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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos: 1342/5/7/20,  
1409/5/7/21(T), 1410/5/7/21(T)

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Tuesday 4th October 2022

Before:  
The Honourable Mr Justice Marcus Smith  
Peter Anderson  
Michael Cutting  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Sportradar AG and Another

Claimants

v

Football DataCo Limited and Others

Defendants

And

Soft Construct (Malta) Limited and  
Others

Interveners

AND BETWEEN:

Football DataCo Limited

Claimant

v

Sportradar AG and Others

Defendants

AND BETWEEN:

Betgenius Limited

Claimant

v

Sportradar AG and Others

Defendants

**AND**  
**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**

Claim Nos: IL-2021-000002, IL-2021-000003

Before:

The Honourable Mr Justice Marcus Smith  
(Sitting as a Judge of the High Court of England and Wales)

**BETWEEN:**

Football DataCo Limited Claimant

v

Sportradar AG and Others Defendants

**AND BETWEEN:**

Betgenius Limited Claimant

v

Sportradar AG and Others Defendants

**A P P E A R A N C E S**

Ronit Kreisberger KC, Alistair Lindsay, Alan Bates, Ciar McAndrew, Robert Howe KC, Barnaby Lowe (instructed by Sheridans appeared on behalf of Sportradar AG & Another)  
Kassie Smith KC, Thomas Sebastian, Will Perry, Lindsay Lane KC and Henry Edwards (instructed by DLA Piper UK LLP appeared on behalf of Football DataCo Limited & Others)  
Tom de la Mare KC, Tristan Jones, Timothy Lau, Ian Mill KC, Hollie Higgins (instructed by Macfarlanes LLP appeared on behalf of Genius Sports Group Limited & Another)  
Conall Patton KC, Greg Adey (instructed by Reynolds Porter Chamberlain LLP appeared on behalf of Soft Construct (Malta) Limited & Others)

Tuesday, 4 October 2022

1

2 (10.30 am)

3 THE PRESIDENT: Ms Kreisberger, good morning.

4 MS KREISBERGER: Good morning, Sir.

5

Housekeeping

6 THE PRESIDENT: Before you begin, just a couple of

7 housekeeping matters. First of all, these proceedings

8 are being live-streamed and, although these proceedings

9 are in open court, nevertheless there should not be any

10 recording, whether audio or visual, of these proceedings

11 and, if there was any infringement of that rule, that

12 would be a matter we would regard very seriously, so

13 please watch, but do not record or photograph.

14 More importantly, down to the detail, we have got

15 a trial timetable. There are two changes that I just

16 want to flag up. First of all, we have got, on

17 Wednesday, 12 October, an early start because of an

18 early finish. That early finish is not any longer

19 required. I think it is to do with the operating of the

20 trains on that day, but it means that we have a little

21 bit more flexibility on that day, but we are very

22 conscious that Mr Ford will be in the box and we do not

23 want him to be overstretched. So it may be that that is

24 a case where we either lose the early start or use the

25 extra time in a manner that does not affect Mr Ford, but

1 the parties should know that the 3.15 finish is not  
2 required on that date.

3 However, on Thursday, 13 October, if at all  
4 possible, we would like to rise at 2.45 on that day. We  
5 are entirely flexible in how that time is made up and  
6 I raise it now for the parties to consider. It is  
7 somewhat in the future so I have raised it now so that  
8 we can work out a solution.

9 Thirdly, moving on from the timetable, it would  
10 I think help us considerably if, after each day is  
11 concluded, a day file of the proceedings could be  
12 compiled for our attention. By that I mean a file that  
13 contains the transcript of a particular day, any  
14 documents handed up during that day and any documents  
15 put to witnesses, so that we can simply keep track of  
16 what is done on any one day. It will assist, I know  
17 from experience, considerably when we are writing up our  
18 findings.

19 Fourthly, we are very grateful to the experts for  
20 their considerable diligence. There is a likelihood --  
21 and I say it simply because this is what usually  
22 happens -- that we will make requests for further  
23 information from the experts so that they can produce  
24 data in different ways. We have no such requests at the  
25 moment, it may be that we do not have any, but the

1 parties should not be surprised if such requests are  
2 forthcoming and we would want none of the parties to be  
3 surprised if such requests are made. We would want the  
4 experts to produce, ideally, a single response so that  
5 we do not have controversy about the data that we are  
6 requesting. We can obviously discuss that further, but  
7 I raise that as a general matter. Inevitably we will  
8 want to slice and dice the data that is produced in  
9 a manner which is consistent with the way we want to  
10 decide matters.

11 Fifthly and finally, we are being transcribed. We  
12 ought to have a ten-minute break, morning and afternoon  
13 for the transcribers. We will try and remember, but if  
14 counsel can remember too, that would be very helpful.

15 So with that over-long introduction, Ms Kreisberger,  
16 I will hand over to you.

17 MS KREISBERGER: I am very grateful, Sir. As you know,  
18 I appear for Sportradar. We have a cast of thousands.  
19 I can read the roll call -- thank you, I am grateful.  
20 We only have a day. But I should say, Sir, I will  
21 address you on the competition case and we are going to  
22 confine Sportradar's oral opening to the competition  
23 case. Mr Howe is leading on the High Court claims. You  
24 have our written submissions on that.

25 THE PRESIDENT: I am grateful.

1 MS KREISBERGER: So just briefly then, housekeeping. We  
2 have the Opus system. If I might ask, will all the  
3 panel members be using Opus bundles rather than hard  
4 copies?

5 THE PRESIDENT: Well, we have discussed this and we will  
6 certainly welcome having the material up on screen.  
7 I find -- and I think I will be followed in this -- that  
8 marking up the paper files is a very helpful way of  
9 working out what is referred to in the course of any one  
10 day, so I will use the paper bundles in the first  
11 instance and I hope that will not slow things down. If  
12 it does, then we will rethink. But I think there are --  
13 there is at least a majority of the antediluvian  
14 approach that I have, so we will be, as it were, doing  
15 both. I hope that does not cause a problem. If it  
16 does, we will address it. I do not want us to be unduly  
17 slowed down. That does, though, I think, give rise to  
18 a point that I am sure everyone has well in mind, which  
19 is, when it comes to the witnesses, I do want them to be  
20 encouraged not to be confined, as it were, to the page  
21 that is summoned on screen. I do think that they are  
22 all entitled to look to context which is not immediately  
23 apparent on screen. It is more apparent when one has  
24 a paper file. So you may want to, when you are showing  
25 a given page, ensure that they see the beginning and

1 know what it is that they are being shown with a little  
2 greater lack of speed than is the case when one has  
3 paper documents.

4 MS KREISBERGER: I am grateful, Sir. The practical  
5 consequence from my point of view is that I will try to  
6 give references to volumes, to hard copies volumes,  
7 where I can.

8 THE PRESIDENT: Thank you.

9 MS KREISBERGER: The other housekeeping point on my list is  
10 confidentiality. I do not want to take up the  
11 Tribunal's time on that. The parties have been liaising  
12 and there have been quite a number of last-minute  
13 unredactions. The consequence of that has been to make  
14 preparing these oral submissions quite interesting  
15 because there is a pragmatic question as to whether  
16 I can read a document or I have to find a way of showing  
17 you the relevant point. I will do my best to take you  
18 through the documents in their current state of  
19 redaction but they are being updated by the minute. But  
20 I think we should just see how we go.

21 THE PRESIDENT: Yes. Ms Kreisberger, we are more than happy  
22 to read to ourselves anything that you would otherwise  
23 want to read out. That is probably more efficient  
24 anyway. We are very happy with elliptical references,  
25 so if you ask us to look at a figure in a particular

1 place, we will do so and I do not think you will lose  
2 any force of advocacy through doing it that way. So if  
3 I could urge all to move on the side of caution and use  
4 roundabout language and reference, that will be a way in  
5 which we can navigate the shoals of confidentiality.

6 MS KREISBERGER: I am very grateful for that.

7 The last point I should just foreshadow is that the  
8 defendants served a supplementary skeleton, as you will  
9 have seen, on Friday lunchtime. It raises a pleading  
10 point about market definition. We have set out our  
11 response. We say the pleading point is hopeless. We  
12 responded in written submissions yesterday, which I hope  
13 the Tribunal has received. I will pick up the points  
14 when I address you on market definition.

15 THE PRESIDENT: Yes. Ms Kreisberger, we are very happy to  
16 receive, as it were, *de bene esse*, anything on this. If  
17 it becomes a hard-edged dispute about a case that cannot  
18 be put, then that I think is a matter for closing.

19 I would not want the opening submissions to be held up  
20 by a kind of argument that you are taking points or may  
21 be taking points that you should not be.

22 MS KREISBERGER: Well, I am extremely grateful for that  
23 indication, so without further ado, I think I can begin  
24 opening my submissions, Sir.

25

1                   Opening submissions by MS KREISBERGER

2           MS KREISBERGER: I propose to structure my oral submissions  
3           in three parts. I will begin with a brief introduction  
4           and address you on what we say is the core distortion of  
5           competition and the core legal principle applicable to  
6           that. Then I will turn to the facts, and that is in two  
7           sections. I will address you on how FDC ended up giving  
8           Genius a position of what we say is unassailable  
9           monopoly and then how Genius planned to use its monopoly  
10          power to shut out rivals and exploit customers, which is  
11          what it went on to do.

12                   The third part of my submissions will then address  
13          the infringements and that will itself be in four  
14          parts: the market definition and dominance, object,  
15          effects, abuse.

16                   So, to begin with the competition law claim in  
17          a nutshell, as it were, I want to set out for you why  
18          the agreement, the FDC Genius agreement -- I will refer  
19          to it as "the agreement" -- is profoundly antithetical  
20          to competition. FDC has been given the exclusive right  
21          to license in-stadium in-play data on behalf of all  
22          134 football clubs that make up the three English and  
23          Scottish leagues. I will refer to that as "stadia LLMD"  
24          or "FDC data".

25                   This concentration of rights gives FDC great

1 commercial power and FDC has then licensed that entire  
2 package of Three Leagues football data exclusively to  
3 a single licensee, which is Genius, for a five-year  
4 period. Consequently, Genius is the only operator  
5 globally from whom bookmakers can buy stadium LLMD which  
6 they need in order to offer in-play bets on UK football  
7 during the match. My submission, Sir, is that this  
8 long-term grant of exclusive rights to Genius violates  
9 competition law and it is a violation because of two key  
10 features of the arrangement.

11 The first feature is the type of data over which FDC  
12 has handed control to Genius. It is data to which  
13 bookmakers in the UK and major bookmakers elsewhere must  
14 have access. Now, the documentary record, which is  
15 extremely important in these proceedings -- and I am  
16 talking about the ordinary course of conduct business  
17 documents -- they are clear on their face. The  
18 different operators speak with one voice on the  
19 must-have quality of the data. FDC knew that major  
20 bookmakers, bookmakers in the UK, must have this data,  
21 Genius knew those bookmakers must have this data and the  
22 bookmakers told Genius that they had to have this data.

23 I am going to show you some of these documents  
24 today, but for now let us just see how Genius put it in  
25 a slide deck. This is {H/356/13}. It is a slide deck

1 from 22 January 2019 and it is called "DataCo Commercial  
2 Strategy".

3 You see there the first bullet point:

4 "UK football is 'must have' content for all  
5 sportsbook operators."

6 In March of that same year -- just for your  
7 chronology that is two months before signing the  
8 agreement -- Genius was even more emphatic. If we could  
9 go to {H/418/7}, you see this is a confidential slide  
10 but the section I am going to read to you is now  
11 unredacted. It is the bullet point on the left-hand  
12 side under "Leverage Strategy". This is what Genius  
13 said in these confidential slides:

14 "UK football holds strong leverage for operators  
15 that cannot afford to operate without offering live  
16 betting on UK football."

17 They specify:

18 "This group goes beyond ..."

19 Now can you read -- no, sorry, that is fine.

20 "This group goes beyond the obvious UK operators,  
21 and includes the large global operators and the large  
22 Asian operators."

23 So these are the bookmakers that Genius says must  
24 have the data.

25 So what this means is that the data operator which

1 gets control over FDC data becomes an essential trading  
2 partner for these bookmakers -- UK bookmakers and other  
3 major ones. In short, that is because UK bookmakers do  
4 not have the option of saying, "Well, FDC data has  
5 become rather pricey. I will take tennis data from the  
6 ITF instead". That is not an option.

7 The point about a must-have product is it is --  
8 a product, as Genius says, that the customer cannot  
9 afford to operate without -- is that there are no  
10 substitutes in the eye of the customer. The fact that  
11 there are no substitutes tells you what the product  
12 market is, because a market, an economic market, is  
13 a set of substitutable products. Now, the fact that  
14 there are no substitutes for in-stadia LLMD for  
15 UK bookmakers and other major bookmakers necessarily  
16 means that the market is no wider than stadia LLMD.

17 Genius knew that UK bookmakers had to have the data  
18 and it had a plan to exploit their commercial dependence  
19 on it once it had monopolised the supply of that data.  
20 So that is feature number one.

21 THE PRESIDENT: Just pausing there, in terms of the evidence  
22 that goes to substitutability and the definition of the  
23 market, obviously the soi-disant statements by all of  
24 the protagonists in terms of the value of their product  
25 is something we would take into account, but presumably

1           you would accept that the products that were purchased  
2           by the bookmakers across the market and what was  
3           included in those is evidence that we ought also to have  
4           regard to in terms of understanding what it is that is  
5           being bought and sold across the market?

6           MS KREISBERGER: Yes. So the analysis I am going to put  
7           before you today is heavily grounded in the real world  
8           evidence, and if you are referring to the fact that this  
9           data is supplied as part of a portfolio --

10          THE PRESIDENT: Well, that is one feature --

11          MS KREISBERGER: The defendants' key argument, I will  
12           certainly address that. I should say at this juncture  
13           that it is not right to say, which is a point made in  
14           the Genius skeleton -- it is not correct to say that  
15           stadia LLMD was not offered as a stand-alone package.  
16           It was offered as a stand-alone package by Genius. It  
17           was priced very unattractively for reasons that I will  
18           take you through, but to say it did not exist as  
19           a stand-alone package is simply wrong.

20          THE PRESIDENT: Yes. I mean, the other -- I am sure I am  
21           only picking at threads here, but of course the other  
22           question is latency and its degree. Clearly it is  
23           possible to run a bookmaker's business using off-tube  
24           data. The question is how much of a disparity there is  
25           between live in-stadia data and the off-tube data.

1           We have seen a range of latency figures and then  
2           that leads on to how far that affects the sort of  
3           betting opportunity that the bookmakers can offer to the  
4           punters in terms of when they close or open their books  
5           for certain bets. Clearly, if you have got a latency of  
6           30 seconds, you are going to have to close your books on  
7           certain bets for probably -- well, a couple of minutes  
8           maybe, whereas if it is a latency of 7 seconds, you are  
9           probably going to have to close your books for rather  
10          less than that, and that must have an effect on how the  
11          punters view the attractiveness of your overall product.  
12          So this is again a sort of area of fact that we see as  
13          important in understanding the products that are being  
14          bought and sold on the market.

15       MS KREISBERGER: Yes, we agree and we will simply be putting  
16          evidence before you in relation to that very point and  
17          I will cover it in my opening submissions. But at its  
18          most basic proposition, you do not see UK bookmakers,  
19          the majors like William Hill or GVC or the bookmaking  
20          market in general -- and I will take you through that --  
21          you do not see them saying, "Actually, the price of FDC  
22          data has gone up so much that we are going to switch to  
23          an off-tube product". It does not happen. It is not  
24          a feature of this market. If I might say, it is an  
25          argument that has been crafted by the defendants for

1           this litigation and it is not reflected in the facts on  
2           the ground.

3           THE PRESIDENT:   The only point I was going to make is we are  
4           obviously not hearing at all from any bookmakers live.  
5           What we get -- the closest we get to what bookmakers  
6           think is what they buy and what they pay in terms of  
7           product, so that is simply a factual hole that we will  
8           have to deal with in terms of evaluating what their  
9           attitude is by reference to, as it were, secondary  
10          evidence.

11          MS KREISBERGER:   We are very alive to that, Sir, and we will  
12          put before you two categories of evidence: the  
13          contemporaneous documents where you really see what the  
14          bookmakers were saying to Genius, but also the economic  
15          evidence from Dr Niels, giving you these facts on the  
16          ground, which really, we say, speak for themselves.  But  
17          we are very alive to that.

18          THE PRESIDENT:   I am grateful.

19          MS KREISBERGER:   So returning to my -- we are still on my  
20          introductory remarks.  The second feature of the  
21          agreement which tells one it is antithetical to  
22          competition -- so the first was the must-have nature of  
23          the data.  The second is the extent of exclusivity  
24          bestowed on Genius.  What FDC has done is to bestow on  
25          Genius what I am going to call "true monopoly" over the

1           must-have data. So I want to distinguish that concept  
2           very deliberately from the notion of contractual  
3           exclusivity. The agreement plainly confers contractual  
4           exclusivity on Genius, it is a single global supplier of  
5           official FDC data, but it goes much further than that in  
6           its provisions.

7           The agreement is deliberately structured in a way  
8           which hands Genius the power to shut down efforts by  
9           rival operators to supply stadia LLMD in any form and so  
10          shield itself from competition entirely, so in that  
11          sense the agreement hands Genius the keys to the  
12          kingdom.

13          Let me explain that. There are three distinct sets  
14          of contractual provisions which achieve this. The first  
15          is that the grant of contractual exclusivity is for  
16          a long term. It is for a five-year period. The second  
17          is in relation to scout-spotting. Now, can I just  
18          explain what I mean by scout-spotting?

19          THE PRESIDENT: Yes.

20          MS KREISBERGER: Scout-spotting involves surveilling the  
21          crowd at a match to identify unofficial scouts and stop  
22          them from collecting FDC data, often by actually  
23          ejecting them from the grounds. Now, I want to put the  
24          point to you -- this is one where the defendants are  
25          claiming confidentiality. So the document is {H/786}.

1 This is the agreement itself and if you could go to  
2 page 26, {H/786/26}, and I will ask you to read  
3 clause 28 to the end of that page. (Pause)

4 So you see there what FDC has undertaken in relation  
5 to scout-spotting and you see an amount invested by  
6 Genius.

7 If I could ask you to turn to page 92, {H/786/92},  
8 that is schedule 10 of the same agreement. This is not  
9 confidential. Ah, I think it is the previous page,  
10 schedule 10, page 91, {H/786/91}. That is the one. So  
11 you see there -- if I just let you read it, Sir.

12 THE PRESIDENT: Yes, thank you. (Pause)

13 Yes.

14 MS KREISBERGER: So Genius anticipates that it needs to  
15 disrupt the unauthorised collection of unofficial data,  
16 so this put Genius in a position of being able to shut  
17 down the supply of unofficial in-stadium LLMD by rival  
18 operators.

19 THE PRESIDENT: Though it is in a sense a crystallisation of  
20 a right, I think you would accept, that every club would  
21 have to regulate what goes on in its stadium. Is that  
22 a fair way of putting it?

23 MS KREISBERGER: Well, our case is that they can do that  
24 provided it does not breach competition law.

25 THE PRESIDENT: Sure.

1 MS KREISBERGER: If, as we say, the scout-spotting shut-down  
2 is part of this anti-competitive arrangement which must  
3 be looked at holistically, then you have to look at the  
4 terms of entry. To the extent that they facilitate the  
5 enforcement of an anti-competitive arrangement, they  
6 will need to be altered. So there will be an impact on  
7 the actual entry terms, but that is not the point I am  
8 looking to put to you here. I am simply saying -- and  
9 the reason why it is significant is that in the previous  
10 eras, for instance when Perform was the exclusive  
11 licensee -- and I will take you through that -- there  
12 was a degree of unofficial scouting. So whatever the  
13 terms of entry are, the competitive scenario was that  
14 some data providers were able to provide a service based  
15 on unofficial scouting and what you see is a sealing off  
16 to the competition with these terms. So in a sense  
17 whether it is within their gift or not is not to the  
18 point for this issue.

19 THE PRESIDENT: Well, Ms Kreisberger, I think it is probably  
20 fair that I put at least one card on the table so that  
21 you can, in the course of this case, push back on it if  
22 appropriate. This is something which actually cropped  
23 up in BGL, where there was asserted a kind of mismatch  
24 between the term alleged to be anti-competitive and the  
25 enforcement of that term. The line that we took was it

1 is expected that all parties will comply with agreements  
2 and rights of other people and that we are not  
3 particularly attracted or I am not particularly  
4 attracted by a notion of, "Oh, well, there is a right to  
5 exclude but it does not matter because it is  
6 unofficially broken". It does seem to us that, if there  
7 is a right to exclude, then that right ought to be  
8 complied with by the person who is subject to the  
9 obligation correlative to the right.

10 MS KREISBERGER: We certainly accept there is a right to  
11 exclude. Let me give you a different example perhaps.

12 THE PRESIDENT: Of course.

13 MS KREISBERGER: You will have seen that Sportradar's case  
14 involves the foundational principle that there should be  
15 non-exclusive licensing of FDC data. The counterfactual  
16 that we put forward is actually what FDC originally  
17 intended, which was a non-exclusive structure restricted  
18 to up to four providers of data. It is not Sportradar's  
19 case that the clubs need to let in anyone who wants to  
20 transmit data. The clubs would have the right to  
21 restrict data providers to the accredited data  
22 providers, up to four different firms operating. So we  
23 are not at all attacking their right to do that, but, if  
24 that right is enforcing a monopoly arrangement which  
25 infringes the competition prohibitions, then you have to

1 look at how it is exercised in practice. So I want to  
2 draw that distinction. We are not bringing a sort of  
3 challenge to the right of the clubs to exclude  
4 individuals from the grounds. That is not the case.

