IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1527/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 8th June 2023

Before:

Ben Tidswell
The Honourable Lord Richardson
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Alex Neill Class Representative Limited

v

Proposed Defendants

Sony Interactive Entertainment Europe Limited; Sony Interactive Entertainment Network Europe Limited; and Sony Interactive Entertainment UK Limited

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A P P E A R AN C E S

Robert Palmer KC, Fiona Banks & Antonia Fitzpatrick for Alex Neill Class Representative Limited (Instructed by Milberg)

Daniel Beard KC, Charlotte Thomas & Gayatri Sarathy for Sony Interactive Entertainment Europe Limited and Others (Instructed by Linklaters)

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Thursday, 8 June 2023

(10.30 am)

THE CHAIR: Mr Palmer, good morning.

(Pause due to technical issue with the remote link)

THE CHAIR: I think we might rise for 5 minutes to allow this to get sorted out. I think it's important the transcription is accurate and able to proceed, so we will just take 5 minutes, hopefully shorter if it can be sorted out and then try again. Thank you.

(Pause)

THE CHAIR: A second attempt.

Submissions by MR PALMER (continued)

MR PALMER: I am grateful.

Sir, members of the Tribunal, you will recall that yesterday I was dealing with our response to the allegation that our claim is really a refusal to supply case and I said part of that was legal, which I've dealt with and I said part of the answer was evidential and I am going to move on to deal with that.

Our first point is that as I took you to yesterday in the claim form paragraphs 104 to 105 which were the paragraphs dealing with the counterfactual, it was broad and made no particular suggestion of any form of access, least of all a precise form of access upon which Mr Beard focussed. We were not making a refusal to supply case, so there was no need to address it at all in the claim form. Least of all in evidence. But the Proposed Defendants have raised this point and we are entitled to respond to it and that is what we've done, pursuant to the Tribunal's order of 14 December, including by serving an expert report of Mr Steinberg on 21 April.

Its relevant effect so far, as relied upon for the purposes of this application, is summarised in our Reply which is in bundle A, tab 4, at page 160 or 163 electronic.

Paragraphs 27 to 29. Particularly at paragraph 27, where you can see a direct joining of issue there, with the points raised by the Proposed Defendants, saying:

"Counterfactual doesn't necessitate any active supply once the digital distribution restrictions are removed.

"There are various means by which a third party might go about establishing a digital distribution channel, each of which is technically feasible, able to be delivered without compromising the integrity or security of Sony's devices and operating systems and is capable of being achieved, if necessary, without any assistance from Sony. Nor does the PCR accept that such a counterfactual would involve any fundamental reworking of the PSN, contrary to the suggestion made by Sony."

So those are the points upon which Mr Steinberg's evidence is expressly relied there and the paragraph references range there from 74 through to 113 and the footnote. Just to take a brief look at that, Mr Steinberg's report is in tab 21 of the same bundle, page 519 or 522 electronic.

If I might go first to page 526, or 529 electronic, instructions given to Mr Steinberg are at paragraph 8 on that page. He was asked to assume that there was:

"... no contractual restriction in the GDPA, obliging the distribution exclusively via the PSN and no contractual obligation on consumers, preventing them from installing other software to enable the purchase of digital games and add-on content, beyond the PSN. Then on that basis, please explain how a third party could establish a digital distribution channel and for each one, identify ... please explain the extent to which establishing and/or maintaining that channel would necessarily require any supply and/or cooperation by Sony. For example, would Sony need to alter its operating software to offer interoperability, supply access to Sony's hardware or software, licence any IP rights beyond the assumption that you are asked to make at (1)."

So directly addressing and sought to address the points relied upon by the Proposed

Defendants.

As to the content of that, I am not going to take time going through it all now, but if I can just give you a couple of sign posts to that in due course. First, at electronic 577 from -- sorry, I have updated my references. So at electronic 577, that's correct, you'll see section 7, beginning:

"Establishing a digital distribution channel on PlayStation."

And you'll see that there a variety, in fact five different alternatives offered. The first one is at the following page, beginning from paragraph 93:

"Allowing sale and download to the consumer via an external channel from the provider's own website, whether that be a publisher or a third party partner."

There's an explanation as to how that would work, through to 96. I would also draw attention, I mentioned it yesterday, to the cloud gaming option which begins at 104, electronic 585. So that's all explained. It's no doubt in dispute, I understand that, but of course, no evidential response has been provided by the Proposed Defendants and if they had done, that would simply confirm there was an issue for trial.

The other section relied upon in the pleading was from paragraph 73 through to 89. 73 begins at electronic 566. That's the section dealing with the lack of any need for fundamental alterations necessary to enable third party distribution on the PlayStation and that's explained in those paragraphs.

Now rather than engage with that evidence which we agree would be an unsuitable exercise to attempt to do in the context of an application for strike-out or summary judgment, Sony seek to argue it should not be admitted at all and the Tribunal should have no regard to it or as they put it, only attach little weight to it, a point I'll come back to in a moment.

But they have two bases for making that point. The first, rather faintly argued, was the suggestion that this evidence is not responsive, which Mr Beard, although didn't

develop in oral submissions, made clear he relied on his written submissions on that point. We say it's plainly responsive. It responds to the core propositions advanced by Sony to the effect our case is really a refusal to supply case. That argument on paper is buttressed by a number of weak points. The first refers to its length and the fact it's said it refers to only three paragraphs of Sony's response. What matters is the extent to which the content engages with that response. The paragraphs of Sony's response to which it refers are paragraphs 22 to 24 which are the critical paragraphs in Sony response, in which it raises these issues which he was asked to address in his report, see the instructions.

It's also said that this report addresses a number of other matters, unrelated, in the opening sections of the report, leading up to the two sections I have shown you. But that's necessary factual background and underpinning to explain the basis upon which he reaches those conclusions later on.

That all leads to the suggestion that the report should be given limited weight or as they say in their skeleton, paragraph 22, Sony's skeleton paragraph 22, no relevant weight. That means, we say, that's wholly incoherent. The question is whether these complaints can be summarily disposed of without a trial. It's properly adduced evidence in response and it is clear that there is an issue suitable for trial.

The second basis upon which it's urged upon you not to admit this is the suggestion that Mr Steinberg is not an expert. It's agreed that the relevant test is that set out by the Tribunal in Kent v Apple earlier this year. Sir, your ruling, so I don't intend to take time taking the Tribunal through it but, obviously, that entailed a review of the authorities and acceptance that experience of a particular trade or industry can be sufficient to establish relevant expertise without there being an organised branch of knowledge.

Mr Steinberg explains what his relevant experience is at electronic 531. I draw

attention to paragraphs 12 through to 19 in particular. There has been the exchange of correspondence on this issue which the Tribunal has seen. I don't intend to go through all that correspondence and those points any more than Mr Beard did, but you will see that paragraph 25, it begins by explaining that:

"Over 25 years, he's had the opportunity to develop expertise in the video game software and digital distribution industries."

Precisely what we are concerned with:

"Within those industries, he's personally found and led multiple companies, consulted on projects with organisations of all sizes, including start-ups and Fortune 500 companies and published an extensive body of work and he's been recognised [and goes on to explain] and indeed cited as a leading ...(Reading to the words)... for Intel. He's advised on their digital marketplace. Intel AppUp ..."

Similar to the Apple App Store. There's a point being made that Intel apparently withdrew that service some time ago. We say that doesn't go to Mr Steinberg's expertise:

"He's covered digital distributors and video games, hardware and software, as part of his work, in connection with consulting and market research ... "

And so forth, he explains.

Then over the page at 14:

"He is also the general manager of Phoenix Online, an award winning game and application development and publishing company."

He manages the distribution network for that game publishing company:

"He has also worked [as he says in 15] over 25 years with numerous digital distributors."

I shan't read out everything he says. At 16:

"He's internationally recognised in technology video games and business trends ... "

To the extent that he there sets out.

At paragraph 18, he refers to his CV which is attached, in particular the cases in which he's been instructed as an expert. You'll find that list of cases at electronic 600. You will recall that in that correspondence, some further details prompted by Sony's objection to his expertise are provided, of some of the most relevant of those cases, without at all seeking to be exhaustive.

It's clear he has expert credentials. The points taken against him are, in my submission, jury points. They are focused on, for example, the list of publications at appendix 3, starting at 602, which is extensive and wide raging. It's clear he's an economist for a variety of publications, including many mass media publications of general interest, ranging from Readers Digest to Rolling Stone, as well as serious news sites, such as CNN and ABC News and so forth.

The fact he is a popular columnist, as well as an expert and professional in the fields with which the Tribunal is concerned, in no way detracts from his expertise.

So the suggestion that somehow the Tribunal should ignore this evidence on a summary basis, treat it as wholly inadmissible, without hearing from Mr Steinberg, is, in my submission, wholly unrealistic. These are points which, if and when Mr Steinberg is called to give evidence at trial, no doubt Sony would wish to explore in cross-examination to assist the Tribunal in determining the weight which it's going to attach to the evidence he gives but it's not an objection at this stage, to admissibility.

THE CHAIR: On your case it doesn't matter anyway, does it, because your primary case, you rely on Google and --

MR PALMER: That is --

THE CHAIR: What's said about --

MR PALMER: That's entirely correct but, obviously, we --

THE CHAIR: No, of course I understand, I just want to be clear that that's the position.

MR PALMER: That's all I wish to say on that. The last aspect of the refusal to supply argument which I want to deal with is slightly belt and braces because it's unclear to what extent it is being advanced at all but the Tribunal will recall that one of the grants of IP rights which the GDPA expressly conferred at paragraph 3.5, related to the use of licensed trademarks.

THE CHAIR: Yes.

MR PALMER: Now we say in the counterfactual, once Sony is under no illusion it cannot restrict digital distribution in this way, it's actually likely to be incentivised to continue to licence its trademarks for its own commercial reasons, to promote its own brand. But if that were to be wrong and if it were to withhold those trademarks, the use in respect of any product which was being distributed by another means, what would be the consequence? Would that give rise to a refusal to supply argument? That's the point we wish to address.

The short answer to that is no, it doesn't provide any difficulty because that's not a necessary supply. In that scenario, the distributor would simply market its products without use of those trademarks, describing its games and content as PlayStation compatible. That is perfectly lawful, provided certain conditions are met, not to pass it off as the official product when it's an unofficial, unlicensed product. But we are going to hand up, if we may, some authorities which I provided to my learned friends on Tuesday, with notice of the point and what it was going to. I asked for confirmation, as indicated, as to whether or not this point was being actively advanced but I haven't had an answer, so --

MR BEARD: I think it's pretty clear from the way I opened that we are not resting just on trademarks. I don't want to in any way deter Mr Palmer from engaging in submissions in relation to trademark research he's undertaken and his team have undertaken. That's always delightful but that's not the essence of the case we are

putting.

MR PALMER: I know it's not the essence but I am wondering if it's part.

MR BEARD: It doesn't matter for the purposes of our case.

THE CHAIR: And perhaps just to focus on short cuts, short-circuiting things, is the point that I think Mr Palmer is going to come on to, just to make good his point that PlayStation compatible is an acceptable --

MR BEARD: Yes.

THE CHAIR: Is that something you would take issue with?

MR BEARD: We are not taking issue with it for the purpose of the application today.

THE CHAIR: Yes, so --

MR BEARD: For those purposes, you can leave it to one side because our concern is about the more fundamental intellectual property and access issues that I'll come back to.

THE CHAIR: Yes, the whole system point.

MR BEARD: If you could solve all of the other problems and then stick a PlayStation compatible badge on a game that was coming through an alternative mechanism, that's not something that we are focused on for the purposes of today.

THE CHAIR: Thank you, that's helpful. I think, Mr Palmer, I don't want to --

MR PALMER: I won't take time.

THE CHAIR: We've got them if we wanted to look at them.

MR PALMER: For your note, it's section 11 of the Trademarks Act and Article 14 of the regulation we've handed up, should you want to look. There's two authorities on that application. I won't take any further time.

MR RIDYARD: Mr Palmer, may I ask a clarification question. You make the point your counterfactuals don't involve supply by Sony, any supply of anything by Sony, and you took us to the Steinberg stuff, but can you just place into context what you

said yesterday about a Sony royalty possibly being payable on third party sales. I think in Mr Harman's report, he talks about platform royalty. Can you just explain to me where those bits fit into the story?

MR PALMER: Yes, in Mr Harman's report -- sorry, I should find the page, find the reference -- he explains the shift which has happened from the payment of royalty in respect of physical media which is still individually, separately identified, to a single commission in respect of the digital distribution. So I am trying to find that reference to give you that reference of where that appears.

So in the counterfactual, one would have to look at how that would operate. If they are no longer providing the service of distribution in respect of a product, they wouldn't be entitled to receive payment in respect of the distribution of that product.

That doesn't exclude the possibility that in the same way that physical media products which are distributed by third parties pay a royalty to PlayStation, there may still be room for that to be done in relation to -- on the same logic, effectively.

MR RIDYARD: Just for my benefit, what would that be for? As a third party distributor, why should I pay this money to Sony? What I am getting for my money?

MR PALMER: Presumably that relates to the initial terms upon which the licence to develop the product was initially entered into. I can't take you to those terms at the moment at this stage but clearly there is a conferral of rights to develop the product and that comes with some obligations, in terms of consideration to take advantage of that intellectual property. But that's discrete from the act of distribution which at the moment, is wrapped up in the digital world, with a single commission covering all aspects, on top of the wholesale price. That wouldn't be the case in our counterfactual.

MR RIDYARD: Thanks.

MR PALMER: I am going to come on next to the point on tying. I think that concludes everything I need to say on exclusive dealing. Tying is introduced in our skeleton

argument at paragraph 23, if you want to have it open. That's at page tab 1, page 12 of the supplementary bundle.

The conditions in relation to tying that must be met are uncontroversial. They are set out in the Microsoft case. We have summarised them at our paragraph 23(a). There are effectively four limbs to the test and a point is taken against us in respect of the first limb, the separate tying and tied products, where the distinctness of products is to be assessed by reference to consumer demand for the tied product.

Before I turn to that, can I just again indicate that that is addressed by Mr Harman in his report, just for your note at this point, at paragraph 6.3.11 to 13 and paragraph 20 and the reference is A, tab 19, electronic 386 and 388.

Sony has two responses to our pleaded case on tying. The first is a repeat of the argument, in essence, about a refusal to supply. I have dealt with that already but we say that their case is even weaker in respect of tying because as you recall in the Google case, I won't go back to it now, but paragraph 235 which is authorities bundle 2, tab 12, electronic 876, there's direct reference to the abusive tying doesn't need to satisfy the refusal to supply condition of indispensability.

Sony's response to that is a further attempt to muddy the water. In Microsoft, to which the general court referred in that paragraph 235 and its reference to tying, the general court examined the complaint of tying without reference to the conditions of refusal to supply. The fact that there was also in that case, a separate complaint of a refusal to supply, is entirely irrelevant. I won't take time going back all the way through Microsoft but you recall there were two complaints. They related to two entirely different matters, indeed two entirely different markets.

So the fact there was also that refusal to supply point in that case is nothing to the point, nor is the point that that complaint was treated as a complaint of refusal to license IP rights. We don't make a similar complaint of refusal to supply in this case,

so we don't have to prove one, as I have covered.

The point made in Google is a different one. A tying complaint doesn't entail the Bronner conditions which would be applicable to an actual complaint of refusal to supply, where it's the refusal which is the relevant trigger.

But Sony tags on to this conflation of different complaints in Microsoft, a separate point at paragraph 31 of their skeleton argument. In that paragraph of their skeleton argument, they make an additional point that Microsoft had tied Windows Media Player to Microsoft's client operating system but Windows Media Player, the tied product in that case, was already competing with rivals such as RealPlayer, the previous market leader. By contrast in the present case, there's no extant market for alternative stores that compete with the PlayStation Store.

But the fact there's no extant market for alternative stores is itself, we say, a product of Sony's abusive conduct and is not informative of whether there's demand for a new distribution channel. So we say that point takes Sony nowhere.

The second argument which is raised in response to us is this claim that the PCR has failed to prove that the two relevant products PlayStation Store on the one hand, and the PlayStation console and all system software on the other, are distinct. It's common ground between us that the distinctness of products has to be assessed by reference to customer demand, but as to how that test is to be applied, Sony relies both on paper and in Mr Beard's submissions, although he didn't go to them orally, on the Commission guidance on vertical restraints. The reference to that is paragraph 38 of my learned friend's skeleton argument. Those guidelines are in the authorities bundle 2 at tab 15, if I can take that out for a moment.

The first and obvious point is at recital two.

THE CHAIR: Sorry, can you give us a page number?

MR PALMER: Yes, it's electronic 1064. I am adding five, I think, with this bundle.

You should have recital two on that page.

LORD RICHARDSON: It's 1062. You add two in the authorities bundle.

THE CHAIR: Yes.

MR PALMER: I am on hard copy 1059.

THE CHAIR: That's right.

MR PALMER: It's 1062, is it?

LORD RICHARDSON: Yes, 1062.

MR PALMER: I will add three then. Thank you. So it's the supplementary bundle is add five. Sorry, I will get the hang of it again.

Anyway, recital two and the point is in the final sentence -- obviously, these guidelines without prejudice to the case law of the general court and the Court of Justice. And the case law that is referred to at recital 390 which is relied upon -- 390 is at -- sorry, forgive me, electronic 1143. You'll see that there it is said -- this is what Mr Beard relies upon:

"Two products are distinct where, in the absence of the tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product."

You'll see the footnote is to Microsoft. At 917, 921 and 922, and we find that in the authorities bundle at tab 7, 603 or 606 electronic. 917 introducing the principle that distinctness has to be assessed by reference to customer demand. At 918:

"The Commission was also correct to state, in the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying."

Then 921:

"As the Commission observed, Microsoft's arguments, based on the concept that

there's no demand for Windows client PC operating system without a streaming media player, amounts to contending that complementary products cannot constitute separate products for the purposes of Article 82 which is contrary to community case law on bundling [take Hilti, for example]. It may be assumed there was no demand for nail gun magazine without nails but that didn't prevent the courts from concluding that they belonged to separate markets."

922:

"In the case of complementary products ...(Reading to the words)... it's quite possible that customers will wish to obtain the products together but from different sources. For example, the fact that most client PC users want their client PC operating T system to come with word processing software, doesn't transform those separate products into a single product for the purposes of Article 82EC."

So that is what the law says on that. Anything going beyond that is gloss and not binding. What matters is whether there is independent demand for the tied product, being the PlayStation Store, and you'll see our response on that point is at paragraph 28 of our skeleton argument which is at supplementary bundle page 18, where we refer to the support provided by Mr Harman.

It is the evidence I referred to earlier which I will turn to now. That's in bundle A, tab 19, electronic 386.

LORD RICHARDSON: Sorry, which bundle?

MR PALMER: Bundle A, I am so sorry. Yes, 386 electronic. You can see that this forms part of -- as he must, Mr Harman goes through each of the pleaded elements of each of the alleged abuses and puts forward evidence in respect of each, to establish the methodology he will be adopting. At 6311, he notes the functional differences between games console and the digital distribution of games and in-game context. I won't read all that out. Secondly, he notes:

"On the PC platform there are several competing digital stores, namely Steam, the Epic store, the Microsoft store and others."

Which suggests potential competition is plausible.

Third, that:

"... there is demand for alternatives to the PlayStation Store and PSN for digital distribution, particularly for services that charge lower fees. And the restrictions imposed by Sony mean that such demand cannot be demonstrated directly on the PS platform but they can be shown on other closely analogous platforms, in particular multiple competing digital distribution platforms on PCs. And with respect to the Apple mobile platform, Epic Games sought to take payments for in-game content directly, rather than having that link through to [in that context] the Apple store."

In our context, as I showed you yesterday, the PS Store:

"... and, as he discussed in more detail below, several national ...(Reading to the words)... should be opened up to competition."

At 6.3.20, over the page, he notes:

"The feasibility of competition in such services has been demonstrated on other analogous platforms [PC platform again] and further, in the case of the game Fortnite, Epic Games sought to offer direct payment for in-game content through its own service on the Apple mobile platform and closely analogous. I'm not aware of any technical ...(Reading to the words)... also being offered for PlayStation games."

THE CHAIR: Mr Palmer, maybe I am missing the point here but why do you need to do anything other than plead this point? I mean it is not being suggested, is it -- I am not aware that there is evidence that has been put in to contradict Mr Harman, to show he's unequivocally wrong.

MR PALMER: No.

THE CHAIR: So why are we dealing with this point?

MR PALMER: Because Mr Beard says it's a reason why you should strike-out the tying allegation.

THE CHAIR: But it's clearly a question of fact, isn't it?

MR PALMER: You anticipate my submission.

THE CHAIR: Yes.

MR PALMER: We put in a prima facie case supported by evidence. Of course there will be more which will be available, following disclosure and full investigation, should the claim be certified. But my short point is this is absolutely no basis for strike-out or summary judgment. Sony has not begun to engage with that evidence, still less show no realistic prospect of success and that's precisely the point I was about to make, sir. But what they do do though, is concentrate on a different point which we say is irrelevant to all this, which is to concentrate on the closed nature of the system, to say it's designed to operate as one integrated system. We say that ignores the fundamental point which is the question of whether there's consumer demand for an alternative to that. They seek to dismiss the PC benchmark on the basis it's inappropriate and different business models but, again, we say these are matters for trial, as is their various comparisons, the position of Xbox and Nintendo operating a similar system. We heard that from Mr Beard yesterday. We say nothing to the point and directed to this test.

