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IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 15th October 2026

Before:
Sir Peter Roth
Charles Bankes
Keith Derbyshire
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Robert Hammond & Professor Andreas Stephan

Class Representatives

V

Amazon.com, Inc. & Others

Defendants

A P P E A R AN C E S

Philip Moser KC and Ben Rayment (Instructed by Charles Lyndon Limited & Hagens Berman EMEA LLP) on behalf of Robert Hammond

Kieron Beal KC, Daniel Carall-Green and Hannah Bernstein (Instructed by Geradin Partners Limited) on behalf of Professor Andreas Stephan

Jon Turner KC, Oscar Schonfeld, Kristina Lukacova and Alexandra Breckenridge (Instructed by Herbert Smith Freehills Kramer LLP and Covington & Burling LLP) on behalf of Amazon.com, Inc. & Others

Ben Lask KC (Instructed by Stephenson Harwood) on behalf of ACSO

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Thursday, 15 October 2026

(10.30 am)

Directions - Class members

THE CHAIR: Mr Beal, we have considered this a bit overnight, and where the Tribunal is, on our understanding having looked at what seemed to be the three key authorities, that is the Court of Appeal in McLaren; this Tribunal in Ennis; and the judgment by Mr Malek KC in Rodger.

MR BEAL: Yes.

THE CHAIR: The position is this: you are not entitled to see any communication that goes from Amazon to class members, represented persons, or to necessarily co-operate with them if they don't want to in the making of such communications, because such communications are protected by litigation privilege.

Secondly, the Tribunal has broad case management powers which it can use to control communications between defendants and represented persons. It could, in theory, order that the defendant makes no communications with represented persons. That obviously wouldn't invade litigation privilege because nothing privileged would arise --

MR BEAL: Nothing would -- exactly.

THE CHAIR: But that would be a very extreme thing to do, and we are certainly not minded to make such an order in this case. It would be a very exceptional order. Obviously, I say this without having heard from you.

But at the same time, case management powers can be used to control the nature of the communication and what has to be said in the communication. One sees a clear example of that being done in the Ennis judgment. If one looks at Ennis, where the

Tribunal went through McLaren with some care and considered it.

MR BEAL: Yes.

THE CHAIR: And then on the very last page, it's paragraph 118 of the judgment in Ennis.

MR BEAL: 527 for those following.

THE CHAIR: Where they say at the bottom of page 52:

"... the following matters should be expressly stated on the face of the communication."

And then they set out four matters, then they say:

"... [there are] other points [which] would more appropriately be addressed by directing that the letter specifically draws attention to paragraph 80 of this judgment."

Obviously, it's not appropriate here -- a letter from Amazon to draw attention to paragraph 80 of the judgment in another case, so one would be looking at some of the things in paragraph 80 that would be then set out.

MR BEAL: Yes.

THE CHAIR: And we can direct that that should be done. That's the approach that we are minded to adopt in this case. Now, I haven't heard from you. If you want to push back and say, "No, we should stop all communication". I haven't heard from Mr Beal, but that's where we are, having reflected on this.

Submissions by MR BEAL

MR BEAL: If where we end up is that a communication is appropriate, my understanding is Amazon accepts that something along the lines of the Ennis or Del Giudice guidelines, tramlines, should be used for any communication. That's really not where the battleline is. The battleline is: is it appropriate to have a temporary pause on any communication with the class until we have a managed and structured approach to selecting class disclosure?

Because there is a risk, in my respectful submission, of any unilateral approach to the

class seeking voluntary disclosure undermining the benefit of a structured approach. So if for example, the Tribunal were to decide in due course that, in fact, on a case management basis, disclosure from the class is simply not necessary or reasonable at this stage, because it's not going to be sufficiently probative of any of the liability issues that are being determined solely at Trial 1, then a unilateral process of seeking voluntary disclosure from the class in the meantime is just a recipe for chaos.

THE CHAIR: It's a recipe for chaos only if: (a) they start providing disclosure --

MR BEAL: Well --

THE CHAIR: They may or may not.

MR BEAL: -- if the Tribunal is of the view that there's no necessity, or it wouldn't be reasonable for the class to provide disclosure that goes to any of the relevant liability issues which are going to be teased out through the Redfern process, then seeking that disclosure on a voluntary basis is tantamount to going behind the Tribunal's back on that determination. That's our concern.

THE CHAIR: Yes, but the determination would only arise if there was an application for an order, wouldn't it?

MR BEAL: But what we're proposing is a structured approach to the determination of whether or not any class or any class disclosure is necessary. Mr Holt says it is, and he's asserted that it is. I'll take you to Dr Houpis' evidence where he says it's not necessary in his view at this stage, certainly without sight of the Amazon disclosure -- it's not necessary and therefore we infer not reasonable to order the class to make disclosure of something that isn't needed for the determination --

THE CHAIR: It will be quite difficult for us to decide whether it's necessary for quite some time.

MR BEAL: But there would have to be a consideration of what Amazon says it proposes to get from class disclosure that it can't get from material it has disclosed.

If, for example --

THE CHAIR: If disclosing, yes.

MR BEAL: Yes. If we look, for example, in the letter from Covington, 30 September 2026. This is bundle A, tab 19, page 566.

THE CHAIR: Just a moment.

MR BEAL: That's bundle A, tab 19, page 566.

THE CHAIR: 566. This is --

MR BEAL: It's dealing with third-party seller disclosure information requests. It says in paragraph 7:

"[These] have been formulated by reference to the pleaded issues."

THE CHAIR: Yes.

MR BEAL: It then says:

"Further, the [third-party] Disclosure/Information Requests have been framed to only request documents and information that cannot be met from Amazon's own disclosure."

And then footnote 1 says:

"Amazon is a very large organisation. It is theoretically possible some relevant information ... may be held within its vast systems, but it would be extremely challenging to confirm definitively that this is not the case."

Well, we haven't got to the stage where they are conducting a proportional and reasonable search yet of the information that's available to them. When we see that the information that Dr Houpis is suggesting could deal with these issues -- when we look at Dr Houpis's approach -- there is only one alternative basis upon which third-party seller disclosure may become relevant. That can only be assessed once we've got the Amazon disclosure.

Now, the Tribunal is acutely aware that communications with class members impose

a significant burden on them, with the suggestion that Amazon say they will pay their reasonable costs. But some of these sellers are therefore going to be facing a disclosure exercise, which in Ennis was estimated to cost in the region of £30,000.

THE CHAIR: If they want to do it --

MR BEAL: Well --

THE CHAIR: -- they'll be told that, "You don't have to do it. There's no order. If there's an application for an order, it's likely to be limited to a specific document or categories of documents, and the Tribunal is likely to order Amazon to pay your costs of taking legal advice, your costs of responding to the application, including the hearing, and then your costs of compliance with the order".

If one of the represented persons who reads that and says, "Well, that's all fine, but I'm happy to do it now ..." And of course, if that information is produced and Amazon gets it, it'll have to be disclosed to you. There's an issue about confidentiality, which we'll have to raise because some of this is highly confidential, particularly between a third party and Amazon.

MR BEAL: It would also be confidential as between class members.

THE CHAIR: As between class members, yes.

MR BEAL: So, we'd need to have a series of rings, but I don't think the practicalities --

THE CHAIR: That can be perhaps dealt with, but my concern is: the two experts may have a different view of what is, they think is necessary. That would be thrashed out when there's a disclosure application.

MR BEAL: Yes.

THE CHAIR: If there is one. And if Amazon actually doesn't get some of this material, then seeks an order from the Tribunal.

MR BEAL: Could I please show you Dr Houpis' approach? It's in bundle C, tab 25, page 125.

THE CHAIR: This is the 30 September ...

MR BEAL: No, this is 3 July 2026.

THE CHAIR: Oh, Dr Houpis.

MR BEAL: Yes, Dr Houpis.

THE CHAIR: Yes, I'm looking. So this is bundle ...

MR BEAL: Bundle C, tab 25.

THE CHAIR: That's page ...

MR BEAL: 125.

Dr Houpis says:

"One issue for consideration is any data/information to be collected through third-party seller disclosure. Houpis 1 has set out that this could be necessary for separating the effects of abuses 3, 4 and 5 on the marketplace ... hence this would in principle be required for Trial 2, if it is still relevant."

That's paragraph 5 at the bottom of the page, sir.

"As both claimed abuses 3 to 4 (raising costs of multi-homing) and abuse 5 (deterring sellers, [et cetera]) can lead to foreclosure ... in order to assess the materiality of the effects of abuses 3 to 4 and abuse 5, a [third-party] seller survey could potentially be useful."

So he's planning to consider that after he obtains information from Amazon related to abuse 5. When one comes on to consider, then, at page 127, abuse 5 in the right-hand column, he indicates in "Additional analysis for quantum at Trial 2":

"I would quantify the resulting marketplace fee overcharge using the same broad approach [and] econometric analysis if relevant."

But otherwise -- over the top of the page, he then says in the middle column he would use:

"... targeted seller evidence on multi-homing and pricing behaviour."

THE CHAIR: I see, yes. Targeted seller evidence.

MR BEAL: But that's only if necessary. If we turn back to the bottom of page 127, what he's proposing to do is assess Amazon's fair pricing policy and whether it deterred marketplace rivals. He would:

"... focus on documents on the policy's purpose, monitoring and enforcement, data on Buy Box removals, and, if necessary, targeted seller evidence on multi-homing."

So he's not refusing in principle to consider the prospect of third-party seller disclosure; that's not our case. Our case is we don't know at this stage whether it is, in fact, going to be necessary or reasonable, which of course, is the test for disclosure from a party or non-party, disclosure before this Tribunal.

We then see, please, at page 140, paragraph 61, he says:

"I would need to assess the quality of the evidence provided by Amazon and come to a view whether this evidence needs to be supplemented by a third-party seller survey, requesting information from a sample of sellers on the following ..."

So he's saying he needs to make a determination of that issue only once he's seen the quality of the evidence provided by Amazon, and whether that evidence then needs to be supplemented.

One is again not ruling out the prospect of seeking a third-party seller disclosure where it's necessary, but the idea would be that it would be used selectively in a targeted way. It is therefore proportionate for the class members. It's that proper approach that we say is endorsed by having a temporary "hold the ring" position on class communication.

So whilst, with respect, sir, it's quite right that a blanket ban on class communications against either litigant before you would be an unusual direction, that isn't what we're seeking. We're seeking a temporary "hold the ring" position until we can clarify the precise scope of the targeted disclosure from third-party sellers that may or may not

be needed. It's open to Amazon, of course, to reach out and speak to witnesses, and all of those communications will be covered by litigation privilege, just as ours would be when we're reaching out to third-party sellers and saying, "Are you interested in being a witness?" That's not controversial either.

If we could then, please, look in this bundle at tab 28, there is then an initial list of documents that are being proposed for documentary requests from Amazon by Dr Houpis. (Pause)

That starts at page 150, and just so I can show you what he's envisaging, it might be necessary by way of third-party disclosure, rather than what he terms disclosure 1 and 2; disclosure 1 being other proceedings, disclosure 2 being second stage disclosure.

If you would be kind enough, please, to look at 178 -- the page needs to be turned around, difficult perhaps electronically -- but we see the second to last entry. (Pause) Bundle C, tab 28, page 168, second to last row.

He's dealing with information on prices of parcel delivery companies made available to FBM sellers, and in the third column he is envisaging a survey --

THE CHAIR: Just a moment.

MR BEAL: I'm sorry.

THE CHAIR: Yes. Survey of parcel delivery companies.

MR BEAL: So that might require disclosure applications for parcel delivery companies. To like effect, at page 170, one is dealing with one-stop fulfilment providers. Again, none of this is relevant. I'm simply showing where third-party disclosure has been recognised to be potentially applicable.

Then at page 171, in relation to evidence of duplicated costs for third-party sellers using FBA -- this is the second entry down -- he is envisaging either disclosure, or the survey of third-party sellers. So that's the sole -- (Pause)

171, second entry down.

THE CHAIR: Duplicated (inaudible).

MR BEAL: That's the only place in this document request where Dr Houpis envisages a survey of third-party sellers, and it's caveated by being in the alternative with disclosure 2, because his consistent approach has been, "Let's see what we get from Amazon and work out whether we can deal with everything we need for Trial 1 liability issues, which aren't going to involve a full-scale effects analysis; they're not going to involve pass-on; they're not going to involve quantum issues".

So the scope in principle for seller disclosure is much reduced, as this Tribunal recognised when deciding to split Trial 1 from Trial 2.

THE CHAIR: Yes.

MR BEAL: We have to say we find this slightly odd, because if Amazon has this data but says, "Oh, well, it's a difficult job for us to produce it, because we're a large company and our network is very big", that rather masks the fact that surely they will prefer the quality and accuracy of their own data to such data as third-party sellers may hold, which may have all sorts of issues as to its translatability into a system for working out what it actually says, and it may have accuracy issues. I mean, some of these sellers are indeed quite small and aren't likely to hold significant repositories of information or data.

So it is rather odd, we say, that Amazon is saying, "Conduct this very expensive ..." I mean, using the Ennis figure of £30,000 -- it's unclear at the moment, and probably I can't say because it's covered by a confidentiality claim, how many people they are expecting, but say it's in the region of 100 or 150 or so -- £30,000 each for a disclosure exercise, you're looking at over £3 million worth of costs for disclosure exercise to try and get material --

THE CHAIR: I don't know if the costs are relevant, because I don't know what the -- do

we know what all the requests were in Ennis? I mean, the figure of £30,000 comes from Ennis, doesn't it?

MR BEAL: It does come from Ennis, yes.

THE CHAIR: Yes. But, I mean, that may not relate to compliance with these requests at all, because these requests may be much more extensive.

MR BEAL: Well, perhaps that's a convenient moment to look at what Mr Holt is asking for.

THE CHAIR: Yes, well, we have done that. But do we know the scope of the requests that Apple sought to make in the Ennis case?

MR BEAL: Well, we see at page 480 of the bundle of authorities that annexed to Apple's letter was a draft list of 19 proposed --

THE CHAIR: There is an annex attached, isn't there?

MR BEAL: Seemingly, there was an annex attached to the letter. I don't think it's replicated in the judgment. But we see that there were -- this is paragraph 6 -- 19 disclosure categories, five broad topics: Apple's services, the prices of apps and in-app content, multihoming and substitution, financial information relating to the download or purchase of apps, and then domicile; and Apple stated it proposed to ask class members to make searches covering 2017 to the present, so a period of nine years.