5 THE PRESIDENT: No. I mean, it may be that one wants to  
6 approach this from the other end of the telescope and  
7 start with what rights an individual club has and you  
8 might say, just looking at a single football club, that  
9 there is a right to permit attendance on terms, there is  
10 a right to permit broadcasting on terms.

11 If one is postulating a single club, then that does  
12 not give rise to a Chapter 101 TFEU question at all. It  
13 might give rise to a dominance question depending on the  
14 size of the club. When one then has a league, one has  
15 a degree of cooperation between the participant members  
16 of the league which does potentially bring into play the  
17 collusion questions. But if one approaches it that way,  
18 one has to go through quite a significant series of  
19 analyses of what is and is not permitted under  
20 competition law before one ever really gets to the  
21 precise agreement that you are complaining of.

22 I suppose it is really that that I would not want to  
23 have sight lost of when one is conducting the analysis.

24 MS KREISBERGER: I am grateful for that, Sir. Can I be then  
25 very clear? The agreement we are challenging before you

1           today is the agreement between FDC and Genius.

2           THE PRESIDENT:   Yes.

3           MS KREISBERGER:   These other questions, if I might say,  
4                            Sir -- the first order question is: does this agreement  
5                            infringe competition law under Chapter I or Chapter II?  
6                            That is the first order question.  The questions about  
7                            the impact on the terms is, if I might say so, a second  
8                            order question which I suggest we park for now and focus  
9                            on the anti-competitive agreement that we challenge.

10          THE PRESIDENT:   Yes, thank you.

11          MS KREISBERGER:   So the third and final set of provisions  
12                            that I wanted to highlight by way of prefatory remark  
13                            relates to the sub-licensing of data to other operators.  
14                            This is really key.

15                        I am going to show you today that FDC had originally  
16                        planned to offset what it knew to be, what it said was,  
17                        the inevitable distortion of competition resulting from  
18                        its appointment of a single global licensee.  It knew  
19                        there was a competition problem and it sought to offset  
20                        that by imposing a duty on Genius to grant sub-licences  
21                        of FDC data to other data operators in the market, like  
22                        Sportradar, like Perform.  So instead of having  
23                        competing collectors of FDC at the upstream level, you  
24                        would not have that because of the Genius contractual  
25                        exclusivity, but you would have, in this scenario,

1 a number of competing providers of the data to  
2 bookmakers at the lower level.

3 The effect of that, the critical impact of that,  
4 would have been that Genius would not have been the only  
5 show in town for bookmakers buying stadia LLMD  
6 principally in the UK, but also elsewhere. So instead  
7 rivals could have taken a licence from Genius to supply  
8 the LLMD to bookmakers downstream.

9 Now, in the course of negotiations with FDC, Genius  
10 put paid to that duty that FDC had intended to impose.  
11 FDC dropped that duty and it banked the attractive terms  
12 on offer from Genius, namely a huge exclusivity premium  
13 and an indemnity. I am going to come back to the  
14 indemnity. In return, FDC bestowed on Genius complete  
15 freedom on whether to grant sub-licences to other data  
16 operators. Genius had the right not to do so. From the  
17 day the agreement was signed, the access of rivals to  
18 in-stadia LLMD was a matter entirely in Genius' gift and  
19 operators like Sportradar and Perform are at Genius'  
20 mercy.

21 Now, Mr Burton, who will be giving evidence in these  
22 proceedings on behalf of Genius -- he is CCO of  
23 Genius -- knew that Genius had scored a significant  
24 victory in heading off the duty to sub-license. He sent  
25 this message at {H/1749/6}. This is a WhatsApp message

1 to Jack Davison and Tom Russell. It is the fourth  
2 paragraph up from the bottom that begins:

3 "We got away with it on the secondary supplier  
4 issue -- no obligation to appoint secondary suppliers  
5 but need to act in accordance with competition law.  
6 Which is great."

7 So Genius had taken over as gatekeeper to the data,  
8 that was their plan, and it had no intention of opening  
9 the gates. Instead, like Baldrick, Genius had a cunning  
10 plan. Genius was going to make a show of negotiating  
11 with its rivals, Sportradar, my client, and Perform so  
12 that it would look like it was complying with its duties  
13 under competition law -- you see there they knew they  
14 had to comply with competition law. That is a thread  
15 that runs throughout these documents -- but those  
16 negotiations would be a sham. They would be a pretence  
17 of acting in a fair-handed manner, but the game was  
18 Genius would drag them out for as long as possible with  
19 twin goals: one, signing up bookmakers on long-term  
20 contracts while they were looking like they were  
21 negotiating and, secondly, delaying what they thought  
22 was inevitable competition litigation, which is where we  
23 are today.

24 Now, as you will see from the evidence I will show  
25 you today, it was a pretence that afforded Mr Burton and

1 Mr Davison much enjoyment. This was negotiation as  
2 performative art, to dupe Sportradar and Perform. The  
3 real plan was for Genius to make sure that its rivals  
4 were only ever offered terms it could never accept.

5 To sum up, the contractual terms ensured that Genius  
6 was armed with the ability to keep unofficial stadia  
7 LLMD off the market and to hold rival operators at bay,  
8 and that is how Genius acquired what I will call "true  
9 monopoly" or an unassailable position of monopoly. Then  
10 it went on to do what economists will tell you  
11 monopolists will do: they exploit their monopoly power.  
12 In this case, Genius realised the spoils by extracting  
13 vastly inflated prices from customers -- I will show you  
14 the data, Sir -- and foisting other content on them that  
15 they had not asked for, whether they wanted it or not.

16 With that, Sir, I am going to move to the core legal  
17 principle and that will end my introductory remarks.  
18 Those anti-competitive effects on customers, as I said,  
19 are the inevitable consequence of Genius being handed  
20 a monopoly by FDC. It is precisely why competition law  
21 sets its face against the long-term grant of exclusivity  
22 over packages of rights which are must-have. This is  
23 competition law orthodoxy. I will take you to the  
24 principal authorities in the course of my submissions.  
25 They are Arriva v Luton Airport and the FAPL

1           broadcasting rights decision. But can I just, for your  
2           note, refer you to paragraph 106 of Arriva. That is the  
3           {L/61/36}. There is no need to turn up the hard copy  
4           bundle, but that provides -- we can perhaps have it on  
5           the screen.

6           THE PRESIDENT: Yes.

7           MS KREISBERGER: Thank you. Paragraph 106, from the top:

8                     "The grant of exclusivity for a long period to  
9           a single downstream provider of rights has a distortive  
10          effect on competition where competitors cannot enter the  
11          downstream market to compete with the undertaking to  
12          whom the rights have been granted."

13                    This is an established principle of competition law  
14          and it maps precisely on to the agreement. This is  
15          a textbook case of foreclosure by exclusivity. FDC's  
16          grant of exclusivity has distorted competition in the  
17          downstream -- we actually call it the "mid-market" --  
18          for supplying in-stadia LLMD to bookmakers and Perform  
19          and Sportradar have been foreclosed. That infringes  
20          Chapter I and Chapter II.

21                    So with that, Sir, I will move on to the second part  
22          of my submission. So those are my opening remarks and  
23          I will then move on to the facts. Now, the facts are  
24          reported and not merely by way of background to the  
25          assessment. Context here is critical because it informs

1 the Tribunal's competition law assessment, in particular  
2 on two points. It explains the purpose of the  
3 restrictions, their commercial rationale, which, as you  
4 know, is the central question in relation to the object  
5 of the agreement, and it also shows the deleterious  
6 effects on competition were inevitable because they were  
7 foreseen by the parties and they were intended.

8 So, to begin, we need to go back in time to the  
9 pre-Genius era, when Perform held the exclusive rights  
10 to collect stadia LLMD under two consecutive three-year  
11 contracts. Now, Sportradar complained to the CMA back  
12 in 2014 about the exclusivity at that stage and its  
13 effect on competition and the CMA undertook preliminary  
14 investigations. Ultimately, the CMA decided it could  
15 not justify allocating resource to a fully fledged  
16 investigation under its prioritisation criteria. Those  
17 criteria explicitly take account of whether the  
18 complainant could instead pursue a private law remedy in  
19 the courts and fund the litigation, and here we are  
20 before you today. The CMA was quite right. It is apt  
21 for private law enforcement. But, in an unusual move,  
22 the CMA was at pains to articulate its competition law  
23 concerns to FDC.

24 Can we please turn up {H/30/1}? This is a formal  
25 advisory letter, as you see there, dated 5 November.

1           Could I ask the Tribunal to read the letter?

2           THE PRESIDENT: Of course. (Pause)

3           I think we are ready for the next page, {H/30/2}.

4           Thank you. (Pause)

5           MS KREISBERGER: If I could just emphasise the penultimate  
6           paragraph:

7           "Given the potential seriousness of this issue ..."

8           So the CMA made its position pretty clear. It was  
9           concerned and FDC knew that its card had been marked by  
10          the CMA. So it is against this background that we need  
11          to understand FDC's tender of rights in its original  
12          request for proposals. I am going to refer to that as  
13          the "original RFP". That was back in July 2018.

14          Now, FDC went to serious lengths to revisit and  
15          rework its licensing structure, unsurprisingly. As  
16          Mr Ford for FDC says in his evidence, FDC appointed  
17          Regulus, a betting consultancy, to advise it on the  
18          structure, and Regulus and FDC consulted extensively  
19          with key players in the market, including Sportradar.  
20          After much deliberation, FDC opted for a non-exclusive  
21          structure involving a single official data provider and  
22          up to three accredited providers.

23          Just for your note, that document is {H/193}. In  
24          the interests of time, I am not going to go to that now.  
25          I will summarise the provisions. Each of the providers

1 was to be appointed for a three-year period and each was  
2 to be permitted to gather their own LLMD from within the  
3 stadia. Data providers would pay rate card fees to FDC  
4 on a per user basis and a distribution fee. Bookmakers  
5 would pay based on usage.

6 I will come back to the original RFP in relation to  
7 counterfactual. What I want to draw out for you now is  
8 how matters unfolded, culminating in FDC's change of  
9 heart, because you see here a very carefully thought-out  
10 structure for a non-exclusive model, but it is not  
11 a free-for-all. One official provider, three accredited  
12 providers.

13 Now, as you would expect, before going out to  
14 tender, FDC, a sophisticated operator, estimated how  
15 much revenue the original RFP structure was likely to  
16 generate for it. I cannot read the number out, so if we  
17 could go to {H/177/5} and if I could ask the panel to  
18 look at the row "TOTALS" --

19 THE PRESIDENT: Yes.

20 MS KREISBERGER: -- you see there the range. So there is  
21 "New-Low" and "New-High". The figure in the "TOTALS"  
22 row under "New-Low" is the bottom end of the range and  
23 then you see the top end of the range next to it. So  
24 that was FDC's predicted revenue, giving a range, for  
25 implementing its non-exclusive structure of up to four

1 providers. So that is what it anticipated.

2 FDC received five bids from Sportradar, Genius,  
3 Perform, IMG and I understand a fifth operator that  
4 I cannot refer to. I think that is not critical. The  
5 bids are summarised for your note only at paragraph 38  
6 of my skeleton. That is {A/1/16}.

7 But there was one clear winner. Let us go to  
8 {H/257/2}. This is how FDC describe Genius' bid. This  
9 document, as you see at the top of the page, is FDC's  
10 summary of responses to the tender for the FDC board.  
11 So this is FDC's analysis. It says there, towards the  
12 bottom of the page, under "Commentary":

13 "This is a buyout proposal designed to blow all  
14 other options out of the water."

15 Now, Genius offered FDC a minimum revenue guarantee,  
16 but it offered that on the basis that Genius would be  
17 the only data operator supplying FDC data with no rival  
18 accredited providers. I cannot say the amount. The  
19 amount is in the bullet point above this table. So it  
20 says:

21 "Minimum Guarantee ..."

22 Then you see the confidential number, and that is  
23 the per annum amount.

24 THE PRESIDENT: Yes.

25 MS KREISBERGER: That is an annual figure, so for the full

1 five-year term you simply multiply that number by five  
2 to get the full minimum revenue guarantee. But you can  
3 compare the annual figure with the revenue range that  
4 FDC predicted, which I just showed you, and you see it  
5 is significantly higher than FDC's estimated revenue  
6 range under the original RFP structure.

7 So the point I want to put to you is that FDC's head  
8 was turned by this exclusivity premium. FDC, just for  
9 your note, {H/180/2} -- FDC had observed that the  
10 downside of limited non-exclusivity, in other words the  
11 original RFP, was no exclusivity premium. So I am using  
12 FDC's words. They saw it as an exclusivity premium.

13 So Genius' offer landed and FDC responded by  
14 inviting a further round of tenders, but this time on an  
15 exclusive basis only. Genius came out on top again and  
16 the parties entered into negotiations.

17 So now we move forward in time to November 2018.  
18 FDC sent Genius a first draft of the agreement. If  
19 I could ask you to look at that, {H/1687/17}. Could  
20 I ask you to please read clauses 18.3 and 18.4? (Pause)

21 So that was a specific obligation on Genius to grant  
22 sub-licences. As I said in my opening remarks, FDC's  
23 plan then was that they would inject some competition at  
24 the lower level between data providers by imposing this  
25 duty on Genius. Now, whilst that would not have been

1 perfect competition, it would have meant that from the  
2 perspective of the customer they had a choice. Genius  
3 would not have been the only show in town.

4 Now, it is at this stage that Genius pushes back and  
5 makes clear that it did not want a non-exclusive network  
6 with no barriers to entry in that market. So please  
7 turn up {H/333/19}.

8 Now, Genius is claiming confidentiality -- I think  
9 this is a Genius claim. Sorry, it may be an FDC claim,  
10 but the defendants are claiming confidentiality over  
11 this. You may take your own view on that but could  
12 I ask you to read comment WL8?

13 Sorry, I will just introduce this document. This is  
14 a draft agreement dated 17 December 2018. Genius is  
15 returning the draft to FDC with its comments.

16 THE PRESIDENT: Yes.

17 MS KREISBERGER: Now, I am not sure why the struck-through  
18 text is confidential because I showed you the FDC  
19 agreement, but apparently it is, so could I ask you --

20 THE PRESIDENT: Ms Kreisberger, I think we will leave the  
21 confidentiality as it is and we will navigate that  
22 later.

23 MS KREISBERGER: I appreciate that, Sir. If I could ask you  
24 to read 18.3 to 18.5. (Pause)

25 Thank you, Sir. So that was the end of any notion

1 that there would be some level playing field downstream.  
2 The message I showed you earlier from Mr Burton,  
3 celebrating that Genius had got away with it on the  
4 secondary supplier issue, that was sent the very next  
5 day after this draft.

6 So Genius had obtained its goal of true monopoly.  
7 That is the type of monopoly worth paying an exclusivity  
8 premium for. FDC understood the risks of this  
9 arrangement. Please turn up {H/325}. This is  
10 a document from 29 November 2018 and this is what the  
11 FDC board had to say -- sorry, page 2, please,  
12 {H/325/2}. Under the heading "Competition  
13 Risk/Indemnity", please read the first paragraph under  
14 that heading. (Pause)

15 Could I ask you to read the last two paragraphs as  
16 well, "As we have discussed ..." (Pause)

17 So I think this is what is known as 20:20 foresight  
18 because FDC accurately predicted this litigation with  
19 its second hypothesis there because we are in a world of  
20 no sub-licensing to data operators. That is what came  
21 to pass. So long before signing the agreement, FDC knew  
22 this was a risk and it wanted to protect itself against  
23 the risks.

24 Now, please turn up {H/786/46}. I am allowed to say  
25 out loud that FDC extracted an indemnity from Genius.

1           The terms of that indemnity are at clause 46.3. I would  
2           be grateful if the Tribunal could read that clause.

3           THE PRESIDENT: Thank you. (Pause)

4           MS KREISBERGER: So FDC banked the exclusivity premium that  
5           came with the Genius winning bid with the protection  
6           that you saw in that clause. The FDC was under no  
7           illusions as to this Faustian pact. Three weeks before  
8           signing the agreement, Mr Ford sent Jack Davison of  
9           Genius, the chief commercial officer, this email,  
10          {H/455}. You see there the last paragraph:

11                   "Separately ..." -- if we could blow that one up:

12                   "Separately I have had both Perform and Sportradar  
13           complaining to me today about the messages Genius is  
14           putting into the market -- ie exclusive rights, control  
15           over who they sub licensing to and in their gift which  
16           they might not give. While strictly true (and you will  
17           have your reasons to manipulate this) I have been at  
18           pains to say to both that wide distribution of Official  
19           Data is a shared goal and taking away the barriers to  
20           sub licensing is part of this -- just so we are on  
21           message here."

22          THE PRESIDENT: Yes.

23          MS KREISBERGER: So what was strictly true was not the same  
24           as what was on message for public consumption, and that  
25           takes me to Genius' sham negotiations. Now, you saw the

1 concern from FDC that if Genius failed to grant  
2 sub-licences, it was likely to find itself on the wrong  
3 end of a competition claim. But Genius, as I said, had  
4 no intention of letting rivals into the market to  
5 compete with it.

6 Please turn up {H/1747/1}. Now, Mr Locke, the CEO  
7 of Genius, Mr Stephenson and Mr Burton, all senior  
8 executives, devised their plan to keep out the  
9 competition in the WhatsApp chats. They are also  
10 summarised in our skeleton at paragraph 48. If I could  
11 ask you to turn to 17/04/19, Mr Stephenson says:

12 "GVC pushing me hard on 'will we sub license to  
13 RB'."

14 Mark Locke -- we can go down, just to save time.  
15 Mark Locke says:

16 "This is dangerous.

17 "I'm really not happy."

18 Matt replies:

19 "I have been playing with straight bat 'only way to  
20 guarantee data' is with us etc."

21 Mr Locke says:

22 "I still hate this now."

23 We then move forward to the next day, {H/1745/12}.  
24 Mr Burton -- it starts about a third of the way down, if  
25 we could blow that page up a little:

1            "We are in a really good place. We need to spend  
2            some time thinking about how we deal with [Sportradar]  
3            and Perform. Might not feel like a priority, but the  
4            longer we can make them feel like they are in a process  
5            the less time they have for contingency planning or  
6            going on the offensive.

7            "Jack Davison: Agreed."

8            Further down the page, Steve Burton at 23.59.01, if  
9            you can see that -- sorry, that should be at 45 past  
10           midnight -- towards the end of the page we have  
11           Steve Burton saying:

12           "I have some thoughts [and this is important]. (1)  
13           we offer them a secondary supplier licence for £Xm and  
14           say they can only supply to customers once they have  
15           signed up to 7% GGR [that is the price] plus other  
16           conditions around unofficial data ... (2) we run  
17           a tender process, saying we are asking for best bids to  
18           appoint a single secondary supplier on same terms as  
19           above ..."

20           Then slightly lower down:

21           "Or we say yes happy to discuss secondary supplier.  
22           We are currently working on the terms."

23           In other words we are delaying.

24           "In the meantime please can you tell us the terms  
25           upon which you will allow us to be a secondary supplier

1 for ITF, NBA, La Liga and WTA video etc ..."

2 Jack Davison cannot contain his mirth:

3 "Ha ha ha ha ha. Love it."

4 Mr Burton says:

5 "The point being, I think we need to buy time ... We  
6 sign [up with FDC] and tell everyone we are exclusive  
7 and haven't signed any secondary supplier deals with  
8 anyone else."

9 So this is why they did not want to agree to the  
10 duty that FDC had initially planned to impose on them.  
11 That is the plan right there.

12 Genius buys time by stringing out sham negotiations  
13 with Sportradar and Perform and, in that window of time,  
14 says to bookmakers, "You can only get the data from us  
15 and we are not licensing our competitors".

16 Could I ask you to go to the next page, 13,  
17 {H/1745/13}. At 9.42, a third of the way down,  
18 Mr Burton says:

19 "We need to be prepared for what we do after it is  
20 signed. We can't take any wrong steps or we will find  
21 the pressure is on us and may face competition law  
22 claims which will take up time and focus. If we are  
23 smart I think we can avoid this.

24 "I am actually really happy that operators are  
25 getting agitated and Perform and Radar are nervous. It

1 means we are onto something here. This could be  
2 a watershed moment ..."

3 Then to avoid reading the whole chain out, which the  
4 Tribunal may wish to do in its own time, Mr Burton ends  
5 by saying -- it might be over the page -- no, it is on  
6 the bottom of that page 12 -- no. Sorry, a third of the  
7 way down, Steve Burton:

8 "Understand that there is no requirement [no duty to  
9 sub-licence] -- but as soon as we say definitively NO,  
10 then the competition law challenge begins. With  
11 a process -- it drags it out and I think damages any  
12 chance they have succeeding with a competition law  
13 challenge."