And various irrelevant arguments were also raised about the CMA's treatment of console hardware and game distribution in a different context entirely, the merger investigation concerning Microsoft and Activision Blizzard, where this question of the separateness of distribution was nothing to the point, it just didn't arise as an issue, so it wasn't necessary for the CMA to consider any different market definition in respect of distribution. We say all of that, if there are points that Sony want to raise and argue in due course, they can raise and argue in due course, but none of them represent

a basis for strike-out, none of them indicate summary judgment should be granted at this point.

So that's all I need to say on tying. The last strike-out point is the point, rather different in character to the ones we've been dealing with so far, it's the future claims point. I am going to move to that now and I am going to deal with that as shortly as I can as well.

MR BEARD: Sorry, I don't know whether this helpful. I didn't open on the future claims point because I thought that was something we were going to deal with, essentially, in the certification matter. Now I recognise that our application deals with it both as a strike-out issue and future claims, but I am concerned that -- I am entirely happy for Mr Palmer to open and me to respond. It doesn't matter to a great extent but I haven't opened on that because I considered that was part of the certification matter.

THE CHAIR: I had rather assumed that's why you hadn't. I think it's the one that does overlap.

MR BEARD: I just left it for those purposes.

THE CHAIR: That's entirely fair. I think in some ways it does not make a lot of difference practically, because either you deal with it now or you deal with it in five minutes, when you're moving on to --

(Overspeaking)

MR BEARD: That's my next thing I do, is open -- yes, absolutely, I was just putting the point, I'm not trying to stop Mr Palmer.

THE CHAIR: I think that's entirely understood. Hopefully, it does not give rise to any practical difficulties.

MR PALMER: I don't think it does, I can deal with it now anyway. One of my first points actually, I entirely agree with Mr Beard, it's not really a strike-out point, it's

a certification point really, and what the terms of the class definition should be. So framing it as strike-out doesn't really assist.

But can I start with this point. If we take out the draft order for the class definition, you'll find that in bundle A at tab 5, electronic 191. So this is the draft order which has been put forward as part of this application but it has been amended following various points of discussion and objection raised by Sony, many of which have been accommodated and as I understand, are no longer in dispute.

But if you look at page, electronic, 192, paragraph 5, you'll see there the class definition and the class:

"... shall be defined as all PlayStation users who, during the relevant period, made one or more relevant purchases or the personal representative of any such PlayStation user, whereby ... "

Then at (b):

"The relevant period means the period between 19 August 2016 and ... "

Then two alternatives now:

"... the date of final judgment or earlier settlement of the proposed collective proceedings or 19 August 2022."

Which is the date that the claim form was filed and explains the significance of the first date, obviously the six year limitation period.

So we advance this application on that alternative basis. I want to explain, first of all, the basis for the first alternative and if, of course, the Tribunal were persuaded by Mr Beard's points on this, then we rely on the second alternative, as dealing with the point entirely.

The question is which of those formulations is more appropriate. The first form, indeed the precise words, have recommended itself to the Tribunal in the Gutmann case, Le Patourel, Kent and Qualcomm. Indeed -- sorry.

LORD RICHARDSON: Sorry to interrupt you. Clearly, you see those precedents cited. Was the point argued in any of those cases?

MR PALMER: I am going to come to that. I'm not aware that at any point, this point was argued.

LORD RICHARDSON: So when you say recommend itself to the Tribunal, it's --

MR PALMER: To be clear, I didn't mean to suggest by that that the argument had been had and that there had been a decision on that, but the Tribunal, as a matter of fact, in those cases, was content and approved and certified the claims on that basis. Do I say that wins me the argument? No, of course it doesn't but that's the background to that wording. So it's right to say that those previous orders formed the precedent upon which the PCR based the application.

But indeed, in Qualcomm, if we can take that out for a moment -- that's authorities bundle 1, tab 24, at electronic 1066. Paragraph 106, you can see reference there in the second half of the paragraph, the Tribunal acknowledging that:

"The value of individual claims will continue to rise, as the proposed collective proceedings progress, as existing class members may purchase additional smartphones (and new consumers will also become part of the class)."

So, again, the point wasn't argued, as we know, but you can see the Tribunal actively contemplating the fact after the claim was certified, in accordance with that class definition, new claims would join the class.

We just also use these words as a correct basis for an important distinction which we want to make clear and draw out. It may be there's no issue to this at all. That is there is a distinction between those who were in the class before the date of the claim being brought and remain in the class and for whom the value of their claims will continue to rise because loss is ongoing and continues to accrue. That's one thing. I think the only point which is in dispute is whether other claimants who have not yet bought from

the PlayStation Store as at that date, can join the class after that date.

The points that we make in our skeleton argument are at page 19 of the supplementary bundle. We make three points, in essence. The first is that adopting that approach facilitates the overall purpose of the regime and aligns with the Tribunal's governing principles and it allows efficiency and avoidance of wasted costs of re-litigating, because the clear alternative to this would be subsequent claims periodically to be brought in respect of the same loss, before this claim is dealt with.

LORD RICHARDSON: Mr Palmer, sorry to interrupt, did you say page 19 of your skeleton?

MR PALMER: Internal page 16, electronic -- sorry, 21.

THE CHAIR: I think it's paragraph 32, isn't it?

MR PALMER: Paragraph 32, sorry, me adding on the wrong number electronic bundle 21.

LORD RICHARDSON: I have that, thank you.

MR PALMER: Top of the page 32, those two purposes being promoted.

Then moving on to 33, the opt-in/opt-out date can be addressed by fixing a date for opting out at a later stage. Then we also make a methodological point in answer to a point raised by Sony as to how losses would be calculated and Mr Harman has explained that he'd be able to identify the specific date on which each PS user became a class member and that would include the volume value and the date of purchases.

THE CHAIR: What about Merricks? Because I don't think you deal with it in your skeleton but it does rather directly deal with the point and I think it's quite difficult, I think, for your argument, isn't it?

MR PALMER: No, it's in the Tribunal --

THE CHAIR: Merricks three, yes, which I think is tab 22 in the bundle.

MR PALMER: It does make it more difficult, although --

THE CHAIR: It makes it very plain that the Tribunal there disagreed with what you are saying now, I think, in no uncertain terms.

MR PALMER: Can I try this point?

THE CHAIR: Yes.

MR PALMER: Sony says, relying on that exact Merricks point, that notwithstanding any amount of good sense, any amount of pragmatism, any amount of efficiency, any amount of proportionality concerns, there's a hard limit to what can be done and we say that approach is formalistic, it gives rise to added costs and there's no reason, in principle, why a claim could be notionally -- I am not suggesting we bring forward an amendment but, notionally, I could bring forward an amendment now, today, sweeping up everyone who has entered the class from August last year, up to this date and periodically, I could go through time from time --

THE CHAIR: Yes.

MR PALMER: -- amending formally, to sweep up members of the class and so forth. Now there might still be the objection to say: well those members wouldn't have had a chance to object to the class at all. And that is a point which the Tribunal will have to consider, whether that actually, realistically, makes any difference, in circumstances where the alternative is for this claim, having been litigated without objection by the class member and having come to a conclusion, were another claim to be brought on behalf of an overwhelming number of class claimants who have arisen since that date, what would happen, were there to be an objection to the form of a class at that point? Unrealistic, we would say.

So the point is formally good. The question is, is the process adaptable enough in principle, to say on a pragmatic basis: we can take account of these notional amendments and rather than require periodic formal amendments to bring in new claimants, just take that pragmatic approach which the Tribunal has taken to date.

That's what recommends it, in our submission.

THE CHAIR: I think the difficulty with that is no amount of pragmatism can deal with the jurisdiction point and the trouble is you start with section 47B and it talks about claims and it refers back to 47A and it's abundantly clear, it seems to me, that 47A is not talking about claims which have not yet arisen. It seems to me that's just -- and that's why I think the Tribunal in Merricks reached the conclusion it did. It seems pretty -- unless you are telling me that --

MR PALMER: That's as far as I can take the point. If the Tribunal thinks that's a hard line jurisdiction, then we go to our fallback and we say that's the position.

THE CHAIR: I think there are two things, it seems to me, that flow out of that. One is, as you say, there's then an entirely practical question about how, if one wants to, assuming certification is granted now and assuming this case runs on and then assuming that there are a body of people who have not previously, within the relevant period, made a purchase, therefore aren't within the class, assuming there is appetite for that, then how do you deal with that group, particularly by reference to taking advantage of all the efficiencies of what's going to happen in a sense. One can see there's clearly a rather annoying, hopefully not too laborious, but there's clearly a possibility for an annoying process, either by amendment or if that wasn't possible, by just issuing a fresh claim form and consolidating the cases. And, actually, you might only have to do that once, on the eve of the trial or whenever it happened to be, if that's the answer.

I am not suggesting that any of these things are the right answer. Indeed, no doubt there may be all sorts of practical objections or, indeed, legal objections to them, but just --

MR PALMER: (Several inaudible words due to overspeaking).

THE CHAIR: -- sticking with that as a possibility, there's a question about whether, in

those circumstances, that's the right approach to it. That rather depends, I think, on the Proposed Defendants' approach to the litigation because at the end of the day, were we to proceed -- were we to grant the CPO, proceed to trial, and none of it were to happen, you'd still be in a position where there would be a finding that this was an infringement and no doubt a claim could be brought for a period of time afterwards, as long as limitation hadn't expired.

We are now talking, I think, about the difference between August 2022 and, therefore, August 2028. So one can see that really, in a way, if there is no way through the jurisdictional point, we are somewhat in the hands of the Proposed Defendants, as to how they want to play it. I think there's a separate point which you identified and I think, as I understand, isn't contested or at least not contested at the moment, which is important, if you want to claim continuing losses from people who are undoubtedly within the class because they have a claim now but the definition of the class makes that plain, and so unless that's something which a point is being taken on which I don't understand --

MR PALMER: (Overspeaking).

THE CHAIR: -- then clearly, whatever adjustment you make now needs to deal with it. I must confess, I hadn't thought that you'd made that reference point.

Are you satisfied that if we are against you on this point, your amendment, the second amendment, in 5B --

MR PALMER: The class definition doesn't need to accommodate that. That does nothing but identify the individuals who are claiming.

THE CHAIR: And of the loss they've suffered, yes.

MR PALMER: We have pleaded continuing loss and so whoever is in the class will benefit from that and their claim can be adjudicated on that basis.

THE CHAIR: Yes. Yes, okay thank you.

MR PALMER: Nothing more I want to say about that.

THE CHAIR: I think that's helpful, thank you.

MR PALMER: That certainly completes strike-out or opens the certification points and I am going to come now to the authorisation condition and eligibility condition points. I am going to start with the eligibility condition which one --

THE CHAIR: I am just wondering if that's a convenient point?

MR PALMER: Of course it is.

THE CHAIR: We are about that time, aren't we? We'll come back at 25 to 12.

(11.25 am)

(A short break)

(11.35 am)

THE CHAIR: Mr Palmer.

MR PALMER: Sir, can I just start, before I move on to the certification, by giving the Tribunal the reference I was looking for earlier about the royalty payment and the difference between the physical game pricing and digital game pricing. It's in Harman one, bundle A, tab 19, electronic 393. It's also reproduced in Harman 2 but let us just get that as well. You'll see at 6.4.19 that the figure below, summarising Mr Harman's understanding of how Sony's revenue on third party titles typically differs between physical retail and digital. And as you can see under the physical distribution, there's a platform royalty on top and then a retailer's margin. In the case of digital distribution, Sony's commission rate margin replaces the platform royalty, and obviously replaces the retailer's margin and we say exceeds both, put together.

In the counterfactual, the alternative distributor would obviously have their own margin or commission. We don't suggest at this stage that would necessarily mean that Sony got nothing and wouldn't get the same platform royalty as they currently get on physical distribution but we don't have details about that at the moment.

6.4.20, Mr Harman says he may need to update his assessment, in light of any disclosure on the nature of the commercial arrangements, commission rates or margins. So that analysis may well have to be developed in due course, when we know more but we are simply pointing out that's the current state of affairs and we go from there.

The certification requirements. To start with eligibility. The law I am going to take -- it's familiar to the Tribunal, much rehearsed, but hopefully helpfully summarised in our skeleton argument, supplementary bundle page 23, paragraphs 39 through to 42, as to the general approach to be taken at the certification stage. Some familiar authorities and familiar propositions which, subject always to the Tribunal, I don't intend to develop.

Now of course I recognise that so far as the eligibility condition is concerned, the Tribunal must be satisfied of all of the elements set out in rule 39 of the Tribunal's rules and we have set out our full case on all of those in our claim form.

THE CHAIR: 79.

MR PALMER: Is it not what I said? 79 is what I meant to say anyway.

THE CHAIR: 39.

MR PALMER: 79 is what I meant to say, thank you, sir.

But our claim form -- I am going to give you the references. Paragraphs 151 to 170 which you'll find in bundle A, electronic 108 to 112, deals with each of those elements of rule 79. Of course, we stand ready to assist the Tribunal with any of those matters but subject to that, I will concentrate my submissions on Sony's specific objection, whose focus is on the Pro-Sys test. There's no longer any issues as to identifiable class once the future claimants' point has been dealt with.

Now the authorities on the Pro-Sys test again are set out from paragraph 43 to 45 of our skeleton argument, following straight on from the last authorities. Again, I am

going to take them as given, subject to any questions from the Tribunal, of course. But I would draw the Tribunal's particular attention, as always, to the Court of Appeal's judgment in Gutmann at paragraphs 53 to 61, which the Tribunal will recall the various factors and dimensions and considerations to take into account and the limits of the exercise. That's at authorities bundle 1, tab 25, electronic 1090.

And more recently in Gormsen in this Tribunal, paragraphs 40 and 56. The reference there is authorities bundle 1, tab 31, electronic 1474 for paragraph 56, where the Tribunal will see -- and it's set out in both our skeleton arguments, I think, the need for an initial blue print, articulating the nexus between the exact breach of duty alleged, the framing of the counterfactual needed to put the claimant class in the position they would have been, had the tort not been committed, and the method of quantifying the damage sustained as a result. I am going to take all that again as read, subject to any points raised by the Tribunal. But crucially, we say, it's a test obviously designed to ensure that there is a suitable methodology to advance the claim. It doesn't require an assessment of the merits of the claim, subject to the strike-out points which I've dealt with and that, we say, is not a distinction which the matters advanced by Sony consistently observes which we say tips over from criticisms of methodology into arguments as to, for example, market definition and approach to markets which are for the substantive stage.

Our principal case as to the methodology which Mr Harman intends to adopt is obviously set out in Mr Harman's two reports. Let me have a quick look with the Tribunal at Harman 1, first of all, bundle A, tab 19. I shan't page turn through it. Obviously, the Tribunal will be paying careful attention to both reports. But first of all, to make an obvious point: section 4 of that report which begins electronic 346, deals with market definition and, indeed, arrives at the four defined markets and subsequently the findings of dominance in relation to them.

Now Sony have made clear they don't agree with that market definition but they haven't produced at this point, rightly, an alternative market definition or an alternative response as to how the market should be defined on the basis of expert evidence or otherwise and don't contest it for the purposes of this application.

Section 6 of the report sets out the methodology for establishing each of the relevant abuses pleaded. That starts at electronic 384 and it goes through, as I indicated earlier, each element of the abuse as per the pleading. That, of course, now we look at the excessive pricing complaint as well and it's dealt with in its two United Brands limbs. Section 7 sets out the counterfactual scenario to establish the basis upon which aggregate damages could be assessed. That's from page 404 electronic.

Mr Harman identified at his appendix D which is at 442 electronic, disclosure sought from the Proposed Defendants, in particular to assess Sony's economic costs and to refine the aggregate damages estimate by reference to the various matters that he sets out there.

Now in Sony's response to that, objection was raised, first of all, that Mr Harman had failed to consider, it was said, the effect of the two-sided nature of what was described as the "video games market" on pricing. We can see how that point was put in the response, which is tab 3 of bundle A and it's electronic 137.

You can see the heading above paragraph 61 which is B, "Alleged failure to analyse the 'video games market' as a two-sided market. Failure to recognise both consoles and games being purchased by consumers." There's a couple of paragraphs outlining two-sided markets in PlayStation's system as described, as being a paradigm of what's referred to as a two-sided platform.

Then the following is said over the page at 63, a few lines down:

"Nowhere in the PCR's form or underlying expert materials is any proper recognition or any recognition at all of either the two-sided nature of the PlayStation system or the

connection between the pricing of consoles and games. PlayStation consoles are sophisticated, purpose built devices, the significant costs of developing and manufacturing of which need to be recovered by Sony. The PCR has simply ignored this."

I am asked to read the first sentence:

"Both the pricing of consoles and the pricing of games ...(Reading to the words)... are part of the single overall business model which must take into account the incentives operating on both sides of the market."

So, again, a point linked to two-sidedness of what has been described as the video games market.

Then at 65, the point is put again:

"It fails entirely to consider the effect of the two-sided nature of the video games market on pricing."

That is developed at 66 through to 68. At 66, making the point consumers must buy both consoles and games and consoles are often sold at the marginal cost of manufacturing and Sony's objective is to try to recover the costs of manufacturing, as well as those of developing the console over each console's generation's lifetime and, if possible, move past the break even point into profit. Then expressly advancing the point the objective is not always achieved and, for example, Sony, this is no longer said to be confidential, did not break even for the PlayStation 3 console:

"By contrast, the marginal cost of games and add-on content is low and Sony therefore targets a higher margin on those sales ...(Reading to the words)... content is a key profit driver for Sony and, in general, selling more consoles results in more users buying games and add-on and a larger installed console ...(Reading to the words)... makes PlayStation a more attractive system for developers to develop games for."

So in other words, that two-sided point to which I referred, in fact, yesterday.

So:

"The margin is part of an overall pricing strategy, not simply a charge levied in addition to the wholesale price."

Then at 67, a complaint that we don't mention this point and Mr Hirano's evidence that if the margin was reduced, Sony would need to seriously consider how to recover the lost profits elsewhere which may mean including increasing the price of the console.

Then lastly at 68, reference to the different counterfactual commission rates being put forward and evidence in respect of that:

"However, the business model for games stores on consoles and PCs are not comparable. As set out above, gaming platforms need to recover the costs of producing and selling consoles and these are significant fixed costs in console development production and console users are highly price-sensitive."

So the point being advanced, that what we hadn't considered was the need for Sony to cover the costs of manufacturing of the console and developing it over the console's lifetime and take that into account in the examination of the pricing levels of the commission on digital distribution.

Now that point was conscientiously considered by Mr Harman, in particular the need to consider whether consoles were effectively cross-subsidised by sales of games and whether the relevant markets he had identified were two-sided and what implications that had, crucially for present purposes, for his methodology. That you can see in Harman 2, section 4, which is at tab 20 electronic 473.

Section 4.2 at the bottom of that page summarises what the concerns were that had been raised in Sony's response and, in particular, Dr Caffarra's first report is summarised and, in particular, we see at 4.2.2 that Dr Caffarra asserted that Sony sells consoles at low, zero or negative margins and that Mr Harman had ignored the impact that a change in commission rates would likely have on console prices and on

consumers, although no primary evidence in respect of that was presented.

So on page 475, section 4.4 therefore analyses the financial performance of consoles and the extent to which they, in fact, earned positive gross margins. I'll just turn the pages through that to the conclusion which goes through various different models of PlayStation and, in particular, considers the rather different position of PlayStation 3 which is explained. Then at 4.4.18, the conclusion on console profitability, suggesting, based on the available evidence at this stage, that consoles earned a positive gross margin. It's the PlayStation 4 and PlayStation 5 which are the ones during the relevant period, that:

"... no evidence had been provided to show a cross-subsidy between console sales and distribution exists, that low or negative margins on console sales doesn't necessarily imply the existence of a cross-subsidy but even if there was, it doesn't imply that Sony's returns in the digital distribution markets were reasonable, aggregate prices to consumers wouldn't reduce and as the sale of consoles appears to be profitable, the basis for the criticisms is rejected."

But it doesn't stop there, it goes on at 4.5 to consider the relevance of two-sided markets in this case. There's a discussion from 4.5 onwards of the definition and then electronic 482, a discussion of the characteristics of -- I draw attention to these words here -- "the relevant markets". What are the relevant markets here for this purpose? The first is the broader market proposed by Sony as video gaming market -- or video gaming market or video gaming systems market or various references to platforms, variously advanced at different points. But, of course, what Sony had not done was to embark on any market definition exercise, as I have made clear. What this market precisely encompasses is unparticularised.

At 4.5.11 is the crucial point that Mr Harman makes. He says:

"I consider that the distribution markets are separate from the primary console

market."

That goes back to his market definition chapter:

"For this reason, I do not consider it axiomatic that academic contributions relating to the hardware market [i.e. consoles] are necessarily relevant to the digital distribution markets."