We can compare and contrast the request that Mr Holt is making, because we can see those requests at page 583 of bundle A, tab 21, page 583.

THE CHAIR: We have looked at that.

MR BEAL: The first point to note is the time frame which is to be covered, which we see at the top of 583 relates to the period from 1 October 2015 to 26 June 2024. So that's well into nine years.

THE CHAIR: Yes. We've looked at this, and it clearly goes far beyond what the

Tribunal would order.

MR BEAL: Yes.

The next point I would seek to make is that this is now predicated also on a sampling process. I don't know if the Tribunal has had a chance to look at the sampling note that arrived on Friday night.

THE CHAIR: This is 9 October?

MR BEAL: It is D, tab 20, page 542.

My version hasn't got the redactions shown, unfortunately, but I hope that the Tribunal's does.

THE CHAIR: We have one that does, yes.

MR BEAL: If one looks at what's going on here, one sees in the introduction that Mr Holt is proposing to come up with a basis for making sellers' requests to get an extract of data. The "Sampling frame" under 1.2(c) seeks to exclude sellers in product categories. (Pause)

You'll see that he is proposing to exclude what I would describe as small sellers, by reference to a value, and he is then proposing to adopt a candidate pool -- this isn't redacted, so I can say it -- of 200 sellers. So when I said earlier 100 to 150 --

THE CHAIR: Small sellers, this is sellers who have sold less than 1,000 in six years?

MR BEAL: Yes.

THE CHAIR: That is sort of (inaudible) insignificant, but there would be many other small sellers.

MR BEAL: When we look at the candidate sample, he is then proposing to do desk research on the 200 to establish which multi-home, and we see --

THE CHAIR: What he's getting to is a sample of 85, isn't he?

MR BEAL: He's going to reduce it to 89. That's at the bottom of page 543.

THE CHAIR: 85, yes.

MR BEAL: Who are multi-homers, and four are then household names that he sought to add in.

THE CHAIR: Which, although (inaudible) adds to the 85, so 89. Yes.

MR BEAL: You end up with a very heavy concentration of multi-homers, even though if one turns to page 548, the sample from whom that final figure has been drawn is based on the 200, and of the 200, we see that only 124 were multi-homers. So you're already having a process which is rather opaque. Mr Holt says it's rules-based, but it's rules that he's devised in order to end up with -- rather than having a figure of approaching 60 per cent of the 200 being multi-homers, something approaching 90 per cent and higher is multi-homers.

So multi-homing seems to have been over-represented. There's obviously a risk of cherry picking. 2.24 at page 550, Mr Holt has added four household names, but it's not clear the basis upon which those household names have been selected. It seems to be because they have physical stores; see paragraph 2.22, bottom of page 549. But of course, the vast majority of third-party resellers on Amazon don't have any physical premises, and yet four of the 89 are now going to be people with substantial bricks and mortar premises.

There is an unclear purpose as to why we are going to be oversampling sellers who use self-fulfilled Prime. At paragraph 2.31, he says he proposes to:

"... fill the remaining eight places by considering both Sellers who use SFP ... and those who do not ... Because the ... Sellers from the DD sample are both in the non-SFP group, eight further Sellers are added split as follows: three that do not use SFP and five that do, going from largest to smallest in terms of [numbers] ... fulfilled with Royal Mail."

He is basing that seemingly on the proposition that they are more likely to obtain documents that will be of relevance. But of course, trying to find sources of evidence

to prove a point does not mean that you end up with a representative sample. There has been a complete omission of consideration of whether the sellers compete with Amazon Retail, and there's also an exclusion of sellers who are no longer active with Amazon. We see that at paragraph 2.39, page 553 and 3.2.

3.2 says in terms at page 555:

"The Amazon Extract covers Sellers who may be in the class but are no longer active on Amazon Store (including dissolved Sellers). The candidate pool is therefore drawn from a sampling frame which is representative across the Relevant Period ... Sellers who are no longer active or have been dissolved may be unable to respond to requests [(inaudible) they have been excluded]."

What that means is: anyone who has been forced off the Amazon platform is not within their proposed sample. Anyone who has ended up in a dispute with Amazon has also been excluded, because we see at paragraph 2.39, page 553, one of the sellers was identified as being in dispute and on that basis was replaced with another one.

Given that our case is that Amazon's abuse has given it an unfair competitive advantage, our case is that a number of third-party sellers are very disgruntled with the service that they've received from Amazon and by Amazon's conduct. Excluding from the representative sample people who have got a beef with Amazon, or are no longer in existence because of Amazon's conduct, is, with respect, one-eyed. Obviously, if they have been dissolved, they're not going to be a class member, because they're excluded. But if they have simply stopped using the Amazon store because of disgruntlement, they are a class member, and yet that won't feature in the sample at all.

In terms of -- we haven't formally responded to this because we only received it on Friday night, but Dr Houpis is of the view that a great deal more analysis is required before we can work out exactly what, if any, disclosure might be required. That's clear

from the evidence that I've shown you; and in relation to the sampling exercise, the critique I've already given you this morning is indicative of concerns within our team that are obviously subject to litigation privilege and which I do not waive, concerning the accuracy and reliability of the representative sample that is being put forward. It's challenging to comment specifically on the sampling methodology and size without understanding: what is one seeking to achieve with the sample?

One needs to understand what's the purpose of having a sample that is said to be representative. If you don't know what it's meant to be representative of, it's quite difficult to work out what the proper approach is. If it is genuinely representative of the entire class, then skewing it in favour of multi-homing and larger sellers, and those who use SFP -- that is not going to be representative of the entire class. Adding in four household names with bricks and mortar premises is not going to be representative of the entire class. The sample size proposed to address questions 1.1 to 1.5 appears small and potentially biased.

THE CHAIR: Just to be clear, that's the 89, is it?

MR BEAL: No, it's the (a), (b), (c).

THE CHAIR: What, in Mr Holt's appendix A? He says sellers (a), (b), (c); that's in fact 89, is it?

MR BEAL: That's my understanding. It's not entirely clear.

THE CHAIR: Then under part 2 of that appendix, "Data information requests made to sellers (a), (b), (c), (d), (e), (f)." That's the 89, I think, maybe. Then how many for the first part?

MR BEAL: 559. It looks as though (a) to (c) go down to number 14, so I've misspoken.

THE CHAIR: 14?

MR BEAL: That's 14 out of the 89.

THE CHAIR: Yes.

MR BEAL: My understanding is -- no, I don't think that's necessarily right. There's a reference to SH1, SH2 at the bottom. I probably ought to know what the acronym stands for -- "single homing", sorry.

THE CHAIR: Yes, I see it. Those 14.

MR BEAL: Yes. Those are not the household names; that's the single homers. So 85 out of 89 are multihoming; there are four that are single homing; and the household names are scattered within the 85.

But of course, until we know what the point of all this is, if the point is to obtain disclosure that goes to a very specific point that Amazon wants to argue, then the search should be for who has that material. Then there'll be an argument about whether it's representative. If this is intended to be representative disclosure of all issues across the class, then a very different exercise may well need to be conducted. And Dr Houpis, I'm sure, would want to comment on the appropriateness of some of the assumptions and propositions that have gone into this.

What we don't know at the moment, because it's not stated, is what hypotheses or propositions Mr Holt is intending to test with third-party seller information in relation to market definition, abuse 1, abuse 3, abuse 4 or abuse 5. So we simply don't know what are the documents you are trying to get and what are they going to go to.

THE CHAIR: Well, we do in some cases because he's explained it in his first three pages prior to setting out the request; request 1.4 is concerned with market definition. So there is some explanation of what he intended to go for, I think, which refers to the different requests.

MR BEAL: What we don't have is any analysis either of why his claimed assertion for why this is necessary for this study can't be met by Amazon's own data. He hasn't engaged with Dr Houpis' suggestion of sources of evidence.

THE CHAIR: Well, we don't really know what he's done. It may be in some of it one

can't, but one can see that 1.4, if it were ever ordered, clearly wouldn't be available from Amazon's own data.

MR BEAL: I'm sorry, is this bundle A? This is the request.

THE CHAIR: Yes, 584, bundle A.

MR BEAL: Thank you. (Pause)

Yes, it is true that obviously if you're asking for internal documents held by a third-party seller, that those will be available from a third-party seller. The question is whether or not Amazon has different documents that go to determine the issue of whether or not it's likely that a seller would be using another channel and what the other retail channel would be.

THE CHAIR: Yes.

MR BEAL: Because Amazon is highly likely to have its finger on the pulse of the market, and know what its rivals are doing, and know, for example, the churn data for its own sellers and the risk of sellers leaving and joining rival markets.

THE CHAIR: The underlying question is whether, with the warnings and explanations indicated at the outset that would have to be included in any letter, Amazon should be allowed to go off, seek a whole lot of information, which the Tribunal, if they had to apply for an order, is most unlikely to order -- in some cases, certainly won't order. And which, on that application, of course, you would then be able to say one reason they shouldn't be ordered; it's not proportionate, it's not necessary, et cetera.

MR BEAL: Yes.

THE CHAIR: And whether a sampling exercise, if it's going to be done and should be done, really, under the supervision of the Tribunal rather than each side seeking to do their own.

MR BEAL: That's essentially my submission. My submission is also that the "cunning plan" I tried to introduce in five minutes last night was also to get these experts to talk

to one another, have information flowing between them, get them to try and narrow the areas of dispute. Because if we end up with a position where, for example, Dr Houpis accepts, following his independent duty to the Tribunal, he's convinced that Mr Holt has actually made a good point and there is something that needs to be covered, then the experts can work together to work out exactly the best source of data and information and where it's most likely to come from.

Conversely, if the ambition is simply to have a roving disclosure exercise for class members generally on all issues, then Dr Houpis can at least respond to the sampling methodology, and they can try to reach common cause on what a better sampling methodology would look like. But it depends, really, what one's seeking to achieve with the disclosure requests. All we're trying to do is bring an ordered and structured process to it, which the Tribunal has visibility on, so that huge swathes of documents are not requested from class members unnecessarily in circumstances where -- if, for example, every class member says, "No, get stuffed", there has to be a full on application for it. And as you've indicated, sir, the Tribunal is unlikely to give disclosure in the very broad terms sought by Mr Holt.

THE CHAIR: Yes.

MR BEAL: But in the meantime, all of the downsides of class communication and the threat of disclosure still exist, and they're well known to the Tribunal. You essentially warn class members that they are going to be on the hook for a series of very extensive disclosure requests, where all sorts of nine years' worth of an extensive range of materials are asked to be produced, which essentially seek to replicate the business operations of that business over a nine-and-a-half-year period.

It's not unforeseeable that some class members will think, "Well, I'm not in for this; I've got more important things to worry about like keeping my business afloat. I'm simply going to opt out". It's been recognised in the case law, in particular in the Rodger

case, that that is a real risk. Now, in the Rodger case, of course, Google was acquitted of any intentional desire to try and exclude class members, but it was obviously a real risk and did, as I understand it in practice, lead to certain class members then opting out.

One also has to bear in mind that this is meant to be a proportionate and reasonable approach. If you're planning on approaching 89 sellers and asking for nine years' worth of pretty much all the business information available to that business, plus internal strategic documents, then that's an expensive business. Amazon may say, "Well, they'll foot the bill", but the businesses then have to speak to their lawyers; they have to go through their filing cabinets; and they have to go through their electronic databases; they have to produce the material to the lawyers; the bill gets presented to Amazon; Amazon may then quibble about the legal fees that are being charged in that exercise; and the whole thing represents a real impediment. If we're in a position where the Tribunal --

THE CHAIR: But they don't have to do it.

MR BEAL: They don't have to do it, that's correct, but it's well recognised that the mere asking for something to be done risks prompting class member disengagement in circumstances where the Tribunal may ultimately find that none of the material that actually was being sought is necessary for Trial 1, which was the predicate for the split trial.

Our proposed approach simply enables us to take the first step of working out what is a reasonable ambit for class disclosure, if any, and having a structured and sensible way of securing that from an appropriately representative sample, if necessary. But we respectfully suggest we're not at the stage where that is known. If the process runs into the sand, then of course the case for a purely voluntary unilateral approach becomes much stronger. But at this stage we respectfully suggest that it hasn't been

shown that a structured, organised, co-ordinated approach, supervised by the Tribunal, is inappropriate and therefore a unilateral communication risks undermining that approach and has all the downside disbenefits that I've identified.

THE CHAIR: Could you give me a moment? (Pause)

MR BEAL: I'm reminded, of course, Amazon is in a strong position with many of these resellers whose businesses depend on access to the Amazon platform, and that necessarily raises the prospect of a letter from Amazon being given more weight than it might do in an otherwise arm's length business scenario.

Obviously, if the outcome of all of this is that a letter is sent, we might have submissions to make on the individual terms of that letter. But I don't apprehend that the Tribunal is saying that we draft the letter at this stage, because it's on a point of principle on which I've been making submissions.

THE CHAIR: Yes. If this exercise as you suggested were to take place, and if there were to be an approach to third-party sellers for disclosure, disclosure would have to be obtained in time for the experts to consider it for their report.

MR BEAL: Yes.

THE CHAIR: Really, it goes for the benefit of the experts' reports.

MR BEAL: Yes.

THE CHAIR: But reports come after next summer. So when would this exercise be done?

MR BEAL: The dates I proposed yesterday were 15 January for proposals for all third-party disclosure, 23 January for responses. Parties agree what can be agreed, and disclosure takes place. Obviously, where it's agreed, disclosure can be sought and obtained. The question of costs would need to be determined, but if that can't be agreed on then it would be ruled on at the February CMC. Orders could be made at the February CMC for such targeted, reasonable and proportionate disclosure from

third parties across the board as is determined to be necessary. The time frame for disclosure could then be brought, one would have thought, within the ambit of the longstop date of 23 April 2027, so everything would be subject to that longstop date, which would then give an anticipated six month period at least for the experts to get their claws on it.

THE CHAIR: Yes, can you remind me, the longstop date we set was sometime in April, was it?