14 So that was the plan, hatched, put into action.

15 On 2 May, just days before the agreement was signed,  
16 Genius held a meeting. Please turn up {H/472/1}. That  
17 is the agenda for this meeting just before signing and  
18 the first bullet point for discussion is "Holding off  
19 the 3rd parties". So there you have it in black and  
20 white. That was Genius' number one internal priority,  
21 was staving off rivals.

22 Now, at this juncture it is apposite for me to make  
23 a submission which I do not make lightly. It is  
24 foreshadowed in our skeleton. You have seen in the  
25 documents I have shown you a hyper-awareness of

1           impending competition litigation. Now, in some of the  
2           documents -- not the WhatsApp chats which I have just  
3           shown you -- you see the key protagonist making efforts  
4           to create a litigation-friendly paper trail. I just  
5           want to show you one.

6           Now, Mr Burton in particular, as a former partner in  
7           a sports law firm, seems particularly aware of the need  
8           to curate the documentary record. So if we turn up  
9           the minutes to this meeting, which I have shown you the  
10          agenda for, {H/481}, you see Mr Burton recorded as  
11          saying there -- ah, page {H/480/1}. It is the third  
12          bullet point up from the bottom. "SB" is Mr Burton. He  
13          says:

14                 "Assume we have to let [Sportradar] in day 1 in  
15                 creating a model."

16         THE PRESIDENT: Yes.

17         MS KREISBERGER: Now, the panel will need to draw their own  
18                 conclusions about the veracity of that statement in  
19                 light of the facts that I have shown you. The first  
20                 Item on the agenda was precisely the reverse, {H/472/1},  
21                 "Holding off the 3rd parties" -- only one can be true --  
22                 and the facts, which are that Genius never granted  
23                 a single secondary sub-licence to Sportradar, to Perform  
24                 or any other SDSB operator -- data provider.

25                 Is that a convenient moment for a break, Sir?

1 THE PRESIDENT: Yes, thank you very much, Ms Kreisberger.

2 We will rise then for ten minutes and resume at 10 to  
3 midday. Thank you very much.

4 (11.42 am)

5 (A short break)

6 THE PRESIDENT: Ms Kreisberger.

7 MS KREISBERGER: Thank you, Sir.

8 Sir, I have shown you the plan and when the plan was  
9 hatched. I am now going to show you the execution of  
10 the plan. I will turn first to Genius' efforts to make  
11 Perform feel like they were in the process. So that is  
12 a competitor of Genius and Sportradar. Now, this is  
13 where Genius' conduct in the market and in this  
14 litigation, I am afraid to say, becomes a little  
15 murkier. Before I take you to the material, I want to  
16 remind the Tribunal that, as the president may remember,  
17 Genius has flatly refused to run disclosure searches for  
18 internal documents on its negotiations with Perform  
19 despite its importance to the case. Now, the material  
20 we do have was disclosed by luck, as it were, in  
21 relation to other disclosure issues. I will come back  
22 to this point shortly, but just so that the Tribunal has  
23 in mind, what I am about to show you may just be the tip  
24 of the iceberg. We do not know.

25 So let us turn up the communications, {H/757/1}. We

1 do not need to dwell on this one. It is just to flag  
2 that on 30 July Perform's lawyers wrote to Genius,  
3 complaining that it still had not had a quote for  
4 sub-licensing fees. That is just to show you the letter  
5 is there, 30 July. The next day we go to the WhatsApp  
6 chats, {H/1748}. So this is July 2019, Jack Davison.  
7 Let us see if we can blow up the right part of the  
8 screen. It is the bottom quarter. So it is  
9 Jack Davison, 15.21.45:

10 "I might be missing something but surely because we  
11 have to assume this is going to be stress tested for  
12 reasonableness in a court at some point."

13 Then Tom Russell, further down, says:

14 "See email I'm getting a steer as to what the risk  
15 is of starting again with Perform on basis that they  
16 look capable of actually doing a deal."

17 Now, let us go on to the next page, {H/472/1/2},  
18 Mr Davison refers to a spreadsheet on that page and  
19 then, at 16.03.49, so right at the top of that page:

20 "I think we can make that number look like [I will  
21 not read the number out] regardless ..."

22 So there Mr Davison is talking about the number that  
23 they will put to Perform as a quote for the price of the  
24 sub-licence. Remembering that Mr Russell has just said  
25 they look capable of actually doing a deal, here is the

1 number, he can make it look like this amount, Mr Davison  
2 says. Then he says a little lower down:

3 "See spreadsheet I sent. It currently calcs at  
4 [I will not read the number out] but its not a hard  
5 adjustment ..."

6 You can see that is claimed as confidential. Then  
7 he says:

8 "And it still be entirely reasonable."

9 So, "*I can bump the number up that we quote to  
10 Perform, but I can still make it look reasonable*".

11 Moving forward to page 5, {H/1748/5}, it is halfway  
12 down the page, Tom Russell at 7.09.23, just above  
13 a little green -- that is it.

14 "To be clear -- I am telling lawyers that they need  
15 to prep a response that sets out our commercial proposal  
16 as [that is the lower figure we saw earlier] ...  
17 calculated as a proportion of the supply element ..."

18 Can we go to {H/1748/6}? At 8.10.34, under the  
19 first black box, "Mark" -- that is the CEO and this is  
20 important -- Mr Locke says:

21 "... I really think we are getting this wrong."

22 He continues, Mr Locke:

23 "The pricing."

24 The number he gives there, the ratio "is arbitrary".

25 Then he says:

1           "Sorry [this is still Mr Locke, the CEO] I have been  
2 thinking a lot about this.

3           "At the prices we are talking about if I were  
4 Perform I would accept the proposal."

5           So he is worried that they have pitched it too low  
6 and Perform might actually accept.

7           Mr Davison says on the next page, {H/1748/7},  
8 10.30.43, right at the top there -- Mr Davison responds:

9           "I am running the numbers. Without changing the ...  
10 split between supply and license it might be hard to get  
11 the number ... up significantly."

12           Now, we have to go then to a different thread to see  
13 how this played out in realtime, {H/1751/11}.

14           Now, Mr Stephenson was global partnerships director  
15 of Genius and on this thread he tells Mr Locke, who is  
16 also on the other WhatsApp thread, that Sky had agreed  
17 to Genius' terms. So this is a customer who has agreed  
18 to Genius' terms. If you look at the bottom, 11.00.14,  
19 so just up from the bottom line, Mr Stephenson says:

20           "[Sky] have agreed to my terms on one condition ...

21           "That if we sub-license they can renege ..."

22           "If we sub-license the data, [we] can renege".

23           Mr Locke's response is over the page, page 12,  
24 {H/1751/12}. To save anyone's blushes, I will not read  
25 that out. You can see what Mr Locke thought about that.

1           Then we go back to {H/1748/7}, so this is back to  
2           the WhatsApp chat between Mark Locke, Mr Davison,  
3           Mr Russell and Mr Burton. An hour after Mr Locke's  
4           expletive, Mr Locke says on this thread, the Perform  
5           thread -- he asked, "Can anyone call me?".

6           We have to assume that is in relation to Sky's move,  
7           "They can renege if you sub-license", because from  
8           Genius' perspective, that meant that the negotiations  
9           with Perform had to fail otherwise there was a customer  
10          at risk.

11          At 15.36 that day, which is just above the black  
12          box, Mr Russell says:

13                 "Letter [has] gone ..."

14          This is the letter to Perform. The quote to Perform  
15          is recorded there by Mr Davison. I cannot tell you the  
16          number. 17.37.34, just under the black box, that was  
17          the quote.

18          THE PRESIDENT: Do you have the reference to the "Letter  
19                 [has] gone", so that we can read it in our own time?

20          MS KREISBERGER: I will come back to you, sir. That is  
21                 a very good question. But you can see that the number  
22                 under the black box, you multiply it by 12 -- that is  
23                 where they got to --

24          THE PRESIDENT: Yes, even we can do that. Thank you.

25          MS KREISBERGER: Yes, I can just about manage that one as

1 well on my feet. So that was the number.

2 So I want to put to the panel members that in the  
3 space of -- I have just taken you through eight hours  
4 in a day -- Genius pushed up the price to Perform from  
5 the number you saw at the beginning to the number you  
6 are now looking at, and that is an increase -- I think  
7 I can say -- it is well over 100%. The reason for that  
8 monumental price inflation was that Mr Locke, the CEO of  
9 Genius, was worried that the lower price might be  
10 a price worth paying for Perform. This is what we call  
11 a "reverse Corleone" from Mr Locke; an offer Perform  
12 could not accept.

13 Now, Sir, I am going to say a few words on Mr Locke  
14 and Mr Russell, the CEO and general counsel of Genius.  
15 Now, in the light of these communications, Sportradar  
16 applied to cross-examine them, as you might recall, and  
17 although the application was not granted at the PTR,  
18 Sir, you indicated that, if appropriate, you would draw  
19 adverse inferences from Genius' failure to call them.

20 Now, my submission is that it is appropriate to draw  
21 those inferences. Now, as to Mr Locke, if I could just  
22 set out --

23 THE PRESIDENT: Ms Kreisberger, to be absolutely clear,  
24 Tribunals very often are faced with gaps in the evidence  
25 and need to draw inferences. Whether those inferences

1           are adverse or otherwise is a matter we will look at at  
2           the end of the day when the evidence is in the round.  
3           So I do not know what I said on the transcript, but  
4           I think it is fair to say that what tribunals do is --  
5           when they see an evidential gap that might have been  
6           filled but was not, then certain inferences may be  
7           drawn, but it all depends on the circumstances. I know  
8           what you are going to be saying in closing, but --

9           MS KREISBERGER: Sir, I am grateful and actually I should be  
10          quite precise. You will be hearing evidence from  
11          Mr Burton and Mr Davison --

12         THE PRESIDENT: Well, indeed.

13         MS KREISBERGER: -- so all I want to do at this stage by way  
14          of opening is foreshadow the point for you, Sir, so you  
15          have it in mind to frame the evidence. But in relation  
16          to Mr Locke, Sportradar's case is that the agreement  
17          restricts competition because it puts Genius in the  
18          position of gatekeeper with an inescapable incentive not  
19          to grant sub-licences. Mr Locke personally intervened  
20          to inflate the price quoted to Perform so that it would  
21          not accept it. We have no opportunity to ask Mr Locke  
22          about his instruction to his senior executives. It is  
23          also right that Sportradar will not have the opportunity  
24          to ask Mr Locke about his instructions to staff to  
25          delete incriminating material.

1           If I could just, perhaps for your note, draw your  
2           attention to paragraph 26(a) -- that is {A/1/12} -- and  
3           the matters are conveniently summarised there in  
4           relation to statements from Mr Locke which relate to  
5           deletion of material and curating of the record.

6           Sir, also troubling, before I move on from this  
7           point, is the case of Mr Russell, Genius' general  
8           counsel. Now, the part played by him brings me to  
9           disclosure issue number 22, which is at {C/1/54}. Could  
10          I ask the panel members to read issue 22 to themselves?  
11          It is in the left-hand box. (Pause)

12        THE PRESIDENT: I wonder if this could be brought up so that  
13          it straddles both pages.

14        MS KREISBERGER: Yes, it carries on. There are a few words  
15          on the next ...

16        THE PRESIDENT: I am very grateful. Thank you. (Pause)

17        MS KREISBERGER: So the issue was why did negotiations with  
18          essentially Perform and other operators fail.

19          Now, Genius resisted disclosure. They said this --  
20          {C/1/135}, on the last paragraph, if you start from the  
21          second sentence at the bottom of the box:

22          "Absent a very detailed review of all the relevant  
23          custodians' email correspondence for the past three  
24          years, it would rely entirely on individuals recalling  
25          who they might have negotiated with over the past three

1 years in order to narrow the initial pool of documents  
2 for review for this request ... [from Oxera]. Either  
3 way, it would require a substantial and disproportionate  
4 review exercise. [We] have granted ... licences to ...  
5 turnkey providers."

6 I will say a word on them later. So this is all  
7 very difficult. The Tribunal took Genius at its word  
8 and so it ordered Genius to produce a schedule,  
9 recording who all these other multiple SDSB providers  
10 with whom Genius negotiated were but failed to enter  
11 into an agreement and to give reasons.

12 So Sportradar was expecting a schedule. This is  
13 what we got: {H/1635}. Now, this is the document that  
14 Genius calls the "schedule". You see "Counterparties",  
15 "Perform", so actually the extensive amount of work  
16 related to Perform.

17 Let us have a look at Genius' account of the reasons  
18 why it failed. Can I ask you to read the text  
19 underneath the reasons? So this is why Genius tells us  
20 they did not conclude an agreement with Perform.

21 (Pause)

22 Thank you, Sir. You see there that Mr Russell, the  
23 general counsel, signed the statement of truth. What  
24 Mr Russell does not say anything about is the WhatsApp  
25 chat in which Mr Locke told Mr Davison not to charge the

1 lower amount because Perform might accept it and instead  
2 told Mr Davison to charge a lot more so that it was  
3 pitched at a level they could not accept. He also there  
4 does not say anything about Genius' strategy to string  
5 out negotiations to make Perform feel like they were in  
6 a process. He does not address or explain these  
7 communications; he just ignores them.

8 So the documentary record is at odds with the  
9 reasons put forward by Mr Russell, signed by a statement  
10 of truth, so that may raise questions about his duty to  
11 provide a true, accurate and complete statement, but we  
12 cannot ask Mr Russell about that.

13 Sir, can I just give you the reference for the  
14 letter to Perform?

15 THE PRESIDENT: Yes, thank you.

16 MS KREISBERGER: That is {H/780} and it is dated  
17 1 August 2019, which is the date of some of these chats  
18 that you saw.

19 THE PRESIDENT: Thank you.

20 MS KREISBERGER: So that is Perform, a somewhat sorry tale.

21 Negotiations with Sportradar. Time will not allow  
22 me to develop my submissions on this. The Tribunal will  
23 be hearing evidence about how those negotiations played  
24 out, but my overall submission for the Tribunal is that  
25 Genius was playing the same games with Sportradar,

1 dragging out the negotiations, playing for time, making  
2 sure Sportradar was never offered terms they might  
3 actually accept.

4 It was summarised neatly by Mr Davison, at the time  
5 Genius' CCO. {H/1796/131}, these are some more  
6 WhatsApps. This is Mr Davison, on 27 June, exchanging  
7 WhatsApps with Christopher Dougan, Genius' chief  
8 communications officer. You see there at 20.50.45,  
9 halfway down, he says:

10 "You would love some of the stuff going to  
11 [Sportradar] and Perform at the moment. Steven is in  
12 his element!"

13 "Steven" is Mr Burton, who will be giving evidence.  
14 Dougan says:

15 "This on the sublicense terms?"

16 "Jack Davison: Yep. They will be fucking hating  
17 us!!"

18 It was a matter of some amusement within Genius.

19 THE PRESIDENT: Yes.

20 MS KREISBERGER: I am going to now move on in the factual  
21 narrative. I am now turning to what Genius did next,  
22 having secured its unassailable monopoly and its ability  
23 to keep rivals out. So this is really the final section  
24 of the story on the facts.

25 Having shut down any possibility for rival operators

1 to access the data or collect it unofficially in-stadia,  
2 Genius began to reap the rewards of its monopoly. It  
3 planned to exploit its customers' commercial dependence  
4 on it with a three-pronged attack, combining pricing and  
5 leveraging strategies. Now, prong number  
6 one: eye-watering increases in the prices that  
7 bookmakers were charged for in-stadia LLMD. I will show  
8 you evidence on the price increases that bookmakers  
9 simply had to swallow when I get to market definition  
10 and effects.

11 So I am just going to introduce the point for you  
12 now. This is Dr Niels' first expert report, {F/1/120}.  
13 If you could read the second sentence. I cannot read  
14 the figure out loud:

15 "In particular, Genius seems to have ..."

16 It is 5.149, sorry, the second sentence:

17 "In particular, Genius seems to have ..."

18 So that is what happened to price. As I say, I will  
19 come back to some more detail on that this afternoon.

20 Prong number two: Genius offered unattractive  
21 stand-alone packages. You will recall that, in my  
22 introductory remarks, I mentioned the stand-alone LLMD  
23 packages. As you have heard, Genius was an expert in  
24 the reverse Corleone, offers the party could not accept.  
25 It pulled the same trick with its customers.

1           Genius gave them two choices. I am going to set  
2           this out without reference to the precise details so  
3           I can say it out loud. Package A -- package A is  
4           a stand-alone package for stadia LLMD only but Genius  
5           priced it too high for it ever to be attractive and that  
6           is why bookmakers did not take it. Package B was a much  
7           more attractively priced wider bundle of data, and the  
8           Tribunal will be taken to evidence on this during the  
9           course of these proceedings. I will come back to it.  
10          But I would just like to show you two communications so  
11          you can see the point. {H/1799}.

12           I think I am going to have to come back to that  
13          because it is an Excel file and it will be complicated.  
14          I think we can live without it for now.

15           If I could take you to {H/468/2}, you see the  
16          redacted text "FDC:", a third of the way up from the  
17          bottom, "Option A ..."?

18          THE PRESIDENT: Yes.

19          MS KREISBERGER: I will not read out the rest. So that is  
20          package A and package B. So that was the game on the  
21          pricing of the packages and Genius never sold a single  
22          package A.

23           The third and final prong is the official data  
24          clause. This was another key weapon -- Genius' words --  
25          to force customers to swallow other content along with

1 the LLMD, where Genius has official data.

2 {H/468/1}, this is how Genius described the strategy  
3 on official data clauses. This is three-quarters of the  
4 way down -- it is further up, "Official Data  
5 Clause: must use us for official data ... anytime we  
6 have official data, you have to take it ['you' is the  
7 customer] this is what locks them in ..."

8 You see the rest of it.

9 THE PRESIDENT: Yes.

10 MS KREISBERGER: They go on:

11 "We interrupt [a few bullets down] [blank] matches  
12 [not sure why that is blanked out]: if you want these  
13 matches, you take all the matches; but also these  
14 events; and also the data clause -- locked in."

15 {H/1097/19}:

16 "The official data clause is a key weapon to  
17 securing commitment from customers. Where historically  
18 we may have asked a customer to commit to 70,000 matches  
19 and got pushback, we can ask for them to commit to  
20 offering games with us where we have official (therefore  
21 better quality) content. We get the same result, but  
22 the customer feels like there is a rational reasoning  
23 behind the commitment."

24 Sorry, is that confidential? I did not think that  
25 was -- I am so sorry. I was not aware but I am not sure

1           that really gives away any crown jewels.

2       THE PRESIDENT: No, but those listening on livestream, I am  
3           not going to make an order but please do not repeat  
4           that.

5       MS KREISBERGER: I am grateful.

6           So Genius' leveraging strategies did the trick.  
7           Dr Niels shows that Genius' share of wallet, i.e., its  
8           share of the total live data and odds revenues, paid by  
9           a number of Sportradar's largest customers went up very  
10          substantially. If I could just show you that, {F/2/42},  
11          paragraph 4.41. If you could just read that.

12       THE PRESIDENT: Yes.

13       MS KREISBERGER: Now, while the strategy of leveraging  
14          content, forcing customers to take broad packages,  
15          forcing them to use their official data, was highly  
16          lucrative for Genius, as you can see there, it is its  
17          customers that were the losers.

18          Please turn up {H/912/1}. This is what one  
19          bookmaker had to say, and this is Erik Backlund of the  
20          Kindred Group, in an email to Mr Davison on  
21          13 September 2019. If you go to the first long  
22          paragraph, halfway down:

23          "Although it seems like operators are in a way being  
24          'forced' into deals through packaging your other data  
25          together with the UK football data (no matter how you

1 twist and turn -- that is the reality ..."

2 Then if we move to {H/450/3}, this is an email from  
3 Mr Davison to Mr Ford. It is cited in our skeleton. If  
4 you go to the third paragraph where it begins:

5 "However unlikely ... should either come to pass, we  
6 would lose our exclusivity ..."

7 This was about actually a minor issue in relation to  
8 exclusivity that I do not need to put before you, but  
9 the point I want to draw out is Genius saying to FDC,  
10 "[If we] lose our exclusivity [that would] drive a coach  
11 and horses through our ability to force customers to  
12 take official data, pay a licence fee and recoup our  
13 investment". That is why they needed the exclusivity,  
14 to force customers to take this content.

15 Sir, that concludes this section of my submissions.  
16 High prices, loss of choice, unwanted content.

17 If I might turn next to the topic of market  
18 definition.

19 THE PRESIDENT: Yes.

20 MS KREISBERGER: So two prefatory remarks. First, as you  
21 know, this is the topic on which the defendants have  
22 made what we say are spurious allegations about the  
23 pleading and we have responded. As I said, time is  
24 short, but I will be picking up the core issue in my  
25 submissions on market definition which put paid to the

1 pleading allegations.

2 Secondly, I would ask the Tribunal to bear in mind,  
3 because this is a consequence of how I have structured  
4 my submissions, that Sportradar's case on  
5 anti-competitive object, which will be my next topic,  
6 does not depend on an economic assessment of the market.  
7 We do not need to define an economic market for the  
8 purposes of the object infringement -- sir, you will be  
9 very familiar with that -- because the whole purpose of  
10 the by object category is to alleviate the burden of  
11 a comprehensive assessment of effects.