So drawing up that contrast between consoles on the one hand and digital distribution on the other hand.

Then at 4.5.13, bottom of that page, the next relevant market which is examined by Mr Harman is a digital distribution market, defined in Harman 1, so the digital distribution of both games and in-game content. He examines those digital distribution markets carefully, from 4.5.13 running through to 4.5.20. I am not going to take time at the moment to go through that analysis in full. The Tribunal has it. You'll see what Mr Harman's views are.

But he makes the point at the top of 4.8.4 that:

"Distribution markets [this is (ii)] are in general, downstream or secondary markets which don't have the characteristics of two-sided markets, as previously defined. Rather, one-sided markets similar to other non-gaming retail markets. In particular, I consider that the physical game distribution market is similar to the digital distribution markets in this respect. The key difference between physical and digital is Sony's dominant position."

So it's not being suggested that there is a difference in terms of two-sidedness in physical and digital. At 4.5.14, he goes on to explain what he's about to do, explain how distribution markets do not have the characteristics of two-sided markets. He examines that and he gives his conclusion of that at 4.5.17. Again, neither physical nor digital distribution appears to have the characteristics of a two-sided market. Again, I stress that because Dr Caffarra, in her second report, has a whole section

saying I don't understand the basis upon which Mr Harman says physical is different from digital in this respect. Well he doesn't.

From an economic perspective, he goes on:

"Once both the developer and the user ...(reading to the words)... distribution market [as he's defined], the developer has developed a game and the user has purchased a console...(Reading to the words)... sunk costs and do not affect their decision to participate in the market.

"In addition ...(Reading to the words)... which reduce willingness to switch platforms. In other words, buyers and sells are locked into the ecosystem and this means that the feedback loop between the number of buyers and the number of sellers which is the characteristic of a two-sided market at console level, doesn't arise in the downstream distribution markets."

He gives an illustration of that in his figure 4.3 and continues at 4.5.18, again to confirm in his view, these are one-sided markets.

That's the end. That's the end of his analysis of the non-two-sidedness of what he calls the relevant markets. He makes a separate point distinguishing at 4.5.21, the two-sided markets in this case, with those in Gormsen and BGL. I'll come back to that if necessary but it isn't advanced that the console market itself is not two-sided.

Now, indeed, all he does is to specifically contrast the position, as I showed you at 4.5.11.

Now it is true that there is one discrepancy in this report upon which Sony seizes, as if this was destructive of the entire analysis. That's on page 475 in the introduction to all of this. It's paragraph 4.3.1, where it's a brief introduction to what follows. As you'll see, (i) deals with the incurred losses, dealt with at 4.4; (ii) deals with the focal markets being digital distribution markets, explained in section 3 earlier.

Then (iii):

"The digital distribution markets and the console market do not appear to be two-sided. I explain this further in section 4.5 below."

As you've seen, he doesn't explain or, indeed, suggest that the console market does not appear to be two-sided. Rather, he expressly contrasts the feedback loop, as he puts it, which exists in the console market, with the position in the digital distribution markets and draws a specific and express contrast between the two.

So that is an error and I, of course, checked the point with Mr Harman. I say on instructions it's an error, he did not intend to suggest there that the console market was not two-sided. Had he wished to make such a suggestion, the Tribunal would no doubt have expected an analysis as to why that was so but none is advanced at 4.5 below or otherwise.

MR BEARD: Can I be clear, is this a contention Mr Harman says the console market is two-sided? I want to be clear what the position is.

MR PALMER: What Mr Harman says is he didn't analyse that or advance a specific analysis. He doesn't challenge the suggestion the console market is two-sided. The implications of that, I'll come on to but his focus is on saying: look, there is a difference now between the emergence of a separate distribution market which is, in effect, a traditional retail market which is one-sided.

Now it's apparent from Caffarra 2 that there is still a dispute as to that but that is not a dispute as to methodology. Insofar as methodology is concerned, Mr Harman goes on at electronic 488 to explain that in light of the points advanced by Sony, this paragraph 462, his existing proposed methodology needs to be extended. That's the final sentence of 462. And he explains precisely what that extension is.

First, he introduces at 463 and then develops in detail further on which I'll go to in a moment, he proposes:

"... to extend his analysis in respect of the counterfactual commission rate to include

the following steps. One, a review of Sony's actual business decision making regarding the pricing of consoles, setting of commission rates and pricing of other products and services, to establish in fact whether there's any relationship between the price Sony charges for consoles and its commission rate."

And, two:

"If there is a relationship between console prices and commission rates, a comparison of the economic costs and economic profitability of Sony's development, manufacture and sales of hardware, to establish whether and to what extent hardware is sold below its economic cost.

"And if [three] hardware is sold below its economic cost, an analysis of cost and profitability of Sony's other revenue generating activities referred to by Dr Caffarra, to establish whether and to what extent any potential cross-subsidy will affect an appropriate counterfactual commission rate."

So that is the headline. The detail of that appears at 489 from paragraph 4.6.7, where he unpacks each of that and it runs through all the way to the end of 491, just over the page, where he explains precisely what he is going to do to review Sony's actual approach to setting hardware prices and the relationship between the setting of hardware prices, console prices and commission rates.

So to the extent -- whatever the disagreement as to the theory about the two-sidedness or one-sidedness of different markets, it has to be said all of Dr Caffarra's considerations of the two-sidedness of the market comes at this at platform level/video games level, rather than engaging with the detail of the separately identified market.

But if there is to be a dispute about that, well that can be had at the substantive stage. For key purposes at the moment, is there a methodology, a blue print to deal with these points? Yes, there is because there's going to be full analysis of the relationship

between console prices and the pricing of digital distribution.

THE CHAIR: Just to pick that point up, Mr Palmer. So if we step back and think about what we are doing here with methodology and I think it has emerged as two separate things or they may not be separate things, actually, they may be linked but there are two identifiable objectives. One is to make sure there's sufficient material about how the claim has been put together, to satisfy us that we can deal with the issues and see if there are common issues. And so it sets, if you like, the framework for the application of section 79 to the claim.

I think there's an emerging -- and whether it's separate or not is perhaps arguable -- second limb which is to be clear that the case can be taken through to trial and tried sensibly and that is tied back into section 79, I think, in the general sense of suitability and also --

MR PALMER: The Pro-Sys test, yes.

THE CHAIR: Precisely. And also, I think recognises the implications for individual claimants of an opt-out action being certified. So then you have to, I think, think about the situation of McLaren, where you have the ships in the night problem and particularly in relation to that second point, the idea that you might have two experts approach the matter in such a different way, that it actually makes it very, very difficult to try it. So if one just thinks about that background, what are the implications here? Because I think what we are getting to and I think you've clearly laid out and we understand the nature of the dispute that has been crystalised -- whether or not it was clear in Mr Harman's first report or whether it's only now clear or whether, in fact, it's made clearer by Dr Caffarra's third report, I don't think is really the point. The point is we now know what the landscape looks like and Mr Harman is holding to some aspect of his position certainly, maybe all of them and those are being challenged vigorously. But there's clearly a difference of opinion and it seems to me it falls out of the question

of market definition and then, particularly, there's a question of whether there's a distinct distribution market and what the characteristics of that are and how one would then compare that with Dr Caffarra's video gaming market, if that's what the market definition is he's going to pursue. Then you get into the question if that's right or wrong what is the significance of the linkage between consoles and the pricing of distribution? So those are sort of the issues that are in play and are ready to be disputes and I think the question that we need to be concerned about from a methodology point of view is, is that a difference which you would expect the experts to be able to sensibly engage on and provide us with, if you like, the ability to reach a conclusion or are we going to be put in the McLaren-type situation, where we are going to have experts running, effectively, competing arguments that don't intersect and we are going to have to try and work out, without proper engagement between them, which of them is right. Maybe that's the wrong way to crystallise the question. Certainly the way I'm thinking about it at the moment is that's the methodology point that we are concerned about here?

MR PALMER: The answer, we say, is very plainly there's not a problem of ships in the night. And the experts clearly, it looks like, are going to disagree, from the early signs, we don't know on what basis precisely, as to market definition, but the point being advanced at this stage by Sony, as we understand it, is methodology must take into account the two-sidedness at the console level or some wider level yet to be defined because that gives rise to incentives on both sides of the market which affect distribution prices, as well as console prices.

THE CHAIR: Yes.

MR PALMER: Which is why specifically to engage with that point, Mr Harman has extended his methodology to include this analysis of that precise relationship between console --

THE CHAIR: Yes, and so Mr Harman does now accept, depending on certain conditions, one of which may be Dr Caffarra is right about the two-sided market, you have to look at the linkage between consoles and pricing and distribution. He's acknowledged that and in Harman 2, we're clear about that.

MR PALMER: Right or wrong, he doesn't need to look at that because particularly if, for example, there was a cross-subsidy between platform and distribution costs, then just taking the excessive pricing complaint on its own, that could be a legitimate source of cost which can be taken into account when considering the excessiveness and fairness of the price charged in distribution.

THE CHAIR: Yes, so he accepts it's not just a question of negative margin --

MR PALMER: No.

THE CHAIR: -- as has been debated (several inaudible words due to overspeaking).

MR PALMER: He says from preliminary investigation, it looks like there isn't actually any cross-subsidy going on at all and PlayStation 3 is an outlier in that respect but all of that to be examined and expressly to be examined and the methodology to take account of precisely those points. I understand Mr Beard's point because he's now backtracked from the cross-subsidy point and said: Oh, no, you've misunderstood, we weren't suggesting that there was any cross-subsidy point or any loss being made and that's not the issue. The point is that there are competing incentives. There's a relationship, nonetheless, between the two, such that if you were to depress distribution prices, there would be a sort of water bed effect and prices on console may go up.

Whether that's right and the extent of that is right and, therefore, the extent to which consumers have ultimately lost, will be something which will be analysed by reference to this methodological approach to examining the existence of any link between those --

THE CHAIR: Yes, it may be that Mr Beard is going to tell me I am wrong in the way I have put the question we should be thinking about and we should be thinking about it in a different way but on the premise I am putting to you, the real concern here is actually whether we are going to end up ships in the night or whether, actually, we just have a dispute that will resolve itself and, actually, the area of the -- the central point that gave rise to the dispute in the first place, about the feature of the two-sided market which is the connection between consoles and the pricing, is actually something that he accepts, but then it's a question as to what do the facts show and what do the different experts say about the implications of that.

Yes, I suppose it's this point, I think you made this point at the beginning about are we trying to resolve these issues now? Obviously not. Therefore, what are we really trying to achieve in the discussion about methodology? I think we are trying to satisfy ourselves that this case can be sensibly tried because the experts are actually lining up and they are going to provide us with a set of disputed issues --

MR PALMER: It may well be at this point Mr Beard is still saying: Mr Harman, you haven't properly accounted for the following relationships, the following incentives or whatever it is, but that will be a point on the merits. This argument as to the two-sidedness or otherwise of identified markets and whether it's appropriate to identify a separate digital distribution market is for another day. That's not a Saint Augustine fallacy type point: please make me good but not yet, it's saying: this is the territory, we've defined the issues, it's becoming increasingly clear at this early stage what the issues between the parties are and the methodology has been adapted and extended to take account of that, so there can be a sensible discussion before the Tribunal. Obviously, the Tribunal is going to have to consider what would be the knock-on effects of a drop in distribution prices. Would they bubble up elsewhere in some other aspects of Sony's market? We say there is a whole series of issues to be

considered there, not least the competitive conditions in the console market and whether, in fact, PlayStation would lose revenue overall by increasing prices in consoles, if they become less competitive as against Xbox. That's obviously the sort of analysis that's going to be done and which Mr Harman, as I can show you, expressly contemplates doing.

But that's for another day. It's not a reason to say this claim can't be certified now.

THE CHAIR: Mr Beard may be saying and probably is saying there's no other way of looking at this, other than a two-sided market and you need to address it that way and clearly that's a case he'll have to advance and make good at trial. The question, I think, the relevance of that question to methodology would be if it meant that the experts were actually setting on completely different assumptions and, therefore, the case couldn't be sensibly tried. I think you are saying that's not the position.

MR PALMER: Clearly they are engaging -- far from ships in the night, they are disagreeing. It's not the same thing as adopting completely different analyses. They are engaging in saying what's deficient about each other's approach and they are going to have to, each of them, tackle the detail of that and the premises of that so the Tribunal can take a view.

THE CHAIR: Yes, thank you.

MR PALMER: And, of course, much of it may go to market definition in the first place which will have wider consequences beyond Harman's report and analysis and methodology as to the constituent elements in the first place. Certainly the ones we've spent most of the time dealing with.

THE CHAIR: Yes.

MR PALMER: These are all points for another day. They are not objections to methodology.

Just to pick up -- I may have covered these points. Yes, the other respect in which

Mr Harman develops his methodology, the second respect, is in relation to the excessive pricing test. He deals with that substantively at page 492 electronic.

THE CHAIR: Are you moving on now from the two-sided market point?

MR PALMER: No, still on the same point. That is completing the account of Mr Harman's extension of his methodology to deal with it. I had not directed you yet to 492. You can see the heading, "Extension of United Brands test for digital distribution markets." And he says:

"My application of the United Brands test to Sony's commission rate actually charged would take account of any cross-subsidy as follows."

That's the point I essentially made to you earlier, that if there is one, that would have to be taken account of. So that's where you'll find it in the methodology.

He refers at 463 to economic value as well.

So that is the summary of the methodology. Seven objections are put forward in Sony's skeleton argument in respect of this. Might I ask you, please, to open the skeleton argument. It's supplementary bundle, electronic 58. If I have that right, you should find paragraph 50 in the middle of the page. Seven objections are enumerated but they all proceed, as you can see, from paragraph 50, from the same starting point, where it's said in response to the apparent criticism of Sony not advancing its own case on market definition at this stage, they say:

"That's nothing to the point, Sony has appropriately refrained from engaging on points of detail in favour of identifying the central flaw in Mr Harman's report."

It's not a point of detail. This is fundamental. Sony's criticisms necessarily rely on an implicit definition which is different to Mr Harman's but, of course, in the absence of a proper alternative position which has been articulated, many of Sony's purported criticisms, we say, are simply irrelevant on Mr Harman's market definitions.

So let me just take that through the seven objections, to see how that plays out. So

the first one is at 52. Perhaps I won't read it out. Can I just ask the Tribunal to remind yourselves of the point made at 52. **(Pause)** First of all, this point does not go to methodology. That's the first point. The second point is based on a misunderstanding of the relevance of Mr Harman's references to the physical distribution market.

You can see there, the point being advanced there, that the two-sided nature of the system doesn't depend on whether distribution is digital or physical. Well as I showed you, Mr Harman does not say it depends on whether it's digital or physical.

At 53 --

LORD RICHARDSON: Before you leave that paragraph, there's reference to Dr Caffarra's second report. What is the position in relation to that?

MR PALMER: I will deal with these -- let me deal with the second report at high level. Essentially, the second report, in its entirety, does not go to methodology. It's continued argument. That's one point, in fact, on methodology which I will pick up. But it's continued argument as to the two-sidedness or otherwise of these markets, often misrepresenting what Mr Harman, in fact, says about that. Again, I'll pick that up.

LORD RICHARDSON: I suppose unless -- I wasn't expecting you to say you agreed with it.

MR PALMER: No.

LORD RICHARDSON: It was more, if I understand the position that is being adopted, you say: well, none of this is really relevant to what we have to consider today, you say.

MR PALMER: That's what I say.

LORD RICHARDSON: But to that extent, were we to consider it, does it prejudice you in that sense?

MR PALMER: (Inaudible) admissibility, it arrived one day before our skeleton

argument, to which we made a predictable complaint. We've had a chance to look at it. We don't object to the Tribunal seeing it. The reason why -- the extent to which the Tribunal should take it into account depends on its relevance, we would we say, to the issues before it. We say it's not relevant. There's one point -- I will do this now -- which is made in paragraph 30. That's supplementary bundle, page electronic 324, tab 12 -- 324 electronic. 319, I think. You can see paragraph 30 there, Mr Harman. "... ignores the impact the reduction in commission rates could have, for example, on the way that Sony sets console prices and taking this into account, is essential to calculating the effect of a lower commission rate on prices."

So, again, it's a form of water bed argument. But the methodology does take account of that, as I have shown you. Harman 2, paragraph 4.6.3, electronic page 488, expressly announces the analysis he's going to do in respect of that.

Beyond that point which I've covered, we say the rest is argument which certainly details elements of the battleground but doesn't suggest that this claim can't be certified on Pro-Sys grounds.

LORD RICHARDSON: So would I be correct in understanding then, just -- sorry, to clarify the point -- that you are not really insisting on a point about admissibility?

MR PALMER: Yes.

LORD RICHARDSON: That's fine.

MR PALMER: Can I go back to my learned friend's skeleton argument. We've reached the second point at paragraph 53. I will try to deal with these points as briefly as I can but each of them merits an answer.

MR RIDYARD: Could you provide us with the reference?

MR PALMER: Of course, yes, in supplementary bundle -- sorry, I'll have to get that reference. We were on -- 54, is it?

LORD RICHARDSON: 58 in electronic.

MR PALMER: 58. It might be 59 for paragraph 53.

LORD RICHARDSON: Moving on to the second -- yes.

MR PALMER: Thank you. The second point, which is reference to the fact Mr Harman states the digital distribution market is a downstream market, with the result that the feedback loop between buyers and sellers doesn't arise. That plainly takes the wrong perspective, it's said. The purpose of defining the market is to identify the competitive constraints operating on the putatively dominant firm. We agree. We say that's what Mr Harman precisely has done.

The precise point is that whereas Sony faces some competition in the console market, it is not constrained in the secondary digital distribution markets by the potential for users to switch away. Because once users have purchased a PlayStation console, they are captive and competition can only take place at the console purchase stage.

So what we say Sony are doing here is to try to obfuscate that market definition, that distinction, so as to elide the analysis of the console market with the digital distributions market, when they are, on Mr Harman's analysis, in fact separate.

LORD RICHARDSON: I mean maybe this is not a useful intervention here but just to be clear, the idea is that, conventionally, the idea would be if you sell a console, you then gain the advantage of locking in -- because you talk about the lock-in effect and you gain the advantage of locking those consumers in for future sales of games, because once you've got them with the console, you know you can charge them higher prices for games. That will be the standard theory which is something that's consistent with your arguments.

The interrelatedness argument is that because of that, suppliers who sell consoles, they compete very hard to lock consumers in, precisely because of the advantages of getting them locked in and it may well be that in doing that, they charge less for the consoles than they would do if the consoles were being sold on a stand-alone basis.

So that would be the argument as to why there is a water bed effect or an interlinkage between the prices at which consoles are sold and which games are sold.

MR PALMER: That is the relationship between the prices of consoles and games -- distribution prices which Mr Harman has said he is going to analyse and consider but, of course, there are other constraints on pricing of consoles beyond that, not lease if you put your price up, then you may make yourself less competitive with your market leading rival, Xbox, as the case may be.

MR RIDYARD: Precisely. That's the whole point about why, in theory anyway, there's intense competition in the sale of consoles because both suppliers are trying to get consumers locked into their system.

MR PALMER: That would still be the same in our counterfactual because there's still the incentive for PlayStation users to buy consoles and sell PlayStation games, whether physical or digital, because they will continue to earn at least a royalty, continue to make money from those users. Many of them, of course, will continue to use the PS Store itself and therefore be paying those commissions in full, directly to PlayStation. Those incentives are still there.

The question is whether the change in those incentives is enough, therefore, to make Sony raise prices on consoles. That's the kind of thing which is going to have to be analysed.

MR RIDYARD: Right.

MR PALMER: But the idea somehow Mr Harman's methodology is defective because he is not identifying the competitive constraints operating on a dominant firm, we say is just completely incorrect. It's not engaging with the methodology which actually has been advanced. What is seeking to be done is to debate the extent of these two-sided effects and the extent of that relationship at this stage, rather than identify a proper objection at certification stage, saying: this claim can go no further because there's no

means of establishing what this relationship is.

So the third point, paragraph 54, you can see the key point four lines down, advances that Sony serves two sets of customers that interact on its platform. Retail consumers on the one hand and publishers on the other hand. And that same point again really being developed as the key characteristic for a two-sided market in respect of consoles.

Again, this is really going over the same territory about the extent to which the digital distribution market is different and operates differently. These points again relate to the separate console market rather than the digital distribution markets and, again, the same points that we've made apply equally. It's all for another day.

Paragraph 55 is the fourth point. 55 concerns the point made about BGL and Gormsen, that those were zero price markets in which all the revenue was obtained on one side of the market. Our primary case, all of this is irrelevant. The point is even if the relevant market is a two-sided market, including digital distribution, there would still be in these cases -- where there is a zero price on one side of a two-sided market, it's obvious that the platform that returns in the case of Meta, for example, or price comparison service, depends on the positive price levied on the other side of the market.

Whereas that is not the case here for the implicit broader market that Sony is assuming because developers pay a commission fee and consumers pay for consoles.