MR BEAL: 23 April is my recollection. I mean, obviously that's assuming -- and this may be an unfair assumption -- that the Tribunal is ready, willing and able to resolve any disputes immediately at the 8 February CMC. But ultimately, in my respectful submission, if the position is sufficiently crystallised, it ought to be capable of being subject to a reasoned order that can be delivered relatively soon after the --

Yes. I'm reminded by my junior that of course this is dependent on an assumption of willingness from third parties. The third parties, having been identified, might need a period of time to respond to the Tribunal's proposed direction, which is a complication, I accept. One would have thought that objection process could be dealt with in relatively short order, and even if it comes in late May, the experts have got more than enough to be getting on with the other proceedings and second stage disclosure, and their own disclosure, before getting into whatever additional benefit the modest and targeted third-party seller disclosure might provide.

But my learned junior is right that our first skeleton argument -- I'm told at 24.5 -- talks about applications then being made in March and determined in April. Subject to the Tribunal's views, we may be able to move that forward a bit. But my learned junior is quite right to note that because we are not acting for the class members directly, we're not in a position to secure their consent other than to use best endeavours to do so if they've been identified as somebody we think ought to give disclosure.

THE CHAIR: Yes, and they could object.

MR BANKES: In your proposal, are you skipping altogether the idea of voluntary disclosure and going straight to an order for disclosure?

MR BEAL: No. We anticipate that we will be calling evidence from class members, and we anticipate that when our class members give witness evidence, they will be giving some disclosure. That's all to be determined, because it's something that we're investigating and which is currently under legal privilege, litigation privilege. (Pause) Yes. I mean, once the Tribunal has indicated that disclosure is necessary from certain class members, we would approach those class members and say, "Are you happy to give this?", and that would be no doubt on a bipartisan basis, because the Tribunal has ruled that it thinks this is necessary.

If the class member still resists, then obviously there would need to be an application process. That would need to be built into the timetable. My submission to you is that whilst we've indicated March for that, obviously circumstances may dictate that we need to move that pretty quickly and deal with any objections pretty quickly.

I don't know what happened in Rodger, because obviously there was an order for class disclosure then, and I don't know whether it was dealt with or not.

THE CHAIR: The case of course settled.

MR BEAL: Settled, yes.

THE CHAIR: So whenever it took place --

MR MOSER: If it would be of assistance. what happened in Rodger was that the requests were sent out. A number of class members then applied to opt out. One, I think, successfully got away. The Tribunal then decided to stay the determination of these opt-out matters and the disclosure applications, and then the case settled. So it's not finally resolved in a way that's going to be a precedent. That's broadly what occurred, as I understand it.

MR BEAL: I'm very grateful for that.

I think, unless anyone's tugging my metaphorical gown, those are my submissions on the class member disclosure.

THE CHAIR: I think we will rise for ten minutes before hearing from Mr Turner.

(11.24 am)

(A short break)

(11.43 am)

THE CHAIR: Yes, Mr Turner.

MR TURNER: On the timing point, we received a message that we were going to finish at 12.30 today because of a fire alarm.

THE CHAIR: I think the point is that we need to be either concluded or in session at 2.00, and if we are not, we will all have to evacuate the building. But there is an exemption if you're actually in court in a hearing.

We will either rise at 12.45 so we're back by 1.45, or there is a chance we can finish by 1.30. We don't want to be not sitting, as it were, at 2.00, but still continuing. That's the position.

Submissions by MR TURNER

MR TURNER: I'm grateful.

A couple of introductory remarks, but I will take this as briskly as possible.

This is an issue that is very important in order for the defendant Amazon, as we see it, to have a fair trial at Trial 1. I will explain.

Mr Beal's position essentially boils down to: they are very happy, willing to consider getting information and documents from sellers, but not yet; potentially, as we see it, only too late for it to be effective. It reminds one of Saint Augustine: give me chastity, but not yet.

There are four initial points I'll make, and then I will develop them. The first arises from

a remark of the Tribunal at the outset about what the propositions are that come from the authorities.

The propositions -- I will show you this as necessary -- are that this is not just about litigation privilege. Ennis establishes that in the Court of Appeal in McLaren, a wider principle is stated. The wider principle is that defendants have a legitimate right to investigate material that may assist their defence, stated in terms.

Here -- we have now heard, and we had a letter from Stephan's solicitors affirming it -- on their side, they are free to contact the sellers themselves. They have been doing it. They are speaking to witnesses. That will entail themselves asking these people for disclosure and information; but not us. When it comes to us, they want to stop us doing that, and they say, "Well, no, you're seeking something different". It is not different in kind at all.

MR BEAL: I'm sorry, have you produced this letter to the Tribunal?

MR TURNER: I'll produce the letter now if you want it.

THE CHAIR: We haven't seen it.

MR TURNER: No, sir, I'm not sure it's in the bundle. Let me give it to you. (Handed)

THE CHAIR: We've got three copies. Yes.

MR TURNER: So we wrote, saying to both Class Representatives, "Have you been speaking to sellers and seeking disclosure and information?" We heard immediately back from my friends, from Mr Hammond, saying that we haven't; and then after a delay, we got this from the solicitors for Stephan:

"Amazon has indicated it intends to undertake a class disclosure exercise. [They characterise it like that.] We confirm Professor Stephan has not sought to undertake such a class disclosure exercise. Professor Stephan has engaged with the class generally, and with certain sellers specifically, for the purpose of managing the litigation, preparing his case, and considering possible witness evidence." [as read]

And they say that's an entirely different matter. As I said, it's not a different matter. The witness evidence also involves asking people what information and disclosure they might have. That's implicit in the witness process.

My first point is that the principle that's engaged here, which is that a defendant has a legitimate right also to look for things to assist its defence, is in play, and there should be equality.

Second introductory point: the Tribunal -- and this arises from a remark, sir, of yours also, in the opening today; the Tribunal addresses applications that are made to it for orders. My friend's submissions -- the detailed submissions on both the substance and on the sampling -- were essentially anticipatory of that. We're not at that stage. Now, as I'll show you in the Ennis case, the Tribunal was sensitive to the fact that they were at an earlier stage and said, "Well, we're not going to comment on what in that case Apple is going to do or plans to do, on the substance, because that could be to prejudge applications that will be made to us".

In this case, sir, you've given certain indications that certain parts of the substantive disclosure may not be things that the Tribunal will be minded to entertain if an order was made.

THE CHAIR: Yes.

MR TURNER: In view of that, it will be at the very least practically helpful to consider those, just to see what it is, so that we don't go off and do things. So that will be helpful. I place a marker down, that it's something we'll need to consider, because we hear from what the Tribunal says that there are going to be certain elements that may not be right. I will need to just explain to you why it is that we're going after certain information so that you see it, in case you haven't got it at the forefront of your mind, and then we will take a decision before we come back (inaudible).

That's point 2. The third point is practical, and this relates to what Mr Bankes asked.

What they propose is too late. Focus on their paragraph 24.5 in their skeleton, if you have got that with you. Just see it -- we will come back to this. But this is for a trial, we must all bear in mind, starting in April 2028. They said at 24.5, if the parties agree or if there's a determination -- that means at the February CMC next year, at that point -- then requests can be made in February. So after this Tribunal has had that hearing --

THE CHAIR: Yes.

MR TURNER: -- requests go out to the sellers. After that, there's a period of engagement with the sellers, according to them, and applications to the Tribunal, if there's an impasse and it's thought necessary, they say here be made in March next year, and after those applications are made to the Tribunal in March -- and that's not going to be on the papers; that will have to be another hearing -- they're determined, they say, in April, and disclosure given by these sellers in May.

That is really not realistic, and that is why -- leaving aside the principle about whether this is something that Amazon is entitled to do itself, or whether we have to march in lockstep with them or make it subject to an order of the Tribunal -- we can't live with this. It will essentially spike the exercise if that is followed. We are proposing something now, because this is a track that is workable and could yield material that will actually inform this Tribunal's judgment hearing in Trial 1.

THE CHAIR: You may end up, however, with something like this. Suppose that out of the 14, section 1, only three respond and the rest say, "No, we're not going to give you anything. Go and apply for an order if you want it". That clearly is not really a basis for sampling, so you will have to then issue an application, if so minded. It will have to be a hearing, those sellers be represented, and it won't (inaudible) time, ideally (inaudible) inescapable. I'm not sure it will be as late as that, but --

MR TURNER: Well, one point -- I don't want it to be missed, and I don't need to go to

the document -- is that as part of our proposal and part of the reason why we want to get on with this now is that if we get refusals, or “we simply haven't got this material, we're not the right target”, there's a bit of time to substitute in somebody else, and make the exercise useful.

THE CHAIR: I'm saying it's not -- the reason you won't get it is that the people say, "We're not going to do it voluntarily. You're our competitor, and we're not going to hand over chunks of our internal documents unless we are ordered to do so".

MR TURNER: I understand, and even with all of the qualifications that would go into a confidentiality ring and so forth, that may be said. I apologise; I'm addressing just a slightly different point, that it may be the case if we start the exercise now that some of these people will say, "Look, I'm afraid you haven't got this. You're asking the wrong person", and this gives us a little bit of time, which may be needed, particularly if there's going to be an issue on representativeness, to substitute somebody else --

THE CHAIR: Yes.

MR TURNER: -- on the substitute bench.

THE CHAIR: Well, I see it advances the timetable. I'm just saying it's a bit optimistic to say that you're going to get all this.

MR TURNER: That also, and we're pricing that in. We understand that. That's why this timeline is suggested.

Those are the first three introductory comments. The fourth and final one is the comments that my friend read out, presumably from Dr Houpis about the sampling note. We listened to that. We're actually very grateful.

On a number of points, there's a simple misinterpretation. We can refine it, but the key point is this: our application, reflected in paragraph 1 of our draft order, is that we want them to engage with us promptly now, not just say, "We're not going to talk to you", and then we will write to these sellers. What we want the assistance of the

Tribunal for is because they have said, "We're not going to do it until there is some joint", or as they put it now, "managed process".

So our application is really for an order saying that they must provide comments on what we've provided; let us take it into account. We don't want to waste time. We don't want inefficiency either, but we can then get on with it, helped by their input.

Then that will be by way of, as the Tribunal in Ennis pointed out, sending out letters, contacting these sellers, subject to the protocols discussed to make sure that it's all above board. But that will be subject to litigation privilege and we'd take it from there.

Those are my introductory points. I'll organise my submissions in this way: first, I will show you very briefly, to support what I've said, the principles that do apply when a defendant in the position of Amazon wants to seek voluntary disclosure and information from class members; and I'll just go to certain extracts from the lucid judgment of this Tribunal in Ennis, handed down only recently, a few weeks ago.

THE CHAIR: Yes. Well, there's also some material in McLaren not quoted in Ennis.

MR TURNER: Yes, there's a reference across to certain paragraphs of McLaren, I think 130 and 131, but I took it that they were saying, "This is what we gather from McLaren". I'll just take you to that quickly.

THE CHAIR: Yes.

MR TURNER: Second, and this will be important in view of what you heard from my friend earlier this morning, I'll need to give you some clarity as to what Amazon proposes to do and why. And why we say that this is needed for Trial 1.

THE CHAIR: Yes.

MR TURNER: Then I'll deal, to the extent I need to, with Stephan's attempt to essentially block us from doing a version of what they themselves have been doing, which is seeking material for our defence from the sellers, they say unless and until there is agreement and this process is followed at a later stage.

THE CHAIR: Yes.

MR TURNER: So if I may start with the first topic, it's the principles. If you could please turn up Ennis, in bundle E, starts at page 476. The context, the circumstances of this case, are very similar to what confronts the Tribunal today. You see from paragraph 3, page 479, that in that case, Apple wrote to the Tribunal and it was indicating that it proposed to seek disclosure only initially on a voluntary basis, and from certain representative class members, and wanted it put on the CMC agenda. The rationale is explained in the text which you've got at the top of page 480, paragraph 4. In particular, they said there -- and we're saying a similar thing -- this is the second paragraph from the top:

"Several core issues ... concern matters within the knowledge and the records of the [class members]."

In that case, Apple considered that obtaining them would be important to its defence. Paragraph 6 on the same page shows that in that case -- and this covers a point that was raised earlier -- Apple had a draft list of 19 proposed disclosure categories. That's far more extensive than the ask in our case. To clarify, ours is divided into the two parts: 1.1 to 1.5 is disclosure; the rest of it, 1.6 to 1.8, is for information. The disclosure we're asking for would be from different groups in different requests.

THE CHAIR: Just a moment.

MR TURNER: Yes. (Pause)

THE CHAIR: You say information, 1.7 wants data on a monthly basis of ten years. That's not information, is it?

MR TURNER: Well, I include some data as information, but it is essentially data rather than documentary records. If they were to provide it in the form of a table.

THE CHAIR: You want them to prepare a record?

MR TURNER: Yes.

THE CHAIR: Going through all their data month by month for ten years, that's what you want?

MR TURNER: Well, exactly. None of us know that this is unachievable or indeed very burdensome, because we don't know yet -- and that's one of the things that we're going to be asking for and testing. If it turns out to be burdensome, because we will speak to them to find out, then we can adapt it. But what we're covering here, both for the disclosure part, the first five questions, and then the information and data part, where we're not asking for the original documents or copies --

THE CHAIR: It's very hard, my way of looking at it, to say that for a seller to go back nine and a half years, a sample of products, and give you the value and volume of sales month by month, is not burdensome. But that's comment.

MR TURNER: No, no, sir, that's --

THE CHAIR: It would be extremely burdensome.

MR TURNER: Yes.

THE CHAIR: Probably even larger --

MR TURNER: That's a helpful comment, we will bear that in mind.

THE CHAIR: But it's blindingly obvious.

MR TURNER: Well, no, sir, you say that. We'll speak to some of these firms. This may be something that can be done readily. I cannot prejudge that. We understand what you say and we are sensitive to it. You may be right, but I'm not going to prejudge that with these entities yet.

THE CHAIR: You say some of it's information they'd have to file, some of it's documents.

MR TURNER: Yes, the distinction is, as you've seen, we'll be asking for information from the wider group. I can explain why we're interested, particularly in the issue of the multi-homing, and I'll show you why.

For the disclosure, we're really mainly interested in the thinking documents, the internal thinking on issues that are relevant to Trial 1, because I'll show you the allegations that are in the case are: sellers will be affected by this conduct, bearing in mind how the market operates. To know that, and you'll see the allegations made on both sides about what sellers take into account in the pleadings, we want to test it. But we're going to target that for each of the first five requests on a smaller group of large sellers who ought to be able to have this information. The reason for the nine or 10 year period is because this is the claim period.