12 So actually all you need to know for the object  
13 category is that, for the overwhelming majority of  
14 bookmakers serving customers in the UK, stadia LLMD is  
15 a must-have and I will be showing the Tribunal data on  
16 that. But it is here clear from the documentary record  
17 alone that this data was a must-have and that there are  
18 no available substitutes. Now, that proposition, which  
19 I will make good on the evidence, is sufficient for the  
20 object infringement case. But Sportradar's case covers  
21 both object and effects so in the interests of  
22 efficiency, I am going to deal with both the business  
23 documents that demonstrate the data is must-have and the  
24 quantitative evidence on market definition together. In  
25 doing so, I would ask the Tribunal to have well in mind

1 its recent admonition in the BGL case, which, Sir, you  
2 are very familiar with. There you said, Sir:

3 "The relevant market should be defined by reference  
4 to the facts in any given case and must not become  
5 overanalytical or overdependent on expert evidence [as  
6 read]."

7 Now, my submission today is that the defendants'  
8 case is characterised by rather exotic economic theories  
9 which are not just disconnected from the facts on the  
10 ground, they are contradicted by the facts on the  
11 ground. Now, I will take you through that.

12 So with that I turn to the relevant markets. I will  
13 summarise Sportradar's case first and then go to the  
14 evidence in support. If you could turn up {F/1/25}.  
15 This is Dr Niels' first report again, figure 2.1. It is  
16 just useful to have the pictorial representation in  
17 mind. It shows the layers of the market. Now, I am  
18 going to begin by looking at the mid-market. That is  
19 the layer where Genius supplies stadia LLMD to  
20 bookmakers. Now, as always, that mid-market has two  
21 dimensions: product and geographic. Sportradar's case  
22 is that the relevant product market at the midstream  
23 level is the supply of stadia LLMD to bookmakers.

24 Now, the fundamental -- the foundational reason for  
25 that is that bookmakers within this market cannot switch

1 away from stadia LLMD either to other types of data for  
2 a different sport competition or LLMD derived from  
3 off-tube scouting, which is the point you put to me,  
4 Sir. William Hill cannot say, "I do not like Genius'  
5 price tag, I am going to take ITF data instead". So  
6 that is product market at the midstream.

7 Then there is the question of the geographic market.  
8 Now, Sportradar's case is that there is a discrete  
9 geographic market for supplying stadia LLMD to  
10 bookmakers who serve the UK betting market; in other  
11 words, punters in the UK. Now, it is right that there  
12 are other regional markets such as Asia, continental  
13 Europe, for whom stadia LLMD is also must-have and it  
14 would be artificial to ignore the existence of those  
15 markets because it is clear from the record. So these  
16 markets are made up of bookmakers who also require  
17 stadia LLMD and they must also swallow high prices and  
18 leveraging tactics.

19 But we are in the UK Tribunal and so, to be clear,  
20 the focus of Sportradar's case is that the agreement  
21 distorts competition in the market for the supply of  
22 stadia LLMD to bookmakers serving the UK market and for  
23 those bookmakers it is must-have, so my submissions on  
24 market definition to you today are principally directed  
25 to the UK market.

1 THE PRESIDENT: But to be clear, it is open to us to  
2 consider that the geographic market is not as you have  
3 stated it but broader?

4 MS KREISBERGER: Oh, of course. This is my submission to  
5 you on geographic market definition, yes. But I do not  
6 want to distract from our central proposition that there  
7 is a discrete UK market, but it is also right that it is  
8 not just the UK bookmakers for whom this data is  
9 must-have. Large Asian bookmakers also require this  
10 data and that is the evidence, so it would be artificial  
11 for me to put that aside. It is also right that the  
12 large global bookmakers which Genius talks about, like  
13 William Hill, GVC, they are global but they also have  
14 substantial UK-facing operations, so you could call them  
15 a global bookmaker or you could call them a UK  
16 bookmaker. For my purposes, I want to show you they are  
17 bookmakers that serve the UK market, and that is my  
18 focal geographic market. So some of these bookmakers  
19 are major chains who also serve the United States  
20 market, for instance, where we do not say stadia LLMD is  
21 must-have.

22 THE PRESIDENT: The only reason I am hesitating is because  
23 a great deal of the business that matters, in terms of  
24 the bets that punters place, will be done online, so  
25 geography takes an immediately rather nuanced

1 position --

2 MS KREISBERGER: I think I can help you there, Sir. I will  
3 be corrected if I get this wrong, but bookmakers who are  
4 serving UK punters need to have a UK licence --

5 THE PRESIDENT: Yes.

6 MS KREISBERGER: -- so there is a clear territorial element.  
7 It is persons who are betting within the UK online being  
8 served by bookmakers who have a licence to serve those  
9 individuals.

10 THE PRESIDENT: Well, it may be that we need to be assisted  
11 on this because I confess, speaking for myself, I am not  
12 perhaps as well up on the regulatory constraints as  
13 I might be. Are you saying then that I, as a UK  
14 domiciliary or resident, cannot place an online bet in  
15 respect of a Premier League match with, let us say, an  
16 American bookmaker?

17 MS KREISBERGER: No, I am not saying that. I think I should  
18 come back to you, Sir, so I do not misspeak. It is not  
19 that you cannot, but it is just that if William Hill  
20 wants to supply the UK market, it must have a UK licence  
21 to do so.

22 I think it is also right -- and I will be corrected  
23 if I get this wrong -- that all in-play betting, which  
24 is what we are concerned with here, is online. I think  
25 it is right to say a punter can go into a betting shop

1           and sit at a terminal, but that is still online betting,  
2           so it is all online in-play because it is reacting in  
3           the moment. That is why latency is so important.

4       THE PRESIDENT: Ms Kreisberger, that is very helpful. I do  
5       not want to take up your time now, but I think if I put  
6       down a marker from our side, we will clearly need to  
7       understand how the market works, not merely technically  
8       but also in regulatory terms. So I put that out there  
9       for all of you to assist us on in due course.

10      MS KREISBERGER: Ms McAndrew has very kindly pulled up  
11      a helpful paragraph from Dr Niels' first report, which  
12      is at {F/1/48}, paragraph 3.59.

13                 Sir, perhaps you could just read that. (Pause)

14      THE PRESIDENT: Okay. Well, that is interesting. It may be  
15      controversial and all I would say now is I have no  
16      difficulty with the controversy.

17      MS KREISBERGER: I will leave it there.

18      THE PRESIDENT: We will, I think, want to have a very clear  
19      understanding of how this works, as I say, both  
20      technically and legally.

21      MS KREISBERGER: Sir, we will make sure that happens.

22                 Now, there are three propositions on which I rely  
23      for my UK geographic market definition. The first is  
24      that Genius has the ability to charge different prices  
25      to different bookmakers because the contracts are

1 individually negotiated. You have seen that in some of  
2 the communications I have shown you. It is not  
3 a product with a universal price tag, like a KitKat on  
4 a shelf. They are negotiated. So Genius can charge  
5 different charges based on territory, location. In  
6 practice, Genius does impose higher prices on bookmakers  
7 for whom in-stadia LLMD is a must-have requirement. In  
8 other words, it exploits their dependence on the  
9 content. So those bookmakers for whom it is a must-have  
10 include, as I said, bookmakers serving the UK market.  
11 So that is what is known as a "price discrimination  
12 market".

13 If we turn up {F/1/47-48}, that is Dr Niels' first  
14 report, paragraph 3.56. I will just let you read that,  
15 Sir. (Pause)

16 In fact, the -- sorry, Sir, if I could just take you  
17 to 3.61 as well, which is over the page, {F/1/48}.

18 THE PRESIDENT: Yes.

19 MS KREISBERGER: Sir, we will show in evidence -- I am just  
20 going to introduce the point now -- that if one takes  
21 the online betting market in the UK by revenue, close to  
22 100% of that revenue is generated by bookmakers who are  
23 supplied stadium LLMD by Genius, so close to 100% of the  
24 online UK betting market correlates to in-stadia LLMD  
25 supply.

1           Just so it is clear -- I do not want to dwell on  
2           it -- it is no part of Sportradar's case that there is  
3           a market made up of 19 individual bookmakers or some  
4           other number, which was the allegation in the  
5           supplementary skeleton. It is simply not the case.  
6           That is a spurious mischaracterisation. But what  
7           Genius' documents do show is that it was targeting 19  
8           UK global and Asian operators. As I said, we also know  
9           from the empirical data, which I have just foreshadowed,  
10          that Genius has sewn up the UK bookmaker market. So  
11          that is the mid-market.

12          If we go back to the diagram, which is {F/1/25}, if  
13          we move up the chain to the upstream market, that is the  
14          market on which FDC licenses stadia LLMD to SDSB  
15          suppliers or, in this case, supplier in the singular.  
16          If the mid-market is confined to stadia LLMD, the  
17          necessary corollary of that is that the upstream market  
18          is also confined to stadia LLMD because the demand of  
19          data providers for LLMD is derived from bookmaker  
20          demand. You simply follow the market up the chain. If  
21          bookmakers have to buy that data from providers in the  
22          mid-market, that means there is a discrete upstream  
23          market on which the data provider gets access to the  
24          stadia LLMD for onward supply to bookmakers.

25          Perhaps just for your note, that is at joint

1 experts' statement, row 215, according to Dr Niels.

2 That is at {F/16/21}, but I do not think we need to turn  
3 that up now.

4 So that is my introduction to the markets.

5 THE PRESIDENT: Yes.

6 MS KREISBERGER: I am going to begin with the mid-market,  
7 and there are three categories of evidence which show  
8 that UK bookmakers and other major bookmakers do not  
9 regard stadia LLMD as interchangeable with other  
10 content. The first category that I am going to show you  
11 is documents from the defendants which describe stadia  
12 LLMD as must-have. Now, my submission is that the  
13 Tribunal should take those documents at face value and  
14 this is what they said in their course of business. It  
15 is contemporaneous statements which are probative and  
16 should be given weight, in my submission, distinct from  
17 the theories subsequently devised by experts purely for  
18 the purposes of litigation.

19 So turning to those statements, I have already shown  
20 you in my opening remarks that Genius said explicitly  
21 that obviously UK, major global and large Asian  
22 operators cannot afford to operate without LLMD. That  
23 was at {H/418/7} for your note. Mr Ford of FDC makes  
24 the same point in this Bloomberg report at {H/489.1/2}.  
25 He says there, middle of the page:

1           "English and Scottish football is vital to any  
2 sportsbook ..."

3           Regulus advised FDC in the same vein in April 2018  
4 at {H/131/4}. The first bullet point:

5           "All credible bookmakers need access to high quality  
6 [English and Scottish] Football data."

7           "All credible bookmakers ..."

8           I have shown you that Mr Ford thought that FDC was  
9 likely to be in a dominant position and that the  
10 agreement was placing Genius in the same position.  
11 Their dominance derives from the fact that bookmakers  
12 must have their product and Genius becomes an essential  
13 trading party for UK bookmakers.

14           Mr Locke, Genius' CEO, actually found the dominant  
15 position to be quite funny. Let us turn up {H/1751/17}.  
16 This is an exchange between Mr Locke and Mr Stephenson  
17 on the WhatsApp. You see there, towards the bottom of  
18 the page -- I cannot read out for some reason the  
19 word -- I must be able to say "Don't" -- it begins at  
20 "Don't", towards the bottom of the page, and he says  
21 "Lol" and Mr Stephenson says "Hahaha", "Dominant", and  
22 Mr Locke says, "I said don't say it", and laughing  
23 emoticons.

24           In fact, this awareness on the part of both Genius  
25 and FDC of the requirements of competition law as a sort

1 of sword of Damocles hanging over them is a thread which  
2 runs throughout these business documents because they  
3 well understood that their control over an input which  
4 UK bookmakers and other major bookmakers had to have  
5 gave them substantial market power over those  
6 bookmakers.

7 But it is really striking to see the allegation of  
8 dominance so accurately represented throughout their  
9 internal thinking.

10 So that is my first category of evidence.

11 My second category of evidence on the must-have  
12 nature of the data is the leveraging strategies by  
13 Genius which I have already highlighted.

14 Now, Genius' strategy of using in-stadia LLMD to  
15 leverage other data on to bookmakers shows you the  
16 must-have nature of the data because it depends on  
17 exploiting the bookmakers' commercial dependence on that  
18 data. The strategy of leveraging would not work if  
19 bookmakers did not have to have stadia LLMD because  
20 otherwise bookmakers would simply switch away to other  
21 content rather than have additional data they did not  
22 ask for foisted on them. I cannot put the point better  
23 than Genius did in its briefing paper dated  
24 31 October 2018, {H/301/1}. It is 1.2:

25 "Premier League Football is one of very few must

1 have properties for every sportsbook across the world."

2 Then 1.4:

3 "Our proposed structure enables Genius ... to have  
4 direct relationships with every sports book operator  
5 across the globe. These are relationships that can be  
6 significantly leveraged."

7 So the strategy of foisting content on bookmakers to  
8 grab market share was based on their commercial  
9 dependency. Now, if it was open to bookmakers to  
10 politely decline package B and do without LLMD  
11 altogether in favour of a cheaper package or a better  
12 package from a different provider, then one would expect  
13 them to have done so. But you saw what Mr Backlund of  
14 the Kindred Group said, {H/912/1}, that "However you  
15 twist and turn, we are being forced to take this data".

16 Now, during the course of these proceedings we will  
17 show the Tribunal other evidence from bookmakers in  
18 a similar vein. Bookmakers protested about the price  
19 increases and they protested about the extensive  
20 packages being foisted on to them, but ultimately they  
21 were beholden to Genius. Now, that is all you need to  
22 know, in my submission, for the purposes of the object  
23 case, the must-have nature. But now, for the purposes  
24 of the effects case, I am going to move to my third  
25 category, so this is quantitative data.

1           There are two separate elements: key statistics on  
2 usage and the SSNIP test. So key statistics, I have  
3 two: Dr Niels' evidence at {F/1/42} -- actually I think  
4 the paragraph begins on page 41, {F/1/41}, 3.35, if  
5 I could ask you to read that. (Pause)

6           Then over the page, {F/1/42}, when you are ready.  
7 So you see he estimates that in-play online betting on  
8 the Three Leagues accounts for, on average, 25% to 30%  
9 of UK sports betting revenues. Now, that statistic in  
10 itself has not been gainsaid by any other expert and it  
11 speaks for itself as regards the importance of this  
12 data. My central submission here -- you are going to  
13 hear a lot from Genius about other types of data -- is  
14 that this data, stadium Three Leagues data, is  
15 different. That is the reason it is different. It  
16 accounts for such an enormous proportion of betting  
17 revenue.

18       THE PRESIDENT: So, to be clear, you would say it is very  
19 important to differentiate between data type? Would you  
20 draw, for instance, the distinction between  
21 Premier League football data and lower leagues' data?  
22 Is that something which we ought to be thinking about?

23       MS KREISBERGER: No, that is not my case. My case is that  
24 they are sold together by FDC as a package and so it  
25 would be contrived to somehow split FDC's package up.

1           This is a point where there is no opportunity to break  
2           up the package. It is sold as one.

3           THE PRESIDENT: Yes, I see.

4           MS KREISBERGER: Now, my second statistic I have already  
5           foreshadowed. That is that close to 100% of UK online  
6           betting revenue is generated by bookmakers who take  
7           stadia LLMD from Genius. So that is a pretty  
8           eye-catching statistic. Those are the bookmakers which  
9           we say Genius has over a barrel and has to accept these  
10          terms whether they like it or not.

11          Now, that brings me to the SSNIP test. Sir, if you  
12          are happy, I think I will make a start before lunch.

13          THE PRESIDENT: Of course.

14          MS KREISBERGER: The SSNIP test -- you will be well familiar  
15          with it -- it is the classic methodology for defining  
16          the market. The purpose of the SSNIP test is to  
17          identify the smallest group of products over which  
18          a hypothetical monopolist can profitably impose a 5% to  
19          10% increase, the SSNIP. It is well established, it is  
20          enshrined in CMA guidance, Commission guidance.

21          To run the test, to perform the test, one must start  
22          with the focal product and ask oneself whether the  
23          hypothetical monopolist could impose a SSNIP on the  
24          focal product with the aim of identifying the smallest  
25          group of products over which a SSNIP could be imposed.

1 I realise I am teaching my grandmother how to suck eggs  
2 by going through this to this panel.

3 Now, in some cases this can be an entirely  
4 theoretical exercise where SSNIP data is not available.  
5 It is often the case. Fortunately, this is not one of  
6 those cases, as Dr Niels observes, because here we have  
7 exactly the real-world evidence that we need to perform  
8 SSNIP methodology on. Now, there are two aspects to the  
9 real-world evidence that we have. The first is, unlike  
10 in many cases, we do not have to hypothesise  
11 a monopolist because both FDC and Genius have real-world  
12 monopolies over the data. The data is not supplied by  
13 multiple parties; it is supplied by a single party.  
14 They each enjoy exclusive control at the upstream and at  
15 the midstream. So we have actual, not hypothetical,  
16 monopoly.

17 Secondly, both Genius at that midstream level and  
18 FDC at the upstream level have profitably imposed price  
19 increases way in excess of the SSNIP. In every case,  
20 the recipient of that increase swallowed it. They did  
21 not switch away to other content. Now, I do not have  
22 the luxury of time to go through all the data we have  
23 now. The Tribunal will be hearing the evidence on that,  
24 on the various price increases. But I would like to  
25 show you some key points now, if I may, so you can see

1 the magnitude of the price increase we are talking  
2 about.

3 Now, this is genuinely commercially sensitive  
4 information so I am obviously not going to read out any  
5 numbers at all. I do not think we need to go into  
6 camera. I think we can just look at the document --

7 THE PRESIDENT: No. For our part, we would rather have  
8 generalities in open court --

9 MS KREISBERGER: Absolutely.

10 THE PRESIDENT: -- but you should feel free, if you think it  
11 is easier or would be more helpful to us, to identify  
12 what we should read. Provide it to us and we will look  
13 at it in light of your general submissions.

14 MS KREISBERGER: I am grateful for that. So I am going to  
15 pick three customer highlights. Now, there is a point  
16 I am going to have to leave and we will address it  
17 later because I think it will be impossible, so I am  
18 going to ...

19 Yes, if I show you actually Niels 1, paragraph 5.15  
20 at {F/1/73}. I am showing you this so you can see --  
21 this is context -- how price is actually addressed in  
22 contracts. It is the highlighted section that I am  
23 drawing to your attention.

24 THE PRESIDENT: Yes.

25 MS KREISBERGER: You cannot just look at it is the point.

1           So with that in mind, Dr Niels had to estimate the  
2           amounts. In fact -- yes, I will come back to that  
3           point. So Dr Niels had to make an estimate of the  
4           amount of the contract price which is attributable to  
5           FDC data in the contract and he does this on  
6           a conservative basis.

7           If I could show you {F/1/78}, paragraph 5.27, this  
8           is the first major customer. I want to show you the  
9           price increase. So in that paragraph -- sorry, Sir,  
10          I will let you read that. (Pause)

11          So you can compare the old price, the new price and  
12          the inflation in price in that paragraph.

13          The next major customer is paragraph 5.29. Could  
14          I ask you to read that paragraph, please, down to 5.31  
15          over the page? (Pause)

16   THE PRESIDENT: I wonder if you can make it a little smaller  
17          so we can see only this page. Thank you. (Pause)

18          Then I think the next page, please, {F/1/80}.

19          (Pause)

20   MS KREISBERGER: Then if we could go forward to page 81,  
21          paragraph 5.36, {F/1/81}, and this is Bet365 -- I can  
22          say this name out loud -- and that is what Dr Niels said  
23          about the price there. You need to go over the page.

24   THE PRESIDENT: Yes.

25   MS KREISBERGER: Now, every one of those price rises, three

1 major customers, is far greater than a SSNIP of 5% to  
2 10%, as you saw. So there is the real-world SSNIP test  
3 data for the midstream market. Those price increases  
4 were mirrored at the upstream level in the revenue which  
5 FDC generated by licensing its data. As you saw, that  
6 was the commercial rationale. Now, one can think of it  
7 as a straw with Genius sucking monopoly rents from  
8 bookmakers and passing a share up back to FDC.

9 So first I want to compare the revenue which FDC  
10 generated in the Perform era, the licensor before  
11 Genius, with the revenue now generated under the Genius  
12 deal. So please turn up Dr Niels' second report,  
13 {F/2/17}, at paragraph 3.11. Sir, I am almost finished  
14 on this section so I wonder if -- just a couple  
15 more minutes should conclude it --

16 THE PRESIDENT: Yes, of course.

17 MS KREISBERGER: I am grateful. You see there, again  
18 redacted, the first redacted figure is the percentage  
19 increase in FDC's revenues from the Perform era to the  
20 Genius era. That is at 3.11. That is again a figure  
21 far in excess of 5% to 10%. There is another number  
22 I just want to put before you which is at -- yes, I can  
23 do it more easily here. If you read the last sentence  
24 of 3.11, that is another price rise instituted during  
25 the course of the contract which is also far in excess

1 of a SSNIP. It is above a SSNIP. So those are  
2 real-world increases at each level of the chain, far  
3 greater than a SSNIP.

