IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 6th May– Thursday 8th May 2025

Before:
The Honourable Mr Justice Roth
Keith Derbyshire
Charles Bankes
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Between

Robert Hammond

Proposed Class Representative

-and-

Amazon Inc and Others.

Proposed Defendants

And Between

Professor Andreas Stephan

Proposed Class Representative

-and-

Amazon Inc and Others.

Proposed Defendants

A P P E A R AN C E S

Philip Moser KC and Ben Rayment (Instructed by Charles Lyndon Limited & Hagens Berman EMEA LLP) on behalf of Robert Hammond.
Kieron Beal KC, Laurence Page and Hannah Bernstein (Instructed by Geradin Partners) on behalf of Professor Andreas Stephan.
Jon Turner KC and Oscar Schonfeld (Instructed by Herbert Smith Freehills LLP) on behalf of Amazon Inc. & Others in respect of the Hammond application.
Daniel Piccinin KC and Kristina Lukacova (Instructed by Covington & Burling LLP) on behalf of Amazon Inc. & Others in respect of the Stephan application.

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Thursday, 8 May 2025

(10.00 am)

THE PRESIDENT: Good morning. Like all courts in the country, we shall be observing the two minutes' silence for VE Day at 12 noon.

We have received the witness statement of Mr Hammond, for which we are grateful and which is helpful. Very helpful. Not only do I regard producing an amended witness statement as impermissible -- because a witness statement is evidence, it's not a rolling document like a pleading and once evidence is given, it's given, and if you want to supplement it, you serve a supplemental witness statement -- but I have to say, reading this shows it is also highly undesirable because it just leads to confusion and we now have a clear account of what happened and how.

MR MOSER: It struck me in precisely the same way. Having listened to you, Sir, yesterday -- and I completely agree with you -- it was that unfortunate amendment, or non-amendment, that led to the whole confusion in the first place.

THE PRESIDENT: Yes.

MR MOSER: In fact, there was no real confusion because at least the correct document was before the Tribunal --

THE PRESIDENT: Yes.

MR MOSER: -- at the certification hearing. We now have, I hope -- I submit -- a clearer picture of exactly how this came about.

THE PRESIDENT: Yes. There is one remaining point.

MR MOSER: Yes.

THE PRESIDENT: Now that we understand the sequence -- in other words, that the proposed PACCAR LFA introduced the change to the priorities, it was not the result, so it seems, of Government, it was in part of the negotiation for the post-PACCAR LFA as explained by Mr Hammond at paragraph 9(d), and that the revised paragraph 49

was to reflect that.

MR MOSER: Yes.

THE PRESIDENT: But we now have a further amendment, which is the third version, which was only just recently signed but obviously drafted a bit earlier, and which has made a further change following *Riefa* -- that's referred to at paragraph 11 -- and the new 9.1, which gives now Mr Hammond a discretion, whereas previously it was an obligation. But he hasn't commented on, in the light of that, what was the amended paragraph 49, where he says:

"I will apply for payment of the funder prior to distribution."

Well, that reflected the second LFA. We are now on the third amended where he no longer has that obligation, he has a discretion.

Is that still his evidence that he's going to apply in any event or --

MR MOSER: No.

THE PRESIDENT: -- is it now the case that you will consider what's appropriate?

MR MOSER: It is. I hope that was reflected in 11(a) on page 7 of the witness statement --

THE PRESIDENT: Yes.

MR MOSER: -- where he introduces clause 9(1) of the revised LFA.

THE PRESIDENT: So he says:

"I would not act so as to disadvantage the proposed class."

MR MOSER: Yes.

THE PRESIDENT: So that's what he means. So that now takes things further forward from paragraph 49.

MR MOSER: That was the intention of that sentence.

THE PRESIDENT: Yes.

MR MOSER: It is both the phrase, "Depending on the relevant circumstances" -- so

that's how he will exercise the discretion -- and, in any event, not that he put it that way, but he says, "I would not exercise my discretion so as to disadvantage the proposed class."

THE PRESIDENT: Yes.

MR MOSER: Then I think he's also made reference, of course, to the supervisory powers of the Tribunal.

THE PRESIDENT: That's, as I say --

MR MOSER: So, we have in a sense come full circle happily, and I apologise for the confusion.

THE PRESIDENT: Can I just raise one thing that perhaps we should have raised yesterday on your claim form --

MR MOSER: Yes.

THE PRESIDENT: -- which is in bundle B at tab 1. We understood that what's been called the exclusionary abuse applies only to customers of FBA sellers. I think that's right, isn't it?

MR MOSER: It would be consumers more generally, because the exclusionary effect would be across the board.

THE PRESIDENT: So, if we go then in the claim form --

MR MOSER: Yes.

THE PRESIDENT: -- on page, bundle page 31, internal page 28, at paragraph 94, it says, under the heading "Class definition", it says:

"Brought on behalf of all consumers who suffered a loss because during the relevant period they were caused to pay more for products than FBA sellers."

That's why I am asking about that.

MR MOSER: Yes, quite. There is that disconnect. We don't represent those non-FBA seller customers, even if the loss was more general. So, our class is the one that you

have correctly identified. The loss may have been wider but there we are.

THE PRESIDENT: And then it goes on to say that virtually all -- consumers will have brought products from FBA, and therefore the class is, in 97, "All consumers who purchased at least one product ..." at least one product "from the marketplace."

MR MOSER: Yes. So you have a distinction without a difference, which is these are the people who we represent. And in practice, virtually everybody is --

THE PRESIDENT: But the loss that you are claiming is loss, therefore, for products bought from FBA sellers. That's what 94 says.

MR BANKES: The question is, did those who bought from Amazon buy a product retailed by Amazon Retail or by a fulfilment by merchant, are they in your class or out of your class?

MR MOSER: It is people who bought from Amazon Retail and fulfilment by Amazon, they are in our class.

MR BANKES: And those who bought from Amazon Retail and fulfilment by merchants outside the class, which is what 94 says?

MR MOSER: Amazon Retail includes -- Amazon Retail are an FBA category.

THE PRESIDENT: I think Mr Hammond is using FBA sellers to include Amazon Retail.

MR MOSER: Yes, correct.

THE PRESIDENT: But I think there are two questions. One is I understand why you say the class is everyone who brought from Amazon because that's on the basis that in practice everyone who buys from Amazon will buy at least some products or one product from Amazon Retail or an FBA seller. So, to try to and distinguish them is, as you say, vanishingly small, I think it is a distinction without a difference, but the loss that you are claiming for them is loss suffered for paying more for products from FBA sellers, i.e. including Amazon Retail, and not for products from FBM sales. That's what

I am --

MR MOSER: Yes, save that that includes, of course, the commission loss of those people.

THE PRESIDENT: Whatever the loss is, those are the -- it is paying more for those products. I mean, however the loss is caused. It might be caused through pass-on and fulfilment, it might be caused through choosing something in the Buy Box when there would have been a better option that was excluded, and so on. But that's the --

MR MOSER: Yes. The link is to the purchase from FBA sellers, and that's the same in 92(c).

THE PRESIDENT: Yes, and we made that point: charge FBA sellers, and the Buy Box will generally be FBA sellers, yes. So it doesn't cover in the exclusionary abuse, I think, the effect on FBM sellers, if any.

MR MOSER: No. I entirely recognise why you ask, and I am grateful. But that's a complexity one sorts of accommodate. You have to cut your cloth somewhere.

THE PRESIDENT: Yes, thank you. Thanks very much.

So, Mr Turner, funding.

Submissions by MR TURNER

MR TURNER: I am obliged, Sir. Just to sweep up on that, three points emerged just for clarity. In answer to Mr Bankes' question, it is paragraph 3 of the claim form where FBA Sellers is defined, as the President says, to include Amazon Retail and FBA sellers.

Second, it is 92(c), 94 and 95 all making the same point. I referred to 92(c) yesterday, the point that the President has now inquired of Mr Moser about.

And third, we are grateful for Mr Moser's confirmation that his class is the consumers who bought from FBA Sellers specifically.

In my round up of the methodology points at the end of yesterday, I referred to having covered four points and it was drawn to my attention I inadvertently missed one. It was pass-on: the absence of the methodology in the Pike reports on dealing with pass-on of overcharges from Amazon to the sellers. I merely draw that to your attention for completeness. I now move on to funding.

THE PRESIDENT: Yes. Of course, you addressed us on it --

MR TURNER: I have addressed you on it.

THE PRESIDENT: Is it included in your summary?

MR TURNER: I should have done that.

THE PRESIDENT: Yes, understood.

MR TURNER: Funding, we submit as follows: this is a clear case where the funding arrangements as they currently stand are incompatible with the proper interests of the class, although the PCR and the PCR's lawyers are content with them.

The two issues to look out for, which the Tribunal in *Gormsen* 2 summarised, were these: (1) the question whether the arrangements envisage that the funder will take more from the class than they properly should; (2) whether the incentives resulting from the level and structure of the agreed arrangements will actually lead to a conflict between the interests of the class and the interests of the funder. For your note -- we need not go there now -- it is paragraph 34 of *Gormsen* 2 at Authorities 33, PDF 2026.

I would add that allied to that is a third consideration for the Tribunal in this exercise, which is the question of how alert the PCR is or has shown that it is to these matters. That's the point which came to a sharp edge in *Riefa*.

In a nutshell, we say the situation confronting the Tribunal is this: one, the funders' return, we see, comprises three elements. You recoup the outlay first; second there is a so-called commitment fee for every year of the litigation running, which is a constant 15 per cent of the maximum total amount stipulated in the litigation plan

budget. The third component is the huge stepped cash payments, we see those rise from £40 million immediately to £80 million, 90 days after a certification order. Then they go up to £100 million if the case is still continuing after the date when the list of documents are first ordered to be served.

The second point, looking at the commitment fee, that rewards the funder handsomely by reference to sums we say in excess of what it has actually committed, and beyond what it could ever be required to contribute. We trailed that in the written submission, I can develop it.

Third, looking at the lump sum cash payments, those are not part of a committed funds model, as Mr Moser said. The returns on the spend which were envisaged by those lump sums in their own right, viewing them as returns on the money hazarded, are staggering. If this case were to settle shortly after disclosure, then the funder stands to get more than 20 times the money it is actually hazarding. So that is, one may say, the funder's sweet spot.

Fourth, these levels of return are far higher than the returns that were under scrutiny in the recent cases in this Tribunal, *Riefa* and *Bulk Mail*. In both of those cases, the maximum returns at any point in time topped out at 5.75 times the spend.

Fifth, even if the Tribunal gauges the funders' return here not by comparing it with the money it hazards, but by comparison with the maximum committed capital, you have returns -- it is common ground -- which approach eight times the maximum committed capital, according to Mr Moser's calculation. We consider that part of the calculation is wrong, but if you take it on its own terms, it's in the same territory as the 8.3 times level which the Tribunal President in *Gormsen* described in withering terms as not defensible and sufficiently extreme to warrant calling out. The points Mr Moser made in an attempt to distinguish *Gormsen* were wrong, as I will show you.

Then sixth: until today, on top of those matters, we saw an apparently firm declaration

of intention by the PCR to apply to the Tribunal for the funder to be paid from any award in priority to the class. Those are the circumstances.

On the PCR side, you are urged that this level of return and this structure is not a concern and that none of this matters now anyway at certification. The suggestion is that all concerns can and should be left over for consideration at the end of the case. In my submission, that's unsatisfactory and wrong, and nor is it compelled by the authorities. There are at least three straightforward reasons for the Tribunal to grasp the nettle now which I will state briefly and then develop.

The first is that the Tribunal is exercising a gatekeeper function here at this stage with an eye to protecting the legitimate interests of the class -- if I may say so as well as the Defendant -- from potentially rapacious behaviour by a litigation funder.

If the returns to the funder which are envisaged here are indefensible and therefore at levels which could unjustifiably eat into an award of compensation to class, then it should indeed be called out now because it is repugnant to the overriding purpose of the regime. Indeed, it is inconsistent with safeguarding the reputation of this young regime.

In some cases, it is true that the Tribunal may consider that the agreed return appears potentially problematic, but a better view can be formed down the line in the light of the actual known settlement or damages award. In such cases, it can make very good sense to defer the funding question to the distribution stage. We concede that; however, this is not a borderline case.

Second, as, Sir, you remarked in the course of Mr Moser's address, the Tribunal is entitled to have in mind at this stage, certification, the need for clarity also on the part of this particular funder. We would add there is a similar policy concern more generally when you look at the interests of the wider litigation funder community to know where it stands and, by extension, in the overall health of the collective action regime itself.

To develop that for just a moment, the last thing the funder here should want is for litigation to proceed with the current arrangements only to find that at the end of the day, those are torn up and replaced with a significantly lower level of return after the funder has spent significant sums on the litigation. That would be bad for the funder. But more importantly, it would be bad for the funding market observing this, and therefore for the potential represented classes which require a well-functioning litigation funding market to bring claims. Indeed, we now see from the new witness statements some of the underlying tensions that arise in the making of these litigation funding arrangements.

If funders are to be put in the position of funding whole proceedings with no confidence that they are going to get anything like the returns to which they are contractually entitled, despite the claim having been certified, that will deter them from funding such litigation. Of course, it is true that certification doesn't mean endorsement of the particular levels of return envisaged; it is true, too, that funders must accept the risk that their returns ultimately may be adjusted or affected at distribution. We say that it shouldn't mean that certification is an open gate when you come to funding. So those are the policy points.

Third, turning to the circumstances of this particular case, there is a practical reason to grasp the nettle now. It is this: it has emerged in the run-up to this hearing that there were no alternative offers of funding for the claim. There were no alternative terms made available by this funder. It has been explained that at the time when the funding was sought, there was a specific difficulty. Mr Moser, and indeed now Mr Hammond, have referred to the existence of the rival consumer PCR, Ms Hunter, who already had her proceedings in place. The suggestion is that that deterred other funders from putting forward offers unless there was an agreement for co-counsel representation, a sort of consolidation between the PCRs.

What one sees is that because of that particular spat at that particular point, there was a predicament which means that if this is left untouched, the entire shape of the funding for the entire future progress of this case potentially has been affected by it. We submit that if the Tribunal agrees that the levels of return envisaged in these funding arrangements in this case are exceptional, are exorbitant, then you should not grant certification predicated on these arrangements.

The counter is, well, that will snuff out a good arguable claim on behalf of consumers. To put Mr Moser's position on that colloquially, it's "our way or the highway." We say that is not the case and should not be the necessary approach taken by the Tribunal at all.

First, as you see from what happened in *Gormsen* itself, a clear expression of view by the Tribunal that it finds arrangements indefensible can lead to funding arrangements in place undergoing significant change and for obvious reasons.

Second, as Mr Bankes pointed out yesterday, in this particular case, if you think about the explanation that was given for the extreme funding arrangements, it was that at the time of the arrangements, Hammond was second on the scene, there was this prospective carriage dispute with Hunter, and the fact is that those circumstances no longer are applicable. There are prospects, therefore, both for this particular funder and indeed other funders, or indeed other potential class representatives, to take this on.

With the Tribunal's permission, I propose to amplify the arguments on those points and respond directly to Mr Moser's submissions. I have an eye on the clock because Mr Piccinin will need to stand up in about half an hour, so I shall go briskly.

To begin with, the commitment fee. If you have the amended LFA, you will find it in D2 -- my D2 anyway -- tab 66 in D, and the returns page --

THE PRESIDENT: Just a minute. Tab 66, yes.

MR TURNER: Clause 9.2 setting out the components of the return is on page 246, that is clause 9.2. After the references to the lump sums and when they come in, at 9.2.4 you have the funder's commitment fee:

"An amount equal 15 per cent per annum of the maximum aggregate amount stipulated in the litigation plan budget as being estimated costs required to pursue the action."

If you go back to 237, the litigation plan budget is defined in clause 1.31, and it is the agreed form project plan for the action as amended from time to time with the prior written consent of the funder, including the solicitors' estimate of the costs required to pursue the action and an outline timetable, which is agreed.

The litigation budget is appended to Mr Hammond's witness statement at Bundle C tab 6. However, what you have in the hard copy anyway was so small that it could not be read. We have blown it up --

THE PRESIDENT: Yes, I think we have the blown-up copy.

MR TURNER: We had to blow it up and spread it over, I am afraid, two separate A3 pages.

THE PRESIDENT: I think we have a one-page blow up.

MR TURNER: There is a new one because even that one was too small, I am sorry.

THE PRESIDENT: That one seems all right.

MR TURNER: Once one passes the age of 50 years old, you have to be in more than 12 point type.

THE PRESIDENT: Yes. The first page is pre-CPO, is it, and the second page is post-CPO, and then we have a total.

MR TURNER: Yes. The only entry I want to take you to, if you look at the bottom row "Total costs", and you go through the various columns and the sequence, you come to "Total budget" in the last column on the second page. You see the total there,

bottom right-hand, £19,839,589 --

THE PRESIDENT: Yes, £19.8 million.

MR TURNER: Yes, to the nearest pound, but approaching £20 million.

THE PRESIDENT: Yes.

MR MOSER: Forgive me, I hope this is the only time I rise to interrupt, and it is very brief. It is in paragraph 63 our skeleton argument.

THE PRESIDENT: Yes.

MR MOSER: My learned friend may be coming to this, but this is not actually the litigation budget as such. This is the complete budget including contingency fees, so it goes beyond the commitment from the funder.

MR TURNER: I will wait for Mr Moser's reply.

THE PRESIDENT: Just a minute. Yes.

MR TURNER: So you also see that this conforms precisely to the description in 1.31 we were just looking at. It is the agreed form project plan, it does have the estimates of the costs required, it does have the outline timetable, it does have the total sums. As you hear from Mr Moser having risen to his feet, there is an issue between us about whether the 15 per cent fee relates to the almost £20 million figure in this document, or to a lower figure of something called the costs limit. If you have the agreement open and you look at page 236, that is defined at clause 1.17, where you see a reference to the total action costs in the litigation plan budget. A lower figure is specified there of £16,692,364, excluding, for the avoidance of doubt, any amounts relating to the costs of the distribution.

Now Mr Moser calculates the commitment fee which is part of the funder's return by reference to that figure, the costs limit.

THE PRESIDENT: Can we just sort this out. Just pause a minute.

Mr Moser, is that what you say is the parties' understanding of the funder's

commitment fee, that it is the costs limit? Is that your position?

MR MOSER: Yes. Because that's what it is committed to fund --

THE PRESIDENT: Never mind that. Rather than arguing about interpretation, can you undertake to have that clarified in a letter signed by the funder and Mr Hammond?

MR MOSER: I am happy to. It is in 9.2.4, the litigation plan budget, which is at C/6/79, the relevant document.

THE PRESIDENT: I think we have just been looking at that. It is a question of how you interpret it.

But if there is ambiguity now and if the parties to this agreement are clear what it means, then there is no objection to them writing jointly saying, "By clause 9.2.4, we agree that it applies to the costs limit as set out in clause 1.1.7".

MR MOSER: If it helps, absolutely.

THE PRESIDENT: I think it does because it resolves any ambiguity.

MR MOSER: Yes.

THE PRESIDENT: And that can be done by early next week?

MR MOSER: Yes.

THE PRESIDENT: Yes, all right. That deals with that point.

MR TURNER: Yes. The important point there which has not been clear is that the funder agrees that that is the case.

THE PRESIDENT: Obviously.

MR TURNER: I welcome the indication, and we will see.

The implications of it are not that considerable for the argument. If you take 15 per cent of that number, you get a commitment fee of about £2.5 million a year. The difference is £3 million a year on our approach, 15 per cent of 20.

THE PRESIDENT: Yes.

MR TURNER: So, I say no more about it. I won't go into the contractual construction.

I focus on the issues with this commitment fee before stepping back and looking at the overall picture. The commitment fee, in our submission, provides a rather striking illustration of imbalance in the funding arrangements that the PCR has signed up to. The funder stands to get the 15 per cent annual return on the full budget, even during the early stages of the litigation when it has in fact contributed a very small fraction of the total budget, and that is even if it never comes close to contributing the full budget. The third point will not apply if Mr Moser produces this document, but if we were right that the full figure was 20 million, it doesn't take into account conditional fee agreement discounts on legal representatives' fees. But leave that to one side.

The point is that the commitment fee as framed unambiguously remunerates the funder on funds that it will not advance -- may never advance, I should say. With that observation, I turn to Mr Moser's overall arguments to you yesterday on the funder's potential return.

His first point was that you shouldn't assess the funder's return here by reference to the money it is actually hazarding at any stage. His argument is that you must compare the level of return against the total money committed. He says this here is a committed funds model, that means you must interpret it by reference to the maximum committed funds and look at it in that way.

He points out that *Gormsen 2* was a case where the LFA, the agreement, had a committed funds model. We say that is true so far as it goes, that was the case in *Gormsen 2*. There are three simple responses to this.

Number one: the fact that in *Gormsen* the funder might receive a large return on funds it hadn't actually hazarded was not an issue in the case. It was not explored in the case. The LFA in that case provided for the entirety of the funder's return to be a multiple of the funder's total commitment ratcheted up over time. That was what happened in that case.