THE CHAIR: Yes, it's --

MR TURNER: And because things may be different --

THE CHAIR: We understand that, it just goes to burdensome, that's all.

MR TURNER: Yes, no, I understand.

THE CHAIR: Well, we gather that. That's obviously -- that's why it's that period.

MR TURNER: Yes, okay. So returning to Ennis, paragraph 7 at the foot of the page you've got there shows that there again, they were looking at searches covering a nine-year period, back to July 2017. So similar there. All of that was objected to in the case by the Class Representative.

Paragraph 10 on page 481 tells you that there was a first CMC in May at which someone called Mr Piccinin for Apple made the point that the Court of Appeal has clarified:

"... that defendants are entitled, as a matter of principle, to communicate directly with class members for the purpose of obtaining evidence ... and that such communications attract litigation privilege."

You see from paragraph 13 on the next page, the Tribunal agrees the reasoned order in June, but it gives the Class Representative the chance to seek procedural directions. The Class Representative does that, and then there's a further hearing that

results in this judgment. There are five important points for present purposes that emerge, and I'll take them briskly in turn.

The first is the point that I've adumbrated, that what's at stake isn't merely a question of --

THE CHAIR: Where are you in the judgment?

MR TURNER: So go to paragraph 66, page 505.

THE CHAIR: 66. (Pause)

MR TURNER: The proposition -- I'll just show you how it arises -- is that it's not just about litigation privilege; there's a wider principle about being free, legitimately, to communicate with class members to seek and obtain evidence. If you look at paragraph 66 on page 505, you see that the Class Representative there was making a submission, faintly echoed by Mr Beal earlier, that the Tribunal can just prohibit a defendant from communicating with class members, because that stops documents coming into being which would be subject to litigation privilege.

The answer given by the Tribunal, nine lines up from the foot of the paragraph you see, is:

"The underlying premise of Lord Justice Popplewell's reasoning in McLaren ... is that, as a general rule, a defendant in collective proceedings may legitimately communicate with class members for the purpose of seeking and obtaining evidence relevant to the dispute."

The wider principle. Then the Tribunal continues by articulating what this general principle implies, says:

"... that any restriction which the Tribunal might impose on such communications would require to be justified by reference to specific circumstances, [ie the case at hand], sufficient to justify the restriction [and should not] interfere unfairly with the defendant's legitimate investigation of the case against it."

First point. The second is: this Tribunal was clear-sighted that Apple wasn't there, at that stage, seeking an order from the Tribunal for disclosure from class members. Apple was co-operatively showing the types of material it wanted to ask for, but its eventual letters of request would be subject to litigation privilege. I mention that because of, again, Mr Beal's remark that they want to have a hand in the letters.

The Tribunal didn't consider it appropriate to go into detail in that case on the elements of the proposed disclosure that were placed before it by the defendant, because they said, among other things, it could prejudge a future application by the defendant made against class members. You see that if you go to page 524, the top of internal page 49, paragraph 109. You pick that up from the end of the fourth line in 109. The last word on the fourth line:

"A difficulty with the CR's approach is that he invites the Tribunal to treat Apple's April letter in effect as if it were an application ... when Apple has been clear that it is not, at this stage, seeking an order from the Tribunal. [Class Representatives' counsel] accepted that the issue for the Tribunal, when addressing the scope of a proposed communication seeking voluntary co-operation, would not be entirely the same question as the scope of an order ... albeit that it should, he said, be informed by the same considerations. It does not seem to us that we should, in the absence of an agreed process, be drawn into comment which might be taken to approve or disapprove a communication, the terms of which we cannot see, and which could prejudge a future application."

Sir, that's why I mention it. Now, we in this case are happy to receive the Tribunal's comments, because we can see that it is going to be efficient. We will take on board the points you made and deal with --

THE CHAIR: That's where I say I think there is material in the Court of Appeal judgment that slightly qualifies that.

MR TURNER: Sir, I'm very grateful. I don't have that at the top of my mind, perhaps we'll need to --

The third point is this: that just as in the present case, what happened was that the Class Representative's advocate was arguing that the impact of the defendant writing to a group of the class members might be to encourage them to opt out. And this was prayed in aid as a reason to restrain the defendant from contacting class members to seek assistance voluntarily.

That's dealt with in this judgment at page 525, internal page 50 at para 112, where the Tribunal says:

"As to the effect of the proposed communication, the issues which the CR apprehends may or may not arise. There is, in a case such as the present one, always the possibility that represented persons will apply to opt out. As Mr Piccinin submitted, there would not necessarily be anything untoward in the decision by a class member to apply to opt out. Any application by a class member to opt out at this stage would, in any event, require the permission of the Tribunal."

Of course, the same situation we have here.

"Such concerns about the possible reaction of class members could not justify preventing Apple from taking legitimate steps to investigate the case against it"

That's the third point.

Fourth: the Tribunal here rejected a request by the Class Representative to make an order requiring the defendant to justify the basis on which it was proposing to select class members from whom to seek material, who they would go after. That's at paragraph 113, at the foot of the same page. See the Tribunal's reasons in the last two sentences:

"It does not seem to us this is an exercise on which we should embark at this stage. Apple is entitled to decide how to direct its investigations, at least when it does not

seek an order from the Tribunal in support of its inquiries."

The last point, quickly, is this: in the circumstances of the Ennis case, the Tribunal did lay down guardrails concerning the communications with class members, essentially to make sure that they were fully made aware of how the voluntary requests fitted into the Tribunal process. You see the last three lines in paragraph 118, which is at the bottom of page 527, and then the numbered subparagraphs over the page, which, sir, you referred to in opening. You picked up that that refers back to paragraph 80 of the judgment, which includes a few further points. If you would go back, please, to page 512, where there is paragraph 80, I'll draw your attention only to one of those points. (Pause)

The one that I'll draw your attention to is actually on the next page, 513. It's paragraph 7:

"The Tribunal has wide power to regulate the costs associated with any application for disclosure ... including power to direct that the party seeking an order ... bear the reasonable costs incurred by the class member in complying ... Whilst the Tribunal cannot prejudge the decision on costs in any particular case, the starting point in the ordinary case is that -- unless there is a good reason to make some other order -- the party seeking a disclosure order against a class member should be prepared to bear the costs of the application and to pay the ... reasonable costs in responding to any application [and so forth]."

You have seen what we propose to do in that regard. That's all I propose to show you now on the legal principles.

If I may, then, I'll turn directly to this case.

THE CHAIR: It's important -- that's, of course, made out next to Rodger, based on Rodger, where that's exactly what was done. There's also the point in paragraph 5, or subparagraph 5, at the top of that page.

MR TURNER: Yes. The point --

THE CHAIR: "... '[will] be carefully circumscribed so as not to impose too high a burden on class members' [and] as a general rule, [the order will be framed] so as to require specific disclosure of individual documents or defined categories of documents ..."

MR TURNER: Yes. We take that on board, and I would say immediately that the document that you have before you now -- and we'll talk about concerns or queries about it, or criticisms -- but it has been engineered with that in mind. Yes, it has, with a view to actually limiting -- and I'll try to show you why now, but we have had in mind that this Tribunal will ultimately be prepared to act as set out in subparagraph 5 that, sir, you have read out.

If we turn to our case, the need for disclosure and information on the sellers' side arises because there is material internal to them which we see as of key relevance to the Trial 1 issues: market definition; alleged dominance by Amazon; and abuse, conduct which is non-normal and has the effect of distorting competition.

On market definition -- start at the beginning -- the core question is for this Tribunal whether there is a distinct economic market in the provision of online marketplaces in the United Kingdom, such that sellers don't have reasonable substitutes through other channels. I'll show you a couple of references on this. If you go to the Hammond claim form, if you have it --

THE CHAIR: Well, you don't have to make that proposition good, and that does seem a relevant question.

MR TURNER: Well, perhaps if I just show you these references. The reason is when you're thinking about whether these requests are unnecessary or disproportionate, you can see the way it's pleaded. I mean, essentially, if you're happy not to look at this, so be it; but what is pleaded shows you that the parties are engaging on what

sellers think, how they make their decisions, whether the online marketplace is in fact a distinct economic market; and they put in issue on the pleadings the considerations taken into account by the sellers, which is what we're asking for. It may be helpful if I show it to you, given the comments that you made at the outset, but it will only take a couple of minutes.

If you go to the Hammond claim form in bundle A, page 22, you have a heading, "Relevant market", on that page. They say what they say the relevant market is at paragraph 51.

If you look at paragraph 53, you then get their pleading as to what the sellers' perspectives are, and they narrate what they say sellers consider, which goes to their market definition case. You can read it for yourself. I'm not going to read it out (inaudible).

So you're absolutely right. It is basic, but I do want the Tribunal just to know this.

Then go to our --

THE CHAIR: Just a second. This is about --

MR TURNER: It begins, "From the sellers' perspective ..."

THE CHAIR: Yes. This is about the online marketplace.

MR TURNER: That's right. It's because they are supporting their proposition, in paragraph 51, about how it's limited, and this is their case.

Just so you see it on Amazon's side, not to belabour it; if you go to -- I think it's the same bundle, page 78, you see at the top under the same heading, "Relevant market", at the top of that page, what Amazon says about it; and Amazon says, "Well, no, this is wrong about the relevant market".

THE CHAIR: Which paragraph?

MR TURNER: I'm sorry. It's paragraph 52 on page 78 in bundle A. You see, Amazon says, "Here are all of these other channels that the sellers can readily use."

Then if you drop down to paragraph 54, just to show you the most relevant bits, go in it to (d) and (e).

You look at (d) on page 79, look four lines up from the bottom of the page. The question is whether sellers can and do switch, and Amazon's pleaded case, four lines up from the bottom:

"This is in fact the case: sellers can and do switch to a wide range of other sales channels ... Amazon competes with both specialised retailers and those with a broader offering."

Then if you look at subparagraph (e), there's issue joined with:

"... the allegation that a seller, indeed (implicitly) every individual seller, would give up a 'substantial proportion' of its online income in the UK if it were to delist from an online marketplace ... Without prejudice to the foregoing, this ... is fact-specific to each ..."

So it's not within our knowledge. It's not admitted.

If you look at the last four lines:

"Quite apart from the fact that this relates to Italy [which is what information had been referred to by Hammond] it does not follow that those third-party sellers would lose a substantial proportion of their online revenues if they sold through other online sales channels rather than an online marketplace."

I can give you other references too, but this is really just a flavour so that you can see what is pleaded on both sides, which is that both sides on the market definition point are saying different things, at variance, on the question of sellers' outside options, and it's very important. It is not information that you would expect Amazon to have.

If you go then --

THE CHAIR: Mr Turner, I don't think we're approaching this on the basis that the information Mr Holt says he'd like to have is irrelevant to the case. You see that it's relevant.

MR TURNER: Yes.

THE CHAIR: There are other conditions for disclosure.

MR TURNER: As, indeed, I think I may have myself prayed in aid yesterday. No, I fully accept that.

THE CHAIR: And we can see that they go to the various issues, and that it would be wonderful to have all this information.

MR TURNER: Sir, that is absolutely right. I'm grateful for that observation.

I would say only two things. The first is that partly for the reasons that I'm seeking to show you by taking you to this, this is not merely relevant; this is essential material. So when you are considering the question of necessary and proportionate, one needs to bear in mind that this is the way the case is put on both sides, and this is why it's important (inaudible) get it. We have in mind the proportionality dimension as well, very front-of-house.

I'll make a couple of further points, then, but you've seen that maps onto the request that is made by Mr Holt. If you want to just see why we say it is essential, if you go back to paragraph 1.1 of his note, which is, I think it's at page 583 of the bundle; if you look at requests -- and I think, sir, you referred to this yourself -- requests 1.4 and 1.5, this maps neatly onto what we've been asking for, because it's essential.

THE CHAIR: You say it's essential. I don't think we will say we can't have a fair trial if lots of sellers don't produce this.

MR TURNER: Well, there may be different ways of getting the necessary --

THE CHAIR: There may be a lot of other information available, but --

MR TURNER: But you see --

THE CHAIR: -- if you at some point say we can't have a fair trial and therefore the claim has to be dismissed because there isn't the information (inaudible) comes --

MR TURNER: Well, sir.

THE CHAIR: As you're getting to 1.4, that is --

MR TURNER: Yes.

THE CHAIR: Nowhere is it seeking specific documents or indeed a specific category of documents.

MR TURNER: Well, sir, if you just begin on the first page, you need to go under the heading "Documentary disclosure requests made to [Sellers A, B, C]". Then it says: "The requests below are for documents created for, or by, the relevant internal committee(s) or board(s), or the relevant employee(s), with responsibility for decision-making and strategy on the issues."

The thinking here was to limit it to the decision-making.

THE CHAIR: But look at 1.4.

MR TURNER: Yes.

THE CHAIR: Considerations -- I mean, there could be thousands of emails over these nine-and-a-half years about looking at what we might do and exchanges within a company. As I say, this is not a specific category of documents, and in no way does it seem to me, if there were at some point to be an application for an order -- and one would obviously hear from the respondent to the application as to what it would involve for them, basically -- is it within the scope of the guidance that you drew attention to in Ennis, paragraph 80.

MR TURNER: May I just -- you say thousands of emails. That's absolutely not the intention. The --

THE CHAIR: Well, documents created by the relevant employee.

MR TURNER: With responsibility for decision-making, yes.

THE CHAIR: Over nine-and-a-half years, how many emails do people send, if they were in a company dealing with these matters, A, B, C?

MR TURNER: Sir, you'll see from that first sentence, we're making an attempt to really

narrow this down to avoid the thousands of emails.

THE CHAIR: I hear what you say.

MR TURNER: Yes. May I just say that this is a voluntary request. Now, this is not an application for an order. What we would imagine will happen is that we will speak to these companies and see what's realistic. That's the point. We're not making an application in these terms. The whole point is that we're now at the stage, showing you broadly what we're after, of going to these entities, saying, "What can you do?" It is only after that engagement has been had that we'll come back to you if we have to -- we may well not, in many cases -- to say we need an order, and at that point it will be narrowly tailored.

THE CHAIR: Yes.

MR TURNER: So, again, one mustn't fall into the trap of saying this is essentially the form in which an application against -- I won't mention any particular -- some particular seller will take.

THE CHAIR: Is it legitimate to seek to write to class members requesting that they disclose on a basis that is far beyond what you could achieve if you had to seek an order?