4 I have to observe, in Genius' skeleton, they say  
5 that the SSNIP test here has lost all connection with  
6 reality and is entirely hypothetical. That is at 73.1  
7 of their skeleton. Well, I hope I have shown you that  
8 we are in a very fortunate position here of having  
9 real-world data to crunch the empirical data for the  
10 SSNIP test. It is these real-world price rises  
11 extracted by Genius and FDC which show that stadia LLMD  
12 supplied to UK bookmakers is the narrowest product over  
13 which a SSNIP can be profitably imposed. That is the  
14 evidence one needs to establish that stadia LLMD, as  
15 supplied to UK bookmakers, is what is known as a market  
16 worth monopolising. That is what one is getting at with  
17 the SSNIP test. What is the market worth monopolising?  
18 That is the relevant market for assessing the  
19 distortions of competition which I will move on to.

20 Sir, that would be a convenient point to stop.

21 THE PRESIDENT: Yes, thank you, Ms Kreisberger. Before we  
22 rise, I find it often helps to have a hypothetical  
23 analogy when one is considering markets and market  
24 definition. I just want to float something which has  
25 been going through my mind as you have been making your

1 very helpful submissions. It may be a bad analogy, in  
2 which case I am sure you will say so, but let us  
3 hypothesise four competing entertainment channels, A, B,  
4 C and D, who provide online content to, let us say, the  
5 UK. It is general entertainment. It is not news, it is  
6 just competing entertainment channels. Now, they can  
7 either produce their own entertainment in-house or they  
8 can buy it in. Let us suppose most of them buy it in.  
9 Of course the terms on which they buy that entertainment  
10 in can be either on the basis that it is an exclusive  
11 provision or that it is provided by the producer to more  
12 than one of A, B, C or D.

13 Suppose there is an entertainment product produced  
14 by someone that is simply very good, that it knocks the  
15 spots off anything else. I mean, one does not need to  
16 hypothesise that that occurs from time to time. You get  
17 something which is just super-popular, which can be used  
18 to leverage, by the lucky person who has the exclusive  
19 rights to this product, packages of entertainment and  
20 market share against the others. So let us suppose A is  
21 the lucky media provider that has this super programme  
22 that increases market share and enables it to both  
23 increase prices or require, you know, wider packages  
24 would be bought. If one is hypothesising so popular  
25 a product exclusively in the control of A, is it the

1           consequence of your case that that has got to be shared  
2           with B, C and D if it becomes such an important driver  
3           of business or is it simply a consequence of A being  
4           lucky or of good judgment to obtain it?

5           I do not expect an answer now but this is something  
6           which was running through my mind when you were  
7           articulating the extreme importance of the data here in  
8           issue.

9           Now, it may be a bad analogy, in which case it would  
10          probably help to be told why it is bad, but if it is  
11          a good analogy, it would be interesting to understand  
12          your position on what A's obligations and the provider  
13          of the programme are with regard to sharing it or not  
14          sharing it to others. So I will leave that with you.

15        MS KREISBERGER: I am grateful for that. We will come back  
16          to you, Sir, after the adjournment on that.

17        THE PRESIDENT: Well, you do not need to then -- it is  
18          simply a thought that is going through my mind and it  
19          may be that it is something we develop as matters go on.

20        MS KREISBERGER: Thank you, Sir. I have some more prosaic  
21          analogies for you after the lunch adjournment as well,  
22          involving supermarkets and eggs --

23        THE PRESIDENT: That is very helpful.

24        MS KREISBERGER: -- but this one is --

25        THE PRESIDENT: Supermarkets and eggs are also good.

1           Thank you very much, Ms Kreisberger. We will resume  
2           at 2.05. Thank you.

3           (1.09 pm)

4                           (The short adjournment)

5           (2.05 pm)

6           THE PRESIDENT: Ms Kreisberger, good afternoon.

7           MS KREISBERGER: Thank you, Sir. Sir, I would like to begin  
8           with your analogy, if I may. You asked if we thought it  
9           was a good one. We think it is a very good one so  
10          I will, if I may, dive straight in with that.

11          What I would like to do, Sir, is give you two case  
12          studies from the real world which are extremely close to  
13          your example and I hope answer the point and are helpful  
14          analogies. Happily, we have authorities for both. The  
15          first is the Premier League case. Now, I will turn it  
16          up in just a moment, just to introduce it. You may be  
17          familiar with this authority. This is one of a series  
18          of seminal Commission decisions in relation to the  
19          collective selling of football media rights to  
20          television broadcasters and I am going to show you the  
21          decision concerning the Premier League media package, so  
22          very close to the facts we are looking at here. That is  
23          in the authorities bundle. It is at {L/101/9}. What  
24          I do not have, I am afraid, is the hard copy number, to  
25          help Mr Anderson, but it is tab 101.

1           Now, this is a case concerned with the collective  
2           selling of Premier League media rights to pay TV  
3           broadcasters, so it is a little like your example, Sir.  
4           Rather than dealing with the creative commodities of  
5           a very popular show, this is actually closer to our  
6           facts here. It is the full package in relation to the  
7           Premier League competition. It involved a three-year  
8           grant of exclusivity which the Premier League was  
9           proposing to grant to a single buyer, a single pay TV  
10          broadcaster, and the Commission said that that is not  
11          acceptable.

12          If you go to paragraph 26 and begin there, the  
13          Commission flag what is the competition problem.

14          "One example of such a foreclosure problem [this is  
15          a foreclosure problem on the downstream market] is in  
16          the exclusive sale of large packages of media rights.  
17          The [Premier League] has so far sold exclusive live TV  
18          rights in packages that were comparatively large [so it  
19          is the full competition] in relation to that which would  
20          be sold by an individual club and [critically] to the  
21          demand from many broadcasters on the market. This is  
22          likely to create barriers to entry on downstream  
23          television markets in the [UK] leading to access  
24          foreclosure in these markets. Advertising-funded TV and  
25          pay-TV are the most commercially important of the

1 markets affected ...

2 "Given the importance of football for pay TV and  
3 free TV services, a restriction of competition on an  
4 upstream market ... is likely to have significant  
5 effects on the corresponding downstream markets."

6 Then importantly, {L/101/10}:

7 "Other concerns could arise through the sale of all  
8 of the Premier League live TV rights to a single buyer,  
9 given the likelihood that this would also lead to  
10 foreclosure on the downstream television markets, and  
11 through the existence of output restrictions ..."

12 So, Sir, what you have here is a package of  
13 Premier League media rights which is required by pay TV  
14 broadcasters. So to come back to your analogy, this is  
15 the very attractive content and it is broad, it is the  
16 full package, which is important. What the Commission  
17 say here is you are not entitled -- competition law  
18 prevents you from taking the whole package of that  
19 important content and licensing it to one broadcaster,  
20 and the reason given or one of the reasons given is that  
21 it forecloses other broadcasters.

22 The point here is that this content, Premier League  
23 content, was driving pay TV subscriptions, so the pay TV  
24 broadcaster, with this content, would have an advantage  
25 in the market, and that is why it was not permissible

1 and it would be a violation here in relation to  
2 Article 101 to license that content to one buyer. So  
3 the remedy was to split the package up -- split the full  
4 package up into smaller sub-packages and ensure that not  
5 all packages were sold to a single buyer. That was the  
6 no single buyer obligation.

7 So there you have a real-world example of the  
8 Commission saying, "You are not entitled to license  
9 important content to one buyer when it gives them such  
10 an advantage in the downstream market". It is a very  
11 close analogy. So that is the first one.

12 I now want to give you another real-world example  
13 which is even closer to the one that you hypothesised,  
14 Sir, which is also extremely informative. I am going to  
15 hand a press release up to you. This is the  
16 Competition Commission's investigation into pay TV  
17 movies. So this was a phase 2 investigation by the  
18 Competition Commission back in the day. The OFT  
19 referred this investigation to the Competition  
20 Commission. (Handed)

21 Can I ask you to read the press release rather than  
22 read the full thing out loud?

23 THE PRESIDENT: Of course. Do you want us to do that now or  
24 shall we save it for later?

25 MS KREISBERGER: If you could. It is just that first page.

1 THE PRESIDENT: Yes, of course. From  
2 "Competition Commission" down to "Notes". (Pause)  
3 Yes, thank you.

4 MS KREISBERGER: Can I just draw out some points from that?  
5 The first is that the Competition Commission were here  
6 looking at Sky's position, Sky TV, given that it had  
7 first pay movies of all the big Hollywood studios. It  
8 offers first pay movies of all the big Hollywood  
9 studios. That is in the second paragraph. So that is  
10 the content that the Competition Commission were looking  
11 at. The Competition Commission concluded that that  
12 content was not a sufficient driver of subscribers'  
13 choice of pay TV provider. So you see -- if I could  
14 just draw out for you the final sentence of the  
15 penultimate paragraph:  
16 "Overall we do not believe that Sky's position with  
17 regard to first pay movie content is driving  
18 subscribers' choice of pay TV provider [as read]."  
19 So this is a case where the Commission looked at the  
20 content -- remember that is first pay movie content,  
21 pretty big package -- and they said, "Well, actually it  
22 does not lead to a foreclosure problem in the downstream  
23 market because it is not a sufficient driver of  
24 subscribers' decisions to sign up for the TV channels".  
25 Now, what that tells you is that the

1 Competition Commission looked at this carefully and that  
2 was its conclusion -- in theory, one can conceive in  
3 theory of a package of content of the type, Sir, that  
4 you put to me that is so broad and so important that it  
5 might be must-have content which would drive  
6 subscribers' behaviour.

7 Let me be clear. We see from contrasting these two  
8 decisions that Premier League content is must-have  
9 content for pay TV broadcasters because it drives  
10 subscribers' decisions, so in that case it was unlawful  
11 to have exclusivity over that content. So  
12 Premier League, unlawful.

13 Here, these films did not give Sky a sufficient  
14 advantage on the fact. One could conceive of a package  
15 so broad of all films made in Hollywood -- I am not sure  
16 what that content would be, but something so attractive  
17 that broadcasters cannot survive without it. But, Sir,  
18 in your hypothetical example you suggested an individual  
19 show, I think. This suggests that that will never be  
20 the kind of content in the entertainment context that  
21 will be forcibly licensed or, rather, one is not  
22 permitted under law to license exclusively because this  
23 was a pretty broad package and it did not meet that  
24 threshold. Premier League content did meet that  
25 threshold in the entertainment context.

1           Sir, I hope that helps with the analogy.

2           I am then going to pick up my submissions where  
3 I left off. I am still on market definition and I am  
4 now going to pick up some of the defendants' rebuttal  
5 points. The defendants have four arguments. They say  
6 stadium LLMD competes with off-tube content, the  
7 mid-market should be defined as a portfolio of data,  
8 prices did not in fact increase and they also set the  
9 legal threshold for a must-have as 100%. Everyone in  
10 the market has to take the content, has to be  
11 indispensable. We are going to address those four  
12 points now.

13           So starting with off-tube, as you know, off-tube  
14 LLMD is data generated by scouts watching television  
15 coverage, where that coverage is available. It is  
16 a low-grade product with high latency so it has a delay  
17 compared to venue-scouted data. It also has poor  
18 coverage and other quality issues, particularly because  
19 you can only see what the camera is pointing out, which  
20 can be an issue. The defendants' position, that it  
21 competes with venue-scouted data, is frankly a triumph  
22 of fantasy over reality because there is not a jot of  
23 real-world evidence to suggest that UK bookmakers and  
24 other major global bookmakers switch to off-tube LLMD in  
25 the face of Genius' price rises or that they even

1 contemplated switching. It was not on the radar, if you  
2 will excuse the pun.

3 So I have four points to refute Genius' claims --  
4 sorry, the defendants' claims on off-tube. The first is  
5 the ordinary business documents show that Genius  
6 regarded off-tube as a completely different product.  
7 Please go to {H/291/2}. If we go to the first page,  
8 {H/291/1}, you see that that is an email at the bottom  
9 of the page from Mr Andry Purk of Genius. Now, this was  
10 in October 2018, when Perform held the exclusive rights  
11 to the FDC data, and Mr Purk wrote to colleagues about  
12 the difficulties of providing a service scouted  
13 off-tube. He noted that at the time Genius had the  
14 benefit of a feed from Perform, but he added this, over  
15 the page, {H/291/2}, top line:

16 "However if we should lose the Perform deal then it  
17 is evident our UK football offering would be with very  
18 poor quality, We have had to cancel 14 matches during  
19 last month from EPL ...", et cetera.

20 So that was -- the latency problems meant that he  
21 had a very poor product. Now, Mr Purk was, at the time  
22 that he sent this email, head of content at Genius so he  
23 would have known what he was talking about.

24 Major bookmakers also regard off-tube as low  
25 quality. Please turn up {H/409/5}. This is what

1 William Hill had to say to Genius. It is all redacted.  
2 If you could take it from -- if we could blow that  
3 up a bit. I am struggling to see that. It starts  
4 "Speed ...", under "Commentary on data feeds" --

5 THE PRESIDENT: Oh, yes, "Speed is everything".

6 MS KREISBERGER: "Speed is everything", that is it. (Pause)

7 So I think I can say there you have it. If someone  
8 has got a better feed, you do not have a business.

9 Perhaps just for your note, another bookmaker, at  
10 {H/643/1}, told Sportradar -- this is not redacted  
11 I think -- oh, is it?

12 THE PRESIDENT: We will read it.

13 MS KREISBERGER: I can read this out. The quote is, you  
14 will note:

15 "... as expected, TV scouted Premier League is not  
16 an alternative; they must have it from venue."

17 That is a Sportradar document.

18 So that is my first two categories, what Genius  
19 thought and what bookmakers thought about off-tube. My  
20 third category is in the entire record in the disclosure  
21 there is not a single document in which Genius  
22 considered whether paying the very high amount that  
23 I showed you that it has paid, the minimum revenue  
24 guarantee -- whether paying that amount for venue data  
25 was a risk because bookmakers could just switch to

1 off-tube.

2 So I have shown you that Genius' strategy was based  
3 on its correct assumption that full control meant  
4 ability to raise price and leverage relationships. So  
5 the absence of any internal thinking, "Do we really want  
6 to pay this amount? Will bookmakers just switch to  
7 off-tube?", that is a negative fact which is frankly  
8 devastating for the argument on off-tube. It casts it  
9 in its true light. It is an argument that has been  
10 devised for the purposes of this litigation.

11 Can I just show you -- again because it is  
12 confidential -- Sportradar's skeleton, {A/1/7},  
13 paragraph 9, you have there the highlighted percentage  
14 at paragraph 9. That is the proportion of Genius'  
15 entire global rights budget allocated to paying FDC for  
16 the data, so it speaks for itself.

17 The final category is Dr Padilla's evidence. Now,  
18 Dr Padilla relies on a single piece of data. He says  
19 that off-tube competes with stadia LLMD, and to support  
20 that contention he has a list of a number of new  
21 customers, 23 new customers, which Sportradar acquired  
22 since 2018, who are single source; in other words, these  
23 are customers that we know do not take off-tube LLMD --  
24 sorry, they do not take stadium LLMD from Genius because  
25 they only have one -- "single source" means one data

1 provider, so they are only engaged with Sportradar.

2 Dr Padilla says, "Look, Sportradar won 23 customers  
3 and they were only using off-tube LLMD". But what  
4 Dr Padilla does not do is look at who these customers  
5 are. Now, that will be a matter for evidence, but I can  
6 tell you that the evidence will show that these are  
7 customers that overwhelmingly supply foreign markets.  
8 They are not customers supplying UK betting. There may  
9 be a vanishingly small proportion of UK betting revenue  
10 in there, but overwhelmingly not.

11 MS SMITH: I hesitate to rise. I did raise this point with  
12 Ms Kreisberger at lunchtime and she has chosen not to  
13 come back to it. Ms Kreisberger refers to matters that  
14 will be covered in evidence as to the 23 single-source  
15 bookmakers. She referred this morning to almost 100% of  
16 bookmakers taking -- UK bookmakers taking material from  
17 Genius, in-stadia LLMD from Genius. Both of those  
18 assertions are based on evidence which was served on us  
19 last night at 7 o'clock. I do not know if it came  
20 through to you, my Lord. It is a supplementary report  
21 from Dr Niels. We had assumed Ms Kreisberger would  
22 apply to the Tribunal for permission to put that  
23 material in front of you at this late stage. We do not  
24 see the basis for that material coming in so late. It  
25 is not in response to anything that has just come up.

1           It is apparently in amplification of a case she had  
2           already pleaded.

3           The application has not been made so I just wanted  
4           to -- I did raise this with Ms Kreisberger at lunchtime,  
5           saying, if she wants to rely on this evidence properly,  
6           she should be making an application to your Lordships  
7           and obviously we should be given an opportunity to  
8           respond if that application is acceded to.

9           THE PRESIDENT: Well, we have not read it at the moment.

10           Ms Kreisberger, I will hear from you briefly on  
11           that.

12           MS KREISBERGER: Sir, I am referring to Dr Padilla's  
13           evidence. He relies on 23 customers, Sportradar  
14           customers, so we must be entitled to say to the Tribunal  
15           during the course of evidence who those customers are.  
16           That is the only point I am making now. We do have  
17           a spreadsheet, we will be writing overnight about that,  
18           but I am not relying on that spreadsheet now. I am  
19           pointing out the content of Ms Smith's expert's  
20           evidence.

21           MS SMITH: It is three spreadsheets and a report dated  
22           3 October from Dr Niels last night. You know, fine, you  
23           have heard my submission.

24           THE PRESIDENT: Well, Ms Kreisberger, it is not  
25           a free-for-all to put in further reports.

1 MS KREISBERGER: That is understood.

2 THE PRESIDENT: There is clearly an objection being made.

3 I do not have a problem with your referring to the  
4 material now because we can put it out of our minds if  
5 it is excluded, but I would be grateful if the parties  
6 could work out whether there is properly a dispute here  
7 which we need to resolve, in which case we will find the  
8 time to do so, or whether it is something that we can  
9 admit without ruling on the matter.

10 MS KREISBERGER: That will be done, Sir.

11 THE PRESIDENT: I am sure I do not need to remind the  
12 parties that we will have considerable regard to the  
13 question of prejudice to the person who is the recipient  
14 of this material, so the more it is rebuttal, the more  
15 inclined we would be to look at it. But if we are  
16 originating new points which will take time to respond  
17 to, then that is a factor pointing in the other  
18 direction.

19 Let us know at what point this needs to be dealt  
20 with. I would suggest some time at the close tomorrow  
21 afternoon if it cannot be resolved before then. But if  
22 it cannot be resolved before then, I think the parties  
23 need to know where they stand before the evidence  
24 begins.

25 Ms Smith, does that resolve the issue you have with

1           this material?

2           MS SMITH: Sir, we wait to see the application -- the basis  
3           of the application by Ms Kreisberger's clients.  
4           Obviously if an application is -- this is new material.  
5           We have managed overnight to talk to our experts about  
6           it. It includes new data in these spreadsheets that has  
7           been extracted from disclosure documents and it includes  
8           commentary by Dr Niels on that data. If it is to be put  
9           into the Tribunal, we do need an opportunity to respond  
10          to it through expert response. My Lord, I can spend the  
11          time now to show you what it is --

12          THE PRESIDENT: No, no, I am not inviting that.

13          MS SMITH: -- but if the application is to be made, then  
14          probably it should be made, and if it can be worked out  
15          overnight between the solicitors, that is fine, but  
16          I think I am putting it on record that if it is -- if  
17          this new evidence is going to go in, this new report is  
18          going to go in, then I for one will need an opportunity  
19          to put in a short note in response to it from my expert  
20          economist.

21          MR DE LA MARE: My Lord, can I just add to that? The  
22          infamous 23 is directed at Dr Padilla's report. There  
23          is a further much more extensive spreadsheet directed at  
24          a substantial part of Mr Majumdar's second report, where  
25          he does an analysis of Sportradar's top 40 customers.

1 It is an analysis that has figured all over the joint  
2 experts' statement. Effectively the document that has  
3 been produced by Dr Niels is an answer to that  
4 particular passage, produced late, without any  
5 forewarning, in relation to this being the response in  
6 the joint expert process.

7 As we understood it, the whole purpose of going  
8 through that exhaustive process was that, if there was  
9 an identified controversy and the experts could navigate  
10 a route through it by reference to the data, that would  
11 be identified and done. Instead what we have had  
12 presented to us is this very extensive spreadsheet, the  
13 answering of which will take a very great deal amount of  
14 time. There is particular prejudice in this because it  
15 entails an analysis of Sportradar's customers and of  
16 course they are the parties best placed to say -- and  
17 should say it by reference to evidence -- who their  
18 customers are, what their business is, where it is  
19 located.

20 So we have some real difficulty, like my learned  
21 friend, in relation to spreadsheet B of the three  
22 spreadsheets and what we would greatly welcome in the  
23 course -- overnight or whenever -- is a careful and  
24 detailed explanation as to why this material is being  
25 produced now as opposed to earlier through the joint

1 expert process, because we think that is a material part  
2 of the Tribunal's response to this very, very late  
3 application.

4 My learned friend referred repeatedly in opening to  
5 the quantitative evidence that they had, the 98% or  
6 100%. That is that document served yesterday.

7 THE PRESIDENT: Well, Ms Kreisberger, I think you had better  
8 take it that you will be making an application  
9 tomorrow --

10 MS KREISBERGER: We have heard what has been said. I am  
11 grateful.

12 THE PRESIDENT: I will only say this in case it assists the  
13 parties: clearly, if this material goes in, there will  
14 be a right to respond. That may address Ms Smith's  
15 concerns but I do not think it addresses Mr de la Mare's  
16 concerns because I think the substance of what you were  
17 saying, Mr de la Mare, is that you just do not have time  
18 to deal with it.