So the analysis which needs to be performed to take account of that two-sidedness is not the same as it is in a zero pricing case. That's really the only point Mr Harman is advancing, saying that those are different and raise their own particular concerns. You can't just read across particular methodological points which would have had to be taken into account in a zero pricing market. Where you are talking about having lower prices than zero, it raises all sorts of different issues and methodological problems

which are not raised here where there's positive pricing on both sides. So, again, we say this takes the point no further. It takes us back to the core issue between the two experts.

Paragraph 56 to 7 is the fifth point. This concerns the CMA's findings in Microsoft and the Activision Blizzard case and this was responsive to the suggestion advanced by Sony that it was somehow significant that the CMA, in that case, had not distinguished between the console market and digital distribution markets and dealt with it all being within the same product markets. We say that's a classic example of the whole exercise of market definition being a tool which is designed for the purpose for the analysis which is to be performed.

The analysis to be performed in a merger context, where the issue was whether, following vertical integration between Microsoft, as Xbox manufacturer and Activision, as a prominent games publisher, could lead to a risk of Microsoft foreclosing the market by depriving Sony of access to Activision's games, thus depriving them of that input. Whether Microsoft would have that ability, that incentive and so forth and whether that would have an anti-competitive effect. That was what the CMA was considering in that case. That didn't require any meaningful distinction to be made between the console market and the digital distribution market. Different considerations were at play. We say the point takes no one any further.

So, again, in that context, the two-sidedness of the console market was no doubt of some importance but it doesn't advance the debate in this case.

At 58, there is a misunderstanding and, indeed, misrepresentation of Mr Harman's case. It's said at the beginning of 58, Mr Harman claims that Sony's assertion that video games markets are two-sided, relies on the claim that consoles have low, zero or negative profitability and he then disputes whether that, in fact, is so.

They say there's no need to resolve that dispute because the two-sidedness of the

market is independent of the profitability of consoles. The difficulty with this paragraph is at no point does Mr Harman make that claim. What he does say is that the salience of the two-sidedness issue depended on console profitability. That's in Harman's second report, paragraph 4.4.2, electronic 475. He didn't say that was a necessary ingredient as to whether or not the markets were two-sided and that was a response specifically to how Sony was, at that point, presenting its own argument which was explicitly, as I have shown you in the response, linking the point with the need for the console to recover its costs, the fact it was sold with marginal costs of manufacturing often and those costs would need to be recovered and so forth. So that's the salience of that point in the argument he was focusing on and integrating that with his analysis of the market, leading him to extend his methodology to take account of that possibility in the way that I have shown you.

He wasn't saying that whether or not there's two-sidedness depends on whether or not the console is loss-making or not. That's not a claim he ever makes.

Indeed, this purported fact of the low to negative margin made on the consoles was a point referred to numerous times in Caffarra 1, to which he was responding. For your note, it's paragraph 7, 21, 22, 26, 30, 31 of Caffarra 1 and the response I have shown you, paragraph 66, but also 79(a), 79(g). It now seems to claim that console profitability is irrelevant and not their focus. Well, fine, we can take account of that as well but it's a change, we say, and the salience of that issue may have diminished but was certainly salient at the time.

Sony's profitability on consoles does remain relevant, we say, for an overall assessment of its economic costs and that's taken into account and Mr Harman's methodology can accommodate it.

At 59, it's simply wrong to say that in the paragraphs identified, Mr Harman is saying: oh don't worry, I'll amend my methodology in due course. Far from it. He

explains in the paragraphs I have shown you exactly how he is extending it to include an analysis of the relationship between console pricing and distribution pricing.

So no element of Saint Augustine's fallacy, as appears to be suggested there. Beyond that, the point is repetitive of previous points. That's the two-sidedness. We say the methodology takes account of it and the ships won't pass in the night. We can have a real conflict of evidence and analysis before the Tribunal on those points and the Tribunal will be able to decide them.

That takes me to the next substantive complaint which is the complaint relating to counterfactual in relation to the excessive pricing complaint and this, for your note -- I need not go through it now in the same way, point by point, but it's dealt with in my learned friend's skeleton argument from paragraph 60 which is electronic 61 through to 64, over the page.

There are two main points advanced by Sony under this head. The first point Sony makes is it's not credible, they say, that a lower commission would have resulted in a lower retail price of a digital game or digital in-game content.

Now Sony, it says, sets the retail price under the terms of GDPA, therefore the commission or margin. It says that with a lower commission, it would have maintained that same retail price and simply paid a higher wholesale price to developers, publishers, to sustain a maximum combined profit. The first point -- this is not a criticism of the methodology. Again, it's a purported defence to the claim which can be pleaded in due course in defence, it's to be relied upon. What we say now though is that the plain and obvious flaw with that argument, if it is to be raised by way of defence, would be that it's no answer to an allegation of excessive pricing.

Sony's position, at its core, is that it could and would continue to exercise its market power to charge an artificially inflated and excessive retail price of its choosing, unrelated to the economic value of the product, by increasing the price of an input,

namely the wholesale price for the game.

We say that's nothing less than an extraordinary assertion of Sony's dominance and market power, to the detriment of consumers.

THE CHAIR: So you are saying that the counterfactual that is being advanced would itself amount to an abuse?

MR PALMER: You can't defend an allegation of excessive pricing to say excessive pricing in a different way which we are not currently doing and rely on that as your counterfactual.

THE CHAIR: But the analysis -- it does get quite complicated, doesn't it? The analysis of counterfactual and whether or not that was an abuse, would be looking at a different economic context, of course, wouldn't it? Because money would be going to different places, so Sony's income would be reduced and the developer's income would in fact be enhanced, wouldn't it, so you won't necessarily come to the same conclusion as you would in relation to the first abusive point, if I can put it that way?

MR PALMER: They say: we can make more money by charging 20 per cent of a higher overall price than we can of the lower counterfactual price than we are currently making. But we make three points here. The first point is the price charged to consumers would still be excessive and the underlying value of the games has not changed. Our case is that price which has not changed would still bear no reasonable relationship to that value. It's irrelevant whether it be economically rational, as it's put, for Sony to continue to charge a profit maximising price, as it puts it, in other words a monopoly price. As indicated by its reference to rationality and the fact it ignores the test for excessiveness, Sony's case is or must be premised on an underlying assumption that it's entitled to price at a level which yields a fixed maximised level of profit, however the revenue is then split.

Whilst that might well represent the perspective of a rational monopolist, by definition

it cannot be an answer to an excessive pricing claim.

MR RIDYARD: But I am not sure that is right because the way this scenario is played out, it's saying that -- let's say the current retail price is £100. The argument is Sony's calculated that £100 is the price that maximises revenue which also maximises profit because there's effectively no cost, that's the argument and then they are saying -- let's say for the sake of argument, Sony currently gets 30 per cent and the developer gets 70 per cent of that £100. Sony's then arguing, as I understand it, that if you say: no, that 30 per cent is too much, that's an excessively high remuneration -- I think it's Sony's argument -- they are saying: if Sony loses that argument and we find, yes, that's an excessively high remuneration, then it should be cut to 15, say. Sony are simply saying, in that scenario, Sony will suffer because it will lose half of its profits. Rightly so, because what it was doing was abusive or anti-competitive or both. But it's just saying it so happens that the other £15 won't get paid to the consumer, it will get paid to the developer. So it's still saying there's an abuse and someone is the victim of that abuse, it just happens the victim of the abuse is the developer rather than the consumer. That's the way their argument works.

So Sony still ends up being much worse off after this intervention, it's just that the PCR is claiming on behalf of consumers and they are arguing consumers wouldn't get that money. In fact, the people who should be standing here should be the developers, saying they deserve their £15 back because they're currently having to concede too much of their value to Sony, in the way the thing works.

MR PALMER: There are several points. The first is -- I need to unpack that but the first is, we have to be careful of dealing with percentages because at the end of the day, what really matters here is the absolute value of the price rather than any particular percentage and whether or not that price is excessive.

But secondly --

MR RIDYARD: I am not saying I or we buy into the whole story. I am just explaining my understanding of what the story is.

MR PALMER: You understand the story. I am trying to explain what's wrong with it and how this will be dealt with if it's raised by way of defence. But Sony's own case appears to be that the increased wholesale price would be artificially inflated. I am going to go to it in a moment, it's confidential, as to how existing wholesale prices are currently set. You may be able to recall it without going to it. It's marked as confidential. Just to remind you of that.

So what's being said is that that price currently reached, would be artificially inflated. We say two points. First of all, that's not a legitimate defence to an excessive pricing claim. Secondly, they say: look, the wholesale price, again, is not an input cost at all, it's simply part of the price which goes to the developer, according to the agreed commission. But as to that, we say firstly, in circumstances where Sony alone sets the retail price, the wholesale cost of the games or the add-on content, forms part of their marginal cost of supply. It's, therefore, properly considered as part of the set of input costs incurred and to be assessed under the United Brands test. Mr Harman sets that out, 6.419 of his report, electronic 395. So we disagree, therefore, with the suggestion in their skeleton that there would be no change in marginal cost in the counterfactual.

Now one of the core assumptions underlying this argument is that it's in Sony's own gift to decide: we are going to pay a wholesale price which is higher than that which has been established by that mechanism at the moment. Leaving out of account entirely, well what do wholesalers have to say about that? From Sony's perspective, it may not matter which of the many games they offer on their PlayStation Store gamers actually end up buying. They get their commission either way. More, admittedly, in respect of their first party games. But in terms of third party games, they

are indifferent as to which game is bought between them.

Games developers and publishers are not indifferent in the same way. They are competing with each other. They may have something to say about their price suddenly being hoicked. They've reached a market driven price for the wholesale game -- and we can look at the mechanism. They are content as things stand with that price that's been negotiated, they are being remunerated.

If that price goes up -- even if the retail price which is said to be the optimised at the moment, there's absolutely no evidence of that at all at that moment, it's the price de facto charged, but even if that were currently optimised, nonetheless, they have an opportunity to compete against other developers, other games in that market.

Sony assume this is all in their gift to say: no, we are just going to charge the higher price, regardless of what's said or what those market dynamics are. Completely unevidenced at the moment that there's price optimisation at the moment, completely unevidenced they have it in their gift to raise wholesale prices in that way. It's not, in fact, consistent with what the evidence tell us about wholesale prices and how they are set.

So we reject the basis of this sort of knock out point: look, this is all completely hopeless, you can't even begin to show any loss to consumers here, because the price is bound to stay the same. The only thing which could possibly change is the split between the two.

So, again, that's a matter, if it's to be relied upon, for Sony to plead and to explain the basis upon which they are acting. Of course, we can respond to that but we say that there are real problems with the argument which the argument, as articulated at the moment, doesn't begin to address.

In particular, there is no aspect of Mr Harman's methodology which is said to fail to take account of this possibility at all. It's not really an attack on methodology at all, it's

just saying: look, there's a slam dunk answer to this, you can't even begin to show that anything is going to change. That is, in its nature, a defence, it is not a criticism at the process stage of what's being done.

There is a second aspect to this argument which I need to cover as well. They are linked, of course, but the Tribunal may be assisted if we draw this out separately and that is that where developers and publishers are in a vertical relationship, as it's said, slightly different from the two-sided market analysis we had earlier, but where they're in a vertical relationship, they have a shared rational incentive to maximise their combined profit and then share it between them. So it really is overlapping the point we just made.

We make three points. Essentially whether the argument is good is a matter for trial. The relevant evidence of fact which is before the Tribunal at this stage is in Mr Svensson's report at paragraph 56. That's in bundle A, electronic 295. I am in the wrong bundle. Sorry, I am juggling bundles and trying to stay close to the microphone at the same time.

It's at paragraph 56. Now much of this is marked confidential but some of it no longer is. Some of it still is. It's said that the major change from retail, physical retail to digital is for digital retail PlayStation is the retailer. This is not confidential:

"This means that for digital games PlayStation will set the retail price. In practice, the way that this works is that third party developers and publishers will come to us with games they have developed for PlayStation or for other systems that they would like to sell through the PlayStation Store."

Now the remainder of that paragraph is confidential. I won't read it out. I will just ask you to note what happens at that point when the third party developer publisher approaches Sony is what happens at the moment. Then in the second sentence what happens next.

Sony has not explained why that process would change in the counterfactual in such a way that either, as I said, Sony would assume unilateral control over the retail price or somehow developers or publishers would gain an understanding of Sony's plans to charge a certain level of commission and unilaterally alter their position within that dynamic.

There is no reason to suppose that either of those changes would occur in a competitive counterfactual. One of my learned friend's points is you don't need to worry about competitive counterfactual. We say that is wrong. I will come to that in a moment. But even if there is potential for that, so it cannot be assumed this would maximise profits for developers and publishers who, as I have said, are in competition with each other.

Regarding the counterfactual, Sony criticises Mr Harman, their skeleton paragraph 63, for commenting that an excessive pricing counterfactual should consider a scenario in which there is normal competition on the digital market. But of course, as a matter of law, such a scenario is relevant. We can turn up Flynn Pharma, if necessary, but the Tribunal will be familiar with the Court of Appeal's observation in paragraph 97 of Flynn Pharma. For your note, it's authorities bundle, electronic 460.

"In broad terms, a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of normal and sufficiently effective competition, ie workable competition."

So, in order to apply that test, you do need to say: if this is going to be your defence, is this something you could do under conditions of workable competition?

If you take a sort of obvious illustrative example of why under normal competitive conditions that wouldn't work, take supermarkets selling bread. Hovis couldn't unilaterally decide to increase the wholesale price of bread because supermarkets would switch to competing brands. Sainsbury's couldn't unilaterally increase the retail

price of bread because consumers would switch to competing supermarkets. Under that counterfactual scenario, we say there's no reason to believe that Sony could in fact behave in this way, and that's relevant to the excessive pricing analysis.

Stepping back and in conclusion on these points, these arguments from Sony are no more, we say, than an attempt to rely on a history of exploitative pricing to dictate a purported counterfactual price. They are premised on an underlying assumption that Sony is entitled to charge an exploitative monopolist price, or profit maximising as their euphemism is. They rely on an entirely speculative counterfactual, which in fact we say contradicts Sony's own evidence of fact on price setting and begs the question of whether the relevant level of profit could be maintained under normal conditions of competition. Ultimately, if that point is to be pursued it's to be pursued at the substantive stage by way of defence and, if necessary, reply.

The final head of criticism advanced by Sony in respect of the Pro-Sys test relates to selective and partial material. That's dealt with in my learned friend's skeleton argument from paragraph 65 onwards, which appears at electronic 64, page 64. I am going to deal with this very shortly indeed.

The first point, Mr Harman's reports are provisional. They are appropriately caveated throughout. Their purpose is to identify the methodology which will be pursued, the disclosure which will be sought to take this case to trial.

Mr Harman is not engaged, as alleged by Sony, in what it terms a "fact-finding exercise". He is of course engaged -- I am sorry if this is boring Mr Beard -- he is of course engaged in an exercise of gathering evidence to inform the methodology which is to adopt. That process of gathering (audio distortion) continues after certification through the process of disclosure. It's precisely what an expert is expected to do, to identify the disclosure, the information, the evidence which he will need to obtain.

The idea that, in doing that, you can't inform yourself by effectively obtaining disclosure

from the public domain by gathering evidence in which you think will be material to your expert methodology and saying: well, by reference to what we know at the moment, this is what I'll need to do, is completely unrealistic. There is no precedent cited for this proposition in my learned friend's skeleton which is actually relevant and on point. It is quite wrong to confuse the observations of courts at trial stage to say: well, it's not for an expert to make findings of fact in their report and to sort of try to dictate. That's a matter for the court where it has to find the facts, not for the experts. That's entirely distinct from the proposition that an expert is entitled to look at publicly available information and say: well, that's relevant to my methodology, that's relevant to my analysis. I will also need the following document which can only be obtained by order of the Tribunal or consent of the defendant through the process of disclosure, but here is what I know now. So the suggestion that he's embarked on some inappropriate exercise from the outset is entirely wrong and there's no basis for it.

The then series of individual complaints which are then articulated at paragraph 72 of my learned friend's skeleton argument are responded to in paragraph 57 of our skeleton argument. None of them take the matter any further than where we are already, so to speak.

They are in fact rehearsing the arguments which we had already in relation to the two-sidedness of the market or otherwise. They complain, in effect, as to what they say is inappropriate selection of factual material. This is in order to disguise disagreement in respect of what is or is not relevant to the identification of the markets and the significance that that may have, two-sidedness or otherwise, to the debate to be had at a future stage. None of them establish any problem in Mr Harman's methodology per se.

I am going to leave it at that on that point and I will develop in reply any particular points which go beyond that advanced by Mr Beard. That deals with the eligibility

condition.

THE CHAIR: Just before you move on from that, there are just a small number of points that I would like to raise with you.

MR PALMER: Yes, of course.

THE CHAIR: It may be convenient -- some of these are actually just observations, some of them are questions you may want to take instructions on.

MR PALMER: Yes.

THE CHAIR: In relation to -- they are largely in relation to funding, and we understand that the points taken by the Proposed Defendant have largely been resolved, at least to their satisfaction.

MR PALMER: Yes, they have.

THE CHAIR: But there are a couple of points that I would like to just pick up with you. The first one is the funding agreement. We need not turn it up, unless you want to, but there is a provision in there about termination, clause 25.3.

I think it's well understood that these funding agreements are going to have termination provisions in them and so there's no objection per se to that. But what has emerged in some of the discussions in these hearings previously is the expectation that the funder won't do that capriciously, which one would hope that they wouldn't, but the mechanisms that's reflected that in some of the certification hearings has been a requirement to take independent legal and expert advice before taking that step.

I can give you the reference to -- I think that emerges from Merricks and so it's 2021/CAT/28. So that's the second round I think of Merricks and particularly paragraph 27 will give you a sense of the wording.

I think there was a hope that that might become a conventional feature of these funding agreements. I am not sure whether it has. I have certainly seen it in other applications. But maybe you might take instructions. It may be that you can't resolve

the matter today and it may be it's something that has to be dealt with by correspondence, but it's certainly an area where I think, as a matter of practice, the Tribunal would like to see some conformed practice.

The other point, just two very quick points, one is the after the event insurance. There's no anti-avoidance provision in the policy. I understand, and I think that point was taken by Sony at one stage, I understand the answer to that, which I suspect has been accepted, is that the structure here, with the funder taking primary risk for the costs, means that you don't need that because then you are back to the question of relying on the funder.

MR PALMER: On the funder (several inaudible words).

THE CHAIR: Presumably --

MR PALMER: Obviously some of the information which has been given which has satisfied the Defendants on this point have been given in a confidential environment.

THE CHAIR: Yes.

MR PALMER: So I can't disclose that, and I don't really want to go much further.

THE CHAIR: I understand. We've seen some of that, and that's not really the point I am driving at. I think it's an interesting structure and actually in a way I presume that if you go to the insurer and ask for an anti-avoidance schedule, then you end up paying an extra premium.

MR PALMER: You pay for it.

THE CHAIR: So this is actually an efficient way of doing it but it actually seems like quite a sensible --

MR PALMER: (Several inaudible words due to overspeaking).

THE CHAIR: Yes, okay, that's helpful.

Just one final point on funding. It wasn't clear to me that the Defendants, Proposed Defendants, had seen the litigation budget. I know we did have -- I haven't actually

been back and checked what we decided when we -- at the previous hearing we did talk about disclosure of this. But I wondered whether there's been any visibility of the budgets at all. I know there's a question of redaction.

MR PALMER: It's in the bundle I think.

THE CHAIR: We can see it. I don't know whether Mr Beard and his team have actually --

MR BEARD: We have seen it.

THE CHAIR: Yes.

MR BEARD: Just to echo the point made by Mr Palmer, quite properly, that we wouldn't want to make any comments on a range of the issues now because of confidential arrangements that have been reached between the parties. Obviously it becomes a matter for the Tribunal to consider these issues, but it's right, as Mr Palmer says, that there have been private arrangements reached that we aren't disclosing or discussing today.

THE CHAIR: Okay, that's very helpful. Thank you very much.

That was all the funding points. There's one other point which actually is very much in the category of leaving a thought with you. I don't think -- you will be able to guess where it comes from. But maybe if I just introduce the point. Just this question of -- I think it comes up in the context if we were to grant the CPO, there's a question of what you -- obviously there will then be communications that would be available to potential class members.

One of the things that presumably would say would be the reference point for the period of the claim, the relevant period. We weren't sure whether that might not need to be adjusted. I think this is probably for a relatively small number of potential class members but for prescription in Scotland where the position is of course different. We wondered whether any thought had been given to that.

It's probably not a matter -- I don't think it's a matter that requires an answer for the purposes of the application, but it would I think become relevant if the application were granted to what was then said and how it was approached.

MR PALMER: The limitation point in Scotland?

THE CHAIR: Prescription.

MR PALMER: Sorry.

MR BEARD: (Several inaudible words due to overspeaking).

MR PALMER: I needed a translation, and I apologise for that.

LORD RICHARDSON: It does make a difference. It is not a procedural issue, it's a substantive one.

MR PALMER: Yes. I will take instructions on that over lunch.

THE CHAIR: I don't think we are expecting an answer today on it and indeed necessarily -- as I say, I don't think it goes into the category of things that have to be resolved if we were minded to grant the CPO. It does not go into the bucket of things that would have to be resolved before that did. The litigation funding point I think does go into that category. But it's a point we were keen to register with you, not least because if we were to grant the CPO we clearly don't want to mislead(?) class members as to what the entitlement might be.

