

- I This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL
TRIBUNAL

Case No: 1749/7/7/25

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6th October 2026

Before:

Sir Peter Roth
Charles Bankes
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, Inc & Others

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

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: ukclient@epiglobal.co.uk

(10.00 am)

(Proceedings delayed)

(10.10 am)

Housekeeping

THE CHAIR: Good morning.

We've received a letter overnight from Stephenson Harwood, which we assume the Amazon team have received, which clarifies certain matters in response to our questions yesterday regarding ACSO, and we appreciate that. We have no further questions on that score, and that resolves those matters to our satisfaction.

The only other point before hearing Mr Piccinin: Mr Carall-Green, I forgot to ask you yesterday, just this. Originally, Dr Houpis in his report setting out his methodologies for the Stephan claim, said on abuse 5 that his primary approach was a regression analysis, as we know. But he also said he would use as a backup the differentiated Bertrand model, which is a form of simulation. As we understand the joint memorandum that was produced with Dr Bagci, where they say they will co-operate and they see their methods as complementary, he will now use her simulation as a way to proceed with the differentiated Bertrand model. That's our understanding. He doesn't refer to it there at all.

MR CARALL-GREEN: Sir, I need to check that if I could, because if memory serves -- and I'm doing this without having consulted his documents -- the original aim of the DB model was that some of the other effects of the other abuses, perhaps. But let me check that and discuss with the Frontier team if I need to, and I shall come back to you.

THE CHAIR: Yes, that would be helpful. Yes. Thank you. Because he certainly says

1 he's relying -- well, uses a sort of backup -- Dr Bagci's simulation model on abuse 5,
2 and it would be very odd to have two simulations.

3 Yes. Thank you. Mr Piccinin.

4
5 Submissions by MR PICCININ (continued)

6 MR PICCININ: Yes.

7 I'm now on to my third ground of challenge of certification, which is that Dr Bagci's
8 simulation methodology doesn't pass the Microsoft test. We say the same thing about
9 the yardstick model, but I don't think it's said that that passes the Microsoft test on its
10 own anymore.

11 I want to start with some short general observations to orient us in these submissions,
12 because there's a risk of sometimes getting lost in where the points go.

13 I'm sure you know this and have seen it in the evidence, but a simulation model is
14 a very different beast from an econometric analysis. Econometric analysis, as you
15 know, is essentially just a statistical comparison between different sets of data from
16 the real world. For example, Dr Houpis wants to check whether Amazon's
17 commissions were higher in one period than they were in another period, after
18 controlling for other things that might have been different in those periods.

19 A simulation is something else entirely. It is a theoretical, mathematical -- not
20 statistical -- model of the way in which in this context different groups of people make
21 decisions. In this context, those different groups of people are Amazon's customers,
22 the third-party sellers, Amazon itself and eBay. As a theoretical model, it necessarily
23 involves making incredibly detailed assumptions about how those different people go
24 about making their decisions.

25 I should say, I say assumptions. I think Dr Bagci prefers the term "modelling choices",
26 but it comes to the same thing, because what you then do with those assumptions or

1 those modelling choices is you build on top of them a mathematical or, if you like,
2 a logical deductive reasoning process to make predictions about how prices would be
3 different in one set of circumstances or another set of circumstances. The important
4 point is: whether you want to call them assumptions or you want to call them modelling
5 choices, they drive the outcomes. The outcomes, the predictions that are made from
6 the model follow inexorably from the assumptions that are made.

7 As we will see, theoretical models are often -- not always, but very often -- brittle or
8 fragile, if you like, in the sense that making what might seem to a layman as a small
9 or a technical change to the starting assumptions or modelling choices can have really
10 drastic consequences for the model. I don't just mean producing very different
11 predictions of overcharges. Often what looks like a small tweak can actually cause
12 the model to break completely, either in the sense that you can't solve it anymore, or
13 in the sense that it gives you results that are not just different but crazy; and we'll see
14 an example of that that Dr Bagci herself draws to your attention about the model in
15 this case.

16 I absolutely accept -- and sometimes, you know, our arguments here are being
17 mischaracterised and caricatured by those on my left, but we absolutely accept that
18 all models are necessarily simplifications of the real world. What that means is that
19 they can never be perfectly realistic. That's not the aim. But what you do need is to
20 make sure that they capture the features of the real world that might make a difference
21 to the analysis. That's what you need for any theoretical model that you're going to
22 rely on to any extent.

23 But if you're going to go on and use them to make predictions about quantum, rather
24 than just qualitative predictions about whether WRPOs make prices go up or down,
25 for example; if you want to do quantum, then you need to be even more careful,
26 because small changes can have very big effects to those quantum. Most theoretical

1 models are not built for quantification work at all.

2 The good thing about theoretical models -- I think it's good for all of us -- is that
3 because they're mathematical, the assumptions are clearly stated either in words or
4 in the equations themselves, so we can see them. Dr Bagci has done a good job of
5 setting out in the appendix to her first report what those assumptions are, what those
6 equations are, how what she now calls her baseline model works.

7 But that baseline model, as she now calls it, is the only model that she has actually
8 put forward for us to be able to test, for us to be able to look at the assumptions that
9 are in it. There are no other models, no variants that she has put forward, that we can
10 actually look at the assumptions and see whether there are any problems.

11 I also accept that it's just an inevitable aspect of using these models that there are
12 going to be some assumptions where it is debatable, properly debatable, as to whether
13 the assumption is a reasonable approximation of the real world, and that's what
14 matters: is it a reasonable approximation of the real world?

15 It may also be debatable, properly debatable, a trial question, about whether
16 a particular assumption is actually important for the model. Those kinds of questions
17 are issues for trial. It is not my position that the Microsoft test requires Dr Bagci to fully
18 specify every possible variation of the model that she might ultimately need to deploy
19 at trial. It could be that the ultimate one that's used at trial is different from all of the
20 ones that are put forward at the certification stage. That's possible.

21 But at the same time, what is not acceptable is for Dr Bagci to put forward only one
22 model, only one variant, where we can already see now that it rests critically on
23 assumptions or modelling choices that are plainly wrong, that are not grounded in the
24 facts of the case. That is because a model of that kind does not satisfy the Microsoft
25 test. Under the Microsoft test, as you all know -- I'm sure you have practically got it by
26 heart now -- the expert methodology must be sufficiently credible or plausible to

1 establish some basis in fact for the idea that you'll actually be able to work it at trial,
2 and the original quote from Justice Rothstein said that it cannot be purely theoretical
3 or hypothetical, but in contrast, it must be grounded in the facts of the particular case
4 in question.

5 Because of the general features of simulation models, that they are theoretical and
6 that they depend critically on the assumptions or modelling choices that are made, my
7 submission to you is that the Microsoft test is particularly important to apply with care
8 in relation to simulation models, and the reason for that is that otherwise there is a very
9 significant risk that people go away and produce vast pages of complicated maths,
10 many variants of the model, that end up calling for hours or days of dense
11 cross-examination at trial, and it all just goes in the bin, either because you conclude
12 that all of the models that are put forward at trial don't work, or they're unreliable,
13 or -- and this is another important point about simulations -- because you find that it
14 produces very different results as between two or three of the variants, and you don't
15 have the means to choose between them, because they depend on something
16 esoteric or unobservable.

17 Every one of the five points that I'm going to make today is a certification point. The
18 list of points that I'll have at trial, if you send this forward, is going to be much, much
19 longer than this. At the trial I can take all of the trial points. Today, all I'm going to do
20 is take five points, and every one of them aims to show that the particular model that
21 Dr Bagci has put forward is not credible. It is not plausible; it is not grounded in the
22 facts of this particular case in respects that are already clear now, and in most of the
23 cases are already clear from things that are written in Dr Bagci's own report or in the
24 claim form.

25 If I'm right about any one of these points, if you can decide right now that it is clear that
26 the model that has actually been put before you is based on a flawed premise, then it

1 is not good enough for Dr Bagci to say that she will have a go at putting together
2 a different model later. She needs to have at least one version of the model written
3 down, so that you can positively say today it is plausible in its assumptions. Otherwise,
4 the Microsoft test is pointless. She didn't even need to have the appendix. All she
5 needed to say was, "Oh, I hope to make a plausible model one day", and that is not
6 sufficient to satisfy the Microsoft test.

7 My final preliminary remark on this, just to orient us, is that the models look quite
8 complicated; and I'm going to go through the appendix and show you what it looks like.
9 Some of the technical language that the economists use to describe it also sounds
10 complicated, and some of it is subtle, but that does not make it inappropriate to
11 consider those points if, after thinking it through and reading it carefully and hearing
12 my submissions, you conclude that there are clear points on the material before you.
13 Otherwise, you are just not applying the plausibility and the "some basis in fact" and
14 the "grounded in the facts of the case" standards.

15 The good news is that although we have to go through and look at some complicated
16 material, once you have gone through it, the actual errors that I identify are simple, so
17 I hope it won't actually be that difficult, if you just bear with me. But you do need to
18 bear with me.

19 With that out of the way, I'd like to turn up Dr Bagci's first report and run through the
20 model, and what I'm going to do is I'm going to show you the flaws as they arise in the
21 model. If we could pick up A, tab 6, page 400. I should say that this will mean that
22 I end up going through them in a slightly different order to the order that my learned
23 friend went through them yesterday, but this is the order in which they come up as we
24 work through.

25 THE CHAIR: I think he followed the order.

26 MR PICCININ: That's right, but presenting it orally now -- sir, that was no criticism of

1 my friend, obviously. What I'm going to do now is work through the model and that's
2 why we'll see them --

3 THE CHAIR: Tab 6.

4 MR PICCININ: That's right, and it's page 400, appendix D. (Pause)

5 Sir, you can see in paragraph 296, Dr Bagci says that she is presenting an amended
6 version of the game theoretic model originally developed by BC. And "game theoretic"
7 just means what I said in my introduction; it means that you're modelling the decisions
8 that people are making, where they take into account what they think the other people
9 are going to do. That's what a game is.

10 Pausing there. The fact that it's an amended --

11 THE CHAIR: BC is ... is that Boik and Corts?

12 MR PICCININ: It is, yes. Sometimes just going to say BC to keep it short. No
13 disrespect is intended.

14 Pausing there, the fact that what she's presenting is an amended version of that game
15 is itself important. It doesn't make it wrong, but it just means we need to be careful,
16 because the model that she is putting forward is not the BC model; it's not the one that
17 BC endorsed. Indeed, it's not one that has gone through any kind of peer review or
18 assessment other than what we're doing now in these proceedings.

19 Dr Bagci tells us that she amended the BC model for two reasons: one is that,
20 according to her, Amazon has WRPOs and its rivals, particularly eBay, don't; and the
21 other is that the platforms are asymmetric. It's the first of those that I want to focus on
22 for my first point. It's what gives rise to the first flaw.

23 Because in paragraph 297, you can see that she says that Amazon is the only online
24 marketplace with WRPOs. So that means she wants to model a world in which only
25 one of the two online marketplaces has WRPOs. What she did was she started by
26 looking at the BC model, just making that change.

1 What she found is that in that scenario, the prediction from the model is that Amazon
2 would set its commissions using something that's called "mixed strategies". One thing
3 that Mr Lask got exactly right yesterday was his explanation of what that means. It
4 means that Amazon would choose a number of possible commissions, and then it
5 would use some random process like rolling a die to choose between them. So it
6 might, for example, decide that it will roll a six sided die, and if it comes up with a one
7 or a two, it will charge a commission of ten per cent. But if it comes up with four or five
8 or six, it will charge a commission of 15 per cent. That's the kind of thing that is
9 predicted by the BC model in a world where only Amazon has WRPOs.

10 You can see in the first sentence of paragraph 298 that Dr Bagci explains that she can
11 see that's not very realistic as an outcome. The outcome of the model with those
12 assumptions doesn't work. That's what I was referring to before with crazy answers,
13 crazy predictions. But instead of drawing the natural conclusion that this theoretical
14 model is just not suitable for this exercise, she decides to make a fundamental change
15 to the structure of the game, to the assumptions or modelling choices, so that it will
16 produce a different result. So that instead of predicting mixed strategies, it will predict
17 what's called "pure strategies", where Amazon actually makes up its mind and picks
18 a commission.

19 Just pausing there -- this isn't my main point, but I do just want to pause and make this
20 point -- that is not good science. You don't run a model, decide you don't like the
21 result, and then change the model. What Microsoft tells us you should do is that you
22 should be driven by the facts, and you should choose modelling assumptions that are
23 grounded in the facts of the case in front of you. That's what you should do -- not that
24 are driven by getting the result that you want.

25 Putting that to one side, the change that she makes --

26 THE CHAIR: But if you were to get a result that you see is completely unrealistic, and

1 that's based on something in the way modelling works, isn't it sensible to say, "Well,
2 in that case, I need to amend model because it's an unrealistic result, it makes no
3 sense"?

4 MR PICCININ: Well, it depends, sir. No, sir, because the risk in doing that is that you
5 keep just changing assumptions until you find something that produces the result that
6 you're looking for. What's important is that the assumptions you make have to be --
7 have to correlate with the way things actually work in the real world.

8 THE CHAIR: Well, that -- yes.

9 MR PICCININ: That's the point I want to go on to, to see whether it does, because the
10 change --

11 MR BANKES: Isn't the point she makes at the beginning of 298 that she doesn't know
12 what happens in the real world? Once you've got this disclosure, you have a much
13 better idea of whether how Amazon sets its price.

14 MR PICCININ: She does say that a few times. I'm about to come on to show you that
15 that's wrong, actually. The assumption that is being made here is not about how
16 Amazon sets its prices in any way that she needs to be able to test for disclosure.
17 I just want to explain that now.

18 The modelling assumption that she makes -- the modelling choice that she makes is
19 to assume that the platforms are setting their commissions sequentially, with Amazon
20 going first and eBay going second. This is one of those game theoretic concepts that
21 is a bit subtle and it's easy to get confused about, because it sounds like the word that
22 economists have chosen -- "sequential" rather than "simultaneous" -- sounds like it's
23 a point about the order in which things happen, and that's all. A point about timing.
24 But that is wrong; it's a point about commitment; it's a point about lock in.

25 In this first report by Dr Bagci, to her credit, she gets that right. The crucial thing to
26 note is the last sentence of this, paragraph 298. Over the page, she's talking about:

1 "... a game where the platform that adopts the WRPOs [so that's Amazon] sets its
2 commission first, commits to a commission level that it cannot change once its
3 competitor has set its commissions."

4 That modelling choice is what guarantees the existence of a pure strategy equilibrium
5 in this game. She is right to say that. She's right to say that commitment, and an
6 inability to change, is a critical element of the sequential model that she actually
7 presents in this appendix.

8 MR DERBYSHIRE: That does change in report three, that tries to describe it as a real
9 world where Amazon wouldn't change its prices every month.

10 MR PICCININ: Yes, and I'm going to come to that. First, I'm going to deal with the
11 model that she's actually got here, and then I'll deal with the idea that she might use
12 a different model with periods in it and time going on.

13 But the model that she's actually got here, the one that's in front of you, is the model
14 with commitment and with an inability to change. That's what it's a model of. It's
15 actually the defining feature of this type of game structure; a sequential game. What
16 it means is that when the game is over, so at the end of her model, Amazon is actually
17 sitting there with the commission that it would love to be able to change; it would be
18 more profitable to be able to change given what eBay has done; but it can't because
19 it's committed to the commission that it chose in step one.

20 Mr Holt makes that point in his first report. It's worth turning that up. That's in Bundle
21 A, tab 9, page 447. It's 2.3.21 to 22:

22 "The sequential game is solved by backward induction. First, for any price the leader
23 might set, the follower's profit-maximising response is determined. This defines how
24 the follower would adjust its price in response to each possible price of the leader.
25 The leader then sets its price to maximise its own profit, taking into account not the
26 follower's price in isolation [so not eBay's actual commission], but the way in which the

1 | follower would react to whatever price the leader chooses."

2 | THE CHAIR: Sorry, you're on which paragraph?

3 | MR PICCININ: 2.3.21.

4 | THE CHAIR: 21.

5 | MR PICCININ: Yes. And then 2.3.22:

6 | "The sense in which this constitutes a subgame-perfect Nash equilibrium ..."

7 | That's just the solution concept; the way we solve the game.

8 | "... differs from the simultaneous game in an important respect. The follower has no

9 | incentive to change its price given the leader's actual price."

10 | So that's something that's the same as in a simultaneous game.

11 | "The leader, by contrast and having observed the follower's chosen price, would

12 | typically prefer to set a different price. It is precisely because the leader has committed

13 | in advance and cannot revise its price after the follower has moved, that it does not do

14 | so. This commitment is therefore the essential feature distinguishing a sequential

15 | game from a simultaneous one, and is what gives the leader's first move its strategic

16 | value. Absent the existence of commitment from the leader, each undertaking has an

17 | incentive to change its price as competitors update theirs, such that this leads to

18 | a simultaneous game equilibrium with all undertakings happy with the commission

19 | rates given those set by the others."

20 | None of that is controversial; it's very basic graduate/undergraduate game theory. But

21 | this is a critical assumption for the model that Dr Bagci has actually presented. If it is

22 | factually wrong, then the whole model fails. And it is factually wrong. It's obviously

23 | not true, as a matter of fact -- there's no pleading and there's no basis to plead that,

24 | as a matter of fact, Amazon cannot change its commission after seeing what eBay

25 | does. Or that, as a matter of fact, having observed eBay's commission which is in the

26 | public domain, Amazon is unhappy with the commission that it actually has. If it was

1 unhappy with the commission that it actually has, it could change it. That is not a fact
2 that is in dispute.

3 THE CHAIR: Not in dispute that it does change its commission regularly watching
4 eBay?

5 MR PICCININ: Well, it's not in dispute that it can change its commission and also that
6 it has changed its commission at various points in time.

7 THE CHAIR: Because of eBay?

8 MR PICCININ: It doesn't need to be because of eBay, sir. For this model structure to
9 work, it needs to be the case that Amazon cannot change its commission, that it is
10 unhappy with its commission having observed what eBay has done. That's an
11 essential element of this game structure.

12 THE CHAIR: I understand that. I don't know that there's evidence that it has changed
13 because of what eBay has done.

14 MR PICCININ: No, sir, there's no evidence about what anyone has done or has
15 thought, but there is no pleading and there could be no sensible allegation that
16 Amazon is unable to change its commission. That is what is needed for this model to
17 work.

18 MR DERBYSHIRE: But it could be unwilling to change its commission too frequently.
19 There must be a cost in changing Amazon's commissions to the merchants.

20 THE CHAIR: The whole basis of this case is that Amazon is dominant, therefore not
21 constrained by competitors.

22 MR PICCININ: Well, sir, that's true, and that's one of the funny features of this whole
23 corner of the case, because while they need to say that for dominance, when they get
24 to this part of the case, actually that the model is all about competition between
25 Amazon and eBay, as we're going to come on to see when we look at how that works.
26 The whole idea that Dr Bagci is presenting to you is that Amazon does choose its

1 commission so that it will influence what eBay then does, and Amazon is then unhappy
2 with the result. It doesn't just choose a commission which coincides with the
3 commission that it would like to have, knowing what eBay is likely to do; it actually sets
4 a commission that pushes eBay to do something different, and then eBay, having done
5 something different, Amazon isn't happy with the result. That's what a sequential
6 game has built into it; that's its defining characteristics.

7 It's important to note, again, that this is not a feature of the BC paper.

8 THE CHAIR: Yes.

9 MR PICCININ: And in fact, Dr Bagci does not cite any economic literature supporting
10 the use of sequential games in this context or in any context like this. She's out on
11 a limb here. This is purely theoretical work. And this assumption, this critical factor in
12 her model, does not have any basis in the facts of this case. It is for ACSO to show
13 that it does have some basis in the particular facts of this case. ACSO hasn't done
14 that now.

15 Sir, you're right that in Dr Bagci's third report she doesn't really talk about
16 "commitment" as a concept, but she does come back to it in her summary report.
17 That's where she makes the point that you make, that there are other ways of looking
18 at it or other ways of modelling. Mr Lask referred to some of those yesterday as well,
19 so I want to look at that. That's A15, page 656.

20 MR BANKES: And this document is ...

21 MR PICCININ: I'm sorry?

22 MR BANKES: 656, which document?

23 MR PICCININ: This is a summary report, Dr Bagci's summary report, and it's
24 paragraph 40.

25 This is where she suggests that the choice between simultaneous and sequential is
26 not binary. Now, obviously the choice between a simultaneous game and a sequential

1 game in the sense that she's actually put it in her report is binary, because those are
2 two different models. But what she's saying here -- and I think Mr Lask, to be fair,
3 explained this well yesterday -- is that you could do something else; whereas you just
4 said, sir, you could have a different game again which has time built into it, where you
5 have Amazon go first and set a price which might be fixed for a period of time, and
6 then eBay sets its price, which might be fixed for a period of time, and back and forth;
7 and there are lots of different ways that in principle you could do that.

8 She says over the page, the third and fourth line on 657, that if the evidence doesn't
9 support the leader-follower relationship, she would reconsider the timing specification
10 and assess whether the conclusions are sensitive to that modelling choice.

11 But my answer is: because the model that she's actually presented is one that has the
12 commitment problem built into it, she does definitely need to do something different,
13 because that isn't the real world. The problem with what she said here in paragraph 41
14 is that all she's saying is that, "I think I'll be able to do something different". The
15 problem with that is that until she actually writes down that other model and presents
16 it to us, we don't know whether it will work at all. Not all modelling choices are actually
17 feasible and capable of being implemented at all. We don't know whether they'll have
18 mixed strategy equilibria, whether they'll have multiple equilibria -- lots of games have
19 multiple equilibria -- or whether they'll have some other kind of problem, or whether in
20 order to make it work and avoid one of those bad outcomes, then she'll need to make
21 other assumptions that are unreliable and not grounded in the facts of the case.

22 I'll come back to the way I pitched this at the beginning in my general observations. If
23 you could say that the model that she's actually presented is plausible, it's credible,
24 it's grounded in the facts of the case, then the fact that it might be that there's another
25 model that is even better, or that her model might fail at trial, that wouldn't be enough
26 for me to get home on the Microsoft challenge. But if you're with me that the actual

1 model that she's put forward doesn't work because it's based on an assumption which
2 is not grounded in the facts of this case, or at least which ACSO hasn't shown is
3 grounded in the facts of this case, then paragraph 41 is no answer; because all that's
4 saying, then, is: my methodology, my blueprint to trial, is that tomorrow I'll come up
5 with a model that I hope will work. That's all she's saying. That's not the Microsoft
6 test. That's just not having a gatekeeper function at all.

7 That was my first point. I do also say that it is striking that when this was presented in
8 her first report, that she didn't draw to the tribunal's attention this problem. She did
9 fairly state that it's got commitment built into it, but she didn't then engage in any of
10 that critical thinking about whether that is in any way plausible. That's really why we've
11 ended up in this situation where we are today, where all she can say is, "Well, I hope
12 to do better later".

13 That's the first point. For the second point, let's go back to her first report. Let's go
14 back to page 401, and let's see how the model develops. We pick it up from
15 paragraph 302. She says that the model has two online marketplaces, Amazon and
16 eBay, and they both have marginal costs that are constant and c_i -- so it would be
17 c_1 for Amazon, c_2 for eBay -- and they both choose a commission, f_i -- so f_1 is just
18 a number of pounds for Amazon, and f_2 is just a number of pounds for eBay.

19 So the marginal cost in their commissions are not the same, but each of them is fixed
20 in pounds sterling per transaction. I'll come back to that in a minute.

21 Then in the third sentence, she says that there is a single multi-product seller that can
22 sell on both platforms, both Amazon and eBay, at marginal cost c_s ; so that's just
23 another number, pounds per product. That's what gives rise to my second problem.
24 There is only one seller on these platforms.

25 Obviously, I can understand why she doesn't need to model all hundreds of thousands
26 of sellers that there are in the Amazon universe. It's a model that's not the real world.

1 But one problem -- I don't say this is the only problem, but one problem with taking the
2 modelling approach of just using one seller is that it means that seller is a monopolist
3 both on Amazon and on eBay. The seller faces no competition on either platform, and
4 that is obviously very different from the real world.

5 In Dr Bagci's own report, when it suits ACSO's case, she tells us that sellers actually
6 operate in highly competitive markets; not perfectly competitive markets, but highly
7 competitive markets. You can see that on page 329, paragraph 274(c). That's in the
8 context of pass-on, and it's part of the basis for her adopting a pass-on rate of
9 75 per cent, which is halfway between perfect competition and monopoly, for her
10 damages calculations.

11 So she knows, and it's obvious, that sellers face competition on both platforms. That
12 is not a trifling detail. Competition is very different from monopoly, and just intuitively,
13 this seems like the kind of thing that could make a big difference to competitive
14 interactions of the kind we're trying to model here.

15 The problem is actually much, much worse than that. It's not actually mainly a problem
16 about monopoly versus competition, because one point that the chair made yesterday,
17 correctly, was that Amazon's policies that have actually been pleaded by ACSO are
18 not simple WRPOs in the BC sense -- in the sense of a parity obligation that applies
19 to a seller's own products -- that they apply to other prices as pleaded, as alleged by
20 ACSO; they also apply to other prices of other sellers off Amazon. So they are not
21 a policy that simply compares the seller's price on Amazon with the seller's price off
22 Amazon.

23 We say that's not the point of the policies at all, but the thing we can agree on is that
24 the policies definitely do compare a seller's price on Amazon with a range of other
25 prices from other sellers. For your note, we saw that yesterday. I think it's on page 64
26 of bundle A in the claim form, footnote 128. I think again, actually on the next page,

1 Mr Lask showed you, I think it was footnote 129. So they've positively pleaded that
2 fact, indeed that they say it makes our policies worse rather than better.

3 But that is a feature of the real world -- it's a feature of the conduct that we're trying to
4 analyse in this case -- that Dr Bagci has simply excluded by assumption, it's been ruled
5 out of her model, even though she knows very well that it exists in the real world, and
6 she knew that when she wrote her first report. That gives rise to an obvious problem,
7 because it is a clear mechanism -- just one of many, but it is a clear mechanism
8 through which this type of policy can drive prices down rather than up. Because
9 a seller on Amazon, who is found to be pricing significantly above or even just above
10 a competitive benchmark that consists of someone else's price off Amazon, cannot
11 solve that problem by increasing that benchmark price, because the seller we're talking
12 about doesn't control that price. That's someone else's price. All they can do in
13 response to the policies that are alleged by ACSO is reduce their price on Amazon.
14 That's the only way they can comply with the policies that are alleged. I say "alleged",
15 because we don't agree with the way they're characterised; but the way that they're
16 characterised by ACSO, that's how they would operate.

17 But that pro-competitive outcome could never happen in Dr Bagci's model, because
18 that whole scenario is just assumed away. In her reply report and summary reports,
19 Dr Bagci just has no answer to this point.

20 If we turn up tab 15 at page 654, which I think is in the summary report, again -- I'm
21 getting nods -- you can see in paragraph 34, first sentence, she begins by agreeing
22 with us that Amazon's policies are different from those in BC. She puts it a bit more
23 coyly than that. She says that they're not identical in every respect, but she's agreeing
24 with us. She says that's not a problem, because the BC framework is useful because
25 it models the economic mechanism that is central to ACSO's theory of harm. You see
26 that in the second sentence.

1 That, again, is not the right approach. That is not consistent with the Microsoft test.
2 It's not Dr Bagci's job to look for models that suit ACSO's case, that assume away
3 everything other than the theory of harm that ACSO is alleging. What Dr Bagci is
4 supposed to be doing is looking for models that are grounded in the facts of the case,
5 as she already knows them to be. "Grounded in the facts of the case"; that's the
6 wording from the test.