19 MR DE LA MARE: I suspect where we are going to be, my Lord,  
20 is that we will do the level best that we can and then  
21 my Lord may well take a judgment as to whether or not to  
22 allow the material in or what to do about the prejudice  
23 that has been caused. I suspect you might take it  
24 incrementally, but first of all we want an explanation  
25 as to why we are being ambushed in this way.

1 THE PRESIDENT: Okay. Well, we will have an application  
2 when the opening submissions are concluded and deal with  
3 it that way.

4 MS KREISBERGER: Thank you, Sir.

5 I am staying with Dr Padilla's evidence and I was  
6 addressing you on Dr Padilla's list of 23 customers.  
7 I am going to ask you to turn that up. Just a reminder,  
8 after the diversion, we are still on off-tube.  
9 Dr Padilla's evidence is at {F/3/53}, paragraph 240. If  
10 we could blow up paragraph 240, the panel can read for  
11 yourselves that paragraph. This is Dr Padilla's piece  
12 of evidence to support his case on off-tube. I am told  
13 I am allowed to refer to the number of 23 customers.

14 THE PRESIDENT: Yes.

15 MS KREISBERGER: Sir, can I just do a little bit of maths  
16 with you, slightly more challenging than the one earlier  
17 for me. Dr Padilla says that 23 customers paid that  
18 amount that you see there after the euro --

19 THE PRESIDENT: Yes.

20 MS KREISBERGER: So that is the amount that 23 customers  
21 paid over the three-year period. So to work out what  
22 those customers paid in one year, one divides that by  
23 three.

24 THE PRESIDENT: Yes.

25 MS KREISBERGER: An iPhone calculator might be useful at

1           this point because I cannot say the numbers.

2       THE PRESIDENT:   Yes.

3       MS KREISBERGER:   So you divide that number by three and then  
4           you divide that number by 23.

5       THE PRESIDENT:   Yes.

6       MS KREISBERGER:   That gives you a very low number.  That is  
7           the number that each customer on Dr Padilla's list  
8           generated per annum.

9           If I could ask you to cast your mind back to the  
10          price tags I showed you for the major bookmakers that  
11          Genius is charging and compare those large numbers with  
12          this very little number, to say these prices are not in  
13          the same ballpark is an understatement.  So the notion  
14          that a product that is worth the price we get here --  
15          that a product at that price level presents any form of  
16          price constraints on the products being sold to the  
17          major customers for those price tags, it is  
18          a fundamentally hopeless argument.  There is no price  
19          constraint.  These are not products in the same market.  
20          I do not have to show you where these customers are to  
21          make good this point.

22          So actually Dr Padilla's evidence is rather useful  
23          because it highlights that off-tube is a deeply inferior  
24          product.  It is being sold for peanuts comparatively and  
25          it does not constrain the price of in-stadia LLMD.

1 I am going to move on to portfolios. Now, as you  
2 know, Genius urges a different approach to market  
3 definition on the Tribunal. Dr Majumdar says that  
4 because bookmakers buy portfolios of data, the market  
5 should be defined by reference to portfolios. That is  
6 how he justifies his approach, which is to take a broad  
7 portfolio of sports data as his starting point for the  
8 SSNIP test. Remember, the SSNIP test, as I submitted  
9 earlier, is the narrowest set of products that you can  
10 apply a SSNIP to. But Dr Majumdar's starting point of  
11 a broad portfolio conveniently means he can never  
12 identify a relevant market which is narrower than his  
13 chosen portfolio.

14 So, in other words, what Dr Majumdar has done is, by  
15 framing the starting point broadly, he avoids asking  
16 himself the one pertinent question, which is: can  
17 a hypothetical monopolist apply a 5% to 10% price  
18 increase to stadia LLMD? He circumvents it, he ducks  
19 it. He does not want to ask himself that question  
20 because I have shown you we actually have data evidence  
21 on that point and we know that they would.

22 Now, you will be hearing the evidence but I am  
23 foreshadowing the point now. Dr Majumdar has completely  
24 parted ways with the orthodox and principled approach to  
25 market definition set out in the guidance. He is off on

1 a frolic of his own. Now, I would like to turn up that  
2 guidance. If you could go to {L/105/7}, and I do have  
3 the hard copy bundle. It is volume 12. Now, this is  
4 the OFT guidance but it is still used by the CMA today.  
5 You will no doubt be very familiar with it.

6 Paragraph 2.9 tells you that you start with the  
7 product under investigation, the focal product; the  
8 product under investigation. Here that is stadium LLMD.  
9 That is the basic proposition that Dr Majumdar ignores.

10 What Dr Majumdar does -- and Genius in its  
11 skeleton -- is to cite a different paragraph. I have to  
12 say, disappointingly, Genius' skeleton adopts the old  
13 trick of partial citing and omitting the key bit of the  
14 relevant passage. That is at page 22 of this authority,  
15 of this document, {L/105/22}, paragraph 5.11. What the  
16 CMA says:

17 "In some cases the relevant product market may  
18 consist of 'bundles' of what are otherwise distinct  
19 products. For example, if a relevant product market was  
20 'one stop grocery shopping', the market may include  
21 bundles of groceries that normally make up a weekly  
22 shop. Whether this is appropriate depends on the  
23 investigation. For example, if the investigation  
24 concerned the supply of a particular grocery item to  
25 a retailer, it would usually be appropriate to consider

1           that item as a distinct product as opposed to bundled  
2           together with other products. The perspective of  
3           customers will be important ..."

4           This case does concern the supply of a particular  
5           product and I want to run, as I mentioned I would  
6           earlier, with the OFT's supermarkets example.

7           Let us imagine that there is a single monopoly  
8           supplier of eggs to supermarkets in the UK and it is  
9           accused of excessive pricing, so one needs to work out  
10          if the egg monopolist has market power and that means  
11          you need to define the market on which supermarkets buy  
12          eggs from the monopolist. Now, Sainsbury's cannot say,  
13          "Well, if prices go up, I will switch to buying bread  
14          instead", because there are certain must-stock  
15          categories of groceries. Sainsbury's has to stock eggs,  
16          bread and milk because customers expect to see it in  
17          their store. It drives customers, footfall.

18          Now, given that Sainsbury's cannot switch away from  
19          eggs in the face of a price rise from the hypothetical  
20          monopolist, that tells us that the relevant market is  
21          the supply of eggs to supermarkets and the egg  
22          monopolist does have market power. That is the thought  
23          experiment.

24          Now, if in that case of the egg monopolist -- if you  
25          define the market as all groceries sold by supermarkets,

1 the bundle, the grocery bundle downstream, you would  
2 miss the fact that the egg supplier has monopoly power.  
3 You would miss the market power. That is exactly what  
4 Dr Majumdar, Genius' expert, has done because he does  
5 not want to find that there is a market for stadia LLMD  
6 so it is a form of economic sleight of hand.

7 My submission to you is that that is an unprincipled  
8 approach and one that taints the rest of his evidence  
9 and the Tribunal should place little weight on it.

10 I want to go to my next point --

11 THE PRESIDENT: Are we going to hear evidence on how the  
12 data is used by the bookmakers? In other words, you  
13 have told us and we have seen in the material that we  
14 have read that live is better than off-tube, but are we  
15 going to have explained how it is that off-tube data, if  
16 one were confined to that, affects the way in which the  
17 bookmakers structure the products that they offer to the  
18 punters, because that in a sense is the driver.

19 I mean, let us assume for the sake of argument that  
20 there is a qualitative difference between live and  
21 on-tube [sic] in the sense that one is much more current  
22 than the other, which is much more latent. If one can  
23 maintain the interest of the punters, the people laying  
24 bets, with latent dated material, then in a sense the  
25 difference becomes one that does not matter. So the

1 short question is: will we be seeing material which  
2 shows just how the in-game betting is constrained where  
3 one has got data that is subject to extreme latency?

4 MS KREISBERGER: Sir, if I can just check the point.

5 Sir, if I could just direct you to evidence that has  
6 been adduced by Genius.

7 THE PRESIDENT: Yes, of course.

8 MS KREISBERGER: This is at {E/14/1}. That is the front  
9 page and this is the first witness statement of  
10 Mr Stephenson, who has cropped up in my submissions. He  
11 is the global partnerships director at Genius Sports  
12 Group Limited. Page 30 of his statement, {E/14/30},  
13 paragraph 83 to the end of 84, addresses the problems,  
14 as it were, with off-tube.

15 That is my immediate reaction, Sir, and we will take  
16 that point forward. If I could also just remind you,  
17 Sir, that off-tube should not be treated as a catch-all  
18 across sports because in some sports you have very good  
19 off-tube where latency is low, coverage is good, so the  
20 fact that you might have a very good off-tube product in  
21 relation to Latvian netball does not tell you anything  
22 about how that product works in relation to  
23 Three Leagues, where we say poor coverage, high  
24 latency ...

25 THE PRESIDENT: No, to be clear, I am postulating

1 a significant difference between the live data and the  
2 off-tube data. So let us assume -- let us take  
3 a latency of 25 seconds, which is I think the upper  
4 limit on the evidence that I have read anyway, I can  
5 quite see that that makes a difference. The question  
6 which I do not think is answered here is how far the  
7 bookmaker can work around the problem and --

8 MS KREISBERGER: Yes, I understand.

9 THE PRESIDENT: -- whether there is no work-around such that  
10 you are therefore compelled to buy the live data because  
11 you want to keep the punters in business.

12 That is why I am referring to a difference without  
13 a distinction or with a distinction because, if you can  
14 work around cheaply, then you are not going to worry  
15 about the difference because you will sell your product  
16 with a different package and retain your betting public,  
17 but if it is the case that you are having to shut up  
18 your books or close your books for longer periods than  
19 you would like and you are losing business or you are  
20 not as attractive to the punters who were placing bets  
21 with you such that they move elsewhere, then one can see  
22 why a price can be demanded for live data which makes it  
23 non-substitutable --

24 MS KREISBERGER: Yes.

25 THE PRESIDENT: In other words, I am not sure it is enough

1 to say there is a difference between live data and  
2 off-tube data. I do not think anyone is going to  
3 dispute that that difference exists. It is much more  
4 whether that difference is material because we are,  
5 after all, talking about a component in someone else's  
6 business. We are not talking about an end product that  
7 is bought or sold. We are talking about a component  
8 that goes into the product that is then sold to the  
9 ultimate consumer, and if the ultimate consumer can be  
10 as well served by something else, then it does not  
11 matter.

12 MS KREISBERGER: Yes, I understand the point.

13 Sir, can I come back to you on that but could I just  
14 give you a reference for your note for now, which is to  
15 Sportradar's witness statement, Mr Lampitt's second  
16 statement, paragraphs 82 and 83. That is at {E/3/27}  
17 but perhaps we can come back to that topic as well.

18 THE PRESIDENT: Sure. Ms Kreisberger, let me be clear. The  
19 reason I am raising these things is not because I am  
20 expecting an answer now; it is more so that those in the  
21 room who are giving evidence and who are asking  
22 questions of those who are giving evidence can elicit  
23 this sort of material so that, come the end of the  
24 trial, these hares have either been shot or resolved.

25 MS KREISBERGER: Quite. No, I am very grateful for that,

1 Sir. They are very helpful indications.

2 MR CUTTING: I wonder if I could add something to that, just  
3 following on from the president's comments. What would  
4 I think be quite useful, displaying my own lack of  
5 betting savvy, would be to understand the range of  
6 in-play bets made live on let us assume an EPL game and  
7 the kind of bets within that subset that might still be  
8 offered by off-tube means, because it would be quite  
9 nice to see the comparison as to what subset or more  
10 than subset of bets either are or are not capable of  
11 being traded.

12 MS KREISBERGER: Yes. Sir, could I just take instructions  
13 for a moment? (Pause)

14 Sir, we have that. I am grateful.

15 So coming back to my rebuttal of the off-tube point,  
16 I would like to spend just a moment on the approach of  
17 Dr Majumdar and Dr Padilla, the defendants' experts, to  
18 calculating the price. I showed you earlier what  
19 Dr Niels did to estimate the price. This is what  
20 I would submit is another sleight of hand in the  
21 economic evidence. They have adopted a proxy for price.  
22 We can call it "price per event".

23 Now, both Dr Padilla -- again, I am introducing this  
24 point and it will arise on the evidence as we go  
25 along -- but both Dr Padilla and Dr Majumdar work out

1 the price that Genius charged for LLMD by taking the  
2 full amount that the customer pays to Genius for the  
3 whole bundle, that is the leveraged bundle with lots of  
4 other content, and then dividing that overall price by  
5 all of the events bought by that customer, and that  
6 gives a price per event.

7 Now what that means -- I am sure you have the  
8 point -- is that in a bundle which includes  
9 Three Leagues data and Latvian table tennis -- I am not  
10 sure why I am picking on Latvian table tennis but you  
11 have the point -- the defendants' experts have treated  
12 the price to the UK bookmaker of the Premier League data  
13 with the price charged for the game of Latvian table  
14 tennis -- it treats them as equal.

15 My submission is that is an obviously irrational  
16 approach. It is not even consistent with what Genius'  
17 own factual witnesses say. Perhaps again for your  
18 note -- I am conscious of time -- Mr Stephenson --  
19 I just took you there -- refers to differences in price  
20 or value between different events in the portfolio. So  
21 he acknowledges, in other words, that Latvian table  
22 tennis is not as valuable as a Premier League game. He  
23 acknowledges that. For your note, that is {E/14/19},  
24 paragraph 50 of his first statement.

25 So to the extent that the defendants' experts make

1 points based on price movements to customers, which they  
2 do, deliberately, my submission is that evidence should  
3 be disregarded because their methodology for calculating  
4 price is fundamentally irrational. It is not fit for  
5 purpose.

6 Just to foreshadow it, there is another consequence  
7 of this pricing methodology which Genius seems to have  
8 overlooked. We have made this point in our skeleton.  
9 Genius has pleaded a positive allegation that its  
10 customers pay a particular percentage of GGR to obtain  
11 LLMD. I do not think I can say the percentage. That is  
12 in their defence at paragraph 27.3.1. That allegation  
13 is not borne out by the facts. The allegation that  
14 their customers pay a straightforward percentage of  
15 gross revenue is not correct if price is calculated as  
16 the price per event.

17 Now, Genius in its skeleton says that -- I will  
18 start that sentence again. Genius, referring to the GGR  
19 amount, says that it is only notionally attributable to  
20 FDC data. That is the amount on which they calculate  
21 what they owe to FDC on the basis of a proportion of  
22 revenue generated by the bookmaker through FDC data.  
23 Now, if it is only notionally attributable, it sounds  
24 like Genius is saying that is not in fact what  
25 bookmakers were charged.

1           So you have my submission. Genius cannot have it  
2 both ways. The problem is it wants a high price for  
3 some purposes, to argue that it charged bookmakers the  
4 same amount that it said FDC would have to charge --  
5 Sportradar would have to charge bookmakers for this  
6 data, but it wants a low price for market definition  
7 because it wants to say the SSNIP test was not met.  
8 They cannot have it both ways.

9       THE PRESIDENT: No, but the question for us will be which  
10 way is the right way. It seems to me implicit in your  
11 submissions that there is a correlation between  
12 spectator interest in an event and that which punters  
13 bet on. Now, that may be the case, but it seems to me  
14 important that one articulates that implied assumption.  
15 One can see why it would be the case because it is in  
16 the evidence that -- or will be in the evidence, when  
17 the statements are given, that a lot of fans want to bet  
18 on their own team and so, if you have got a popular  
19 sport, like football in the Premier League, then that  
20 will drive the betting market. Now, that is an  
21 assumption which I think we are all making, but it does  
22 need to be laid out there clear because there is no  
23 reason why one cannot have a deeply boring event that  
24 actually provides excellent fodder for betting.

25           I mean, one could imagine a nice little betting

1 market on length of submissions in the Competition  
2 Appeal Tribunal. No one would be very interested in  
3 watching what is going on, but they might be extremely  
4 interested in working out who is going to be the  
5 shortest and who is going to be the longest and have all  
6 kinds of interesting bets on number of interventions by  
7 the Tribunal in the course of submissions. One could  
8 have a very interesting market in that regard. But that  
9 would be entirely detached from the intrinsic interest,  
10 and I do not want to say anything about the intrinsic  
11 interest, of these proceedings.

12 It does seem to me that that is again a point that  
13 needs to be unpacked in terms of how this market  
14 operates because I think it is underlying your  
15 submissions that the fact that the data relates to very  
16 popular events ties to the significance of the data for  
17 the only partially related industry of creating  
18 a betting product.

19 MS KREISBERGER: Yes. If I may say so, that is helpful,  
20 Sir, because it is right that it is illuminating --  
21 Premier League's popularity speaks for itself. But I do  
22 not want to overstate the point because the litmus test  
23 is what the bookmakers think they need to have and  
24 Genius thinks that UK bookmakers cannot afford to  
25 operate without stadia LLMD. So I do not really need to

1 go behind that proposition. That is the touchstone:  
2 what does the bookmaker need, have to have? It is not  
3 about importance or popularity; it is what they have to  
4 have in order to operate in this competitive market.

5 So my final topic, rebutting points from the  
6 defendants, is the legal test for must-have. Now,  
7 Genius in its skeleton argues that, in terms, in order  
8 to be a must-have product, every single bookmaker in the  
9 market has to regard the product as essential. That is  
10 the specific allegation put forward by Genius;  
11 indispensable, everyone has to have it. That is wrong  
12 as a matter of law. That is not the legal threshold for  
13 a must-have. The simplest way for me to show you an  
14 authority on the point is the Socrates case. That is at  
15 {L/75/46}.

16 Perhaps we do not need to turn it up in the  
17 interests of time, so if I give you for your note,  
18 paragraph 123, that is on page 35, {L/75/35}, and 164,  
19 that is on page 46, {L/75/46}.

20 But what the Tribunal held there was that -- the  
21 case concerned an accreditation scheme for conveyancing  
22 firms and the Tribunal held in terms that that  
23 accreditation scheme was a must-have because -- and  
24 I quote -- "close to 60% of firms active in residential  
25 conveyancing subscribed" to the scheme, and it went on

1 to say that therefore the majority -- that is the  
2 two-thirds -- had little option but to seek  
3 accreditation. The point is just a bad one in law.

4 Sir, that is a convenient place to bring my market  
5 definition submissions to a close. Dominance I do not  
6 think I need dwell on at all because the necessary  
7 corollary of my argument, that the market is LLMD --  
8 stadia LLMD to UK bookmakers, is that Genius and FDC are  
9 essentially monopolists in that market so I do not need  
10 to dwell on dominance.

11 So my next topic, I now move on to infringement, so  
12 I have object, effects and abuse.

13 THE PRESIDENT: Yes.

14 MS KREISBERGER: I can take some of this quite crisply. So  
15 starting with object, I will structure my submissions in  
16 two parts. I will begin by setting out the legal test  
17 for object infringement and then explain why this  
18 agreement, when properly construed, has an  
19 anti-competitive object. The law on the relevant  
20 principles which apply is pretty uncontroversial. It  
21 was recently reiterated by the Tribunal, Sir, you will  
22 recall in the BGL case. That is at {L/98/136},  
23 paragraph 203. The paragraph starts on actually  
24 page 135, {L/98/135}. Could I ask the Tribunal just to  
25 have a look at those paragraphs? I will not read them

1 out.

2 THE PRESIDENT: Yes, of course.

3 MS KREISBERGER: In particular paragraph 205. (Pause)

4 THE PRESIDENT: Next page, please, {L/98/136}. Thank you.

5 (Pause)

6 Yes, thank you.

7 MS KREISBERGER: Sir, also for your note -- there is no

8 need to turn it up -- in the seminal case of

9 Cartes Bancaires, for an object infringement, the Court

10 of Justice makes the point that certain types of

11 agreement we know from experience -- it says experience

12 shows that they lead to falls in production and price

13 increases, resulting in poor allocation of resources.

14 So we know from experience that certain types of

15 agreements are anti-competitive and we do not need to

16 test their effects.

17 The type of agreement at issue here is one which

18 competition law has blacklisted many times before and

19 the category of anti-competitive agreement is

20 foreclosure by long-term grant of exclusivity.

21 Experience has shown us that granting a single operator

22 long-term exclusivity over rights which are required by

23 competitors distorts competition by erecting barriers to

24 entry and foreclosing rivals. So it is a rule of UK and

25 European law that these types of long-term grants of

1 exclusivity infringe the prohibition.

2 I have already shown you FAPL, which sets out that  
3 principle. If we could then turn to Arriva v  
4 Luton Airport. In that case, Luton Airport -- which you  
5 may well be familiar with -- Luton Airport ran a tender  
6 for the long-term right to operate coach services on the  
7 route between the airport and Victoria Station.  
8 National Express won the tender and replaced Arriva as  
9 the incumbent. Arriva challenged the award.