By contrast, if you take two others, very recent, *Riefa* and *Bulk Mail*, like in this case, the agreement did not calculate the funder's return simply as a multiple of the committed maximum capital. In both those very recent cases, the Tribunal did assess the return by reference to the projected spend of the funder, and it looked at the multiple of the drawn funds which the return represented in both *Riefa* and in *Bulk Mail*.

It may help if I just show you the references, although the point ought to be clear. Authorities 4 -- if you go first to *Riefa*, it is in tab 41 of the Authorities bundle. If you go in the PDF to page 2303 --

THE PRESIDENT: What paragraph?

MR TURNER: Sorry, my pagination is different.

THE PRESIDENT: Yes. Do you have a paragraph?

MR TURNER: Paragraphs 43 to 48.

THE PRESIDENT: No, 2303 is correct. 43?

MR TURNER: Yes. In my hard copy, it is a different pagination.

THE PRESIDENT: Yes. 2297 in hard copy, I think.

MR TURNER: Yes. You see at 44, the table in particular with the multiples being given there. If you read it, if you look at paragraph 46, reference to comparison with the value of the drawn funds.

So that was what was being looked at in that case. If you look at the table at the top or just above paragraph 49, you can see the additions of the four times multiple for the balancing multiplier, and the 1.75 times for the priority multiplier, accounting there for the maximum of the 5.75. That was 5.75 after seven years, as you see three lines down in the following paragraph, paragraph 49.

That's the position in *Riefa*. The other is *Bulk Mail*, which is Authorities tab 42. The relevant paragraph is just paragraph 34, which you may have at PDF 2345.

THE PRESIDENT: Sorry, which paragraph?

MR TURNER: 34.

THE PRESIDENT: Thank you.

MR TURNER: If you read that to yourself, you will see again the description: drawn funds will be repaid, then the multiplier applicable to the drawn funds and adding up the two components, you get to 5.75 overall again, which is consistent with the other case.

That's how it was approached in those two very recent cases. My third point is to step back from those examples of what has happened recently in practice and to say that it obviously reflects commercial reality to approach the assessment in this way. It is suggested in effect that the only comparison here should be between the maximum amount the funders agreed over the whole litigation, which is now said the £16.7 million, compared with the return it gets on settlement or judgment.

It is argued that that is the right comparison -- the only comparison -- even if a settlement comes at an early stage and the funder has not provided anything like the £16.7 million. The justification given is that there is an opportunity cost. However, we know that in this case the funder has been willing to undertake to maintain access to only a minimum of £5 million or the equivalent in other currencies -- that's in their skeleton at 55(c). In the interests of time, I shan't necessarily take you to that, unless you want it. That's the hard edge of the commitment.

We say it puts paid to the idea that the funder is tying up the full litigation budget amount of £16.7 million in the litigation from the outset, and it is essentially sterilised. Because even the £5 million which the funder is willing to commit to maintain access to is obviously very unlikely to be sitting idle in non-interest-bearing accounts; the funder will still be getting a return on that cash in whatever currency it chooses to hold it. Of course, it may not be setting aside cash at all because the undertaking to

maintain access to £5 million is phrased to ensure that access to a borrowing facility is enough.

For all the rest of the committed capital, the funder doesn't even need to maintain the ready access, so it can put to use its other investments in the knowledge that it could be years before most of the commitment is ever drawn down, if that happens.

The last observation is that the funder's commitment of capital is already expressly -- and we say generously -- rewarded by the commitment fee. I have already excluded that from the return calculations based on the sums which were actually outlaid.

That is why the approach --

THE PRESIDENT: Sorry, the commitment fee?

MR TURNER: That's the 15 per cent.

THE PRESIDENT: Yes.

MR TURNER: Because -- yes, the 15 per cent.

THE PRESIDENT: But 15 per cent applied to what?

MR TURNER: The 15 per cent is applied to the £16.7 million.

THE PRESIDENT: But I thought that's what you are complaining about, that it shouldn't be applied to the £16.7 million.

MR TURNER: That's why I say it is very, very generous, and that takes account of the argument coming from the other side: you have to understand when you look at the totality of what the funder is expected to get, that there is a commitment.

THE PRESIDENT: Yes.

MR TURNER: We say one piece of this is a commitment fee, which itself is generous or indeed overstated, and then there are these very large stepped funds as well. When you roll it all up, the argument that all of this is attributable to a commitment and an opportunity cost does not fly.

Mr Schonfeld says I should make absolutely clear that the multiples I was referring to, like the 20 times figure which arises if there is a settlement after disclosure, that is aside from this issue. That's just if you look at the lump sums and the return on the outlay. That is why we say the approach, our way of looking at the problem of defensibility of the funds in this case is valid.

Riefa and *Bulk Mail* were not cases where the Tribunal said these were at levels where we might refuse certification. But what they do achieve is they give you a good benchmark to look at the sorts of returns funders in the market are broadly considering acceptable in these sorts of collective cases. It is striking that we here are in a completely different funding ballpark.

But having said all of that, even if you assessed the level of return in precisely the way the PCR urges, you make all the assumptions that he does to reduce the resulting figure, the funder still stands to receive around -- almost up to eight times the full committed capital, which is just a fraction below the 8.3 times that the Tribunal in *Gormsen 2* robustly said was not on the face of it defensible.

Then you have the question: is *Gormsen 2* distinguishable in some way? What was said was it is because the Tribunal objected there to the fact that the level of return rose to over eight times the level of exposure some 21 months after the first milestone date, the payment for the payout. The reference if you have it is in Authorities tab 33, it should be PDF page 2029. The reference is at paragraph 39, subparagraphs 3 and 4, thank you.

The case today before you is no different. The level of return goes up to almost eight times the level of the funder's maximum exposure at the time of the first order for disclosure, which is similarly not going to be too long after the first milestone date for the payout, which is 90 days after the grant of a certification order.

So, these reference points in the decided cases are important. We say there is

significant value in consistency and predictability in this Tribunal's approach in different cases because it gives funders and potential PCRs a clear and aligned understanding of what levels of return are considered to be acceptable. That is all I wish to say about the defence of the return which was offered by Mr Moser in his address.

In relation to the issues of priority, we have now had clarification today because it was not clear from the witness statement. Paragraph 49 of the first witness statement is essentially wrong or out of date, because it says, "I will do this, I will apply for the funder to receive ..."

THE PRESIDENT: When you say the first witness statement, the revised first witness statement?

MR TURNER: Yes, the Re-Re-Amended First Witness Statement said that at paragraph 49 in the violet text.

The Second Witness Statement as, Sir, your question elucidated was not wholly clear on whether that position was maintained, but orally it was confirmed that that position, that statement, is therefore out of date. So, one has a situation where there is a discretion, and the PCR says they will exercise it as they see fit at the time.

We do say in relation to priority that the concerns over the level of the excessive returns and the structure I have drawn attention to, those are exacerbated by the obligation to seek -- well, subject to this discretion, to seek payment of the funder's return where it is appropriate in all the circumstances.

The context here is that it has been mooted in these proceedings that recovery by consumers might be distributed by way of the Amazon account credits. That may well mean that there wouldn't be, if that model was adopted, undistributed damages available to any extent to the funder. If that is indeed what happens, any return to the funder would have to be paid in priority to the class or not paid at all. Therefore, we say that this accentuates the need to grasp the nettle today because whereas it may

be acceptable for a funder to take priority where the funder's return is clearly seen to be proportionate at this sort of stage in the case, where the return appears manifestly indefensible at this stage in the case, it creates a serious potential conflict between the interests of a funder and of the class with the PCR in the middle.

In conclusion, we say that in all these circumstances, it is appropriate to decline to grant certification to Mr Hammond's claim while the current arrangements represent the funding arrangements. The litigation should not go forward on an indefensible basis. That does not entail that a good arguable claim will be snuffed out. A good arguable claim, supported by a defensible funding package, can be expected to proceed. The answer is not, we say, to allow this claim with the funding arrangements having been created on the happenstance of a carriage dispute to plough on regardless.

Sir, those are my submissions.

THE PRESIDENT: Thank you.

Mr Moser, can I ask you something on this point about this question. When I look at the new clause 9.1, which is bundle D, tab 66, bundle page 245, HB/245, which is the new 9.1 -- we have 9.1.3, I am just trying to understand it:

"Subject to an order of the court to the contrary [the court is defined to include the Tribunal], instruct the solicitors to apply to the court for an order that the stakeholder fees [which includes funder's return and costs] are to be paid from either undistributed damages and/or where it is appropriate in all the circumstances from something other than undistributed damages, including from the proceeds [i.e. from before damages are distributed], having regard to the quantum of the funder's outlay, the quantum of the funder's fee, the quantum of proceeds, and the level of the stakeholder fees."

I think there should be a full stop there, shouldn't there, otherwise I don't make much sense of it.

MR MOSER: There could be a full stop.

THE PRESIDENT: If there isn't, I don't see -- "instruct the solicitors to apply" for this, that's what they are being instructed to do, either that or that -- or a semi-colon or something.

MR MOSER: Yes.

THE PRESIDENT: But, "If there is any dispute" -- well, no, it has to be a full stop. "If there is any dispute about whether it is appropriate in all the circumstances to make such an application as envisaged by this clause 9.1.2 ..."

Well, this isn't clause 9.1.2. 9.1.2 doesn't involve any application, so I don't know if that is supposed to be 9.1.3.

MR MOSER: It must be.

THE PRESIDENT: "Such dispute shall resolve through the dispute resolution process ..."

Which is clause 23, which I think is a reference to a claim to an expert --

MR MOSER: A binding opinion from a King's Counsel with appropriate expertise.

THE PRESIDENT: Yes. I am still not clear. Clearly it is going to be appropriate to make an application for stakeholder fees to be paid. It is bound to be appropriate to make an application for stakeholder fees to be paid from one or other of these sources. You can't imagine in any case where any money is recovered where one is going to ask for the costs and the funder's appropriate fee from either one or the other. So, I am just now struggling as to what the dispute is.

MR MOSER: What it seeks to address is the last point my learned friend Mr Turner made a moment ago: that there could be a conflict at the end of the day and it seeks to address conflicts.

So, you must apply in order to be able to make such payment, so that's not in issue. The question is whether Mr Hammond is going to make an application for a payment

from undistributed damages, which has just been approved by the Court of Appeal in *Gutmann v Apple*.

THE PRESIDENT: That is a possibility, yes.

MR MOSER: The possibility, yes -- or from something other than undistributed damages, including from the proceeds. In doing so, having regard to all the various things that are set out in 9.1.3 over the page as well.

So, if there is a dispute between, say, the funder and Mr Hammond and the funder says "No, you must go for proceeds", and Mr Hammond says, "In all the circumstances and taking into account the four factors in clause 9.1.3, I am going to go for undistributed damages", then that can be referred to the dispute mechanism.

THE PRESIDENT: So really, is this right: it's not that it should refer to clause 9.1.2, it should refer to clause 9.1.3.2, is that right? It is a bit of a dog's breakfast, this drafting. Because that's the question: it's not whether to make an application for payment of stakeholder fees, it's whether to make an application that they should come from the proceeds, or which alternative of the two alternatives to seek. Is that right?

MR MOSER: I think what learned costs counsel who drafted this intended by the phrase "make such an application", is whatever application under 9.1.3.1 or 9.1.3.2 has been proposed by Mr Hammond. So it says:

"... if there is any dispute about whether it is appropriate in all the circumstances to make such an application as envisaged by this clause."

Then someone has the wrong number, but 9.1.3. Then it can go to dispute resolution because of the conflict point my learned friend Mr Turner rightly addresses. That's how it is sought to resolve that potential conflict at that stage.

THE PRESIDENT: So it's, "Whether in all" --

MR MOSER: "Whether it is appropriate" --

THE PRESIDENT: -- the dispute is as to what application should be made pursuant

to this clause, really. It's a choice between 9.1.3.1 and 9.1.3.2.

MR MOSER: Yes.

THE PRESIDENT: So, if Mr Hammond thinks it's not appropriate to apply for this to come from something other than undistributed damages and the funder disagrees, then that can go to expert adjudication, which is binding.

MR MOSER: Yes.

THE PRESIDENT: If the adjudication supports Mr Hammond, then that's that, and he goes for undistributed damages.

If the experts' adjudication supports the funder, then Mr Hammond has to apply for something other than undistributed damages, including therefore proceeds, but then the Tribunal of course still has discretion not to accept it.

MR MOSER: Then the Tribunal is the ultimate backstop, the Tribunal will decide.

THE PRESIDENT: Yes. So there are two stages, as it were, if there is a dispute between him and the funder.

MR MOSER: Yes.

THE PRESIDENT: Yes.

MR MOSER: We have seen it in --

THE PRESIDENT: Yes. When they write their letter clarifying 9.2.4, which you have agreed to do --

MR MOSER: Yes.

THE PRESIDENT: -- I think it would be appropriate to say that in the last sentence of 9.1.3, the reference should be to 9.1.3 and not to 9.1.2, that's a mistake.

MR MOSER: If I may say, it is an obvious mistake because this clause makes clear that should be 9.1.3.

THE PRESIDENT: Yes, yes. It is really a dispute about what application to make, not whether an application should be made.

MR MOSER: Yes.

THE PRESIDENT: Yes.

MR MOSER: Whether it should be in that form, such an application.

THE PRESIDENT: Yes. Well, there we are. Okay, thank you. Just a moment.

Yes, Mr Piccinin.

Submissions by MR PICCININ

MR PICCININ: May it please the Tribunal. I would like to start, if I may, with a brief roadmap just so you know where I am going and how my various points fit together into the overall mosaic.

My first few points are going to be *Microsoft* challenges to Professor Stephan's methodologies for establishing the five alleged abuses in the Stephan claim. I just want to be clear about what I mean by that in view of the way my learned friend Mr Beal covered these topics.

I am obviously not bringing a reverse summary judgment or strike-out application; nor is the burden of my submission that it is impossible to put together a methodology for proving that there was an abuse in one or more of these categories. What I am saying is that in order to bring a damages claim like this one, you need a methodology which is capable of identifying at trial specifically what conduct, if any, is abusive. You need that for two reasons.

One is you need that methodology to establish there is an abuse in the first place. I think this is common ground, but this Tribunal in the Commercial Card Interchange Fee Case, *CICC*, said that PCRs do need methodologies at the certification stage to cover abuse, and of course Dr Houpis has endeavoured to put them forward. For your reference, that is in the Authorities bundle PDF page 1745, paragraph 158. That's one reason why you need these methodologies.

The other reason is that in a damages claim like this, at trial you need to know which bits of conduct you are supposed to be stripping out in the counterfactual, so you need to be able to identify the abusive conduct for that reason. In that respect, all of the points I am making to you about methodologies for abuse are also points about methodologies for causation.

Just for example: for the second and third abuses, which you will recall relate to alleged discrimination in the featured offer in the FMA, featured offer algorithm, you obviously need to know which criteria in the algorithm are discriminatory and which ones are not. Similarly for the first abuse, you are going to need to know which data and which uses of data by Amazon Retail are abusive, if any.

I am clearly not saying that Professor Stephan needs to give you the answers to those questions today. They have not had disclosure yet, so they couldn't give you a definitive set of answers to that question. But what they do need to give you is a plausible methodology that meets the *Microsoft* test for how those questions can be answered at trial.

I just want to emphasise that that is a very different exercise from the one the various regulators whose decisions you have been looking at were undertaking. Obviously, Sir, neither the European Commission nor the CMA ever even got as far as a conclusion on whether anything was abusive at all. The only conclusions they actually reached were that in view of the commitments which were submitted to them, they had no remaining concerns about the conduct which was the subject matter of the investigation.

That conclusion is important in and of itself today, particularly when we come to abuse 4, which is the SFP alleged abuse in relation to the UK -- I will come back to that. But --

THE PRESIDENT: Their conclusion was that the commitments dealt with their

competition concerns.

MR PICCININ: Yes. The specific point, just so you know -- because I think there was some confusion on this point with Mr Beal -- is that the only commitment which was given in the UK in relation to SFP was to negotiate to allow third party sellers to negotiate their own rates with DPD and Evri. So contrary to the impression which I think Mr Beal gave, there were no concerns and no commitments given in relation to the eligibility criteria which Amazon puts in place in the UK for FBM merchants to qualify for the SFP eligibility. I am going to come back to that and I will show you.

THE PRESIDENT: There were in Europe, weren't there?

MR PICCININ: But not in relation to the UK. And of course, the options in a situation with fulfilment in the UK is different.

THE PRESIDENT: Yes. But on the discriminatory operation of the algorithm, unless you say it's a completely different algorithm in the UK, and there is no such evidence, one would expect it to be the same.

MR PICCININ: The algorithm, Sir, is an issue for abuses 2 and 3. Abuse 4 is not about that, it's about eligibility to join Prime. So, for that one, we do say you should be looking at the CMA commitments.

I think on that there is common ground. Where the confusion arises is that my learned friend seems to have thought there were objections from the CMA dealt with by commitments to change the conditions for eligibility to Prime in the UK for SFP in the UK, and there weren't.

MR BEAL: I am sorry to interrupt. I made it clear that the CMA's commitments were not substantially the same for abuses 2 and 3, but I made it absolutely that the CMA's concerns were less far-reaching --

MR PICCININ: I certainly did not mean to suggest that Mr Beal was intentionally misleading the Tribunal. Maybe I misheard him, in which case I apologise. But we

will come back to that when I get on to abuse 4.

The main point I was making about what those regulators have done is of course they never had to deploy a methodology for finding an abuse at all because they didn't need to reach a conclusion on abuse. All they needed to do was to satisfy themselves that the commitments being offered made the concerns that they had go away.

The Italian authority is obviously in a different position because it reached conclusions. But that is under appeal, and of course we say it is fundamentally flawed -- obviously whether that is right or not is not for today. But again, that one says nothing about abuses 1 or 5, and it doesn't help much on -- sorry, abuse 1 is data, and abuse 5 is the discounting product. It doesn't help much on abuse 4 either, SFP, as you will see when we come to that.

In relation to abuses 2 and 3, the algorithm, of course my learned friend can point to anything in the Italian decision he likes as constituting a methodology for trial. But my submission is going to be: when I come and look at what he's actually said he's going to do, nothing it offers is an acceptable blueprint for how the scope of those alleged abuses, if any, can be determined at trial either. That's just to remind you of what the nature of my submissions is going to be, and I will come on to make them.

Then I will deal with Stephan's quantum methodology, particularly focusing on the gaps in the methodology on what we say is the highly speculative claims about overcharging the logistics and marketplace fees which Mr Turner already addressed you on yesterday in relation to Dr Pike's methodology. Then I will come to conflicts, and then the opt-in and funding together.

So there are a large number of topics. But in each of them, I am just going to focus on what seemed to me to be the most important points. I am not going to go through all of the detail of what is and isn't there.

So, beginning with the first alleged abuse, which is the data abuse. We say that when

you strip away the tendentiously defined term of "non-public seller data" and you look at what is actually included in the scope of this allegation, it is quite an extraordinary allegation.

THE PRESIDENT: You say "tendentiously", it is defined by the CMA as well.

MR PICCININ: It is the same terms they have used.

THE PRESIDENT: Yes.

MR PICCININ: I will come on to show you what I mean by that, Sir.

My submission to you is going to be that the methodology Dr Houpis proposes to deploy to establish an abuse and the scope of this alleged abuse would capture behaviour by Amazon which if it happened would be self-evidently pro-competitive. On that basis, it's not a methodology which is capable plausibly of delineating abusive from non-abusive conduct. In that regard, I do say it is telling that this is not a claim pursued by any consumer class, and I will come on to show what I mean by that.

To explain why, we need to have a look at those definitions, Sir, a closer look at the way the claim is put. We take that from the claim form, if we go to bundle B, page 153. Just above paragraph 21, you have a list of definitions. You can see the definition of "Seller data". Just read it carefully. It is:

"... data relating to and/or derived from the commercial activities of third-party sellers, including information about transactions on the website and the app."

The point I want to stress for now is you can see immediately that the definition is not limited, for example, to information provided by the sellers. It is enough that the information relates to their commercial activities. And by "commercial activities", that includes actual transactions consummated on the store. So information that Amazon gathers, not provided to Amazon, information that Amazon gathers which is about the sellers' commercial activities, i.e, relates to, would be caught by this definition.

Next we go to page 204, which is still in the claim form. I think this is where they define

non-public. You will see in paragraph 137 -- sorry, page 204 -- the way it is defined is as seller data, so that's referring back to the original definition:

"... that are available to Amazon but are not publicly available and cannot be replicated by third party sellers."

So, the test they seem to have in mind is whether the same data can be accessed or replicated by third party sellers.

As I am sure you all know, Amazon actually goes out of its way to provide lots of data to sellers to help them make better decisions about pricing and inventory management for their own products. You can understand why Amazon does that because it promotes the success of the store, it provides good options for customers. What we are talking about here -- and here I am on the same page as my learned friend Mr Beal, I think -- I accept he's only talking about the seller data that is not packaged up in some way by Amazon and provided to third-party sellers. We are talking about data relating to sellers which Amazon has by virtue of running the store, and which sellers don't have from those other sources that Amazon provides, or which other third parties provide.