7 Then she says in the final sentence that to the extent that Amazon does benchmark
8 sellers' prices against competing sellers off Amazon, that is an additional competitive
9 mechanism which she would assess against the evidence, and if it's material,
10 incorporate into the model. But again, that's being a bit coy, because she doesn't need
11 disclosure to know that this is an aspect of the policies that are being challenged by
12 ACSO, because the policies are in the public domain, and they have been reproduced.
13 Screenshots are in the claim form that she presumably reviewed. We know this is
14 something that Amazon's policies do, and she has seen them. You don't need to wait
15 for disclosure. It obviously is material, because you can't have a model that completely
16 excludes this competitive mechanism, as she calls it, and yet say that it's grounded in
17 the facts of the case.

18 So again, the model that she has actually put forward is inadequate. It's not credible
19 or plausible. She's definitely going to need to make a model with a fundamentally
20 different structure in order to take this into account, and it's not just adding more
21 sellers. She does need to add more sellers for this to work, because there has to be
22 another seller out there for this issue to arise. But it's more than that. She needs to
23 stop modelling WRPOs and start modelling clauses that actually have this additional
24 feature in them, in that they compare the price on Amazon to the price off Amazon.

25 THE CHAIR: If that additional feature is not alleged to be (inaudible) the model is
26 looking at seeking to assess, as it were, a counterfactual contrast, you can keep that

1 feature, can you?

2 MR PICCININ: Well, sir, there's two answers to that. One is that Mr Lask wasn't very
3 clear yesterday, at least as I understood him, in his answer to your question about
4 whether they are or are not challenging that aspect of the policies, as to whether that
5 aspect of the policies should or shouldn't be there in the counterfactual. If they are
6 challenging it -- which is the way I read it, because they define them as policies and
7 say that they're challenging them -- I understood them to be challenging the whole of
8 the MFPP, and what they call the CEPP, which we'll look at later.

9 If they are challenging it, then that's very obviously fatal to this approach. But even if
10 they're not challenging it, it's an important feature of the way that competition operates
11 that needs to be taken into account, and it may be that it renders the comparison with
12 the seller's own price immaterial, because there are so many other benchmarks that
13 you're being compared to that what's going on with your particular price doesn't matter.
14 So, it would need to be there in both the factual and the counterfactual model in order
15 to determine whether that's right or not. Either way, sir, I'm afraid that the model is
16 inadequate.

17 Again, my point is that until she has written down a model that does this, I don't know
18 and you don't know whether it's going to be feasible at all; or if it is feasible, whether
19 it's going to create a whole new raft of problems. Maybe we'll be back to randomised
20 commissions again. Nobody knows until Dr Bagci has done the work.

21 On the next page, she says at paragraph 38 -- Mr Lask referred to this as well -- that
22 it is feasible to build in competition. She's talking about a "multiple-seller extension".
23 She says that is feasible because she's read in a US judgment, in another class action,
24 that someone else in the US has done that work in a different claim against Amazon.
25 The judgment does say that; someone out there has built a different model which has
26 multiple sellers in it. That's what the judgment says. But she doesn't say, in that

1 paragraph -- and the judgment doesn't say -- that Dr Bagci's modified model has been
2 extended in that way. Even more importantly, she doesn't say -- and the judgment
3 doesn't say -- that the class's economist in that case has also modified the model in
4 a way that changes it from a WRPO to the kind of policy that we're actually talking
5 about here. None of that is said in the judgment.

6 Even if it had been, it's just a matter of writing down the equations. What Dr Bagci
7 was required to do is show us a model; not necessarily the final model for trial, but
8 show us a model that is plausible and is credible and is grounded in the facts of the
9 case. It's not good enough to say that she thinks maybe someone else might have
10 done it. She has to do it, and show it to you, and show it to me, and show it to Mr Holt,
11 so that we can all check that we agree that it meets the standards that this tribunal is
12 obliged by law to apply. That's my second point.

13 If we go back to page 401, back to the first report. (Pause)

14 We can immediately pick up --

15 THE CHAIR: Your third point?

16 MR PICCININ: My third point, yes. You can immediately pick up my third point,
17 because we were looking before at paragraph 302, and we noticed before that
18 Dr Bagci assumes that both Amazon and eBay charge a commission, which is the
19 letter F -- F1, or F2 -- and that means that Amazon and eBay both charge a flat fee --

20 THE CHAIR: On what page in the first report?

21 MR PICCININ: It's 401. Para 302.

22 THE CHAIR: Yes.

23 MR PICCININ: Second sentence. The words:

24 "... charges commission fi."

25 What that means is that both Amazon and eBay pick a number of pounds per
26 transaction, and that is the commission that they charge. But Dr Bagci knows very

1 well that that is not how either Amazon or eBay actually charge for their services. The
2 problem is particularly serious in relation to eBay, because eBay actually has both
3 a percentage commission -- which Dr Bagci thinks she could probably find a way to
4 deal with and might be right -- but in addition to the percentage commission, eBay also
5 charges a fixed charge per order. I know Dr Bagci knows that because that's where
6 I know it from. If you go back to her same report, the very same document, page 321.

7 THE CHAIR: Yes.

8 MR PICCININ: It's para 258. (Pause)

9 And you can see in the third sentence:

10 "I note that some marketplaces, such as eBay, charge a fixed charge per order which
11 would increase the total fees (ie commission + fixed monetary amount)."

12 It's actually quite significant, it seems to be, in her analysis, because if we go on to
13 page 327, she gives an example in footnote 309 of how that would work. You'll see
14 that where she gives the example of a £10 transaction, the fixed charge of £0.30 would
15 be 3 per cent. If you add that to the eBay commission -- to the model, the most
16 common eBay commission, which is the one she uses in her yardstick approach,
17 which is 10.9 per cent -- then you get a charge of 13.9 per cent, which is actually
18 getting pretty close to Amazon's 15.3 per cent -- again, in her analysis. I don't accept
19 any of those numbers.

20 It's not a negligible fixed charge in a scheme of what eBay is.

21 THE CHAIR: It depends entirely on the amount of the order.

22 MR PICCININ: Exactly. That's right. But there's no basis in her report for treating it
23 as being negligible.

24 Now, to the untrained ear, this may sound like nitpicking. You know, "fi" instead of
25 some nonlinear function. But in the world of economic theoretical model, this kind of
26 thing really matters, and I can show you that. If you go to Mr Holt's summary report at

1 | page 633, paragraph 2.3.27.

2 | THE CHAIR: 633?

3 | MR PICCININ: 633. So, tab 14, page 633, paragraph 2.3.27. This is the point he's
4 | talking about linear pricing. He notes that BC -- because they also assume linear
5 | pricing -- state in their paper that choosing linear pricing is great because it simplifies
6 | the analysis greatly. That's good. But they also acknowledge that it:

7 | "... does rule out nonlinear pricing schemes, including those in which sellers pay fixed
8 | fees to platforms or fixed fees coupled with linear fees that recruit platforms marginal
9 | costs."

10 | And as Mr Holt says there, that suggests that modelling nonlinear pricing might cause
11 | serious difficulties. We don't know whether it would be feasible or if you did it, whether
12 | it might cause all manner of problems.

13 | Again, Dr Bagci's response to this is just inadequate. If we go to her summary report,
14 | tab 15 page 657. Heading is, "Pricing Assumptions". You can see in the middle of
15 | paragraph 42 that she says:

16 | "[The BC model does] not necessarily carry over unchanged to every possible form of
17 | nonlinear pricing."

18 | But she notes, as I said earlier, that they "expect their results to continue to hold" for
19 | ad valorem fees. Then in paragraph 43, she says:

20 | "Following disclosure [again], I would identify the fees actually faced by sellers ..."

21 | And then she would work out whether a simplified fee specification is good enough
22 | and, if necessary, adapt the model to incorporate the relevant fee structure. That
23 | reference to disclosure is just nonsense; she doesn't need disclosure to know that the
24 | model that she's written down is wrong. She has already identified the fees that are
25 | faced by sellers; they're in the public domain. She already knows that they are
26 | materially different from the way she has modelled them, and she knew that when she

1 wrote her first model.

2 Now, again, in this argumentative tone -- you know, she criticises Mr Holt for saying
3 that she needs to model every conceivable nonlinear pricing scheme. Nobody is
4 saying she needs to model every conceivable nonlinear pricing scheme, but to pass
5 the Microsoft test, she certainly does need to model the way that she already knows
6 eBay actually charges for its services in the real world, and she also knows very well,
7 from what BC have said in their paper, that trying to deal with non-linearity is potentially
8 very complicated, if it's possible at all. BC haven't done the work and neither has she.
9 So, she's in real difficulties here. Again, these are real difficulties that she's just not
10 even owning up to in her first report.

11 The other little reflection I just want to have, rounding out this third point, is just to note
12 again -- just to calibrate your thinking about theoretical models: this is another
13 illustration of how fragile and brittle theoretical economic models tend to be,
14 particularly when you're trying to deal with complex markets like these ones. Because
15 seemingly quite small technical sounding changes -- just, you know, the letter "f"
16 appearing in that sentence there, and it having a different structure -- can make
17 massive differences or can actually make the whole model fall apart.

18 MR BANKES: It can do, but we don't know that it does.

19 MR PICCININ: We don't know. That's right, sir. So it's possible that it's possible to
20 write a model that would pass the Microsoft test, but it has never been the law that it
21 is acceptable for a class representative to come to this tribunal, and ask for their claim
22 to be certified, on the basis that it's "possible" that they will write a model that passes
23 the Microsoft test; they actually have to write the model that passes the Microsoft test.
24 It's really important that you do that, because otherwise the risk is that they go away
25 and they produce something, and it's got these fundamental flaws buried in it; lots and
26 lots and lots of pages of texts and equations are written about it; and then you get to

1 trial and lots and lots of hours of cross-examination take place. Potentially millions of
2 pounds could be spent on these models, and then they were fundamentally flawed all
3 along. That's why we have the Microsoft test; it's to weed out methodologies like that,
4 that have some fatal flaw in them. The model that she has presented is wrong. It's
5 just wrong. And we know that. She knows that. That's point three.

6 We go back to page 401, back to the first report. Having got those first three points
7 out of the way, what I'm now going to do is just walk you through the model, see how
8 it works, and then I'll get to my fourth point, which is the baked-in problem. Let's step
9 through the way it works.

10 Because it's a sequential game, you solve it backwards; you start at the end of the
11 process. So, in equation (2), you can see you've got the consumer's demand function.
12 That's a simple linear demand function.

13 THE CHAIR: Which page are you on now?

14 MR PICCININ: Page 401.

15 THE CHAIR: 401.

16 MR PICCININ: You can see it's a straight-line negative relationship between the
17 seller's price on Amazon and the quantity sold on Amazon, as well as a straight-line
18 positive relationship between the same seller's price on eBay and the quantity sold on
19 Amazon. So, if you increase prices on eBay, you increase your sales on Amazon and
20 vice versa.

21 This goes back to your point, sir, about the relationship between Amazon and eBay.
22 The model is assuming that there is competition here, and that the competition is
23 significant. Obviously, that is one way you can model demand, and this is not one of
24 my fundamental flaws that she's picked linear demand. But you do just get more
25 fragility built into it, particularly for quantum purposes, because of course, as Dr Bagci
26 fairly acknowledges, there are other ways to model demand, too, and she says she

1 might go on to do them. So, you'll end up choosing between two or three or
2 four different models that have different demand systems, and that's fine.

3 That's what the consumer does. That leads to the question of how the seller chooses
4 its prices. If we go on to page 403 -- that's where we find it -- this is where we find it
5 for the counterfactual, which she solves first, which is the world with no WRPOs. I'm
6 just going to try and translate for you the equations that you see there into English.

7 So, equation (3) says that the seller chooses its prices on Amazon and eBay to
8 maximise its profits, taking into account its costs, and also taking into account the
9 commissions charged by Amazon and eBay.

10 Then you do some high school calculus, and that gives you the answer in equation (4).
11 That's relatively simple, as these things go; it's just a simple equation. You could plug
12 it into a calculator and come up with an answer. The price on Amazon only depends
13 on the commission that Amazon charges -- that's the "fi" -- and likewise, the price on
14 eBay only depends on the commission on eBay. That's because this is a world without
15 the WRPOs.

16 Next, from the bottom of the page and over the page, we get to the way that eBay sets
17 its commission. Equation (6) says that eBay sets its commission to maximise its
18 profits, taking into account what it knows at that stage; it already knows what Amazon's
19 commission is fixed at. So, it chooses the best possible answer to Amazon's
20 commission, which it takes as being rock solid by that point. That's the point we've
21 already talked about, showing you how it's expressed in the model.

22 That gives you, in equation (7) after doing some more high school calculus, the level
23 of eBay's commission as a function of Amazon's commission. The higher Amazon's
24 commission is, the higher eBay's commission will be. Again, to the chair's point,
25 competition between Amazon and eBay is built into this model.

26 Then finally, we have equations (8) and (9), which tell us how Amazon sets its

1 commission, and Amazon does something different. It commits to a level of
2 commission that will maximise its profits, given the way that it knows that eBay will
3 react. So, it's trying to push eBay to a higher commission, because that's then better
4 news for Amazon. That gives us the slightly ugly-looking equation (9). But again,
5 although it's got a lot of terms in it, it's all fairly straightforward; you could plug that into
6 a calculator with your phone and then start producing some answers.

7 So that's the way the model works without WRPOs. Dr Bagci has just modelled the
8 counterfactual, and she's come up with prices.

9 We then have the world with WRPOs from the bottom of this page, and on page 405,
10 we start again with the seller's decision in equations 10 and 11; and this time it's more
11 complicated, because the seller is forced to choose a single price to charge on both
12 platforms. That's the WRPO at work. It's built into the model. It has to charge the
13 same price on both of them. You can see in equation 11 that this single price depends,
14 unsurprisingly, on both Amazon's and eBay's commissions. Whereas before the
15 Amazon one only depended on the Amazon commission, now it depends on both.

16 Then in equations 13 and 14 on the same page, we get what eBay does, and again,
17 eBay sets its commission taking into account the commission that it knows Amazon
18 has committed to and can't change.

19 Then finally, from the bottom of the page and it runs over the page, we have Amazon's
20 decision, and this is more complicated this time. It's more complicated because --

21 THE CHAIR: It certainly looks it.

22 MR PICCININ: Yes, that's right. It certainly does. The reason why it's more
23 complicated is important for the point I'm going to make soon. It's more complicated
24 because Amazon this time has to consider the possibility that if it sets its commission
25 too high, the seller -- and again, I remind you that there is only one seller -- might
26 choose to sell only on eBay, and that's because the seller might not want to just set

1 a higher price to compensate for Amazon's high commission because it's stuck with
2 that high price on eBay as well, and it doesn't want to be. So, it might prefer just to
3 operate on eBay if Amazon pushes its commission too high.

4 If that happened, Amazon would earn nothing in this model, because there's only one
5 seller. But if the seller decides to leave Amazon altogether, Amazon earns zero; and
6 that's why in this model, if Amazon ever finds itself in a position where because of the
7 other parameters and the assumptions about demand, Amazon would find it profitable,
8 it would like to set a price above that level, it stops itself, and it sets its level at the
9 knife-edge participation constraint to keep the seller on Amazon. It sets it at the
10 highest price, the highest commission, that is consistent with the seller being happy to
11 stay on Amazon as well as eBay. That's the participation constraint.

12 What that means is that Amazon either sets the commission that is described in
13 equation 16, which is of the same kind that we've seen before -- it's just an equation;
14 you could plug the numbers in and it would produce a result; you could do it on your
15 phone -- or it sets the highest commission at which the seller would be willing to sell
16 on Amazon, which is defined by equation 17. That's the equation at which if Amazon
17 increased its commission by even a penny per transaction, the seller would stop
18 selling on Amazon altogether, and would single home on eBay.

19 Mr Lask quibbled with that characterisation of it on his feet yesterday, but at least when
20 Dr Bagci wrote her summary report, she agreed with it. I'll show you that briefly now
21 before continuing, so you've got it clear. It's in A15, page 651, paragraph 26. Can
22 you see on the right-hand side in the middle is a sentence that begins, "From an
23 economic perspective ..."?

24 THE CHAIR: Yes.

25 MR PICCININ: "From an economic perspective, an 'indifference point' is simply the
26 point at which a seller would earn the same profit from two alternative choices. For

1 example, suppose a seller earns £100 by selling on both Amazon and eBay and £90
2 by selling only on eBay. The seller would prefer to remain on both platforms. If
3 Amazon increased its commission sufficiently that the seller's profit from selling on
4 both platforms [combined] fell to £90, the seller would be indifferent between
5 continuing to sell on both [on the one hand] and leaving Amazon to sell only on eBay.
6 That is the seller's indifference point."

7 Then the last sentence is the one that I just said:

8 "A further increase [you could say any further increase; you could say a further
9 increase of just a penny] in Amazon's commission would make selling only on eBay
10 more profitable."

11 That's why I say, if Amazon increases its commission above the participation
12 constraint level, then the seller would leave. That's just what it means.

13 MR DERBYSHIRE: That is the indifference point?

14 MR PICCININ: Exactly.

15 MR DERBYSHIRE: And the point is that, forget Amazon and eBay, but wouldn't
16 a platform try to achieve that indifference point to maximise profit?

17 MR PICCININ: No, no, because that knife-edge position is not typically where the
18 profits are maximised. The profits are typically maximised at a lower level than that,
19 and the reason for that is -- if you go back to page 406, what this page is saying, what
20 the equations are saying is that Amazon wants to maximise its profits -- that's the top
21 of the page -- and typically what that will be is equation 16, which would be, for the
22 many parameter values, a lower number than what you would get out of equation 17.
23 If I just explain the intuition to you, it's because increasing your commission on
24 Amazon is not cost-free to Amazon in this model. Don't worry about the real world. In
25 Dr Bagci's model, it comes with a problem. If you increase the commission on Amazon
26 with WRPOs, two things happen. One is that eBay actually cuts its commission in

1 response. The other thing is that the seller increases its price, and when the seller
2 increases its price, what that does is it means there are fewer sales taking place, and
3 so there are fewer transactions on which Amazon earns that commission. It's the
4 classic trade-off. Even a monopolist, right, doesn't usually set a price at the maximum
5 level that anyone will pay, because setting your price at the maximum level that anyone
6 will pay will result in you missing out on a lot of transactions. That's why the
7 Kuhn-Tucker conditions, as they're described -- that's just undergraduate
8 calculus -- that's showing you the price that would maximise profits, subject to it being
9 more profitable for the seller to sell on both platforms than only on one.

10 So that's the typical case, but then there's the knife-edge case as well where that's not
11 true, and Amazon would love to be able to set a higher price. It doesn't care about the
12 lost sales, but then it's constrained by the participation constraint, and it has to set that
13 indifference level at which the only seller would leave the platform altogether if the
14 commission increased by only a penny. You don't need to worry about this too much,
15 actually, because I'm going to get to a simpler way of looking at this point in a moment.
16 But that is actually the only way that the model can show WRPOs having
17 a pro-competitive effect. You might notice that there was no participation constraint in
18 the world without WRPOs, and that's because in the world without WRPOs, all the
19 seller has to do -- it doesn't matter how high Amazon pushes the commission; all the
20 seller does in the model is just sets an even higher price on Amazon. That's good for
21 it, because it then gets the sales on eBay that are pushed away from Amazon. The
22 sellers are monopolists, so it doesn't care where they take place.

23 But in the world with WRPOs, this is the one potential pro-competitive thing that is
24 introduced in Dr Bagci's model, is this participation constraint. Suddenly, because
25 Amazon has chosen to have WRPOs, it has put on itself an additional constraint, which
26 in some parts of parameter space, in some scenarios, will result in it actually having

1 to reduce its commission. So, Amazon has constrained itself by adopting the WRPOs.
2 That's what the participation constraint is saying.
3 That's how the model works. What's the point of all of these equations? What do we
4 do with them? The idea is that Dr Bagci will go out and get values for all of the different
5 letters that you see here on the page. So, she'll have to get values for the a's, which
6 are different for Amazon and eBay; those are the willingness to pay. She is going to
7 have to get different values for the b's; those are the extent of substitutability between
8 Amazon and eBay. She is going to have to go and get values for the c's; again, those
9 are the marginal costs, which again might be different.
10 I'm sorry. The b's are the price responsiveness on the platform. The d is the single d
11 she is going to need to get, which is the substitutability between the platforms.
12 She hopes to be able to go and get those from various real-world data and calibration
13 exercises as appropriate. Don't worry too much about that for the moment. That's
14 going to be my final point.
15 What she then does is she just plugs them in in the way that I described -- you could
16 do it with the phone -- to the equations that we're looking at, and you get the prices
17 that come out of it and the commissions that come out of it, and you ask yourself: are
18 they higher with WRPOs or are they higher without them?
19 That leads to my fourth problem, which is that the assumptions about how competition
20 works that are baked into the model drive the result. Dr Bagci and Mr Holt actually
21 both agree that it doesn't actually matter what value any of those letters take. This
22 model will always predict higher prices for the world with the WRPO than without it,
23 unless you're in the particular parameter space, the particular combinations of a's, b's,
24 c's, and d's, for which the participation constraint binds.
25 Mr Holt said that as clear as day in his summary report. That's page 627, 2.3.11,
26 second sentence.

1 He's talking there about the participation constraint and the fact that Dr Bagci has
2 shown that when the participation constraint binds, you can get the result that WRPOs
3 lead to lower prices. What he is saying in the second sentence is that that:

4 "... corresponds to a situation in which, for a given eBay condition, Amazon sets its
5 commission at exactly the level that makes a seller indifferent between selling on both
6 Amazon and eBay versus selling exclusively on eBay."

7 Then just looking at the final sentence of that paragraph, over the page:

8 "Indeed, taking her model literally, even the smallest increase in commission would
9 lead all sellers [because there is only one] to abandon Amazon entirely."

10 That is what it means for the participation constraint to be binding. There is no dispute
11 of expert evidence here, because Dr Bagci responded to this in her summary report.
12 That's tab 15, page 652, paragraph 30. She says in the second sentence she does
13 not dispute that:

14 "... in the restricted cases examined by Mr Holt in which the seller continues to
15 participate on both platforms and the participation constraint does not bind, the model
16 produces a higher Amazon commission with the WRPO than without it."

17 All she is saying there is that you might have a situation where some sellers are at
18 their indifference point, and other sellers are not. But her model is only a model with
19 one seller in it, and that's why it gives rise to the knife edge that we've seen. What it
20 says is that her model is guaranteed to find the WRPOs increase prices unless the
21 seller is indifferent, at its indifference point, the point at which they would all abandon
22 the platform for any increase.

23 We say that's implausible for various reasons, given that every seller -- there are
24 hundreds of thousands of them -- they're all very different from each other, and
25 Amazon sets the same commission for all of them within each category. It's obviously
26 fanciful to imagine that there's any very large portion of them for which Amazon has

1 happened to alight upon the magic number.

2 Putting that to one side, can I just step back and say what's really going on here, what
3 the problem with this is? That is to ask the question: why does the model produce this
4 result? Why is it that it only shows lower prices when the participation constraint binds
5 them?

6 The problem is, aside from that pro-competitive constraint that the model introduces,
7 the model airbrushes out of the real world all the reasons why Amazon's policies might
8 actually produce benefits for consumers. That's why I wanted to show you how the
9 model works. We've already discussed one of the points that's missing, which is the
10 possibility that Amazon's policies benchmark a seller on Amazon with a third-party
11 competitor off Amazon, and that leads to lower prices on Amazon. That's impossible
12 in Dr Bagci's model, and we've already talked about that.

13 Even beyond that, there is just no possibility in this model of sellers engaging in
14 opportunistic and confusing price gouging, where a particular seller just sets very high
15 prices and hopes that a small number of people will pay massively over the odds.
16 That's just impossible here, because in this happy world of the model, consumers are
17 assumed to be perfectly informed and they make perfectly rational choices all the time.
18 That was equation (2). That was the demand function I showed you that had in it the
19 price on Amazon and the price on eBay; the consumer always knows both prices at
20 the time they make the decision.

21 It's also assumed to be impossible in Dr Bagci's model for any seller to make
22 a mistake, and accidentally, or algorithmically, set a very high price on Amazon.
23 Nobody makes mistakes in her models. But on our case, all of this -- the price gouging,
24 the mistakes -- these are significant parts of what these policies are for and why they're
25 beneficial to consumers.

26 Now, I'm obviously not asking you to decide whether I'm right about that today. Nor

1 am I asking you to decide whether any of those pro-competitive effects outweigh any
2 anti-competitive effects that might arise. What I am asking you to see is that Dr Bagci's
3 model is a model that rules out those effects by assumption, and that is what makes
4 this whole modelling approach inappropriate. Because if you are going to model the
5 effects of Amazon's policies using a theoretical model, it is critical to use one that has
6 enough flexibility in it to capture the potential positive effects alongside the potential
7 negative effects.

8 If you had a model like that, the point of it would be to investigate which of those are
9 larger on the facts of this case, using the data. This model can't do that because it
10 assumes that any benefits other than the ones arising from the participation constraint
11 are impossible. That's why you don't need to fret too much about the nuances about
12 the participation constraint; don't worry about that so much -- whether that's likely or
13 unlikely, it doesn't really matter. The point is all of the other things that are excluded
14 from the model; that's the point.

15 The one other point I just want to make about that, which relates to a different topic
16 that you addressed yesterday with Mr Lask, that the exercise I've just described -- of
17 needing to ask yourself the question of whether these policies produce benefits or
18 detriments to competition to consumers -- is going to be a Trial 1 exercise. So, I agree
19 with Mr Lask to some extent about that; that doesn't mean his simulation model is
20 a Trial 1 exercise. I also agree with you, sir: obviously, one doesn't need to quantify
21 the effects. We're not interested in causation and loss at the Trial 1 stage. But we are
22 going to have to work out whether these policies are good policies or bad policies. So
23 there is going to need to be a way of looking at how they work in practice.

24 Because our case is going to be that a mere theoretical possibility that they might have
25 bad effects is not enough, and it's obviously not enough for an article 101 case either.
26 We'll get on to article 101 when they're doing effects. That's obviously not enough.

1 My final point concerns the values of the "a", "b", and "d" parameters. If you go to
2 page 406 to see them, sometimes that helps. You can see, for example, that
3 equation (16) is littered with b's and d's. There are some a's there too. Remember
4 that those represent the consumer's willingness to pay on Amazon versus eBay, and
5 their price sensitivities either on the platform or between platforms. I mentioned earlier
6 that what Dr Bagci intends to do about these is to estimate those or calibrate those
7 using real world data.

8 If you go back in her report to page 315. (Pause)

9 You can see that in paragraph 243, first sentence. That's fine for today's purposes;
10 again, I'm not suggesting she needs to have done that already. That's not what we're
11 doing here. Time will tell if it's really possible to do that with sufficient reliability. Again,
12 I'm not asking her to have done that.

13 But it's the second sentence I'm interested in. Because what she says there -- and
14 this is not presented as a sensitivity; this is what she's, at this stage, saying she's going
15 to do -- she says:

16 "From the observed data, I propose to adjust the coefficients to reflect the
17 counterfactual state of the world (i.e., to reflect the lower levels of platform
18 differentiation) under different scenarios regarding platform differentiation and
19 Amazon's market share and simulate the counterfactual prices based on the estimated
20 coefficients."

21 So, she's going to have different a's and b's and d's in the counterfactual than she's
22 going to have in the real world. Her professional opinion at this stage in her first
23 report -- of course, she might change her mind -- was that that was something that
24 needed to be done. The problem is that, as Mr Holt has explained, there's just no way
25 to estimate what those parameters would be in the counterfactual, because we
26 obviously can't observe the counterfactual, so we can't do it in the same way that she

1 | proposes to do it for the real world.

2 | But Mr Holt explains that the problem is actually bigger than that. If you go to tab 9,

3 | page 451. It's the paragraph on this page, 2.3.31, he says --

4 | THE CHAIR: Just a minute.

5 | MR PICCININ: Yes.

6 | THE CHAIR: You jump around. That's no criticism.

7 | MR PICCININ: No, no, I --

8 | THE CHAIR: You know where you're going.

9 | MR PICCININ: And you don't. That's fair. I'm also electronic, which makes it quicker,

10 | too.

11 | THE CHAIR: But even then, one has to get to the next one.