MR PALMER: I will certainly take instructions on that and revert to the Tribunal after lunch.

To assist the Tribunal, I am almost at the end, as the funding, as we have discussed, has been resolved, subject to the point the Tribunal has raised, and the --

THE CHAIR: So you've just got authorisation.

MR PALMER: Yes, authorisation which I am going to deal with, again --

THE CHAIR: No, we have no other questions.

MR PALMER: I think there's a concern, not an objection, raised by my learned friend

in relation to the class representative's change of role which I will briefly cover, but I think, beyond that, we have set out our case on authorisation in writing and the claim form.

THE CHAIR: Yes.

MR PALMER: So I don't intend to develop that further.

THE CHAIR: So you will hopefully only be a few minutes.

MR PALMER: Only a few minutes, yes. I was hoping to finish before lunch. I have not quite managed that.

THE CHAIR: No, thank you. That's very helpful. We'll start again at 2 o'clock. Mr Beard?

MR BEARD: No, I was just rising, sorry.

(1.04 pm)

(The luncheon adjournment)

(2.00 pm)

MR PALMER: I have managed to take instructions on the point you raised just before the break concerning termination. I am reminded that that has actually been dealt with and there has been agreement from the PCR and Woodsford communicated to Sony, to adopt precisely that amendment. It has not yet been amended to do so.

THE CHAIR: Fine.

MR PALMER: Can I give you the reference of where it is in correspondence, for the record. It's in bundle C. It's page number 293 but that's electronic --

THE CHAIR: That's fine.

MR PALMER: -- I think. Paragraph 17. It's a letter from Milberg to Linklaters dated 3 April, in which the amendment, with the authority of Woodsford as well, to make precisely that change.

THE CHAIR: Okay, I am sorry, I missed the point.

MR PALMER: It's defined by reference to amend clause 12 of the IFA, in accordance with the Merricks judgment, 26 and 27 and the recent approval of the same form of wording in Gutmann.

THE CHAIR: That's very helpful. Thank you very much.

MR PALMER: So that's that one.

In relation to the prescription point, we are still considering and will write in due course to Linklaters to propose a way forward and update the Tribunal if we may. We are conscious that in the new post-Brexit Rome II world, there is a sort of internal market of Rome II where we can opt to make the law of England and Wales applicable, even to those who are resident in Scotland. That would have to be done by way of amendment to our pleading. It's not yet done and so for prescription/limitation purposes, no doubt there would be issues to consider as to the date of effect of that amendment and so forth, but I am not in a position yet to give an authoritative answer to that but we will of course consider and update the Tribunal in respect of that.

That leaves just other formal matters in relation to the authorisation condition. Rule 78 requirements are set out in our claim form at paragraphs 138 to 139. Again for your note -- again, I don't intend to go through those matters, absent any further questions from the Tribunal.

The factual position there described has been updated recently by Ms Neill's third witness statement in the supplementary bundle, tab 8, page 119, which concerns her own position, as well as one change relating to the advisory panel. Her own position relates to her new role for Consumer Voice which provides information about class actions directed towards consumers, allowing consumers to gain information as to whether they may fall within any of the classes which are currently being litigated and how to register their details if they think they may be, as well as news items as to the progress that those various claims have reached.

So far as this claim is concerned, there is a link on the Consumer Voice website. The reference in supplementary bundle is to page 219 which says: here is a link to the claim website. So those who think they are interested can come through to the website which has been established by the PCR, to publicise the claim and to make clear how to register if you are an affected consumer.

We see no conflict or potential for conflict in any of those activities. I have taken instructions from Ms Neill. She does not propose to do anything else in relation to the Sony claim, other than those two activities of continuing to provide that link on that website and no doubt the news stories as to developments in the progress of the claim will be reported. We see, subject to the Tribunal, no reason at this stage to think there is a conflict of interest which arises. Indeed, we see it as wholly confluent with the role of the PCR to bring the existence of the claim to the attention of consumers.

That, I think, subject to any further questions from the Tribunal -- again, the question formally of opt-out rather than opt-in, again there does not seem to be any dispute about that, subject to the Tribunal. We say it's a claim suitable for the opt-out procedure. I think unless there are any further questions, that completes my submissions.

THE CHAIR: No, thank you very much, Mr Palmer.

Reply submissions by MR BEARD

THE CHAIR: Mr Beard.

MR BEARD: My Lord, I will deal with matters in the following order. I will deal with reply points in relation to the issues pertaining to the exclusive dealing and tying issues first.

I will then pick up the future claims point, albeit I anticipate rather briefly, and then I will deal with the issues to do with methodology and certification. In relation to the points that Mr Palmer has just raised, obviously those questions are ones for the Tribunal

and you will have seen our skeleton argument in relation to those matters, paragraph 77 through to 79.

THE CHAIR: This is the authorisation point?

MR BEARD: Yes, on the authorisation point. I am not going to expand on it further, unless I can assist the Tribunal in relation to it but it's obviously a material issue that requires consideration by the Tribunal, under these circumstances.

THE CHAIR: Thank you.

MR BEARD: Sir, with that, I will take a step back to yesterday, if I may, and deal with the position that was being taken in relation to the points we made about why this should be seen as a refusal to supply or refusal of access case. I am just going to boil it down, essentially, to two points. With respect to Mr Palmer, there is on his part and the part of the PCR, a gross misunderstanding of the way the licence works and also a fundamental misinterpretation of Google. Those are the two key issues here.

Just if I may, I will start with the understanding of the licence. If I could -- I don't know, do you have the transcript of yesterday available?

THE CHAIR: I don't actually.

MR BEARD: We have some hard copies.

THE CHAIR: That would be helpful.

MR BEARD: The trees have died but --

THE CHAIR: No, for some reason, we didn't get it last night, so that would be helpful. **(Handed)** Thank you.

MR BEARD: The only reason I was going to do this was I was actually going to pick up an exchange, Mr Chairman, you had with Mr Palmer about the licence. I am going to go back to the licence if I may. If we could pick it up at page 85. You specifically asked him at line 3:

"THE CHAIR: So just to understand what you are saying. You are saying that the only

restriction that really matters for present purposes, nothing to do with any of the things in paragraph 3, it's actually this paragraph 9.2.1, that's the offending principle, so therefore you are not saying --

MR PALMER: Granting licences in paragraph 3, restriction of doing anything else for any other third party, is in 9.2.1.

THE CHAIR: So you say that simply puts aside the refusal to supply point because that's not what it's about. I know you are going to come on to that.

MR PALMER: Yes."

But the essence of his position yesterday and he said it at various points, was: put a line through those bits of 9.2.1. That's a restriction. I get rid of a restriction. That's not an access issue. That's broadly where we got to in his appraisal of the licence. We say that's just misconceived.

So if we may, I will use the version of the licence that he took you to. The only reason I used a different GDPA licence was just because it didn't have asterisks in, it was as sophisticated as that, my choice. But it's in the hearing bundle at hard copy 639, electronic 642.

Now forgive me, there are one or two bits here you will have seen, you were taken to both by me and Mr Palmer but I am just going to go back through one or two of them if I may. So if we start at the very beginning which, of course, is a very good place to start. Just under the introductory sections, it says:

"SIE and its affiliates design and develop certain core technology relating to its systems [which I will come back to as a defined term] and operate proprietary network services through PSN, including PlayStation Now."

"Proprietary" there is obviously referring to intellectual property in the PSN and services through the PSN. As I say, I will come back to systems in a minute. Then it goes on:

"The publisher desires to be granted a non-exclusive licence to develop, publish, have manufactured, market, advertise or distribute or sell PlayStation compatible products, in accordance with the provisions of this GDPA and Sony is willing, in accordance with the terms and subject to the conditions of this GDPA, to grant such a licence."

So it's obvious what this whole scheme is doing, it's saying: we have all of these rights and we will grant you rights to do these things up to a point. We only need to look at those two paragraphs to see what is going on there.

Then the key provision is three, the key clause in this licence is three:

"Conditional licence grant".

We knew that it was going to be a licence grant that was on conditions from the terms of the pre-amble because it says "in accordance with the terms and subject to the conditions of this GDPA, we are granting a licence".

Then it says in three:

"Subject to the terms of this GDPA, Sony grants to the publisher for the term, subject to additional periods, throughout the territory, a non-exclusive, non-transferable licence, without the right to sub-licence as follows."

The first right that's conferred is to use the SIE materials solely to develop and test PlayStation compatible products. Now that was a point that Mr Palmer emphasised and we know SIE materials are the development kits and they are absolutely imperative for you to be able to develop the game. We know that a lot of investment has been put into that. Mr Svensson gave evidence in relation to those issues and I don't think it's disputed.

So first of all, you are getting tools that enable you to create games or, more exactly, PlayStation compatible products but it's 3.2 -- sorry, just for your note, the relevant Svensson reference is paragraph 44.2. In his witness evidence, he's saying that it's the SDKs that allow you to develop content for the PlayStation. "Our intellectual

property in those SDKs we licence to you, so you can develop games."

3.2:

"The right to publish, distribute, supply, sell, rent, market, advertise and promote digitally delivered products to end users ..."

So I will come to digitally delivered products in a moment but "to end users". So this is a licence to a developer or publisher to be able to publish and distribute digitally delivered products, including games, to end users. And this is the critical thing, "through each applicable SIE company through PSN."

That's the only right you are being given under this licence. Conditionally, we are saying: you can do these things, you have can have access to our property in order that you can distribute through us and through the PlayStation Network.

THE CHAIR: So I think Mr Palmer is saying that the "through PSN" is a point of the licence. I think he's saying that the reason for this is to give you a licence to effectively access PSN. You are saying that's not correct.

MR BEARD: No, it absolutely provides you with a licence to access PSN, absolutely, but what Mr Palmer is saying is that, essentially, you should strike through "through each applicable SIE company and through PSN." That's what competition law requires you to do, is his case. That's, in essence, what the variation is that he is asking for.

In other words, he is saying the conditional grant of licence should be to a publisher, "to publish, distribute, supply, sell, rent, advertise or promote digitally delivered products to end users." But, no, as he puts it, restriction on it coming through Sony or the PSN.

THE CHAIR: I think he's saying he doesn't need a licence, if he's not using PSN, I think that's the way he was defining it. He was saying: this is to allow me to use PSN, I don't need a licence to do anything else. Once I have the materials and use the

licence to -- I don't need a licence to do anything else.

MR BEARD: He doesn't have any liberty to do anything with the tools he gets, except what's provided for here.

THE CHAIR: So perhaps to be clearer, you are saying that when he gets the tools, gets the materials and makes a game, you are saying that Sony has some proprietary interest in that game, that they can then control how it's used or am I misunderstanding you?

MR BEARD: Well, actually, that is correct and I will come on to the definition but it's not just in relation to the game. What is being said is: you can have our tools to develop but only insofar as you are providing those games for sale through our system. That's the quid pro quo here.

THE CHAIR: So you are saying 3.2 --

MR BEARD: Yes.

THE CHAIR: -- is the second part of that?

MR BEARD: It's the critical part of that. If you assumed a world where you didn't need SDKs, that people could just -- from first principles code to design games. The critical thing here is we are licensing you as a games developer to have access to the PSN. That's the critical thing. You are able to sell and we are only giving you that licence to access this because you are going to sell through the PSN.

THE CHAIR: Yes.

MR BEARD: Of course, we recognise in order to facilitate the development of those games, we allow you to have access to the tools that we have built as part of the overall system.

THE CHAIR: Yes, so he says it's permissive. He says 3.2 is permissive. It allows you, if you need a licence, to go through PSN. So it allows you to do that. You say it's actually restrictive, that the combination of 3.1 and 3.2 mean you get the tools and

you can only do it through PSN.

MR BEARD: Absolutely.

THE CHAIR: You are effectively saying -- I am probably jumping ahead -- this is tantamount to the same restriction as sits in 9.2.1.

MR BEARD: It's more than that. This is the key provision because this is the conditional grant of the licence. 9.2.1 is the modalities of distribution but there is an irony. If you just drew the line through 9.2.1, as Mr Palmer suggests, this arrangement would still obtain.

THE CHAIR: But you have to get from clause 3, the restriction. The restriction doesn't exist in its own right. The fact you've given somebody development materials doesn't mean there's any automatic further restriction that applies. I think you are saying -- I want to be absolutely clear -- I don't think you're saying there is a freestanding restriction that comes just by implication in the tools, you are saying the construct of three is you get the tools and you distribute through -- yes.

MR BEARD: You wouldn't get the tools without this conditionality, is what's going on here.

THE CHAIR: Yes.

MR BEARD: You get the tools because you then get the opportunity to supply through us. We wouldn't just give people tools to develop PlayStation games, absent this limited licensing scheme.

So you can look at it the other way round. What he's asking for is access to the development tools. He's asking for a freestanding access to development tools without any conditionality. There are different ways you can put the point but all of them require a different access arrangement to Sony’s intellectual property.

LORD RICHARDSON: Mr Beard, yesterday I was talking with Mr Palmer about this alternative sales, these hybrid sales, the download codes.

MR BEARD: Yes.

LORD RICHARDSON: Was clause 3 of the GDPA different at that point, did it change?

MR BEARD: I don't believe so. I would have to check that. But I think the GDPA terms, such as they existed at that time, would have been materially the same.

LORD RICHARDSON: So notwithstanding, on that analysis, a digitally delivered product was not being sold through the PSN, that was all right, was it?

MR BEARD: Well, as you can see, exceptions can be made by Sony in relation to it. But I am not sure that it's right to say --

LORD RICHARDSON: Where do I see the exception?

MR BEARD: So, sorry, do you mean more generally in relation to -- I thought you meant in relation to the GDPA itself?

LORD RICHARDSON: Sorry, I was reading 3.2.

MR BEARD: Yes.

LORD RICHARDSON: "To publish, distribute, sell."

MR BEARD: Yes.

LORD RICHARDSON: As we discussed, the download, as I understood the way that worked, the download was still through PSN but the sale wouldn't be through the PSN.

MR BEARD: The specific terms on which someone is provided with a download code may be different from the situation that we are dealing with here. But that doesn't change the way in which this licence works in relation to publication generally.

If what you are asking, sir, is whether or not there were separate arrangements for those that provided download codes that then varied the GDPA to the extent that the code itself could be made available separately, but the publisher was still required, even if it sold the download code, still only to make that available, such that it could be used on the PlayStation Network.

LORD RICHARDSON: Yes.

MR BEARD: I think the answer to that is, yes, all of those terms would remain in place but I think there was a supplemental arrangement in relation to the release of the download code. But none of that changes the fundamental issue. You couldn't get a download code to use on anything else and a publisher couldn't develop a game in respect of which there was a download code. They couldn't use the SDKs, they couldn't have access to any of those tools, in order to create a game that could be used by any other means than through the PlayStation system.

LORD RICHARDSON: I suppose what -- the reason I am interested in exploring it is the way, as I understand it, you are setting out your argument, is to say: well, in approaching the licence, we need to see this as one thing, one set of arrangements.

MR BEARD: Yes.

LORD RICHARDSON: You say it's absolutely fundamental to the set of arrangements that the access to the tools and so on and so forth, is linked into the distribution, it's all one thing, you can't just cover it up.

MR BEARD: Yes.

LORD RICHARDSON: But that doesn't seem quite consistent with the fact that there appear to have been, at least on one view, methods whereby the sale of digital products was not coming through the PSN in the way it is now. If you are saying: well there are supplemental arrangements to deal with that, it suggests maybe it's more complex than just one simple arrangement that we can't split up.

MR BEARD: No, let's take that in stages. First of all, in terms of arrangements, by which, if you get a game -- obviously, these agreements not only deal with digital but also physical media products.

LORD RICHARDSON: Yes.

MR BEARD: So if it were possible to deal with download codes as treating them as

a physical product, actually that would be dealt with here. I am not trying to presume an answer in relation to whether they should be designated as physical products, I was assuming for the sake of argument, on the hypothesis, sir, you were putting, that I am not treating them as physical media products.

LORD RICHARDSON: No.

MR BEARD: I am then asking myself: does the existence of this hypothetical other category of digital products change the analysis of this agreement, which I think is the hypothetical you are testing.

LORD RICHARDSON: Yes.

MR BEARD: The point I am making is that even if you were to treat those as different, in the sense that you didn't, effectively, get the code through the PlayStation Store, you got the code through a different store --

LORD RICHARDSON: Yes.

MR BEARD: -- the arrangement for the publisher and the rights the publisher has would only be varied in relation to that particular delivery of the code. The access to the tools that enabled the publisher to build the game and the restriction on the game only being played as the concomitant through the PlayStation Network, those would remain the same. You would have the same trade off, it would just be that the code was delivered not in the PlayStation Store but elsewhere.

But everything else remains the same.

In other words, when you are asking yourself what is it that you are getting under this licence, as the publisher, you are getting access to the tools to enable you to build the game and the rights for your game to be sold, distributed and played on the PlayStation Network. If there is a variation that says: in addition, the code for this game can also be accessed through a retail store, that doesn't change the fundamental nature of this licence.

Because, look, taking a step back and looking at it colloquially, you are not making this some sort of broader, open system. You are still controlling the way in which access to digital products is made.

LORD RICHARDSON: I see the network, it's possibly of limited value, in the sense that, as you rightly point out, it may be the download codes would fall within the definition of digitally delivered products anyway.

MR BEARD: Actually, helpfully, I have been told what the answer is.

LORD RICHARDSON: Excellent.

MR BEARD: The answer is even simpler. The answer is you get a voucher code you then use through the PlayStation Store. So, actually, all it was was something that you exercised through the PlayStation Store. It wasn't through any other means at all.

LORD RICHARDSON: That's very helpful.

MR BEARD: So I don't need to get into the hypotheticals further because it still fits with the whole scheme we are talking about here.

In other words -- and it's important to focus on this from the publisher's point of view. If you are a games publisher who thinks: there are various consoles I can design my game for. I want to design it for PlayStation because PlayStation is extremely successful. I get the tools and I get the ability to sell on PlayStation through this agreement. But the idea you can say: ah, yes, but I'll have the tools but I won't sell through the PlayStation system, is not something Sony ever countenanced as licensing, it's only that package.

As I say, what is being suggested is that publishers could have the tools so as to build the games but would not then be limited to distribution through the PlayStation Network which is the absolute essence of the way we built the system.

LORD RICHARDSON: I have that point.

MR BEARD: So when we are talking about -- so I am just going to work through

a couple of the other points in relation to this. If I may, one of the points that was made against us was: well it's not really clear what sort of intellectual property you are talking about in relation to these systems. But, with respect, it's actually very clear. If one goes to hard copy 694, electronic 697, there's actually a defined term of SIE intellectual property rights and it's used for various points in various places in the agreement. But the point I make is that what this identifies is the intellectual property we are talking about you getting access to.

The intellectual property rights there relate to the system, the design and development of PlayStation compatible products, PSN and any SIE materials. So we have intellectual property rights in relation to all of these arrangements and if we go over the page, you'll see that system is there defined or systems, as being all of the various PlayStation variants.

THE CHAIR: What's a PlayStation compatible product; is that a game?

MR BEARD: Well let us go back. If you go back to electronic 696, you'll see there is a PlayStation compatible product. It's not just a game. It means any software --

THE CHAIR: Sorry, does it include a game, do you think?

MR BEARD: Yes, because a game will be software and content. Because, of course, what we are talking about, although obviously, these things appear to us as a form of entertainment, they are copy righted code that is essentially being transferred.

THE CHAIR: So the materials allow the developer to build an application or game, if that game contains elements of Sony generated code?

MR BEARD: Yes, it absolutely will do. If we go back, if we may, just to that definition of SIE intellectual property rights, you'll see it means:

"Intellectual property rights that relate to a system, the design and development of PlayStation compatible products, exclusive of any publisher intellectual property rights therein."

In other words, the PlayStation compatible products we are talking about, the software and content, that SIE intellectual property, those PlayStation compatible products have our intellectual property in them. Indeed, it's defined as such. Now, the game publisher will also have intellectual property. I am not pretending we own all intellectual property in relation to third party games but that's how these SDKs work. Mr Palmer will say I am giving evidence in relation to these matters. As I say, Mr Svensson is the person with the experience in Sony who gave evidence in relation to the importance of SDKs. I will say this much. My understanding of things is that an SDK, for example, will be a software suite that enabled you to have characters or items shooting in a game.

In other words, it's pre-built and can then be used. You can see that, therefore, it is intellectual property that's embedded within other games.

MR RIDYARD: I was going to ask this question. This may be an impossible question to answer but I will try it anyway. You'd think from the developer's point of view, I am developing a game. Obviously, I'd like to sell it on PlayStation and Xbox because why wouldn't you, most people do. I mean how much -- are we talking about a situation where I go away and develop my game. It all sort of works, then at the last minute, I obviously then have to make sure it speaks to both systems. Then I just get the licence for this little bit of intellectual property, so it can go to this system and that system or you are suggesting it's much more fundamental and I would have to develop almost two games or at least one and a half games?

MR BEARD: Yes.