My starting point here is that there is nothing unusual about the owner of a store using data for its own label purposes which would fall within this definition. Anyone who runs a store -- a supermarket, for example -- is going to see what's popular with customers and what isn't and is going to react to that, not only in terms of how they organise this --

THE PRESIDENT: Mr Piccinin, you said you are not going to contend that it's not an arguable case.

MR PICCININ: That's right, Sir.

THE PRESIDENT: But you now seem to be saying there is no arguable case that this definition of data, not gathering it and using it, is an abuse?

MR PICCININ: Yes -- yes and no, Sir. What I am not saying to you --

THE PRESIDENT: Yes.

MR PICCININ: -- what I am not saying to you is that there is no arguable case that within this definition of non-public seller data, you are going to find something that would be abusive.

THE PRESIDENT: Yes, but the arguable case is the case we have. To say there might be another arguable case, a lesser arguable case, but this case is not arguable, that's then going into the merits of what is an abuse.

MR PICCININ: Yes.

THE PRESIDENT: I thought you are not going to do that.

MR PICCININ: It's merits-related, then, Sir. The way I have put it is that the methodology which has come back from Dr Houpis -- and we are going to come on and look at that -- Mr Holt made the point that there is no methodology to delineate between uses of data which constitute competition on the merits and are legitimate on the one hand, and uses of data which don't meet that definition on the other hand. What we got back from Dr Houpis in his reply was the view that actually any usage of non-public seller data as defined is a departure from the competition on the merits. What I am saying is that that is not a methodology which can be deployed at trial to delineate between abuse and non-abuse. You are right, Sir, because some of that conduct, as I said at the start of my submissions on this topic, is just clearly not abusive.

THE PRESIDENT: By saying that, you are going into the merits. The question is: do they have a methodology of applying the case that is alleged? If you are saying the case which is alleged is not going to succeed because of the way it's being alleged to -- the allegation is too broad. That is a merits argument.

MR PICCININ: Yes.

THE PRESIDENT: Our question for certification, unless you apply to strike out or for partial summary judgment -- which you could have done, saying, well, on this definition of seller data, this case is bound to fail because it includes all sorts of things which you say can't be an abuse, and therefore the definition is inherently flawed.

But that's the case that's being brought. We have to ask, well, on that case, is there a methodology they can apply to get to a consequence of what loss is caused and how you value it?

MR PICCININ: Sir, I do see another way in which this argument -- or a way in which this argument could have been brought is by way of a targeted partial reverse summary judgment application in relation to this subject matter.

THE PRESIDENT: Given Amazon's resources and the quality of the legal advice it's getting, it would have thought very carefully about whether or not to do that.

MR PICCININ: Yes, Sir, of course. But an alternative way of putting the same point is that the methodology which has been deployed isn't leading anywhere. It's not going to take you at trial to a place where you can delineate between abusive and non-abusive conduct.

I do say, Sir, the nature of the point was put very clearly -- the substance of our complaint was put very clearly in our CPO response and there was supporting evidence from Mr Holt. It's been addressed by Dr Houpis in response. My submission is that the form in which it's put really shouldn't matter. If you would prefer to deal with it, of course the Tribunal has its own powers --

THE PRESIDENT: No, we are not hearing that. It's not been listed on that basis and it would be a very different kind of argument. We are hearing a certification hearing, which is very clear, save only on the question of opt-in or opt-out which is not looking at the merits.

MR PICCININ: Yes, I understand that, Sir.

Perhaps I can move on to the second aspect. There are two aspects of the methodology that we take issue with here in relation to abuse 1. One is the point I have just been making, which is about the width of the definition of non-public seller data, and the other aspect of it relates to foreclosure.

Just to illustrate the point I have in mind, if you think through the way in which this issue arises and what is the substance of the complaint. Take shoes, for example, which are something that Amazon Retail sells quite a lot of. Suppose it uses some non-public seller data within the definition -- here I am not going to take any point about what that is or whether it is considered to be non-public seller data -- suppose it uses that information to make sure that shoes which Amazon Retail already has in its range are kept in stock more reliably.

The consequence of that is that customers end up buying Amazon Retail shoes a bit more often than they would have done if Amazon had ignored these data. But nobody is driven out of the market or marginalised, instead it is just a bit more competition than if Amazon ignored the data. In those circumstances, the allegation of foreclosure on effect of competition wouldn't be made out, we say. So there needs to be a methodology to address that.

I will show you what Dr Houpis has said about that. That's in bundle C at page 1448.

THE PRESIDENT: This is the third reply report, yes.

MR PICCININ: In paragraph 83, you can see he refers to the various methodologies he proposes to deploy to look at the effects of the conduct.

The first one is a bottom-up exercise, which essentially seeks to re-run not just the algorithm, but re-run Amazon Retail's processes for making its various decisions, taking out the reliance that Amazon Retail places on -- or is said to have placed on -- non-public seller data. All he's going to show in that, he says, is a negative impact on the sales of Amazon's rivals.

If you think about an example like shoes, as I said before, you can well see how if it were shown that Amazon Retail used non-public seller data to keep itself in stock more often and customers like Amazon Retail shoes, it may well be there are more Amazon Retail sales, and fewer sales by third party sellers of shoes at the relevant time. But that doesn't add up to foreclosure of competition in a market for shoes, however you define the market for shoes. There is no analysis here which is going to tell you anything about the appreciable reduction in competition in a market for the retailing of shoes.

Of course, that's a non-dominated market, Sir. It's obviously not said that Amazon has a dominant position in the market for retailing shoes. You will recall, Sir, your judgment in Streetmap -- we can look at it if it is helpful -- where you explained that in circumstances where the allegation is an abuse of dominance that affects a neighbouring market which is not dominant, it is necessary to show appreciable effects.

Simply re-running not just the algorithm but Amazon Retail's processes and concluding that without the information, third-party sellers would have made fewer sales, doesn't establish an appreciable effect on competition.

THE PRESIDENT: You can only know when it is appreciable when you know what the effect is, so you have to do the exercise.

MR PICCININ: That I accept. I accept that would be step one in the analysis.

THE PRESIDENT: Yes.

MR PICCININ: What is missing from here is going further than that and doing a study of shoes, doing a study of batteries, doing a study of all of the other things that are sold to show appreciability.

What Professor Stephan --

THE PRESIDENT: Are you saying one has to do a market analysis of every single

product that Amazon Retail sells?

MR PICCININ: That would be one way to do it, Sir.

THE PRESIDENT: It's not I think what Mr Holt has said that we need market definitions for every single product on the Amazon marketplace.

MR PICCININ: The point being responded to here, which came from Mr Holt, is that Dr Houpis has not set out how he's going to show foreclosure. It's not up to us to tell him --

THE PRESIDENT: Well, it's for foreclosure. You are just saying it's not appreciable.

MR PICCININ: That's right.

THE PRESIDENT: But when you are dealing with such a wide range of products, one has to take a general view, it seems to me. Otherwise it becomes -- there is no effective way of looking at the question because you have to do potentially thousands of market definitions.

MR PICCININ: Sir, taking the example of shoes, as I hope is illustrative or illuminating, in the sense that it surely can't be said that anything going on here is going to make an appreciable difference to competition in shoe retailing -- to competition, Sir. Not to profits, but to competition.

THE PRESIDENT: We don't know. But we will know because you have changed the way you are doing things following the commitments.

MR PICCININ: That's right, Sir.

THE PRESIDENT: So, we are going to have here an actual -- not just an example, but a demonstration of what effect now it's had since it has been, what, about a year, and it will be a bit more than a year, no doubt --

MR PICCININ: No doubt.

THE PRESIDENT: -- before disclosure is complete and reports have been prepared. At least a year and a half in which one can see what the difference seems to be. If

there is no difference or a trivial difference, you will be able to say, "Well, that's not appreciable, there is no abuse".

But again, if you are attacking the method as opposed to whether you have a good argument on abuse, I don't quite understand why you say the method is flawed.

MR PICCININ: Because it doesn't go far enough, Sir. I should take issue just briefly with what you said about the commitment, Sir. It is true things will have changed as a result of the commitments. Whether you could actually use a regression analysis to determine what difference that has made is another question for another day.

But what's not accepted, Sir, is that the set of things which have changed were things that were abusive. We don't accept that any of them were abusive.

THE PRESIDENT: No, but the claimant says it was.

MR PICCININ: Yes.

THE PRESIDENT: So, on the claimant's case, we have a method of seeing what effect does this change have. It's not perfect because the period on this abuse may be fairly short and there will be a lingering effect on pricing and supply, and so on, sources of supply. But that's a start.

Of course, that's his point C.

MR PICCININ: It is, Sir. But the problem with it is that none of this goes any further than showing what is the impact on lost sales by the sellers. None of it goes beyond that to assess whether those lost sales add up to appreciable effect of competition in the retailing markets.

The fact that that may be difficult doesn't mean it is a step that can be skipped in the establishment of an abuse. What is extraordinary about this allegation, Sir -- and this is why it's not being brought by any consumer class -- what is being said is that these third party sellers have a right to be compensated for the fact that they faced more competition in the markets in which they compete. That is what it comes down to.

THE PRESIDENT: If using non-public seller data is an abuse, which is what is being said, if that advantages therefore Amazon Retail over third party sellers, therefore it distorts competition in the market and they say that causes them to lose sales.

MR PICCININ: Sir, the topic I am on at the moment is the methodology for establishing just those very things you have said. Just those very matters about whether it's abusive and whether there is a distortion of competition in the retailing of shoes, the retailing of batteries, or whatever else it may be.

That is a matter they have to prove and it's a matter for which there is no methodology here because it stops at showing, "You used data and that caused us to make fewer sales" -- "us", the sellers --

THE PRESIDENT: Yes.

MR PICCININ: -- to the benefit of consumers.

THE PRESIDENT: Sorry? What's to the benefit of consumers?

MR PICCININ: Amazon being in stock more often, Amazon having a slightly lower price. Those things are to the benefit --

THE PRESIDENT: We all know that abusive conduct by a dominant company can lead the dominant company to charge less.

MR PICCININ: It can.

THE PRESIDENT: That's well known. It doesn't mean it's not an abuse --

MR PICCININ: It doesn't.

THE PRESIDENT: -- one is looking at the competitive markets.

MR PICCININ: Absolutely, Sir.

THE PRESIDENT: That's a sort of emotive point to make: consumers are better off from predatory pricing because they pay less. That doesn't mean it is to the benefit of consumers, so I think that is a bit irrelevant. We are looking at the competitive nature of the conduct.

MR PICCININ: Sir, the reason why it's not irrelevant -- of course if it were said our prices were predatory, that would be a different matter --

THE PRESIDENT: It is also for the benefit of the consumers paying lower prices, isn't it?

MR PICCININ: But it leads to foreclosure.

THE PRESIDENT: It may do.

MR PICCININ: It may do. Predatory pricing if it is below cost has been held not to be competition on the merits. But the conduct described here is very different and they need to show it is non-predatory pricing. It is just being in stock more often, charging prices that are lower but which are above cost. That is conduct to the benefit of consumers, unless they can show there has been some foreclosure or distortion of competition in those retailing markets. That's the step I am putting to you is not addressed here.

THE PRESIDENT: I am just lost. It seems to me if you are using data of others which you only have through your dominant position and which they don't have to compete with them, and subject to your point about appreciability -- which therefore clearly disadvantages your competitors, that is not competition on the merits. Whether it has an appreciable effect is a different point, but that's the abuse case. That's the merits argument.

MR PICCININ: I have already made the point that it's not information of sellers either.

THE PRESIDENT: You say it goes too broad, but some of it is. I mean, what about the seller's suppliers? Amazon sees that this third-party seller on the platform is doing very well with this product, it sees who the supplier is because it has that information, and it gets it under the BSA. It's entitled to use it --

MR PICCININ: Yes.

THE PRESIDENT: It goes to the supplier and says, "Right, supply me, I will probably

be able to sell more", and the existing seller is forced out because Amazon knows what the terms of supply were. Is that competition on the merits?

MR PICCININ: Sir, if those facts are established -- which of course I don't say they are -- that would be one thing. But there is no investigation of that latter matter which I said of that supplier being forced out. That's what I am saying is missing here.

THE PRESIDENT: No, but it's not competition on the merits. What the consequences are is then the next step. That was conduct which of course the Commission found was happening. You can say it's not abusive, but they found it is going on.

MR PICCININ: Well, Sir, maybe --

THE PRESIDENT: Obviously certain uses of the data have less consequence than others.

MR PICCININ: And some of them may have consequences which are beneficial to consumers and don't result in any reduction of competition in the retail markets and they want damages for that. That's what I am saying to you in summary is inadequate about this methodology: it simply doesn't delineate between conduct which is anti-competitive which is, you know, liable to produce foreclosure effects, and conduct that simply might cause some loss to some sellers but is beneficial to competition. It's more competition, not less.

But that's the point. Just looking at the time, Sir, I don't know whether now is a convenient moment or if you prefer to continue until 12.00?

THE PRESIDENT: No, we are not taking a break at 12.00, So let's pause now. Thank you. We will come back in five minutes.

(11.43 am)

(A short break)

(11.54 am)

THE PRESIDENT: Yes, Mr Piccinin.

MR PICCININ: Sirs, I am moving on now to abuses 2 and 3. This is my point about identification of bias in the FMA, and this is a point which overlaps with Mr Hammond's claim. Mr Turner foreshadowed yesterday that I would be addressing you on the prior point to the ones he was making, which applies to both claims. That is the first step in both claims -- before you get on to looking at what the effect of removing the discriminatory criteria would be, the first step has to be identifying the criteria used in the algorithm which are biased, are discriminatory, which raises a prior question different from would removing it have any effects and, if so, what?

Obviously, we recognise that the various regulators looking at the algorithm have either expressed concerns about, or in the case of the Italian decision, made findings about those matters. But in these proceedings, both of them, we contest all of those concerns and those findings. Our position is that although changes have been made to the algorithm, nothing that we were ever doing in the algorithm was biased or discriminatory. We have changed some things in accordance with the commitments, but that's because those were changes and commitments we were willing to make to resolve those investigations, particularly in a context where the DMA and DMCC were coming down the line anyway.

The point that matters is that at trial, one of the issues the Tribunal is going to need to determine is which of these criteria are actually discriminatory and therefore should be removed from the algorithm in the first place. That means it's not enough for the PCRs to say they are going to re-run the algorithm without the criteria which have changed through the commitments processes. They also need a methodology to demonstrate that those are criteria which should have been removed in the first place which were discriminatory.

To understand the subtlety and difficulty of that task and the reason why the methodology which has been put forward is not adequate, we need to understand,

I am afraid, in a little bit more detail the way the algorithm actually works, what it does with these criteria.

THE PRESIDENT: Yes. What actually is your commitment in that regard?

MR PICCININ: Yes, it's in the Authorities bundle. If we take the CMA one since that's the UK, tab 76, 3345 in the Authorities bundle, 3351 in the PDF. If you skip on to 3356 in the PDF, you actually have a series of commitments.

THE PRESIDENT: Yes, it is paragraph 3.

MR PICCININ: Then it goes on, Sir -- and there's also, for example, paragraph 5, which is a specific commitment not to use Prime eligibility and Prime labelling.

THE PRESIDENT: Yes, I'm looking at 3.

MR PICCININ: Yes.

THE PRESIDENT: "Amazon will apply objectively verifiable non-discriminatory conditions and criteria".

So, what's left will be objectively verifiable non-discriminatory conditions and criteria.

MR PICCININ: Yes.

THE PRESIDENT: And anything that's objectively verifiable and non-discriminatory will be retained?

MR PICCININ: Yes.

THE PRESIDENT: So presumably, therefore, you only remove things that are not objectively verifiable or which are discriminatory, aren't you?

MR PICCININ: No, Sir. That doesn't follow, I am afraid. We remove things which, having removed them, put ourselves in a position where the CMA can be satisfied, having considered the monitoring trustees' reports, that what's left is non-discriminatory and objectively verifiable, and so on. But I am afraid the converse doesn't follow. It doesn't follow that the things we took out in order to satisfy them were objectively discriminatory.

THE PRESIDENT: Because you say they might have been unreasonable in what they were asking for?

MR PICCININ: That's right. This is our position, Sir: what we were doing before was fine, but in order to resolve the erroneous concerns the CMA had about them, we have made changes and now they are satisfied.

THE PRESIDENT: And now they are objective -- now that, you accept, they are now objectively verifiable.

MR PICCININ: Absolutely.

THE PRESIDENT: So one will see what you have removed.

MR PICCININ: That we can do.

THE PRESIDENT: Which of course nobody can see at the moment until disclosure.

MR PICCININ: Well, in one case you can, Sir. You can see paragraph 5 there is a specific one.

THE PRESIDENT: On Prime?

MR PICCININ: On Prime. And Prime actually illustrates --

THE PRESIDENT: Yes. We will pause for the two minutes silence.

(12.00 pm)

(Pause to mark VE Day)

(12.02 pm)

MR PICCININ: Sir, perhaps the simplest way I can put my point on this issue, just to really illustrate the nature of the problem, then you can make of it what you do, is to give you that example of Prime.

THE PRESIDENT: Yes.

MR PICCININ: Suppose Amazon operated its store in a different way. Suppose we didn't have the featured offer at all and people -- we simply left consumers to their own devices to figure out which offer they wanted to look at and to purchase. But we still

have the Prime programme and people subscribe to Prime because they want the free, fast, reliable delivery that comes with it. Suppose we did run the store in a way that made clear which offers were Prime and which not by giving them the clear Prime labelling.

Suppose it's the case -- and this ought not to be controversial -- that consumers, both customers, both those who are Prime subscribers and those who are not, actually -- when they want fast delivery, what they will do is they will look at the offers marked "Prime" because they believe those ones will deliver when they say they will.

THE PRESIDENT: Yes.

MR PICCININ: Simply running a store in that way could have the consequence that customers choose Prime products again and again and again, even if there are other products out there which actually could have been delivered just as quickly and weren't part of the Prime programme, but simply customer preferences, making their own decisions in the way they do, the imperfect way they do, they end up choosing a lot of Prime products. That couldn't possibly be said to be abusive.

THE PRESIDENT: Sorry, you said even if there are other products that could be delivered as quickly?

MR PICCININ: Yes. That could in fact be delivered as quickly. But what customers do --

THE PRESIDENT: But then why are they not Prime?

MR PICCININ: Suppose they have not decided to join the Prime -- to obtain Prime eligibility.

THE PRESIDENT: The seller?

MR PICCININ: The seller, yes.

THE PRESIDENT: But they have the equal chance to do so.

MR PICCININ: We are going to come on to that issue in abuse 4.

THE PRESIDENT: But that's the premise; that they could.

MR PICCININ: That's the premise.

THE PRESIDENT: Yes.

MR PICCININ: So, suppose operating the store in that way led to lots of customers choosing Prime products. That couldn't possibly be said to be abusive.

Now think about what the purpose of the featured offer algorithm is. The purpose of it is to save customers the trouble of ferreting around through the long list of offers there are and show them the ones they would have chosen themselves if they had been going through that exercise.

Obviously that is a very difficult task to perform. We can't measure customers' preferences perfectly. All we can do is choose signals, choose criteria, which correlate well with the way the customers would actually behave if they were making the decisions themselves. That's what the featured offer algorithm is.

If it is the case that customers would use Prime as an indicator to make their decision, then our position is that it couldn't possibly have been discriminatory, or at least it's not obvious how it is discriminatory, to use an algorithm to do the same thing the customers would have done.

How is that question -- I am not asking you to determine in my favour everything I have just asked you to suppose is true, I am not asking you to find that using Prime as a signal was not abusive. My point is that's an issue which is going to have to be grappled with at trial, and our position is that the litmus test has to be: where we are choosing criteria that were a reasonable attempt at capturing, mirroring, customer preferences, there is just --

THE PRESIDENT: No. I don't think it goes that far, does it? It doesn't have to be whether they were necessarily a reasonable attempt at capturing customer preferences. It might be well done or badly done, I suspect; given Amazon, it is very

well done. The question is whether it is discriminatory in the way it applies. In other words, if it treats delivery speed in the same way when it is looking at Amazon Retail and looking at an independent third party; whether it is looking at customer preferences applying the same criteria. The criteria might not be the best criteria one could devise, but if they are applied equally --

MR PICCININ: Sir, the particular criterion I am using as an example to illustrate this debate is Prime. That's an example you see in these decisions, this is one --

THE PRESIDENT: But Prime is not -- I am looking at the non-discriminatory bit, which is 3, isn't it?

MR PICCININ: I am looking at 5, Sir.

THE PRESIDENT: 5 is a different element.

MR PICCININ: It is the same heading, Sir --

THE PRESIDENT: Isn't part of the problem with Prime that an FBM seller couldn't get Prime, is that not right?

MR PICCININ: That's not right, Sir. No, it's not.