12 | MR PICCININ: Yes, I'm sorry.

13 | THE CHAIR: This is Mr Holt, that A14, page ...

14 | MR PICCININ: Page 451, tab 9.

15 | THE CHAIR: Yes.

16 | MR PICCININ: He says:

17 | "In any event, the estimation of demand in the counterfactual is, in Dr Bagci's

18 | framework, a priori impossible given that the underlying drivers of demand that

19 | Dr Bagci cites affect more than one parameter."

20 | Gives the example:

21 | "For instance, marketplace differentiation may impact both Amazon's brand value [that

22 | would be the alpha, the α] and the elasticity of demand [that would be the b 's and the

23 | d 's]. Dr Bagci neither explains how she would address this question nor identifies the

24 | potential scenarios she would consider. The issues raised by the estimation of the

25 | demand function, in particular in the counterfactual scenario, imply that [she] would

26 | not be able to reliably estimate the potential effects of the Alleged Conduct."

1 Now, Dr Bagci responds to that. In the next tab, tab 10, page 487. It's paragraph 46,
2 page 487. (Pause)

3 Paragraph 46. What she says there is that Mr Holt has not described her baseline
4 approach correctly. In her baseline approach, we're told now, apparently she will not
5 make any adjustments to the parameters for the counterfactual. I will apologise if I'm
6 shown to be wrong about this, but I don't think that was actually an error on Mr Holt's
7 part; we just looked at her report and she didn't seem to be saying that there was
8 a baseline where she doesn't make any adjustments.

9 What's actually going on here, it seems to me, is an adjustment that's being made after
10 a problem has been pointed out with the approach that she was going to take. Let's
11 park that. I'm more interested in playing the ball than the person. The problem is that
12 even if that's right, even if all along she meant to have a baseline model, or now she
13 wants to have a baseline model that doesn't make the adjustment, that doesn't make
14 the problem go away, because Dr Bagci has expressed her professional opinion that
15 the parameter values may well be different in the counterfactual.

16 And of course, if she's right about what these policies do, then she's also right that
17 they might make a difference to the counterfactual. Equally, if we're right about the
18 beneficial things that our policies do, then it's right that removing them might make
19 a difference to some of the parameters of the demand function. If that is correct, then
20 she needs to make an adjustment; you can't just not make an adjustment. You need
21 to make an adjustment, or else the model is going to spit out the wrong answer.

22 She says in the next paragraph at 47 that ignoring the change and using her baseline
23 approach is conservative, because changing them would actually lead to even worse
24 outcomes for us. But that obviously depends on what the change in parameter values
25 is. If there is no way to investigate that, then there's no way to know whether it's
26 conservative or not. You can see over the page that she's envisaging having lower

1 values of a_1 and b_1 in the counterfactual. I think she actually means higher values of
2 b_1 , but don't mind that.

3 But what if it's the other way around, or what if d changes as well? It's all just
4 unknowable. That is, again, the trouble with working with these theoretical models,
5 which are designed for a different purpose -- just to give you qualitative effects -- that
6 are incredibly fragile and sensitive to assumptions that you need to make in order for
7 the model to work, that frankly you just cannot verify by reference to the real-world
8 evidence.

9 I should say that Dr Bagci says that she does not accept Mr Holt's point that it's
10 impossible to do her sensitivity, and she says that she would do something sensible
11 and should do something that's "evidence-led". But that is not a blueprint to trial; those
12 are platitudes.

13 Her references at the end of paragraph 48 to looking at "internal documents" and
14 various sources of data are quite confusing in this context because they, like any
15 documents or any data, will be concerned with the real world, not the counterfactual.
16 But there is no plan for how this will be done, all she's saying is, "Trust me, I'm an
17 expert, I'll find a way". Life always finds a way.

18 So the simulation approach -- I'll just finish up on this point, and then maybe it's a time
19 for a break. The simulation approach, we say, is just one disaster after another, and
20 it truly is a colossal waste of time that has no prospects -- I don't need to go this far,
21 but it does have no prospects -- of leading to any reliable outcome.

22 Where it actually leads, and I say this from bitter experience, is to vast numbers of
23 pages of maths dealing with very technical details of multiple versions of complex
24 models that bear very little relation to anything that happens in the real world, followed
25 by many hours -- in this case, it could be days -- of complex cross-examination on
26 those technical points, which will make what I've just been doing today look like a walk

1 in the park. And at the end of all of that, the modelling is all going to go straight into
2 the bin.

3 THE CHAIR: (Sotto voce joke).

4 MR PICCININ: Sir, as I said, it comes from bitter experience. That is what happened
5 in Kent. It's also what would have happened in Interchange Trial 2 if this tribunal had
6 not had the wisdom to prevent it by refusing permission for the claimants even to
7 develop the simulation model. That was dealing with the comparatively simple
8 exercise of working on a pass on rate for a widget retailer. Models that deal with pass
9 rates are like simulation models that deal with pass-on rates; it's the simplest thing in
10 the world, it's just the impact of costs on prices. This is a complex market involving
11 multiple decision-makers making multiple decisions that interact in multiple ways.

12 Now, I don't go so far as to say no simulations ever, in any case. But I do say that it
13 was Dr Bagci's job to provide you with a clear blueprint to show how her model could
14 work at trial. She didn't need to give you all of the final answers, but she did need to
15 give you a set of equations that described at least one workable model that at least
16 arguably corresponds to the important features of the real world. She has not done
17 that, and so her model fails the Microsoft test. Even if she had done that, it would still
18 fail the Microsoft test if, having considered all of the points that I've been making, you're
19 not satisfied that there's a reasonable chance of getting to an outcome where you can
20 be confident in any particular model.

21 So even if you thought that the one she presented was just about arguable -- had
22 some basis in fact, but not much -- still, if after hearing all of my points and the thought
23 of many more points to come, you just think that this kind of modelling exercise is just
24 not useful for this kind of sensitive area, then still you should say it fails the Microsoft
25 test. As I said, although it was not a collective action, that is the decision that the
26 tribunal took in Interchange.

1 As I've said, I don't think I need to say anything much about the yardstick methodology,
2 because it's no longer said to be a standalone methodology.

3 THE CHAIR: No, I don't think it's ever (inaudible) standalone. It was a sort of --

4 MR PICCININ: Cross-check.

5 THE CHAIR: I think Dr Bagci accepted, a fairly crude cross-check, but she thinks it's
6 worth doing as a sense check, and it's not very complicated.

7 MR PICCININ: It's certainly not very complicated, sir. But what I would say again: she
8 talks about needing disclosure and about needing to make adjustments later on; she
9 already knows what the marketplaces are. If you just look at tab 6, page 322. (Pause)
10 She's already compiled a list of the online marketplaces that she's identified in the UK,
11 and she's chosen eBay and AliExpress for her damages calculations. They are
12 obviously very different from Amazon, in respects that go far beyond their policies
13 towards this kind of conduct. It's not like she's magically going to discover at trial that
14 there's some other marketplace she's never heard of that is actually exactly the same
15 as Amazon, except for the absence of a WRPO. That's not realistic at all, nor is there
16 going to be any methodology to account for the differences.

17 So, I do say when she calls it a cross-check, sometimes people use "cross-check" to
18 mean different things, like maybe to set an absolute maximum: it couldn't possibly be
19 more than this. But as a methodology to provide you with any kind of reliable number,
20 it's useless, completely useless.

21 For those reasons, we say that ACSO has no methodologies that satisfy the Microsoft
22 test beyond the methodology that Stephan is already relying on, which you the tribunal
23 have already found to pass the Microsoft test. So, there is no need for Dr Bagci in the
24 case at all. That ravel back up all my previous submissions yesterday.

25 THE CHAIR: That would be a sensible moment to take a break?

26 MR PICCININ: That would be a sensible moment.

1 THE CHAIR: Thank you.

2 (11.41 am)

3 (A short break)

4 (11.53 am)

5 MR PICCININ: Mr Lask and I were just discussing before the break that we're entirely
6 in your hands as to whether you would now like to hear me on the strike-out, or whether
7 you would prefer for us to bob up and down a bit and have Mr Lask reply to me, and
8 then have me make the strike-out.

9 THE CHAIR: I think we would prefer to hear Mr Lask in reply, and I think
10 Mr Carall-Green wanted to address us also on the potential for co-counsel (inaudible)
11 and that we'll deal with that in the certification and then do the strike-out --

12 MR PICCININ: The strike-out.

13 THE CHAIR: -- as a separate action.

14 MR PICCININ: Very good. I'll give way to my learned friend.

15
16 Submissions by MR LASK

17 MR LASK: Thank you, sir. Good morning.

18 What I propose to do is respond first on the Microsoft points while they are fresh in
19 everyone's mind, and then return to some of the points made by my learned friend
20 yesterday afternoon.

21 Microsoft: firstly, by way of framing, we do say that my learned friend rests his
22 Microsoft submissions on an entirely unrealistic understanding of what the Microsoft
23 test requires. Where the facts are unclear, as they often are at the outset of
24 proceedings and as they are in this case, it is in my submission entirely appropriate
25 for an expert to make reasonable assumptions pending disclosure and to indicate how
26 they may amend their model, or modify their model, after disclosure once they have

1 the necessary evidence.

2 Just to make that point good, I would like to take you back, please, to your judgment
3 in Hammond and Stephan, where you dealt with the Microsoft test. My learned friend
4 didn't take you to any authorities on the Microsoft test, and I submit that is telling, in
5 circumstances where we say Amazon's case on the Microsoft test rests on an incorrect
6 understanding of what it requires. It's at bundle D, tab 1, page 33, please.

7 THE CHAIR: Yes, and you showed us this before.

8 MR LASK: I did. I'll take it quickly, but I want to emphasise a couple of passages that
9 I asked you to read yesterday.

10 At page 33, this is paragraph 77, the tribunal sets out a number of propositions drawn
11 from the appellate authorities, and I'd like to emphasise the following. At number (2):
12 "It must be recognised that the methodology is formulated prior to disclosure and is
13 therefore necessarily provisional and might properly identify further refinements and
14 work to be carried out after disclosure ...

15 "(4) The methodology is not required to achieve perfection. The Tribunal should bear
16 in mind that it is armed with a broad axe by which it can fill gaps and plug lacunae in
17 the methodology ...

18 "(5) The 'some basis in fact' test requires only a minimum evidentiary basis and is not
19 an onerous condition ..."

20 Then the only other point: in paragraph 78, the quote from McLaren; you see the
21 reference to the well-known phrase "initial blueprint".

22 I emphasise "initial" blueprint. My learned friend said towards the end of his
23 submission, "There needs to be a clear blueprint". That's wrong. It's an initial blueprint
24 that's required in my submission. In my submission, that suggests an outline
25 methodology rather than a fully fleshed-out one, which is what Amazon appear to be
26 requiring at this stage.

1 I would also say, before moving on to the specific arguments that there is of course
2 another independent expert in this case who has indicated that the proposed Boik and
3 Corts model that Dr Bagci intends to run is likely to be useful, and that's Dr Houpis.
4 He says it's likely to serve as a useful alternative or cross-check to his methodology.

5 THE CHAIR: That's in the joint memorandum?

6 MR LASK: That's in the joint expert statement, which I'm going to take you to a little
7 later.

8 Sir, I'll deal with the specific complaints in the same order that my learned friend just
9 took them. The first relates to the timing of commission setting. This is the issue as
10 to whether Amazon sets its commission followed by the other platform, or whether it's
11 sequential or whether it's something else.

12 My learned friend grounded his submissions on the factual assumption that Dr Bagci
13 refers to in her first report, that Amazon sets its commission and commits to it. He
14 emphasised the notion of commitment, of a commission being set in stone. What my
15 learned friend said is that if one changes that factual assumption, the whole model
16 fails. That was his submission. The problem with that submission is Dr Bagci does
17 not accept it.

18 If I could show you, please, the way she deals with it in Bagci 3, paragraph 39. This
19 is A15, page 656.

20 I'm sorry, Mr Bourke corrects me. It's a summary report at A15, page 656. I'm
21 grateful.

22 One sees at paragraph 39, "Timing of Commission-Setting", third sentence:

23 "In Bagci 1, I therefore represented commission-setting sequentially, with Amazon
24 setting its commission before the rival platform. I made this modelling choice because
25 I believe it is unlikely that I would find evidence to support the theoretical finding that
26 Amazon randomises over commissions. Mr Holt says that this is 'fatal' because it

1 requires Amazon to commit to its commission and not change it once the rival platform
2 has responded, and that there is no factual basis for such a commitment."

3 I emphasise the word "fatal", because that's where my learned friend gets his
4 submission from, but once you change the assumption, the whole model fails. As
5 I say, Dr Bagci doesn't accept that.

6 Paragraph 40:

7 "Mr Holt frames the choice as binary: either simultaneous commission-setting ... or
8 sequential commission-setting ... I do not accept that framing. In practice, the
9 question is not whether Amazon can never revise its commission schedule, but
10 whether its commission-setting behaviour is more accurately characterised by
11 infrequent, publicly observable changes around which rival platforms adjust, or by
12 continuous simultaneous optimisation."

13 At the end of that paragraph:

14 "[This] is an empirical question.

15 "41. As I stated in Bagci 3, I agree that the appropriateness of the timing assumption
16 should be assessed against the evidence, including the chronology and frequency of
17 changes in [the] commissions, whether and to what extent Amazon monitored rival
18 commissions, and evidence as to whether rival marketplaces responded to Amazon's
19 commissions ... or vice versa. If the evidence does not support a leader-follower
20 relationship, I would consider the timing specification and assess whether the
21 conclusions are sensitive to that modelling choice."

22 Then she gets on to the more nuanced variations that I referred to yesterday:

23 "For example, if the evidence shows that platforms revise observable commissions at
24 discrete intervals and respond to one another with lags, a repeated or discrete-time
25 specification could allow commissions to be revised periodically without imposing
26 either permanent commitment or one-shot simultaneous commission-setting; the

1 appropriate representation would depend on the observed evidence. The timing
2 assumption is a matter to be tested in implementing the model; it does not establish
3 that the structural approach is incapable of reliable implementation."

4 My learned friend's next submission was to say, "We just don't know whether any such
5 modification would work". In my submission, that sets an impossible standard. As
6 Dr Bagci has explained in the evidence I've just referred you to, the specification
7 depends on the evidence, and what my learned friend is urging the tribunal to do, in
8 my submission, is put the cart before the horse.

9 Then finally under this heading, my learned friend says, and this is really his fallback
10 position; he says the model that has been set out at this stage has no basis in fact.
11 But that is simply wrong, because Dr Bagci has explained why the sequential
12 commission-setting approach that she has assumed in Bagci 1 is a reasonable
13 assumption at this stage of proceedings. That's Bagci 1, paragraph 298, which is at
14 tab A6, page 400. This is the second sentence:

15 "To make the model more representative of the real-world, I amend the BC model to
16 assume that platforms set their commissions sequentially rather than simultaneously
17 and that platform that imposes the WRPOs sets the commission first. This assumption
18 reflects the fact that Amazon likely has a dominant position (even in the counterfactual
19 world where it never imposed WRPOs) and is therefore likely to be the price leader."

20 So, the assumption does have a basis in fact. Now, it may turn out that the evidence
21 at trial indicates that it's not that simple, and that modelling adjustments need to be
22 made accordingly. But it's simply wrong to say that the assumption that she has made
23 at this stage has no basis in fact. You'll recall, from the Hammond and Stephan
24 judgment I just took you to, it is not an onerous requirement. The Microsoft test does
25 not require very much.

26 The second complaint concerns the use of a representative seller, and I want to deal

1 firstly with a submission my learned friend made in order to set up his Microsoft
2 criticisms under this heading. He said because of the way in which Amazon says its
3 policies work, a seller can only comply with the price parity policies by reducing its
4 price on Amazon. This is the pro-competitive effects point that Amazon is trading.
5 Because there is an external benchmark that doesn't just encapsulate that seller's
6 price of Amazon, but other sellers' prices off Amazon too, the only thing a seller can
7 do in order to ensure that its prices are compliant is lower its prices on Amazon.

8 There are three problems with that submission: firstly, it's not what factual evidence
9 indicates, as pleaded by ACSO; secondly, it's not what Dr Bagci thinks; and thirdly,
10 not even Mr Holt goes as far as my learned friend.

11 Just to make those points good, we could look at the amended claim form, bundle A,
12 tab 1, page 83. (Pause)

13 Paragraph 257. This is in the section of the pleading dealing with object infringement.
14 Paragraph 257:

15 "Amazon is aware that its price parity policies do not result in lower prices on Amazon's
16 marketplace but rather protect Amazon's 'price perception' by preventing or strongly
17 discouraging sellers from offering lower prices elsewhere."

18 Then we've set out a number of illustrative examples based on the evidence from the
19 US proceedings. I'll just read out a couple:

20 "257.1. For example, '[a] 2017 Amazon internal memo observed that Buy Box
21 disqualification 'has not led Sellers to lower their prices' and 'has not motivated
22 Sellers to reduce prices'".

23 And over the page, 257.5:

24 "Amazon refers to sellers offering lower prices off Amazon as sellers 'stepping out on
25 us'. According to the US Federal Trade Commission, 'Amazon's CEO of Worldwide
26 Stores explained that policing sellers to prevent them from discounting elsewhere, so

1 Amazon can maintain a reputation for having low prices, is "a dirty job, but we need to
2 do it".

3 So, the submission that a seller can only comply with the policies by lowering its
4 on-Amazon prices, is inconsistent with our pleading and inconsistent with the evidence
5 that we've pleaded. Obviously, no one's inviting the tribunal to decide the point now,
6 but I do say it's important for the tribunal to have that in mind.

7 MR PICCININ: Just to clarify and save some time. That's not a submission I ever
8 made. I never said that the only way a seller can ever comply with the policies that
9 are alleged is by reducing its price on Amazon. What I said is that if the particular
10 reason why they are in noncompliance is because their price on Amazon is higher
11 than a price that somebody else is charging elsewhere -- in that scenario, the only way
12 that they could comply is by reducing their price on Amazon.

13 MR LASK: With respect --

14 MR PICCININ: That is the submission I made.

15 MR LASK: -- that's detached from reality, because as I showed you yesterday in our
16 pleading, Amazon doesn't tell sellers who it's benchmarking their prices against. So
17 there isn't a world in which a seller would know whether it was non-compliant because
18 of its own price or because of someone else's price off Amazon.

19 The second point is Bagci 3, paragraph 33, which is volume A, tab 10, page 484.

20 (Pause)

21 Paragraph 33:

22 "Amazon's external price-checking policies compare a seller's Amazon price not only
23 with that seller's own off Amazon price, but also with prices offered by other retailers
24 for the same or equivalent products. That does not undermine the methodology. It
25 identifies an empirical question. A seller may respond to an external price check by
26 lowering its Amazon price. But it may also respond by raising the off-Amazon price,

1 stopping off Amazon discounting, or reducing activity on rival platforms."

2 MR BANKES: And is it Mr Piccinin's point that it can only do that in relation to its own
3 price on the other platform, third party, not to --

4 MR LASK: Well, we would absolutely accept that it can't change a third party's price,
5 either on or off Amazon.

6 MR BANKES: Yes.

7 MR LASK: The point is: how does the seller respond when it's not compliant with the
8 policy? Does it respond by lowering its Amazon price? Does it respond by raising its
9 off Amazon price? Or does it respond in one of the other ways that Dr Bagci has
10 suggested, and --

11 MR BANKES: But the latter is not possible if it's not its price that has been observed --

12 MR LASK: It doesn't know, because.

13 MR BANKES: It must know because it must know its own prices.

14 MR LASK: Well, obviously it knows if its price off Amazon is higher than its price on
15 Amazon.

16 MR BANKES: Yes.

17 MR LASK: Right, so the surefire way of a seller ensuring that it's not in breach of the
18 policy is making sure its price off Amazon isn't lower than its price on Amazon. That's
19 what it can do. And the dispute at the moment -- of course, it's not a dispute the
20 tribunal can resolve -- is whether, inevitably, the seller is just going to adjust its
21 on-Amazon price, or whether actually there are other things it might do, whether it
22 might actually respond by doing something to its off-Amazon price.

23 The point I'm making is that our pleading, and the evidence we've pleaded, indicates
24 that actually what sellers do is ensure that they're off Amazon prices are at least as
25 high, if not higher than their Amazon prices.

26 THE CHAIR: That's how they comply with that aspect of the policy. The other aspect,

1 | they can only -- I don't know how it's actually implemented, (inaudible) told that they're
2 | in breach -- then if they're told, they will know as Mr Bankes (inaudible) whether it's
3 | because of their own price or because --
4 | MR LASK: Well --
5 | THE CHAIR: You say as regards their own price, they know that they can't have lower
6 | prices. What happens --
7 | MR LASK: Exactly.
8 | THE CHAIR: And therefore, as regards their own price, the way they comply is to
9 | have the same higher price off Amazon --
10 | MR LASK: Yes.
11 | THE CHAIR: -- rather than using their price on Amazon.
12 | MR LASK: Yes, because --
13 | THE CHAIR: And how they respond to the other aspect is known; that was by
14 | lowering.
15 | MR LASK: We certainly can't know at this stage.
16 | THE CHAIR: Well, it would have to be by lowering prices, their price on and off, have
17 | to keep them the same. And if there's a lower price from another seller off Amazon,
18 | they could in theory just reduce their on-Amazon price and their off-Amazon price high.
19 | MR LASK: In theory, if they knew what was going. But if I can just remind you what
20 | we say at paragraph 205 of the claim form, bundle A, tab 1, page 64. (Pause)
21 | "Importantly, Amazon does 'not reveal the names of the retailers' it monitors, and
22 | therefore in practice, third-party sellers must maintain price parity across all sales
23 | channels since the 'Competitive External Price' could refer to the price offered at any
24 | 'reputable retailer' anywhere else on the internet."
25 | This is deliberate:
26 | "Amazon internally acknowledges, 'we are deliberately providing limited information

1 about how we generate competitive prices'."

2 Insofar as this affects the economic methodology, there is a measure -- only
3 a measure -- of common ground between Dr Bagci and Mr Holt on this. If we go to
4 bundle A, tab 9, page 445. (Pause)

5 Paragraph 2.3.17:

6 "While this downward effect on prices arising from the competitive benchmarking
7 aspect of the Alleged Conduct is important to consider in any assessment of the
8 Alleged Conduct, Dr Bagci's model automatically excludes that possibility."

9 I emphasise "important to consider" because Mr Holt is recognising that it's an
10 evidential question; the effect that seller to seller competition may have is an empirical
11 question. So, the evidence needs to be gathered, and the model needs to take
12 account of it.

13 Now, as I submitted to the tribunal yesterday, Dr Bagci's use at this stage of
14 a representative seller is a modelling simplification that she thinks serves a useful
15 purpose. And that's in Bagci 3, tab 10, page 483. (Pause)

16 Page 483, paragraph 32 at the bottom of the page:

17 "The representative seller is a modelling simplification, not an assumption that
18 competition between sellers is absent in the relevant market. Its purpose is to isolate
19 cross-platform mechanism relevant to ACSO's theory of harm: whether WRPOs
20 restricted or discouraged sellers from reflecting lower rival-platform commissions in
21 lower retail prices and thereby weakened competition between marketplaces. That
22 mechanism can in principle operate alongside competition between sellers. The
23 empirical question is whether omitting seller-to-seller competition materially affects the
24 model's ability to represent the pricing and competitive relationships relevant to the
25 analysis."

26 So, if what's being said is that at certification stage of proceedings, a proposed

1 methodology uses certain modelling simplifications, is inadequate. That would in my
2 submission be extending the Microsoft test beyond anything that it's previously been
3 applied for. Perfectly acceptable in my submission, for Microsoft purposes, to adopt
4 the modelling simplification. And, indeed, it may well be perfectly acceptable at trial
5 for there to be modelling simplifications. That doesn't suggest that the model is
6 thereby rendered useless.

7 Economic modelling often involves simplifications, even at trial. It doesn't mean they
8 get thrown in the bin, because there may well be good reasons for it, and it may well
9 have a reasonable evidential basis. In any event, as the tribunal will be aware,
10 Dr Bagci has explained how she would test the impact of seller-to-seller competition,
11 and she's given an outline of how she would adapt her methodology to account for it.
12 This is the "extension" that she refers to.

13 As she explains in Bagci 3 -- you should have should still have it open in front of you.

14 Paragraph 34:

15 "Such an extension is feasible: Boik and Corts discuss the implications of multiple
16 sellers, and the Boik and Corts framework has also been extended to model
17 competition between sellers in the De Coster proceedings, in which Dr Pathak
18 accounted for multiple competing sellers, and found that the model continues to predict
19 that WRPOs lead to higher prices."

20 The tribunal may be assisted just to look at the ruling from De Coster. I can take it
21 quite shortly. It's in bundle B2, tab 34.

22 MR BANKES: Which bundle, sorry?

23 MR LASK: Sorry, it's B, volume 2 in the hard copies, tab 34.

24 MR BANKES: Page?

25 MR LASK: Sorry, page 1037. Well, in fact, if we start on 1036, that's the front page.

26 One sees from the introduction:

1 "This matter comes before the Court on Defendant [Amazon's] Motion to Exclude the
2 Testimony of Parag Pathak. The Court has considered the materials ... The Court
3 DENIES the motion."

4 And then over the page, 1037 gives some background:

5 "Plaintiffs sued [Amazon], claiming that the company violated Sections One and Two
6 of the Sherman Act."

7 And in the last sentence of that paragraph -- well, sorry, let me read the paragraph:

8 "They contend that Amazon denies customers the 'benefits of lower prices and fees'
9 that would arise in a competitive market; and they say Amazon does so by imposing
10 on third-party sellers 'Most Favored Nation' policies that cause customers to pay
11 supra-competitive prices."

12 Just pausing there, "most favored nation" policies is old language for WRPOs.

13 "Plaintiffs allege that Amazon's pricing policies prevent 'third-party sellers from offering
14 lower prices off of Amazon, and punish them for violations, which in turn insulates
15 Amazon from competition from low cost, alternative platforms'."

16 So, the claim is very similar; the claim that ACSO is bringing is challenging the same
17 policies. Then page 1043. (Pause)

18 Dr Pathak's application of the Boik-Corts model to Amazon's transactional data does
19 not render his expert opinion unreliable. The Boik-Corts paper was first published in
20 the peer-reviewed journal in 2016 and, in the words of Amazon's expert, has become
21 'one of the papers that you would normally cite if you [were] studying a platform MFN.'
22 And Amazon does not point the Court to any economic literature describing flaws or
23 errors in the model. (During his deposition, Dr Hitt [I think Amazon's expert] stated
24 that he looked at 82 research papers focused on PMFS and could not recall any of
25 these papers critiquing the Boik-Corts model."

26 THE CHAIR: MFNs are platform ...

1 MR LASK: That's how I read it, yes:

2 "... Amazon's contention that Dr Pathak improperly extended the Boik-Corts model to
3 the facts of this case is unavailing. Dr Pathak says that he applied the Boik-Corts
4 model to transactional data provided by Amazon to assess the impact of the
5 company's anti-discounting policies ... He analysed about 236 million individual items
6 sold on Amazon from ... 2017 to ... 2023 ... and he explains that although the
7 Boik-Corts model assumes that a merchant is a 'monopoly seller' and controls prices
8 across all platforms, he extended the model to consider other economic conditions,
9 including a variant that included 'perfectly competitive' assumptions – i.e., the seller
10 faces so much competition for its products that prices are driven down to
11 costs ... Dr Pathak states that his conclusion was the same regardless of the
12 competitive conditions imposed on the model -- anti-discounting policies result in
13 higher prices ... In sum, Dr Pathak took a peer-reviewed economic model and applied
14 that model to transactional data provided by Amazon."

15 So, that's why Dr Bagci feels reasonably confident that it will be possible to incorporate
16 an extension that reflects seller-to-seller competition.