MR RIDYARD: How can we -- just looking at these agreements can't tell us anything about that or even give us any intuition about that, so I just don't know --

MR BEARD: You don't need to have any intuition about that. The latter situation is true. You do have to build this sort of intellectual property in much earlier. But let's

assume you have no idea whether or not that's true or not. The question you are asking yourself here is when we are talking about these allegations, what is the essence of what is being said against us? The essence of what is being said against us is: we want -- we hypothesise in this counterfactual world, that publishers would be entitled to develop these games for distribution, either through a third party store or through side loading. Mr Palmer made a big thing saying: I wasn't focused enough on side loading. That's taking it from a website and running it through the PlayStation system. It doesn't matter which we are talking about. The difference with a third party store is you have to have this other licensing agreement which we canvassed in exchanges.

The point is that the licence we would need to give publishers in order to do that is different from and broader than the one that we give them today. The reason we give them a narrower one today is because we invest in this system, we want them to develop games for this system to be played through the PlayStation Network and the PlayStation Store and that's part of the way we monetise the system overall.

The question you have to ask yourself is not to what extent do SDKs embed in games early in the development process, late in the process. It's in order for them to reach their counterfactual, would we have to grant a different and wider licence to them? The answer to that is, yes, obviously we would and it doesn't matter when that SDK issue arises because we would have to grant them a licence that enabled them to use those tools whenever was appropriate, depending on what the facts are. But without any quid pro quo that those games were then played through the PlayStation Network and the PlayStation Store. And that's a wider, different licence because you are removing part of the conditionality which is set out in clause 3.

THE CHAIR: So we are having quite a wide-ranging -- there's no criticism at all because I know you are responding to questions and we have quite a wide ranging

discussion about how this might work or does work. If you put that in the context of the strike-out application --

MR BEARD: Yes.

THE CHAIR: -- are you saying that we can be clear enough from, effectively, what we have in front of us, which Mr Svensson does deal with this document but not really in any detail? He certainly doesn't get into the material we've been talking about.

MR BEARD: No.

THE CHAIR: Are you saying it's sufficiently clear from clause 3 and the remainder of the document that we can be absolutely sure there's no alternative construction of the agreement, so we don't need to worry about having a factual context in which to construe it?

MR BEARD: No, there isn't any difficulty here because I mean I am being, essentially, charitable to Mr Palmer. Mr Palmer said: we'd strike through bits of 9.2.1. That's all we need to do. Then we can have all the other benefits but we don't have to sell through PlayStation Network and PlayStation Store. That's his position.

THE CHAIR: Yes.

MR BEARD: The point I am making to you is even if you strike through 9.2.1, Mr Palmer wouldn't get home. He has to strike through parts of 3.2 which are the conditionality of the licensing.

THE CHAIR: That's on your reading. I rather suspect he wouldn't agree with that construction and say there's an alternative and, therefore, we are faced -- now you may say -- in fact, you are saying, as I understand it, it's so plain we don't need to worry about the dispute --

MR BEARD: I am taking the point at both levels because I can say even if you only focus on 9.2.1, when Mr Palmer says: oh, I strike through that, that's removing a restriction. What he's actually doing is saying: this licence must be wider. Because

what he is saying is: I must be permitted, as the putative publisher or developer, to be able to distribute my games more widely than the conditions under this licence currently permit. That's what he's doing.

THE CHAIR: But where do we find that in the evidence? I know you've just had that exchange with Mr Ridyard but we don't have evidence about that, do we, about how, for example, a game needs to be rebuilt effectively in order to sell it to Xbox?

MR BEARD: Sorry, in relation -- I am not sure that the fact that games need to be rebuilt or built differently for Xbox is material to this. Because what we are asking ourselves is whether or not the licence that we are talking about is different and wider under Mr Palmer's hypothesis.

THE CHAIR: Yes.

MR BEARD: It doesn't matter about the --

THE CHAIR: I think you were advancing it as a separate point from construction of 3.2.

MR BEARD: Yes.

THE CHAIR: If you assume 3.2 in Mr Palmer's favour which I think is the argument we were having --

MR BEARD: Yes.

THE CHAIR: -- then 3.2 doesn't get you home, so you have to make a case that says: as a matter of practicality, you would need to have a licence to do the things that need to be done. We don't know what the things are that need to be done, do we? You have given us examples but we don't have evidence of that.

MR BEARD: Sorry, I think we may be talking at cross purposes or I may have been.

THE CHAIR: I am sure it's my fault.

MR BEARD: No.

THE CHAIR: Lack of --

MR BEARD: I am not suggesting that for a moment. The question we are dealing with here is whether or not the counterfactual that is being put forward by the claimants, the PCR, is one that actually involves us refusing to supply or allow access to something.

At the moment, we refuse to allow access to any intellectual property at all, for use by publishers for the digital delivery of games outside the PlayStation system. That, I think, is common ground.

Mr Palmer says: we must be able -- in the counterfactual, competition law would say you can do that. We say: but if that is the counterfactual, then in those circumstances, you are requiring a grant of a broader licence, in order for that to occur. In other words, you are requiring us to provide a licence in relation to whatever intellectual property you are getting a licence to, for a broader use than you are permitted under this licence.

THE CHAIR: So does that argument boil down then to this point about the extent of Sony code that sits in the developed product. Is that what you are talking about or are you talking about something more than that?

MR BEARD: No, it won't just be Sony code that sits in the developed products, it's any intellectual property you get or need. Because after all, what's being asked for, what is being said is we do need a licence. It's not being said you don't need a licence as a publisher, you do need a licence in order to be able to create that game. So there must be intellectual property you require.

THE CHAIR: I think you need a licence to be able to use that materials that allow you to create the game.

MR BEARD: Yes.

THE CHAIR: But once you've done that, you don't need a licence, you don't need the materials anymore because you've done that. The question then -- I think you are

saying there's some residual intellectual property right that sits in the game because there are aspects of the materials incorporated into the game. I get that --

MR BEARD: (Several inaudible words due to overspeaking).

THE CHAIR: My question is, is there anything else? It does not seem to me -- once you've finished with the materials, the licence in relation to the materials is redundant, isn't it?

MR BEARD: There's a further element, I think. I was referring to the systems that you're talking about because what's being talked about is not playing games on other devices, it's playing them on PlayStation.

THE CHAIR: Yes. So you are then back to this point that if you go off on side loader on a PC, then you are saying there's a need for a licence --

MR BEARD: You have to get back in somehow because you've got to meet the end user and the end user is the person holding the controller, connected to the PlayStation.

THE CHAIR: Yes, does the developer need a licence for that or does the consumer? The consumer has bought this thing?

MR BEARD: They both do is the answer.

THE CHAIR: We have not really spent much time looking at the consumer licence.

MR BEARD: No, we haven't because the consumer licence, effectively, you can see as being the concomitant of preventing consumers circumventing the publisher licence arrangements and the nonexistence, effectively, of a third party store licence. Because I did take you to extracts of the consumer licence but, essentially, the consumer licence says you can only use it for private purposes, you can't re-engineer, you can't install other code on the system and so on. And there's the whole code of conduct about not encouraging cheating, not encouraging malware and so on. So all of those, you can actually see what is going on there is if you buy a PlayStation, you

can't then engage in some commercial actively to try and upload stuff on to the PlayStation, that's not permitted.

But that is simply part of keeping the system, as it's been referred to, closed. We discussed this in terms of a third party store provider. You would have to either flex one of these licences enormously or provide a new licence to someone to come and install a third party store or make available for installation, a third party store that interacted with the systems that are constituted by PlayStation.

THE CHAIR: I think at the sort of extreme end of this, you'd buy it on a third party store on your PC and then you'd put it on a hard drive and then you would plug it into your PlayStation and you'd download it.

MR BEARD: Yes.

THE CHAIR: I am not sure whose -- I guess the question is, who needs a licence to do what at that stage?

MR BEARD: At any point when you are talking about it using the system --

THE CHAIR: Yes.

MR BEARD: -- whether you've, you know, remotely downloaded it or put it through in a plug-in, whatever else.

THE CHAIR: The consumer clearly is using the system because there's no question about that.

MR BEARD: Exactly.

THE CHAIR: I am not sure the developer is at that stage.

MR BEARD: Well the developer -- the game that has been provided, whatever route it comes by, the developer restriction, as it is here, says you can only do that through the PlayStation Network.

THE CHAIR: Yes.

MR BEARD: So the developer has to do it that way. If you are assuming for the

counterfactual purpose that the developer doesn't have the restriction to provide through the PlayStation Network but is provided with a licence under the publisher licence to access the systems in order to play, again, what you are coming up with --

THE CHAIR: Not a developer.

MR BEARD: I am so sorry.

THE CHAIR: You mean the consumer?

MR BEARD: I am sorry, I meant the publisher.

THE CHAIR: Publisher, I see.

MR BEARD: I am so sorry, the publisher, because it's GDPA -- sorry, I am conflating the two.

THE CHAIR: Yes.

MR BEARD: If you are talking about the publisher, the publisher of course, would need permission for its game to play on the system, whatever route it comes by. As I was just identifying, the system is part of the intellectual property we are talking about. So, again, you are dealing with a situation where -- it doesn't matter which route you take. It doesn't matter whether you are talking about a third party store side loading, whatever else, as long as what you are doing is using the PlayStation, the PlayStation system, the console, to play that game. The publisher will have to have had a licence for that game to play on the PlayStation system because it's intellectual property that's identified in the licence.

That's why I say you don't need to get into all of the factual issues that were being explored because it doesn't matter which route it is. One way or another, if you are a developer, you need the development kits and then the rights for the game to be provided downwards; if you are the publisher alone, you need to have the rights that the game can play on the system, the intellectual property that Sony has. If you are the customer, you have to have the right to access the game, subject to a range of

conditions imposed on the customer.

So that's why I say it doesn't matter how you deal with it. The reason why this is -- although one explores all these different routes, what it comes down to is a contractual system that creates the closed PlayStation system.

MR RIDYARD: The key thing to what you are saying is that the licence with the developer would be different in the scenario the developer chooses what to do what it does now --

MR BEARD: Yes.

MR RIDYARD: -- or it might decide to sell its games independently --

MR BEARD: Exactly, yes.

MR RIDYARD: Certainly you are saying because that licence will be different -- so you would say: I am going to lose some margin there, so I am going to get something back for that and if we found against Sony, we could say: we don't like that and find some way of stopping it or not allowing Sony to do it. But you are saying in that situation, it would still then have to be -- still refusal to supply situation between the --

MR BEARD: Yes, I am just trying to get to the essence of what's going on here. I am not trying to deal with the substance of the criticism because I can see -- I went through the refusal to supply case law. Some of those cases, the conclusion was it was unlawful to refuse to supply; some of those cases was, it was lawful to refuse to supply. What we are talking about is what the structure of analysis has to be and what has to be pleaded out here. And the reason we go through these agonies about the licensing is because going back to Bronner, that is the property that we have developed and the question is, is what's being suggested that we should make that property available under different circumstances, different conditions from the ones that apply now? And the answer is yes, and that is necessary -- it doesn't matter whether you look at the developer, the publisher or the customer. As long as you are talking about

circumventing the PlayStation Network arrangements that are specified in 3.2, it's a different and wider licence.

Therefore, it's an intrusion into our property rights and we say: yes, okay, competition law can sometimes require that, but because, as Bronner explained, when you are talking about access to infrastructure of this sort -- and that's why I was talking about the system, it is infrastructure we are talking about here -- you need to make sure those criteria set out in Bronner and Microsoft are met.

LORD RICHARDSON: Sorry, to understand how this part of the argument fits into what you are going to come to which is your second point about Google -- you are going to come back to that, aren't you?

MR BEARD: Yes.

LORD RICHARDSON: Would it be right in understanding if you are right about this and wrong about Google, then it doesn't matter? In other words, if Google says what Mr Palmer says it says which is, as I would understand what Mr Palmer is saying, he says: Google explains to us everything you've said so far is not enough because everything you've said so far is about refusal to supply but what Google tell us, so Mr Palmer says, is: yes, we've got that case law about refusal to supply but we've got to think about how that fits into the analysis.

It's Google which says if there's an extrinsic, whatever, alternative additional use, then you just side step the refusal to supply stuff and so that doesn't help you at all. So just addressing -- I know you are going to come on and address and say that Mr Palmer is quite wrong about that --

MR BEARD: Yes.

LORD RICHARDSON: -- but before we get there, so I understand the structure of your argument, am I right to understand that for you to be successful here, you have to be right about both of these points?

MR BEARD: I see them as two sides of the same coin because, essentially, what I am saying is: look, you have to see this as a refusal to supply case and all the stuff Mr Palmer said about Google doesn't mean it's not a refusal to supply case. So, yes, is the short answer to your question.

LORD RICHARDSON: That's helpful.

MR BEARD: But I think it's just worth taking a slight pause before we get to Google because what all that case law on refusal to supply is focused on and the reason I went to the Advocate General in Bronner is the rationale for talking about access to property being subject to more stringent criteria.

So I am obviously concerned not to get back too much into analogies with land and so on but there is a temptation to do this.

LORD RICHARDSON: Sorry to interrupt you.

MR BEARD: Please.

LORD RICHARDSON: If one goes back to Hoffmann La Roche and all of these countless, countless vitamin supply contracts, no doubt which existed up until the point the case was litigated in front of the European Court. Multiple clauses, such as -- all of which would have to be put through, following that. In a sense, I suppose my point is you say: well we need to look at this and understand how it all fits together. You say what it means is that if Mr Palmer is right, then much of this agreement is going to have to be struck out.

MR BEARD: I think you have to be careful, with respect, with use of pens in contracts because you are absolutely right, in Hoffmann La Roche, the upshot would be lots of exclusivity terms in contracts would be struck through. That's entirely true. What none of that would do is change the obligations for Hoffmann La Roche to supply anybody. It would not make them supply differently, in the sense of them not being required thereafter to supply vitamins to a particular person. What they are not allowed to do

is impose prices that mean that the purchasers essentially buy all their requirements from Hoffmann La Roche. You are not messing with Hoffmann La Roche's property rights in any sense there. What you are saying is you can't require -- in the simplest terms, the exclusivity clause that would be written through in Hoffmann La Roche is one that says: you, a customer, must buy all of your vitamins from us.

Hoffmann La Roche could keep selling to the customer and, in fact, the customer might buy all of their vitamin demands from them, so the outcome might be completely the same. But that's why I say you have to be cautious about equating the two different things. You are dealing with a different situation when you are talking about mandating access to a system, mandating wider intellectual property licences.

That's what you get from Bronner. Higher test when you are saying: I want access to your delivery system, higher test in IMS, when it said: I would like to be able to use your brick framework to develop my marketing. Higher test in Microsoft, where it's: I would like access to your interoperability information. Now, of course, in Microsoft, the claim was made out and the interoperability information had to be provided. So I am not saying never, nothing like that. But each of those cases was an intrusion on the supplier's, the dominant entity's, property rights in those circumstances.

Sorry, whilst I diverged somewhat but if we could just go back to the terms of the GDPA, 641 or 644 electronically.

Just for your notes, you've got a whole section in 5 on limitations on the licenced rights. So this doesn't change the substance of my overall submission but there you've got a whole set of provisions that are setting out how you have particular limitations on the development tool rights, that's in 5.1, which again, throughout that section, is referring to SIE intellectual property which goes to all elements that I took you to, in terms of the definition.

Then you've got, if you work your way down, 5.4, limitations on ownership and protection of SIE materials and SIE intellectual property rights. Then you've got over the page, the reservation of rights, saying: look, this GDPA, just for the avoidance of doubt, it doesn't give you anything that's not specifically provided for.

Then in 6, you start moving across into slightly more technical issues about the scheme for development of PlayStation compatible products, the definition which I took you to and then the product assessment of quality assurance scheme which, again, is just all part of that closed system.

We are saying, yes, you can develop these products but we are going to mandate rules in relation to product assessment and quality assurance because we are just not going to let any old stuff through on this system.

Mr Palmer says: no, don't worry, those rules can still apply but what we are saying is anything that is, in the end, coming through to a customer, we will govern and we don't understand how that is going to work in relation to side loaded or third party store arrangements. But that we accept that's a factual issue. We recognise that.

Obviously, there are detailed rules in relation to the development tools at clause 7 which is 649. Then we get to the distribution provisions. Of course, as Mr Palmer fairly took you to, those distribution provisions in 9, at 654 electronically, they are not varying or qualifying in any way the fundamental right structure that is being provided for here.

So, yes, 9.2.1 does say you can only distribute through the PSN but that is mirroring our provision of property access and the terms on which we are willing to grant it, what the conditions are that you can have access to our IP and then benefit from the use of our systems.

If you want to get to customers we have essentially acquired through the enormous investment we've made through these systems, you will distribute through us.

Now I am not trying to ask the Tribunal to reach any decision about whether open or closed systems are better or worse. That's not the issue today. It's how you test whether or not there is a problem with a closed system being told that it must become more open through wider licensing.

So those, I think, are probably some of the key issues that frame how you have to look at this and, no, we are not asking you to make factual findings in relation to these matters. We've given you enough, we say, with Mr Svensson, Mr Hirano, essentially explaining why it is we have this system. People can come along and criticise that but it does not mean that we are simply engaging in some sort of exclusive dealing arrangement and that if you are going to come along and say it's abusive, you have to show that this wider licence would be required under competition law because otherwise, if you don't have the wider licence for the developers, the publishers, putatively the third party store provider, then the customers are not going to, legitimately, have any alternative means to get the product and, indeed, you would have to vary the terms of the customer licences because they are only entitled to use the PlayStation to acquire games through the PlayStation Network.

Again, it's just all part of the same scheme.

I am sorry I have taken a little bit of time on that.

THE CHAIR: We took you out --

MR BEARD: I think it's important because essentially, there was a wrong end of the stick sense in relation to Mr Palmer's submissions. Of course, that does take me to Google and the joys of self-preferencing.

The place I will start, if I may, with Google, so I will just move a couple of files. It's tab 12, isn't it? So it's authorities bundle 2 at page -- I think 835 electronically, is where it kicks off.

THE CHAIR: Yes.

MR BEARD: But, actually, the place I am going to go to is at the prompting of Ms Sarathy yesterday, I mentioned these paragraphs but I want to go back to them. So 176 if I may. Because, obviously, we know what --

LORD RICHARDSON: Sorry, Mr Beard, do you have a page reference?

MR BEARD: 865, I am sorry. In the electronic, I think.

LORD RICHARDSON: Thank you.

MR BEARD: Thanks. So we know what the history is. We know what the accusation is. We know that Google was coming along and saying: no, no, no, although you said this is self-preferencing, in other words, discrimination, it wasn't discrimination, this was actually a refusal to supply. But the context in which the Court's subsequent reasoning needs to be considered is by reference to the framework that it sets out here:

"It must be observed that in that regard, that given the universal vocation of Google's general search engine which is, as apparent from recital 12 of the contested decision, designed to index results ...(reading to the words)... its own, over the specialised results of competitors, involves a certain form of abnormality."

I took you to 177 yesterday:

"The infrastructure at issue, namely Google's general search results page which generate traffic to other websites, including those of competing comparison shopping services, is in principle, open which distinguishes it from other infrastructures referred into the case law, consisting of tangible or intangible assets, press distribution systems [an obvious reference back to Bronner], intellectual property rights [IMS and Microsoft], whose value depends on the proprietor's ability to retain exclusive use of them."

Our simple point is here that is precisely what the PlayStation system is, it's a system whose value, we say, depends on our ability to retain the exclusive use of them and that's how we've designed our business model. That's what Mr Hirano explains:

"Unlike the latter infrastructures [so in contrast to what we've been referring to as closed systems], the rationale and value of a general search engine lies in its capacity to be open to results from external third party sources and to display these multiple and diverse sources on its general results pages, sources which enrich and enhance the credibility of the search engine as far as the general public is concerned and enable it to benefit from network effects and economies of scale that are essential for its development and its subsistence in a market which, by their very nature, few infrastructures of that kind can subsist, given those network effects. A very large number of users is needed to reach critical mass."

And so on. I will leave you to read the remainder of it.

LORD RICHARDSON: Mr Beard, this part falls -- is the Court not -- I am not saying -- I clearly see the relevance of what you are saying to the argument you are making, but if one goes back to electronic page 859 --

MR BEARD: Yes.

LORD RICHARDSON: -- between paragraphs 138 and 139, we see that what we are dealing with there is -- what the court is dealing with there is the first part of the fifth plea in law:

"The prices at issue ...(reading to the words)... cannot be treated as abusive."

MR BEARD: I completely accept that.

LORD RICHARDSON: Whereas, just to complete the point, because it's very easy to lose one's track in these very lengthy judgments, if one goes forward to -- I think it's paragraph 199 --

MR BEARD: That's right.

LORD RICHARDSON: -- we then have what I had understood to be, but I would be grateful for your assistance, if you think I am wrong in this regard, that the issue where the Court is squarely dealing with the applicability of the Bronner case law, is the

second part of --

MR BEARD: You are completely right, sir. Sorry, no, I am not trying to demur and I will come on -- sir, you are completely right, the relevant part -- the relevant plea that's being dealt with or the part of the plea that's being dealt with in the section I've just referred you to, is, as you rightly say, headlined at 859. It's the first part of the fifth pleading law, as you say:

"Practices ...(Reading to the words)... that constitute competition on the merits."