THE PRESIDENT: I thought that's --

MR PICCININ: We are coming on to --

THE PRESIDENT: I thought that's the underlying reason, isn't it?

MR PICCININ: That is abuse 4.

THE PRESIDENT: Yes, but that's either a fact or it isn't, whether --

MR PICCININ: They certainly can get Prime. That's the SFP programme.

THE PRESIDENT: Yes, but only that --

MR PICCININ: Yes.

THE PRESIDENT: They have to sign up to that.

MR PICCININ: Yes.

THE PRESIDENT: And if they are just as fast but they are not in that programme,

they can't get it. They have to use those particular carriers you specified on the terms you have accepted, yes?

MR PICCININ: That's right.

THE PRESIDENT: So, it is already controlled by Amazon in that way. It's not, "You have to have a carrier who delivers within two days on terms that you may negotiate".

MR PICCININ: No.

THE PRESIDENT: No. So it's not a non-discriminatory eligibility.

MR PICCININ: Sir, take the other example -- we don't accept that, Sir, but to take another example just to further illustrate the nature of the beast. You mentioned delivery times, so suppose one of the criteria is when is the product going to be delivered? Now you could have two sellers who say it will be delivered tomorrow or two days from now. But what's not clear to me is: is it being said we can't make any adjustments to those at all? So even if in fact what happens is that some sellers -- FBM sellers, say -- tend to deliver late more often. That's obviously a factor that consumers/customers would take into account when making decisions for themselves.

Is it said that it is inherently discriminatory to make adjustments based on what is actually happening in the real world? What's the litmus test, what's the economic methodology which is going to be deployed in order to identify or define what kind of adjustments are acceptable and what kind of adjustments are not acceptable? That's what we just don't have the methodology for.

I can just show you what Dr Houpis says about that. If we go to bundle C, 1452 -- start on the preceding page, 1451, at the bottom, number 95. What he says there is:

"The FMA should determine the featured offer based on Amazon's evidence-based assessment of the value attached by consumers to different drivers of consumer choice, price, quality ... and the inputs to these drivers should reflect their true values

and not be affected by any of the alleged abuses."

Then over the page, he gives a non-exhaustive list of types of bias. My point is that when you scratch the surface on these types of bias, you just run into more questions and there isn't a methodology, or even a framework, underpinning it. So his first example is artificial adjustments to the input data to pay Amazon Retail or FBA. When you follow the references through, you end up at recitals 130 to 132 of the Commission's commitments decision.

So if we can look at that, that's in the Authorities bundle, PDF page 3627.

THE PRESIDENT: What recital is it?

MR PICCININ: 130 to 132.

What those recitals say is that in June 2020, Amazon made changes to the seller performance metrics so that now Amazon tracks performance of all types of offers. Just pausing there, that's five years ago now, so for the large majority of the claim period and all but the first couple of years, Amazon has been using performance metrics which apply to all types of offers. But the Commission says here that Amazon still makes adjustments to some offer attributes based on the "observed or anticipated performance of the relevant carrier". Based on the observed or anticipated performance of the relevant carrier.

Then they say this results in bigger adjustments to FBM offers than FBA offers. Well, fine, because the performance of the carriers is different. That takes us back to where we started.

The Commission is telling you that the adjustments are made based on observed or anticipated performance. Prima facie, that sounds like a sensible thing for Amazon to be doing. Is it really being said by Dr Houpis that we should not make adjustments to delivery promises, for example, based on observed or anticipated performance? What is the economic test which one applies, and where is the methodology for applying it

which is going to show whether those adjustments are artificial or not?

Now, it's not my submission to you that it would be impossible for someone to demonstrate an abuse of that kind, obviously the Commission never had to go on and do it. But my point is there is a question which immediately arises here, which is: what is an artificial adjustment and how is he going to establish one?

So that's really an illustration of the problem that we say arises.

THE PRESIDENT: Has your commitment said that you won't make any adjustments based on performance?

MR PICCININ: No, I don't think it does. I think we were just looking at the commitments, Sir.

THE PRESIDENT: I think we were looking at the CMA ones.

MR PICCININ: The CMA ones. I think I am right in saying --

THE PRESIDENT: It would be strange if you did, in which case you will continue to do that --

MR PICCININ: Sir, that --

THE PRESIDENT: -- if it is done on the same basis for everyone based on anticipated performance. So that will continue to be done because it is post-commitment.

MR PICCININ: There is the rub, Sir, because Dr Houpis is giving this as an example of something he says needs to be stripped out. Not that the monitoring trustee says needs to be stripped out, not that the European Commission said needs to be stripped out. It is something that he says needs to be stripped out.

My question is --

THE PRESIDENT: Where does he say that?

MR PICCININ: The way we got here, Sir -- if we just go back to bundle C.

THE PRESIDENT: 96?

MR PICCININ: Yes, 96(a). We were just following his references. He says artificial

adjustments. My question is: what is an artificial adjustment?

THE PRESIDENT: I don't know what he means by -- I would have thought artificial adjustments means adjustments that are not objectively justifiable.

MR PICCININ: Right, Sir.

THE PRESIDENT: That's how one will do it. Until you know and actually see the adjustments being made, if they are all done equally to all sellers and Amazon Retail -- and it suggests maybe that since June 2020 that's been done -- then those adjustments are not problematic. But until one actually knows what is happening --

MR PICCININ: Sir, my submission is that what is missing here is the methodology where he explains how he is going to go about that. What does he mean by equally -- he doesn't say "equally", he says "artificially." What does he mean by artificial, and what's the economic test which operationalises that concept? That's the question we asked in our CPO response and there is no answer to.

THE PRESIDENT: You see what he does and you may then have a good argument at trial saying, well, since June 2020, there's no adjustment -- those are not artificial and therefore this abuse is no longer made out.

MR PICCININ: I don't want to labour it, but just so you have my submission and then I can move on to the next point.

THE PRESIDENT: Yes.

MR PICCININ: The submission is that the requirement at this stage is that a methodology is put before you which shows how we are going to answer these kinds of questions at trial. That's the requirement and my submission is that it has not been fulfilled. Paragraph 96 of Houpis 3 does not fulfil that requirement at all because it doesn't tell you how he's going to assess what is artificial and what's not.

There is going to have to be concrete analysis, like data analysis, in which case of what data, of what kind, how, applying what threshold? You can't just say, as my

learned friend did with his analogy with FRAND, you can't just say: we will know it when we see it; we are all courts or lawyers or economists, we will identify it as discriminatory. It is much more subtle and much more complex than that.

That takes me to the fourth alleged abuse, which is concerning SFP eligibility. This one is particularly odd, and again I need to put it in a bit of context. As you know, Prime is a subscription service that Amazon offers to its customers. The gist of it is that the customer pays a subscription fee and in return gets access to faster shipping on offers that carry the Prime badge for no additional cost. That's the bargain that's struck with Amazon.

In order for that subscription service Amazon is providing to customers to offer value for money, the offers that carry the badge need to meet that fast delivery promise reliably. We sometimes forget in this brave new world that Amazon is brought to us -- the logistics of fast delivery, particularly of very fast delivery, are actually really difficult. Things can always go wrong. But if they go wrong in a way which results in late delivery too often, then we have a problem because people who are relying on this service and paying for this service will find that it doesn't deliver them value for money and they will stop using it, they will stop subscribing.

So it's not surprising, therefore, that Amazon needs to impose strict conditions on the SFP option. It can't tolerate a situation where Amazon doesn't know in advance that offers which carry the Prime badge will actually be delivered reliably in the timeframes they advertise.

When we are talking about conditions, though, I think sometimes there has been a bit of slippage and confusion as to what fulfilment actually means and what conditions are actually relating to. So it's important we are clear in this context what we are talking about. The logistics involved in delivering a product to you are not just the actual delivery by Royal Mail, DPD or Evri or whoever it is. I am not going to go

through it all, but broadly speaking, there are the things that happen in the warehouse -- or getting to the warehouse first -- so the storing, the sorting, the preparing of the packages and the labelling; and then there is the last step, which is the delivery by Royal Mail, or whoever it is.

If you use FBA -- FBA that is -- then Amazon is doing all of that. It is doing the storing, the sorting, everything. So it is Amazon, not the seller, who is responsible for everything which needs to be done in order to get the product on time to the Prime subscriber.

THE PRESIDENT: I thought we were told yesterday -- it was news to me, I have to say, perhaps because I am not sufficiently observant of the parcels I receive -- that actually Amazon subcontracts some of the FBAs. It is not actually all done by Amazon.

MR PICCININ: That's not correct. If you look out the front door, you will see sometimes there is an Amazon van, and other times it will be Royal Mail, or DPD, or whoever.

THE PRESIDENT: Yes. Because I thought you just said Amazon does all of that, but do you mean not on every occasion?

MR PICCININ: Sorry, what I mean is -- what I said is that Amazon is responsible for everything that's --

THE PRESIDENT: Responsible.

MR PICCININ: What I should have said, to make it clear, is Amazon as opposed to the seller is responsible for making everything happen. It is Amazon's job to get an FBA product there on time. Some parts of that will be subcontracted.

THE PRESIDENT: Subcontracted.

MR PICCININ: As I say, Sir, it's not the seller's problem.

The point of SFP is that you, the seller, can do the first parts of that process yourself. You can use your own warehouse -- it's not a Royal Mail warehouse -- you do your

own sorting and preparing of the packages, and then you hand over at that last stage to Royal Mail, DPD, or Evri, and they do the delivery. But when we talk about the conditions which Amazon imposes as distinct from the rate negotiation -- I am going to come on to the rate negotiation, but first I am talking about the conditions -- they are conditions which relate to the first stages of the process, which are the stages the seller is responsible for.

I think my learned friend said on Monday that those conditions are not transparent. If he did say that, it is difficult to understand in what sense they are not transparent because as we are about to see, he has copied and pasted them from our website into his claim form.

If we go to bundle B, page 193, you see at paragraph 118.4 what the conditions are in the UK:

"To be eligible for seller fulfilled Prime, your business must meet the following criteria:

You must have an Amazon professional seller account.

You must have a domestic warehouse from which to fulfil your orders.

You must ship over 99 per cent of your orders on time.

You must have an order cancellation rate of less than half a per cent.

To use Amazon by shipping services for at least 98 per cent of the orders."

Then over the page:

"You must deliver orders with our supported seller fulfilled Prime carriers."

Pausing there, there is no objection to that aspect of it from the CMA, there is no objection to any of this from the CMA.

The next one is:

"Seller must agree to the Amazon returns policy and allow for all customer service enquiries to be dealt with by Amazon."

Now to be clear, just in case it is not obvious, if a seller is choosing FBA, then it's not

so much that the seller is exempt from those conditions as that the seller is not in control of any of that because that's what Amazon is doing. So it is only if a seller is doing it themselves that we need to be worried about how well they are going to do it. I think it is now common ground -- perhaps it was always ground and I just misunderstood Mr Beal -- that the CMA did not require commitments about any of these conditions. And that's a problem because the centre piece of the methodology Mr Beal presented to you on Monday was that Dr Houpis was going to look into how many more sellers use SFP now post-commitments. But that's not going to tell you anything about these conditions because these conditions haven't changed. They were not required to change under the commitments.

The only commitment the CMA asked for in relation to SFP was that sellers should be free to negotiate their own rates with DPD and Evri, and of course they are already able to negotiate their own rates with Royal Mail. It was already the case that you can actually do the whole thing, doing the first part yourself and then having Royal Mail do the second part with rates that you have negotiated yourself with Royal Mail if you don't like the Amazon ones.

So on these conditions, again I am not asking you to find today that Amazon has carte blanche as to the conditions it applies for SFP; nor am I asking you to find as a factual matter today that the conditions which Amazon has imposed are all acceptable from a legal perspective. Instead, the submission I am making is that there are obvious reasons why competition on the merits would entail Amazon controlling these matters quite tightly to make sure it can be confident that the Prime badge is not going to be devalued.

So if there is going to be an abuse found here, again some clear line is going to need to be drawn between criteria that are legitimate and those that are not. So what I am about to show you is that what we have on that from Professor Stephan just doesn't

stack up. That's what I want to do now.

If we could go to bundle C, 1462, paragraph 125.

THE PRESIDENT: Yes. For some reason that report in my bundle doesn't have the page numbers on it -- ah, I have internal pages.

MR PICCININ: Internal page 44.

THE PRESIDENT: Thank you.

MR PICCININ: You should have paragraph 125 at the bottom, Sir.

THE PRESIDENT: Yes.

MR PICCININ: In that paragraph, Dr Houpis summarises Mr Holt's point that Dr Houpis has not put forward any methodology for distinguishing between SFP criteria which are discriminatory on the one hand, and which are legitimate on the other. So it is just setting up the point he's about to be answering.

His response is over the page, labelled as such, paragraph 126. What he says is he's going to compare the worst performing FBA offers against the SFP criteria. So if the worst performing FBA offers would fail to meet the SFP requirements, then he's going to conclude that the SFP requirements are not competition on the merits.

Now let's assume in his favour that there is some objectively meaningful way of identifying what the worst performing FBA offers are. Still we say that can't be a workable standard for identifying the boundary between legitimate and illegitimate because what that would be tantamount to is the position that Amazon is required to undertake a lowest common denominator approach to Prime; where so long as your average performance is at the level of the worst performing FBA offers, you can come in.

If that's what we did, that would undermine the quality of the Prime offering to the detriment of Amazon's customers. So we say that is not a methodology for establishing that the pleaded case, which is that these are discriminatory criteria,

discriminatory conditions which Amazon is imposing.

We say that in the absence of a proper definition of what discrimination means in this context and a methodology to apply that definition to the facts, all you really have here is a fishing expedition which shouldn't be tolerated.

Again, I emphasise -- although I am not suggesting this would provide a basis for a strike out, but of course the CMA knew all about the SFP requirements in the UK, and the CMA didn't require us to make any changes at all in relation to these conditions. So the commitment is not going to help anyone in looking into the effects of any alleged discrimination on these conditions.

THE PRESIDENT: At the moment, as I understand it, the proportion of sales on Amazon covered by SFP is minimal.

MR PICCININ: I understand the data point my learned friend put forward I think was that 0.6 per cent of all offers, I think it was -- of all offers of any kind, whether they be FBA offers or FBM offers, are SFP. What I have not seen is data, I don't have to hand data on what proportion of Prime offers are SFP, or what proportion of FBM offers --

THE PRESIDENT: Do we know the proportion of all offers that are Prime?

MR PICCININ: That I haven't seen.

THE PRESIDENT: I thought we had something.

MR PICCININ: Sorry, what proportion of all offers are Prime, yes. There may be a data --

THE PRESIDENT: Someone can get to you --

MR PICCININ: You may be able to, Sir.

THE PRESIDENT: It seemed very small, and of course it has been extended, I think, to either -- I can't remember whether it is Evri or --

MR PICCININ: Evri --

THE PRESIDENT: Fairly recently.

MR PICCININ: That's true, Sir.

THE PRESIDENT: So if we go back in the period, it was just Royal Mail.

MR PICCININ: DPD as well, Sir.

THE PRESIDENT: DPD came at a -- there was a succession of stages, I think.

MR PICCININ: There were stages, Sir.

THE PRESIDENT: Yes.

MR PICCININ: My submission is that the story you see is the story of Amazon having created its Prime service and then opening it up progressively and expanding it, making it more flexible for third party sellers to participate in that programme in ways they find convenient which don't undermine the quality of the programme. It has been done progressively, Sir, which we say is not a matter on which Amazon can be criticised.

But the point I am making is a simpler one: ultimately, if you want to say these conditions are discriminatory, it's not enough to say not many people choose to adopt them because people may find that actually these are quite hard conditions to adopt and the best way to meet them -- the best way to hit those high standards that Prime delivers to Amazon's customers is to use FBA because it is cheap and it is very high quality and why would you do anything else? That's a perfectly sensible explanation for what you are seeing there.

Just looking at that number, staring at it any which way you like, is not going to tell you the answer. It is entirely consistent with our case.

So you are left here, Sir, with an allegation of abuse for which there is no real methodology. You have no blueprint, no idea what's going to be done at trial, and what is going to need to be done by way of preparatory work in order for us to get us there. So that's the conditions element of it.

As to the one point for which there were actually commitments, which is the

commitment to extend the option that already existed for Royal Mail, which is that you use your own negotiated rates, we are going to extend that now to enable you to do that with DPD and with Evri. One can understand why the CMA might have been pleased to receive a commitment to that effect, but again it's a long way from clear to me how someone is going to prove at trial that the progressive approach Amazon has taken was in some way abusive.

As we have just discussed, what has happened here is that Amazon has created of its own initiative the SFP programme so that sellers who want to use their own fulfilment process -- the first stage we were talking about, with the warehouses --

THE PRESIDENT: Why do any of these conditions require Amazon to have control of the rates that the seller pays to the carrier?

MR PICCININ: That's not the submission, Sir. They don't. The conditions we have just been looking at are all really conditions about the first part of the fulfilment process; about the warehousing, about all of that.

THE PRESIDENT: Yes, but the commitment is only dealing with --

MR PICCININ: The second part. That's right, Sir.

THE PRESIDENT: If prior to commitment, the pre-commitment regime deterred sellers from using an SFP carrier like DPD or Evri --

MR PICCININ: That's what I am about to address you on.

THE PRESIDENT: Yes.

MR PICCININ: Again, you can immediately understand, I hope, why in addition to the conditions that we had relating to the first part of the fulfilment process, Amazon also needs to be concerned that what happens next, the actual delivery bit of it, is going to happen quickly as well. You can understand I hope -- we don't have fact evidence on what was involved -- there needs to be a framework for Royal Mail and for DPD and for Evri to work with the programme to make sure it delivers what it needs to do.

One way to put in place a programme like that is for the store in the position of Amazon running the subscription programme to conduct those negotiations, agree the framework, agree how it all needs to work, negotiate the best price they can, and make that available to everyone who wants to access it at their own terms.

That's the way it was done initially, and then at some point -- I don't have the date -- the Royal Mail programme was made more flexible so if you don't like those terms, you can have your own separate terms. All that's happening with that now is Amazon has been required, or has committed, to put in place that more flexible arrangement for the other sellers as well.

THE PRESIDENT: The previous arrangement --

MR PICCININ: Yes.

THE PRESIDENT: Although specifying the delivery carrier, although stipulating the delivery time, because the seller couldn't negotiate their own rates, deterred sellers from using it and they are now starting to use it much more. But that flexibility as you call it, or others would say less restrictive arrangement, has been provided --

MR PICCININ: Sir, I just say --

THE PRESIDENT: If that is the case, then unless you have an objective justification -- which is not for now -- as to negotiating the rates, why is that not relevant if it actually emerges that sellers are better off? They might be paying more, but if they are paying more, you would think they would use the rate you have achieved.

MR PICCININ: I can understand that, Sir. I am not bringing a strike-out application.

THE PRESIDENT: No.

MR PICCININ: What I do want to do now, though, is look at what Dr Houpis says he's going to do, which is not the same as what you've just said, I am afraid, Sir.

If we could go to page 1461 and start by looking at paragraph 123 -- sorry, it is internal page 43.

THE PRESIDENT: Yes.

MR PICCININ: At paragraph 123, you can see the comparison he wants to make is between SFP carrier rates negotiated by Amazon -- so the rates Amazon negotiated with Royal Mail, DPD and Evri -- he wants to compare those not with the rates that sellers go on to negotiate for themselves after the commitments, that's not the comparison he's making.

He wants to look at FBA and he wants to unpick the FBA rates to figure out what he calls an effective price for the parcel delivery component of FBA. So that's just the last mile -- if I can call it that, probably wrongly. So he wants to unpick that and come up with an effective rate; and if it turns out that FBA is cheaper than DPD, in the rate that DPD has given to Amazon for the SFP programme, if FBA is cheaper than DPD, then he wants to conclude that this aspect of the SFP programme was abusive.

I just say that is not a methodology to address the issue, because suppose he can do that -- let's put to one side the practical problems with unpicking the effective price for just the last little bit of FBA. Suppose he's right that FBA is cheaper than DPD for that last little bit, what does that tell you? It tells you that Amazon is a cost-effective and competitive provider of these services. It doesn't tell you that Amazon has negotiated over the odds, it doesn't tell you that you could have got a better deal with DPD if you were working on your own. So that's not a methodology, which is directed toward the abuse that's been alleged.

The other proposed methodology I need to address is the one that keeps finding favour with this Tribunal, Sir. It's at paragraph 122, I do want to address it. This is a before and after analysis of the commitments. What he wants to do is he wants to see whether after the commitments, there has been an increase in take-up by third-party sellers: in other words, are there more third-party sellers subscribing -- subscribing is the wrong word, I am sure -- becoming eligible for the

Prime label?

Sir, that doesn't tell you anything about whether the reason why there are more sellers joining, other than becoming eligible, is that they are negotiating their own rates. Indeed, it doesn't even tell you whether they have negotiated their own rates. For some reason I can't place my finger on, Dr Houpis doesn't seem to want to investigate the mechanism which is actually said to be the abuse.