17 My learned friend made the submission that, well, that this wasn't dealing with the
18 precise extension that Dr Bagci will make, and at this stage, Dr Bagci doesn't precisely
19 what the extension will look like. It hasn't happened yet, so of course this isn't dealing
20 with the precise extension. But let's not forget, this is Amazon's case, the De Coster
21 case. Amazon knows what's going on in that case. Amazon has the details about the
22 precise way in which Dr Pathak modified his model. If they wanted to come before the
23 tribunal and say, "Well, actually, notwithstanding what the US court found, there are
24 fundamental problems with any attempt to incorporate a seller-to-seller competition
25 extension", they could have done so by reference to what was done in that case, but
26 they haven't. Amazon knows; we don't, and the tribunal doesn't.

1 Then the third complaint, following my learned friend's order this morning, concerns
2 pricing assumptions. Again, as the tribunal will now be aware of, Dr Bagci has adopted
3 a simplified assumption on pricing. So, she has assumed, for present purposes, linear
4 fees being charged by Amazon.

5 Amazon does not say that linear fees form no part of its pricing approach. What it
6 says, and the basis for its complaint, is that its pricing, in fact, is more complex. The
7 linear fees aren't irrelevant; it's just more complex. But that doesn't mean that the
8 model isn't grounded in the facts. The model is grounded in a simplified version of the
9 facts, and that is acceptable at this stage of proceedings. That is fine for Microsoft
10 purposes. In addition, and this is also important, Dr Bagci makes clear that the
11 application of more complex fee structures does not jeopardise the workability of the
12 model, and that's at tab 15 of bundle A, page 657, paragraph 42:

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

17 The approach Dr Bagci has taken is grounded in the facts, and Dr Bagci believes that
18 it will be possible to adapt the model to take account of more complex structures
19 without the model falling apart. It will remain workable.

20 THE CHAIR: I think the criticism that's levelled at this is not that that may not be
21 possible. But the model put forward, or method put forward at this stage, the Microsoft
22 test is not -- it's a method that's now going to be implemented. It's clearly not that it's
23 a method that explains what, once (inaudible) information becomes available, how the
24 expert is going to do this at trial; and if it's clear that there is a non-linear fee structure
25 in terms of eBay, and therefore it's clear now that a modification or adjustment is going
26 to be necessary, then the model put forward should take account of that and just give

1 some indication how it can be adjusted, because it's clear that it will need adjustment;
2 and it's not that we want a simplified model to do a simplified estimate now, and a more
3 complex model (inaudible) estimation of damages at trial. But we don't want to do any
4 estimation now. We want to see what is the nature of the model that will be applied at
5 trial.

6 MR LASK: Yes.

7 THE CHAIR: I think the concern is that on a number of points, Dr Bagci says, "Yes,
8 well, it can be adjusted or it can be modified", but there's not much explanation of how
9 that adjustment can be made for one to assess whether that's really feasible. That's
10 part of the difficulty. I think that was the thrust of quite a lot of (inaudible).

11 MR LASK: I accept that that was the thrust, and an expert can always do more work,
12 even at the certification stage. They can always go down more rabbit holes and spend
13 more money fully fleshing out their methodology.

14 THE CHAIR: Yes.

15 MR LASK: But there is a proportionality issue here --

16 THE CHAIR: No, I (inaudible) that.

17 MR LASK: -- particularly in this case, where Amazon are asking this tribunal not to
18 certify the claim because of cost concerns.

19 In my submission, what --

20 THE CHAIR: Well, I don't think they could, on the way they put their case, really object
21 to certification based on what we've heard, if you're saying you were going to use
22 Dr Houpis's methodology; because that removes a large part of cost concerns and
23 that methodology has been certified, so there wouldn't be much left, it seems to me,
24 (inaudible) of grounds for opposition.

25 MR LASK: Yes, but what Dr Bagci has done, in my submission, is use her judgment
26 to determine how much detail to go into when specifying the model at this stage, and

1 she has taken a proportionate approach. She has made certain assumptions and
2 simplifying modelling choices, but has listened to the criticisms levelled at her by
3 Mr Holt and sought to engage with them and explain how she would deal with those
4 issues if the claim was certified, and if she was permitted to go forward and carry out
5 her methodology.

6 THE CHAIR: Yes.

7 MR LASK: But, you know, as we saw in that Hammond and Stephan judgment, it is
8 permissible at this stage for Microsoft purposes to identify where refinements are going
9 to be needed, and that's exactly what she's done. (Pause)

10 I appreciate my learned friend said, "Well, she already knows how Amazon charges",
11 but what she is also saying in 43 is that the modelling choices she would wish to make
12 in this regard would depend on disclosure, not simply what is in the public realm. So,
13 she says at 43:

14 "Following disclosure, I would identify the fees actually faced by sellers, including
15 referral fees, fixed charges and other material components. I would then assess
16 whether a simplified fee specification adequately represents those charges and, if
17 necessary, adapt the model to incorporate the relevant fee structure."

18 So, she thinks there is potential disclosure that will help inform these choices.

19 THE CHAIR: Yes. I suppose there could be disclosure on eBay which would show
20 (inaudible) purchases at different pricings, different price brackets. Therefore, you
21 could translate fixed fee into a percentage for the purpose of doing it as a percentage.

22 MR LASK: Yes. Of course, the risk in going further at this stage and seeking to really
23 flesh out all of the possible modifications to the model that might be made is: the way
24 in which those modifications are described, or designed at this stage, may very well
25 turn out to be not the appropriate way of approaching things following disclosure. So
26 every time she goes down a rabbit hole, she may find, following disclosure, that it was

1 the wrong rabbit hole. It's been a waste of time. And that underlines my submission
2 a moment ago, which is that the approach she's taken is proportionate, reasonable,
3 and Microsoft-compliant.

4 Then the fourth complaint is the baked-in complaint. I'm not going to take you back
5 through the equations, which it may or may not please you to hear. But I think it's fair
6 to say that what the complaint comes down to is a complaint that Dr Bagci's approach,
7 Dr Bagci's modelling, which incorporates what's referred to as the participation
8 constraint, is implausible; assumes implausible things implicitly, or explicitly.

9 The short answer to that is: Dr Bagci simply doesn't accept that. She doesn't accept
10 it, and the tribunal is not equipped at this stage to resolve that particular dispute,
11 because it requires factual evidence, and it requires the modelling to be tested through
12 cross-examination; and that is why the complaint isn't really a Microsoft complaint.

13 With the greatest respect, I had to remind myself when listening to my learned friend's
14 submissions that this wasn't closing submissions at the end of an eight-week trial,
15 because that's what it felt like. Those were the sorts of points you would expect to
16 hear at the end of a trial, where the methodology has been properly scrutinised and
17 properly subjected to cross-examination.

18 Just to remind the tribunal where Dr Bagci says she doesn't accept this: it's volume A,
19 tab 15, page 652. This is Dr Bagci's summary report, and the three passages I'd like
20 to emphasise; firstly, the first sentence of paragraph 27:

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

24 Then paragraph 29, last sentence:

25 "This analysis would not require me to identify a precise commission at which each
26 individual seller is exactly indifferent between remaining on Amazon and its best

1 alternative."

2 Then paragraph 31 on page 653, first sentence:

3 "Contrary to Mr Holt's assertion, allowing sellers to decide whether to participate is an
4 economically relevant feature of the model: it captures the basic possibility that
5 a platform's charges may affect whether sellers continue to participate."

6 Then the final complaint concerns demand parameters. For this purpose, could we
7 go, please, to Bagci 3, paragraph 48 at A10, page 488:

8 "Mr Holt's criticism appears to relate primarily to the sensitivity analysis that I propose
9 to run. As explained in Bagci 1, given Amazon's WRPOs have likely contributed to
10 creating and sustaining the likely significant market power it holds today, any
11 counterfactual analysis will need to make appropriate adjustments to reflect that
12 Amazon's market power may have been lower had it not imposed WRPOs on
13 third-party sellers. That is, in the counterfactual, Amazon would likely not have been
14 able to establish the network effects to the same extent as it currently enjoys, and rival
15 online marketplaces would have been able to expand and gain market share from
16 Amazon. As I explain in Bagci 1, to reflect this lower level of market power, I may have
17 to reduce the parameter values for a_1 and b_1 in the counterfactual, to reflect that
18 Amazon's brand value may have been lower and its consumers could have been more
19 price-sensitive in the counterfactual than they are today. Any such adjustment to these
20 demand parameters would be evidence-led. It could be informed by Amazon's internal
21 documents, market-share evidence, seller and consumer switching evidence, rival
22 platform data, and evidence on the operation and enforcement of the policies."

23 Dr Bagci has explained the approach she would take, specifying the sensitivity in
24 outline terms, but that is an initial blueprint to trial. That's all it's required to be: an
25 initial blueprint.

26 Then just finally on the yardstick point, my learned friend said at the beginning of his

1 submissions that he understood the position to be that we don't say the yardstick
2 approach passes the Microsoft test. That's not our position. We do say it passes the
3 Microsoft test, and I can address you on it further if necessary.

4 THE CHAIR: As I understand it, it's not put forward as that on its own.

5 MR LASK: That is correct.

6 THE CHAIR: It's just there as a cross-check or a sense check?

7 MR LASK: Correct.

8 THE CHAIR: So, it's really saying, "This is the primary methodology you've been
9 addressing", and then having done that, she used the yardstick approach to see
10 whether what she's got from this seems (inaudible).

11 MR LASK: Yes.

12 THE CHAIR: But not to use the yardstick approach to get to the price?

13 MR LASK: That's correct. That's correct.

14 THE CHAIR: So, it plays a much lesser role.

15 MR LASK: Yes.

16 THE CHAIR: So, it's really an adjunct to this, and one has to look at it that way, it
17 seems to me, and not in isolation. So, though it might not pass the Microsoft test in
18 isolation, which seems to me it clearly wouldn't, but it's simply used as an additional
19 check for --

20 MR LASK: If I may say, sir, your characterisation of the role intended to be played by
21 the yardstick methodology is correct. If what you're putting to me is that you don't
22 need to be satisfied that it passes the Microsoft test, given its role, then I'm content to
23 accept that. What I would resist is any submission made by, made by my learned
24 friend that it doesn't pass the Microsoft test and therefore should be excluded from any
25 analysis that Dr Bagci is permitted to carry out at trial.

26 THE CHAIR: Yes, I mean, as I say, there are really two possibilities: one is, if the

1 primary methodology simulation model doesn't pass the test, you're not relying on the
2 yardstick saying you can get through on that, so it's not looked at in isolation; if this
3 does pass the test, what you're saying is we shouldn't exclude use of the yardstick
4 method as a cross-check?

5 MR LASK: Yes.

6 THE CHAIR: That's your --

7 MR LASK: I'll just check that I'm not misspeaking.

8 Yes, that is correct, thank you.

9 THE CHAIR: It plays a much lesser role.

10 MR LASK: Yes.

11 THE CHAIR: And that's why Dr Bagci, I think, frankly acknowledges that she's not
12 sure how reliable it will be as a yardstick. That's why I don't think we need to get too
13 deeply into it.

14 MR LASK: I'm happy to leave it there, sir. That was all I wanted to say then on the
15 Microsoft test, and we're going to come on to deal with the topics that my learned
16 friend covered yesterday afternoon.

17 Dealing firstly and briefly with the cost-benefit analysis, two points: first, my learned
18 friend said that an astute litigant, spending its own money would, in these
19 circumstances, simply rely on Hammond and Stephan to pursue the litigation. We
20 don't accept that. My submission, in reality, an astute litigant spending its own money
21 would evaluate the pros and cons of active participation versus a purely passive role,
22 and take the approach that it considered to be in its best interests. More importantly,
23 the tribunal wouldn't force the litigant to take a purely passive role if it wished to
24 participate, because that would be unfair.

25 The fact that these are collective proceedings doesn't alter that basic point, as
26 illustrated by the tribunal's observations in the Ennis v Kent ruling that I showed you

1 yesterday.

2 THE CHAIR: Yes.

3 MR LASK: Then the second point is that my learned friend criticised the damages
4 estimate that ACSO relies on for the cost-benefit analysis. For the reasons I gave
5 yesterday, we submit that the damages estimate is a reasonable basis for cost-benefit
6 analysis, and is indeed the best evidence currently available to the tribunal. As I said
7 yesterday, even if you cut the lower bound of Dr Bagci's estimate in half, prospective
8 benefits to the class are very large and are continuing to grow.

9 Now, the tribunal is, of course, astute to the evidential limitations of the certification
10 stage, but the right approach in my submission is to rely on Dr Bagci's estimate for
11 present purposes, even if the tribunal has to exercise a degree of caution. It may be
12 helpful to look at what the president said on this in the JLP ruling last week. This is at
13 bundle H2, tab 21, page 1072.

14 MR BANKES: Sorry, 1000 and ...

15 MR LASK: 1072. At paragraph 169, the tribunal outlines the provisional damages
16 estimates provided by the PCR's expert Dr Pike. Then it's really at the bottom of the
17 page where the tribunal says:

18 "Apple and Amazon dispute the assumptions on which those figures are based.
19 However, in the absence of any other figures, it is appropriate to take these as the
20 starting point in our assessment of the costs and benefits of these proceedings, albeit
21 with a degree of caution."

22 It's worth, actually, while we're here, looking at how the tribunal then applied the
23 cost-benefit analysis. One sees in paragraph 169, where we just were, about two
24 thirds of the way through the paragraph:

25 "Dr Pike estimates that it will reach a value of £289 million (at 8 per cent interest), or
26 £306 million (10 per cent interest), assuming growth of Apple sales at a rate consistent

1 with the overall sales in 2019-2024."

2 That's the updated damage estimate between £289 and £306 million. Then you'll see
3 from paragraph 170 onwards, the tribunal is dealing with the costs. There's a table
4 at 171 setting out the costs including all the returns. That was the table that inspired
5 the table we provided to the tribunal I showed you yesterday.

6 You'll see there are two different bases, including Riefa and excluding Riefa.

7 MR BANKES: Yes.

8 MR LASK: The tribunal did decide that it wasn't appropriate to include Riefa.

9 MR BANKES: Riefa should be excluded.

10 MR LASK: Yes, so the costs figure it uses is £92 million. One sees that at the end of
11 paragraph 174, so the tribunal thinks actually the cost ought to end up being lower
12 than that:

13 "The exclusion of those figures will therefore immediately significantly reduce the cost
14 of the litigation if there is a successful outcome, resulting in the lower figure of around
15 £92 million set out above."

16 Sorry, the point I just made is dealt with in the next paragraph 175:

17 "While that remains a very substantial sum, it is based on the current litigation budget."
18 The tribunal thinks that further reductions ought to be achievable. So, the tribunal is
19 taking £92 million as the upper limit of the estimated costs.

20 Then paragraph 177:

21 "Set against those considerations, it is necessary to consider the benefits to the class
22 members, both individually and as a whole, if the proceedings are certified. It is fair to
23 say that the projected returns for each class member are not significant. Using, again,
24 the PCR's own estimate of an On-Amazon damages claim of £37-£39 per customer,
25 the returns are on any modest."

26 And then at 178, the tribunal notes that this is a "straightforward distribution

1 mechanism". I referred you to this paragraph yesterday, perhaps without taking you
2 to it. This is a distribution mechanism that is similar, the one that the ACSO is relying
3 on. You'll see at the end of paragraph 178 --

4 THE CHAIR: Yes.

5 MR LASK: The tribunal expects "the take-up to be significantly higher than ...
6 Guttman".

7 THE CHAIR: And here we have got an estimate of take-up.

8 MR LASK: Yes, we have.

9 THE CHAIR: From Verita.

10 MR LASK: Yes, 50 per cent.

11 THE CHAIR: Yes.

12 MR LASK: And then at 180:

13 "Taking all these factors into account we consider that, subject to the amendments to
14 the funding and PCR remuneration arrangements, the benefits to the class as
15 a whole ..."

16 THE CHAIR: You've skipped over 179. I think you are seeking injunctive relief, but
17 the effect of a decision would be that Amazon would have to effectively stop using
18 those clauses, because otherwise they'd just get damages claims.

19 MR LASK: Well, yes, certainly one would expect in the event of a successful claim
20 that Amazon --

21 THE CHAIR: So, it does have a conduct-changing effect.

22 MR LASK: One might expect it to.

23 THE CHAIR: Yes. I'm looking at 179. The second sentence.

24 MR LASK: Yes, the reference to injunctive relief?

25 THE CHAIR: No.

26 MR LASK: Oh, I'm sorry.

1 THE CHAIR: The reference to the "Agreements remain in force".

2 MR LASK: Yes, which is the same position here, yes.

3 THE CHAIR: Yes

4 MR LASK: Then at 180, the conclusion, that the benefits to the class as a whole

5 "sufficiently outweigh the likely costs". And that's in a situation where costs are around

6 £92 million, all in, and the benefits are between £289 and £306. (Pause)

7 That's all I had to say in reply on cost benefit.

8 Then there is an issue around the necessity of Dr Bagci's methodology. You may

9 recall that yesterday you indicated that I didn't need to address you on this in opening,

10 but could come back to it in reply if that was helpful. My learned friend did make the

11 submission yesterday that even if you're satisfied that Dr Bagci's methodology passes

12 the Microsoft test, you shouldn't allow ACSO to rely on it going forward; instead, you

13 should require access to rely exclusively on Dr Houppis's methodology at both trials.

14 THE CHAIR: Yes, as a cost constraint.

15 MR LASK: The cost constraint reasons, yes.

16 THE CHAIR: Just one moment. (Pause)

17 Well, while you'll need to address us on that for Trial 2, we have indicated that Trial 1,

18 we're very reluctant to allow two expert's methodologies --

19 MR LASK: Yes.

20 THE CHAIR: -- for liability.

21 MR LASK: Yes. Sorry, I missed the first part of what you said about Trial 2.

22 THE CHAIR: In trial 2, you needn't address us on the necessity point if Dr Bagci

23 passes the Microsoft test. That was the basis of the necessity submission.

24 MR LASK: Yes.

25 THE CHAIR: Yes.

26 MR LASK: I'm very grateful, thank you.

1 Maybe I can deal with Trial 1 briefly, depending on what the tribunal's current
2 intentions are.

3 THE CHAIR: Yes.

4 MR LASK: Our understanding based on the tribunal's indications yesterday is that the
5 tribunal wishes to deal with the question of: what expert evidence is permitted for
6 Trial 1 as a case management issue. We are content for it to be dealt with by way of
7 case management, we would like the opportunity to liaise further with Stephan,
8 including a possible further meeting between Dr Bagci and Dr Houpis.

9 In outline, there are two reasons for that. I can elaborate on them if you need me to,
10 but you may not need me to if you're happy to deal with this as a case management
11 issue. The two reasons are: firstly, in my submission, it is important that ACSO has
12 the opportunity to rely on empirical expert analysis to support its case on liability,
13 because precluding such analysis may prejudice ACSO's ability to establish its case
14 on infringement at Trial 1; and second, it would be unfair, in my submission, to restrict
15 access to the empirical analysis currently proposed by Dr Houpis, because that
16 analysis -- the only empirical analysis envisaged by Dr Houpis at Trial 1 -- is the
17 regression analysis, about which we have concerns.

18 Now, if I had addressed you fully on necessity for Trial 2, I would have elaborated on
19 those concerns and shown you what Dr Bagci says about them. I'm very happy to do
20 that.

21 THE CHAIR: I have read that.

22 MR DERBYSHIRE: Yes.

23 THE CHAIR: Equally, we are very concerned about the cost point. The
24 disproportionate aspect --

25 MR LASK: Yes.

26 THE CHAIR: -- of two experts. And we're not then getting into details of (inaudible)

1 looking at a water level of (inaudible) any effect or any appreciable effect. We have
2 indicated we are extremely reluctant (inaudible) and said that there should be
3 two experts on that point.

4 MR LASK: Yes.

5 THE CHAIR: Which is entirely common between you and Stephan at Trial 1, and there
6 can be no difficulty about joint instructions because (inaudible) conflict within evidence
7 (inaudible) Trial 2 (inaudible) pass-on.

8 That's where the point about necessity does come into play.

9 MR LASK: Yes.

10 THE CHAIR: We wouldn't be saying who it should be at the point (inaudible) fully from
11 Professor Stephan, but I think that may come into a decision on certification, because
12 we are concerned about costs, and the proliferation of experts on that matter seems
13 to us inappropriate. Now, what the single expert will do, whether he or she will use
14 those methods or method, or it can be refined, that's something certainly they can
15 discuss together.

16 MR LASK: Yes.

17 THE CHAIR: But (inaudible) to have two experts on a common issue dealing with
18 liability.

19 MR LASK: Well, sir, we hear that, and I'm not intending to argue as a point of principle
20 that you ought to allow two experts on the question of liability. Our concern, as I've
21 just outlined, is that there does need to be an opportunity for some form of empirical
22 analysis.

23 THE CHAIR: Yes, well, that we're not certainly not going to decide now. But I think if
24 we do certify, it may be on the basis that there will only be one economic expert for
25 Trial 1, because we do take into account some of the concerns that voiced very
26 forcefully by Mr Piccinin. That's part of the cost-benefit analysis: how costs can be

1 | constrained appropriately in this case.

2 | MR LASK: May I just have a moment to take instructions on that point? Thank you,
3 | sir.

4 | I'm not going to push back on the indication that there should only be one expert for
5 | Trial 1. We're aware that the Hammond and Stephan class representatives have
6 | recently written to the tribunal and to Amazon proposing a process whereby the parties
7 | will make proposals for the division of labour between experts going forward to Trial 1,
8 | and it seems to us that if ACSO's claim is certified, the appropriate way forward would
9 | be for ACSO to slot into that process and be part of those discussions, so that we can
10 | deal with the two concerns that I've just outlined.

11 | THE CHAIR: Yes.

12 | MR LASK: I think on that basis, I don't need to address you any further on certification
13 | or expert evidence at this stage. It will be a matter for my learned friend to make his
14 | application on strike-out.

15 | THE CHAIR: We are going to hear from Mr Carall-Green.

16 | MR LASK: Of course.

17 | THE CHAIR: But before that, on the LFA. Where do we stand on that?

18 | MR LASK: Yes. As things stand, at least at 10.00 this morning, the wording of the
19 | amendments were still under discussion. It may be that that process has now been
20 | completed, but what I would ask is that I take instructions on that over lunch and give
21 | you a full update this afternoon.

22 | THE CHAIR: Yes. We're not necessarily expecting the final wording today --

23 | MR LASK: All right.

24 | THE CHAIR: -- but we want to know that as a matter of principle, the two points raised.

25 | MR LASK: Yes. That's very helpful, sir. Again, I can confirm this this afternoon. My
26 | understanding is that there is not a problem on the two points of principle, and we've

1 heard what the tribunal said, and it is possible to address both those points for
2 amending the LFA.

3 THE CHAIR: Yes, and we will need to see (inaudible).

4 MR LASK: Yes. Of course.

5 THE CHAIR: I can understand that it involves the party that's not here.

6 MR LASK: Yes.

7 THE CHAIR: But if it's not impossible to get a final draft by the end of today.

8 MR LASK: That's very helpful. I'm grateful.

9 THE CHAIR: Perhaps, Mr Carall-Green, should we hear you at 2.00? Would that be
10 sensible?

11 MR CARALL-GREEN: Sir, I did just want to say that in that very long reply, there were
12 four new points that I wanted to give very brief answers to; roughly two minutes in total,
13 maybe three.

14 THE CHAIR: You could have your two minutes now, and (overspeaking).

15 MR CARALL-GREEN: That's fine. That's what I was going to propose. Yes, but as
16 I say, it is a new point.

17 THE CHAIR: (Overspeaking).

18
19 Submissions by MR CARALL-GREEN

20 MR CARALL-GREEN: The first of them related to my second complaint on the
21 methodology, the one about there being a single seller in the model. My learned friend
22 showed you the US judgment from De Coster, and he made the point that there were
23 obviously expert reports from the class side in that case, and that we were sitting on
24 them and knew what they said, and they didn't know.

25 The two points I wanted to make about that are, firstly, that those reports are under
26 seal, so that's why they can't just be produced. But the second point is that when you

1 look at the judgment in the passage we showed you, it does say that the class expert
2 in that case produced a model that had multiple sellers in it. It doesn't say that he
3 produced a model that addressed the point I was actually making, which is about the
4 fact that Amazon's policy is to compare prices of seller 1 on Amazon to prices of
5 seller 2 elsewhere. That's the point to which there just isn't any answer. That's the
6 first point.

7 The second one relates to the third complaint, which was concerned with linear pricing,
8 and the chair made a generous suggestion as to what Dr Bagci might have had in
9 mind when she talked about waiting for disclosure, because obviously she knows what
10 the structure is of eBay's commissions. That's in the public domain. But the chair
11 said, "Well, maybe what she wants to do is work out the average transaction value
12 and then convert the nonlinear prices into linear ones", and my learned friend jumped
13 on that bandwagon.

14 That's not what Dr Bagci says, and it would be wrong -- I'm sure Mr Derbyshire can
15 explain this later, but the point about non-linear fees is that they change the incentives
16 of everyone involved, because they don't vary with volumes. So, the whole of the
17 model with everyone's pricing decisions gets thrown out of whack. That's why you
18 can't just convert the nonlinear into linear.

19 The next point concerned my fourth complaint, where my learned friend characterised
20 it as being a complaint that Dr Bagci's inclusion of the participation constraint in her
21 model rendered the model implausible. That wasn't my complaint at all. My complaint
22 was that the participation constraint is the only very niche, very small possibility for
23 pro-competitive effects to emerge in her model, because she excludes by assumption
24 all other ways in which these policies can lead to pro-competitive effects, and my
25 learned friend said nothing about those.

26 Then the final very, very short point: you were looking at JLP before in relation to costs

1 and benefits. You were looking at paragraph 179. You made the point that even
2 though this isn't an injunction case, it's still a case that could in principle affect
3 behaviour, so that should be taken into account.

4 My answer to that, without getting into whether it would or wouldn't affect behaviour,
5 is just a very simple one; which is that the claim is already being brought by
6 Professor Stephan, so ACSO's claim actually doesn't add anything in that dimension
7 to the claim that's already here. I don't think that moves the dial, because that wasn't
8 really the nature of my submissions on costs and benefits. My submission, as you
9 know, was you could have the benefits without the costs, but just to cover off that point.
10 I hope that wasn't much more than two minutes.

11 THE CHAIR: It's much within the time, and we'll return at 2:05.

12 (1.08 pm)

13 (The short adjournment)

14 (2.12 pm)

15 THE CHAIR: Just one moment. (Pause)

16 MR CARALL-GREEN: Sir, I think I need to do two things. The first is to answer your
17 question about the differentiated Bertrand model, and the second is to address you on
18 the question of the joint instruction of legal teams, which is a point we discussed at the
19 end of yesterday.

20 First, to answer the question about the Bertrand model, the short answer is that
21 Dr Houpis is not planning to jettison that model or to replace it with the Boik and Corts
22 model; and the short reason for that is that the two models are about different things.
23 They're answering different questions. The easiest way for me to illustrate that is
24 probably to take you to Houpis 1; that's bundle E, page 393. (Pause)

25 I'm looking in particular at figure 28, which is on the second half of the page. That's
26 page 393, sir. (Pause)

1 This is a table that summarises the way that Dr Houpis is planning to use different
2 methodologies to answer different questions, and the differentiated Bertrand model
3 sits in the penultimate row. If one follows that row along, one sees that the shaded
4 squares denote that the Bertrand model is being used to model FBA fees and FBM
5 fees; so together, fulfilment fees, but on the original plan in Houpis 1, not being used
6 to model the marketplace fees.

7 THE CHAIR: Yes, I see.

8 MR CARALL-GREEN: Effectively --

9 THE CHAIR: And the marketplace fees; that's going to be done just by the regression?

10 MR CARALL-GREEN: Under his original plan, that's right. So, if you like, the
11 suggestion that he now puts forward, having discussed with Dr Bagci, is that there will
12 be an additional backup methodology for the marketplace fees, just as for the FBA
13 and FBM fees. There's a parallelism there, because as you can see from the table,
14 both in the case of the FBA fees and the FBM fees, there is one methodology
15 proposed, and then the model comes in as a second option.