MR TURNER: Well, we won't be doing it in that way. The attempt will be to probe what can be proportionately provided. Just as we were arguing between ourselves yesterday about what Amazon can provide, you need to hear from these people; there needs to be a discussion. This is not a final application and we don't pretend it is, but it's an important observation to make.

If I may very briefly then show you -- leaving aside, that point, sir -- you see from the substance of 1.4 and indeed 1.5 that, subject to that very important point that you've made, it maps on to the fact that there is an issue in the case, a basic issue, for which Amazon is not going to have this material. We're going to have to find some way of

getting it. Now, the same is true for dominance on the part of Amazon. The core question here for the Tribunal, one of the core questions, is whether sellers are dependent on Amazon, at least in part, to reach their consumers. If you go to Hammond's pleading on this, bundle A, page 24. (Pause)

Paragraphs 58 and 59 are particularly relevant, but their pleading, if I pick it up from 58, four lines down is:

"Large numbers of shoppers use Amazon for the wide range of products available."

Do you have that?

THE CHAIR: Yes, in the middle of the paragraph.

MR TURNER: That's it, yes.

"Large numbers of shoppers use Amazon for the wide range of products available, therefore, to reach these consumers it is indispensable for sellers to list on Amazon, even if they also list their products on more specialist marketplaces."

If you go back to paragraph 53 on the previous page, it's actually the last few lines, at the top of page 23, they plead:

"If a seller were to de-list from an online marketplace to sell through other online sales channels, it would result in the seller giving up a substantial proportion of its online income in the [United Kingdom]."

That's their case on this aspect of dominance. I can, but I won't take you to our response, but you see that's put in issue. Light is shone on this by asking for material from the sellers; it's an allegation about how sellers see things and behave. You don't get it from Amazon, and I would interpose at this point, in case you saw this in my friend’s skeleton: there was an odd misapprehension there in the Stephan skeleton that competition authorities who've looked into these issues, and made even the preliminary assessments that you're aware of in relation to Amazon and the Buy Box, like the European Commission, like the CMA, they said, "Well, they haven't gathered

information from sellers and other parties". They have.

This is Stephan's first skeleton, paragraph 20. We don't know what that assertion was based on, but it's absolutely wrong, and you've got all the material showing it's wrong. The CMA, for example, if you take the CMA decision -- it's bundle E, if you look at page 586 -- you've got paragraph 2.2 opening the CMA's decision. They say there: "During the investigation, the CMA undertook various investigative steps to gather evidence from Amazon and other third parties."

And that's what they did. I should say that Amazon wasn't provided with the evidence gathered by the CMA from the other third parties, and any reference to third-party feedback was also redacted in what we got from the CMA in its decision. So we don't have this. The CMA absolutely did do that.

THE CHAIR: Yes.

MR TURNER: And the same is certainly true of the European Commission. Standard practice. The Commission, to investigate the market and the dominance, sent requests for information to a range of retailers, to marketplace operators, to third-party solution providers, and they say that; it's in the same bundle, E, at 537.

THE CHAIR: Pause just a moment. (Pause)

This is the European Commission decision.

MR TURNER: Yes, sir, you know this is what the Commission does in these cases; it includes abuse of dominance cases as far as I know, well, generally. You'll see at recital 16 at the bottom of 537.

THE CHAIR: Yes, "retailers".

MR TURNER: Yes, so they had to do this. Now, coming to where we are in this case, these are standalone claims in these proceedings of abuse of dominance. These include the allegation that the sellers on Amazon are substantially dependent on winning the Buy Box, becoming the "featured offer", as it's now called.

THE CHAIR: Yes.

MR TURNER: We put this in issue. I'll give you two references, our defence back in bundle A at page 56. (Pause)

28(b) at the bottom of that page. The second sentence says what the issue is for the trial:

"... it is in any event denied that selection of their offers as the Featured Offer in the Store [the Amazon store] is 'critical to online sellers' success in making a sale' given the myriad options available."

That's the allegation. We put that basic point in issue as really a critical issue for Trial 1. (Pause)

If you look at disclosure on the seller side and go back to our note, and again, sir, the comments of the Tribunal are helpful. Go, for example, to paragraph 1.1, page 583, that note. There what we're seeking to do is to get at this point squarely. To illuminate it, what we're after is the seller's actual possible strategies for competing in the store, including these points.

That's why we're asking for this. That's why we see this as important. Sir, I take to heart what you say that this doesn't necessarily mean some vast exercise of asking for documents from scores of sellers. However, we have to be able to meet this case, and we have to be able to try to get the material to prove our point from the sellers, because we don't have it.

Now I move to the issue of abuse. I'll take this quickly. Abuse of dominance. There are basic questions about whether the conduct complained of by Amazon really does tend to harm competitive processes, in which these sellers are involved, in the various ways that they allege. I'm not going to go through this point by point. As, sir, you pointed out earlier, Mr Holt outlines some key elements in his short note.

THE CHAIR: Yes.

MR TURNER: At page 580. But let me just give you two examples to illustrate. The first one is the allegation made by both Stephan and Hammond that this "featured offer" algorithm is tilted to artificially favour sellers who use Amazon's own logistics service, FBA. The argument -- their case is that this materially pushes the sellers to use the FBA rather than other solutions, and this enables Amazon to overcharge the sellers for the FBA service.

They also both say that this pushing effect discourages the sellers from so-called multi-homing. In other words, just using more than one sales channel -- other sales channels as well -- as well as weakening the non-Amazon providers. If I may draw your attention to the way that Stephan puts this in the claim form, bundle A, page 192. You see the guts of the main case. Go to 192, abuse 3 at the foot of the page. You have 170.3, abuse 3, which is the abuse I've just been talking about. You'll see from 173.2, the second subparagraph, the case that this leads to the increase in the FBA fees.

THE CHAIR: Yes, I think we remember this.

MR TURNER: Yeah. 173.3 is preventing rivals from getting scale. Then if you just look at 173.4 over the page, the plea is -- the case -- it "reduces the seller's incentives to engage in multi-homing". That is the selling on the different channels. Sir, the question is raised: does this reduce the seller incentives? Does it tend to, when you properly understand the way this market works?

There's a reference back made there, you'll see, to paragraph 119. I invite you just to look at that on page 171. Just look near the top of the page 119.2. Their case is put in these terms:

"Once they have started selling on Amazon, sellers must then decide whether to multi-home. The decision will depend at least in part on the costs of multi-homing, relative to the benefits of multi-homing, (most notably in the form of increased sales)."

Don't deny, as it were, the proposition, but they say this is what this point depends on, and they plead it. This is their case concerning the decision-making by the sellers, which Mr Beal has helpfully indicated they themselves now feel free to go off and ask sellers about, while trying to stop Amazon from investigating.

All of this raises questions about the economics for the sellers of multi-homing, staying on this page, the way in which sellers purchase logistics services generally, and the considerations that are taken into account by sellers when they're choosing whether to use the FBA or another solution. It's a major point of Trial 1.

The second example I give on the abuse side is this, and then I'll stop in the interest of economy: the allegation that Amazon offers, if you recall, the seller-fulfilled Prime, SFP, which is that other carriers can be badged as qualifying, so then you get all the benefits of Prime, which otherwise you get through the Amazon Logistics Service. The allegation is that Amazon offers -- that says, "Well, you can use other carriers", but at the same time as doing that, it stifles it or cripples it, they say, so that FBA, their own in-house service, remains the more advantageous one for sellers.

You see that if you go to Stephan's claim form, if you go in this bundle to page 168 --

(Pause)

Look at the top of the page, paragraph 118.2:

"Second, insofar as sellers cannot negotiate commercial terms and rates with fulfilment/logistics providers (which they cannot do except with Royal Mail [Royal Mail is treated differently from the others]), Amazon retains full control over those terms and rates, and so is able to ensure that FBA remains more advantageous than SFP."

That's their case. On the next page, page 169 and look at the top of the page, 118.2.3. Their pleading:

"The end result is that for 'several vendors [sellers, here], SFP entails higher costs than can be obtained from independent negotiation with carriers, particularly when the

nature of the product sold involves significant differentiation requirements in the delivery service to the end customer, which in turn affects the cost of delivery', and that 'Some retailers have reported that they have given up using SFP…, precisely because of the inability to define tariff details appropriate to their business'."

They say, well, that was the conclusion in the Italian case. We rely on that proposition. We say that applies here in the UK. Their case. We have to be able, again, to test this. Our defence to it is at page 238, where you see at paragraph 67.4(a)(i), Amazon says:

"As to the negotiation of rates, Amazon considered that it was generally likely to be able to secure better rates for third-party sellers in negotiations on behalf of third-party sellers as a group than individual third-party sellers would have been able to secure in individual negotiations "

We say there's no effect here: this is what we were doing; this is a dud point. Their reply, finally, is on page 295, paragraph 29, just near the top. So what do they say? They say:

"Amazon is put to strict proof."

They say, "Go on, you show that. You say that about the sellers, you show it".

"... put to strict proof of the matters set out in … 67.4(a), in particular in the light of its assertion that its conduct serves to 'benefit sellers'."

Sir, very sharply, they're saying, "Well, this information from sellers is necessary, you say that? You prove it". At the same time as you hear these submissions stopping us, if they can, from actually speaking to sellers in what is a really tight timetable to get to this trial, which I'll be coming on to in a moment.

If you go back to the disclosure information note on page 583. I'm not going to go through it point by point again -- I say this because of the Tribunal's indication earlier about content. The material that I've just been discussing, all of this is fed into why

we're trying to get this sort of material from sellers to help us defend ourselves. You see a number of requested categories that are relevant to what I've just been saying. If you look at paragraph 1.2, (a) to (e). Unless the Tribunal's got further comments on it, I don't propose to go through every single one. But as I say, we're extremely receptive to points the Tribunal has. This is why we're asking this, and these questions about the general impact or, as we say, the lack of impact of Amazon's conduct on sellers' decisions as players in the logistics market, as well as on the logistics market itself, they say has been harmed by all of this -- these are the Trial 1 issues looking into whether sellers' commercial decisions have or have not been affected by Amazon's conduct, based on a good understanding of how sellers actually operate. It will cast light on whether Amazon's conduct affects competition, or is likely to do so. If I can pause there, because I --

THE CHAIR: I think we better stop, or we'll all have to --

MR TURNER: Yes, yes.

THE CHAIR: -- and return to it at 1.45 pm.

(12.47 pm)

(The short adjournment)

(1.53 pm)

THE CHAIR: We are told that the expectation is that the fire alarm is muted in this courtroom, in which case we can just continue. If that has not been successful, we will rise for five minutes when it goes off.

MR TURNER: Sir, we will make progress because I'm coming to the end.

THE CHAIR: Yes.

MR TURNER: Subject to any observations from the Tribunal about specific points in the note, the list, or the sampling methodology, which I know you've read, and to some extent discussed, I don't propose to return to this now to go through it. As in Ennis,

this isn't an application to the Tribunal for an order in the terms of that document. The proposed requests are being shared, like the sampling note, with the Class Representatives now, to seek their comments. The problem that we face, and why we have asked for the Tribunal's assistance, is that the Stephan Class Representative has opposed providing comments to us at this juncture, or engaging, on the basis that you've heard, to help us frame the request that we want to make, which would be efficient.

Now, Hammond say in their skeleton argument, very shortly, "We are neutral at this stage as to seller disclosure". The argument is just made by the Stephan Class Representative. His position of principle is that any requests for material from sellers should be subject to the joint exercise, or managed exercise, that was described to you, either agreed fully with them for anything written, or ordered by this Tribunal, Amazon shouldn't be allowed to contact the sellers by itself.

Our response, for all the reasons I've now given, is that that's wrong in principle. But just as a matter of pure practicality and timing, it is not calculated, the process that they propose, to get the most useful material that we need to help persuade this Tribunal at trial that we're right on these issues.

I showed you at the outset of my address that in paragraph 24.5 of their skeleton, they put forward a compressed process, which we say is unrealistic. To remind you, they envisage requests for voluntary disclosure from the sellers going out to them for the first time after discussion, possibly in adjudication at the February hearing.

THE CHAIR: Yes.

MR TURNER: After that February CMC. Then we engage, supposedly, on a trilateral basis, quadrilateral, with the sellers on a tight time frame, and applications are then made.

THE CHAIR: I think we see that. I think we understand that's just going to stretch it

out.

MR TURNER: Yes, well, our short point is that that timeline just has the effect of destroying the utility of the exercise. For those reasons -- and that is why, and you may say it's not necessary -- we were seeking an order in the form of paragraph 1, the composite draft, which was that by 23 October, the Class Representatives provide comments on our requests and the sample and the methodology so we can usefully build them in.

THE CHAIR: But I don't see how we can order that, either. Each of you, as it were, from your different perspectives, are saying, "We would like to compel the other side to co-operate with us". Mr Beal says, "We think this is the best way to do it, and Amazon should be ordered to co-operate with us and not do its own thing". You're saying, "This is what we want to do, and the Stephan Class Representative or through its expert should be compelled to give comments". I mean, it might be certainly helpful to your exercise, if they did, but I don't think we can really order that.

MR TURNER: Well --

THE CHAIR: Any more than we can order you to, you know, agree on a co-operative approach with them.

MR TURNER: Sir, I hear that. In that case, I won't press it, just to say from our perspective, looking at the timeline, I'll just expand it for a moment: it is important, if they will give us comments, it would help so that we're not faced, later down the line with all these sudden complaints of a hearing that you've missed this, that and the other. Mr Beal read out a series of points from Dr Houpis. It's very useful to take that into account.

There's more: we would like it, but our idea is that we'll write to the sellers asking for such disclosure and information as we advise, taking account of all the comments we've now got, on a voluntary basis. Then if one steps back from, let's say,

23 October, to the date that we envisage for sensible applications to this Tribunal against sellers for disclosure information, down the line, that's -- I think we envisaged the 7 December -- about six weeks. Six weeks is the time -- and it's a reasonable time -- to discuss with the sellers what they have and what they don't have. For example, on the point that, sir, you raised: whether they have automated systems on things like their sales over this period or not; to refine the requests to make sure that they are right, bearing fully in mind proportionality as well as relevance; and as I mentioned earlier, if it turns out that some of these are dead ends, we might be able to substitute in other people.