10 THE PRESIDENT: Yes.

11 MS KREISBERGER: Mrs Justice Rose, as she then was, held  
12 that the award was abusive. Her findings are directly  
13 on point. That is at {L/61/34}. Please read  
14 paragraphs 103 to 106. (Pause)

15 THE PRESIDENT: Then just the end of 106.

16 MS KREISBERGER: Yes, I think that is over the page. That  
17 is a key section there, {L/61/36}.

18 THE PRESIDENT: Yes.

19 MS KREISBERGER: Now, there are two points I would like to  
20 draw out from those paragraphs. The first is that the  
21 judge found in terms that the analysis was identical  
22 whether the rights are granted by a single upstream  
23 undertaking or a group granting their rights  
24 collectively. So the rule she articulates applies under  
25 Chapter I, which was FAPL, and Chapter II, which is this

1 case. Here we are in both, but FDC has the right as  
2 regards the entire package thanks to the upstream  
3 arrangements. We do not challenge those.

4 The second point is the judge is here articulating  
5 a generally applicable rule of competition law. That  
6 rule -- because it is important, I will just restate it:  
7 the grant of exclusivity for a long period to a single  
8 downstream provider of rights has a distortive effect on  
9 competition where competitors cannot enter the  
10 downstream market to compete with the undertaking to  
11 whom the rights have been granted.

12 So you saw an application of that principle in the  
13 films investigation of the Competition Commission, where  
14 they applied that principle and found that it was not  
15 triggered by those facts. It did not have the  
16 downstream foreclosure effect because that content was  
17 not sufficiently important, unlike the Premier League  
18 content which was. So if one operator gets exclusive  
19 control over a large package of rights such that rivals  
20 are excluded from the downstream market, that is  
21 a distortion of competition; no need for sophisticated  
22 economic analysis. That is the rule.

23 So foreclosure by long-term grant of exclusivity is  
24 a generally applicable proposition. As I said, no  
25 analysis of effects is necessary. It is in line with

1 AG Kokott's first justification for the object box which  
2 you saw in the BGL judgment. The complainant is  
3 relieved of the burden of establishing effects.

4 As an aside, Mr Davison of Genius also thought that  
5 Arriva is the governing authority here. Can we go to  
6 {H/1748/5}? Now, at an interlocutory stage in Arriva,  
7 prior to this final judgment, the court refused to grant  
8 Arriva an interim injunction, just on the usual --  
9 applying the classic test for interim injunctions. This  
10 information was conveyed by Mr Burton to Mr Davison  
11 within Genius and Mr Davison says here, "This is good".  
12 He is really happy that an interim injunction was  
13 refused; the final judgment went the other way.

14 He says:

15 "This is good ... with a load of similar parallels."

16 That is about the fourth line down, talking about  
17 Arriva.

18 "This is good ... with a load of similar parallels."

19 We agree.

20 One final point I want to draw out of the object  
21 case law -- and it is an important one for your  
22 determination -- is how one approaches the question of  
23 identifying if an agreement has an anti-competitive  
24 object. Now, Cartes Bancaires makes clear that although  
25 one is not engaging in a comprehensive assessment of

1 economic effects -- that is clearly not what one does  
2 here -- nonetheless the assessment of object does not  
3 take place in a vacuum; far from it.

4 If I could call up {L/64/44}, paragraph 53. This is  
5 Cartes Bancaires. This is well known, this language.  
6 Paragraph 53, object must be assessed by reference to:

7 "... the content of its provisions, its objectives  
8 and the economic and legal context of which it forms  
9 a part. When determining that context, it is also  
10 necessary to take into consideration the nature of the  
11 goods or services [and] the real conditions of the  
12 functioning and structure of the market or markets in  
13 question ..."

14 Paragraph 54 says:

15 "... although the parties' intention is not  
16 a necessary factor ... there is nothing prohibiting the  
17 [courts] ... from taking that factor into account ..."

18 What you have here are four evidential categories  
19 for assessing object: content, objectives or aims,  
20 context and, if appropriate, subjective intention. The  
21 assessment of object calls for a detailed factual  
22 investigation of those points: wording, purposes,  
23 products, context. It is not a cursory assessment. It  
24 obviates the need for economic analysis.

25 I just want to draw to your attention the Paroxetine

1 case. It is a good illustration of this approach. The  
2 case involved a number of patent settlement agreements  
3 whereby GSK, which was the incumbent patent-holder of  
4 a blockbuster antidepressant drug, settled patent  
5 litigation with rivals that were poised to enter the  
6 market with a generic drug. As part of those  
7 settlements, GSK made large payments to its generic  
8 rivals and they agreed to drop the litigation and to  
9 stay off the market. The Tribunal found that the  
10 settlement agreements had an anti-competitive object and  
11 it engaged in a very fact-intensive analysis of these  
12 agreements. I was involved in it.

13 Now, the approach which was laid down by the Court  
14 of Justice on a preliminary reference from the Tribunal  
15 focused heavily on the actual sums which GSK paid to the  
16 generic company to drop their challenge and stay out of  
17 the market. That is at {L/91/18}, paragraph 87. Ah,  
18 yes, 87, this is the Tribunal judgment citing the Court  
19 of Justice and you see paragraph 87:

20 "However, such a characterisation as a 'restriction  
21 by object' must be adopted when it is plain from the  
22 analysis of the settlement agreement concerned that the  
23 transfers of value provided for by it cannot have any  
24 explanation other than the commercial interest of both  
25 the holder of the patent and the party allegedly

1 infringing the patent ..."

2 They also said, for your note, on the previous page,  
3 {L/91/17}:

4 "Such a delay [in generic entry] leads to the  
5 maintenance on the market of the medicine concerned [at]  
6 a monopoly price."

7 So they looked very closely at payment. So there  
8 was anti-competitive purpose, because the parties agreed  
9 that GSK could continue to enjoy exclusivity over the  
10 drug, provided that it split monopoly profits with the  
11 generic rivals.

12 So, with that, I move on to why this agreement has  
13 an anti-competitive object with those principles in  
14 mind. I would like to go through four categories of  
15 evidence, quite crisply: content, context, aims and  
16 subjective intention.

17 Content of the agreement. I have already  
18 highlighted the content. There are four key planks,  
19 just to summarise: five-year grant of contractual  
20 exclusivity to Genius; gatekeeper control given to  
21 Genius by FDC over stadia LLMD. That is made up of the  
22 anti-scouting and the discretion, complete discretion  
23 not to grant sub-licences. That is gatekeeper control.  
24 That is the second key plank of the agreement.

25 The third key plank is the consideration. That is

1 the minimum revenue guarantee, including the exclusivity  
2 premium. Just so you have it, schedule 10 on  
3 scout-spotting -- I showed you that -- makes clear that  
4 the commercial rationale -- and that is what we are  
5 looking at here -- was to pay FDC the minimum guarantee.

6 The fourth point is the indemnity. Now, I showed  
7 you the clause. It was part of our pleaded case that  
8 the indemnity which Genius gave to FDC formed part of  
9 the anti-competitive object of the agreement. That was  
10 subjectively intended by the parties. That is at  
11 {B/4/13}, reply, paragraph 21. Perhaps you could just  
12 read that to yourselves. So that is at the bottom of  
13 the page. (Pause)

14 THE PRESIDENT: Yes.

15 MS KREISBERGER: I cannot read that out, but that is the  
16 case. Sir, I am being reminded about the transcribers'  
17 break, but I suggest I get to the end of object, which  
18 I am quite close to, if you are content with that.

19 THE PRESIDENT: Yes, of course.

20 MS KREISBERGER: I am grateful.

21 Sir, I have raced through that in the interests of  
22 time, but that is content or wording of the agreement.  
23 So that is the first evidential category for the object  
24 infringement.

25 The second evidential category is context, as you

1 saw, and context includes nature of the product. That  
2 is in the legal test and I have by now addressed you at  
3 length on the must-have nature of the product. I have  
4 shown you some of the key pieces of evidence. You will  
5 be shown much more evidence on this topic. Sir, you  
6 mentioned yourself the interplay of that with the  
7 popularity of UK football, but the position is, for the  
8 overwhelming majority of bookmakers in the UK and also  
9 major bookmakers elsewhere, there are no substitutes for  
10 in-stadia LLMD.

11 Now, that is all I need to show you for the object  
12 infringement, not the economic analysis.

13 Then a brief word on structure of the market, which  
14 you saw is part of the legal test. Very simply, by  
15 virtue of the upstream joint selling, FDC controls all  
16 stadia LLMD on behalf of all the clubs. So it has this  
17 great commercial power because it has the rights to the  
18 entire package and, at the midstream level, well, UK  
19 bookmakers and other bookmakers depend on SDSB providers  
20 to supply them with stadia LLMD. So in the UK the data  
21 provider that controls stadia LLMD becomes an essential  
22 trading partner. So that is the structure. I need not  
23 say any more about that or object.

24 My last category is subjective intention. I am  
25 going to take subjective intention first, which you are

1 entitled to take into account -- and my submission is it  
2 is very important that you do in this case -- and then  
3 end on purpose of the agreement, which is an objective  
4 question.

5 I have taken you through the documentary record with  
6 some very uncomfortable material for FDC and Genius.  
7 I am going to summarise the parties' respective  
8 intentions and motivations. Genius' motivation was to  
9 extract an agreement which gave it complete control over  
10 stadia LLMD. It had a plan to avoid signing up to any  
11 duty to sub-license the LLMD to competitors. Its  
12 intention prior to finding the agreement -- we saw this  
13 in the WhatsApps -- was to run sham negotiations with  
14 its rivals, Sportradar and Perform, so that they would  
15 feel like they were in a process. It was also Genius'  
16 intended strategy -- and this is prior to signing the  
17 agreement -- to leverage its relationships with  
18 bookmakers. They are bookmakers that Genius said could  
19 not afford to run their business without this content.

20 FDC understood that this was Genius' aim but FDC  
21 asked Genius to please clean up its message to the  
22 market. FDC's concern was to protect itself against the  
23 financial risks of the arrangement, which it did. Once  
24 that was in place, any financial fall-out was on Genius'  
25 head. That is subjective intention.

1           I want to end on the aims, the objective aims, of  
2           the agreement, its purposes.

3       THE PRESIDENT: Just so that we are calling a spade a spade,  
4           you have used the word "sham" a few times. I think  
5           I know what you are saying but it is probably as well to  
6           get it explicitly on the record. I think you are saying  
7           that the negotiations with other data providers were not  
8           conducted in an attempt to reach an agreement but in bad  
9           faith and --

10       MS KREISBERGER: Precisely.

11       THE PRESIDENT: -- were constructed to fail.

12       MS KREISBERGER: In relation to Sportradar and Perform,  
13           because those are the documents we have seen. That is  
14           precisely the -- the intention with Perform was to  
15           massage the price upwards to a level that Perform could  
16           never accept. So that was done in bad faith, yes.

17       THE PRESIDENT: Okay. Thank you.

18       MS KREISBERGER: So objective purposes and aims, so that is  
19           setting aside all the prejudicial material about what  
20           was going on in the background. The objective aims of  
21           the agreement are clear simply from reading its terms,  
22           its provisions, in context, because the various ways in  
23           which Genius has set out to seal off the market to rival  
24           data providers, extract the fruits of its monopoly, were  
25           a predictable and inevitable consequence of this

1 agreement.

2 Let me illustrate the point in this way, Sir. At  
3 the time of pleading our claim form, Sportradar of  
4 course did not have access to these communications  
5 behind the scenes, the WhatsApps. We did not know. Can  
6 I ask you to turn up that claim form? That is at  
7 {B/1/32}, 71(f). Now, this is Sportradar's pleading on  
8 the objectives of the agreement. Could I ask you to  
9 read paragraph (f), so you need to go over the page.

10 THE PRESIDENT: Okay. (Pause)

11 Next page, please, {B/1/33}.

12 MS KREISBERGER: Could I ask you to note in particular  
13 subparagraphs (iv) and (v) on this page.

14 THE PRESIDENT: Yes. (Pause)

15 Is (g) where it ends?

16 MS KREISBERGER: Yes, sir, just subparagraph (f).

17 So Sportradar's case at the time of pleading was, if  
18 you put one competitor in a position of unassailable  
19 monopoly, then rivals will be excluded and customers  
20 will be exploited. You then look at the WhatsApps that  
21 we now have and the other documents and you see that  
22 that is precisely what came to pass. The point I am  
23 drawing out for you now is we can now say, with full  
24 line of sight on what the parties actually had in their  
25 minds, that the objective aim of the agreement was to

1 hand Genius the fruits of monopoly, provided that Genius  
2 shared them with the licensor, FDC.

3 So, to conclude -- and that would be a good moment  
4 for the break -- the holistic assessment of object,  
5 content, context, objective aims and subjective  
6 intention, all point inexorably to the anti-competitive  
7 object of this agreement.

8 Sir, if that is convenient then to have a break.

9 THE PRESIDENT: Thank you very much, Ms Kreisberger. Just  
10 to keep an eye on the clock, you will give way to SCM  
11 I think this afternoon for 30 minutes. Are we okay for  
12 the timing on that front?

13 MS KREISBERGER: Sir, I still have effects and abuse to do.  
14 Abuse I can deal with very quickly. Effects, I do need  
15 to take you through my case on effects and I will do  
16 that as efficiently and quickly as I can, but -- I do  
17 not know if there is any prospect of sitting late today.  
18 I appreciate we had not asked for that.

19 THE PRESIDENT: How late is late? I mean, you can certainly  
20 have until 4.30.

21 MS KREISBERGER: I think that would help.

22 THE PRESIDENT: Okay. We will see how we go. We will rise  
23 for ten minutes until 3.40 and we will see how we go.

24 (3.31 pm)

25 (A short break)

1 (3.43 pm)

2 MS KREISBERGER: Thank you, Sir. So I am moving on to  
3 effects. The legal test is set out in our skeleton at  
4 paragraph 68. The legal threshold for anti-competitive  
5 effects is whether the agreement is liable to have an  
6 appreciable adverse effect on the parameters of  
7 competition. Effects need to be tested against the  
8 counterfactual. The question on the counterfactual is  
9 the actual -- the counterfactual is the actual context  
10 in which competition would occur in the absence of the  
11 agreement.

12 So the key question on counterfactual is a factual  
13 one. How would competition work in the absence of the  
14 agreement? That is the question. The counterfactual  
15 must be realistic and likely.

16 Sir, just for your note, could I bring to your  
17 attention the merger assessment guidelines,  
18 paragraph 3.4 and 3.5. They are at {L/108/20}. There  
19 is an excellent exposition of the counterfactual and the  
20 test that applies. That is all I need to say on legal  
21 principles.

22 Now, in many cases identifying the but for scenario  
23 can be challenging, particularly if the market has  
24 always operated on the basis of a particular set of  
25 restrictions with little thought given to alternatives.

1 I mean, MIFs is one that comes to mind. But this is not  
2 one of those cases because I have already shown you  
3 that, after much careful deliberation, professional  
4 advice from Regulus and industry-wide consultation, FDC  
5 proactively opted for a specific non-exclusive structure  
6 which involved an official provider and three accredited  
7 providers of the data.

8 I showed you the range that FDC estimated. Now,  
9 that range was lower than the Genius exclusivity premium  
10 but not too shabby. So the original RFP was FDC's  
11 explicit commercial preference at the time of going out  
12 to tender. Now, not only that but throughout the tender  
13 process and afterwards, FDC continued to believe that  
14 the non-exclusive structure was a viable and attractive  
15 alternative to the Genius exclusive bid. That is why  
16 this is a likely scenario for the counterfactual. FDC  
17 were pretty wedded to it.

18 Now, I do not have time to show you all the  
19 documents. There are five FDC working documents. You  
20 will be shown them during the course of the evidence.  
21 They are also summarised in our skeleton at  
22 paragraph 100. That is {A/1/44} for your note. I am  
23 going to show you one. This is at {H/293/1}. This is  
24 an assessment from October 2018, "Genius DataCo Betting  
25 Market Proposal High Level Risk Assessment". Taking it

1 from the bottom of page 2, so second page of the  
2 document, {H/293/2}, under the heading which is  
3 unredacted, "Financial/Commercial -- Opportunity Cost",  
4 you see there the subheading:

5 "The question is whether an alternative rights  
6 structure will deliver greater returns over a comparable  
7 period to Genius?"

8 Could you please read the four paragraphs underneath  
9 that heading? There is some confidential material.

10 THE PRESIDENT: Yes. (Pause)

11 MS KREISBERGER: So FDC, in October, thought that what they  
12 refer to here as the "initial RFP structure", the  
13 original structure in the tender, up to four data  
14 providers, limited non-exclusivity -- they thought that  
15 this was a really attractive model still. This was  
16 after they got Genius' exclusive bid. They say in that  
17 second paragraph, under the heading:

18 "There is a good argument for saying that in the  
19 long run ... such a model could yield more annually than  
20 the Genius minimum guarantee."

21 So when I say to you the original RFP structure is  
22 the right counterfactual, after receiving the bids, FDC  
23 thought it was a pretty good alternative; in fact, the  
24 next best alternative to the Genius blow-out proposal.

25 So that is our counterfactual right there and it was

1 one that FDC took extremely seriously.

2 So the counterfactual presents something of an  
3 intractable problem for the defendants' experts because,  
4 if you compare the real world, the actual world, that is  
5 the Genius true monopoly, with FDC's non-exclusive  
6 model, the adverse effects on competition are crystal  
7 clear because on the one hand, in the actual world, you  
8 have a single operator shutting out rivals, hiking  
9 prices, leveraging content on customers, but in the  
10 counterfactual, you have up to four data providers  
11 competing with each other on price, quality and  
12 innovation, to the great benefit of the customer.

13 So faced with that intractable problem, Drs Padilla  
14 and Majumdar adopt some rather novel approaches to try  
15 to circumvent the problem. I will just set them out for  
16 you now. In his first report, Dr Majumdar decides not  
17 to bother with a counterfactual altogether. He does not  
18 follow the conventional approach of identifying the  
19 counterfactual and then asking himself what are the  
20 effects on competition of the actual world compared to  
21 the counterfactual. He decides that the relevant  
22 question is not the effect on competition at all. The  
23 question Dr Majumdar asks himself is whether there are  
24 effects on Sportradar.

25 He then makes an assumption. He assumes that

1 Sportradar will operate on the market -- this is  
2 a different market. This is his widely drawn market --  
3 he assumes that Sportradar will operate whatever the  
4 licensing arrangements in the actual world, in the  
5 counterfactual world, and he concludes from that -- I am  
6 paraphrasing it for you -- that identifying  
7 a counterfactual would involve unnecessary complexity.  
8 That is for your note at paragraph 506 of his first  
9 report, {F/10/140}. We will be hearing from  
10 Dr Majumdar, but the approach in my submission is  
11 circular and wholly unprincipled.

12 He then has a change of heart in his second report.  
13 In his second report he proffers multiple permutations  
14 of counterfactuals involving different combinations of  
15 exclusivity and non-exclusivity. None of them bear any  
16 resemblance to reality or any sort of model which was  
17 actually contemplated by FDC. So that is Dr Majumdar's  
18 evidence on the counterfactual.

19 Dr Padilla, by contrast, accepts that the  
20 counterfactual must be non-exclusive, so to that extent  
21 he is following the orthodox approach. You remove the  
22 restriction. But he then makes a very unconventional  
23 assumption. He says that FDC could capture the same  
24 amount of revenue under a non-exclusive model as it did  
25 capture under Genius' exclusive bid. Now, that is

1 unprincipled because exclusivity begets an exclusivity  
2 premium. That is basic economics and that is why  
3 Genius' tender was regarded by FDC as a buy-out proposal  
4 designed to blow all the others out of the water. But  
5 Dr Padilla's other real problem with this assumption, so  
6 the assumption that non-exclusivity is as lucrative as  
7 exclusivity, is that his own clients' business documents  
8 contradict his hypothesis.

9 Now, as I said, I am not going to take you through  
10 all of the working documents -- they will become  
11 familiar -- but they make clear that Genius' bid was  
12 ranked number one, top of the range, most lucrative, but  
13 the original RFP structure, the non-exclusive structure,  
14 was second-best based on the revenue range I showed you.  
15 So it would not generate as much as Genius' proposal, it  
16 came in somewhere less than that, but it was number two.  
17 So that is why we say that is the counterfactual.

18 Now, effects on competition. Once you accept that  
19 the counterfactual is a non-exclusive model with SDSB  
20 providers competing to supply stadia LLMD to bookmakers,  
21 then it follows that the agreement has adverse effects  
22 on competition. I just want to -- I am not going to go  
23 over the same ground, but just to distinguish between  
24 effects on customers, the bookmakers, and effects on  
25 Genius' rivals.

1           So effects on bookmakers, the test is adverse  
2 effects to the parameters of competition; in other  
3 words, were customers exploited? You have my submission  
4 that the parameters of competition affected were price,  
5 high prices, and loss of choice because content was  
6 forced on the bookmakers, and forcing content, that is  
7 tying.

8           Now, the documentary record is replete with  
9 bookmakers complaining about another parameter of  
10 competition; that is the quality of Genius' service.  
11 These examples are set out in our skeleton at  
12 paragraph 103(c). That is at {A/1/47}. I am just going  
13 to give you one example, {A/1/47}.

14           In February 2020, Paddy Power Betfair asked Genius  
15 if it was possible to have an in-stadia LLMD service  
16 which incorporated events such as throw-ins and goal  
17 kicks. The candid response which came back from Genius  
18 was -- we do not have -- I think we have got a bad  
19 reference -- yes, if you could go down to the footnote.  
20 It is in the footnote -- yes, {H/1397/28}, but the  
21 footnote will do. The candid response that came back --  
22 ah yes, I cannot read it out. Can I ask you to read,  
23 "... the response was ...", and you see that is  
24 redacted. That is what Genius said.