So again --

THE PRESIDENT: Is it more third-party sellers who become eligible for Prime, or more third-party sellers who use SFP?

MR PICCININ: SFP, sorry. You are right, Sir, I misspoke.

THE PRESIDENT: Yes.

MR PICCININ: All the same, Sir, that doesn't tell you that they are doing it on their own negotiated rates. They may well be selecting the Amazon negotiated rates with Royal Mail or DPD. They may be paying more, they may be paying less. That's not the thing he is investigating here. There could be all sorts of reasons why SFP as a programme that may grow, bearing in mind what we have already said, Sir, which is that it has been a progressive programme. Amazon has off its own back been expanding this programme and making it more flexible over time.

So if it is true that there has been more -- and I don't know whether that is or isn't true -- there are lots of good reasons why that might be the case. If you want to investigate specifically this allegation of abuse, you'd better be looking at rates people are negotiating. So where is the plan to do that? What's the approach that's going to be taken?

We say this one just --

THE PRESIDENT: Just help me understand. What do you say are the sort of other reasons you might choose to go with a different carrier from Amazon, other than rate?

MR PICCININ: I want to be really clear about this: the choice between FBA and SFP is not mostly about the carrier. The major difference between FBA and SFP is not the carrier, it's that you are doing the warehousing and the sorting and the selection, all of that process too. There's at least -- I don't have evidence on how much each of these matter, but those are two parts to the story.

So people with their own warehousing operation and with their own logistics operation to do that part of it may now want -- I don't know whether they are or aren't, but they may now want to get the Prime label, demonstrate that they meet all of the conditions we have looked at before, and take the excellent rates which were negotiated with DPD already, and away they go. Businesses may do that because their warehousing operations have improved over time. Any number of reasons, I don't know. Maybe the addition of Evri in 2023 makes all the difference and now people want to use Evri. The point is, Sir, there are any number of reasons why people chose between FBA and FBM, and that's really what's going on here when we talk about SFP. It is choosing to do Prime through FBM instead of FBA. If you want to tie it to the rates, then you need some methodology which is capable of tying the change you observe, if any, to the rates.

That takes me on to abuse 5 -- we are nearly done with the abuses.

THE PRESIDENT: Yes.

MR PICCININ: Abuse 5 is the anti-discounting abuse. In some ways this is the most speculative of them all. Obviously it doesn't find any support in the Commitments decisions.

The policy itself is conveniently set out by Dr Houpis in his first report, at page 691 in the bundle. I don't know, Sir, whether your first report has page numbers?

THE PRESIDENT: It does, yes.

MR PICCININ: Excellent.

THE PRESIDENT: Figure 19, is it?

MR PICCININ: That's it, yes. I would like to look at what the policy is and what it says. There is no dispute about that. It is called a fair pricing policy, marketplace fair pricing policy:

"Sellers are responsible for setting their own prices on Amazon marketplaces. In our mission to be the world's most customer-centric company Amazon strives to provide our customers with the largest selection at the lowest price and fastest delivery, and sellers play an important role. Amazon regularly monitors the prices of items in our marketplaces, including shipping costs, and compares them with other prices available to our customers."

Pausing there, that is not just other prices by a particular seller; it is other prices available to our customers:

"If we see pricing practices on a marketplace offer that harms customer trust, Amazon may take action such as removing Buy Box, removing the offer or in serious and repeated cases suspending or terminating selling privileges. Pricing practices that harm customer trust include but are not limited to setting a reference price on a product or service that misleads customers ..."

We come to the one that my learned friend is particularly interested in:

"... setting a price on a product or service that is significantly higher ..."--significantly higher --"... than recent prices offered on or off Amazon ..."--on or off Amazon, and I might add "by anyone." Not by the seller, by anyone.

Then we go on to the other concerns about selling multiple units of a product for more than the single unit price. You can understand why we have that. Setting a shipping fee that is excessive and so on.

So I emphasise three points here. First, you can see that large parts of this policy have nothing to do with price comparisons at all. This is a policy that is mainly aimed

at other issues, like misleading or exploitative pricing. The whole context for this policy is protecting customers and thereby -- this is important -- protecting Amazon's reputation as a store that customers can trust. It is part of how Amazon competes in the market for places where people can buy things, if I can put it in neutral terms.

That's the first point. The second point is that even the small part of the policy that Professor Stephan objects to is not a price parity clause. You can see that just from the words. It's not specifically about comparing a particular seller's price to the price that the same seller is charging at the same time on another platform. It is saying that no seller should be charging significantly more on Amazon than anyone in their recent prices, whether they are on Amazon or not, has recently been selling the product for. So, for example, this type of policy would catch the kind of price-gouging conduct that we saw in lots of places around the world during the pandemic when shortages or peaks in demand led to outrageous prices being charged for simple products.

Importantly, that means that if seller A is selling the product much more cheaply somewhere else, then it is not only seller A who would be in breach of this rule for selling at a much higher price on Amazon: no seller should be selling on Amazon at a price that is significantly higher than is available elsewhere, because Amazon is just not interested in being a store in which third-party sellers try to milk customers for uncompetitive prices. That is behaviour that is harmful to customers and it is behaviour that is corrosive to trust in the store.

The third point is that reflecting the fact that this is a clause about customer trust, it is not a "most favoured nation" clause. It is categorically not saying that the price on Amazon has to be the lowest price anywhere; it's only concerned with situations where someone sells the product at a price that is significantly higher than recent prices elsewhere to an extent that would damage customer trust.

Now again, I am not trying to say at this stage that it is impossible for a clause like this

to cause anti-competitive effects, but you can see that it's not a price parity clause. So if an abuse is going to be established, some work is going to have to be done to explain how a clause like this, which on its face forms part of how Amazon competes on the merits, actually isn't that and can be abusive.

Instead of that, instead of some subtle analysis of the dividing line between legitimate policy aimed at protecting customer trust and abusive anti-competitive conduct, if we go to page 695 -- so just go on a few pages -- to paragraph 442, "Methodology and data to be sought post certification" is not a methodology. It's only the second bit. It's only data to be sought post-certification. It's a fishing expedition not a methodology.

THE PRESIDENT: Well, if we look at the allegation, the allegation is not: this policy, as there expressed, is in total abusive and therefore you shouldn't have that document. That's not what's said.

I think what's said is what Amazon does in practice. That's the abuse as I understand it, if one looks at the claim form --

MR PICCININ: Yes.

THE PRESIDENT: It's at paragraph 162. And a lack of transparency, which is 163 in the claim form. In practice Amazon removes --

MR PICCININ: Yes.

THE PRESIDENT: -- and sellers consider there is a risk it will remove -- one feeds the other -- seller's offers from the Buy Box and/or the marketplace altogether if sellers offer their products for lower prices elsewhere. Perhaps it should say "significantly lower prices elsewhere."

Further, sellers have no knowledge of the benchmark of what "significantly higher" means, so it's not a transparent test, which reinforces, no doubt, sellers' concern about how they might reduce prices elsewhere. I mean, that's the allegation.

MR PICCININ: I understand that, Sir.

THE PRESIDENT: One can understand that if that is made out it might be an abuse. You don't seek to argue the contrary here at this stage.

So to know whether that is happening, and to understand what is the benchmark, it's impossible to know that before one gets disclosure, isn't it?

How can any expert say the way Amazon is applying this is to remove people who just price the same product less elsewhere on a large scale until they know what is actually going on.

MR PICCININ: Sir, two things about that. One is if I can just put a pin in that thought and come back to it when we get to opt-in.

THE PRESIDENT: Yes.

MR PICCININ: Because there will be a submission that I will be making that this claim is a bit like Hamlet without the Prince. If this were a claim that were brought by individual merchants -- by individual sellers, sorry --

THE PRESIDENT: Yes.

MR PICCININ: I am using language from other cases. Then they might be able to say "this has happened to me" and they would sign a statement of truth to that effect. But let's put that to one side. To answer your question directly, Sir, I come back to the distinction that I drew at the beginning between answers that I am not looking for today -- I'm not quite that mad -- and methodologies for obtaining answers.

Here in paragraph 442 what you have is a list of data requests. What you don't have is an explanation of what he's going to do with any of that data to draw a line between the obviously pro-competitive competition on the merits -- legitimate aim that I have articulated to you that is there on the face of the policy that is being challenged, and conduct that trips over into abuse.

Because, Sir, it can't be right that Amazon is -- and I don't think this is the pleaded allegation -- that if Amazon ever takes action against a seller who is factually selling

at a much lower price somewhere else, that that constitutes an abuse. Because of course if it was at a much lower price somewhere else that could be conduct that falls within the legitimate scope of the policy.

So it's not the focus of the policy. But my point is that you need some methodology for analysing the pro-competitive/competition on the merits aspect of this policy and saying "When I get these data, this is what I am going to do to investigate whether Amazon has crossed the line".

I accept he can't show that they have crossed the line yet, but he does need to show you what's going to happen at trial. The whole point of this exercise, this Microsoft exercise, Sir, is so that you have an idea in your head of what is going to happen at trial. At the moment I don't have that in my head.

That's the conclusion of my submissions on the abuses.

THE PRESIDENT: Would that then be sensible -- we can come back at five to 2 -- would that be a sensible moment to break?

MR PICCININ: That makes sense to me.

THE PRESIDENT: Yes. You know where you are going next better than I do, so we will come back at 5 to 2.

(12.59 pm)

(The luncheon adjournment)

(1.55 pm)

THE PRESIDENT: Yes, Mr Piccinin.

MR PICCININ: That takes me on to the topic of loss. I am not going to say anything more about loss in the form of diverted sales, which you can think of as being the most direct form of loss arising from the alleged abuses -- I think that really follows on from my submissions before about how you would re-run the algorithm, how you would select what things to switch off and what you would replace them with.

What I do want to address you on -- my last Microsoft point -- is the more convoluted, the longer causal chain part of the case where they try to connect those diverted sales to overcharge on FBA and FBM and marketplace fees.

Before I look at the methodology of that, I just want to put it in a bit of context by just highlighting how unusual this part of the case is. My reason for doing that is not to say that it is unarguable and you should strike it out; my reason for doing that is to say that this is a very unusual causal chain that calls for really quite careful scrutiny as to whether there is really an adequate methodology for dealing with it.

Because the most obvious claim you would expect to see in a self-preferencing algorithmic discrimination case with this kind of structure would be an argument that says: you, Amazon, effectively made me use your service by discriminating in favour of your own service, so my only way to reach customers was to use your service, and your service was more expensive than the alternative services that were available to me at the time and my loss is the most obvious loss [you may add some bells and whistles] would be the difference between what I had to pay because you made me use your service and what I would have paid if I had used someone else's service instead.

The methodology would be a simple one: you gather data on what they paid our prices, Amazon's prices; you gather data on FBM prices which are available in the market and you'd subtract. That's what you'd expect to see when you read what the abuse is.

They are not running that methodology and they are not running that case. The reason they are not is because everybody knows that FBA is not expensive, it is cheap. So instead, the argument we are faced with is one that says: look, you, Amazon, made me use your service. If you hadn't, I would have used or someone -- maybe not me, other people -- would have used the alternative service (even though it's not cheaper).

And then if everyone had gone off and used that other service (even though it's not cheaper), it would have become cheaper over time because of all of that additional scale they would have had in the counterfactual. It would have become cheaper for the other service providers, lower costs, and that would have led the other service providers to lower their prices. And then, Amazon, your service would have had to have become cheaper as well, lower priced, in order to compete with those others. That's the causal chain. That is a very unusually complex and long and convoluted and tenuous and surprising causal chain. So I do say that calls for some quite careful investigation now as to how it is going to be made good. It's important for us to understand what the pitfalls and issues with it are in order to then test those against the methodology that's been proposed.

THE PRESIDENT: I may have misunderstood, but are they not saying, contrary to what you just set out, that actually FBA was more expensive because it had artificially high demand?

MR PICCININ: Well, Sir, what I propose to say is --

THE PRESIDENT: I thought that was just said --

MR PICCININ: -- more expensive than what is the question, Sir. The answer to that is they say more expensive than it would have been in the counterfactual.

THE PRESIDENT: Because there was artificial demand created for it?

MR PICCININ: Exactly, artificial demand created for it, and also less competition from FBM because of the argument I have just made.

THE PRESIDENT: Yes. So they are saying that you had to use FBA and --

MR PICCININ: What they are not doing, Sir, is the obvious thing, which is to say that FBA was more expensive than FBM. They are not saying, "You made me use your service and there was a cheaper alternative available that you prevented me from using".

THE PRESIDENT: Yes, I understand.

MR PICCININ: So the more demand -- again, I don't want to turn this into a merits argument --

THE PRESIDENT: No.

MR PICCININ: -- but the more demand argument is a bit hard to understand because if there wasn't a cheaper alternative, then I don't really know where that argument is going. But I don't want to make this into a merits point. I am just trying to show you that even if you want to think they do have a good point there, Sir, they certainly also have the more convoluted argument that I put forward.

THE PRESIDENT: Yes.

MR PICCININ: That is one which takes us into a complex world where we need to think quite carefully about cost structures -- not just cost levels, but cost structures -- for all sorts of different types of logistics providers. We also need to think about how competition between FBM logistics providers of their various kinds and FBA works to figure out whether a world in which there was more demand for FBM would actually have been one with lower prices for FBM or FBA, or both.

As we will see, it's a very long way from obvious that they would. It is quite hard to see how that would happen. But the important point for today is not that; the point for today is that there is no adequate methodology. There is no methodology put forward which is capable of dealing with the complexities and the pitfalls I am about to show us. Our concern is a proper Microsoft concern, which is that Professor Stephan is leading us all on a very expensive and time-consuming wild goose chase.

So let's look in more detail at why we say that: what are the pitfalls, what are the issues? I warn you the first bit of this is going to sound meritsy, but that is only to set up what the issues are that will need to be answered by Stephan at trial.

The first point I want to make is the one that's already been made by Dr Pike, actually,

which Mr Turner showed you yesterday, which is: if the harm arises from shifting volumes between FBM and FBA -- those diverted sales -- causing changes in logistic providers' costs, so if some part of the harm arises in that way, then that's a point which cuts both ways. Because if it is true as Dr Houpis says that smaller volumes for FBM in the real-world cause higher costs for FBM in the real world, if that is true, then it is also true that greater volumes for FBA in the real world should cause lower -- lower -- costs for FBA in the real world.

Then if it is true that costs feed through into price, then that should lead to lower prices for FBA -- at least that's one possibility -- and it is very far from clear as to what the net effects would be on the class.

Mr Turner showed you yesterday that Dr Pike's opinion supports that point. He said of his own accord, not only in the context of this debate with Dr Houpis, that Amazon has benefitted from economies of scale resulting from the alleged diversion, and this has led to lower FBA charges. Not just costs, but prices by Amazon. The reference for that -- let's not turn it up again, but Mr Turner showed you, it is bundle C, page 435, paragraph 90. I think that was the reply report.

Indeed, just following that thought through and seeing where it goes: if anything, the cost effect for Amazon, which is beneficial to class members in the real world, could be larger than the countervailing adverse effect for the FBM sellers. That's because greater volumes for FBA in the real world are greater volumes concentrated in just one provider -- Amazon -- whereas the smaller volumes for FBM in the real world -- or if you find it easier to think the other way, the larger volumes for FBM providers in the counterfactual, FBM logistics providers in the counterfactual -- are divided between at least several FBM logistics providers. Indeed, some of those may be self-fulfilled at the warehouse stage, in which case it could be divided between many, many, many third-party sellers.

As I say, that's a merits point. But the question is: how does Dr Houpis grapple with it? Again, I need to start by giving you his merits answer, and then I need to show you how he's going to make it good. His merits answer is -- perhaps if we turn it up – HB/C, page 1491. Sorry, Sir, this is the reply report, so it is page 73 internal.

THE PRESIDENT: Can you give me the page again, please?

MR PICCININ: I am sorry. Page 73 in the reply report.

THE PRESIDENT: Yes.

MR PICCININ: If I just show you first the point you put to me a moment ago at paragraph 230. You are quite right, of course, that one reason why Dr Houpis says that FBA overcharge is positive -- so FBA prices are higher in the real world -- is because of what he calls the "demand" side effects, which comes from what he calls the reduction in substitutability of rival FBM fulfilment services. That's not the point I am on. The point I am on is his other one, which is the supply side effects, which is the result of economies of scale we have just been discussing.

Then at 231, he's answering the point I have just articulated to you about the fact that you have to watch out for the effects on Amazon's costs which is countervailing and probably larger. He says he doesn't consider that under the counterfactual, the increase in Amazon's costs would have been greater than the reduction in FBM fulfilment providers' costs. This is because, as a general principle, cost curves become flatter as volumes increase.

So the point he's making there is if you are already a big guy, then becoming a bit bigger may not reduce your costs by very much anymore; whereas if you are starting off as a little guy, then the same increase in volumes, or even a smaller increase in volumes, might make a big difference to your costs. So that's his merits answer.

As a purely theoretical proposition, I can understand that for today's purposes. But the problem is where that leads us is how are we going to investigate that issue at

trial? Let's look at what he says. If we go on two pages to page 76 for you, Sir, and 1494 for everyone else, and we look at paragraph 241, the heading "Estimating the appropriate cost curve" in Houpis 1.

He explains that it would be useful for him to be provided with cost information from Amazon for its fulfilment services, both in the UK and in other jurisdictions over time, in order to derive the relationship between a fulfilment provider's scale and its costs of providing services. This would enable him to estimate the relationship between costs and volumes and how costs change with scale. He also plans to use this cost relationship, the one estimated using Amazon's data, to estimate the costs of rival smaller one stop fulfilment providers.

So he says he's going to use Amazon's cost curve to estimate the cost curves of some providers of FBM, so he's going to use Amazon's cost curve as a proxy. That's not, in my submission, an investigation of the issue we have been talking about, which is how you could have very different impacts of volumes on costs for Amazon on the one hand and Amazon's competitors on the other, resulting in an overcharge. That's the difficult job he's got to do, but he's not doing it here; he's just saying he's going to use Amazon's costs.

At a couple of points in the hearing, Sir, I think it has been suggested by various people -- I think you raised the possibility a couple of times -- that even if there are no current plans to get third party disclosure of cost information from third-party logistics suppliers, that shouldn't be a big problem because the class reps can just go and do that. We can have a third party disclosure exercise and what's to worry about that? We are only talking about Royal Mail, we are only talking about DPD or Evri, the three of them. So that shouldn't be such a big deal.

A problem with that, Sir, is that it entirely depends on what you mean by logistics providers. If you are talking about delivery, then I can see where you are coming from

in thinking about how many there are likely to be. But of course, if you are thinking about delivery, then Dr Houpis' theory you have been just shown -- this is why I showed you his meritsy answer -- that theory doesn't apply at all to Royal Mail. Royal Mail isn't smaller than Amazon at all, let alone, you know, orders of magnitude smaller than Amazon. It's not a subscale operator.

So, the whole argument about extra scale, this whole line of enquiry, just doesn't get off the ground if you are talking about that. One of the problems here is that there has just been a real lack of specificity, a real lack of thinking through of the issues that arise from this part of the claim.

If instead of that, you are talking about the kind of one stop shop providers which Dr Houpis refers to in his report, then I am afraid there do seem to be rather a lot of them. That just raises a number of further questions, but first I want to make good that claim. If we could go to -- still in bundle C, page 601 -- this is back in his first report, Sir, so I hope you have the pagination -- we are going to look at the footnote, so I probably should have done Mr Turner's trick of blowing it up. It is definitely not 12 point font. Do you have it, Sir?

THE PRESIDENT: Yes, we can read that from here. 601, yes?

MR PICCININ: Yes, and footnote 230, the first footnote at the bottom of the page. He's referring to some articles he's found talking about the kind of one stop shop providers he has in mind, he says. All I need to really show you -- we have the articles, they are not in the bundles, I could hand them up if you want to look at them. All I wanted to say was just look at the titles: "The 14 best [14 best] e-commerce fulfilment services in the UK in 2024". So not the 14 that are available, but these are the best 14. Or look at the last one, "UK e-commerce fulfilment services:, 11 options to scale business". So we are talking about more than a dozen of these guys out there, and that's just the creme de la creme.

So that really gives rise to three problems here. One is that it is obviously a rather large number of businesses which potentially need to be hassled for highly confidential data on costs and volumes, if we were going to go down that route (for which there is no current plan).

THE PRESIDENT: Would you have to go to all of them?

MR PICCININ: I don't know, Sir. This is all the kind of thing that would need to be looked into in a methodology for how you are going to grapple with the issues we are talking about. You may need to because of the next couple of points, Sir, which is: it doesn't really sound like a market in which a lack of scale is a major barrier to operating efficiently. If I just put that question the other way round: if it were, if scale were a really major issue for operating in this market, why would so many enter? How does the smallest of even the top 14 compete against even the biggest of the top 14 if they have very steep cost curves of the kind that could plausibly give rise to the effects Dr Houpis is hoping to pick up here with his proxy methodology?