16 THE CHAIR: Yes.

17 MR CARALL-GREEN: Or as a complement or an alternative or however it works out.
18 It's almost as if that row were being shaded in, penultimate row, last column, although
19 you would need to change the label from differentiated Bertram modelling to modelling.
20 That's the simple answer: they are simply aimed at different things. I should also
21 explain, sir, that they're aimed at different causal phenomena, because the Bertrand
22 model is about the intensity of competition, and the reason it's being put forward by
23 Dr Houpis in the context of modelling the fulfilment fees is because the question of
24 what's happened in the fulfilment market is about whether or not the intensity of
25 competition between fulfilment providers has been decreased on account of the
26 abuses; and so the model is trying to ascertain what would happen if that intensity

1 were higher than it is in the factual, whereas the Boik and Corts model is specifically
2 aimed at the effect of the WRPOs, or whatever short form we're going to give to the
3 price parity -- the price parity MFN phenomena.

4 THE CHAIR: Yes, I understand.

5 MR CARALL-GREEN: Sir, the final reason that I would give is also that Dr Houpis
6 points out in his report at page 302 -- looking at footnote 682, which is the bottom of
7 that page -- that the differentiated Bertrand model has been described as a workhorse,
8 so it has something of a track record. So, he wouldn't propose to jettison that purely
9 because the Boik and Corts model has come in to model something else.

10 THE CHAIR: Well, it's more that it was never being used for this purpose. I mean, it's
11 been used -- simulation models are also used for merger analysis, but I think you've
12 answered the question.

13 MR CARALL-GREEN: Yes. I should also say, sir, that these are all being suggested
14 as Trial 2 points.

15 THE CHAIR: Yes.

16 MR CARALL-GREEN: They're not Trial 1 points as I understand it.

17 THE CHAIR: That's correct.

18 MR CARALL-GREEN: That's very good. I think that answers that question. Before
19 I move on, I've been asked to clarify this point, and it's related to the exchange that
20 we've just had. We've heard the tribunal's strong indication that the tribunal would be
21 minded to only have one expert on the question of liability on abuse 5 at Trial 1. The
22 suggestion is that the detail of that might be -- I don't know if a concluded view has
23 been expressed on this -- held over as a case management issue.

24 One point that I did want to clarify, however, was whether or not the question of the
25 certification of the simulation model as a methodology for use at Trial 1 was also being
26 held over as a case management issue. Or is that still in the frame, as it were, as

1 a question of certification? The reason I'm asking that is because the burden of my
2 submissions to you yesterday, and indeed the burden of what Professor Stephan has
3 put in his written observations, is really to do with the utility of the simulation model at
4 Trial 1. I think, as I put it to you yesterday, you can see it through two lenses: if one
5 looks at it through the lens of cost benefit, then it potentially is a certification question;
6 but equally, it may be that the tribunal prefers to see it through the lens of case
7 management.

8 The only clarification I sought was whether or not the tribunal had reached a view on
9 that so that we might understand what is and is not to be decided in this context, and
10 what is and is not to be decided in a case management context. Sir, I'm aware that
11 the answer to that question may be we have not formed a view, and I don't insist upon
12 an answer, but I wished to clarify the exchange that the tribunal had had with my
13 learned friend before lunch.

14 THE CHAIR: Yes. Just a moment. (Pause)

15 Well, we are not in a position to answer that question now, but we will indicate an
16 answer to that as soon as we can.

17 MR CARALL-GREEN: I'm grateful.

18 THE CHAIR: So you can take it into account in advance of the CMC, which is later
19 next week as to what single expert it would be, even if ACSO was certified. So you'll
20 know our position on that.

21 MR CARALL-GREEN: Very good, sir. That then leaves only the question of the joint
22 instruction of legal teams. We discussed yesterday that if the suggestion is that
23 Dr Houpis be jointly instructed, then that is fine, subject to agreeing the practical
24 arrangements. However, if the suggestion is that legal teams be jointly instructed, that
25 raises different considerations.

26 This is because ACSO is only pursuing abuse 5, whereas Professor Stephan is, at

1 least in principle, more open to the possibility that any effects about which he
2 complains might have been more the result of another abuse. That, of course, is not
3 his full case, but the point is that because Professor Stephan advances a number of
4 different abuses, he necessarily has a little bit more flexibility in his position. So ACSO
5 is committed to the proposition that any harm that it identifies or that it complains about
6 must be the result of abuse 5. Professor Stephan is not committed to that proposition
7 because -- I'm not saying that this will happen -- but it is open to him to pivot to say,
8 for example, some of the effects on fees are more the result of abuses 3 and 4 than
9 they are the result of 5.

10 The scenario that I have in mind, purely by way of hypothetical example, is this:
11 Dr Houpis, in the discharge of his duties as an independent expert, is perfectly entitled
12 to reach the view, having reviewed the evidence, that abuse 5 is not all that much.
13 I certainly don't invite him to take that position, but it is entirely possible.

14 THE CHAIR: (Overspeaking).

15 MR CARALL-GREEN: And you were taken to the passages from the Power Cables
16 case that make the point that it's entirely possible for an expert to be jointly instructed
17 by parties that have diverging interests.

18 THE CHAIR: Yes.

19 MR CARALL-GREEN: So it's possible for an expert to please one of the parties and
20 displease the other. But in that scenario, where Dr Houpis had pleased one and
21 displeased the other, Professor Stephan would, one imagines, not have an
22 impediment, or an absolute bar -- again, not saying that he would do this -- to resting
23 his case on abuses 3 and 4, and accepting or supporting the evidence of Dr Houpis
24 that abuse 5 was not all that much.

25 Conversely, ACSO would not be able to do that, but would presumably be in a position
26 where it would consider challenging Dr Houpis's evidence on the question of abuse 5.

1 Now, I don't express a firm position on where that leaves us because it is reasonably
2 complex. But the reason I raise it as a hypothetical possibility is because: if the
3 suggestion is that what's in the offing is a direction that there'd be some kind of joint
4 instruction, that may or may not be professionally possible because of scenarios like
5 the one that I have described.

6 THE CHAIR: Yes, we are alive to that point.

7 MR CARALL-GREEN: Very good.

8 THE CHAIR: Well, we don't think we need to hear from you more. We are not
9 attracted by the potential for co-counsel, certainly on Trial 2; we think probably even
10 for Trial 1. We think that for a number of reasons would cause (inaudible).

11 MR CARALL-GREEN: I think --

12 THE CHAIR: The other one is pass on, of course.

13 MR CARALL-GREEN: The other one is pass on, but I think the example I was given
14 was calculated more towards the heart of liability in the case --

15 THE CHAIR: Yes.

16 MR CARALL-GREEN: -- to illustrate the point that it infects Trial 1 also.

17 THE CHAIR: Yes.

18 MR CARALL-GREEN: But if that's your position, sir, then I need say no more about
19 it.

20 THE CHAIR: It may not extend to having a single counsel addressing a particular
21 issue (inaudible) arises, as opposed to what was floated, I think, that there should be
22 co-counsel, meaning not counsel as a barrister, but one team of solicitors comprising
23 solicitors from two firms.

24 MR CARALL-GREEN: Whether or not that would need to be a formal joint instruction
25 is an open question, because, in fact, the way that these things sometimes play out is
26 simply that one person standing on this side of the room effectively takes the lead on

1 everything and somebody else can --

2 THE CHAIR: Yes, we don't hear duplicative.

3 MR CARALL-GREEN: Exactly, yes, sir.

4 THE CHAIR: No, I think that can be worked out. But we have the point you made fully
5 in mind. Thank you very much.

6 MR CARALL-GREEN: Thank you.

7 MR LASK: Sorry, apologies for rising. May I just seek a clarification on the clarification
8 raised by my learned friend just now? Based on the exchanges we had before lunch,
9 we had understood that if the ACSO claim was certified, the tribunal was minded to
10 indicate in the judgment that it was conditional on ACSO and Stephan instructing
11 a joint expert at Trial 1, but not the tribunal was going to reach a decision on who that
12 expert should be -- which was fine, my perspective, because it meant we would have
13 the opportunity to liaise with Stephan and potentially for Dr Bagci and Dr Houpis to
14 liaise in order to try and reach an agreed position between the parties.

15 The reason that's important from ACSO's perspective is, well, the reasons I've already
16 explained: we do think empirical analysis is required for Trial 1; we do have some
17 concerns with the empirical analysis that's been proposed by Dr Houpis. So, we would
18 like the opportunity to try and thrash out those issues with Stephan and with Dr Houpis.
19 Our ability or our opportunity to do that would be removed if tribunal were to indicate
20 in its judgment that ACSO was being required to rely on Dr Houpis for Trial 1. (Pause)

21 THE CHAIR: Yes. (Pause)

22 I hear what you say, Mr Lask, but I cannot give you the assurance that we won't say,
23 in the certification judgment, if we allow only one, who it should be for Trial 1. We may
24 do so. With regard to the point you made, there is also the consideration that your
25 clients have come rather late to the party, as it were, and people have been working
26 on this for some time. There's now a timetable to Trial 1. That's also a consideration --

1 MR LASK: I won't press the point. I think --

2 THE CHAIR: We understand your interest and concern. I'm grateful that. Yes.

3
4 Strike-out application

5 Submissions by MR PICCININ

6 MR PICCININ: So just before I begin my strike out application, two points arising from
7 the very interesting discussion that we've just had.

8 On the first one, Mr Carall-Green's point about the conflict that may arise between the
9 ACSO class and the Stephan class as to what the cause of any effects might be. The
10 first point is that I think that was being put -- but I just wanted to check -- that was
11 a conflict that arises in Trial 2 not in Trial 1, because insofar as it's about the amount
12 or extent of the effects, that's a quantification issue rather than a question of whether
13 there is an abuse or not, which is the question for determination in Trial 1. But perhaps
14 if I can just make my other point about the same issue first and then we'll see what is
15 said.

16 The second point is that what was said actually does cause me some significant
17 concern. If you just take the simple case about the debate between the effects of the
18 anti-discounting conduct, if I can call it that, on the one hand, and the alleged FMA
19 discrimination conduct on the other hand, that is not a conflict that arises between the
20 classes. The interests of the customer class, the Hammond and ACSO classes -- it's
21 the same as the interests of the Stephan class, because they're both pleading both. It
22 doesn't matter what the distribution is. There's only one group of people to whom that
23 distinction matters, and that is the funders and the lawyers who are bringing the claims
24 on behalf of Hammond on the one hand and ACSO on the other hand.

25 This is the point I made at the last CMC when I made my strike out application. It was
26 dismissed by the tribunal on the basis that it was unlikely to arise that there would be

1 any unseemly fighting between the customer class representatives, on the footing that
2 it's not about maximising the total amount that's recovered by that single
3 class -- because it is substantially the same class -- but is actually about who gets the
4 swimming pool of cash; does the £100 million reward go to this group of people or the
5 group of people that were here before, but I think have left.

6 That is a situation that is intolerable, in my submission, and it is an artefact of
7 approving a second representative to represent the same class in respect of
8 interrelated claims. That was a submission that I made to you last time; was the thing
9 that's unnecessary, didn't need to be done, Mr Hammond could represent both. And
10 that is a conflict. And it should not drive a decision as to what the legal teams are that
11 are being represented, because ultimately the responsibility --

12 THE CHAIR: This is the point you made last time, isn't it?

13 MR PICCININ: It is the point I made last time, but as I said, it was rejected on the
14 basis that it was implausible. Now, it's being said that the case should be managed in
15 a particular way because it is plausible. That is something that gives me significant
16 concern, because what you're describing is a situation where there will be a conflict
17 between the class representatives for the consumer class. That, I say, is wrong in
18 principle. Each of them should be seeking to maximise the overall recovery for the
19 class, not the overall recovery for the class that then gets passed on to their funder
20 and goes into their pockets as the lawyers. That is an intolerable situation.

21 It could be indeed, just taking Mr Carall-Green's, scenario and running through it, it
22 could be, for example, that it's in the interests of the ACSO funder to have a smaller
23 overall award for the customer class by saying that the loss is largely driven by the
24 anti-discounting conduct, and that leads to a bigger award for them, for ACSO, but
25 a smaller award overall because of the underlying facts that come out, like the extent
26 of competition between eBay and Amazon, for example. That is not a situation that

1 should be tolerated, in my submission. That was one point.

2 The other point was just this question as to which one of the two experts and what is
3 the team and what is the case that is going forward for Trial 1 is a matter of some
4 significant urgency. We've got a CMC next week -- or everyone else has a CMC next
5 week -- and then the idea is that there's going to be a further CMC -- CMC 3, I think it
6 will be -- some point early next year at which disclosure will be decided. We obviously
7 need to know in the period between those two CMCs, what is the expert methodology
8 that is actually going to be put forward at Trial 1 on the class representative side,
9 because that will inform the debate about what disclosure is needed for that to take
10 place. So, if it's suggested -- I don't know how late Mr Lask wants to kick this off.

11 THE CHAIR: We realise that. All I'm saying is, and I have indicated, that we will seek
12 to do that as soon as possible. We're well aware that it impacts on disclosure and
13 case management going forward.

14 MR PICCININ: That was all I wanted to say.

15 THE CHAIR: But just on the very first point you've raised, Mr Carall-Green, what you
16 said about the impracticality and potential conflict of a single sort of joint legal team
17 instructing; does it apply to Trial 1 as well?

18 MR CARALL-GREEN: Sir, yes. I think I was choosing the example of which abuse to
19 emphasise, which abuses to run, even, in order to make the point that this was
20 something that could affect Trial 1.

21 THE CHAIR: Well, they're all being run.

22 MR CARALL-GREEN: They're all being run.

23 THE CHAIR: But Trial 1 is to say: is there a liability; do each of these abuses actually
24 constitute an abuse?

25 MR CARALL-GREEN: That's right.

26 THE CHAIR: And your case is that the anti-discounting is an abuse.

1 MR CARALL-GREEN: It may be helpful to distinguish between: all of the classes'
2 interests are aligned. We're all rowing in the same direction.

3 THE CHAIR: Yes.

4 MR CARALL-GREEN: The risk that I'm identifying is not that any classes' interests
5 will divert. The risk that I'm identifying is that the class will wish to take a different
6 stance vis-a-vis the expert, so that, for example, I think the example I posited was
7 Dr Houpis coming to a view which was something that was tolerable for the Stephan
8 class. Because the decision had been taken, for example, it didn't really matter that
9 he had taken a particular view on abuse 5 at Trial 1. But for the ACSO class, that was
10 quite important.

11 So, what would be happening was that if the cross-examiner was instructed by both,
12 he would receive conflicting instructions, because the Stephan class would say, "No
13 need to go hard on Dr Houpis on this. This is fine. It doesn't matter", whereas the
14 ACSO class would say, "It's very important to challenge Dr Houpis on this". That was
15 the example I was given.

16 THE CHAIR: Yes.

17 MR CARALL-GREEN: This doesn't mean that their interests in terms of the outcome
18 of the case are different. Their interests are fully aligned in terms of the outcome of
19 the case. The hypothetical scenario is about the alignment or positioning or the
20 direction of travel of a witness, and therefore what one has to do by way of challenge
21 to that witness.

22 THE CHAIR: Yes. Yes. I see.

23 MR PICCININ: Sir, that is deeply, deeply concerning.

24 THE CHAIR: Well, we've got your concerns.

25 MR PICCININ: What is being described is if the situation -- and Mr Carall-Green is
26 right -- is that there is no conflict between the interests of the class, but there is

1 a conflict between the interests, the financial interests of the legal teams, that is
2 a conflict of interest between the legal team and their class.

3 THE CHAIR: We've got the point, Mr Piccinin. You don't need to repeat that.

4 MR PICCININ: I'm grateful.

5 THE CHAIR: I think we should move on. It's now 2.30.

6 MR PICCININ: Yes.

7 THE CHAIR: What we want to hear is your summary judgment strike-out application.

8 MR PICCININ: Yes.

9 As we have seen, as you know, in addition to the allegation under the chapter 2
10 prohibition, ACSO also argues that Amazon's alleged policies infringe the chapter 1
11 prohibition. We are applying to strike out (inaudible) reverse summary judgment in
12 respect of that element of the claim, for the simple reason that none of the conduct
13 alleged by ACSO even arguably constitutes the threshold -- meets the threshold
14 requirement of an agreement or concerted practice.

15 I'll show you the law in a moment, but we say it comes down to two questions. The
16 first question is whether the sellers agree not to charge higher prices on Amazon than
17 they charge elsewhere. Our answer to that, and I'll show you -- it's clear from the
18 policies -- is: no, they do not. They're free to set higher prices on Amazon than
19 elsewhere, if that's what they want to do. They had that commercial freedom. The
20 consequence is just that if their price is above the competitive level that Amazon
21 identifies, then Amazon may not specifically highlight their offer as the featured offer
22 for customers, but they remain on the store.

23 THE CHAIR: This is true for both the main policies, is it? I thought there was
24 a difference, but maybe I misunderstood.

25 MR PICCININ: I'll come to that wrinkle. So as to the MFPP, which has more serious
26 consequences --

1 THE CHAIR: So the statement you made was about which one?

2 MR PICCININ: It was about what they call the CEPP.

3 THE CHAIR: Yes. Right.

4 MR PICCININ: And also about part of the MFPP, as they describe it.

5 THE CHAIR: Yes.

6 MR PICCININ: That's where the threshold is just: are you charging more than the

7 benchmark?

8 THE CHAIR: Yes. The CEPP is about the featured offer.

9 MR PICCININ: That's right. Exactly.

10 THE CHAIR: But the MFPP --

11 MR PICCININ: Is about both.

12 THE CHAIR: -- is it just generally being on the platform, isn't it?

13 MR PICCININ: And also about the featured offer. It depends on the circumstances.

14 THE CHAIR: Yes.

15 MR PICCININ: We'll come on and see that, but the key point is that the obligation in

16 the MFPP, as written expressly in the policy that's been reproduced in the claim form,

17 is only -- rather, the way it's framed is only by reference to pricing significantly above

18 levels elsewhere. It's not engaged simply by charging prices that are higher on

19 Amazon than elsewhere.

20 The second question is: does Amazon need any help from the sellers to achieve its

21 aim, to achieve what it wants to do about this? The answer to that is going to be: no,

22 it doesn't. Amazon designs and implements the FMA in the way that it thinks best as

23 the operator of the store.

24 The starting point must be the decision of the Court of Justice in Bayer. That was

25 a case that concerned parallel imports of a pharmaceutical. Bayer, the manufacturer,

26 wanted to prevent parallel imports; I think it was into the UK, actually. So, it adopted

1 a policy of cutting sales to wholesalers in France and in Spain in particular, where the
2 wholesalers had been increasing their purchases to purchase very large volumes of
3 the product at low prices, to then parallel-export them to the UK.

4 The wholesalers understood very well why their volumes were being cut, and the
5 European commission found that this was an anti-competitive agreement. But Bayer
6 successfully appealed to the CFI, and then on a further appeal by the commission to
7 the CJEU, the CJEU analysed the circumstances in which an agreement can be
8 inferred by conduct.

9 The relevant part begins at H1, tab 11, page 168. The nice thing about this application
10 is that it engages some of the early authorities in the bundle. So far, we've just been
11 looking at the other end; now we can see the beginning.

12 If you're there, you can see the heading, "Findings of the Court" --

13 THE CHAIR: Yes.

14 MR PICCININ: -- just above paragraph 96, and at various points the court is
15 addressing different formulations of the argument. But in paragraph 96, you can see
16 that the court is addressing an argument that the CFI -- now the general court -- had
17 erred in law by holding that an agreement could not exist unless one business partner
18 demanded a particular line of conduct from another. That was one way the argument
19 was being put.

20 If I can just show you another way the argument was being put, over the page in
21 paragraph 99. You see that the court also records that the appellants formulated that
22 complaint in another way, namely being that the CFI wrongly considered that it was
23 necessary to prove an express export ban had been agreed; an express export ban.

24 In paragraph 100, you can see that the court says that that's not what the CFI was
25 saying. The court acknowledges that you can deduce the existence of an agreement
26 from the conduct of the parties, in some circumstances, even in the absence of an

1 express agreement. But crucially, and this is the proposition that we rely on in
2 paragraph 101, there are limits. There are legal limits on the power of a court to draw
3 that inference. In paragraph 101, the court says that:

4 "... such an agreement cannot be based on what is only the expression of a unilateral
5 policy of one of the contracting parties, which can be put into effect without the
6 assistance of others."

7 So, if the policy of Amazon, in this situation, can be put into effect without the
8 assistance of the sellers, but something that Amazon can do unilaterally, then you
9 can't infer from the fact that it takes place and the fact that the parties continue doing
10 business with each other, you cannot infer that there is an agreement within the
11 meaning of article 101 that takes that form. That's despite the fact that there is
12 a contractual relationship. It's despite the fact that there's an ongoing commercial
13 relationship. What the court is doing is drawing a critical distinction between the scope
14 of article 101 and article 102, and that's a theme that we're going to come back to and
15 see in a couple of other authorities soon.

16 So that's a critical dividing line between a tacit agreement on the one hand, which
17 engages chapter I and unilateral conduct on the other. You have to ask: is this
18 something that Amazon can do without the cooperation of sellers, just like Bayer could
19 simply sell less of its product to the French and Spanish wholesalers, whether they
20 liked it or not? Is that the situation, or is this something that we need cooperation from
21 them?

22 THE CHAIR: Is that the text? The fact that they could do it without cooperation, but if
23 there was an express agreement --

24 MR PICCININ: That would be different.

25 THE CHAIR: Clearly. So that's the test --

26 MR PICCININ: That's right.

1 THE CHAIR: -- that's set out in 102, which is not quite that. It's that there is an
2 invitation by the one party which can be implied to fulfil the goal jointly.

3 MR PICCININ: Sir, I actually --

4 THE CHAIR: Which is accepted, even if it's not in the interests of the other party.

5 MR PICCININ: That's right. Absolutely.

6 THE CHAIR: That's really it. It's not whether they could do it unilaterally.

7 MR PICCININ: There are two tests, sir. That's why I began by posing two questions.

8 One of them is whether there is actually an express agreement between the parties.

9 THE CHAIR: Yes.

10 MR PICCININ: If there is an express agreement in the parties that the sellers will not
11 sell at prices above the level that they sell elsewhere, then we don't get into the second
12 question. That is an agreement within the meaning of article 101; so, an agreement
13 in which the sellers give a contractual commitment, or a non-contractual commitment,
14 if you like, but some sort of agreement that they will not charge more on Amazon than
15 they charge elsewhere. If they agree to that, then you're right, sir; of course that's an
16 agreement that engages article 101.

17 The reason I'm showing you this is that my learned friends run a case in tacit
18 acquiescence as well, and that's the test that -- the existence of an agreement, an
19 express agreement, is relatively simple. We'll come and look at the facts, and I'll
20 explain why there isn't one. But tacit acquiescence has this limitation in paragraph 81.

21 THE CHAIR: Does it, if we read 102? That's all about tacit acceptance.

22 MR PICCININ: Yes, sir, but it's subject to paragraph 101, and we'll see that
23 paragraph 101 is picked up by the Court of Appeal in an authority that is binding on
24 this tribunal as well, shortly; so that the proposition in paragraph 101 is a proposition
25 of law, that an agreement cannot be based on what is only the expression of
26 a unilateral policy of one of the contracting parties, which can be put into effect without

1 the assistance of others.

2 THE CHAIR: Yes, that's --

3 MR PICCININ: If I express --

4 THE CHAIR: -- a clear principle of law.

5 MR PICCININ: That's right.

6 THE CHAIR: But so is 102. So that's a negative, 101.

7 MR PICCININ: That's right.

8 THE CHAIR: So, 102 is the saying it can be based as having been included by tacit
9 acceptance.

10 MR PICCININ: That's right.

11 THE CHAIR: If there's a wish of one of the parties which constitutes an invitation to
12 the other to fulfil that goal jointly, and that's been tacitly accepted --

13 MR PICCININ: That's right.

14 THE CHAIR: -- even if it's against the interests of the other --

15 MR PICCININ: That's right.

16 THE CHAIR: -- that's also a proposition of law.

17 MR PICCININ: That's right, too, but when you're reading the words to fulfil that goal
18 jointly, you've got to read this paragraph 102, not as its own separate statute, but
19 consistent with paragraph 101. The distinction between those two statements, the
20 negative and the positive, is that the positive one is talking about a situation where the
21 goal has to be fulfilled jointly. So, in other words, it's something that Amazon can't do
22 on its own; it needs to do it together with the sellers. And 101 is talking about
23 a situation like in the Bayer case, where the manufacturer could simply say, "I'm now
24 not going to supply you with more of this pharmaceutical than you need for your
25 domestic market". Even though it's perfectly obvious to everyone why it's doing
26 that -- to achieve an end to or at least a reduction in parallel imports; it's perfectly clear

1 to everyone -- still that doesn't engage article 101, because they don't need the
2 cooperation of the wholesalers for that end -- just to achieve a reduction in the sales
3 to France or Spain; they can do that themselves.

4 The parallel, just to sell the punchline, is that in relation to the FMA, certainly, so for
5 the selection of the featured offer, that's something that Amazon does. It does that as
6 a communication to the customers, highlighting for them a particular offer. That's
7 a unilateral act in its capacity as the operator of the store -- a store with customers.
8 We say that for that reason certainly, all of the conduct that concerns the FMA and is
9 outside the scope of chapter I.

10 THE CHAIR: Well, the FMA point is not well relied on, is it?

11 MR PICCININ: No, it is, sir, because the CEPP is a point about the FMA; it's about
12 eligibility for selection for the featured offer. I should stress I've said CEPP a couple
13 of times -- we don't accept that there's any such policy that has that name, but I'm
14 using it as a shorthand because ACSO uses it. They've created the term to describe
15 something that is real, which is that, of course, in selecting the featured offer, Amazon
16 does take into account whether the price is higher than competitive benchmarks. I'll
17 come on to that.

18 THE CHAIR: Yes, I mean, in 103 it's important, isn't it? Whether --

19 MR PICCININ: Yes.

20 THE CHAIR: -- and required of the wholesalers as a condition of their future --

21 MR PICCININ: Exactly.

22 THE CHAIR: -- in practice.

23 MR PICCININ: That's right.

24 THE CHAIR: That they should comply with its policy.

25 MR PICCININ: That's right. I accept that. In other words, to translate that to our case,
26 you form an agreement with the sellers that says, "It's a condition of your future

1 contractual relations that you will charge the same price on Amazon as you charge
2 everywhere else", and they agree to that. Then, at least arguably, there's an
3 agreement there. That's not this case.

4 MR BANKES: It's strongly (overspeaking).

5 MR PICCININ: I'm sure.

6 MR BANKES: If they agree to that (overspeaking).

7 MR PICCININ: If they agree to that, there's an agreement, that's fair, sir.

8 Let's look at the Court of Appeals decisions. I'll start with one that post-dates Bayer,
9 and then that cross refers to one that predates Bayer, which I want to show you as
10 well. So, the post-Bayer judgment is Unipart. What's interesting about all of these
11 Court of Appeal judgments is that they're on a summary basis; they're not post-trial
12 decisions. The claim that was struck out in Unipart was an allegation that the --

13 THE CHAIR: What's the reference?

14 MR PICCININ: Oh, sorry, it's H1, tab 24, and I'm going to pick it up from page 585.
15 But I was just going to explain the facts to you first before we --

16 THE CHAIR: No, sure.

17 MR PICCININ: The claim that was struck out was an allegation that the price charged
18 by Cellnet to Unipart was an anti-competitive margin squeeze. In other words, the gap
19 between Cellnet's wholesale price that it charged to Unipart and the retail prices in the
20 market was too small for Unipart to be able to compete. That was said to engage
21 article 101 because the wholesale price was of course charged pursuant to an
22 agreement between Cellnet and Unipart. So, Unipart must have agreed to it.