Six weeks is tight, but it needs to be now. A good comparison is the Redfern process we were talking about yesterday, where they're asking for disclosure from Amazon. You'll recall that itself is another six-week process of engagement between these parties for Amazon to say what it can provide. That was, if you remember, was between November and December. Just as a sort of comparison, you see that what we're saying is it's been thought through, and we hope and trust that it is practical and will commend itself.

Finally, as regards the modalities, we've said how we plan to do this, fully respecting the need to avoid harming the integrity of these proceedings. Perhaps its most convenient just to look at Covington's letter of 30 September, setting it out. Bundle A at page 568, tab 19. The footnotes are what matter for this. If you look at the bottom of page 568, see what Amazon's proposing. I'm sorry it's in footnotes.

What we say there is that these contacts with the sellers could be done via something called:

"... the 'Seller Central' dashboard on the Amazon Store where it is likely to come to [their] attention most quickly ([because that's how they] communicate with [the] sellers [in their] day-to-day business); and/or a letter sent to ... the class member's in-house

legal department, where one's been identified."

THE CHAIR: Where in the letter are you?

MR TURNER: I'm sorry, it's page 568. If you go to the bottom of the page. I was reading from footnote 2. This is on the modality, and the proposal is, I think, we would do both. The Seller Central dashboard is the way in which we're most likely to actually get a response, and we would accompany it by a letter to the legal department, where they've got a legal department and so forth, and we'll be guided by the Tribunal as to what's felt most appropriate. We're picking this up from Ennis.

The next footnote says that we'd ask for a response in 21 days. We make the point that:

"... [the] seller is under no obligation to undertake any searches or to make any disclosure in response to the request ... will not ... affect their relationship with Amazon."

But say that we are "prepared to meet the ... reasonable costs" or may be, in response to that.

Pausing there, assuming it's not some gold-plated exercise and it is reasonable, what we understand what they're going to do --

THE CHAIR: I can tell you that the condition or contents, as per Ennis, that we would require --

MR TURNER: Yes.

THE CHAIR: -- is not that you may be, but that you will meet the reasonable costs, including costs of taking legal advice.

MR TURNER: I'm grateful, sir.

THE CHAIR: But yes, reasonable cost, so it's not open ended.

MR TURNER: No, that's an obvious concern, but yes.

THE CHAIR: Give you an opportunity to say these costs are unreasonable.

MR TURNER: Yes. That's what we're planning to do. And then I think if you go to page 570 and look at paragraph 20.

MR BANKES: Can I just ask you one question about using the Seller Central dashboard?

MR TURNER: Yes.

MR BANKES: One of the things that concerns me is the question of confidentiality and Amazon contacting your competitors. Amazon Retail is getting information from other retailers. Are you confident that the Seller Central mechanism can be operated in a way which preserves information sufficiently confidential, so as not to infringe competition law?

MR TURNER: That's a very fair point. My understanding in general terms is that the answer is yes, but I need to just take a moment and find that out. But yes, we understand the concern and we think that's a necessity, yes.

I can just get some instructions.

THE CHAIR: The proposal is that it would go into -- because this is not, of course a Tribunal -- the confidentiality ring? What are you going to say about treating any response you get with information as confidential, in the sense that it goes to your expert, but not to Amazon?

MR TURNER: Yes, it would go to the external legal representatives and the relevant experts. There would be -- we'll have to fashion this, because I see the point -- assurance that they were subject to confidentiality restrictions, both because it's necessary for the reason Mr Bankes gives, and because it's going to be needed as a practical matter, too, to ensure that people are happy to give the information in the first place.

It's a very fair and strong point.

Paragraph 20. I don't think I need to cover that; there's nothing additional that we set

out there. We say how it would work. We don't consider it as necessary in the circumstances of this case for this Tribunal to make an order, sort of an Ennis order setting everything out, because we have said to this Tribunal that we will follow these steps, and --

THE CHAIR: I think we will make an order.

MR TURNER: Yes.

THE CHAIR: We intend to make the order, because this is a question of case management and where we are at the moment, I think we will produce a short judgment.

MR TURNER: Yes.

THE CHAIR: So that will delay you slightly, but I think we can tell you we'll have it by the end of next week.

MR TURNER: Right. To complete what I was going to say in the next 30 seconds, then: it's a voluntary process. I've explained the thinking and why we feel these periods of time are needed and why we need to get going now, bearing in mind again the date for disclosure actually to be given by the trial date.

We consider that this voluntary process should work well, or at least sufficiently well -- have useful information for the defence at the trial. If there is a need for applications to be made, directed at particular sellers, we want to minimise the scope for that to happen, and therefore maximise the time that we can actually speak to people, in order to iron out difficulties. You don't have to make applications which aren't actually needed; it's another reason why giving us some time now is going to be important.

If applications do end up having to be made, our proposal, as I say, is that Amazon does need to do that by 7 December this year -- put that in the composite order at paragraph 5(a). We hope and trust --

THE CHAIR: Again, I don't know if we need to order you to do it by then. You are keen to get this quickly, so you will want it heard. Bearing in mind that the addressee of the request can respond quickly and can be heard, either independently represented or they may choose to instruct the Class Representative, whatever. Like any third-party disclosure application, no doubt you want to get your application out quickly so that it can be heard on 8 February.

MR TURNER: Yes.

THE CHAIR: I don't think we need to order that you do that.

MR TURNER: I'm grateful for that, in that case. Then it's essentially an informal target to see how things develop.

Then you have, if we have to, the CMC envisaged for 8 February or that week.

THE CHAIR: Yes.

MR TURNER: Applications. After that's made, it leaves roughly two-and-a-half months for any ordered disclosure or information to actually come through.

I had in mind early May yesterday, that this Tribunal was thinking that all material should really be in by the last week in April, 23 April. So, it's quite tight. We think given where we are now, given the trial date, this is the process that best works.

THE CHAIR: I understand.

MR TURNER: Sir, unless I can assist the Tribunal further, those are --

THE CHAIR: I did want to ask you one thing, which is to what extent, has Mr Holt inquired, whether any of this information is available from Amazon. Has he made that enquiry?

MR TURNER: I'll check with him. What I can say is, reflecting the point made in the Covington's letter: we have asked what Amazon has, and that reference to which Mr Beal referred, was not saying that we have got this seller information neatly packaged at all. What we are saying is merely that if there are bits of information

following internal requests or surveys, we would have to look hard for those. Those would be indirect, anecdotal, second-hand, and we have no idea.

MR BANKES: Well, last week we were looking at a mechanism by which Amazon monitored the prices of goods on its and on other platforms, so it clearly has a -- last week, I assumed it has a mechanism which gathers a great deal of price information.

THE CHAIR: I mean, we're looking at your request (inaudible) 1.6 on page 584.

MR TURNER: Yes.

THE CHAIR: "Price histories for a representative sample ... associated market commission, sold through channels (a)-(c) and (e) ..."

The other online marketplaces, social media, with the same products also. But we were told that Amazon actually has an account -- I think it's called the AHRP, whereby for every product sold on Amazon, it monitors the price sold off Amazon, because if it is sold at a lower price off Amazon, it doesn't meet the eligibility requirements to be the featured offer --

MR TURNER: Yes.

THE CHAIR: -- and that it is constantly monitoring those prices.

MR TURNER: There's two answers to that. The first answer is: this is not an across-the-board process. This is in relation to a selected sample.

THE CHAIR: What Amazon does?

MR TURNER: Yes, I understand.

THE CHAIR: I thought Amazon has to decide whether a product is eligible to be a featured offer, and it does that by checking whether it's been sold at a lower price elsewhere.

MR TURNER: Sir, I was addressing the question of some specific monitoring on a routine basis, as I understand it.

THE CHAIR: Yes. It's called the AHRP.

MR TURNER: I understand in relation to that, insofar as records are kept, that's for a sample. In relation, sir, to your question about whether in policing or enforcing the MFPP on a routine basis -- I don't know, I would take instructions -- whether information is kept, that is across the board. My understanding is that it's not. I think --

THE CHAIR: If it's for a sample, you're only asking for a sample.

MR TURNER: Well, that, that relates to the circumstances that they're interested in for that particular policy, the MFPP.

The second point is --

THE CHAIR: But the subject matter is the same. The question is the same, when they sold -- the price history, for example. Obviously, Amazon knows what it sold on Amazon. It's not asking for that. It's asking for the prices sold through these other channels off Amazon.

MR TURNER: Yes.

THE CHAIR: I thought that is what Amazon monitors.

MR TURNER: I'll just check. My understanding has been that monitoring is not fully across the board at all; and secondly, insofar as records are kept, it's in relation to some limited grouping. But I will get back to you on that.

The second point, though, is of equal importance, which is that what we're aiming to get from these requests is not specifically just looking at the prices. We want to actually put together, with the considerations taken into account by the sellers when they decide to sell on the different channels, and how they see the substitutability of Amazon's store with these other channels. We're putting that information together in order to create a useful picture to answer the question of market definition and to an extent dominance, that I foreshadowed earlier on.

THE CHAIR: I thought 1.6 goes to the question of potential effect of the price parity policy, because that was my understanding of what Mr Holt says in paragraph 5(a) of

his explanatory text, and that this is not about market definition. That's how he explains the reason for 1.6.

MR TURNER: Yes. Okay.

THE CHAIR: At this stage, it would allow me to test the extent to which sellers set lower prices on rival marketplaces.

MR TURNER: Yes. No, you're correct that does, at least primarily if not wholly, go to that question of the price parity.

I've since had some information handed up to me about what we were debating a moment ago. First point: it seems I am correct; the information is not retained after the point of use. Second point: again, what I was saying in relation to the monitoring, the clarity is that this monitoring is in relation to all the products, but for certain select competitors only were chosen for that exercise. That's how it works and what we have got.

THE CHAIR: Amazon has not retained this information, even since this case started.

MR TURNER: About the price history?

THE CHAIR: Yes. I would have thought once the allegation was made in proceedings, the information would be retained.

MR TURNER: I will again need to actually confirm that. I see the point.

Subject to that, if you have further observations, these are important, and on your general first enquiry, for reasons I have given, these aren't matters that we expect within Amazon you can simply produce information that will suffice. (Pause)

Sorry. In relation to Mr Bankes's point, may I just return to Seller Central for a moment to tell you what we had, which is that the Seller Central is only accessible to certain employees at Amazon. It is not accessible to the retail division, and we have made that absolutely clear, so that they create a Chinese wall.

Second: that the Seller Central, we envisage, following up that footnote 2 in the letter,

be useful for making the first contact with the entity. But after that, you're not in a Seller Central. Documents and data can be a direct exchange with their legal team through another route. It's really because that breaks the ice, and that was the way in which (inaudible).

MR BANKES: I'm struck by the fact that we were talking about it, not simply one information request, but a series of correspondence and possibly conversations. (Pause)

You're talking about not a single piece of communication, but a series of communications, and possibly phone calls or discussions.

One of the points that has been raised is the possibility of intimidation, and I'm not for a moment suggesting -- but nevertheless, there needs to be clear evidence that's not taking place, and that can be addressed through using the rubric in Ennis.

What I am interested in knowing is how you will continue to police that point and be able to demonstrate ex post that there's been no variation from the standard set out in Ennis when you get on the phone.

MR TURNER: Yes. Also, if I may say, an extremely important and fair point.

Those communications again, we know from (inaudible) were meant to be subject to litigation privilege, apart from the fact that the chair -- they're going to make an order biting on this -- for this, we obviously will treat this extremely seriously.

We will need to -- well, now I'm thinking aloud, sir, if you will permit me to do this. We can make a trail, a record of the conversations and documents. The other side, obviously, if there is a concern about intimidation, can face that directly, but we will make clear through that document trail what we are doing. If there is some occasion in which it is legitimate to raise that, and a concern is raised, it will be available. Difficult to think of a balance that would otherwise be struck. I will take instructions in a moment, but that would be my suggestion.

THE CHAIR: And of course, if not a complete way of policing, but if you have to make an application for third-party disclosure against one of these sellers which haven't produced it in that application, you then have to formally disclose the exchanges you had trying to get the information voluntarily before seeking an order.

MR TURNER: Yes.

THE CHAIR: At that point.

MR BANKES: Similarly, if ever we had to hear a late opt-out and the grounds for opt-out were in any way connected with conversations that had taken place during the course of this exercise, that would be unfortunate.

MR TURNER: Yes.

THE CHAIR: We haven't heard Mr Beal's reply, but if we were to, as it were, say, "We're not going to stop you communicating as you wish", but there will be the sort of Ennis requirements of things that way in the communication, we are minded to have a further term of the order that in (inaudible) Amazon (inaudible) its advisers must do nothing in any follow-up communications that's inconsistent with the matters set out in the letter.

MR TURNER: We understand.

THE CHAIR: I'm not suggesting that would be their intention to do that, but it can easily happen, just to make clear. So that is actually prohibited by the (inaudible).

MR TURNER: Subject to anything further from the Tribunal, may I just check on my side that there isn't something that needs to be said.

Nothing further on this side of the courtroom.

THE CHAIR: Yes. Thank you.

Mr Beal.

Reply submissions by MR BEAL

MR BEAL: Can I start, please, with the twin so-called mischiefs of privilege and

somehow impeding equality of arms in Amazon's defence.

Firstly, on privilege. If you still have open bundle A, tab 19, page 570, which I think is the last document you were taken to, you will see in paragraph 20, Amazon confirms that its proposal in respect of third-party seller disclosure information requests is to approach third-party sellers on an open, not a privileged basis. It says on that basis that the question of privilege is academic. That's --

THE CHAIR: Where are we, sorry?

MR BEAL: That's page 570, paragraph 20, four lines up from the bottom of the paragraph:

"Amazon ... [proposes] to approach third-party sellers on an open (not privileged) basis [so it's said on that basis], the question is academic."

That's their proposal. They're proposing to write to third-party sellers on a purely open basis. Sir, that, I think, ditches any suggestion that privilege is relevant here, even once one's got past the point in McLaren from paragraphs 99 and 122 that --

MR BANKES: Sorry, sir, I'm reading this. It goes on the next sentence:

"But in any event, if Amazon were to approach third-party sellers unilaterally, it would be entitled to do so."

MR BEAL: It does say that, but in terms of what they're actually proposing to do, they're saying they're proposing to write on an open basis. If that isn't their proposal anymore, then that's changed.

THE CHAIR: What is your direction 1.4(h) that they're referring to? Is that in our consolidated --

MR BEAL: Sorry, would you give me a moment?