Then the further problem, Sir, is this: in the counterfactual, you need to worry about where the additional volumes are going to go. Because on the face of this, they could be split not two or three ways, but 14 different ways, and that's only if it is only going to the best of them.

I say all this not to invite you to conclude that it is hopeless and there could never be such an effect. I say all this just to show you just how complex this exercise is. And this is not me insisting on unreasonable precision, this is a situation in which plausibly -- most likely, most realistically, you might think, I would think -- the answer is zero. The truth is zero. That's definitely a plausible answer here.

It is not like a cartel where you think there is going to be an effect; you might think in some cases, there is going to be an effect. At least we know it is positive and not negative. Here, it could be negative rather than positive, we don't know. And you

need to investigate these details in order to be able to get somewhere with it, to grapple with it. Yet none of this has been grappled with as to methodology. It is always tempting -- I genuinely do understand the temptation to say, "Too hard basket, let's worry about it later".

There is a gatekeeper function here. We are constantly told by the Court of Appeal, we're constantly told by this Tribunal that there are teeth to the *Microsoft* test, that it will be applied, that claims won't be waved through. The Court of Appeal says it is an error of law to do that in McLaren. And this just hasn't begun to deal with the complexities.

That is one of my problems with this part of the case. An even bigger problem arises from the mismatch between Dr Houpis' theory of harm and the way he proposes to measure specifically the alleged FBA overcharge.

As I said before, the theory of harm includes the proposition that the various biases towards FBA make FBM uncompetitive, and therefore allow Amazon to charge more for FBA than it would in the counterfactual. The key point there is that that is a story about there being more competition between FBA and FBM in the counterfactual, an ineffective competition in the factual.

Dr Houpis' plan is to measure the FBA overcharge by looking at FBA charges in isolation. He wants to compare FBA charges in the real world during the claim period with FBA prices in the period before he says Amazon became dominant. Of course, it is a regression analysis, so he proposes to control the cost and demand side factors that may have changed over the period. I say that is heroic, I say good luck, but that's not the debate for today.

The bigger problem is this: his whole theory is driven by competition between FBA and FBM, and yet FBM prices are nowhere to be found in his econometric model he has plans for and couldn't be -- this much is common ground -- because they are jointly

determined FBA and FBM prices. They are jointly determined in the real world, and that would give rise to obvious econometric problems of endogeneity if you tried to include them in the models. So he doesn't propose to include them in the model. He has dodged Scylla, it is Charybdis he needs to worry about, which is the problem of not having them there.

I want to show you his answer to this point, which is page 1489 in the bundle.

THE PRESIDENT: Internal page?

MR PICCININ: Page 71.

THE PRESIDENT: Thank you.

MR PICCININ: Paragraph 217. Perhaps you could just read 217 to yourselves, 218 as well. I am obviously going to summarise it when you have finished.

THE PRESIDENT: Yes.

MR PICCININ: Sir, if I can just summarise because I know it is dense and it is slightly technical material for a certification hearing. But at the same time, this is the Competition Appeal Tribunal, so I will muck in and press on.

What he's saying in 217 is if the infringement drove up FBM prices in the real world and that in turn drove up FBA prices, then his model will correctly ascribe that effect to the infringement. So far, so good, that's not where my complaint comes.

Then in paragraph 218, he says that any other systematic variation in FBM fees must be caused by one of his other control variables -- his magical demand and cost drivers, GDP, inflation, I don't know what else it will be, price of oil -- so any other variation in FBM which is not caused by the infringement must be caused by the variables which are in his regression analysis, so they will just feed into the coefficients on those variables. That's fine.

He says any other movements in FBM fees which are not caused by the very variables he has identified, they are necessarily random and so will not cause any bias. I am

sorry to say it would be a sad day if that piece of analysis got through this Tribunal.

Given the complexities of the logistics industry and the myriad things that have changed over time, it is entirely -- and over time, we are talking about since the period before 2016 up to now -- it is entirely unreal to think that a regression analysis is ever going to explain everything which is important in determining FBM and FBA fees. That would never be the aim in a normal regression analysis, you don't need to try to capture everything of interest to your variable.

But the problem here is that there is a very important omitted variable, which is what is going on with the FBM prices. So there is no basis at all for Dr Houpis to assume that the other control variables he comes up will affect FBM fees and FBA fees equally and will be the only important drivers of any movement in FBM fees over that period.

The simple point is that on his own theory -- and this is something Dr Pike agrees with too -- FBM fees are very important determinants of FBA fees as part of the causal mechanism. So omitting them leads to what I have to say is the most screamingly obvious problem of omitted variable bias I have ever seen in this Tribunal. To simply wave your hand and say, "Don't worry, you can just assume it's not a problem" is just unacceptable.

It's really important I emphasise here that this is not a temporary waving of the hand. This is not a waving of the hand at certification with a "Don't worry, I am going to come up with a solution later". This is his solution. There is no clever test he's saying he's going to deploy at trial to show you that this isn't a problem. He's just going to say at trial, in the witness box that, "It's not a problem, you don't need to worry about FBM fees. Those aren't the fees you're looking for".

That is just not a methodology you can countenance as a plausible blueprint to a trial of billions of pounds in highly remote and speculative damages that come at the end of the causal chain which I outlined at the start, with all of the logical problems with it

and the counter-arguments that could have pushed in the other direction.

Dr Houpis has, to be fair to him, canvassed an alternative approach, which is a completely different approach, which is a theoretical model --

THE PRESIDENT: Just one moment, please.

MR PICCININ: Yes.

THE PRESIDENT: Yes.

MR PICCININ: Dr Houpis has canvassed an alternative approach, which is a completely theoretical model, a ground up, written in Greek, mathematical model of how competition between logistics providers works in the United Kingdom. It will have FBM in there of the different kinds and, presumably, FBA. This is what he calls the differentiated Bertrand model -- I am sure those words are familiar probably to all of you.

But saying the words is not an incantation, saying the words is not a methodology. What he hasn't done -- you appreciate this is a theoretical model, so it is a mathematical model, it's not something he's going to get from disclosure from us. It is something a mathematically trained economist writes down and does the calculus. It is something he could have done now, but he's not written down the model and told us how it is going to work.

I should also say, as I am sure the Tribunal knows, that these are highly complex exercises. It is very, very far from clear that anyone would be able to implement a model of that kind with the degree of precision and sensitivity and nuance that is required to grapple with the problem I have outlined at the start: my meritsy point as to the countervailing impacts of bits of volume coming away from Amazon, therefore reducing Amazon's scale and going into different parts of the FBM world; some people's own individual warehouses, other one stop shop providers' warehouses, some of it going into Royal Mail. All of that, how that is going to be worked out in

a theoretical model, he's just asking you to trust him, and again that's not the *Microsoft* test. It's not good enough.

That takes me to my third point about this area of the case. This one is a short one because there is not much to look at. This one is pass-on. My submission on pass-on is that Dr Houpis' methodology, if you want to be so generous as to call it that, is no more developed at all than Dr Pike's. Please can we go to bundle C, page 808. This is the first report, so it should work for all of us. It is in the annexes, annex J. I think, it's called "Common quantum parameters."

Are you there, Sir?

THE PRESIDENT: Yes.

MR PICCININ: Page 808?

THE PRESIDENT: Yes, J.3.

MR PICCININ: J.3, pass-on, correct. It is paragraph J18:

"To the extent that there is pass-on, it can be estimated [he says] by analysing the extent to which sellers change their prices in reaction to cost changes. For example, if Amazon increases its fees by 10p per unit and sales data indicates that sellers followed this by increasing their sales prices by 5p per unit, this would suggest 50 per cent pass-on. The data which would ideally be sought from Amazon in relation to my quantum analysis should enable me to conduct this analysis."

That's not methodology, Sir, any more than Dr Pike's one is. That's describing what pass-on is and saying that he hopes to be able to estimate it.

J19 is just saying -- the punchline for it is over the page, the final sentence:

"Given the above [complexities, complexities, complexities], I will consider whether it is necessary to estimate different pass-on rates for different groups of products."

Okay. How?

J20, it's just saying, "For now, I will assume it is 50 per cent". All right.

In the interests of time, I will just give you the reference point for where he deals with this in -- let's go to it. Page 1497 of this bundle, this is in Houpis 3.

THE PRESIDENT: J20 is simply saying, "Because I have been asked to produce damage".

MR PICCININ: Yes.

THE PRESIDENT: But he obviously has not carried out the method yet, and that's -- so the 50 per cent is --

MR PICCININ: I am not suggesting he should have, Sir. But at the same time, you will remember probably that the two-day hearing we had more than a year ago in Interchange where we spent -- I think it was -- maybe this is a Dorothy from Kansas moment ...

THE PRESIDENT: I have had so many hearings in Interchange over the years. They all blur into one by this point.

MR PICCININ: We spent a couple of days arguing about different methodologies for estimating pass-on. It is a complex exercise.

In any event, in reply, all he says -- it is internal page 79, paragraph 257:

"I have set out a high level methodology for estimating pass-on in Houpis 1."

If you replace "high level" with "satellite level", maybe:

"I have been instructed that it is up to Amazon to decide to put forward a pass-on defence. If it does, I will develop a more detailed methodology at the appropriate stage."

Well, that's not right. Not in a world -- not at all, and certainly not in a world where he knows that Professor Stephan knows he has Mr Hammond sitting next to him, making the same claim alleging pass-on. That's not right. So that might as well be a blank page too.

We say that this whole part of the case, which is kind of an attack on from what you

might think of as the direct harm said to be caused by the infringement, which is the diversion, that part of it I can understand. I don't agree, but I can understand. This part, really, is seeking very large sums of money on the back of nothing in circumstances where it's quite a troubling theory of harm, a very subtle theory of harm. That concludes my submissions on the Microsoft points. We move on next to the also important topic of conflicts, which is just a Stephan issue.

In relation to conflicts, there is no real dispute, I think, about the applicable principles. It is common ground that a class representative is a fiduciary. What that means is he owes a single-minded duty of loyalty to each class member. That means he can't put himself in a position where his duty to advance one class member's case as best he can conflicts with his duty to advance another class member's case as best he can. Pausing there, although sometimes we call this a conflict of interest -- and I am as guilty as anyone of slipping into that language -- that's not quite legally accurate. The problem is not conflicting interests between class members, the problem is conflicting duties on the part of the fiduciary. Specifically, it is that conflict between the duty to advance the case as best he can for one with the duty he has to advance the case as best he can for the other.

That's where the focus of the analysis needs to be. It needs to be on the way in which Stephan is advancing his case because he's the one who has to approve the trial strategy and instruct his counsel team, his solicitor team, and then his counsel team to present the case essentially in the same way as they would present it if they were acting for any of the other class members; or at least -- perhaps that's too harsh -- at least not in a way that you wouldn't want to run the case on behalf of another one of your clients, or here class members.

The thesis of my submissions on this topic is simple, which is that it is impossible for him to do. I want to be clear because my learned friend often shoots at the wrong

target, I think he's still fighting the last war on conflicts. I don't need to show, and I am not trying to show, that running a case on abuses 3 and 4 is contrary to the interests of sellers who exclusively or predominantly use FBA for their offers. That's not my submission to you. That was really what BIRA was saying last time around, and you can understand why they wanted to say that because they weren't running a case on abuses 3 and 4.

What we are saying is that in the context of abuses 3 and 4, Professor Stephan intends to run a positive case at trial -- I will show you this -- on the extent of diversion from FBM to FBA which happened in the real world. That's where the conflict arises, and it arises for this reason: if he were acting for a seller who only or even mostly used FBM, Professor Stephan would have an interest, or rather a duty, to push for the highest possible diversion rate. That would be his duty. A higher diversion rate immediately feeds through to a larger damages award for FBM offers because the seller making those offers would have sold more volumes in the counterfactual. Then on top of that, you have the FBM overcharge as an additional benefit -- I will come on to how that feeds in.

In contrast, if you were acting for a seller who only or even mostly used FBA, the picture would be very different. I can still accept for today's purposes that such a seller might want to advance abuses 3 and 4, although it is a bit of a funny case, and I think it is just worth us thinking through how that argument would be articulated. What you would be saying to the Tribunal is that Amazon unlawfully discriminated in your client's favour causing your client to enjoy more sales than they would have enjoyed in the counterfactual -- profitable sales.

But, your argument would continue, the consequence of sending those additional profitable volumes to your client was that third party logistics providers lost the ability to gain scale and reduce costs, and there was less competitive pressure on Amazon,

or more demand for Amazon, so Amazon charged 25 per cent more on FBA services that it would have charged in the counterfactual. Then you have to say that the overcharge on FBA services made a bigger difference to your profits than the increased volumes did, so on balance you suffered a loss. That's the case you would be articulating.

That would have significant implications for what you would want to say about the diversion rate. If you were going to pursue this claim, I accept you do need to say there was some diversion. You do need to say the diversion was large enough to make that long and tenuous causal chain we were looking at before sound plausible.

But beyond that point, establishing a larger diversion effect is harmful to your client. You can see that immediately from the way my learned friends intend to establish the size of the overcharge at trial which we have just been looking at. What was the methodology -- this is not a pop quiz, but what was the methodology, I ask rhetorically, for the FBA overcharge? That was a before and after regression analysis, where the variable being explained is the FBA prices, and you have a long list of explanatory variables, one of which is an indicator for before and after 2016.

The diversion rate is just not an input into that regression analysis at all. They are not implementing the long causal chain which is the theory of harm in a methodology. They are using an entirely separate methodology, which is just a regression analysis to measure the overcharge. They are going to say that prices are higher in the period post-2016 than in the period before 2016 after controlling for oil prices, et cetera.

What that means is that every extra percentage point of diversion you establish at trial reduces the size of the claims in respect of FBA offers. We show that -- some people have visual minds, I really don't -- but we've put that in our skeleton at bundle A, page 95, I am hoping this will help somebody. We have the charts at the top of the page and what these charts -- how they have been put together is they have been put

together using Dr Houpis' own preliminary estimates of loss. I am not suggesting this is where he ends up at trial, but these have been put together using his assumptions he's been making. The chart on the left is showing the total damages for FBA offers under various conditions, and the chart on the right is showing the total damages for FBM offers.

Obviously that doesn't line up perfectly with different groups of sellers because lots of sellers will have offers in both charts. That's a point I am going to come back to, and it is a point Mr Beal relies on. But it illustrates the point we are making, which is if your offers were exclusively or overwhelmingly of one kind or the other, this is roughly what your claim would look like on Dr Houpis' methodology.

You can see we have the blue line for damages for all abuses, which excludes the marketplace fee damages, but it doesn't matter for these purposes. We have the red line, which is obviously lower, which is just the damages for abuses 3 and 4, the ones where the problem really arises. The only point that really matters here is that the chart on the left is downward sloping everywhere. It's not the point which crosses that's the big deal, the point it crosses is the point at which you don't even want to run the abuse at all.

But our point is a different one, which is that arguing for a higher diversion rate, once you have reached the point where you have justified as plausible your theory of harm and you have proceeded to quantification, from the quantification perspective, it is only going to get worse for you. The value of your claims go down as you argue for more diversion; whereas on the right, the value of your claims go up as you argue for more diversion.

So we say that is an actual conflict, not a potential one. But the conflict is already here, right now. In addition, there are further potential conflicts lying in wait down the road. You have heard what I said, you have heard what Mr Turner has said about the

ropiness of the long causal chain which my learned friends need to establish in order to prove any overcharge on FBA sales at all.

So if you were acting for a seller who only used FBA, even if you took the view at this stage that it was worth pursuing abuses 3 and 4, you would definitely want to keep that under review. The test for conflict -- you have already seen this, Mr Beal fairly showed it to you in Ennis paragraph 18.2, PDF page 226, I don't think we need to go to it -- the test for a potential conflict is only that there is a real sensible possibility of a conflict arising in the future, a real sensible possibility.

In my submission, in light of everything I have said to you, all my meritsy points today, and the ropiness of the methodology, there must be a real sensible possibility that there will come a point in the development of the evidence base where your advice to the seller who only has FBA sales might be, "You know what, we should drop this claim because given where we have reached in the evidence, this claim is detracting from the overall value of your claim".

So that is an additional problem with Professor Stephan's claim. Nobody is in any position to give anyone advice on that issue because at that point, there is an even greater conflict between the interests of sellers with predominantly FBA claims, and sellers with predominantly FBM claims.

My learned friends say all of that is wrong, they have a number of points, and I want to go through them. One of their points which I foreshadowed earlier -- and I have been careful with my language to dodge it -- is that sellers are not rigidly FBA or FBM. To be clear, we strongly agree with that, absolutely. Sellers can choose to do both, or they can choose indeed on an offer by offer basis, even for the same product as between FBA and FBM.

But that is also true of a truck -- here I am cross-referring to the Trucks case: a logistics company, who in that case would be a claimant, a class member in the RHA claim,

can choose on a truck by truck basis whether they want to buy a new or used truck. I would just like to have a look in the Authorities bundle at what was said about that in Trucks because the facts are striking.

If we go in the Authorities bundle to PDF 1968 -- I don't know if you prefer the PDF numbers or the numbers at the bottom.

THE PRESIDENT: PDF, please.

MR PICCININ: 1968, then. It is the paragraph at the bottom, paragraph 37. You can see the point has been made in the second sentence that of the PCR's class members who had signed up to or registered for the RHA proceedings, about a quarter used only used trucks, a third acquired opened new trucks, and some 40 per cent purchased both.

Then if we go over to paragraph 57, which is page 1975, we can see Mr Jowell KC --

THE PRESIDENT: Yes.

MR PICCININ: -- who is submitting that in relation to the 60 per cent of RHA signed up PCMs who were either only new or used, there was a clear conflict of interest. He also submitted that many of the 40 per cent in the overlap group will have brought a preponderance of new or a preponderance of used and will know where their interest lies. Either way, there was a fundamental conflict of interests, and so on.

I don't think the court even thought the point was worthy of discussing in the discussion section. I haven't found a discussion of it there, but it obviously was brought to their attention and did not carry the day, presumably for the reasons given by Mr Jowell KC. So that takes them nowhere.

Another answer my learned friends give is to say that our charts, the ones I showed you before, are misleading or wrong, or however you want to put it, because the value of FBA claims does increase with the diversion rate because a higher diversion rate means a bigger kickstart to that causal chain at the beginning, and therefore bigger

effects at the end of it. That's the gist of the argument.

If we can go back to bundle C, Houpis 3, 1505, page 87, you can see this most clearly from paragraph 284 where he says his post-disclosure methodology does allow him to reflect the link between the degree of diversion and the level of the FBA overcharge explicitly. I am afraid that is deeply confused, or doesn't address the actual issue we have here, which is that his methodology is just a regression analysis, as he accepts here, where the size of the overcharge is given by the co-efficient on what he calls the infringement indicator. But the infringement indicator is just a dummy variable. It is 0 in the years before 2016, and 1 in the years after 2016. It's not a measure of the scale of the diversion. As I have already said, the scale of the diversion is not slated to appear in his regression analysis for estimating overcharge.

His point seems to be a different one, as I understand it. Which is that if the diversion rate was in fact large, and if his regression analysis does a good job of measuring overcharge, then the measured overcharge will be large, so there is a connection between the factual diversion rate and the measured overcharge. He does also raise the possibility here of introducing different indicator variables to capture different periods of time in which there might have been more or less diversion. It seems that what he has in mind is for example -- he doesn't say, but it seems what he has in mind -- is having one indicator for the early period of the infringement, 2016 to 2019, or whatever, and then another for what comes next. That's fine as far as it goes, but there is still a complete disconnect between his measured diversion rate and his measured overcharge.

When I say "measured", you could replace that word with "contended for by Professor Stephan." So there is a complete disconnect between the diversion rate which Professor Stephan is inviting the Tribunal to find at trial, and the FBA overcharge which Professor Stephan is inviting the Tribunal to find at trial. That's because they

are calculated through two completely separate processes.

The regression analysis we have already been discussing determines the overcharge and doesn't have the diversion rate as an input, at most it has multiple indicator variables. Whereas if you go over the page and see paragraph 286, he has a separate methodology for measuring diversion. That's going way back to re-running the algorithm, so he re-runs the algorithm or uses his regression analysis -- either way, his regression analysis that's replicating the algorithm -- and he uses that to estimate the extent of discrimination and therefore the extent of diversion.

Our point is that in applying that paragraph 286 methodology and inviting the Tribunal to accept the conclusions which draw from it, Professor Stephan has a conflict of duties.

That also gives us the answer to another one of their responses. My learned friends say they only need to worry about aggregate damages for the whole class which they say can't be negatively affected by the diversion rate. They say any adverse effect on FBA claims only arises at the distribution stage when the aggregate damages which they will have maximised are split between the sellers. They say at that stage his role is like a trustee of a discretionary trust -- you remember that submission about executors up and down the land.

I am afraid that doesn't work because as we have just seen, Professor Stephan will be taking a position on the scale of the diversion rate during the main proceedings. That's his paragraph 286 methodology which we have just seen. As we have seen, that's where the conflict arises because he has a duty to advance the case of all class members, but by arguing for a higher diversion rate, he's setting in train a situation where the value of the FBA claims will be reduced at the distribution stage.