23 Sir, as I said, I'm picking it up from 585, which is where the Court of Appeal's
24 conclusions are explained. It's the judgment of Lord Justice Parker. If we look at
25 paragraph 90 under the heading, "The scope and purpose of [what was then]
26 article 81(1)", Lord Justice Parker notes:

1 "In Bayer, both the CFI and the ECJ stressed the differing roles of [what are now
2 Articles 101 and 102] ..."

3 Article 101 is narrowly focused on:

4 "... obstacles to competition that are set up as a result of a concurrence of wills."

5 Or an agreement narrowly focused on that.

6 In paragraph 91, he says:

7 "It is of fundamental importance that a supplier may adopt whatever supply policy he
8 regards as necessary to protect his commercial interests, provided only that ... he does
9 not abuse a dominant position ... and that there is no relevant 'concurrent of wills' [with]
10 his wholesalers."

11 And at paragraph 92, he refers to the "paradoxical" results that would follow if you
12 started to take a wider approach to article 101, where you sweep in conduct that is
13 truly unilateral simply because it is part of an ongoing contractual or commercial
14 relationship. He cross-refers to paragraph 62. To save you the cross-reference and
15 the flicking, it was a point that was made by the CFI in Bayer, which is that if you widen
16 the scope of article 101 in that way, you'll actually end up treating refusals to supply
17 more harshly under article 101 than you treat them under article 102. Because, of
18 course, in under article 102, it's not generally an abuse of dominance to refuse supply;
19 it's only in certain specific situations than it is. And if you treat refusals to supply in
20 existing contractual relationships as automatically engaging article 101, then you
21 could end up with a harsher result in that context, which would be paradoxical.

22 At paragraph 94, he says, distilling Bayer, that the first step is to identify as precisely
23 as possible the conduct of which complaint is made, and then over the page at 95, he
24 says that the complaint in that case was really, when you analyse it, as being the
25 setting of prices at an excessively high level, as part of a policy of a margin squeeze.

26 Although the allegation in this case is a different one, there is something similar going

1 on, because as we will see when I get to the facts, there is no agreement that sellers
2 will charge the same price on Amazon as elsewhere. The objection, at least part of
3 the objection, is to Amazon's alleged policies of disqualifying offers from eligibility for
4 selection as the featured offer, when they're more expensive than the sellers' offers
5 elsewhere.

6 Moving on, paragraph 97 is also important, under the heading, "The contractual
7 relationship between Cellnet and Unipart":

8 "The mere fact that the conduct of which complaint is made took place against the
9 backdrop of a continuing commercial relationship ... takes the enquiry no further."

10 And at the end of that paragraph, you can see the judge endorses the observation of
11 a learned judge in an earlier case called Cound -- which was one of the BMW
12 cases -- that:

13 "... it would be startling if 'any conduct taking place in the context of a contractual
14 relationship or in relation to such a relationship [constituted] an agreement within
15 article [101]'."

16 Then in paragraph 98, the judge endorses the earlier decisions of the Court of Appeal
17 in that case, and in another one that also concerned BMW. That one's called
18 Clover Leaf. Then over the next few paragraphs, concluding in paragraph 102, the
19 judge explains why the margin squeeze policy in that case was obviously not an
20 agreement. That part of the reasoning is obviously different from our case, because
21 it's concerned with those particular facts. So, there's obviously no agreement on the
22 margin squeeze.

23 Then the judge goes from paragraph 103 onwards to address the argument that the
24 margin squeeze was nevertheless subject of tacit acquiescence. In paragraph 5, you
25 can see that the judge adopts the test that I identified earlier from paragraph 101 and
26 Bayer, which is whether the policy can be put into effect without the assistance of

1 others. He said it was impossible to see how that test could be satisfied in that
2 case -- so since there was no express agreement, and then the test for tacit
3 acquiescence couldn't be satisfied, that was the end of the analysis.

4 THE CHAIR: Yes.

5 MR PICCININ: Sir, I just want to show you one more authority. So, because
6 Lord Justice Parker endorsed the earlier Court of Appeal rulings in the BMW cases,
7 I just wanted to show you one of those, which was called Clover Leaf. That is at H1,
8 tab 20, page 500. (Pause)

9 The facts were that BMW exercised a contractual right to terminate a dealership
10 agreement because the dealer had been acquired by a PLC, and BMW was alleged
11 to have a policy of restricting -- like keeping within narrow bounds -- the proportion of
12 its dealers that were subsidiaries of PLCs, allegedly because it was worried about
13 having dealers who were too powerful.

14 You can see that on page 500 at the letter E. I should say this is in the judgment of
15 Lord Justice Staughton.

16 Over the page, right at the bottom, you can see that there was a Mr Turner -- I think
17 this wasn't our Mr Turner, I think this was a different one, just from looking at the
18 headnote -- but the claimant argued that there was a proposition of law -- this is at the
19 bottom -- he said there was a proposition of law --

20 THE CHAIR: The bottom of page ...

21 MR PICCININ: Of page 501:

22 "Mr Turner submits that the AEG case ..."

23 MR BANKES: Yes.

24 MR PICCININ: There was a proposition of law that:

25 "... if a manufacturer has a system or a policy, that it will take unilateral action in certain
26 circumstances of an anti-competitive nature, then one can infer [from that], as a matter

1 of law, that this is agreed to by the dealers in the ... network."

2 So that adds up to a tacit agreement. Then you can see right at the bottom of that
3 page, the last sentence and it goes over the page, that Lord Justice Staughton says
4 that that's not what AEG established. Then at D, he says that it's not right:

5 "... that in every case unilateral action by a manufacturer is deemed to have been
6 agreed to by the network of dealers. Indeed, [his lordship said] it would be contrary to
7 common sense to suppose that all the ... dealers ... [had] tacitly agreed that if they
8 [were to] become subsidiaries of a plc, and if that [increased] the percentage ... [that
9 were] subsidiaries of plc ... then they [would] be dismissed."

10 He explains that that would be contrary to the earlier decision in Cound. Then over
11 the page, on the final page of this judgment, Mr Turner sought to distinguish Cound
12 on the basis that in this case, Clover Leaf, there was a systemic policy which had not
13 been present in Cound. He said that even if termination for an anti-competitive reason
14 counted as unilateral conduct, where the manufacturer acts on an occasional caprice,
15 the position is different where there is a systemic policy. But Lord Justice Staughton
16 disagreed. Same reasoning applies.

17 Although that case came before Bayer, in some ways it prefigures it; and as I showed
18 you, it was endorsed by the Court of Appeal in Unipart in a post-Bayer judgment.

19 Those are the legal principles, which are relatively simple. What I want to do now is
20 show you the way in which the claim is put, and then explain why nothing in it actually
21 alleges anything rising to the level of an agreement even arguably.

22 The pleading is lengthy and diffuse, which makes the analysis a bit more difficult. But
23 in the amended claim form from section 6.2.7 onwards -- I'll give you the reference in
24 a moment -- ACSO does go through each of the alleged policies separately. What
25 I want to do is I want to show you those sections, just to pick up what the content of
26 the conduct is said to have been.

1 If we go to bundle A, tab 1, page 62. If you go back just to see the prior heading, it's
2 on page 60: "Amazon's price parity policies -- a summary". But from 62 we get to the
3 first of them, which is the alleged "Competitive External Price policy".

4 That is the first alleged policy that is set to impose a price parity obligation on
5 third-party sellers. You see that from the first sentence. As I said before, this is going
6 to sound a bit confusing, but I do need to say it: there is no such thing as the
7 competitive external price policy. That's an invention by ACSO. It doesn't exist in any
8 of the contracts or on the website. That doesn't really matter --

9 THE CHAIR: Well, we can't -- that's a factual question, isn't it?

10 MR PICCININ: Sorry?

11 THE CHAIR: Isn't that a factual question?

12 MR PICCININ: Well, the policies are available on the website, so you can see what
13 they are. The contract they have, you can see what's in it, and it's not. So that's not
14 a factual question that is in dispute.

15 But it also doesn't really matter, because we can look through the label to the
16 substance of what they're alleging, and they do refer to some things that do actually
17 exist, so I can comment on those and we can do the analysis.

18 In particular, there is a concept of a competitive external price. That is a real thing,
19 and so that's what I want to look at, what they say about it.

20 Over the page, on page 63, you can see in figure 5, the screenshot from our website
21 that provides an explanation of what the competitive external price is:

22 "[It] is the lowest price for an item or items the customers may consider to be
23 equivalent, recently found at another reputable retailer ..."

24 That's what it is.

25 THE CHAIR: Yes.

26 MR PICCININ: Then if you look over the page at paragraph 206, you can see the

1 allegation is made that that:

2 "... third-party sellers' offers will not be eligible to win the Buy Box [to be selected as
3 the featured offer] if the price offered on Amazon exceeds the 'Competitive External
4 Price'."

5 Then in paragraph 207, they say that that policy is expressed by Amazon to the sellers.
6 It's made clear, and they give an example of that over the page on page 65, in figure 6.
7 You can see they refer to the frequently asked questions, and someone has received
8 a message -- this is one of the frequently asked questions -- "I've seen the message
9 that one of my items is not eligible; what does this mean?" It says that Amazon notifies
10 them, the sellers, when their offer becomes ineligible:

11 "This happens when your total price ... is above the Competitive External Price when
12 we have one available, or otherwise when your total price ... is significantly higher than
13 recent prices."

14 Then over the next couple of pages, they give further examples of the mechanisms
15 through which Amazon communicates to sellers about whether their prices are above
16 the competitive level. If you look at page 67, for example, at figure 8. (Pause)

17 "Pricing status":

18 "You can view how your price compares to other prices on Amazon or outside of
19 Amazon in the Pricing Status section of the Price + Shipping column."

20 This column, so something that's communicated to the sellers, will compare their price
21 to the featured offer, so they can see how their price compares to the featured offer,
22 and also to the competitive price, which is the lowest price for the item from other major
23 retailers, et cetera. That's something that is communicated to them.

24 I just pause there, because that harks back to a debate that we had earlier in relation
25 to methodology, when we were asking about: how would the seller know whether their
26 price was above the level of some other seller that Amazon was benchmarking? Well,

1 the answer that ACSO itself has pleaded and shown you here is that you're told if your
2 price on Amazon is above the competitive price; and of course, you will know whether
3 it is above your own price elsewhere, and if it's not, then the inference is obvious.

4 I do say there is a really troubling pattern of behaviour here where ACSO says, "Oh,
5 you need to wait for disclosure to know whether that's a real thing or not", when
6 actually they've already pleaded and shown you screenshots that show that these
7 phenomena are real.

8 The important point is that this, this part of the case that we're looking at, the so-called
9 CEPP, is all about the selection, the eligibility for selection of the featured offer.

10 THE CHAIR: Basically, you say you don't take issue with anything that's said here.

11 MR PICCININ: No.

12 THE CHAIR: And you say this is not a tacit acceptance. This is just a unilateral
13 statement of the condition you need to fulfil if you want to be the featured offer.

14 MR PICCININ: That's right. Just taking it slightly more slowly than that: through this
15 alleged policy, sellers are not agreeing to charge a competitive price in the relevant
16 sense. They're not agreeing to do that at all. On the contrary, they remain free to
17 charge an uncompetitive price, if that's what they want to do.

18 THE CHAIR: Yes. They just won't be the featured offer.

19 MR PICCININ: That's right. Amazon will not highlight their offer to customers on the
20 website, and that is a unilateral act by Amazon. It's not something we need any help
21 from them on. That's the CEPP.

22 Then on page 68, we have the MFPP, which is given effect through the contract with
23 sellers as a contractual policy. The actual text of it is set out over the page, on
24 page 69. You can see the first sentence; so, it's outside the red box.

25 THE CHAIR: But where's the contract? It says it's given contractual effect.

26 MR PICCININ: I can find a reference for you. The BSA requires sellers to comply with

1 various policies. This is one of those policies.

2 THE CHAIR: Where is that provision?

3 MR PICCININ: I'm going to get that for you, so you've got it and can have it to hand.

4 But if you look at what the policy -- page 131 of bundle A. (Pause)

5 THE CHAIR: It's in the pleading, is it?

6 MR PICCININ: Yes. Yes. It's an excerpt from -- if you go to page 130, you see the

7 heading, "The BSA". We say that:

8 "ACSO pleads, accurately, that third-party sellers who wish to sell products in the Store

9 are required to enter into [a contract called] the BSA.

10 "80. [Then] The 'General Terms' of the BSA include the following wording [which is]

11 "BY REGISTERING FOR OR USING THE SERVICES, YOU ... AGREE TO BE

12 BOUND BY THE TERMS OF THIS AGREEMENT, INCLUDING THE SERVICE

13 TERMS AND THE PROGRAMME POLICIES FOR EACH SERVICE YOU REGISTER

14 FOR ..."

15 So you're agreeing to be bound by the programme policies.

16 Then the top of 132, in paragraph 85, "It is common ground that the MFPP is a

17 'Programme Policy'". So that is the sense in which it's -- it's on a contractual --

18 THE CHAIR: It's different in this respect from the CEPP --

19 MR PICCININ: From the CEPP.

20 THE CHAIR: -- which you say is in the policy anyway.

21 MR PICCININ: Correct, in that it has a contractual footing. I'm glad, sir, you asked

22 me to show you the words, because we should look at them. What you're agreeing to

23 be bound by is the terms of the agreement, which include the programme policies. To

24 understand what that means, we then need to look at the programme policy itself, so

25 that's where I was back at page 69.

26 THE CHAIR: Yes.

1 MR PICCININ: It's not drafted in the form of obligations, but it does provide important
2 information, and of course everyone is stuck with what's said there.

3 But the very first centre of it, which is not highlighted by ACSO, is that, "Sellers are
4 responsible for setting their own prices on Amazon marketplaces ..." That's the starting
5 point.

6 Then in the red box that ACSO has added, Amazon says that it monitors prices, and
7 if it sees pricing practices that harm customer trust, it can take action like removing
8 Buy Box, or removing the offer, or suspending or terminating selling privileges.

9 Then it gives examples of practices that harm customer trust. They include prices that
10 mislead customers, and also prices that are significantly higher than recent prices
11 offered on or off Amazon; again, by anyone. But it's significantly higher. So, there is
12 no agreement here to price parity, just the allegation. There's no agreement here.

13 THE CHAIR: There are two questions out there. One is: by agreeing to comply with
14 the policy, is that then accepting -- not even tacitly, expressly -- that they will therefore
15 price accordingly with the policy? For example, they agree that they won't set a price
16 that misleads customers.

17 MR PICCININ: Yes.

18 THE CHAIR: And that that is an agreement for the purpose of --

19 MR PICCININ: I think --

20 THE CHAIR: Article 101.

21 MR PICCININ: -- for the purposes of today, we'll proceed on that basis, sir, because
22 while it certainly is an agreement --

23 THE CHAIR: An express agreement.

24 MR PICCININ: -- it is that the consequence --

25 THE CHAIR: (Overspeaking) the policy, and the policy appears to say, "Don't set
26 misleading prices".

1 MR PICCININ: Yes. That's right; and also says, don't set prices that are significantly
2 higher.

3 THE CHAIR: Well, then there is the second question, which is: how is that agreement
4 implemented in practice as to what "significantly higher" is treated to mean in the
5 implementation of the agreement?

6 MR PICCININ: That's right.

7 THE CHAIR: That's something which is a question of fact that we don't know.

8 MR PICCININ: That's true, sir. That's absolutely right.

9 THE CHAIR: But if it is in fact implemented and it's agreed to -- you've accepted
10 that -- by Amazon on the basis that significantly means anything other than de minimis,
11 then if that's how Amazon interprets the contract, isn't that an agreement?

12 MR PICCININ: No, sir. For a starting point, we know that's not what the contract
13 means, because of what's been alleged in relation to the CEPP (inaudible). We looked
14 before at the fact that you can have offers on Amazon that are more expensive than
15 the competitive, external price, so you can have offers on Amazon that are more
16 expensive than prices elsewhere; just that if you do, then the consequence of that may
17 be that you're not selected as the featured offer.

18 THE CHAIR: Well, except it doesn't say here that Amazon will always remove the
19 product.

20 MR PICCININ: No.

21 THE CHAIR: It says it may remove the product. So maybe sometimes Amazon
22 doesn't remove it, but it still won't be of the featured offer.

23 MR PICCININ: That's right. But in my submission, you can't construe this as an
24 agreement to charge the same price on Amazon as you charge elsewhere.

25 THE CHAIR: If we're looking at this in terms of contractual enforcement for breach in
26 strict law, attracting damages, such that they could sue Amazon and say, "You

1 shouldn't have removed me, because I was higher, but I wasn't significantly higher",
2 that may be so, but this isn't a form-based assessment. If in practice Amazon operates
3 this agreement -- and we don't know at the moment; maybe they do, maybe they
4 don't -- but for summary judgment, it's got to be something that's really not in serious
5 question.

6 MR PICCININ: Yes.

7 THE CHAIR: And if they interpret "significantly higher" as being something that many
8 people wouldn't regard as significant, and therefore it operates as a quasi-price-parity
9 obligation, and merchants become aware that's how Amazon is applying it, the fact
10 that they might have some contractual recourse doesn't really stop it being an
11 agreement; well, for article 101 terms.

12 MR PICCININ: In my submission, sir, yes, it does. The reason why is that -- if
13 I suppose you're right, obviously you appreciate our position is that the hypothesis
14 we're dealing with here is not right; it's not true that Amazon interprets or applies the
15 MFPP in that way; our case is that that's not what we do.

16 But just to entertain that hypothetical: if the position is that you've got an agreement
17 that is objectively construed, an agreement about selling prices that are really
18 significantly higher than elsewhere, and when you're construing that, obviously, you
19 would look to the surrounding examples to give it colour -- the kind of thing that we're
20 talking about. And you would also look to the fact that we have this other approach to
21 selecting the featured offer, which definitely doesn't suggest that it's impossible to sell
22 on Amazon at one penny above the price elsewhere.

23 But if objectively construed -- and this is a task that you can complete today -- it's
24 referring to something other than price parity, then even if it were true that Amazon
25 goes about wrongly, not pursuant to the contract; wrongly purporting to enforce the
26 contract in a way that is anti-competitive, that is not an agreement. That's something

1 that Amazon is doing, which might be alleged to be an abuse of a dominant position,
2 but it's not being done in implementation of an agreement with the cooperation of the
3 sellers; it's being done to the sellers, in that hypothesis, by Amazon acting unilaterally,
4 on a frolic of its own, beyond what it's permitted to do under the contract.

5 So, if that is the allegation -- and it does seem to be the allegation; my learned friends
6 do allege that Amazon applies the MFPP as though it was engaged when you're one
7 penny above -- or one cent above in one of the quotes they give -- than competitive
8 prices, we say that's wrong.

9 THE CHAIR: That's factual.

10 MR PICCININ: And that's a factual question, I accept that. But if that was something
11 we did, that's not an implementation of this policy. That is a unilateral act by Amazon
12 actually in breach of contract on that hypothesis, if it's not what the contract says.

13 So, I do say, sir, that when you're construing what the agreement is, and this is a case
14 where you have a written agreement. =,-- so it is the right approach to look at what the
15 words are and construe them in context, in the usual way. And this is an agreement
16 that says that the sellers are responsible for setting their own prices. It says -- if you
17 look at the other list of forms of conduct that are caught -- things like misleading
18 customers, or selling multiple units for more per unit than a single unit, or setting
19 a shipping fee that is excessive. It's about all of those kind of things. So, when you
20 read the significantly higher than recent prices offered on or off Amazon, it would be
21 perverse to construe that as giving Amazon licence to delist people for selling it just
22 one penny above the competitive price.

23 THE CHAIR: So, you say if Amazon communicates to sellers, as set out in
24 paragraph 2.20.

25 MR PICCININ: 2.20?

26 THE CHAIR: Yes. I don't know if they do on the UK platform, I think this is from the

1 US, but if they did -- and seems to be alleged here, they do -- you say, "Well, that's
2 Amazon purporting to apply the contract in contrary to its proper interpretation, and
3 therefore that should be regarded as a unilateral act and can't be attributed to the
4 contract".

5 MR PICCININ: Well, sir, it's interesting that you go to that example of paragraph 2.20.
6 That's where I was going to go next to show you the kind of point that's made against
7 us.

8 THE CHAIR: Yes.

9 MR PICCININ: Because what's said there is that Amazon considers a price to be
10 uncompetitive, even if it was one cent -- it's obviously a US document -- but
11 uncompetitive. It's not a statement about the threshold to qualify as being significantly
12 higher than recent prices off Amazon. It doesn't say that Amazon considers any price
13 that is one cent above the price available outside Amazon as being significantly higher
14 than recent prices off Amazon.

15 You can follow the reference through in the footnote. Where it comes from is
16 paragraph 15 of the third amended complaint in another one of the class actions, the
17 Frame Wilson case that's in bundle B, tab 30 at page 690. (Pause)

18 If you just read paragraph 15 to yourself, that's the paragraph we were taken to.

19 THE CHAIR: Sorry, paragraph ...

20 MR PICCININ: Fifteen, one-five?

21 THE CHAIR: Sorry, where is the complaint?

22 MR PICCININ: It's -- so it's bundle B, page 690, tab 30. It might be B2. Actually, it's
23 page 690, so ...

24 THE CHAIR: Yes.

25 MR PICCININ: So, if you just read the whole of paragraph 15, please.

26 THE CHAIR: So, you see this is in the context of the CEP, as it were.

1 MR PICCININ: Well, it's -- that's right. The one thing that's crystal clear from it is what
2 is being discussed there is the concept of a competitive price, and in the context of
3 eligibility for the featured offer.

4 I should say -- I know it goes without saying, but I'll say it anyway -- that one needs to
5 be very cautious about all of these snippets of documents, particularly when they're
6 reproduced in pleadings. I don't accept any characterisations that are made of them.
7 That's all for another day. I'm not trying to argue that on the facts, but you'll understand
8 that we don't accept any of the characterisations that ACSO has made of any of these
9 documents.

10 But taking them at their highest, this point in paragraph 15 is talking about Amazon's
11 unilateral conduct in determining eligibility for selection as the featured offer. What
12 they --

13 THE CHAIR: These are illustrations, aren't they? The "significantly higher".

14 MR PICCININ: No, sir.

15 THE CHAIR: Aren't they? Looking at the policy on page 69:

16 "If we see pricing practice on a marketplace ... that harms customer trust, Amazon
17 may take action."

18 And then they say:

19 "Pricing practices that harm consumer trust include, but are not limited to ..."

20 MR PICCININ: That's true, sir.

21 THE CHAIR: So, there could be. And what is said is, at 221:

22 "Amazon can and does ... terminate selling privileges if Amazon detects a lower price
23 for a product offered through other sales channels ... purportedly on the basis that the
24 availability of lower price off Amazon 'harms customer trust'."

25 MR PICCININ: There's no basis for that allegation, but that's --

26 THE CHAIR: Just a moment. That allegation, if made out, says that that's how this

1 contract works.

2 MR PICCININ: Well --

3 THE CHAIR: You say the facts won't support it.

4 MR PICCININ: No, sir. That's not what I say. I mean --

5 THE CHAIR: I think what you're saying is there's no basis.

6 MR PICCININ: -- I do say that as well; but that's not the argument that I'm making on
7 this strike out application. The argument that I'm making on this strike out application
8 in relation to the MFPP is twofold: one is that you cannot construe that agreement as
9 biting on a situation where someone sells at only a slightly higher price on Amazon.
10 You can't construe it that way because even though it contains the word
11 pricing -- "practices that harm customer trust include, but are not limited to", you can't
12 sensibly construe those words as including additional conduct which is of the same
13 kind as in one of the bullet points, but is less serious than it. That that is not a sensible
14 construction of the contract.

15 Then the other point is that when you're construing those words, including the
16 "significantly higher", you need to construe it as a whole, together with and taking
17 colour from the other examples, and also from the fact that we know that you're
18 allowed to sell at uncompetitive prices on Amazon. Because if you weren't allowed to
19 sell at uncompetitive prices on Amazon, there would be no need to exclude from the
20 featured offer process sellers' offers that are uncompetitive.

21 MR BANKES: Is the text at figure 9 the entirety of the marketplace fair pricing policy?

22 MR PICCININ: I think so, sir.

23 MR BANKES: Okay.

24 MR PICCININ: It's like I said, it's on the website; it's all in the public domain.

25 THE CHAIR: Yes, that's --

26 MR PICCININ: So, if, sir --

1 THE CHAIR: Yes, the quote from the --

2 MR PICCININ: It is the entirety.

3 THE CHAIR: -- contract, which you said is on page, is it 131?

4 MR PICCININ: Yes, that was it, 131.

5 THE CHAIR: How does it work? Is someone who registers sent a copy of the service

6 terms and programme policies, or given a link, or what happens?

7 MR PICCININ: I don't know whether they receive a hard copy or not, but the link is on

8 the website. It's on Seller Central, isn't it? Seller Central.

9 THE CHAIR: The programme policies page?

10 MR PICCININ: Yes, I should say programme policies is hyperlinked, yes.

11 THE CHAIR: And the hyperlink takes you to -- and this is what you get from that

12 hyperlink?

13 MR PICCININ: I think it takes you to a list of the programme policies, one of which is

14 the MFPP. And if you click on that one, it takes you here.

15 THE CHAIR: I see, yes.

16 MR PICCININ: I can give you a reference to where you can see the hyperlink linking

17 if you like. It's B25, 377. I'm not sure the hyperlink will still work, but you can see that

18 it is hyperlinked.

19 THE CHAIR: Yes.

20 MR PICCININ: My submissions, as I said, are twofold: one is that you can't construe

21 that as an agreement -- the price parity, it's just not what the words say and it's not

22 what they mean in the context, that's not an available construction. That is a legal

23 submission.

24 THE CHAIR: Yes.

25 MR PICCININ: And then the next submission is also a legal submission, which is that

26 if it were true, which it isn't, if it were true that Amazon acted in a way that was contrary

1 to the agreement that it had signed with the sellers, and it applied a different policy,
2 which is that it would crack down on you and kick you off the store because your offer
3 was one cent above competitive level, that would be conduct by Amazon which you
4 could argue about whether it was abusive. But that wouldn't be an implementation of
5 the agreement that was actually made. That's not conduct that is authorised by the
6 agreement in any way, either contractually or in a looser competition law sense; that's
7 not something that the sellers sign up to and agree.

8 Those are my two submissions about the MFPP. Sorry, I beat about the bush a bit
9 with that, but hopefully at the end of that, that much is clear.

10 THE CHAIR: Yes.

11 MR PICCININ: I should say, in addition to the example that we gave, that there are
12 other snippets of documents that my learned friend might take you to that is
13 highlighted, which they rely on to show that Amazon does consider anything above
14 the competitive price to be "significantly higher" or to engage the MFPP. As I say,
15 none of that -- even if it were true, and we don't accept it -- is open as a construction
16 of the agreement. So it follows it would be unilateral conduct, and not collusive
17 conduct.

18 Now, in their skeleton argument at paragraph 75, which is on page 26 of the skeletons
19 bundle, if that's how you're working, and internal page 23, if that's how you're working.
20 It says in paragraph 75 that even if we're right, that the MFP only applies "to
21 'significantly' higher prices", even that is anti-competitive because it would prevent or
22 discourage lower prices on rival platforms.

23 That is not the way in which their case is actually put. It's certainly not the way their
24 methodology is put. They don't have a methodology to address that case. They rely
25 on the way it's pleaded in paragraph 245.5, which is back in bundle A at page 79. But
26 if you just scroll back to page 78, just to see how that paragraph begins, this is

1 a general set of allegations about what Amazon's so-called price parity policies
2 amount to, or are given effect through. In 245.5, all you have is a general plea about
3 the effects of the policies, individually or cumulatively. There's no specific plea that is
4 about the policy being based on significantly higher prices.

5 THE CHAIR: Well, rather the contrary. From the last sentence, it said to constitute
6 a price parity policy.

7 MR PICCININ: Exactly, sir. As I said, you know from the discussion we've already
8 had about methodology that that's not the way their case is put at all. Frankly, if it was,
9 we would say it was also unarguable that a policy against price gouging and a policy
10 against that sort of conduct could be said to be anti-competitive.