LORD RICHARDSON: Yes.

MR BEARD: You are completely right. The point is, I was only dealing with findings from the Court and not submissions and I was just trying to explain some of the context because when you then go on to the second part of the fifth plea in law which, as you say, begins at 869 and is the relevant bit that is directly dealing with these matters --

LORD RICHARDSON: Yes.

MR BEARD: -- it important to have in mind how the Court was thinking about these issues more generally and what it was considering.

Because I think as I indicated, although I have not gone back through all the preceding part of that section on the first part of the fifth plea, there are references to cases like Microsoft in there. As I say, it's obvious that the references in 177 to press distribution systems and intellectual property, those are implicit references to Bronner and Microsoft. I don't think there's any real doubt about that.

But you are completely right that the relevant consideration of Bronner effectively begins at 212 which is on 871, "Findings of the court." I think as I took you to when I was opening, I referred you to those paragraphs running from 212 through to 218 which essentially are laying out the case law on refusal to supply. They are not in any way demurring or diverting from it.

Then the relevant point, probably just easily to pick it up, is from 220:

"It's apparent from recital 662 of the contested decision, Google is accused of failing to make a similar type of positioning and display available to competing comparison shopping services, as is available to its own comparison service and therefore failing to ensure equal treatment of its own comparison service and the services of competitors."

But this is being considered. The reason I took you to those earlier parts is because this is being considered in the context of an open system. You see that -- well at 222: "The contested decision thus envisages equal access by Google's comparison shopping service and competing shopping services to Google's general results pages, irrespective of the type of result concerned and does, therefore, seek to provide competing comparison shopping services with access to Google's general results pages."

The reason I emphasise that is because what is being said is that the Commission's decision was: you didn't treat Google's comparison services and rival comparison services equally, you discriminated against them. The remedy to deal with that inequality is to provide equal access to the sort of prominence that's afforded to comparison services. So it does talk about access being enabled as a remedy to the discrimination that the Commission has identified in the decision.

Then at 223, you see the fact that the Commission didn't refer to Bronner at all in relation to its analysis because it was dealing with this as an equal treatment case. That's why it didn't need to refer to Bronner. So Google then turns up and says: well, actually, because you are requiring us to provide access as a remedy, you should actually be seeing this as a refusal to supply that access case. That's what is going on here.

The Court then rejects that and how does it reject it? Well, if we go over -- so --

LORD RICHARDSON: When you say reject it, it says the Commission was wrong not

to consider Bronner but right in the result.

MR BEARD: Yes, it was right in its result, absolutely.

LORD RICHARDSON: But that's because they say Bronner -- they were wrong not to consider it but Bronner doesn't apply; is that right?

MR BEARD: Yes, exactly. Sorry, that's slightly shorthand. The key point is, sir, you are right but what they are saying is this isn't a refusal to supply case, is the way they are dealing with it.

LORD RICHARDSON: Again, we may be dispensing over the words but they might be saying it shouldn't be treated as a refusal to supply case in terms of the Bronner case.

MR BEARD: I am not going to quibble with that. That doesn't matter for my purposes. My point is this case we are dealing with should be treated as a refusal to supply case, so I am not going to fuss about that distinction.

229:

"It should be noted that while the practices at issue, as Google maintains, are not unrelated to issues of access, they can nevertheless be distinguished in their constituent elements from the refusal to supply issue in the case giving rise to the judgment in Bronner which vindicates the Commission's decision to consider them from the aspects of criteria other than those specific to that judgment."

So this is the point where they are saying: yes, okay, we should have Bronner in mind but, actually, this isn't a Bronner type of case. And why is that?

"Not every issue or part of or partly of access, like that in the present case, necessarily means that the conditions set out in Bronner relating to the refusal to supply must be applied.

"That is so in particular, as the Commission indicates at 469 of the contested decision, where the practice at issue consists of independent conduct which can be

distinguished in its constituent elements from a refusal to supply, even if it may have the same exclusionary effects."

So what it's saying here is, in essence, if the primary conduct you are concerned about is not a refusal to supply but might end up having exclusionary affects that's akin to refusal to supply, you don't treat it as a refusal to supply.

Just to skip ahead and I will work my way through it, they are essentially saying the unequal treatment you afforded so badly relegated the comparison shopping services that it was akin in some ways to having an exclusionary effect, like a refusal to supply. But that didn't turn it into a refusal to supply because it was the extrinsic conduct, not a refusal to supply, but the unequal treatment that created the problem, the exclusionary problem here.

That's what we come on to see in 232 which was the paragraph, sir, you asked Mr Palmer questions about:

"A refusal to supply that ...(Reading to the words)... judgment of Bronner implies that it's express, that is to say there's a request or in any event, a wish to be granted access and a consequential refusal."

Mr Palmer took the point there needed to be an actual explicit request. That's no part of the case law. It's not recognised in the Commission guidelines we were taken to yesterday but what it is saying is you actually need to have some kind of refusal, either a direct refusal in answer to a question or a clear: no, we shall not provide this.

Now, obviously, in our case, we are in the context of: no, we will not provide this wider licensing because no one has actually come along and asked us for it but it's transparently clear and it's out position we won't do that. The difference here, of course, is that there wasn't a refusal by Google in relation to comparison shopping services. They could appear on the results page. It wasn't excluding them by some sort of refusal to consider them, it was just relegating them compared to its own results.

That's why this is emphasised in the judgment here.

Then the second point that's made:

"The trigger of the exclusionary effect, the impugned conduct lies principally in the refusal as such and not in an extrinsic practice, such as in particular, another form of leveraging abuse."

Here, in Google, you have a different form of leveraging abuse. You are leveraging a general search and then you are using your power in general search to relegate rivals in the shopping comparison situation. That is the extrinsic conduct that is being talked of here. It's not a refusal to supply. In our case, the essence of what is being done is we are refusing to grant broader licences to publishers, putative third parties, developers or, indeed, customers. That's our refusal to supply. It's our refusal to grant access. It's not extrinsic, it's absolutely intrinsic to the way we've built the PlayStation system and that's why this case does not qualify the analysis that I put forward, about Bronner, IMS and Microsoft being the key cases here.

THE CHAIR: You could say that in Google, the access that is necessary to fix the preferencing makes the same linkage, couldn't you? Because in Google, the complaint is: I am not being given access on the same basis as your own service, effectively.

MR BEARD: It's a terms of access issue but that's what Google was trying to run and the court is grappling to some extent with the question you were asking yesterday, Chairman, which is where is the line?

THE CHAIR: Yes.

MR BEARD: What they are saying here is: well, look, we know that people can argue about how you describe stuff but what you really need to look at is what is the essence of what's being done here. If it's intrinsic to the alleged abuse, you are essentially saying: no, you can't have access to this facility in this way, then it's a refusal to supply.

If, on the other hand, what you are doing is saying: yes, yes, you can come and play but, actually, we'll just push you in a corner, then it's the unequal treatment discrimination abuse which is what the Commission had identified in its decision.

THE CHAIR: Does it follow that if you have a -- you are making a virtue, in a way, of having a closed system, if one can use that expression.

MR BEARD: It's perhaps not surprising my client would see it that way.

THE CHAIR: Does it follow that if you are in that situation, pretty much every abuse, I am sure you are going to find some exceptions but there could be a lot of abuses that are going to end up in the same place because of the nature of the closed system. So tied with -- just we find that pretty much everything you think about that complains about the nature of the closed system and the inability for there to be competition at the distributional level -- I appreciate you don't accept that analysis -- but pretty much every aspect of it is going to run up against the same problem, isn't it?

MR BEARD: I don't think so. Take Hoffmann La Roche and Intel -- it was no defence in Intel, for example, to turn round and say: we've got these exclusivity rebates but they are essentially just refusal to supply. That's just not an analysis that applies in relation to it. The same in relation to Hoffmann La Roche.

THE CHAIR: Perhaps my example is not a very good one then. Put another way, should we be concerned about the use of a closed system, effectively, to stifle any form of abuse? In a way, how do you deal with the point that -- you say the closed system is entirely justifiable.

MR BEARD: Yes.

THE CHAIR: Mr Palmer says -- actually, I think he's effectively saying you are using the closed system to create an anti-competitive position because you are excluding certain forms of competition.

MR BEARD: Yes, he is.

THE CHAIR: He is saying, actually, that makes the closed system an abuse in its own right, if one can put it that way.

MR BEARD: Let him make that case but that's a different case because what's he's saying is: I want to break open the closed system because he's saying: the closed system is flawed and I want to break it open. Okay, you want to break it open. The way you break open a closed system is to show that that closed system should have allowed you access and then it's no longer closed.

We entirely appreciate there is competition law out there that says there are circumstances where closed systems are not permissible. But in a way you can see that as the Microsoft interoperability situation. Essentially, what was being alleged was Microsoft was closing off interoperation of its server systems to rivals and it was a less intrusive demand for access to that system, just the interoperability information, essentially the virtual plugs, if you can see it that way, so that you could join different servers into a Microsoft system but that was breaking up what I suppose could be seen as a form of closed system.

We are not saying it's impossible to come forward with a case and say closed systems should be broken open but we need to deal with the reality of what it is that Mr Palmer is really saying here and, sir, you have absolutely captured it. He is saying: this closed system should be broken open because this closed system results in, he says, higher commissions, effectively, being paid by game providers and those higher commissions resulting in higher prices to customers. He says that's all the product of the way you've got it wrapped up and I want to -- he says: well, look -- I mean it's a fine piece of forensic advocacy -- I am just drawing a line through one clause in an agreement. So if I do that, then there is an exclusive dealing to the customers. But, no, that's breaking the closed system we've built. If you are going to do that, you need to hit the requirements for breaking open the closed system which are in terms of property

because it's our property to deal with these things as we want. You have to have a justification for mandating access. Here it's providing the wider licence.

LORD RICHARDSON: Would I be right in understanding and I appreciate this is a hypothetical situation --

MR BEARD: Yes.

LORD RICHARDSON: -- if one has a closed system such as the one we have here --

MR BEARD: Yes.

LORD RICHARDSON: -- is it the case then, that no matter how abusive the conduct, if you've got it tied up nicely with a closed system, where you say in order to interact in our system, you are going to have to use this intellectual property and you can only use intellectual property for the purposes we have in our licence but subject to that, we are going to impose all these and any other kind of context -- outrageous conditions on you.

But then we can be bomb proof, as it were, from any challenge to that because we say: no, that's fine, you need to satisfy Bronner because in order to, as you say, break open the system, you need to show indispensability and all these other conditions and show you're going to put forward an alternative product or whatever.

What I am trying to test is one reading of Google might be to say that it's not sufficient to characterise a case as a refusal to supply if there is extrinsic abuse, if there's some other abuse and, therefore, if there's the other abuse, that's really what the court is dealing with and the fact that it impacts on refusal to supply doesn't matter.

MR BEARD: Yes. Look, let me take it in stages. If you are talking about an extrinsic abuse which is apart from refusal to supply, I think one needs to work out what that extrinsic abuse is.

LORD RICHARDSON: Yes.

MR BEARD: Because Google is not telling you that. Google is telling you this extrinsic

abuse which means there isn't a refusal to supply issue. That's what this is doing.

LORD RICHARDSON: On the particular facts in Google, yes, I see that.

MR BEARD: Yes, but it's the fact and the reasoning, sir. The reasoning there is saying: well you shouldn't see this as a refusal to supply because -- a refusal to supply abuse -- sorry, I assumed you were talking about a situation where there is an allegation of refusal to supply abuse; yes?

LORD RICHARDSON: Well there is an allegation of an abuse that's met with a: no, no, this is a refusal to supply.

MR BEARD: It depends -- I don't want to come up with some sort of blanket story about what putative abuses there might be. But when what is being said is: you are essentially using the closed system in order to over price to people which is the essence of what's being said here -- I know it's exclusive dealing, tying, excessive pricing but the essence of the claim is you are overcharging customers because you have essentially built a closed system and you have market power within that closed system.

Now we don't agree with any of the story about markets but leave that for the moment. If that story on market is correct, the question is, are we using our closed system essentially to elevate prices? And the counterfactual that's put forward to say: well those prices are higher, is: well there would have been lower commissions charged outside a closed system.

THE CHAIR: Yes.

MR BEARD: And, therefore, you are then focused entirely on whether the closed system is justified in the circumstances. When we look at what the allegation here is, it's plainly and squarely not allowing the wider licensing, not allowing the wider access to publishers and developers.

So I am slightly concerned not to go further than that because when you say you could

include any sort of outrageous terms, I think one needs to be extremely cautious. I am not going to agree to any proposition so broad, of course. I am not saying you actually expected me to.

LORD RICHARDSON: No, no.

MR BEARD: But we say when you are talking about an access or refusal to supply infringement, then you do have to apply the Bronner and Microsoft tests and those are not -- they are just not unrelated to why you would invest to build a closed system, because the reason why you build a proprietary system, why you make that investment, is so you can make profits further down the line.

You have to be extraordinary cautious in competition law about coming in and saying: no, no, we've spent all that money, it's been extremely successful, everybody share nicely now. Well that might very well work in a sand pit, it's not the rule that applies in competition law.

LORD RICHARDSON: I don't think it works very well.

MR BEARD: As soon as I said that, I thought "No, actually, the rules of the sand pit are more vicious than competition law by some margin", but I leave that for another day. So that is the point that arises here. What you can't do is you can't take Google and say: well so long as I can re-describe this breaking open of the closed system as well, in relation to consumers, an exclusive dealing arrangement or in relation to the software, a tie in arrangement, then I can circumvent the requirements created in this refusal to supply case law. That's just not what Google is saying at all.

Just to close out on Google, obviously it goes on further but I took you very briefly and probably too speedily to 244 and 245. I should just touch on two 237, 238. So this is at 876 electronically.

You note there that what I am -- I'm so sorry, I should actually go back a page if I may. We focused on 232. If you read through 233 and 234, what is being talked about there

is actually going back to the point that Mr Ridyard raised with me the other day, that of course you can have a whole range of exclusionary abuses which may end up having the same effect as a refusal to supply but that doesn't mean you treat them all as such. Again, that is not changing how you characterise this case or the application of the Bronner case law.

Then just to finish, 237, 238 are touching on these ideas I picked up earlier, about the importance of this being, effectively, an open system and the impacts that can come through on an open system having exclusionary impacts.

Then I touched yesterday on 244, 245. I won't read them again but what those are saying is, as I have already anticipated, the fact that a remedy for an abuse might look like a mandated supply, doesn't mean that the abuse itself is a refusal to supply. That's what is being clarified there.

THE CHAIR: Should we take a break?

MR BEARD: I am sorry, I am much slower than we anticipated.

THE CHAIR: That's fine, we have time if weeded. Why don't we take a break. We'll come back at 20 to four.

MR BEARD: I am grateful.

(3.29 pm)

(A short break)

(3.40 pm)

MR BEARD: I shall move things along. Unless the Tribunal has further questions in relation to Google and the licensing and so on, I will move on from that.

On the factual issues you have the Svensson material which sets out our position there. He is effectively illustrating how these IP licensing problems would create ramifications. The proprietary intrusion would create difficulties in relation to encryption, security, account management for games and so on. Mr Palmer

says: I am sure we can deal with that by contractual arrangements. Well, no, but I accept that would be a matter for evidence in due course but it's the prior point, we shouldn't have to get there.

In relation to Mr Steinberg, I am not going to repeat the points I made. Mr Palmer dutifully read out various and referred to various bits of his statement and his background. We don't accept that they provide a proper basis. We will be making further enquiries of the PCR and more generally about Mr Steinberg. But for today, I don't think that matters. There are two points I would make. Mr Palmer emphasised that Mr Steinberg had talked about a range of ways, I think five methods, by which games could reach end users on PlayStation. It's paragraph 91, just for your notes. We say all of those involve having to have access to the system.

THE CHAIR: In the sense that at the most basic level, the game's got to get on to the system somehow.

MR BEARD: It has to get on to the system somehow, it has to be running on our software, it has to be permitted to access the PlayStation which, as I have already emphasised, is our property, our intellectual property. So that doesn't advance their position.

To be fair to Mr Steinberg, although he was instructed to comment on whether or not there might be any need for any IP licensing, further IP licensing in order for any of these methods to work -- just for your notes, that's in paragraph 8, page 530 electronic bundle, he was asked about that -- he doesn't provide any opinions as to whether, in fact, further IP licences would be required or wider IP licences. There's nothing there on those issues.

So there were two very limited points, one of which I have just lost my note on. It is that in paragraph 9.2.2, therein lies precisely the place where retail voucher permissions are to be found and referred to.

THE CHAIR: 9.2.2 of?

MR BEARD: The GDPA, I am so sorry.

THE CHAIR: The GDPA, yes.

MR BEARD: 9.2.2(ii) and there's a reference to permission to sell by way of retail vouchers.

LORD RICHARDSON: Is that in the version we were looking at?

MR BEARD: Yes, it's in both. Yes, you look in the right direction, sir. I am a mere vassal for these purposes.

I think at one point yesterday, Mr Palmer started finding on Netflix, the intellectual property and the licences, in order to enable Netflix to operate on the PlayStation. So non-game content. They are very much similar to GDPA licences. We have not tried to produce them but I just thought it was sensible just to note that, given that various references were made to it.

I won't take matters further in relation to those issues, unless you have further questions in relation to --

THE CHAIR: Thank you.

MR BEARD: -- those issues.

In relation to the future class issues which can either be dealt with as a strike-out or as part of the certification, I think I got a clear impression of where the Tribunal was thinking about these things and, obviously, we had the temerity to send in a copy of section 47A to you a couple of days ago because we think therein lies the answer, essentially.

THE CHAIR: I got that myself actually without seeing it.

MR BEARD: Oh, I'm sorry, yes.

THE CHAIR: I don't think there is anything that we need to trouble you further with on that.

MR BEARD: I am grateful. That then takes me to issues to do with methodology. Although I have not had the opportunity to review it yet, since it only emerged, I think, at 2 o'clock, there's apparently an interesting judgment of the Tribunal in relation to Interchange and the concerns that arise in relation to ensuring that the methodology that is being put forward that gets you from, in this case a finding of infringement, through to causation and quantification of loss, is very clearly spelt out.

That's an integral part of the certification process and an important part of the Tribunal's gatekeeper role, not least I think, probably, as a matter of self-preservation, in the sense that ensuring there's a process through to trial that can be managed is extraordinarily important, that at least a clear methodology is being presented by the other side.

I recognise of course, sir, the point that's made by reference to McLaren about the ships passing in the night position and there is an extent to which that was undoubtedly and clearly the case in relation to Mr Harman's first report. It is, to put it at its lowest, somewhat surprising for a report to consider the video games industry and not refer at all to the two-sidedness of video games console production and provision.

It has been absolutely the paradigm of analysis in relation to two-sided markets and I will touch briefly on the Tirole material that's been referred to in this regard that indicates the importance of the consideration of two-sided markets when you are considering pricing. Of course, that is at the essence here. The allegation that we are primarily focused on is an excessive pricing claim. It's an excessive pricing claim that's set out in the claim as focused on excessive commissions.

It's worth perhaps just turning up the claim form in this regard. So the claim form is in hearing bundle A and the paragraph I was going to go to was -- well one can start, in a way, with the counterfactual at paragraph 105, so that's 87 or 90, I think, electronically.

Because when you look at the exclusionary abuse counterfactual in 105 but over the page at page 91, you'll see:

"On the basis of the information currently available, Mr Harman's preliminary estimate of the level of commission or margin that would have been paid is in the range of X instead of Y."

So he is starting off focusing on the level of commission for the counterfactual and then if we go on two pages to paragraph 114, we are here dealing with the pleading in relation to United Brands. The two limbs: are the prices excessive and are they unfair? First limb, the excessive limb, paragraph 114. So it's page 93:

"The evidence currently available indicates that the commission satisfies the excessive limb. In particular, it appears that Sony enjoys an extraordinary profit margin in respect of digital sales on the PlayStation Store."

But it's the commission that's said to be excessive here.

That's actually true also when one goes down to the unfairness limb. Bottom of the page, 94 electronically:

"Even at this pre-certification stage of proceedings, it's apparent from the nature of the differential that the percentage commission set by Sony is unfair in itself."

So that is the gravamen, actually, of the United Brands claim. It's a focus on excessive commissions. What we have sought to emphasise is that when you are talking about commissions on the one side being effectively akin to the prices to publishers and the prices on the other side being the prices of games to customers and consoles to customers, it's imperative that the assessment of what is or isn't excessive and what is or isn't unfair, takes into account both sides.

Now this is not being taken as some sort of simple market definition point. We recognise and Mr Palmer was perfectly fair, that it would not be within our gift at this stage, unless there was some very clear error which I think we would say did occur in

Mr Harman's first report, to ignore considerations for market definition entirely, for us to actually contradict market definition, because market definition, we would inevitably be having to put forward the sort of evidence that goes beyond what could be really considered for the purposes of summary judgment or, indeed, given the limitations on merits consideration, the certification stage. So we are inevitably limited in that regard but we looked at the material that was produced in Harman 1 and it was obvious that it was clearly missing a proper consideration of how those matters fitted into any methodology to identify the excessiveness of the commissions or a route through to damages, never mind whether or not there was an infringement in the first place.