25       THE PRESIDENT: Yes.

1 MS KREISBERGER: Those kind of statements do not go down  
2 well in competitive markets, but here bookmakers were  
3 denied the opportunity to opt for a provider offering  
4 the lowest price, the best quality, the most innovative  
5 service. That is all I am going to say on effects on  
6 bookmakers.

7 Effects on SDSB providers in the mid-market. Well,  
8 as I have said, they were shut out, the barriers to  
9 entry erected by the agreement are impermeable and the  
10 effects of the conduct extends to neighbouring markets  
11 because of the leveraging strategy, so it affects  
12 providers -- they are shut out from supplying stadia  
13 LLMD.

14 So this, by the way, is a structural -- I have shown  
15 you effects on the parameters of competition with  
16 bookmakers. This is structural. But the conduct was  
17 also deliberately targeted at Sportradar. If we could  
18 turn up {H/1401/3}, this is redacted. This is the  
19 minutes of a Genius board meeting -- no, sorry, it is --  
20 no, that should be right. Yes, that is the right one.  
21 I have got a bad reference unfortunately. It should be  
22 1401. It is not a bad reference. Sorry, we have got  
23 the wrong document on the screen. {H/1401/3}. It is  
24 the redacted text. Could you read 4.2.7? (Pause)

25 THE PRESIDENT: Yes.

1 MS KREISBERGER: Now, this is a point -- a rebuttal point.

2 Genius and FDC's response to all of this is to say --  
3 and they make much of this in their skeleton -- that  
4 there is no anti-competitive foreclosure because  
5 Sportradar is a really successful provider of SDSB  
6 services to bookmakers. That is like saying Microsoft  
7 did not suffer harm when its Bing search engine was  
8 trounced by Google because Microsoft has a profitable  
9 line in Office applications and operating systems. But  
10 Microsoft, for whatever reason, was excluded from the  
11 search engine market given Google's prominence.

12 Microsoft's success in other markets is irrelevant; or,  
13 to take one of our authorities, Mr Davison's preferred  
14 authority, Arriva, Arriva was shut out from the route  
15 between Victoria and Luton Airport. Consumers cannot  
16 travel on other bus routes to get from Victoria to Luton  
17 so it is a distinct market. It was not open to  
18 Luton Airport in that case to argue, "Well, there are no  
19 adverse effects on competition because Arriva has  
20 a thriving service on the Aylesbury to Milton Keynes  
21 route". Success in other markets does not assist the  
22 analysis. The question is whether there is a distortion  
23 of competition in the relevant market.

24 I should add, for completeness, that Genius' attempt  
25 at a David and Goliath narrative in the skeleton is wide

1 of the mark. If I could just remind you that, following  
2 its New York Stock Exchange listing, Genius' market  
3 capitalisation reached 5 billion.

4 The final points on effects. Two rebuttal points  
5 raised by the defendants. First, they argue that  
6 exclusivity is normal competition and they say you see  
7 it in a lot of other sports data licences. The point is  
8 a bad one. It does not assist the Tribunal in the  
9 assessment of this agreement because, as I hope is by  
10 now clear, my submission is that the agreement is  
11 anti-competitive based on the specific combination of  
12 three key elements here: the must-have nature of the  
13 data; the true monopoly bestowed on Genius; the fact  
14 that off-tube coverage is no substitute. When I talk  
15 about "true monopoly", I am referring to no scouting and  
16 no sub-licences.

17 The fact that other sports may have licences with  
18 contractual exclusivity -- you will recall I distinguish  
19 contractual exclusivity from true monopoly -- does not  
20 illuminate the question -- other sports do not  
21 illuminate the question of whether this agreement is  
22 anti-competitive given the specific facts here.

23 If the Tribunal wanted to rely on other sports, it  
24 would have to interrogate them. It would have to work  
25 out: is the data must-have? Are there substitutes? Are

1           there viable off-tube products? Has the incumbent  
2           granted sub-licences? It would have to do the full  
3           factual interrogation.

4           That is not a burden that should be put on the  
5           Tribunal in these proceedings. As you might expect, the  
6           factual position differs widely in relation to different  
7           sports. In some cases off-tube is low latency.  
8           I mentioned that earlier. So you cannot draw  
9           conclusions from the full panoply of other sports.

10          One last point, you will be pleased to hear, on  
11          effects. Final topic -- it is a rebuttal point because  
12          the defendants rely on it heavily -- turnkeys. The  
13          defendants rely on turnkeys to say that actually the  
14          position is a non-exclusive model because turnkeys were  
15          licensed. It is an absolute red herring. Turnkey  
16          operators are customers of SDSB providers like Genius  
17          and Sportradar, so turnkeys are data aggregators for  
18          small bookmakers and they sit in a layer between the  
19          SDSB provider and the bookmaker. This is how Dr Padilla  
20          describes them, {F/3/12}, paragraph 27 of his first  
21          report. He says:

22                 "Midstream SDSB suppliers compete to supply  
23                 bookmakers and turnkey solution providers with  
24                 a portfolio of sports data, and may also supply  
25                 additional services such as betting odds and trading

1 services. Turnkey solution providers aggregate data  
2 from multiple midstream SDSB suppliers and in turn  
3 supply bookmakers with a 'turnkey' solution that  
4 includes data and other services."

5 So that is Genius' evidence. We agree. Turnkeys  
6 are customers. They do not tell you anything about  
7 whether the model is exclusive.

8 I am getting to my final few minutes.

9 THE PRESIDENT: Yes.

10 MS KREISBERGER: I am moving on to abuse. I can deal with  
11 it quickly. I have taken you through market definition,  
12 dominance and I have taken you through just now the  
13 distortions of competition. The applicable legal  
14 principles, they are not controversial. They are set  
15 out in our skeleton at paragraph 73 to paragraph 75.  
16 The legal threshold for abusive conduct is conduct  
17 capable of restricting competition. You have my  
18 submissions on Arriva, the key authority. You have my  
19 submissions on what the adverse effects were, the  
20 distortion of competition. So I am going to confine my  
21 submissions on abuse to refuting two arguments made by  
22 the defendants in relation to abuse.

23 First they point out that Sportradar has not brought  
24 a claim against Genius in relation to abuse of  
25 dominance. That is quite right. In its skeleton FDC

1 goes even further. FDC accuses Dr Niels of positing  
2 various theories of harm regarding Genius' conduct which  
3 it argues are outside the scope of Sportradar's pleaded  
4 case.

5 FDC has missed the point. The core, the  
6 foundational aspect of Sportradar's claim, is that this  
7 is an agreement -- the long-term grant of exclusivity --  
8 this is an agreement which distorts competition and it  
9 is the agreement which creates the unassailable Genius  
10 monopoly. The agreement is the root cause; Genius'  
11 conduct by contrast is simply the inevitable consequence  
12 of its monopoly. I showed you our pleading on that. We  
13 foresaw how one would expect Genius to behave, having  
14 been given these rights. Monopolists freed from the  
15 constraints of competition will exploit their power over  
16 customers and reap the rewards. So, Sir, an abuse claim  
17 against Genius would not get to the heart of the matter.  
18 It is the anti-competitive structure itself which  
19 Sportradar challenges before you today.

20 My second and last point then. FDC in particular  
21 argues that -- despite everything I have said to you  
22 today about the challenge to the long-term grant of  
23 exclusivity, FDC says that Sportradar's case on abuse is  
24 an allegation that FDC refused to license data to it.  
25 On that basis FDC says the well-known principles

1 regarding refusal to license an IPR, which the Tribunal  
2 will be very familiar with, McGill and IMS Health and  
3 those cases -- FDC said those are the relevant  
4 authorities.

5 I would observe that FDC and Genius' skeletons are  
6 conspicuously silent on Arriva, even though we have been  
7 citing Arriva since the transfer application. They do  
8 not have an answer. They do not engage with it. Now,  
9 they ignore that principle. I am not sure if FDC is  
10 deliberately going for a second bite at the cherry  
11 because we addressed this point at the transfer  
12 application.

13 I will give the answer again. There are two short  
14 answers why it is not for FDC to say this is a case  
15 about a refusal to license an IPR. Quite simply,  
16 Sportradar has not brought a claim alleging that FDC  
17 should have granted a licence to Sportradar instead of  
18 Genius but refused to. That would be a refusal to  
19 license case. We are not bringing that case. You have  
20 my oft-stated refrain now. We are challenging the  
21 long-term grant of exclusivity under these particular  
22 terms. We are not bringing a refusal to license case.  
23 It is not relevant.

24 Now, secondly, however much the defendants would  
25 prefer to be fighting a case, a different case, alleging

1 refusal to supply, it is not up to the defendants to  
2 choose the case they have to meet. This is an obvious  
3 proposition. It is in my gift to bring the case I want  
4 to allege, but just in case there should be any doubt  
5 about that -- and we went through this at the stage of  
6 the transfer application and it was accepted -- but that  
7 specific proposition was upheld by Mr Justice Mann in  
8 Purple Parking. That is at {L/50}. I do not think we  
9 need to look at it. But the judge held at paragraphs 76  
10 and 77 and then paragraph 105 -- he held that which  
11 infringements are alleged is entirely a matter for the  
12 claimant. The defendants cannot force Sportradar to  
13 bring its case on some other footing. It cannot force  
14 Sportradar to bring a different case. So their  
15 submissions on abuse do not assist.

16 Sir, I am conscious that is a responsive point and  
17 you will need to hear from them.

18 Unless I can be of any further assistance to the  
19 panel, those are my submissions.

20 THE PRESIDENT: Ms Kreisberger, thank you very much. We are  
21 very much obliged.

22 Mr Patton.

23 Opening submissions by MR PATTON

24 MR PATTON: May it please the Tribunal, I appear together  
25 with Mr Adey, who sits behind me for the SCM parties,

1           which are five of the six defendants to a separate claim  
2           that Genius has brought in the High Court. I am  
3           conscious that the president knows everything that I am  
4           about to say, but I will say it hopefully for the  
5           benefit of the other members of the Tribunal.

6           THE PRESIDENT: Quite.

7           MR PATTON: In those proceedings Genius is suing the SCM  
8           parties for infringements of alleged database rights  
9           which are said to arise from 220 or over 220 data rights  
10          agreements which are between Genius on the one hand and  
11          various sporting leagues and federations or data  
12          collection bodies on the other hand. Those include the  
13          FDC Genius agreement, which is the subject of these  
14          proceedings.

15          Now, those proceedings -- our proceedings have  
16          recently been listed for a trial in February 2024, so  
17          they are running approximately 16 months behind these  
18          proceedings. In our proceedings, we, the SCM parties,  
19          advance a number of competition law points. We say that  
20          certain of the data rights agreements are in breach of  
21          Article 101 and the Chapter I prohibition. We also say  
22          that certain of the leagues and federations, including  
23          FDC, occupy dominant positions which they have breached,  
24          contrary to Chapter II and Article 102. We also do say  
25          that Genius occupies a dominant position and that it has

1           abused that position. We counter-claim from Genius an  
2           entitlement to be granted a sub-licence on FRAND terms.

3           So as that very short summary will make clear, there  
4           is a significant overlap with issues in this case but  
5           there are also some notable differences as well.

6           The president, as I say, is presiding over that  
7           litigation in the High Court and he has indicated in an  
8           important ruling of 16 February this year, which is in  
9           the bundle at bundle {D/16}, that there is a potential  
10          for findings, analysis and conclusions from this  
11          Tribunal's judgment in this action to be read across  
12          into the judgment which he will in due course deliver in  
13          our case. So that is by way of explanation as to why we  
14          are here at all. This is not our case, but we have been  
15          put on notice that there is a potential for read-across  
16          from the judgment that you will ultimately deliver in  
17          this case into our case.

18          As I say, it is not our case so we are not here to  
19          persuade you of our case. We see our principal role as  
20          being to alert you to the key similarities and  
21          differences between the two sets of proceedings so that  
22          you, as a Tribunal, are conscious as to how the  
23          decisions you make in this case may end up having  
24          implications for our case, subject to the potential for  
25          read-across, and also and perhaps more importantly, so

1           that you have the opportunity to decide or to consider  
2           whether you do actually need to decide certain points in  
3           this litigation or whether it might be better for  
4           certain points to be left over so that they can be  
5           looked at afresh in our case.

6           THE PRESIDENT: Mr Patton, if I could just interject, only  
7           violently to agree. It does seem to me that the  
8           critical role you and your team play in these  
9           proceedings is against over-reach; in other words, we  
10          are obviously going to decide the issues in these  
11          proceedings, but we want to decide only those issues and  
12          to go no further than we have to.

13                 Now, that in a sense is an articulation of good  
14                 judgecraft anyway, but it does matter in this case  
15                 because the last thing we want to do is unnecessarily  
16                 create obstacles further down the line in what is  
17                 a different trial involving not completely but  
18                 substantially different parties.

19          MR PATTON: Yes, sir, and that is a point that we certainly  
20          have taken on board. Genius, who are also obviously  
21          parties to the other litigation, they will be conscious  
22          of that. FDC has been joined as a party to the claim  
23          and the defence in the other litigation and so they may  
24          also wish to be conscious of that point.

25                 As the president indicated in the ruling, the

1 collective goal is to avoid, insofar as it is possible,  
2 a reprise of what happened in the interchange fee  
3 litigation, where different judges and tribunals reached  
4 inconsistent outcomes on very similar cases. So we are  
5 very conscious of that rule.

6 As we were asked to do when we were given permission  
7 to intervene, we have filed a statement of intervention.  
8 Just for your note, that is at bundle {B/20} and I would  
9 respectfully ask the Tribunal to read it at some point  
10 during the trial. I know you have had a lot of reading  
11 to do in the run-up to the openings. It is not my  
12 intention to take you through it in detail now because  
13 I have been given some time at the end of the closings,  
14 when it may make more sense to address you in detail in  
15 the light of the evidence you have heard and the  
16 submissions that have been made to you in closing by the  
17 main parties.

18 If I may, though, just by way of introduction so you  
19 know who we are, if I can put it that way, take it just  
20 at page 4, that is {B/20/4}. If you see at  
21 paragraph 11, we explain that the SCM group has its  
22 origins in physical retail betting shops in Armenia.  
23 That was then subsequently developed into  
24 a technological offering. As we explain in the  
25 paragraphs that immediately follow, there are now really

1 two different brands. In a nutshell, the first brand,  
2 as explained at paragraph 13, is called FeedConstruct,  
3 and that is a sports data supplier. It has a team of  
4 about 2,000 scouts. Then, in paragraph 14, the second  
5 brand is known as BetConstruct, and that is a betting  
6 software provider. Because of that, BetConstruct is  
7 a licensee of data both from its own sister brand,  
8 FeedConstruct, but also from other sports data  
9 suppliers, including, as it happens, Sportradar.

10 Just over the page at page 5, paragraph 15,  
11 {B/20/5}, we explain what BetConstruct's typical product  
12 offering to its bookmaker customers are. I just wanted  
13 to highlight the second one, which is the most  
14 significant by far. That is the turnkey product. That  
15 provides bookmakers with a package of sports and  
16 non-sports gambling products that can be integrated on  
17 the bookmaker's website or gambling venue. So that is  
18 just so you know what sort of people we are.

19 Can I just, in the brief time that is available to  
20 me -- and I do hope that someone did place a bet on who  
21 would make the shortest submissions because they are  
22 about to hit the jackpot -- there are really just a few  
23 points I wanted to make. First, and at the risk of  
24 stating the obvious and recognising it is not really why  
25 we are here, but we do wholeheartedly support

1 Sportradar's case in these proceedings. We agree with  
2 them that in-stadia live match data are must-have data  
3 and that off-tube data are not an adequate substitute.  
4 That is a contention that will be very much at the heart  
5 of our case as well.

6 On the very fundamental issue that you have got to  
7 decide, we wholeheartedly agree that the grant of  
8 exclusivity to Genius over the in-stadia data, without  
9 any obligation or incentive to sub-license those data to  
10 its competitors, is anti-competitive. Although that may  
11 be obvious, I thought one reason perhaps just to spell  
12 it out explicitly is that this could be a case that  
13 otherwise presents as something of a two against one  
14 battle, with Genius and FDC largely repeating and  
15 reinforcing each other's arguments and calling, as it  
16 happens, two experts against Sportradar's one.

17 Now, that is not an unfamiliar phenomenon in  
18 competition cases and I am sure none of us have any  
19 doubt that you will be influenced by that feature even  
20 at the most sub-conscious level. I simply point out  
21 that if the procedural history had played out  
22 differently and had allowed for the two cases to be  
23 heard together -- for reasons I will not weary you with,  
24 that has not proved possible -- we would be here and we  
25 would be standing full square behind Sportradar in

1           advancing the case that it does.

2           The other point that I wanted to draw your attention  
3           to now is that we have noticed -- perhaps if we can  
4           bring up {A/3/3}, which is Genius' skeleton for the  
5           trial. At paragraph 4 -- it is a point that my learned  
6           friend Ms Kreisberger alluded to -- the significant  
7           emphasis that Genius and FDC, for forensic reasons,  
8           place on the fact that Sportradar is a large player in  
9           this industry -- one understands why they seek to  
10          emphasise that -- but the suggestion may be that it is  
11          absurd for such a large player to portray themselves as  
12          the victim of anti-competitive conduct.

13          Now, this is of course a trial of Sportradar's  
14          claim, but given the potential for read-across, we are  
15          certainly keen that you should bear in mind, when you  
16          reach your judgment, that this is not the kind of point  
17          that it will be possible for Genius to make against us  
18          when it comes to our case and that was partly why  
19          I wanted to show you who we are.

20          Our business, with its origins in Armenia, has been  
21          focused on Eastern Europe and the CIS states and our  
22          case is that we have been foreclosed from competing in  
23          the more mature Western European markets, such as the  
24          UK, by the alleged anti-competitive conduct.  
25          FeedConstruct is a younger sports data supplier than

1 some of the more established operators in the industry.  
2 The SCM group is a new entrant to the UK, not an  
3 established player there.

4 We would also want you to have in mind, at least in  
5 relation to any read-across, that a smaller supplier  
6 like SCM will be less likely to have the depth of  
7 customer relationships or of its own exclusivity,  
8 exclusive content, to be able to survive the kind of  
9 strategy on the part of Genius and the FDC which is  
10 alleged in this case.

11 The reason I highlighted that BetConstruct's most  
12 significant product is the turnkey offering is because,  
13 as that label suggests, the turnkey offering is  
14 primarily going to be attractive to smaller bookmakers  
15 who do not tend to multi-source -- and my learned friend  
16 explained what that meant -- but so they are likely to  
17 contract just with one supplier rather than with  
18 a number of different ones. They tend to want to  
19 partner with a single provider who can provide a full  
20 service.

21 So we will be saying, when it comes to our trial,  
22 that if we are deprived of the ability to include these  
23 data, the data, for example, that are the subject of the  
24 FDC agreement, then bookmakers will have to turn away  
25 from us and find someone else. As I say, I will develop

1 those points when it comes to the closing.

2 Can I just briefly explain the role we envisage  
3 playing, going forward at the trial? I am here today  
4 and tomorrow for the openings but my learned friend  
5 Mr Adey will be here during the evidence. He is  
6 effectively on a watching brief. As we made clear when  
7 we were given permission to intervene, we do not seek to  
8 ask questions of the witnesses. We did not seek  
9 permission to adduce any of our own evidence in this  
10 trial, consistent with the fact that it is not our case  
11 and that is not the reason why we are here. We do not  
12 at this stage envisage that we would file any written  
13 closings at the end of the day, but we will keep that  
14 under review in case we think a note would assist you to  
15 update our position in the statement of intervention in  
16 the light of what you have heard, but then we would make  
17 our closing submissions in the light of the evidence and  
18 the other parties' closing submissions.

19 So unless I can assist you, that was all I wanted to  
20 say, Sir.

21 THE PRESIDENT: No. Well, Mr Patton, we are very grateful  
22 to you. Thank you very much.

23 Well, that was 4.30. You are to be doubly  
24 congratulated. We obviously will not start anything  
25 afresh now, but we were minded to start tomorrow morning

1 at 10 o'clock so that there would be a half-hour slot at  
2 the end of the day in which to deal with the disputed  
3 evidence, as I will call it.

4 I wonder if someone would be kind enough to provide  
5 us with an exact list of what we should read, ie what  
6 evidence is disputed. We have seen reference to  
7 spreadsheets and reports. I do not think any of us have  
8 read them. I am sure they are somewhere in the papers  
9 or on Opus, but it would be helpful to have an  
10 exhaustive list so that we can read those overnight and  
11 reach at least an educated view as to what is in there  
12 and what is not. Does that cause anyone any problems,  
13 having an earlier start? No? Half an hour is tight but  
14 I hope that we can deal with it in that timeframe.  
15 I would not want the opening submissions of the  
16 defendants constrained beyond that.

17 Then tomorrow, Ms Smith, it will be you starting,  
18 will it, and then Mr de la Mare? Very good. Well,  
19 thank you all very much. We are much obliged. We will  
20 start again at 10 o'clock tomorrow.

21 (4.25 pm)

22 (The hearing adjourned until  
23 Wednesday, 5 October 2022 at 10.00 am)

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