11 THE CHAIR: Well, you've got the German decision.

12 MR PICCININ: We do have the German decision, which is not an article 101 decision,
13 sir.

14 THE CHAIR: It's not?

15 MR PICCININ: No.

16 THE CHAIR: I thought it was. What is it?

17 MR PICCININ: It's a decision taken under a specific provision of German competition
18 law that relates to digital dominant-ish platforms. Sorry, I've got the technical details
19 wrong. My German is not very good, but it's not article 102; but it is more akin to
20 article 102 than it is to article 101.

21 THE CHAIR: Right.

22 MR PICCININ: I should have had that at my fingertips.

23 THE CHAIR: Yes.

24 MR PICCININ: I think we have got materials about it in the bundles we can point you
25 to if you're interested, but it does not support this case.

26 THE CHAIR: Yes.

1 MR PICCININ: The final policy -- that was the MFPP. Is that the German --

2 THE CHAIR: I think that's right.

3 MR PICCININ: It's like the German version of the DMA.

4 THE CHAIR: Yes.

5 MR PICCININ: Okay.

6 THE CHAIR: Yes. It's under a section of that domestic --

7 MR PICCININ: I have in my head section 19(a). I don't know if that's right.

8 THE CHAIR: Yes, I think that's right, Mr Piccinin.

9 MR PICCININ: The final policy I need to pick up is the account health rating policy.

10 THE CHAIR: Well, that's just an adjunct, isn't it?

11 MR PICCININ: Exactly, sir.

12 THE CHAIR: If the other two go, I don't think it's seriously said that on its own, that

13 can be an agreement. Isn't that right, Mr Lask?

14 MR LASK: If the other two had gone, we wouldn't be coming to the tribunal asking it

15 to find that the AHRP on its own was quite (overspeaking).

16 THE CHAIR: Yes, I didn't think so. It's just said that it's a reinforcement and it aids

17 the construction, I think, of the other two. Is that right?

18 MR LASK: That's a fair characterisation of how we put it, yes.

19 MR PICCININ: I come back to the questions I started with. Do sellers agree not to

20 charge higher prices on Amazon than elsewhere? There are written agreements here.

21 Do they say that? No, they do not. In fact, on the contrary, the materials that are

22 communicated from Amazon to the sellers are inconsistent with that proposition,

23 because the communications from Amazon to sellers tell them that their price is above

24 the competitive price, and that a consequence of this is that they will not be selected

25 as the featured offer. That is inconsistent with there being an agreement in which

26 sellers commit not to selling above the competitive price.

1 Does Amazon's conduct of selecting the featured offer, and selecting a featured offer
2 that is below the competitive price or at the competitive price -- does that
3 policy -- which is really what is being complained about in relation to the CEPP -- does
4 that policy require help from sellers to achieve (inaudible)? No, it doesn't, because
5 Amazon is free to select the offers from whichever ones are made on the store.
6 For those reasons, there is no arguable claim for a breach of chapter I. This is a legal
7 innovation that ACSO has made. They're out on a limb, and it's inconsistent with some
8 of the classics of the competition law jurisprudence that we've seen earlier today.
9 Those are my submissions.

10 THE CHAIR: Yes. I think we'll take a short break now and then hear Mr Lask.

11 MR LASK: Yes, sir. What time would you like us back?

12 THE CHAIR: We can again sit till 5.00 if necessary. I don't think it will be necessary.
13 I know that's the short edition application. But come back at just under 3.50.

14 (3.39 pm)

15 (A short break)

16 (3.51 pm)

17 THE CHAIR: Yes, Mr Lask.

18 Submissions by MR LASK

19 MR LASK: Thank you, sir.

20 I turn now to Amazon's strike-out/summary, reverse summary judgment application, in
21 relation to the chapter 1 case.

22 The relevant legal principles that apply to an application of this kind are common
23 ground. They are set out in our reply at 166, and our skeleton at 67. The only point
24 I would emphasise is that strike-out is a draconian remedy which the tribunal should
25 not grant unless it is certain that the claim is bound to fail.

26 The relevant chapter 1 principles are also, it seems, common ground; and in those

1 | circumstances I don't propose to take you through the case law, but rather I wish to
2 | emphasise four points which are addressed fully in our reply at paragraphs 167 to 174,
3 | bundle A, tab 3, page 193.

4 | First, there is no need for a formal contract in order to establish an agreement under
5 | chapter 1. All that is required is a joint intention between the parties to conduct
6 | themselves on the market in a specific way, sometimes referred to as concurrence of
7 | wills. The case reference for that is Bayer in the CFI, paragraph 67 to 69, bundle H1,
8 | tab 10, page 84. (Pause)

9 | MR BANKES: Which paragraph in your reply?

10 | MR LASK: Well, this is all dealt with in paragraphs 167 to 174 of the reply. That's
11 | where we set out the legal principles.

12 | MR BANKES: Thank you.

13 | THE CHAIR: Page 193.

14 | MR LASK: Second, an agreement may be established where the policy or practices
15 | of one party receive the acquiescence of the other party. That's Bayer CFI,
16 | paragraph 71.

17 | Third, acquiescence may exist where the counterparty cooperates with the defendant,
18 | such cooperation being necessary in order to attain the defendants' objectives -- that's
19 | Bayer in the Court of Justice, paragraph 104, bundle H1, tab 11, page 170 -- or where
20 | the defendant imposes ongoing responsibilities or obligations on the counterparty,
21 | which the latter accepts. One sees that from the Achilles case in the Court of Appeal,
22 | paragraph 64, bundle H1, tab 28, page 688.

23 | Finally, still under my third point, acquiescence under pressure is acquiescence
24 | nevertheless, and that's also Achilles paragraph 65.

25 | My fourth point: in order to establish whether there is an agreement under chapter 1,
26 | it is necessary -- or at least it may be necessary, depending on the case -- to examine

1 the conduct of the parties concerned. That is Bayer in the Court of Justice,
2 paragraph 100.

3 Turning then to the application: Amazon seeks to strike out ACSO's claim under
4 chapter 1 on the basis that ACSO's pleaded case discloses no reasonable grounds
5 for a chapter 1 claim.

6 Amazon's application is a pleadings-based application. It hasn't adduced any
7 evidence in support; instead, it relies on the facts pleaded in our claim form. In those
8 circumstances, it is to be assumed that the allegations of facts pleaded by ACSO can
9 be made out. Just to tell you why I say that, if I could ask you to pick up the authorities
10 bundle, H1, tab 26, page 603.

11 This is the case of SEL-Imperial, a judgment of the chairman. At paragraph 1, the
12 judgment says:

13 "Save on one point, as explained below, this is a 'pleadings-based' application: that is
14 to say, the defendant relies on the pleaded case and not any extraneous evidence.
15 Hence it is to be assumed for the purpose of this application that the allegations of fact
16 pleaded by the claimant can be made out."

17 The question for the tribunal on this application is whether on the pleaded facts, ACSO
18 has a realistic prospect of establishing the existence of an agreement or concerted
19 practice that prevents or strongly discourages sellers from offering lower prices for
20 their products elsewhere.

21 The formulation of that question reflects paragraph 78 of Amazon's response,
22 bundle A, tab 2, page 130. In substance, I don't think it's any different from the way in
23 which my learned friend framed his two questions. It's a composite question, and it
24 fairly reflects paragraph 245 of the pleading, where it's pleaded that the policies
25 prevent or strongly discourage sellers from offering lower prices off Amazon.

26 In my submission, the answer to that question is yes, and I propose to respond to it in

1 more detail by reference to the amended claim form. To be clear, in case it isn't
2 already clear, the reason this matters is because whilst we've obviously pleaded an
3 abuse of dominance claim, it's open to Amazon to deny dominance. We understand
4 that it has done in the Hammond and Stephan claims. So, if it succeeds on the issue
5 of dominance, it's important to ACSO that it can still pursue its case under chapter 1.
6 That's why we've pleaded the case.

7 If we could begin, please, in the amended claim form on page 60. We've set out here
8 the contractual bases. Paragraph 192:

9 "Amazon's price parity policies individually and/or in combination, prevent or strongly
10 discourage third-party sellers from offering lower prices than other sales channels.
11 Individually and/or in combination, they constitute WRPOs (and NRPOs) or measures
12 having the same effect."

13 Then at 193:

14 "As noted ... above, in order to sell their products via Amazon's UK marketplace,
15 third-party sellers are contractually obliged pursuant to the BSA to comply with ..."

16 Then we have the marketplace fair pricing policy at 193.1, and the account health
17 rating policy at 193.2.

18 At 194 -- you were asking, sir, about the BSA:

19 "Pursuant to the BSA, third-party sellers are required to 'agree to be bound by the
20 terms of this agreement, including the Service Terms and Programme Policies for
21 each service [they] register for or use in connection with a particular Amazon site'.
22 'Programme Policies' are defined as all policies and programme terms provided on the
23 Programme Policies page' and expressly include the Amazon Marketplace Fair Pricing
24 Policy and the 'Account Health Rating Policy'."

25 THE CHAIR: So, in fact, not only do you make the point we've got to assume that this
26 is correct, but that's not, it seems, disputed.

1 MR LASK: This part isn't disputed. It's common ground that the BSA obliges sellers
2 to comply with the MFPP and the HRRP, and accordingly, it's common ground that
3 there is an agreement here for chapter 1 purposes. The issue is whether the policies
4 to which the sellers agree arguably prevent or discourage them from offering lower
5 prices off Amazon. That's the pleaded case.

6 Paragraph 195, we set out the contractual basis for the CEPP, at 195 to 196. ACSO
7 does not plead that sellers are contractually obliged to comply with the CEPP, but of
8 course, that is not necessary in order for there to be an agreement under chapter 1.
9 195 to 196 nevertheless explain that Amazon operates the CEPP in the exercise of
10 rights conferred on it by the BSA.

11 Then if we could pick it up, please, at 197:

12 "Amazon has internally acknowledged that its current price parity policies were
13 intended to replace the price parity clause previously included in its Business Solutions
14 Agreement with third-party sellers. Following the removal of its explicit price parity
15 clause from the [BSA] in the United States in March 2019, Amazon noted that despite
16 'the recent removal of the price parity clause in our BSA [...] our expectations and
17 policies have not changed'."

18 Then at 199:

19 "Amazon noted internally that '[a]s planned', the introduction and/or expansion of its
20 current price parity policies 'will require sellers to match external prices in order to have
21 their offers available through the Amazon store'.

22 "200. As an Amazon Director explained in the course of State of California's
23 proceedings, third-party sellers queried, '[d]idn't you just remove your price parity
24 clause which means I can set whatever prices ...? And the answer is no'."

25 THE CHAIR: This was all in the US.

26 MR LASK: Yes, it's all taken from the US. But the reason I emphasise it is because

1 it shows, in my submission, that the objective of these policies is to influence the prices
2 set by third-party sellers.

3 THE CHAIR: Well, I think as regards the MFPP, that's also common ground, but it's
4 to influence, because if it's significantly higher, I think it's accepted --

5 MR LASK: Yes.

6 THE CHAIR: -- that that's akin to a contractual obligation. What I think is said is
7 there's nothing to suggest that that means it is the same effect as a WRPO.

8 MR LASK: Yes, I think that is Amazon's case.

9 THE CHAIR: I think that's the point that's made. I mean, the position is quite different,
10 it seems to me, as regards the two policies. One is it's said it's not contractual at all,
11 and it is price parity but it's not a contractual obligation; it's just unilateral conduct to
12 be the featured offer. And as I understand it, the second one that's accepted is that
13 policy is contractual --

14 MR LASK: Yes.

15 THE CHAIR: -- but it's not price parity, correct?

16 MR LASK: Right. Yes.

17 THE CHAIR: So very different point.

18 MR LASK: And sir, I'm going to come back to the point on objective. But to be clear,
19 we do plead -- I showed you at 192 -- that we say the policies constitute WRPOs or
20 measures having the same effect.

21 THE CHAIR: Yes.

22 MR LASK: Our pleaded case does not stand or fall on whether, strictly speaking,
23 these policies constitute WRPOs. Our pleaded case is that they prevent or strongly
24 discourage sellers from setting lower prices off Amazon. That's what we have to
25 establish, we say, in order to show a breach of chapter 1.

26 THE CHAIR: Yes.

1 MR LASK: So when it comes to the objective, the reason I emphasise
2 paragraphs 197, 199 and 200 is because -- and this applies to both the MFP p and
3 the CPP -- they do show that the objective is to influence the prices set by third-party
4 sellers, and that is relevant to -- and in my submission, fundamentally inconsistent
5 with -- Amazon's submission that this is about unilateral conduct, because it's all about
6 third-party sellers' prices.

7 Now, it is the sellers, of course, that are responsible for setting their retail prices, not
8 Amazon, and we saw that in one of the figures that my learned friend highlighted later
9 on in the pleading. The most Amazon can do is try and influence those prices through
10 the impugned policies. But if the sellers did not play ball, those policies would not
11 meet Amazon's objectives. The cooperation of the sellers is necessary; without it, the
12 policies fall apart. (Pause)

13 Then the section on the CEPP begins at paragraph 201:

14 "Amazon's Competitive External Price policy imposes a price parity obligation on
15 third-party sellers because it requires third-party sellers to price each of their products
16 on Amazon no higher than the price that they offer for the same product on other sales
17 channels, even where the costs of selling on other sales channels are lower ... policy
18 is communicated to third-party sellers in various sections of the 'Seller Central'
19 dashboard, including specific web pages regarding (i) how to price an item on
20 Amazon's marketplace; (ii) the measurement of a seller's pricing health; and (iii) the
21 management of inventory."

22 THE CHAIR: Your first sentence.

23 MR LASK: Yes.

24 THE CHAIR: It requires that to price each of their products no higher the price they
25 offer.

26 MR LASK: Yes.

1 THE CHAIR: But we've got the policy, only required to do that to be the featured offer.

2 MR LASK: Yes.

3 THE CHAIR: So not required beyond that.

4 MR LASK: Well, in practice. I'm going to come on to the featured offer. It's really,

5 really important to be eligible for the Buy Box. So, when Amazon tells sellers that in

6 order to be eligible for the Buy Box, they have to ensure that they do not price any

7 lower off Amazon, we say that in practice that prevents or strongly discourages them

8 from pricing any lower off Amazon, because being in the Buy Box is really important.

9 I'll show you why. (Pause)

10 Paragraphs 174 to 175 on page 56. Do you have that, page 56? (Pause)

11 "As set out below, regulators and public bodies have found that most sales on

12 Amazon's marketplace occur through the Buy Box. It is therefore in practice essential

13 for sellers to qualify for and win the Buy Box in order to be exposed to consumers and

14 to compete for the majority of sales on Amazon's marketplace."

15 And then we've referred to Evans. And at 175:

16 "In its November 2023 commitments decision, the CMA noted that '[h]aving an offer

17 selected as the Featured Offer [i.e., winning the Buy Box] is important to sellers, as

18 evidence provided by Amazon indicates that over 75 per cent of purchases on the UK

19 Amazon Marketplace are made via the Featured Offer."

20 So, Amazon, we say, makes eligibility for the Buy Box conditional on complying with

21 the CEPP. And because eligibility for the Buy Box is so important, the practical effect

22 of that is to prevent, or strongly discourage, sellers from pricing lower off Amazon.

23 Just to complete the part of the pleading I was on, page 63, paragraph 202 was really

24 the point I've been making:

25 "Under Amazon's [CEPP] ... third-party sellers are not eligible to win the Buy Box if

26 they offer a lower price for the same product through other sales channels, including

1 other e-commerce platforms and online retailers (including sellers' own websites if
2 applicable). Result of being rendered ineligible to win the Buy Box is that, for the
3 reasons given above ... third-party sellers are placed at a huge disadvantage in their
4 ability to sell their products on Amazon's UK marketplace."

5 Then 203:

6 "Amazon directs third-party sellers to several tools, including the 'Pricing Health' tool,
7 which communicates the [CEPP] policy to third-party sellers, allows them to compare
8 their offer's price to the 'Competitive External Price' and enables them to determine
9 whether they are in breach of the policy and therefore, ineligible to win the Buy Box."

10 So, sellers are being directed to tools the purpose of which, at least potentially, is to
11 enable them to adjust their prices. That's what this policy is all about: influencing the
12 way in which sellers price, using the levers that Amazon has, which are very powerful
13 levers.

14 Paragraph 205, I've shown you already. It's the point about sellers not knowing who
15 they're being benchmarked against, pursuant to a deliberate strategy by Amazon,
16 which means that in practice, third-party sellers must maintain price parity across all
17 sales channels. That's 205.

18 Paragraph 208.4 on page 65:

19 "Therefore, once again, Amazon confirms that it makes access to the Buy Box
20 conditional on third-party sellers complying with a price parity obligation."

21 And 208.5.4 on page 66:

22 "At the time of or by introducing the 'Pricing Health' tool, Amazon formalised the
23 [CEPP] and offered third-party sellers a tool to monitor and ensure compliance with it:
24 '[w]e have launched the "Pricing Health" page on Seller Central to make it easy for
25 sellers to view and address offers that may be disqualified for the reasons outlined
26 above'."

1 Pausing there, I ask rhetorically: if Amazon isn't seeking to influence the prices set by
2 third-party sellers, what on earth is it doing?

3 Then, if we could momentarily skip forward, please, to page 78. I'm going to come
4 back to the section on MFP, but just paragraph 245 on page 78 where we draw the
5 threads together. We see at 245.3:

6 "In addition, and as a means of complementing and/or reinforcing the Marketplace Fair
7 Pricing Policy (which itself is reinforced by the Account Health Rating Policy), Amazon
8 utilises the Competitive External Price policy to require third-party sellers to ensure
9 that they do not offer a lower price for the same product off Amazon. Amazon does
10 this by conditioning access to the Buy Box on compliance with the Competitive
11 External Price policy, in the exercise of its rights under the SoAS terms (which sellers
12 are obliged to comply with pursuant to the BSA)."

13 And then at 245.5:

14 "Collectively or individually, Amazon's price parity policies thus prevent and/or strongly
15 discourage third-party sellers from offering lower prices on rival e-commerce platforms
16 and/or third-party sellers' own websites than on Amazon's UK marketplace.
17 Collectively or individually, the price parity policies constitute WRPOs (and NRPOs) or
18 measures having the same effect."

19 So, on ACSO's pleaded case, the CEPP seeks to ensure that sellers do not offer lower
20 prices off Amazon by conditioning access to the all important Buy Box on compliance
21 with the CEPP. In my submission, ACSO's pleaded case establishes, at least
22 arguably, the necessary concurrence of wills, because even if sellers do not explicitly
23 agree to the CEPP, they acquiesce in it through their actual pricing. That's reflected,
24 in my submission, at 245.5:

25 "Amazon's price parity policies ... prevent and/or strongly discourage third-party sellers
26 from offering lower prices on rival platforms."

1 And indeed, as I've emphasised, the whole focus of the CEPP is on the pricing of
2 third-party sellers. The ability to fulfil Amazon's objective depends upon their
3 cooperation.

4 Now, the extent to which they co-operate in practice is a factual question to be
5 determined at trial, but this is about the pleading. Now, Amazon's case is that what
6 we're complaining about here is unilateral conduct. The way it's put in Amazon's
7 skeleton, which is fairly reflected in my learned friend submissions this afternoon, is
8 that the reason it's unilateral on ACSO's case -- that's what Amazon has to say, and it
9 does say -- the complaint is about "unilateral conduct", because no cooperation from
10 the sellers is required for Amazon to disqualify uncompetitive offers from eligibility for
11 selection as the featured offer. That's paragraph 51 of Amazon's skeleton, and it's
12 elaborated on paragraph 53 of their skeleton, where it says:

13 "Amazon is entitled, and able, to avoid highlighting uncompetitive offers irrespective
14 of how sellers choose to price. And if sellers in fact respond by changing their prices,
15 that is nothing more than a reaction to Amazon's unilateral conduct as operator of the
16 Store, applying their own strategies."

17 That's how Amazon puts it. In my submission, that argument is detached from reality
18 and misunderstands ACSO's case. If we could go, please, to the Unipart case in
19 bundle H1, tab 24. My learned friend took you to this earlier. Tab 24, page 585.

20 (Pause)

21 94 at the bottom of the page:

22 "Approaching article 81(1) on that basis, the first step, in my judgment, is to identify as
23 precisely as possible the conduct of which complaint is made: that is to say the conduct
24 which is alleged to have caused the loss in respect of which damages are claimed.
25 For in my judgment it is that conduct which must be the subject of an agreement
26 between undertakings of article 81(1) is to be engaged in respect of it."

1 Just while we're on this case, I'm going to come back to why paragraph 94 is so
2 important. It may be helpful why you have Unipart open, just to look again at
3 paragraph 103 onwards on page 587, because it gives quite a nice illustration of what
4 real unilateral conduct looks like.

5 THE CHAIR: Sorry, which paragraph?

6 MR LASK: Paragraph 103.

7 THE CHAIR: 103.

8 MR LASK: 103. You'll recall this was about Cellnet's pricing as part of a margin
9 squeeze policy.

10 "On the face of it ... Cellnet's alleged conduct in adopting a policy of 'margin squeeze'
11 was unilateral on its part. However, it remains to consider whether it can be said that
12 Unipart consented to or tacitly acquiesced in such a policy, thereby giving rise to the
13 requisite 'concurrence of wills'.

14 "104. Plainly Unipart did not positively consent to the adoption of such policy ... So,
15 the only question is whether there was in the instant case 'tacit acquiescence' of the
16 kind found in Sandoz."

17 And then 105:

18 "I find it impossible to see how, applying Bayer, a finding of tacit acquiescence by
19 Unipart could be made in this case. At [101] of its judgment in Bayer ... the ECJ
20 referred to 'a unilateral policy of one of the contracting parties, which can be put into
21 effect without the assistance of others'. In my opinion the policy of 'margin squeeze'
22 (if adopted) was just such a policy. Indeed, its anti-competitive efficacy derives from
23 the very fact that a network operator, by reason of its market power (albeit not
24 amounting to a dominant position), coupled with its ability to cross-subsidise its own
25 TSPs, is in a position to put pressure on ISPs with a view to driving them out of the
26 market. It requires no cooperation or assistance from the ISPs: on the contrary it is,

1 by its very nature, a unilateral policy aimed at 'the weakening of ISPs and their
2 eventual elimination from the mobile service provision market'."

3 Now, in my submission, this case couldn't be more different because, for the reasons
4 I've given, Amazon's policy absolutely requires the cooperation of third-party sellers
5 through their pricing. But for present purposes, I focus on paragraph 94 and the need
6 to identify as precisely as possible conduct of which complaint is made; the conduct
7 that is alleged to have caused the loss. That's what's said in 94 of Unipart.

8 Here, the impugned conduct is Amazon's policy of preventing or discouraging sellers
9 from offering lower prices on other sales channels. We've seen that in paragraph 245
10 of the pleading. That is the conduct to which we say sellers agree or at least
11 acquiesce.

12 Now, disqualifying uncompetitive offers from the Buy Box is the means by which
13 Amazon enforces that policy. It is the sanction that Amazon imposes for violations.
14 Now, Amazon says, "Well, we don't need anyone's cooperation to determine eligibility
15 for the Buy Box". Whether or not that's right, disqualification from the Buy Box is not
16 on its own the conduct that is alleged by ACSO to have caused the loss. The conduct
17 that's alleged to have caused the loss is the underlying policy that the sanction serves
18 to enforce. And as I've said, as pleaded, the purpose and effect of that policy is to
19 exert influence over the prices set by third-party sellers.

20 So, Amazon's attempt to focus only on the enforcement mechanism, and to somehow
21 treat that as hermetically sealed off from the policy to which it attaches, is completely
22 unrealistic. It ignores the approach required by Unipart, which is to focus on the
23 conduct alleged to have caused the loss.

24 Moving on then to the MFPP. I'm back in the claim form on page 68. Paragraph 213:
25 "... third-party sellers are required under the BSA to comply with the MFPP.

26 "214. Pursuant to [the MFPP], 'Amazon regularly monitors the prices of items on our

1 marketplaces, including shipping costs, and compares them to other prices available
2 to our customers. If [Amazon sees] pricing practices on a marketplace offer that harms
3 customer trust [and that's the key: harms customer trust] Amazon may take action,
4 such as removing the Buy Box, removing the offer, or, in serious or repeated cases,
5 suspending or terminating selling privileges'.

6 215. The Fair Pricing Policy also indicates that 'setting a price on a product or service
7 [on Amazon] that is significantly higher than recent prices offered on or off Amazon' is
8 a pricing practice that allegedly harms customer trust."

9 And one sees that from figure 9 on the following page.

10 THE CHAIR: Yes, and that's all common ground.

11 MR LASK: Yes, but the point is, as you picked up on, sir, pricing practices that harm
12 customer trust "include, but are not limited to", then you have those bullet points,
13 including the one referring to significantly higher prices. So, it's not exhaustive the
14 way in which the policy is expressed in figure 9.

15 More significantly for my purposes is footnote 132 of our pleading:

16 "Although the Fair Pricing Policy refers to the setting of prices 'significantly' higher than
17 recent prices offered on or off Amazon, Amazon in fact enforces the Fair Pricing Policy
18 for any difference in price: see paragraph 220 below."

19 220 on page 70:

20 "... Amazon's communications to sellers state that "[i]n fact, [Amazon] consider[s]
21 a price to be un-competitive, even if it is one cent above the price available outside
22 Amazon!".

23 THE CHAIR: But that's in the US.

24 MR LASK: Sorry?

25 THE CHAIR: That's a communication in the United States.

26 MR LASK: Yes, it is.

1 THE CHAIR: I mean, what policy is it made in respect of?

2 MR LASK: Well, the point I was just coming on to, sir. We have pleaded this in relation

3 to the MFPP. Actually, we think that that might be a reference to the CEPP, because

4 it refers to prices that are uncompetitive, which is a language of the CEPP. We are

5 not sure at this stage, and I don't think Amazon has said that the plea is incorrect in

6 terms of which policy it applies to.

7 THE CHAIR: Well, they directed us to your footnote.

8 MR LASK: Yes.

9 THE CHAIR: And that rather looks as though it is the equivalent of the CEPP.

10 MR LASK: Yes.

11 THE CHAIR: The test isn't whether it's uncompetitive; the test is whether it's

12 significantly higher.

13 MR LASK: Exactly, sir. The first point is, in any event, our pleaded case is that the

14 MFP applies simply where Amazon detects a price that is lower on other sales

15 channels, whether or not it is significantly lower.

16 THE CHAIR: But on what basis is that (inaudible) made?

17 MR LASK: Originally, it was made on that basis because we thought that was

18 a communication in relation to the MFP.

19 THE CHAIR: Yes.

20 MR LASK: Amazon has not pleaded a defence to this claim, obviously. Amazon

21 hasn't said that's wrong, but we've looked at it again and we think, "Actually, we're not

22 sure about that". But there is other evidence that suggests that the same message is

23 sent in relation to the MFPP. We've referred to it in our reply. If I could take you to

24 the evidence, please.

25 THE CHAIR: Yes.

26 MR LASK: It's in B1, tab 27.

1 THE CHAIR: B1. Your reply to --

2 MR LASK: No, sorry, I'm taking you to the evidence itself.

3 THE CHAIR: Oh, I see. What's the reference in the reply?

4 MR LASK: I'll have to be reminded. I think it was --

5 THE CHAIR: One-seven-something.

6 MR LASK: It might be 170. Oh, no, it's not that.

7 THE CHAIR: No, that's --

8 MR LASK: It's 191 on page 201; do you have that?

9 THE CHAIR: Yes.

10 MR LASK: Page 201, paragraph 191:

11 "As is clear from its pleaded case, ACSO does not accept the MFPP says 'on its face'

12 tells the whole story. The MFPP states that Amazon may take action against

13 third-party sellers, such as removing their offers from the Buy Box, if it detects pricing

14 that 'harms customer trust'. Whilst the MFPP explains that such pricing practices

15 'include, but are not limited to' prices that are 'significantly' higher than recent prices

16 offered on or off Amazon, amazon enforces the MFPP for any difference in price and

17 this is communicated to sellers. Thus, for example [and this is a quote from the us

18 proceedings], Amazon 'sends the message that pricing products higher on Amazon

19 than off Amazon is a pricing practice that 'harms customer trust' and violates the

20 [MFPP]'."