If I may, I will just go to Dr Caffarra's first statement. So this hearing bundle 1, tab 22 and it begins at 617 in the electronic bundle. If we pick it up at 621, this is the criticism that was levelled by Dr Caffarra:

"Mr Harman ignores the two-sided nature of business model of video gaming systems."

So this isn't just we are arguing about a specific market. We are talking about the dynamics of the industry we are talking about. Yes, in due course there will be arguments about market definition and whether it's the video gaming market and so on. But this issue of two-sidedness is important in any event.

If we just go down that page, one sees the economics literature recognising video gaming as a two-sided platform. Paragraph 15, it's talking about this move in the early 2000s leading to, in particular, the Rochet and Tirole paper about the economics of two-sided platforms.

That paper, ironically, used video gaming as the paradigm for the analysis of this new economic analysis overall, not specifically, but it wasn't trying to make a particular point on market definition, it was thinking about how do you do economic assessment of fair pricing and the dynamics of the way in which these industry features operate?

Mr Ridyard will be very familiar with these, as other members of the Tribunal may be. Then if we go over the page to 623, you'll see that what Dr Caffarra is emphasising is the changes in price on one side of a two-sided platform can affect the demand and price on the other side of a two-sided platform. I realise that this is a banality for those familiar with two-sided platform economics. What she stresses at 17 is:

"Mr Harman's analysis ignores the well recognised characteristics and monetisation of two-sided markets and particularly the business model of video gaming systems. This omission is a crucial flaw in Mr Harman's analysis of competition and pricing effects."

In other words, what is being said is if you are going to talk about what is and isn't an excessive or fair price, you do need to be thinking about all of these different dimensions, you can't just ignore that.

If we go over the page, she emphasises, in particular at 20, the Roche and Tirole material through to 23. If we just pick it up, perhaps to be read at leisure, 20 to 22, but at paragraph 23 on 625:

"Therefore, the economic literature makes it clear that the game store commission cannot be considered in the same way as a price in one-sided markets. Instead, the commission is part of a price structure that links the price of the console and the commission charged."

And is then, of course, also linked to the price of the games that are sold as well.

Please.

MR RIDYARD: Mr Harman, now maybe his acceptance is a bit grudging for your liking but, nevertheless, he's accepted the notion that it might be relevant to look at the console pricing and the game pricing in conjunction with one another, so what more do you want?

MR BEARD: What more do we want? I won't dwell further. Obviously, there is a fairly radical shift. There was a substantial radical shift today, where it was accepted that

although his report says console markets are not two-sided, in fact that's something of an error and, actually, he does accept, I think, that console markets are two-sided. Now that, again, is a pretty substantial issue and when we read it, I think our skeleton referred to it as being flatly wrong. It is flatly wrong. The idea that console markets are not two-sided is something that I think -- console gaming.

MR RIDYARD: Gaming.

MR BEARD: Would be very difficult. It's difficult to think about consoles --

MR RIDYARD: I mean is it really about -- because the prices we are talking about are the prices consumers pay for the console and then the price they subsequently pay for games on their console.

MR BEARD: Yes.

MR RIDYARD: So it's the price I am paying in both cases.

MR BEARD: Yes.

MR RIDYARD: Is it not really just like a system? Is this not just razors and razor blades rather than fancy notions of two-sided markets?

MR BEARD: No, I think it's more than razors and razor blades. There's a razors and razor blades issue here undoubtedly. By that, I take it to mean the cost you incur in relation to the console and then the cost you incur in relation to the games you pay and you have to consider that as a bundle when you are thinking about what the fair price for games is and the equivalent of razor blades, effectively.

So there's obviously an aspect of that. But no, it's not just that because it's also the two-sidedness of these issues, where you've got two groups of consumers, effectively. On the one side, you've got the gamers and on the other side, you've got the publisher developers.

I think as Mr Palmer fairly put it, you need to attract publisher developers on one side. Some of them can be your own game in-house developers but you do want to attract

third parties. We are not making any bones about that. On the other hand, you want to attract gamers. Gamers want good quality games and a variety of games. Publishers wants to have a good audience because if they are going to spend the money building the games that work on the PlayStation system, they are going to want to make sure that they can monetise that in due course.

Now those two sides of the gaming platform mean that there are effectively indirect network effects arising and direct network effects to some extent, in relation to these markets. And that, in those circumstances, those direct and indirect network effects will affect the relevant pricing that is justifiable in the language that we are going to be talking about, in the context of an excessive pricing case. And that's why Harman 1 was just catastrophically poor, in terms of its analysis, because you cannot begin to talk about an excessive pricing analysis in relation to one component of that system, without thinking about the other parts of it.

Now I understand --

THE CHAIR: Luckily, we have Harman 2, don't we?

MR BEARD: We've got Harman 2 but, sorry, I was just picking up the point you are making which is no, you can't just think about one side of it, you absolutely can't. And that's the point that Dr Caffarra was making and was making very emphatically in Caffarra 1.

The problems that persist in relation to it are illustrated by the fact that in Harman 2, we have a statement saying: consoles, no, that's not two-sided either, as if you are just talking about: well there you are just literally selling the razor. It's truly bizarre, in those circumstances, to think about consoles separately.

But we've heard today that's not the case and we misunderstood the statement saying that. But that doesn't end the story in relation to these issues because when we are looking then at the methodology that arises in relation to Harman 2, it's still important

to think about how we consider these various dimensions and whether or not Harman 2 is actually capturing a methodology that can properly do that.

If we go to Harman 2 itself, which is at -- it begins at page 446 in the electronic bundle. Tab 20. It is, of course, correct, as Mr Ridyard says, that we are seeing a radically different approach to how Mr Harman is proposing to deal with these matters which is now set out in his report.

He begins his analysis or his proposal at 4.88, "How this is addressed in my proposed methodology." I just want to take you to 492 because 492 is where you've got --

THE CHAIR: Page reference?

MR BEARD: I am sorry, it's 492.

THE CHAIR: It's a page.

MR BEARD: Yes, it a page reference, I apologise, I was thinking paragraphs and --

THE CHAIR: 492. What's the paragraph number?

MR BEARD: 4.6.2(i).

THE CHAIR: Yes.

MR BEARD: Now I am going to come back to some of the reasons that Mr Harman talks about why it is that two-sidedness is not really relevant here because Dr Caffarra has dealt with these issues in her second report and they are clearly still significant errors in the way Mr Harman is dealing with it.

But let's just focus on the point Mr Ridyard is raising which is, well, if we think about the preceding sections, he's now saying he will take into account commissions and consoles and presumably game pricing as well. But there's another thing that has come up today, as we understand it, which is reference to royalties. Now there's nowhere in this methodology that talks about how Mr Harman is going to consider the sort of royalties that Mr Palmer has been referring to. We are not quite sure how they fit in. Indeed, Mr Ridyard asked one or two questions about royalties. It implied, of

course, that what was being afforded was access to intellectual property which, of course, would rather reinforce the points I have been making in relation to my prior submissions.

But if what is now being countenanced is, in fact, there would now be arrangements for royalties to be paid or payable, then we don't understand how that fits with the methodology that's been put forward at the moment because there's no reference to that. There's only reference to royalties in relation to physical distribution, not digital distribution and that wasn't how we understood the case to be being put today.

So I may be misunderstanding what is being said and the exchanges with Mr Ridyard but what we have is a real concern that this approach that was put forward in Harman 1 was wrong. It has undoubtedly reacted to the criticisms that Dr Caffarra put forward. We are continuing to hear changes in relation to what Mr Harman's position is, for instance, in relation to console markets but we are also getting new ingredients that will be tipped into the mix.

Now we are not saying that is irrelevant to the analysis. That's not our position. But if you are going to be positing those sort of things you do need to explain how methodologically you are going to deal with them and there's nothing here.

Of course what we actually see at 4.6.2(i) are the key considerations that must go into any issue in relation to excessive pricing, and it's remarkably brief:

"In relation to paragraph 4.6.5 above, my application of the United Brands test to Sony's commission rate actually charged in digital distribution markets would take account of any cross-subsidy as follows. To the extent there was any cross-subsidy that Sony actually recovered, I would incorporate it within my assessment of the excessiveness limb. Any cross-subsidy would constitute in substance an economic cost of supply. I would quantify Sony's economic costs in accordance with the established economic principles for assessing costs under the

excessive limb of the United Brands test, including established approaches to identifying direct costs and for quantifying and allocating indirect costs."

Well, he then refers at the bottom to Flynn Pfizer, but there is an awful lot of mystery in relation to how this exercise is actually going to be undertaken in order to begin an analysis that gets you to a point of showing (a) that you actually have an infringement here of excessive pricing and (b) moving towards the extent of it. Notably, nowhere in there is there any consideration of issues of royalty and --

THE CHAIR: So, sorry --

MR BEARD: Please, sir.

THE CHAIR: So are you saying that this falls -- how would you put this in the context of certification and methodology?

MR BEARD: I can't go as far as the ships passing in the night. I can't do that because, given what has happened in relation to the changes in Harman 2, we are not in ships passing the night territory. But we are in a territory of having real concerns that there is a lack of clarity, given the substantial shifts that have been made, how it is Mr Harman is actually going to carry out the sort of analysis that go to the excessive pricing test, which is what we need here.

THE CHAIR: Sorry, can we just stay with this point for a minute because I think the way I put it to Mr Palmer, and I am not sure, perhaps I slightly mangled this, but I think if you look at the reason why we have a methodology test at all, of course it has to come out of the case law rather than the statute.

MR BEARD: Yes.

THE CHAIR: But I think it's important to tie it back into the statute.

MR BEARD: Sure.

THE CHAIR: It's not something that just sits free-floating, certainly the way -- if you look at the judgment at 2 o'clock, you'll see the way that it fits, it seems to me, is that

you are looking at the extent to which the methodology helps you understand how you meet the test in 79, if you do.

MR BEARD: Yes.

THE CHAIR: So how do you identify common issues and various other things that flow from that, including quite a broad set of requirements as to whether this is the most suitable way to deal with the proceedings.

MR BEARD: Yes.

THE CHAIR: But also, at the same time, not independently but part of it, but actually it's certainly worth calling out how do you get this thing to trial and make sure it's succinct because that protects the interests of the class members who have been drawn into this.

Within that, you've got a whole range of different things, haven't you? At one end the ships in the night, at the other end these are things that the Tribunal needs to keep an eye on and may need to encourage some dialogue.

MR BEARD: Yes.

THE CHAIR: Or whatever it is. Do you see where I am coming from?

MR BEARD: I completely concur with -- the two elements of consideration, I think of our statutory compliance but also blueprint to trial, is the euphemism for the second part of the consideration. It's undoubtedly right that the ships passing in the night issue actually probably goes more to blueprint to trial than necessarily it does the statutory provision.

THE CHAIR: I agree, yes.

MR BEARD: Because if you have a legitimate story as an expert, the fact that someone else disagrees with you doesn't mean that you can't be certified, I think is the way I tended to think of these things.

So I am not talking about ships passing in the night in the light of what has happened

in Harman 2. But we are saying that how are we going to actually work out what the methodology is, given that we don't have a finding of infringement. And when we come to the extension of the United Brands test, we are talking in very -- or Mr Harman is talking in extraordinarily general terms about costs issues and so on.

If you track back through the material that precedes it, which is this huge -- the wholesale shift in, "I will consider these other issues", what you also see is the predicate statements for inordinate fishing expeditions in relation to disclosure on various matters.

I don't want to be standing here saying: no, no, this is fine. We've got a blueprint for trial here, because we've got a couple of paragraphs saying how Mr Harman is thinking about costs issues and talking about going to trial. We are hearing new stuff about royalties and other methodological considerations and we are being warned about vast disclosure exercises.

THE CHAIR: Yes.

MR BEARD: So we are not at the far end, undoubtedly, but are we in a position where this Tribunal can happily say: no, no, no, this is fine. We can just roll forward with this approach to the expert evidence. There's not going to be a difficulty. There's no danger of wasted costs. We are going to be able to determine where the disclosure issues should lie and so on. This report does not do that.

THE CHAIR: I understand exactly where you are coming from on that, and obviously Mr Palmer may have some further things to say about this, but just taking that at face value for the moment.

MR BEARD: Yes.

THE CHAIR: You then have some options as to how one deals with it.

MR BEARD: Yes.

THE CHAIR: Actually some of those options may involve more vigorous case

management because, as you say, these questions tie into questions of disclosure. Undoubtedly, control of the expert process in a case like this is something that the Tribunal I think will want to exercise --

MR BEARD: It's clearly imperative, given that -- well, I don't want to anticipate what needs to be done with Mr Steinberg, but I imagine that there may be other issues, not just in relation to Mr Harman.

THE CHAIR: Then I suspect there are probably going to be a number of other experts who may well be necessary and there may be questions about whether they are recognised expertise and how one finds them and so on.

MR BEARD: Absolutely, yes.

THE CHAIR: Then I think -- and I don't want to sort of push you too far along on this.

MR BEARD: No.

THE CHAIR: But I think there is just a practical point, which is what are you actually asking us to do? Are you asking us to stop this thing and say: until you've come back with a further list of things that affects them, then that's as far as it goes? Or are we over the hurdle but we are going to manage it very closely? Those are two obvious options.

MR BEARD: Yes. I think the reason we've raised it as we have done -- and obviously it has been imperative it was raised because obviously the terrain has now radically changed from where it was put. Harman 2 is a late April report. It's undoubtedly different, as Mr Ridyard didn't say but obviously indicated that the world had moved on.

So it has been imperative we engage. Obviously Dr Caffarra came back with a second report. I think it's worth just very briefly, if I may, looking at that.

THE CHAIR: Of course.

MR BEARD: Because what it does is it does explain to some extent where, even

beyond the issues to do with royalty and methodology and cost mechanism and disclosure that is being fished for here, it talks about a number of the problems that arise.

So this is the supplementary bundle. I have it at -- I think it will be 314 electronically, if I am getting my supplementary maths right.

THE CHAIR: Yes.

MR BEARD: So what Dr Caffarra is trying to do is not engage in an argument about market definition, but what she is saying, as can be seen at paragraph 5, which is 316 electronically, is that:

"Having reviewed Harman 2, my conclusion, as expressed in my first report, remains unchanged. Mr Harman's analysis fails to account for well-recognised economic principles and is therefore unreliable as a result."

This goes in part to some of the reasoning that Mr Harman puts forward.

"Mr Harman incorrectly assumes that my evaluation of video gaming systems as two-sided platforms relies on an assertion that they have low, zero or negative profitability."

Now Mr Palmer says: no, no, that wasn't what was being said by Mr Harman. But it appears to take on a salience, as I think it's put by Mr Harman, which isn't correct because the low, zero or negative profitability doesn't change the way that you look at two-sidedness, inherently. Nor indeed does zero as a price.

I can see that zero as a price, as was discussed in Meta, creates other issues. But I think to economists zero is on a scale and that you can have negative prices and positive prices. In those circumstances, there is a danger in overemphasising zero, albeit I understand there's economic literature about the power of zero and so on.

Then there are points that are being made by Mr Harman that Dr Caffarra deals with which are indicating how Mr Harman is misunderstanding and improperly citing the

literature about business models and linkage between monetisation tools. So she has come back with a series of specific points saying: look, okay, you are now recognising that there are other considerations here, but you still have a fundamental range of problems in your analysis.

The reason I refer the Tribunal to that as a starting point is this is a: go away and come up with something better, clearer and more focused as your methodology. It's not: let's certify and carry on, is the way that we would put it.

Because we are concerned that there are real gaps in this methodology, partly because of the way that it has come to be put forward as an alternative proposal in a second report. As I say, I have taken you to those paragraphs where the proposal of analysis is set out in 4.6.1 through to 4.6.20 in Mr Harman's report. But then when we actually get to United Brands what we have is a very very narrow exposition of how we are going to go about this.

This takes me back to the thing that I said right at the outset. It's particularly important in a case like this, where the key allegation is that there was an abuse by way of excessive pricing -- okay, we've seen excessive pricing cases being brought, undoubtedly more over the last decade than previously, albeit predominantly in circumstances where the allegations were price gauging in relation to orphan drugs or narrow market drugs. We are not saying you can't bring an excessive pricing case, but it's imperative that this Tribunal, and we, and our experts, properly understand exactly how that allegation of infringement is going to be made out.

This somewhat on-the-hoof development of the way the methodology should be spelled out and what costs measures are going to be used and how it's going to be explored is not satisfactory.

Now of course Mr Harman will come back and say or Mr Palmer on his behalf will say: yes, but this is early in the process. I don't have the information. I have to think about

these things in general terms. But there is a very very significant problem with that at this stage because of course what we are ending up doing is certifying a case, if we were to certify on that basis, without us really having a concrete blueprint through to trial as to how we are going to deal with these things methodologically and that's what we say is highly problematic here.

Now we have other criticisms of Mr Harman's report, but that's part of the reason why we say it is imperative that there is actually a clearer methodological position adopted, not correction of typographical errors supposedly about whether or not console markets are two-sided, not casual references to royalties that may well be put into the mix.

These things need to be set out so we can understand and so the Tribunal can understand and so our experts can understand, and that seems to us to be a stage that should be done now, not after certification. I think that is really the critical issue that arises here: how is this best to be case managed? We do, as I say, have real concerns in that regard.

The matters that we've picked up in our skeleton argument obviously Mr Palmer worked through at some speed. I don't know whether it's of assistance for me to answer those various points for the Tribunal because I can do. We have seven objections to Mr Harman's report. Mr Palmer tried to work through those. I can join issue, but I am slightly concerned that actually what the Tribunal is focused on is not necessarily a to and fro in relation to particular issues but more a way of managing this process in order to get clarity.

THE CHAIR: I think that is right. I don't want to dissuade you from anything you feel you want to do.

MR BEARD: No, no, of course.

THE CHAIR: I think that because we do have the further report from Mr Harman,

Harman 2, and obviously there has been a pretty extensive canvassing of the issues between Mr Harman, Dr Caffarra -- I absolutely understand the points you are making. You say that still leaves some points unresolved. Indeed, there is clearly a significant difference between them about what is right or wrong. But it doesn't seem -- I don't think we would be assisted very much by further articulation of the issues between them, if that's helpful guidance.

MR BEARD: Yes. I think there are a number of other points that I do need to make, particularly in relation to the lack of credible methodology, given the retail pricing issues, because I think those are a further problem with Mr Harman's report.

There are one or two issues I need to pick up in relation to what's referred to as the selectivity of material that's relied on by Mr Harman. I just want to be clear about that before I come on to it.

THE CHAIR: Yes.

MR BEARD: We recognise that in the early stages one of the problems that is faced by a PCR is that they want to rely on expert material in order to back up their claim, and the Tribunal has regularly accepted the admission of expert material. But of course it's expert material at a stage which is very different from the provision of expert material in normal proceedings, because of course we normally case manage matters to ensure that experts only opine when there is a factual substratum upon which they can confidentially rest. There is a good reason for that because they are not fact-finders.

One of the problems we have here is that some of the material in relation to Mr Harman's report really just doesn't adequately reflect key issues that arise in relation to some of the factual material relied upon.

THE CHAIR: I think that's -- I saw Mr Palmer nodding for quite a lot of what you were saying. I think we are in this -- it illustrates quite an interesting point about this process,

doesn't it, that you get these expert reports turning up? Of course the more you go down the methodology line, the more weight you are putting on those expert reports. Understandably, particularly in these cases with what's said to be the asymmetry, there really is quite a lot of shooting in the dark.

I think that can cut both ways, can't it? I can absolutely understand why you are making the point you do, but equally Mr Palmer makes the point the same way which is doing the best we can but there are some limitations on it.

I think it probably, to my mind, comes back to the point about the case management -- if certification is granted, of how one case manages it after that.

MR BEARD: Look, I am not going to --

THE CHAIR: You are not going to --

MR BEARD: -- complete my submissions in 3 minutes.

THE CHAIR: No, you are not, and we have realised that. You have read that out.

MR BEARD: I don't think I need to be long tomorrow on this.

THE CHAIR: We are not going to hurry you. The only constraint we've got is that, because we've now anticipated that wouldn't be all day tomorrow, we do need to finish by lunchtime.

MR BEARD: Yes, that's fine.

THE CHAIR: Assuming that we can have an assurance of that.

MR BEARD: Yes. I think that would also give us the benefit overnight if we can think about any specific proposals that might assist the Tribunal in terms of case managing this expert process, that might be of assistance.

THE CHAIR: That would be helpful. I am conscious the conversation we've had is before hearing Mr Palmer, so obviously you should not take anything I have said --

MR BEARD: I would not dream of doing so, and of course the persuasive words of Mr Palmer may change the picture entirely. But on the other hand, we do have the

papers in front of us.

THE CHAIR: Yes. Good. Okay, and so we will have plenty of time. We could start early tomorrow if there was any doubt about that.

MR BEARD: No, I don't think it's necessary.

THE CHAIR: I assume there's ample time. No. Good. In that case, we will start at 10.30 in the morning. Thank you very much.

(4.24 pm)

(The hearing adjourned until Friday, 9 June 2023 at 10.30 am)