THE CHAIR: I don't know what it's referring to, just to understand the sentence.

MR BEAL: I'm told the numbering in the order has changed. It was the provision that dealt with whether or not they were going to be required to pay for legal advice to

advise third-party sellers on whether or not the content was privileged or not. What they seem to be saying is, "We don't need to pay for that because we're planning on writing on an open basis". (Pause)

Can I clarify what I've said? Professor Stephan, I think -- it was being suggested or offered. We were saying we would pay, potentially, for class members to obtain advice from a solicitors' firm as to whether or not the communication was in fact privileged. To meet that suggestion, i.e. they would send a letter, we would say, "Well, we'll pay for that particular class member to get advice as to whether or not it's considered that the communication is privileged or not", whereupon the response, as I understand it from Covington, was to say, "Well, we will send the communications on an open basis".

In terms of equality of arms, fairness of the defence. My learned friend, when he handed up the letter that we sent within 24 hours of receiving the request on 13 October 2026, which is the loose letter, didn't read out paragraph 3, where we had made it clear that our proposal would not prevent Amazon from communicating with the class members in the ordinary course of business, or by way of considering possible witness evidence. What Professor Stephan is proposing is not unfair, does not prevent Amazon from preparing its defence, and does not inhibit compliance with the proposed timetable to trial in 2028.

So we were making it clear in 2 and 3 combined that what we were seeking to control was the nature and extent of the third-party seller disclosure process. We weren't in any way seeking to inhibit their ability to obtain such evidence as they consider necessary to conduct their defence.

In terms of the overall delay point that is being urged upon the Tribunal, "We're getting this all too late, we need to start now". If I understand Mr Turner's final submission, it's that this will be available for the long stop date of 23 April 2027 on their proposal, and on our proposal that date is also the long stop date for third-party disclosure. We

don't understand how one proposal is too late and the other proposal is satisfactory. One does need to bear in mind that the reason for the delay that is necessary in our proposal is because we need to wait and see what they've produced, by way of the other proceedings, to work out whether or not this third-party disclosure is really necessary.

As to why that is important, it was said, I think by Mr Turner, that they didn't have any relevant seller information as a result of the CMA and EU processes. Could I take you, please, to the European Commission decision? It's in the bundle of authorities, E, tab 9, page 544. (Pause)

We see at paragraph 67, there is part of the Commission's reasoning in their decision: "From the seller's perspective, audience-building and preserving commercial independence from marketplaces is a viable strategy only for a limited number of large retailers, whereas typical marketplace sellers are small-revenue sellers who are unlikely to be able to build up [their] own viable online shop which substitutes the marketplace option."

Then if we look at footnote 24, it says:

"See for example Annex 35 to Amazon's response to the Commission's RFI."

And then footnote 25, which then deals with recital 68. So recital 68 says:

"The biggest advantage of selling on an established e-commerce platform, in comparison to selling via an individual webshop, are the immediate access to a large consumer audience and thus the generation of potentially higher traffic for retailers."

And the footnote reference, 25:

"See for example a study conducted by Amazon among sellers which shows that ... [and then it's redacted] factors taken into consideration by sellers when choosing which marketplace to sell on."

And it refers to particular pages of a particular annex to Amazon's response to the

Commission's RFI. Now, this is material which should be coming in the other proceedings.

If we then, please, look at recital 22, which is at page 538. Recital 22 says:

"On 20 September 2022 the Commission informed Amazon of the observations received from interested third parties following the publication of the notice. On 22 November 2022, Amazon submitted an amended proposal for commitments."

Again, at face value, the Commission is saying that they had informed Amazon of the observations received from interested third parties. Now, obviously, to the extent that that has been committed to a document, we would also expect that to show up in the other proceedings' disclosure from the European Commission, which is the --

THE CHAIR: I think that's observations on the initial commitment, not observations on the matters being sought here. That's fairly clear, isn't it, from recital 21.

MR BEAL: That could well be the case, but it looks as though that the Commission has been prepared to hand over to Amazon information from third parties, which one would expect, subject to the usual redaction for redacting the identities of the people who are making the comments.

THE CHAIR: Yes.

MR BEAL: In terms of the CMA, as I understood it, the suggestion was made that the CMA had not provided details of the information from sellers that they had relied upon. My solicitors have managed to find over the short adjournment, within the CMA disclosure, a document that, I'm afraid, because it's been adduced only into the confidentiality ring I will need to invite you to read, and I don't propose to say anything about it other than to make an observation as to what one can derive from it.

It must only be handed out to those in the room who are in within the confidentiality ring. Don't pass it on freely. (Handed)

MR BANKES: Can I ask a procedural question about the EU process? I see from

recital 17 that there was a statement of objections.

THE CHAIR: Yes.

MR BANKES: Was that accompanied by an access to the file process? And is the material that was provided in the access to file process part of the disclosure?

MR TURNER: Yes, there was an access to file process.

MR BANKES: And is that within the scope of other proceedings, that materials are provided (inaudible).

MR TURNER: So, sorry, yes. I'm just directed in the document in recital 16 which we looked at for -- and this is for France and Germany. If you look at the footnotes applicable to it.

MR BANKES: 4, 5 and 6?

MR TURNER: Yes, essentially, I'm told France and Germany.

MR BANKES: And you would therefore say that's not geographically relevant?

MR TURNER: Not necessarily. Going back to the debate yesterday, we take to heart the point that if it is relevant to these proceedings -- not merely if it relates to it, as the chair pointed out -- then that that is in scope.

MR BANKES: Okay, so anything in there which goes to the issues subject to a third-party questionnaire will be disclosed?

MR TURNER: Yes. On that specific point, I need to cast my mind back to the rules on disclosing in court proceedings material you've got from the Commission through the access to file, which might require a permission. But leaving that aside, you have our submissions on the relevance of it and how we'll deal with it.

MR BANKES: I can't remember the answer to that, either.

MR BEAL: In relation to the CMA document that I've handed up.

THE CHAIR: Yes.

MR BEAL: Within -- I'm afraid it's not numbered; it's been produced at short

notice -- page 6, six pages in. I don't think controversial to refer to a question that is in the middle of that page. That's interesting.

THE CHAIR: What's the question number?

MR BEAL: 1(b).

THE CHAIR: Yes.

MR BEAL: And then three pages, on page 9.

THE CHAIR: This is a questionnaire --

MR BEAL: It is.

THE CHAIR: -- that was prepared, but what's interesting is, of course, the answers.

MR BEAL: Yes.

THE CHAIR: And the question is, did Amazon get the answers?

MR TURNER: We don't have the answer to that.

MR BEAL: What we see at page 9 is question 7.

THE CHAIR: Yes. I mean, the questions are relevant, but not unless one gets the answers, or a summary or a tabulation of the answers, it doesn't take one anywhere.

MR BEAL: Sir, I'm told it's a 96 page document. We took --

THE CHAIR: We've just been told that Amazon did not receive the answers.

MR BEAL: That depends what is meant by "the answers". Did they receive third-party responses to the CMA's survey with all of the details provided by the third-party? Probably not. Did they receive a gist or a summary of the information that had been provided by a particular party, whether it's a 96 page document and we haven't printed the whole thing out.

THE CHAIR: Yes.

MR BEAL: But the point is, we simply don't know. (Pause)

We don't know at the moment what else is in the other proceedings disclosure, which might have documents such as this and documents from the European Commission.

We simply don't know. We simply don't know because Amazon itself has clearly commissioned its own surveys and put those in a response to the Commission, in response to an RFI. They've clearly received information which suggests that, in fact, seller data -- seller views -- is being communicated by the CMA to Amazon as part of the inter partes process in the CMA investigation. But we can't say more than that because we've only just received the CMA information and we haven't had anything from the European Commission.

The Tribunal of course has this point, which is asking for the very extensive series of requests settled by Mr Holt, even to a large seller, is going to be very burdensome. Data compilation and production of data from scratch is not going to be a legal expense; it will be an internal management cost that will be very burdensome in terms of time.

The next point is, whilst my learned friend referred to "market definition", and said that the sellers' views on who they would use and why they would use people is necessary for the market definition. But there's plenty of article 102 cases on market definition where the users, the operators in the market are not treated as being determinative. The CMA, for example, has historically fought shy of subjective survey evidence. It's certainly not every case which requires market surveys from a sample of users to understand the delineation of the market. It's usually a question of expert economic evidence based on, principally, objective criteria.

Amazon has pleaded that there were competitive constraints from rivals -- that's the essence of their pleading -- and in order to plead that, they must necessarily have had an evidential basis for that assertion, which has been signed by a statement of truth. So the idea that they can't defend themselves without the third-party seller material implies that they shouldn't have pleaded the case and the assertion that they made. If they hadn't been able to make the point that they were not feeling any competitive

restraint from rivals, or, sorry, were feeling a competitive restraint from a rival, they wouldn't have been able to settle the defence the way they did.

My learned friend said what they were after was a discussion with us about what is needed. That's precisely what we've suggested. The difference between us is they're saying we need to have a process whereby we try and reach a common landing so far as possible. We're saying, yes, we agree. The only difference between us is: when do specific directions kick in to enable third-party class disclosure to the extent that the Tribunal gets involved with it; when does that direction kick in and set a formal process for applications for third-party disclosure? We have suggested, as I've indicated, 15 January for proposals and 22 January for replies, and then the matter is dealt with at the February CMC, and that still leads to a long stop date of 23 April 2027 for any production.

What our suggested route enables us to do is to take into account the CMA disclosure, hopefully the European Commission disclosure, and all of the Redfern process requests and answers, so that we have a much better idea of the utility benefit of third-party disclosure, viewed against the very severe burden it will impose if 89 claimants are requested on a voluntary basis to provide nine-and-a-half years' worth of their basic business operations.

All we're seeking to do is introduce an ordered and structured process, and the prohibition on reaching out to the member class is time-limited, and is ambit-limited. It's only for the sort of disclosure exercise that is being suggested by Mr Holt, and it's only for a temporary time period. We are not suggesting they cannot reach out and have discussions for potential witnesses and so on. It's simply introducing a proper framework for consideration of the issues so that Mr Holt's requests can be considered, and so that any necessary sampling process can be properly considered.

What I'm afraid is entirely unclear as a result of my learned friends' submissions is

which of Mr Holt's requests are left. If it's the full suite, then you end up with the extremely unattractive position where Amazon is deliberately seeking to ask members of our class for a whole range of information and data which it knows it cannot secure in a direct third-party disclosure application. We know that may well have a chilling effect on the willingness of the class member to engage with the class process.

Our proposal, instead, is that we put in place consensual approach to working out what can be done, with a backstop date of 15 January for a formal application for a proposal for disclosure to be made, and that is then dealt with through the prism of the February CMC in 2027.

My final point in relation to Mr Holt's proposed requests is: you didn't receive an answer as to whether or not Mr Holt had in fact sought this relevant information directly from Amazon. Given, for example, the footnote I showed you in the commitments decision that Amazon was conducting its own seller surveys, it's extremely surprising that that exercise hasn't been done.

It can't, of course, have been done, because Amazon's primary position is that they haven't engaged with second stage disclosure yet. They were waiting for this CMC to get going on how the second stage disclosure process should operate, and one can therefore infer that Mr Holt has not got to the bottom of the documents that Amazon holds and has not sought to work out whether or not he could obtain sufficient and appropriate information directly from his client that he can review at his leisure without having to impose a disproportionate burden on the seller class.

As a point of information, the trouble with looking at CMA material that we've only just received is that its full significance and where it's come from may not be entirely clear. But our concern may be that this in fact is a document not produced by the CMA, but a document produced by Amazon. I'm told that somewhere in the disclosure there is a spreadsheet, which I confess I haven't seen, that may well contain, if not directly the

answers, at least a summary of the answers that were given. I'm told it looks like the answers, but I haven't seen it, and I can't make an assertion to the Tribunal on the document.

MR BANKES: It appears to have a commission case number on it as well.

THE CHAIR: Commission?

MR BANKES: Yes (inaudible).

MR BEAL: Yes. I'm told it's a CMA document. It was in the CMA disclosure, but you're quite right. It does look as though it has a file reference number that is a commission file reference number. Case reference number, I should say, their file within DG Comp.

Again, unless I can be of any further assistance, those are our submissions.

Reply submissions by MR TURNER

MR TURNER: I'm not making a rejoinder. Make of it what you will. It's just to clarify a few points of fact.

The privilege point that Mr Beal opened with; we have said that we're going to that initial letter. We will treat that as open. But for the avoidance of doubt, the follow-ups and the dialogue, we're not copying all of that to them, and we come back to the process that I was canvasing with Mr Bankes.

THE CHAIR: If the initial letter is open --

MR TURNER: Initial letter, yes.

THE CHAIR: -- will you then have any difficulty copying it to the Class Representative?

MR TURNER: No. One qualification on that, and then a further point. The qualification is we don't propose to actually identify the individual within the seller class that we are going to be contacting, the specific person, which relates to my next point. If you step back, what you see from the exchanges we've had over most of today is that on that side of the courtroom, they are implacably opposed to us engaging in this

process, and are straining every fibre of their being.

MR BEAL: How is that not --

THE CHAIR: Well, that is a rejoinder.

MR TURNER: Well --

THE CHAIR: What would be helpful is: can you shed any light on the brand health tracker questionnaire which was conducted by Publicis Media? Was that on behalf of the CMA, or was it on behalf of your client, who then put it to the CMA?

MR TURNER: I'm afraid I can't at the moment.

THE CHAIR: If someone could write in tomorrow.

MR TURNER: Yes, we will do that.

Sir, I didn't mean to make a rejoinder point. What I was going to say was, because I want to say it for the record, that in view of what you've heard, we hope and trust that when they have received this information about who we're speaking to, that there won't be communications from them which put sand in the wheels and hurt the process. It's a matter of cooperation and the governing principles of this Tribunal, but it is something that needs to be said, and we do hope that that will not occur.

Second point is just that we will check the brand tracker point. What I said about the third parties was essentially I just rechecked my submissions in relation to the CMA, and what we were not provided with from them. So far as the commission is concerned, I'm not going to make any further points.

On costs, it is said, well, you're not proposing to meet the reasonable costs of the information-gathering exercise. We will do that.

Sir, subject to anything else that you may wish to ask, I just wanted to enter those points.