That's entirely different from a position of a discretionary trustee who is given -- and this is why it is important to think about duties, not interests -- their duty is to exercise

the discretion they have been given as to which beneficiaries should receive what money in what circumstances. The beneficiaries have conflicting interests, of course, they are all putting their hands up, but there is no conflict in duties the trustee has. The trustee just performs the duty which has been given.

So that's why I said at the start that you need to look at conflicts of duties. In contrast, Professor Stephan is asking you to entrust him to prosecute these claims on behalf of all class members. He can't do that, it is impermissible for him to do that in a way which enlarges the value of some claims at the expense of others.

So my learned friend is wrong to say that as long as they are only maximising the overall pot, that's all that matters. Indeed, if that were true, there would be no problem with a single Class Representative acting for direct and indirect purchases together. You would say "Don't worry about pass-on, that's a matter for distribution. I will be like an executor at that stage". Indeed, that point was also addressed in Trucks -- I will just give you the reference because I am conscious I am running short on time. It is paragraph 97, which is authorities PDF 1983.

While we are here, page 88 of Houpis 3, I should also grapple with the argument that Dr Houpis is actually trying to make in this paragraph. The argument he's making -- I don't say "that argument" pejoratively, I mean the opinion he's expressing -- is that you don't need to worry too much about all of this.

THE PRESIDENT: 28?

MR PICCININ: 286, the same paragraph we looked at before.

THE PRESIDENT: Yes.

MR PICCININ: What he's saying is you don't need to worry about any of this because his expert analysis is just going to tell you what the objective truth is about the diversion rate. He says there will be a much reduced scope for material disagreements between class members. It is obvious there is going to be enormous scope for the exercise of

judgment in the analytical processes involved in re-running the algorithm, and I have already addressed you on those. That's exactly why there is a conflict.

Again, just to give you two more references to Trucks. It is 1982 in the PDF, paragraphs 95 to 96, where the Chancellor dealt with exactly that argument being made in relation to Dr Davis's, "Trust me, I am an expert" line. It's not something he said, but the argument being made was: trust Dr Davis, he's an expert, he will sort out the pass-on rate, we don't need to worry about that. That is just not good enough for the reasons the Court of Appeal explained.

So we say there is no way round this problem. On the issue of the diversion rate, Stephan faces exactly the same sort of conflict of duties which the RHA faced in Trucks. This is nothing like the Ennis case either, because that was a case in which --on the Tribunal's analysis, anyway -- the potential conflict related to an argument that Ennis could have run but didn't. It was like, "You have a duty to run this argument which will help some of your class members but it will hurt others". But he wasn't running the argument, that is what was said. Here, Stephan is running the argument that Amazon diverted profitable sales from some class members to other class members, and you can't do that in a claim where you are purporting to act for all of them.

That brings me to my final two topics, which are interrelated, and they also build on what is said, so I am going to deal with them together. The final two topics are opt-in and funding. Again, I don't think there is any dispute about the legal principles. I think Mr Beal, to his credit, put it very fairly, as he always does. He showed you that you have a very broad discretion as to what you certify. There is a long list of factors -- I am not going to go through -- and you are permitted to take into account all of them and any other factor which seems to you to be relevant to the certification decision as to opt-in versus opt-out.

As you know, the Supreme Court is currently in the process of giving all of us further guidance about how to carry out that task in the forex proceedings, O'Higgins. But we don't have that today, so we are just going to have to press on for today. But we do reserve our right to come back to this issue later when a judgment emerges.

Our submission on this issue is not a complex one. This is a claim brought on behalf of business class members, some of which are large and sophisticated -- not all of them, but at least some of them are large and sophisticated; like Sports Direct, for example, you can find on the Amazon store. However, unlike, say, the Interchange proceedings -- so close to my heart -- this is a claim about a core part of class members' businesses. It is not some peripheral thing, some fee they pay on some small part of their revenues. This is core to their activity of conducting their business, the issues in this case.

They all have experience by definition of operating on the Amazon store. The ones that chose to use FBA for some or all of their offers, they know why they do that, they know what the alternatives are, and they know why they chose to do FBA. The ones who don't, the ones who use FBM, to the extent that they do, they know why they do that. Those who compete against Amazon Retail will have their own experiences of that; those who use other marketplaces, likewise. Those who do or don't set lower prices on other stores or on their own website will know why they have or haven't made those choices and what happened when they did.

They will all, naturally, have views on the subject matter of the claim already. So the task of considering once it is brought to their attention -- I will come on to how later -- once the claim is brought to their attention, the task of considering whether it is one that they want to sign up to shouldn't be too complex. It is right in the heart of what they know about.

Indeed, it doesn't have to be a binary decision either. If you had run this case as an

opt-in, doing a proper book building exercise, as used to be traditional -- you know, it used to be traditional in this Tribunal, even in claims like this, in forex, they went out and tried a book building exercise --

THE PRESIDENT: When you say "traditional" ...

MR PICCININ: I just mean it used to be the done thing.

THE PRESIDENT: Used to be. This regime has not been around that long, there have not been many attempts at opt-in.

MR PICCININ: No, but there were a few. Anyway, that's by the by. My point, Sir, is just that if they had done it, they might have found all sorts of things in the views that were expressed to them about the claim. As I said before, it really is Hamlet without the prince territory, trying to skip all of that and just do it on an opt-out basis.

This is also a case where for the reasons I have already explained, all my meritsy points, the causation arguments are frankly outlandish, very unusual and speculative. They include speculating on the ways in which class members would have behaved in the counterfactual. It is a case where, as we have just discussed, class members will have very different interests depending on the ways in which they have interacted with Amazon in the real world and over time.

On top of that, and frankly no doubt at least in part because of how speculative the claim is, this is a case where even the newly discounted fees, the current funding arrangements which are put before you, are on terms that are genuinely eye-watering. We are talking about a funder's profit that is up to ten times the outlay. That's at the back end if you get as far as day one of a trial. At the front end, so if you certified it today, you would be talking about 4.5 times the outlay. Just to give you the reference, that's C1590; bundle C, 1590.

In the carriage judgment at paragraph 55, you referred to those figures as remarkably high. The reference for that is E472. All I want to say about that is that that is a very

polite way of putting it. Because a factor of ten times is almost twice the cap we saw in Bulk Mail which Mr Turner showed you before -- I think that was 5.75, wasn't it? Yes. Likewise, Riefa, itself an interesting claim, to put it mildly, 5.75. And these guys are asking for 10 in these proceedings, and to hit 4.5 right out of gates on certification. We are also in a situation where in the context of those fees, Professor Stephan has told us virtually nothing about how he came to agree those terms; or the even more remarkable terms he agreed before that. I will just show you where we reached on that. It is bundle D, page 334 ... it's paragraph 10. I will invite you to read it to yourself, but when you are reading it, what you are going to see is some information about who gave advice. What I ask you to look out for, if you spot anything about how the negotiations worked or whether other options were considered and how they were investigated, then let me know because I have not found it.

THE PRESIDENT: Yes.

MR PICCININ: What is missing from that is any explanation, any of the more candid explanation you have heard from Mr Hammond about his processes -- I don't want to say anything about the merits of them. But you certainly have more information in that case than you have here. Here you just have, "I thought it was a good idea to enter into this LFA. I sought advice from people, they told me it was" --

THE PRESIDENT: Well, you say "Sought advice from people." He went three times to leading counsel, a specialist on costs, and he has a very experienced panel, including an extremely experienced litigation solicitor --

MR PICCININ: Absolutely.

THE PRESIDENT: -- who negotiated the LFA. He's not telling you the advice they gave him.

MR PICCININ: No, and I am not asking --

THE PRESIDENT: Who took that into account as to whether this is a reasonable thing

to do.

MR PICCININ: I am not asking to see the advice, Sir, obviously that is privileged. But some sort of account of, "Did you shop around?", for example.

We've pressed on this in correspondence -- I won't go through it because it is tedious and goes nowhere -- and the answer we received was, "See previous letters", "See February". My submission is that this is not the kind of candid upfront explanation that was canvassed in Riefa. You need to know more about -- not going and asking people whether it's a good deal, whether I should enter into this, but what has actually been done in the market to try to get the best deal? Did you run a process to select the best terms competing between tenders, and why did you pick this one?

THE PRESIDENT: You speak to people who know the market and say this is something reasonable, you say, that is inadequate?

MR PICCININ: I do say that, Sir, if that's all there is. Obviously we can't see what the advice was so we don't know even what the questions were, or what the considerations were, or whether they went into the market. None of that. When you get down to talking about the amounts, who knows whether they were even advising on the amounts? I don't know. Maybe they were advising on, you know, is the structure a lawful structure, there have been lots of interesting issues about structure that have been debated. We just don't know.

So we do say -- I appreciate what's been said about this in the carriage judgment, which is you can always sort it out at the end. But we do say this is a remarkable amount of money on its own terms.

But in addition -- and this is why I am running my two points together, funding and opt-in -- we say it is also relevant to the opt-in versus opt-out debate. Because all of us know what it is like either working for an organisation or having clients to whom the claim actually belongs and the kind of scrutiny you get from them of proposed courses

of action of any kind, but particularly financial ones. If this claim had to be brought with the buy-in of class members, it might unfold in lots of different ways that would have been good to know and could have been better for them. Some, as I said before, might have taken one look at it and said they want nothing to do with this, it is nonsense. They have a great experience with Amazon, they have made a fortune, couldn't have replicated what they get from FBA, it is great value, why would I sue Amazon? Others might put pressure on to negotiate the better funding terms, or the claim could even have been brought on a menu basis with some classes --

THE PRESIDENT: Nothing to do with it? You say some might have said they want nothing to do with it?

MR PICCININ: Yes, some might have opted out.

THE PRESIDENT: Yes, exactly.

MR PICCININ: Quite, Sir. But if they are required to opt-in, some might have then thought about it and then said they want nothing to do with it and not opted in, which might be different from a set of people who think about it and opt out, that being the point of the opt-in versus the opt-out regimes.

In any event, you understand the point, which is that if you engage with the people in whose name the litigation is being brought, they might have some interest in the funding, or any other aspects of the claim, and they might negotiate better terms, or insist on better terms being negotiated.

In any case, the upshot would be that Amazon would be facing real claims by real businesses, rather than claims that are manufactured by lawyers and funders. I should say that at least in this submission I am making today, I am not using "manufactured" pejoratively, but just in a realistic sense that it is a claim which has been put together by lawyers and funders and economists, rather than a claim that is being put together and advanced by people with a grievance. If that can be done,

particularly for a case like this --

THE PRESIDENT: Yes, I am not sure that in reality opt-in claims are not also put in --

MR PICCININ: Sorry?

THE PRESIDENT: I am not so confident that opt-in class actions are not also put together by the lawyers and the funders.

MR PICCININ: Yes. But at least there has been a stage of buy in, Sir.

THE PRESIDENT: Yes, you have to get buy in, but I think the claims are put together and then they seek to build a book.

MR PICCININ: In the first instance, I am sure that's right.

THE PRESIDENT: It is only if you go for a -- you know, a GLO when you have to sign up a different way.

MR PICCININ: I take that, Sir, it is a question of degree.

THE PRESIDENT: Yes.

MR PICCININ: A specific point that they might well object to is another one of the points we have canvassed in our CPO response, which is about the way the settlement regime works under LFA. I know the Tribunal looked at this in the context of the carriage dispute, but we do say it is a real cause of concern in a case like this at least. What I do I mean by that? Let me just paint you a picture of one obvious way in which things could go seriously wrong here. Suppose we get to a trial, and suppose we're in a place -- if we do that, we would be in a place where the funder is contractually entitled to ten times outlay if Stephan wins. Suppose the trial is going badly for them on the more speculative elements of their claim, or on all of it, such that Professor Stephan may take the view as a responsible Class Representative that he should settle for a small fraction of what was being claimed, and suppose that Amazon was willing to offer that.

The funder may have a very different outlook from the class members. The funder

may think that if the claim settles for a small sum, the funder may not get back anything much more than its outlay; whereas if it prays for a miracle, it might get one and might make a vast fortune, even if only after an appeal. At that point, it is easy to see how a funder could trigger the independent KC opinion procedure which is provided for under the Stephan LFA and not, as far as I can see, under the Hammond LFA.

If the Stephan procedure is triggered, that would be a very difficult task for the independent KC. Being independent, they will not have spent months preparing the trial, they will not have spent weeks fighting the trial. If they are required to form their own independent view of the merits of settlement rather than to defer to the counsel team -- I should give you the reference to the clause in case you want to turn it up, it is C1534 clause, 18.4, that's the KC opinion. You get there in relation to settlement from a combination of clauses 7.1 and 7.5 on page 1527.

So we do say there is a very real risk that in a situation a bit like Merricks, but perhaps even worse because it happens in the heat of a trial, you will find that a fair settlement which is in the interests of the class is rejected because the funder -- understandably, I don't criticise the funder -- thinks it's not in its interests, because its interests are different, so they trigger the clause. Then there could be a good faith, but again understandably -- not negligently, just understandably -- erroneous opinion being given by an independent KC in incredibly difficult circumstances.

Again, we object to that on its own terms. We say it is far from clear why that is needed in a regime where any settlement will be subject to the Tribunal's evaluation in any event. As the Merricks case shows, the funder can object to a settlement if it pleases the funder to do so, and the Tribunal can consider its views, as this Tribunal did in the Merricks case.

But if the settlement is one which the Tribunal would consider to be in the interests of the class at such a hearing, then I say it is quite something for the funder to be able to

block it with a roll of a dice on an independent KC. Hopefully, it is a bit better than a roll of a dice, but you can see how views can differ on very difficult matters like this. If you are not there in the trial, it's incredibly difficult to advise.

So that's why we have objected to that in principle. It's actually not fair to Amazon either to have a fair settlement with the class, which is fair for the class and which the class is willing to accept, blocked by some independent KC. But even beyond our objections to that in principle, that really does seem like the kind of thing that a proper business opting into a claim might have a few questions to ask about them.

My learned friends say that despite those points -- I am wrapping up, Sir, I am conscious I am trying your patience -- that opt-in proceedings --

THE PRESIDENT: It is not our patience. It is just that we need to finish today.

MR PICCININ: I am actually still within time, I think. My learned friends needed an hour for reply.

In any event, my learned friends say that opt-in proceedings would not be practicable and should not be ordered for that reason. But if they are right about that in this case, then it really is difficult to understand what kind of case the opt-in regime, for which Parliament has specifically legislated, is practicable for. Because this is a case where not only are they all businesses, not only are they all businesses who know about this stuff, but we know -- we, Amazon -- know who they are because they do business with us. So Amazon itself --

THE PRESIDENT: Can you help us, then, how many are there?

MR PICCININ: I can't tell you how many there are, Sir.

THE PRESIDENT: You say you know who they are. I am not asking for names and addresses, just the number.

MR PICCININ: I know. We have not progressed the exercise yet.

THE PRESIDENT: We have been asking that a number of times. We have estimates,

but of course the class representatives are at a great disadvantage. They don't really know.

MR PICCININ: Yes. That exercise fell away once it became apparent that the difference between the Class Representatives at the carriage stage was just a difference of approach.

The difficulty was --

THE PRESIDENT: It might be relevant to the opt-in/opt-out point.

MR PICCININ: I understand that, Sir. I take the point and I am prepared to work with Professor Stephan's estimates. The point I was making is we could actually contact them for you in a form of words -- I know my learned friends don't like that, but we could do it in a form of words that is approved by the Tribunal. My learned friends have made clear they don't like that idea, but that is common practice in the United States, for defendants to help contact class members, and there is no practical reason why that shouldn't work here.

We say these are not proceedings --

THE PRESIDENT: I am sure if we get that far, it would be very helpful on distribution.

MR PICCININ: Yes, Sir.

THE PRESIDENT: So we will note that in any event.

MR PICCININ: I understand. We say these are not proceedings that should be certified at all for all of the reasons I have touched on today: methodology, conflicts, and the points on funding, including settlement which I have just made. But also on top of those points, we say these are not proceedings that should be certified on an opt-out basis. If at all, they should be certified opt-in.

Unless anyone has any questions for me, those are my submissions, ten minutes early.

THE PRESIDENT: Just a moment.

MR DERBYSHIRE: If we can just look at pass-on for a moment.

MR PICCININ: Yes.

MR DERBYSHIRE: Both Stephan and Hammond and their experts haven't said much about pass-on.

MR PICCININ: No.

MR DERBYSHIRE: And you have criticised it for that. I personally find what they have said quite persuasive, in that they have listed the data they will look at, and you can infer from that data what they intend to do. I think in one case, Dr Houpis has said what he will do and illustrated it: if that number was 2 per cent and that number was 4 per cent, it would be 50 per cent. I think the data Amazon has is very good to actually identifying what pass-on would be, based on an increase in fees in a particular goods market, and what then happened to prices. So do you strongly disagree with that?

MR PICCININ: Sir, the submission isn't that it is impossible to do, that's not the submission we are making.

The submission is that in a case where pass-on is obviously going to be in issue, I would expect to see outlines of the kind of regression analysis that would be deployed, the kinds of data which would go into it; and if it is going to be by regression analysis, is it specifically FBA fees, is it other costs? How is it going to be done? How are they going control for compounding factors; how are they going to look at different periods of time?

All of those sorts of issues are the kind of things I would expect to see explored. The submission wasn't that it can't be done, it is that it is a big topic and there is a paragraph on it in each of the two reports.

MR DERBYSHIRE: And you would expect all those things to be specified in advance.

MR PICCININ: Not locked in stone, Sir. Not locked in stone, but outlined in blueprint,

like with the rest of report. You don't just say, "Oh, look, I'll re-run the algorithm", full stop, done. You need to explain how it is going to be done. We can disagree with what they say there, but they certainly have said a lot about it -- we do disagree with it. But a different order of detail is provided there from this. This is essentially just, "I will do a pass-on analysis", comparing costs and prices. That is what all pass-on analyses are, but there are lots of different flavours of it and different approaches that can be taken.

MR DERBYSHIRE: That's a fair point.

Can I also go back to some of the evidence from Mr Turner yesterday --

MR PICCININ: The question is for Mr Turner?

MR DERBYSHIRE: Yes, if that is okay.

MR PICCININ: Of course it is.

MR DERBYSHIRE: On the constant volume and constant price scenarios -- and you criticised both --

MR TURNER: Yes.

MR DERBYSHIRE: -- on the constant volume scenario, you said it would be well-nigh impossible for merchants to actually reduce their prices to a significantly lower level to capture the business.

MR TURNER: I didn't put it like that, just to be clear. The way that the constant volume scenario is explained in the report, it's said that there are these two possibilities: either you hold the prices constant, or else you imagine the scenario where all or some sellers --

MR DERBYSHIRE: All or some, yes.

MR TURNER: Yes. All or some drop prices to the point necessary to maintain the same probability of winning the Buy Box.

My comment was that he's missing out the necessary friction of your costs, that people

will generally typically price above their costs, and it didn't seem to be any part of his methodology. That's the only point.

MR DERBYSHIRE: He does make the point in the report that given the alleged removal of the discrimination, the FBA sellers would face a new kind of paradigm of more competition and their profit-maximising price might drop. Obviously he presented it in the extreme version where everybody did that. I do not think you are suggesting anywhere near everybody would do it, but it was just illustrating the range between nobody doing it and everybody doing it?

MR TURNER: He takes an extreme point for the constant volume scenario. In his preliminary report, he says, "I am going to model for, how we say he did it, the constant prices scenario, and here is the number that it spits out; at the other end, I am just going to assume that everybody who won, the FBA sellers, drops their price to the level that would be necessary to continue to have the same probability. Then with those two poles, he says "Now how am I going to approach this?" looking ahead post certification.

MR DERBYSHIRE: Yes.

MR TURNER: He then says there are these various possibilities, one of which was "I could just take a midpoint".

My observation there was that to take a mid-point based on those assumptions would not be plausible because of what the extreme pole -- the upper pole -- of constant volume scenarios involves, which doesn't take into account the costs, or as you say the change in the conditions at all.

So I was saying you have to go on to do what he says is the more complex approach and consider these issues of seller behaviour. So that was really a preamble to say, "Let's look at how he's going to do that", because if you get post certification, that must become the main show for the trial and that was where I was concentrating.

MR DERBYSHIRE: Okay. And he didn't specify how he would look at changing seller behaviour?

MR TURNER: That's right. So there were these (i), (ii) and (iii), which I went through in turn to show you this is what he's saying he would do in each case. My intention was to say that this won't cut the mustard in each of those cases, without revisiting those points now, if you look at what he says, the concern.

MR DERBYSHIRE: Okay.

MR TURNER: Given that it will be central -- or would be central -- focus on what he says he would do. My submission was it wouldn't be plausible.

MR DERBYSHIRE: I did think there was some merit in (ii) and I should have raised it yesterday. Sorry to actually bring you back on this point.

THE PRESIDENT: I think we will take our break now and then move on to reply.