21 THE CHAIR: And that's what you're about to show us.

22 MR LASK: That's what I'm about to go to.

23 THE CHAIR: And this is from the California claim, yes?

24 MR LASK: Yes.

25 THE CHAIR: And this references --

26 MR LASK: It's file B, tab 27, page 483, paragraph 119.

1 THE CHAIR: Just one moment. 483.

2 MR LASK: Page 483. (Pause)

3 Paragraph 119:

4 "Amazon sends the message that pricing products higher on Amazon than off Amazon
5 is a pricing practice that 'harms customer trust' and violates the [MFPP]. As Amazon's
6 corporate witness testified under oath, 'customers seeing uncompetitively priced offers
7 does harm customer trust'."

8 Pausing there, you can see that the distinction between the MFPP and the CEPP isn't
9 always clear. That does underline the information asymmetry we're dealing with here,
10 and the way in which one policy may impact on the other, which we do plead.

11 "Amazon's written response to investigative questions admit the same: 'overpaying for
12 a product found at a lower price elsewhere can damage trust with the customer'."

13 So "trust" being a reference to the language used in the MFP. Then over the page,
14 line 9:

15 "Under the Fair Pricing Policy, as a condition of selling in the Amazon store, third-party
16 sellers must agree not to do anything to cause their prices elsewhere to be lower than
17 their prices on Amazon, because such 'pricing practices' 'harm customer trust'."

18 THE CHAIR: Well, that's an allegation, isn't it?

19 MR LASK: Well, yes, that sentence I just read out does include some terms in quotes,
20 but it's not a quote itself, that's correct, yes. But the previous one on the previous page
21 was.

22 Sorry, while we're here, sir, I skipped over something that is potentially significant.

23 Going back to the bottom of page 483:

24 "As Amazon admitted several years ago in official correspondence to the UK's Office
25 of Fair Trading, lower off Amazon pricing constitutes a pricing practice that harms
26 customer trust."

1 THE CHAIR: Sorry, lost you for a minute, where's that?

2 MR LASK: Starting at the bottom of page 483:

3 "As Amazon admitted several years ago in official correspondence to the UK's [OFT],
4 lower off Amazon pricing constitutes a pricing practice that harms customer trust."

5 And I do emphasise we have very limited visibility of the evidential landscape. We
6 obviously haven't had any disclosure yet, but we do say that there's at least an
7 arguable case that the MFP applies to any difference in price, not only significant ones,
8 and that this is communicated to sellers. As I've said, what one sees in some of the
9 evidence we've looked at is a blurring of the concepts of "uncompetitive pricing" and
10 "pricing that harms customer trust". So even if the one cent quote at paragraph 220
11 of the pleading is strictly a CEPP communication, it will be necessary to consider at
12 trial how such communications may affect sellers' interpretation of the MFPP.

13 Our pleaded case is that the MFP is complemented and reinforced by the CEPP and
14 one sees that from paragraphs 212 and 245.3 of the claim form. (Pause)

15 So to sum up our response to Amazon's argument on these points, though I think my
16 position is probably already clear, Amazon says that although sellers are contractually
17 obliged to comply with the MFPP, it's not even arguably a price parity agreement
18 because it because of what it says on its face. My three answers to that are as follows:
19 First, there is obviously a dispute between the parties as to the precise scope of the
20 policy that sellers agree to. That can't be resolved on the strike out application
21 because it depends on the evidence; what matters for present purposes is that on
22 ACSO's pleaded case, the MFP applies to any difference in price and this is
23 communicated to sellers. So, we don't accept that this is simply Amazon going off on
24 a frolic of its own. We say that the meeting of minds, or the concurrence of wills,
25 applies to any difference in price.

26 Of course, as I emphasised earlier, because this is a pleadings-based application, it

1 must be assumed that the factual allegations pleaded by ACSO can be made out. So,
2 in my submission, it is at least arguable that sellers agree to a policy under which they
3 will be penalised if they offer lower prices on other sales channels. That is obviously
4 an agreement for chapter 1 purposes.

5 Second: even if the policy that sellers agreed to under the BSA is limited to prices that
6 are significantly higher on Amazon, even if it's limited in that way on its face, we say
7 sellers acquiesce in Amazon's practice of enforcing the policy for any difference in
8 price, and they acquiesce through pricing accordingly.

9 We don't accept that this is a case of unilateral action by Amazon. As with the CEPP,
10 the punitive measures identified in the MFPP are the enforcement mechanism, but the
11 purpose and effect of the policy itself is to exert influence over the prices set by
12 third-party sellers.

13 Then the third point is that even if the MFPP applies only to significantly higher prices
14 and is only enforced for such prices, ACSO pleads that individually or combined with
15 the other policies, it prevents or discourages lower prices on rival platforms. In
16 circumstances where sellers are not told what "significantly higher" means; and where
17 there are these other communications flying around, indicating that pricing one cent
18 above on Amazon will land you in trouble; in those circumstances, that's an allegation
19 we're entitled to advance.

20 Indeed, as the tribunal has seen, Professor Stephan pleads that the MFPP is abusive,
21 and he characterises the MFPP as something that applies to significantly higher
22 prices, and Amazon hasn't sought to strike out that claim. So, the tribunal is going to
23 be determining at trial whether the MFPP is capable of anti-competitive effects,
24 whatever its true scope.

25 Given the time, sir, I think all I'll say about the AHRP is that it underlines the bilateral
26 nature of the other policies, because it enables -- well, perhaps I should show what

1 (inaudible) pleading about it.

2 THE CHAIR: It's really a monitoring provision, isn't it?

3 MR LASK: I'm sorry?

4 THE CHAIR: Isn't it a sort of monitoring provision to assist enforcement?

5 MR LASK: We characterise it as monitoring and enforcement. If we go to
6 paragraph 222, on page 70 of bundle A, "... third-party sellers are ... required under
7 the BSA to comply with [the AHRP]". (Pause)

8 Paragraph 223: the AHRP measures third-party sellers' compliance with key selling
9 policies, including the MFPP, that allows Amazon to punish sellers for repeated
10 noncompliance, including by deactivating sellers' accounts. One sees that in 224.

11 Then across the page, 226:

12 "To calculate each seller's 'Account Health Rating', Amazon assigns points to a seller's
13 account based on the number and severity of policy violations. There are four severity
14 levels: critical, high, medium and low."

15 And there's some detail --

16 THE CHAIR: But this doesn't restrict pricing. This is just a means of implementing
17 and enforcing the other (overspeaking).

18 MR LASK: Yes. All I wanted to do was highlight 228, and then I'll make my point:

19 "Upon detection of any new policy violations, a seller loses points, which they can
20 regain by successfully addressing those violations. Repeat violations will cause
21 sellers 'Account Health Rating' to degrade faster."

22 So the only point we make: first of all, it's an important part of the factual matrix. But
23 for present purposes, what's important is that it underlines the bilateral nature of the
24 other policies, because it enables a seller to regain points by addressing its violations;
25 and in circumstances where the violation relates to a seller's pricing, the obvious way
26 to address the violation is by adjusting your pricing.

1 Just finally, sir, I've dealt with Unipart. My learned friend also relies on Cound and
2 Clover Leaf, which were described in Unipart at paragraph 78 as very similar cases.
3 I was only going to refer to Cound, but this was about a BMW dealership. In that case,
4 the Court of Appeal agreed with the High Court that the giving of a notice of
5 termination was a unilateral act. Obviously, a giving of termination is a unilateral act.
6 But what Amazon seeks to do is draw an analogy between the giving of notice to
7 terminate in Cound and Clover, and its own conduct in disqualifying offers from the
8 Buy Box.

9 But as I've already submitted, the disqualification is not the gravamen of ACSO's
10 complaint. Disqualification is the means by which Amazon enforces the impugned
11 policies.

12 THE CHAIR: Yes.

13 MR LASK: Those policies are not unilateral.

14 THE CHAIR: Giving the notice of termination was not the conduct complained of, was
15 it?

16 MR LASK: In Cound, it was. It was the giving the notice of termination that was said
17 to constitute the anti-competitive agreement.

18 THE CHAIR: I thought it was the reason termination was given. Otherwise, I mean,
19 giving a notice of termination is not anti-competitive in itself.

20 MR LASK: Well, we can go to it if helpful, sir. I mean, it may not matter, the difference
21 between us on that, and it may be that your recollection is correct and mine is wrong.
22 But the essential point is that Cound and Clover, in my submission, are quite clear
23 examples of unilateral conduct, and they're miles away from this case.

24 THE CHAIR: Yes. Thank you. (Pause)

25 Reply submissions by MR PICCININ

26 MR PICCININ: Sir, I'd like to organise my reply submissions under three headings.

1 They won't take very long.

2 The first is just one short point on the law. My learned friend referred to, but didn't
3 take you to the Court of Appeal's decision in Achilles, and he referred to that for the
4 proposition that part of the dividing line between unilateral conduct and agreements is
5 where there are responsibilities and obligations that are imposed on the people who
6 sign up to them. I just wanted to show you the paragraph of the Court of Appeal's
7 judgment, because actually it's quite useful in elucidating the distinction beyond that
8 point.

9 That's in bundle H, volume 1, in the first authorities bundle. It's page 688. What the
10 court says there, or the majority says, is that:

11 "It seems to us that there is no error of law in the [court's] decision that the imposition
12 of the Schemes amounts to an 'agreement' ... First, in our judgment, the insistence on
13 the RISQS-only rule [which was a rule that Network Rail had that anyone given access
14 to the infrastructure had to be vetted by a particular provider] does not amount to the
15 imposition of a unilateral requirement by Network Rail. Mr Woolfe gave an example
16 of what he said would be a unilateral requirement: [which is] that no red-headed
17 person be allowed to have access to the rail infrastructure. Perhaps a more realistic
18 example might be that Network Rail might refuse to allow access to any contractors
19 who fail to meet its environmental criteria. It seems to us that that would be a truly
20 unilateral requirement."

21 It's worth just pausing and reflecting on that there. So, Network Rail could have
22 a policy, which is clear to everyone, that it will refuse to deal with them unless they
23 comply with its environmental criteria. It may be that that would be considered to be
24 a very powerful lever or a powerful tool. It may be that the intended consequence of
25 that policy would be that people would then change their behaviour to comply with the
26 environmental criteria; and it may be that, in fact, that is what would happen, that

1 people would change their behaviour to comply with the environmental criteria so that
2 they could gain access to Network Rail's infrastructure.

3 All the same, it would be a unilateral requirement. Ask yourself why that is, going back
4 to Bayer, going back to Unipart. It's because the objective, the conduct that would be
5 complained of in that case, is by Network Rail, saying, "I don't want anyone on my
6 infrastructure that doesn't meet my environmental criteria". That's the policy. That's
7 the conduct that is complained of, and they can achieve that policy unilaterally, just by
8 refusing access to their infrastructure. It doesn't matter that someone changes their
9 behaviour as a result. It's still unilateral.

10 Then the court continued, and this is the part that my learned friend relied on. He
11 says:

12 "On the contrary, here ... it is clear from the Schemes that they impose responsibilities
13 and obligations upon the bodies which sign up to them and that those responsibilities
14 are ongoing. For example, they are required to report breaches of the requirements
15 of the Schemes and to undertake investigations."

16 So, there are ongoing contractual requirements imposed on those who sign up to the
17 RISQS-only rule, and that's what rendered it an agreement in that case. That is, in my
18 submission, quite useful to just to calibrate again your thinking of what we're looking
19 for when we're talking about unilateral versus -- it's a red herring to ask whether people
20 change their behaviour. It's a red herring to ask whether it's intended that you should
21 persuade other people to change their behaviour. That's not what it's about.

22 The question is: what is it that the undertaking, the defendant, is actually doing, and is
23 that something that they need cooperation for, or is that something that's in their gift?

24 With that in mind, my next topic is just to address the CEPP. I'm grateful, sir, for your
25 making the point that we should separate them in our analysis, because I think in my
26 opening submissions I was sometimes jumbling things up a bit. It's much cleaner if

1 we look at them separately.

2 In relation to the CEPP, you summarise my argument accurately, that it is a unilateral
3 act on the part of Amazon, as it is defined by ACSO. Because ACSO -- if you ask
4 yourself what the conduct is, what is Amazon actually doing under the alleged CEPP,
5 Amazon is ensuring that none of its featured offers are at uncompetitive prices. If you
6 ask yourself, is that something that Amazon needs anyone's cooperation to achieve;
7 does it need the sellers to change their prices in order to achieve that objective; no, it
8 doesn't, because Amazon can achieve that objective simply by disqualifying any offers
9 that are uncompetitive, and not having a featured offer for those products, if nothing is
10 satisfying the policy.

11 So, when my learned friend says that cooperation is necessary under the CEPP, he
12 is wrong about that, because when you look at what the conduct is, you can see that
13 just like Network Rail's supposed hypothetical environmental criteria --

14 THE CHAIR: We have got the point.

15 MR PICCININ: Yes. Okay.

16 The second submission under this heading that my learned friend made was that, "Oh,
17 well, it's different here, because becoming the featured offer, being eligible for the
18 featured offer, is really important". It's what he said. It's a powerful instrument.

19 But that, sirs, is a complaint about the effects of Amazon's unilateral conduct. It would
20 be just like saying that our access to Network Rail's infrastructure is really important,
21 and so people will change their behaviour, comply with the environmental criteria, so
22 as to gain access. It may be that that some sellers, at least for today's purposes,
23 change their prices in the hope of becoming the featured offer. None of that transforms
24 unilateral conduct into an agreement.

25 Indeed, that is always the fact pattern in all of these cases. It was true in Bayer. It's
26 true in Clover Leaf. It's true in Unipart. It's always the case that people who sign up

1 to the agreement, it's always the case that if there are powerful instruments, then you
2 get conduct accordingly.

3 The point of principle that was stated in Unipart is that if you are not dominant, then
4 you are allowed to engage in --

5 THE CHAIR: I think we've got that.

6 MR PICCININ: You've got that. Okay.

7 THE CHAIR: Do you want to move on to the MFPP?

8 MR PICCININ: MFPP. Yes.

9 In relation to the MFPP, again, there are two points. There is a point of construction
10 of the agreement, and when I say "construction" now, sir, I'm acknowledging the
11 theoretical possibility that it could be construed differently for competition law purposes
12 than for contract law purposes. But what does the agreement mean?

13 In this context, we have the agreement, and you can see what it means, and I'm not
14 going to repeat my submissions about what it means, but we say it's clear. Now, my
15 learned friend says that, "Oh, well, that might be what it says, but what it means is
16 something else", and that Amazon communicates to sellers that it means something
17 else. Initially he relied on the document that he now accepts, I think, doesn't relate to
18 the CEPP, or at least he's got no basis -- sorry, doesn't relate to the MFPP. He's got
19 no basis for saying it does.

20 Then he shifted to the US pleading, which I'd like to turn up, if I may, to bundle B,
21 page 483, paragraph 119. We need to look at this with just a little bit of, of care, but it
22 won't take long.

23 The first sentence says what my learned friend wants it to say. It says that Amazon
24 sends the message that pricing products higher on Amazon than off Amazon is
25 a pricing practice that harms customer trust and violates the MFPP. But that is just an
26 assertion. We need to look at what follows. In what follows, in that paragraph, you

1 will not find a single communication to sellers. In that context, it cannot be said that
2 there is any agreement with sellers, any different agreement being negotiated and
3 agreed with sellers, because none of those other statements are even alleged to have
4 been made to the sellers.

5 If you read them carefully, they are also not statements to the effect that the MFPP
6 means that sellers are obliged to have price parity. None of them actually say that.
7 They say things in more general terms, like that it can harm customer trust to have
8 higher prices on Amazon than elsewhere. Of course that's true. For example, if your
9 price on Amazon was significantly higher than elsewhere, that would indeed harm
10 customer trust.

11 But taking these snippets, which don't actually say that the MFPP is breached by being
12 a penny above or even a cent above the competitive level, they don't say that. So
13 they don't provide any basis for that submission, either, even if they had been
14 communicated to sellers, which they weren't.

15 In addition, you already have my points that as a construction of the agreement that's
16 there, it's simply illogical. You also have my point that it's actually inconsistent with
17 ACSO's case about what the CEPP is, because that presupposes -- and all of the
18 communications from Amazon to the sellers about the so-called CEPP
19 presuppose -- that you can.

20 THE CHAIR: You made that point.

21 MR PICCININ: I did make that point.

22 Well, those are my points.

23 THE CHAIR: Yes, thank you. Just one moment. (Pause)

24 Thank you. Well, we should move. We need to finish at 5.00 pm to the outstanding
25 application, which is the application by ACSO, which I think is set out -- is it in your
26 skeleton argument at the very end? The communications protocol.

1
2 Communications protocol application

3 MR BOURKE: Sorry, I think I should cut it quite significantly, given the timing. So I'll
4 try and fly through this.

5 THE CHAIR: Well, we have thought about this.

6 MR BOURKE: Yes.

7 THE CHAIR: Amazon said they have no intention at the moment to send such a
8 communication; they haven't sent it in the Hammond case; they haven't sent it in the
9 Stephan case, which might be a more likely case for it, where they're dealing with
10 some large merchants.

11 It would be a fairly onerous direction. We have some guidance from the
12 Court of Appeal in McLaren that sort of encourages parties on this point to follow what
13 one might call the Del Giudice guidelines, namely the approach that the Canadian
14 court adopted, and the Court of Appeal thought was sensible. We don't feel inclined,
15 subject to hearing from you of course, to make an order to that effect. But we would
16 have thought that if Amazon were minded to make any such communication, it would
17 be sensible to follow that approach. Mr Piccinin will be well familiar with it having been
18 in that case, and indeed in the Ennis case.

19 That's to say that if there's a communication that's out of the normal course of
20 Amazon's business, on a topic that's substantively significant to these proceedings
21 and, one would add, not related to the pursuit or gathering of evidence for these
22 proceedings, then it would be desirable that they would send a draft to the class
23 representative and await your comments on it.

24 I don't know if that's something that Amazon is willing to indicate that it's minded to do.

25 By the current indication, they've no intention of sending any communications at all.

26 And in those circumstances, to make an order like this would be extremely unusual

1 and I think undesirable. That's our present --

2 MR BOURKE: Yes. Thank you, sir. I mean, it's slightly more complicated than that

3 in terms of their intention not to do it. Because ACSO wrote to them during the summer

4 and asked them to agree not to make any communications encouraging class

5 members to opt out.

6 THE CHAIR: Yes.

7 MR BOURKE: And inexplicably, they refused.

8 THE CHAIR: Well, they don't want to sign up to an agreement, but they have said to

9 the tribunal that's not their present intention.

10 I think what I can ask Mr Piccinin, is if that intention changes, would Amazon agree to

11 let the class representative know this is all. I'm sorry I said Mr Piccinin, now, I shouldn't

12 have made that assumption. This was all on the assumption, of course, that the ACSO

13 case gets certified, otherwise this falls away.

14 MS LUKACOVA: Sir, may I just take instructions?

15 THE CHAIR: Yes.

16 MS LUKACOVA: That's fine, we have no issue with that.

17 THE CHAIR: Yes. If you undertake that, you will then inform the class representative.

18 If that happens, you can then seek to discover what's the nature of the communication,

19 and if so advised you can apply to the tribunal for direction and an order, and it will be

20 considered then as a matter of case management.

21 Rather than otherwise, we'd be making this sort of blanket order in every case, and

22 I don't think that's desirable.

23 MR BOURKE: I'm very grateful for the indication.

24 MS LUKACOVA: Sir, that was merely an indication rather than an undertaking.

25 THE CHAIR: Right.

26 MS LUKACOVA: Can I also say I am attending the CMC next week as well, so if it's

1 convenient to the tribunal and to everyone, we would also be content to deal with it.

2 THE CHAIR: Well, we can revisit it at the CMC, and perhaps that will give you
3 a chance to take fuller instructions on this point. As I say, we're very reluctant to make
4 any order, but it would be helpful, Amazon having said, I think it may be in the
5 skeleton --

6 MS LUKACOVA: (Overspeaking) in the skeleton that Amazon doesn't intend to
7 encourage people to opt out. But certainly my instructions have been to resist any
8 order.

9 THE CHAIR: Yes. Sorry, I'm looking for -- there's no intention -- yes, of encouraging
10 customers to opt out. What I was floating with you is that if that intention changes,
11 that you then notify the class representative.

12 MS LUKACOVA: Yes, except it may be more complicated than that, because if the
13 intention were to change and we did intend to encourage people to opt out, that's one
14 thing, of course, but the way this has been put by ACSO tends to capture a wider
15 range of circumstances, potentially. So that's where it gets complicated.

16 THE CHAIR: Yes. I think it's put in paragraph 62 as:

17 "Amazon shall not send mass communications to proposed class members
18 encouraging them to opt out during the opt-out period."

19 That's paragraph 62 of, if I understand it, your skeleton argument, but quoting from the
20 reply; is that right, that's what you are seeking?

21 MR BOURKE: Yes, sir, we think it's very narrow --

22 THE CHAIR: Yes, I think it's been narrowed from the earlier correspondence. So it
23 is, I think, just directed to encouragement to opt out.

24 MS LUKACOVA: So if the question is whether we're prepared to notify ACSO if our
25 intention changes as put in the skeleton, then I understand that we would be prepared
26 to do that, absolutely.

1 THE CHAIR: Yes.

2 MS LUKACOVA: But that wouldn't be the same thing as agreeing to the order as
3 sought by ACSO, because we regard that as broader than that.

4 THE CHAIR: Yes.

5 MS LUKACOVA: And it would encompass various statements that we would feel we
6 are entitled to make, and there's no basis for having to agree those statements.

7 THE CHAIR: Yes, well, I think if that can be taken further in correspondence between
8 now and the CMC, and if it's not satisfactorily resolved, we can revisit it at the CMC.
9 But given the very helpful indication that you've given, I would expect that it can be.

10 MS LUKACOVA: Yes.

11 THE CHAIR: Thank you. Is there anything else, Mr Lask?

12

13 Housekeeping

14 MR LASK: Well, sir, there are one or two homework items that I owe you a response
15 on.

16 THE CHAIR: Yes, it's the LFA point we're getting to.

17 MR LASK: It's the LFA. We do have an amended version of the LFA. I appreciate
18 the tribunal indicated it didn't necessarily expect one.

19 THE CHAIR: Yes.

20 MR LASK: But it has been agreed. And rather than me to try and summarise what
21 we've done, I was proposing just to provide it to the tribunal.

22 THE CHAIR: Yes.

23 MR LASK: So, we've got some copies. (Handed)

24 We hope that we have addressed the tribunal's concerns. I wasn't proposing to make
25 submissions, but I can certainly help explain what we've done if that would assist.

26 THE CHAIR: Although we said we wouldn't sit beyond 5.00 pm, we will take this

1 outside for five minutes and come back, and raise any points if we have any.

2 MR LASK: All right.

3 (5.03 pm)

4 (A short break)

5 (5.13 pm)

6 THE CHAIR: Mr Lask, this is a considerable improvement. We note the deletion of
7 the opening of 21.5, of a reference to defendant, and indeed the reversion clause. But
8 we are still concerned that, by the insertion of "the best endeavours" obligation in 21.4,
9 which gives priority, therefore -- obliges you to settle by seeking in a settlement, if
10 possible, to get the 21.4 route as opposed to the 21.5 route, best endeavours being
11 quite a strong obligation. That's an obligation to the funder.

12 The point we were seeking to make is that the class representative, ACSO, should be
13 left with a free hand as between these alternatives. So that you could either do 21.4
14 or you can do 21.5, but there shouldn't be any form of obligation to have to prioritise
15 the 21.4 form of settlement.

16 It's really -- obviously not going to redraft it in the tribunal, but it's not very difficult to
17 achieve to say that if the settlement takes 21.4 form, and it should include these
18 provisions, and if it takes the 21.5 form, it should include those provisions. That's the
19 first point.

20 The second point is we did say that we are concerned about the notion that there's,
21 under the ACSO's contractual obligation to the funder, it's got to have a settlement
22 where, as a term of the settlement, these payments have to be made. What we
23 suggested is a simple way achieving -- what our concerns are is to say where it says
24 in what's now 21.4.2, I think. 21.4.2.2, where it says:

25 "Including funders' total entitlement, any conditional ATE insurance including IBT, and
26 any conditional fees due to solicitors and counsel or in such amounts as will be

1 approved by ..." [as read]

2 I think you're saying "the court" and I assume that's to find somewhere to mean "the
3 tribunal". So it says:

4 "... or in such amounts as will be approved by the Court." [as read]

5 And similarly, where in 21.5 it says:

6 "Including the funders' total entitlement, any conditional ATE insurance cost, including
7 IBT, or in such amounts as will be approved by the Court." [as read]

8 MR LASK: Yes.

9 THE CHAIR: In other words, if the tribunal should say, "Well, the funders' total
10 entitlement is unreasonable in circumstances in which the settlement has occurred",
11 and this figure is a reasonable figure, that will be consistent with the settlement and
12 you won't be in breach when prevented from reaching such a settlement by your
13 contractual obligations to the funder.

14 MR LASK: Yes.

15 THE CHAIR: So those are the two changes that are needed. If you can let us know
16 in the next two days with a revised version.

17 MR LASK: Thank you. I'm grateful.

18 THE CHAIR: You've given us otherwise a lot to think about. We're not in a position
19 to announce a decision straight away. If we can, in the next few days, send you what
20 will be a sort of headline decision with detailed reasons to follow so that you know
21 where you are for the CMC, we will do so.

22 We appreciate it means ACSO's not in a position, fully, to participate in the CMC,
23 because it won't know in time to do skeleton arguments and so on. But you can
24 obviously observe the CMC. But if you are participating, there may have to be
25 a supplementary CMC that is arranged.

26 MR LASK: I see. So may we proceed on the basis that we won't be required to file

1 | skeleton arguments on Friday for the CMC.

2 | THE CHAIR: Yes.

3 | MR LASK: But we may be invited to attend in a less active capacity?

4 | THE CHAIR: Yes, I think that's exactly (overspeaking).

5 | MR LASK: That's helpful, sir, thank you. Then the only other thing was the point that

6 | was raised with me on class definition, and the reference to class members being over

7 | 18. We've reflected on this. I should say that ACSO doesn't feel very, very strongly

8 | about it, but the conclusion we've reached is that the sensible thing may be simply to

9 | delete the reference to the age of class members.

10 | I'll explain why: we understand from Amazon's conditions of sale that Amazon does

11 | not sell to under 18s. If that's right, then by definition, if you've made a purchase from

12 | the Amazon marketplace --

13 | THE CHAIR: Yes.

14 | MR LASK: -- you're over 18. And we note that the Hammond class definition doesn't

15 | refer to the age.

16 | THE CHAIR: There are some nods, I think.

17 | MR BANKES: That must answer my question that you know how old people are.

18 | MR PICCININ: There is a paragraph in the JLP judgment about this, actually. I think

19 | at 179?

20 | THE CHAIR: Both my colleagues were in that case, but I wasn't, I think. That's right

21 | that you don't sell to people under 18?

22 | MR PICCININ: (Overspeaking).

23 | THE CHAIR: Sorry?

24 | MR PICCININ: It's paragraph 286.

25 | THE CHAIR: Thank you.

26 | MR PICCININ: I remember it well, sir.

1 THE CHAIR: And that is to that effect?
2 MR PICCININ: Yes.
3 THE CHAIR: Yes. So however much one hears about children purchasing on
4 Amazon, they're officially over 18. Yes, very well. Well, I think that does seem
5 a sensible course.
6 MR PICCININ: Thank you, sir.
7 THE CHAIR: Thank you very much.
8 (5.21 pm)
9 (The court adjourned)
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1	
2	
3	

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?