THE CHAIR: Yes. (Pause)

Yes. Mr Turner, if we were to not go along with Mr Beal's proposal, but allow Amazon

to write to third parties, selected third-party sellers, we are a bit concerned that not enough effort has been made to engage with Mr Holt as to what information is available within Amazon. That doesn't have to wait for disclosure. Amazon will know what it can provide.

We have just seen that Amazon did a survey of sellers, from that note in the commission decision. We don't know how broad it was, but it's obviously potentially relevant, and Amazon may have done other surveys. We don't know. So we are considering whether we should restrict Amazon to say that it should not seek information from third parties without first taking reasonable steps to check whether equivalent information is not readily available within Amazon.

We raised with you the monitoring of other prices. It wasn't clear that Mr Holt had actually explored that with Amazon; how they do it, what records they have, and we wonder how far Mr Holt has actually discussed with Amazon, "Have you done any surveys? Can I see them? What do they cover", and so on. We are not saying there should be a trawl of Amazon internationally, everything, because as mentioned by your solicitors at one point, that might be difficult, but people have been involved in dealing with these three or four investigations in recent times.

As I say, we are minded at the moment to include such a restriction, and we thought we should put that to you --

MR TURNER: Yes.

THE CHAIR: -- to give you a chance to respond.

MR TURNER: Yes.

THE CHAIR: That really feeds into a request you made, if we have any comments on schedule, questions, or clearly when it comes to seeking an order for third-party disclosure, one question, as you know, is not just relevance, but necessity. Amazon -- and this is true generally of third-party disclosure; one of the questions

always is, "Can you not get this elsewhere, including -- first place -- within your own sources, before you go to a third party?" So it would have to be addressed at that point in any event, of course.

That's what is going through our mind.

MR TURNER: Yes. If I may, I'll give one immediate reaction, but then I'll need to just take instructions.

The immediate reaction is, which I know to be the case, that these requests which have been crystallised in that disclosure note, have been taken against privileged consideration of what Amazon has got, and it has not been done in an irresponsible fashion, a point I made at the outset. The proposal -- and I wrote down what, sir, you said -- was a restriction that there should be no contacts with the third parties without taking reasonable steps to check if equivalent information is readily available in Amazon.

With that in mind, if I may, I'll just have a couple of minutes to see what I can achieve on this side.

THE CHAIR: If you want us to rise for ten minutes, we can, if that would be --

MR TURNER: I think, given the importance, that would probably be sensible.

THE CHAIR: We are obviously not in any danger of not finishing soon.

(2.56 pm)

(A short break)

(3.12 pm)

THE CHAIR: Yes.

MR TURNER: I'm grateful for the chance to confer. It's been useful. Two points.

As regards the restriction that, sir, you referred to --

THE CHAIR: Yes.

MR TURNER: -- we're content with that. We do not think that this goes beyond what

essentially we've been doing anyway, but what we shall do now is double-check with Amazon that there aren't any readily available materials that should be shown to Mr Holt. If there are readily available materials, and I have in mind the survey from that footnote shown, then we're going to show those to Mr Holt, and we're not going to make requests for equivalent -- essentially duplicative -- information from sellers. We won't do that.

Second point is to return to something that was debated again just before we broke, which is about what we show to the Class Representatives. You referred to copying them in on the letters.

We would propose not to copy them in on the letters. We will give them the final text of the letters showing the substance of the requests. We do not consider it is appropriate to actually say, "These are the people we're writing to in real time", at this time, for two reasons.

First is the concern that I mentioned before the break, and I will not repeat, other than to say that we want to minimise friction in being able to liaise with sellers. The second is, of course, that on the other side, we know that they are speaking to individual sellers themselves, and speaking to them about relevant material. They do not propose to tell us who they're contacting, and we're not asking for it.

Sir, those are my submissions on those two points.

Reply submissions by MR BEAL (continued)

MR BEAL: May I come back on that second point? I'd understood my learned friend to say that the correspondence, at least at the initial stage of contacting people, was going to be open. If it's open correspondence, then I fail to understand, I'm afraid, why it can't be shared with us. We could simply make a disclosure request for it; if it's not privileged and it's relevant, they would have to disclose it. I'm really struggling to understand why we can't be notified who they are proposing to write to, if that's what

they're doing.

Of course, it goes against the allegedly consensual process that my learned friend was urging upon the Tribunal, at least from a sampling perspective, to be writing to any number of people with a view to trying to get voluntary disclosure. That goes against his entire submission that this is a structured, orderly process that we're in control of, but it's our job to do this and to exercise that control, not you, the Tribunal. If in fact, the sampling exercise was simply a fig leaf to be able to write to all and sundry, then that's rather alarming.

MR BANKES: Yes. Don't you know who they're going to write to?

MR BEAL: No, because he's just said he's not going to tell us.

MR BANKES: Well, if you look at --

THE CHAIR: We've had the report from Mr --

MR BEAL: But he's not confirmed that that's the 89 they're going to write to.

MR TURNER: No, that's right.

THE CHAIR: Not the 89, but for the 14, I think.

MR TURNER: Well, for disclosure. That's right, it's a smaller number for disclosure.

THE CHAIR: It does list the 89, doesn't it?

MR TURNER: It lists the 89, of which a smaller number at the beginning are the disclosure group.

THE CHAIR: Yes.

MR TURNER: That is the proposal. I think I'll be corrected: it's fair to say should matters be drawn to our attention -- for example, to the points read out from Dr Houpis earlier, that there are some points which require to be addressed -- that may not be the final list. Our concern is, therefore, it won't be simply them saying, "We need to know everyone who you're speaking to in real time". That should not happen and it does not need to happen.

THE CHAIR: Yes.

MR TURNER: The requirement of this Tribunal, following Ennis, is that this should be an orderly process where nothing improper happens, and we will do that.

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

Well, we think you will show the form of letter, and we don't think you need to copy the letters to the Class Representative. It is an open letter, so it's open to the Class Representative just to write to whoever it wants to in the class saying, "Well, if you get a letter from Amazon solicitors, please send us a copy", and it will be up to them whether they do. It's not then a privileged letter.

MR BEAL: Yes, in order to understand so that the Tribunal obviously, not having made a decision on my application and my approach yet, if I can understand correctly what my learned friend is saying is, in fact, there is no undertaking to this Tribunal at all as to the number or names of the people who are going to be approached, it's completely up in the air. If I can just clarify that, because it does change the parameters.

MR TURNER: Leaving aside the forensics, it's not completely up in the air. You've seen the proposal; you know where we're heading. We will take on board comments and adjust it.

THE CHAIR: I think that will be recorded. We haven't fully decided it and we will reserve our decision, and it's something (inaudible), as you said, important in this case, but it's something that may arise in quite a number of cases and it's starting to arise in cases. So we think it's right that we just take a little time to consider it, but I have said have a judgment by the end of next week unless something unforeseen happens. We'll leave it there.

Directions

THE CHAIR: Other matters. I think it might be appropriate to direct today that the

evidence in any one of these cases should stand as evidence in the others, unless anyone opposes that direction. And I think we can include in that the ACSO case, if it is pursued, so it doesn't have to be revisited.

You've said that the CMC will be on the first available date after 8 February. Given the experience of the last two days, we think it should probably be fixed for two days, with an additional day in reserve in the event that there are third-party disclosure applications. We think it's best to list it on that basis. It can always go shorter, but if you run out of time, you're then in some big trouble.

Also, we would ask if before that CMC someone, or perhaps by collaboration, could produce a glossary of acronyms. There seem to be quite a lot and we are beginning to struggle. That would be very helpful for everyone. It can be a rolling document to be used in these proceedings.

Otherwise, if counsel could produce a draft order excluding the point about the third-party disclosure on which we haven't given a decision, but with all the other provisions about disclosure and dates and so on, if that can be sent next week.

Is there anything else that we --

MR LASK: Just before we finish, I had two very brief ACSO points. So we have just a minute --

THE CHAIR: Is there anything else from the present parties?

Submissions by MR TURNER

MR TURNER: There's just two things, I'll be corrected if I'm wrong about this, on the directions. So you've said you're not going to deal with directions past the summer?

THE CHAIR: Yes.

MR TURNER: Two things.

THE CHAIR: A date for witness evidence?

MR TURNER: Yes, witness evidence and the proposed agenda for the next CMC.

The proposed agenda for the next CMC -- something was in the draft order. We propose that comes out now.

THE CHAIR: Yes.

MR TURNER: We don't need that. So far as the witness evidence is concerned, we ought to -- if the Tribunal agrees -- just revisit that, because we spoke yesterday about the potential longstop for the documentary material being in on 23 April.

THE CHAIR: Yes.

MR TURNER: So then we've got to consider the witness statements, the main ones, and the reply.

THE CHAIR: Yes. We've seen the two proposed witness statements be by 18 June? And the responsive witness statements by 23 July.

MR TURNER: Yes, may I just have a moment.

THE CHAIR: Yes. (Pause)

MR TURNER: Sir, what I'm reminded of or told about is: first, there's going to be the trials in the US taking place, I think at some point in the first half of next year with witnesses, as a consideration. We consider there's not much in this, but if the disclosure is 23 April as the target, and we consider a period after that for the witness statements, we wonder if we could have till the end of June rather than 18 June.

Then the time for the response for the witness statements, we do not think does need to be beyond three weeks, as we had said, and therefore 23 July suits. We would ask for the main witness statements to go to the end of June.

THE CHAIR: Well --

Submissions by MR MOSER

MR MOSER: Sir, I'll make one point -- slightly broken record -- but my learned friend has reverted to his language of 23 April being the target for disclosure. Absolutely not; it's the long stop, and disclosure is on a rolling basis, which is what the order will say.

Secondly, we expect that our witnesses are going to have quite a lot to do in responding, which is why we'd originally suggested six weeks. The Tribunal has suggested five weeks, and we'd be content with that, but unlike the Amazon witnesses, one imagines there'll be essentially recycling whatever the evidence is they're giving in other places, we're going to have to deal with that fresh, and they won't have nearly the same pressure the other way from our witnesses. So in order to be fair, we do prefer the timetable that's been suggested by the Tribunal.

MR BEAL: I'm aligned with Mr Moser on timetabling. (Pause)

THE CHAIR: We are going to stick to 18 June and 23 July.

MR TURNER: I think that -- I was going to say that -- obviously I'm wrong, but that completes the business apart from ACSO.

MR MOSER: Well, there's the question my learned friend rightly raises of what the agenda is for next time. I was also just going to double check with the Tribunal. You don't want to make the orders about experts this time; is that right? Because we haven't reached that.

THE CHAIR: No, there was something agreed --

MR MOSER: There were some agreed bits.

THE CHAIR: -- that they would indicate what they are covering.

MR MOSER: We're going to do that by 30 October.

THE CHAIR: Yes. That's part of the order. But beyond that, no.

MR MOSER: Nothing beyond that, fine.

THE CHAIR: Because we think that something that ACSO should be involved with. It could be done on 8 February, and there's nothing urgent about it just.

MR MOSER: There's shrugging behind me, which I take as enthusiastic agreement. Now, before ACSO say their piece, there was, in the multicoloured order, the paragraph 11 agenda:

"Further case management conference to be listed."

That's all agreed. The provisional agenda:

"(a) determination of any applications concerning second stage disclosure."

(b) is not being pursued by Amazon. And then (c):

"Any orders or directions sought as to ..."

And there are some minor differences between Amazon and the Class Representative -- some of it has been resolved.

THE CHAIR: This is in the composite --

MR MOSER: Yes, the amazing technicolour composite order.

THE CHAIR: I know what you mean. It's somewhere. Sorry, Mr Moser, I had mislaid my copy. Yes, what was it?

MR MOSER: 11.

THE CHAIR: I don't think we need set the agenda now.

MR MOSER: Right.

THE CHAIR: I think it's fairly obvious, but it may get refined. What we have said is it's two days with one day in reserve.

MR MOSER: Yes, and we can put a full stop after reserve.

THE CHAIR: Yes.

MR MOSER: Apart from costs being in the case or cases, that I think concludes the proceedings as far as the order is concerned, subject to Mr Lask.

Submissions by MR LASK

THE CHAIR: Yes, Mr Lask.

MR LASK: Thank you, sir. I hope the much trailed update from ACSO isn't a letdown. I can be very brief, and it's uncontroversial. There are two matters, both of which have been agreed between ACSO and Amazon, and I ventilate them only in case the Tribunal has any observations; if it does, the parties would, of course, take them into

account.

THE CHAIR: Yes.

MR LASK: Firstly, ACSO and Amazon have agreed directions on pleadings. In short, the timetable will run from the later of the date on which ACSO confirms its intention to proceed, and the date on which the Tribunal gives its judgment on ACSO's CPO application. That will be the start point. From then, ACSO will have two weeks in which to make any amendments to its claim form, if so advised. Amazon will then have six weeks to file and serve its defence; ACSO will then have six weeks to file and serve its reply.

THE CHAIR: Yes.

MR LASK: What we propose is that those directions are reflected in a draft order provided after this hearing. It can be part of the Hammond/Stephan draft order, if the Tribunal wishes, or it can be a separate draft order, but either way, it will also deal with the matter I addressed you on yesterday -- Amazon's updated other proceedings disclosure explanation.

We think it's worth dealing with these points in an order now rather than waiting until we produce the draft collective proceedings order, which will need to reflect the Tribunal's judgment.

THE CHAIR: Yes.

MR LASK: That's the first issue. Then the second issue on which the parties have reached agreement is the communications protocol issue which was canvased at the end of the CPO hearing last week. The Tribunal may recall, the parties agreed to go away and correspond on it.

THE CHAIR: Yes.

MR LASK: They have corresponded and they've reached agreement, and Amazon has agreed to notify ACSO's solicitors if it intends to send any mass communications

to class members expressly encouraging them to opt out of the ACSO claim, and to provide such notice to ACSO's solicitors not less than ten business days prior to the communication being sent to class members.

Our understanding of the hearing last week is that the Tribunal wasn't minded to make an order, and that's fine with us. We don't seek one. We're happy with the agreement that's been provided by Amazon in correspondence.

THE CHAIR: Thank you, yes. That's all fine. Thank you very much. Appreciate the parties' constructive engagement on that. I think it's probably better that it's a separate order, the ACSO proceedings.

Is there anything else? I think it probably is right that it should be costs in the case on all matters. Thank you all very much.

(3.33 pm)

(The hearing adjourned)

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Key to punctuation used in transcript

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