(3.29 pm)

(A short break)

(3.42 pm)

Reply submissions by MR MOSER

MR MOSER: Sir, yesterday my learned friend Mr Turner KC made five points; four which he summarised yesterday, and this morning he also added that he talked about pass-on. You have, I think, all the submissions I wanted to give you on pass-on, partly because I was asked to comment yesterday. I won't say anything more about that, unless asked. I will say something about the other four.

My learned friend based his submissions on what he described as common sense. That's understandable in the absence of evidence, since Amazon has not produced evidence to date. For him to succeed on these points, therefore, it would require the Tribunal to find that Dr Pike's methodology, both his primary exploitative and his

exclusionary methodology, are so hopelessly flawed that the consumer class cannot be certified. I say, with respect, that wildly overstates the defence's case.

My learned friend made his submissions by turning a microscope on some of Dr Pike's findings in his reports, particularly his first report. The first point my learned friend raised was he said there was no evidence that there was foreclosure in the fulfilment market which he said as a matter of common sense. My learned friend took you through the relevant passages in Dr Pike's first report. You will remember this, it was the commentary upon paragraphs 392 and 398 in particular, in bundle C1, tab 15 -- that's the first report -- pages 375 and 376.

I have of course taken you through these in opening, my learned friend went back to them. He commented upon this aspect of the methodology in 392. You see the exclusionary effect foreclosing rival fulfilment; at 398, the potential for additional harm. What he did first was he said there are these paragraphs, and then he made reference to paragraphs 326 to 331, and paragraphs 389 to 399. Then he said, and I quote him, "That's all there is".

For starters, we don't see that a proposed methodology at this stage, using familiar concepts, needs to be more than 20 paragraphs of closely reasoned economic argument. The volume point, as it were -- how long is it -- certainly doesn't merit the purported conclusion that Dr Pike doesn't have a methodology on foreclosure in the fulfilment market, and of course there is elaboration on this in Pike 2, 3 and 4, and there is a summary.

Leaving all that aside, when my learned friend continued with his first submission, he actually concentrated on a very small part of those paragraphs. He concentrated on paragraphs 327, 328 and 382, "Methodology on exclusionary abuse", page 361 of the bundle. You will remember this, of course, it was only yesterday.

The hook for this was the Jeff Bezos interview which was produced to you and handed

up. In it, Mr Bezos unsurprisingly says Amazon has done some price elasticity studies. My learned friend said this business of elasticity studies is, "an unsurmountable problem" for us, the Class Representative.

MR TURNER: Just to clarify, the insurmountable problem comes after that.

MR MOSER: Fine, I will get to what comes after that. Neither is insurmountable. I have the note at this stage, but I may have -- I completely concede if I have it wrong. This isn't insurmountable, the next thing is not going to be insurmountable. Because what is common sense, in my respectful submission, is that firms in these markets do price elasticity studies all the time. Indeed, this was not my original point, but when the president put this to my learned friend, he did change tack -- perhaps this is what comes afterwards -- "Aha", he said, all right, but then the key insurmountable problem is paragraph 330. He said there is not going to be any evidence of these other logistics providers -- and this the point around Evri and Royal Mail.

When it was put to him that in fact Amazon had negotiated with them so would have the data, I submit this further insurmountable problem also proved all too surmountable. It clearly isn't common sense that there are no such data -- and I would note, if we are being careful with our language, my learned friend very carefully didn't say -- quite properly didn't say -- that there definitely aren't such data. I rely here on the *Microsoft* test, specifically on the part of the *Microsoft* test that there has to be some basis in fact that relevant data exists, and there clearly is such a basis. There is a basis in relation to studies of elasticity of demand for fulfilment services, there clearly is in relation to the likes of Evri and Royal Mail.

So on this first issue my learned friend identified, no evidence of foreclosure as a matter of common sense, on this first issue, there is no gap as he alleged, the gap does not exist. It is not unreasonable to assume that Amazon, the largest such company in the world, has done such studies and, as a fallback, it is available from

third parties. So either way, the evidence plainly exists. I submit the first point falls away.

My learned friend's second point was there is no methodology as to how loss to consumers is attributable to foreclosure of the market, no methodology in Dr Pike's report. If we turn back to pages 375 and 376 where my learned friend had started, this is then the point he made about scope and fulfilment.

Here, my learned friend turned his microscope on to what he says is a contradiction between Dr Pike's paragraph 392(a) and (b), where he says there is no overcharge, or there might be an overcharge; and paragraph 398, where he talks about potential for additional harm -- perhaps not so much 398, but how it was then summarised in Dr Pike's responsive report and summary. I will come to that in a moment.

Just to set the scene, if we remember, unlike Dr Houpis, Dr Pike is essentially agnostic on overcharge because for his primary methodology, he doesn't need overcharge. That's why in 392, he says there might be no overcharge. In 392(b), he posits there might be. But especially in 392(c), he does posit that FBA prices could go up. But in each of those three, (a), (b) and (c), it doesn't really matter for him at the end of the day because as he explains at 394, it doesn't add to the loss to the class. It causes no additional loss to the class.

So if we look at the last sentence of 394 to be clear, that harm -- and that is 392(b) and 392(c) -- that harm would be a proportion of the harm described in primary, so again would not be additional. And he means additional to the harm which is calculated in the primary methodology.

So bearing that context in mind, Mr Turner KC's criticism when we look on to 398 on page 376 and the later iterations of that, is he says, "Ah, here at 398 there is additional harm". Therefore, he says in further course of his argument, it is a conflict that this later argument we are about to come on to doesn't stand together with the argument

in 392.

It may be more accurate when he's talking here about additional harm to say he's looking at alternative potential sources of overcharge related loss in relation to a different fee. Because by the time we reach 398/399, we are looking at the platform commission fee. It is additional only in the sense that unlike any FBA overcharge under 392, it would add to the direct damages. It's not that both the FBA overcharge and the commission overcharge have to exist side by side: he's looking at potential overcharge, it doesn't really matter for his methodology, it's not additional, and then he's looking at something else. That's really the simple point. He's looking at something else when he's looking at 398 and 399.

My learned friend finally looked at how the two earlier reports were summarised at pages 452 and 453 -- I believe that's in the 20-page summary, paragraphs 61 and 62. Paragraph 62 is itself only an alternative way of assessing commission overcharge because if we start at paragraph 61, which is the first instance of summary of the additional harm argument, paragraph 61 suggests an empirical method for assessing supra-competitive commission. So the first way Dr Pike proposes to look at this is to say he will look at the evidence and he will do a before and after analysis using data on Amazon's commission from pre-2006.

I suppose, adding in my own parenthesis, you could look at what happened afterwards, after 2020, but anyway, he wants to look at supra-competitive commission empirically. 62, then, which attracted the particular criticisms from my learned friend, is an alternative to 61. 62 exists in a world where at least Dr Pike isn't particularly concerned with whether or not there is an FBA overcharge at all. As I say, he doesn't need it.

If there isn't a fulfilment overcharge, then Dr Pike's fulfilment theory of harm comes to nothing in the FBA. But his methodology for marketplace overcharge would then still

work, as we see in the summary in 62.

So the theories are not inconsistent, they are merely complementary. Building on what is said in a sentence in paragraph 62 in order somehow to undermine everything Dr Pike says is, in my respectful submission, over-egging it.

Having said all of that, the liberating thought perhaps, with respect, is that expressed by you, Sir, the President, yesterday. If we have a joint case management direction and there is a direction that certain aspects of this are to have joint evidence, then the expert who principally relies on overcharge and pass-on will make those assessments. And whether an expert is joint or joint on agreed issues, it is clear he's by definition an expert that both PCRs, both Class Representatives, can rely upon. So, it would be extraordinary if somehow, we couldn't pursue our pleaded pass-on loss for an overcharge in a joint case based on what Dr Pike has posited in -- as I say, a not inconsistent paragraph, but even if that is held against me, as posited in paragraph 62. If it is right, as for instance Dr Houpis says there might have been a 50 per cent overcharge, the other 50 per cent would have gone to us. It would have been our loss, the consumers, so we must be entitled then to claim that. That's the second point. There is nothing in it; and if there were, it's not going to matter.

The third point -- I am going to take this fairly swiftly -- was it was said Dr Pike has no methodology for showing the true loss on a constant price scenario. This, it will be recorded, was the fascinating suggestion that we haven't allowed for a monetary value assessment that might be put on delivery speed specifically when it comes to damages.

That is, with respect, at best an innovative and interesting argument for trial on which Amazon can produce its defence expert report -- and I look forward to reading it -- but it is certainly not a "systematic overcompensation"; or rather it could only be a systematic overcompensation if Amazon's novel argument were first correct and, in

the further perhaps unlikely event, it could not also be accounted for in the calculation of loss.

So if they are right and they are going to persuade the CAT of this idea that there is some netting off of a monetary value for the true loss on price, then it ought to be -- as is perfectly usual when it comes to the assessment of damages -- it ought to be possible to give credit for any such monetary value and adjust any such damages accordingly. But that is for trial and without wishing to go too far ahead of ourselves, probably not even for Trial 1.

The fourth point which I want to address is again the so-called common sense point, that the constant volume scenario must be inadequate. Mr Derbyshire briefly touched on it just before the short adjournment. My learned friend's fourth point founded upon an interpretation of a footnote at page 447 of the bundle in paragraph 44. The heading above it is:

"The counterfactual algorithm can be used to estimate a set of counterfactual set of prices."

And it is where Dr Pike says:

"Whether I use the actual algorithm or a model, I will need to consider how sellers would have reacted in the absence of that discrimination."

In the footnote, footnote 14, it is said that he would evaluate the feasibility of correcting these biases if the claim is certified. My learned friend, again a sort of, with respect, microscopic point, said it is not reasoned here. Again, it was a point where it was put to him that FBA sellers may have to accept lower margins because of greater competition. So common sense doesn't in fact dictate that there is no room for lower prices.

Once again, being an experienced advocate, my learned friend retrenched and he turned his fire instead on paragraph 47, that's the paragraph with (i), (ii) and (iii). He

said -- this is page 449 -- there is no saying that there is such evidence available, and he made reference to the statement of Mr Rowan. If we look at paragraph 47, in fact there are three alternative approaches in that paragraph suggested by Dr Pike and as I read it or heard it, my learned friend only attacked one of them.

So in 47, it is said that one simple option is to take the lower of the two as a cautious estimate of damages to the class. Another simple option is to model damages as the mid-point between the two estimates. Those are the first two. Today my learned friend expanded slightly on what he says about the second one, the simple model of damages as the mid-point.

But as a concept, I say you cannot really quibble with it. It is the third which yesterday got the privilege of my learned friend's attention. It was a more complex approach would be to investigate the proportion of sellers that can be expected to set lower prices in the counterfactual.

So the first trite point I make is even if we don't get to the more complex approach, we have other approaches. On the more complex approach, there are the three examples. On (i), my learned friend said, "Ah, Mr Rowan says there are no such surveys", and there was also an assertion that it seemed that we had no reason to believe that there would be evidence such as (ii) and (iii).

However, I do not understand Mr Rowan to say that there is no analysis of seller behaviour, for instance, so he can't rely on the statement for that. Also, he doesn't say that one can't examine a sample of sellers who became FBA sellers, and hence who have periods with and without the discriminatory advantage. So he can't rely on Mr Rowan to say there is no (ii) any more than he can to (iii).

At some point, I thought I heard my learned friend say yesterday that I had asserted that you cannot be someone who wasn't an FBA seller and became one, or similar. I certainly didn't. All I said is there are FBA sellers who also sell non-FBA, so who sell

FBM.

It is certainly common sense, and surely we all realise and must know that these exist, there will be sellers who at some point weren't FBA sellers and then became FBA sellers. So why there should be no (ii) possibility frankly defeats me. We have every reason to believe they exist, as we have every reason to believe that Amazon will do research and analysis of things like likely seller behaviour. Especially when they are being pursued around the globe by regulators, they will want to know how sellers will respond to non-discriminatory algorithms. Again, it hasn't been said that as a matter of fact they don't exist. That's what I want to say on my learned friend's submissions yesterday.

Today, my learned friend commented on funding. He prefaced his remarks with some high level points of principle around both the integrity of the system and, importantly, the predictability of outcomes. I am not going to reply to those in detail, not least because in broad terms no one disagrees, but also because I don't consider that those points of principle are engaged by the specific facts of this case.

However, it would, in my respectful submission, be entirely disproportionate in this case to refuse certification and drive the consumer class from the seat of judgment when there are more proportionate levers available to the Tribunal, most particularly at the time of distribution.

One of the aspects of my learned friend's attack this morning was that he referred to other cases where, like the present one, it has been accepted that a commitment basis is used for the calculation of the funder's fee. He referred first to the case of *Gormsen 2*.

If I may please go to *Gormsen 2*, it's at tab 33 of the Authorities bundle, page 2023 -- you will have it on the PDF at 2029, I think. Paragraph 39 of that judgment begins over the page, but it is paragraph 39(4) that is on page 2029, 2023

of the hard copy.

My learned friend went to this -- which I have also already gone to, as he said -- and the criticism which was made in that case was on an exposure of £90 million, a return of £350 million represents a return of 3.8 times that exposure. That's defensible. Not on the face of it defensible is the return 21 months later of 8.3 times of that exposure. In his comment on this, my learned friend -- understandably for advocacy purposes -- said we are as near as damage to eight, even on our own figures of 7.7, so that is very close to 8.3. Of course there is quite a big difference between 7.7 and 8.3, but even leaving that aside, I want to draw the panel's attention to two points.

The first is that like our calculation, it was on a commitment basis, not on a fees paid basis, and also what the Tribunal actually did about it in *Gormsen*. We see that at paragraph 41, which my learned friend didn't take you to, so I will just take you to it now.

"In conclusion, we say only this:

(1) the funding arrangements as they presently stand [and that includes the 8.3 higher than us] do not stop us from making an order permitting these proceedings to continue."

I realise there were some changes that were made to soften the ratchet, and so on:

"The funding arrangements as they presently stand do not stop us from making an order permitting these proceedings to continue. We are minded to certify.

"(2) We would not want there to be any suggestion the Tribunal's certification of these collective proceedings that we are in any way approving or endorsing or expressing any kind of approval of the terms on which these proceedings are funded. It is simply that of the two choices we have, to certify or not to certify, we consider the option of certification to be the right course in this case."

THE PRESIDENT: I thought we were told -- and I am not so familiar with that

case -- that the Tribunal sent the parties away and they came back with a revised --

MR MOSER: They did.

THE PRESIDENT: Is this the revised one, because here they are not refusing it.

MR MOSER: They did switch back to a damages-based funding arrangement if the law were to change to permit this. Of course the law did not change to permit this.

THE PRESIDENT: Yes.

MR MOSER: Also, I think it is what we see at 42, the operation of the ratchet was softened, which affected both timeframes and trigger points.

MR TURNER: The first sentence of paragraph 40 is also useful.

MR MOSER: Yes, my learned friend is quite right. In broad terms, that's described in 40(1) and 40(2).

THE PRESIDENT: For the law to change?

MR MOSER: Yes.

THE PRESIDENT: This is what is not quite clear, the operation of the ratchet. Is it the case that the table and the details in paragraphs 2 and 3 were then changed in a way that is not explained? Because then they say the funding arrangements -- are those not the funding arrangements as they presently stand that were then certified with the warning shot, as it were, in paragraph 40(2) Or are they saying, "Well, that's what we had, they have now been softened"?

MR MOSER: My understanding is --

THE PRESIDENT: In which case, why are they being set out?

MR MOSER: Well, quite. My understanding is that the position is as in the tabular form, that the multipliers are as described in 39(4). But the ratchet was softened in a way that is not articulated.

THE PRESIDENT: The ratchet means?

MR MOSER: Presumably the steps, similar to the steps we have. We have --

THE PRESIDENT: The dates?

MR MOSER: The dates, yes.

MR TURNER: You will see in paragraph 39, the underlined word "were."

THE PRESIDENT: Yes, I saw that. We will come to the changes proposed.

MR MOSER: Yes, "were," then come to the changes in a moment. The only change that is mentioned --

THE PRESIDENT: Is paragraph 40.

MR MOSER: -- is paragraph 40.

THE PRESIDENT: Significant change. One is the provisional switch to damages-based funding --

MR MOSER: Which never happened, and then the softening of the ratchet.

THE PRESIDENT: But it is not clear what the softening of the ratchet was because indeed the Tribunal says, "We are not going to articulate it."

MR MOSER: Yes.

THE PRESIDENT: So we don't actually know what the final basis was, is that right? Except we do know that they nonetheless said in their paragraph 41 the two points you have drawn to our attention. They made clear they are still not approving them, but they will certify.

MR MOSER: Yes. I understand that my learned friend Mr Beal will pick this back up because it is mentioned in his carriage judgment, so it may be we will hear more from him in his reply.

THE PRESIDENT: Yes. This is *Gormsen 2*, so this is the final one.

MR MOSER: Yes.

THE PRESIDENT: Yes. It is just not clear what paragraph 40(2), what actually happened.

MR MOSER: No.

THE PRESIDENT: No, there we are.

MR MOSER: A similar sort of judgment that I mentioned in opening which my learned friend didn't return to, was I mentioned *Gutmann v Apple*. It is tab 35, page 2121, paragraph 36. Again, it is mentioned this was a committed capital case, I did mention it in opening.

In that case, the committed capital was 18.5 million and there was an uplift of over 70 million -- about the middle of the paragraph -- a very large sum:

"We do not at this stage conclude it sufficiently extreme to warrant calling out, or that this is of itself a reason not to certify. It is not to say the theme will not be subject to scrutiny by this Tribunal at the conclusion of these proceedings."

I think by no means that we have a complete compendious collection of committed fee cases where they went on to certify. There is another example in our written materials and in the bundles. Just for your note, it is *Neill v Sony*, which is at tab 30, page 1948.

THE PRESIDENT: Yes. I know that committed funds is often used.

MR MOSER: Yes, and that's another committed funds case, very similar. Paragraphs 161 to 171 of that case.

THE PRESIDENT: Yes.

MR MOSER: So if we are talking about predictability and consistency of outcome, I would quote it back at my learned friend and say there is a line of case law which has dealt with this sort of matter, both on a committed basis and on the basis of issuing perhaps a warning, but not using the nuclear button of not certifying. When the option the Tribunal has is certify and not certify, it is disproportionate to choose the latter.

In his submissions this morning, my learned friend also hazarded tentatively -- but he certainly suggested it -- where perhaps alternative terms might be available, and he mentioned the conditions explained very candidly by Mr Hammond.

Mr Hammond in his Second Witness Statement at paragraphs 23 and 24, which you

were served this morning, has explained some of the difficulties if he were to try to change course at this stage. I don't know where you have that witness statement, but you will recall it's right at the end of his statement: his ability to further negotiate terms is rather hampered by his agreement, clause 25, which provides he can only terminate in the event of breach. Of course he's explained also in his statement that he has been taking all of these steps with the advice of specialist costs counsel, and he has taken that advice.

I am going to respond to my learned friend's point about carriage by recalling something that was said at the carriage hearing, which my learned friend of course was at, Amazon attended our carriage hearing. Because as it happens, the funder's fees between Hunter and Hammond at the carriage hearing weren't radically different. They weren't in different universes of magnitude, despite Mr Hammond's relative inequality of bargaining power as he described.

At carriage, we worked out and put in our skeleton that at most -- worse case we thought -- our funder's fees would be up to 20 million more than Ms Hunter's. Ms Hunter's team in their skeleton argument said that "may understate it", but they didn't allege that there was a significant difference, and it never played any part.

So perhaps we can take some comfort from that fact that there is nothing so radically different that would have been available in any event when Ms Hunter had an open market, or perhaps Mr Hammond's arrangements are in fact a triumph of his negotiating skills. But that, I say, ought to give further comfort that it is unlikely that something radically better is going to be out there.

That brings me to the last part of my learned friend's submissions this morning when he attacked both the commitment fee, and of course again attacked the level of return. On the commitment fee, with respect, I submit my learned friend really has no basis for saying that the commitment fee of 15 per cent is generous, which he said. He can't

say whether it is generous or not, he has no evidence. It is a matter for the funder. We have no visibility of what the thinking of the funder is in relation to the 15 per cent commitment fee. He referred -- I won't turn it up because of time --

THE PRESIDENT: Just a moment.

I don't think we need to hear from you further on funding, Mr Moser.

MR MOSER: I am grateful. In which case, may it please the panel, those are my submissions.

THE PRESIDENT: Yes.

Yes, Mr Beal.

Reply submissions by MR BEAL

MR BEAL: Firstly, may I inform the Tribunal that our LFA was live on the website as of this week.

THE PRESIDENT: Thank you very much.

MR BEAL: I am going to deal with the submissions in reverse order.

Funding. He said there was 10 times outlay. Of course because that involves adding in actual outlay itself. The multiplier, as you have seen at schedule 3, is nine times.

But in any event, comparing that with the *Gormsen* fix is something which occupied the Tribunal's attention in the carriage dispute. If you would be kind enough to look in bundle E, tab 22, page 853, one sees the beginning of the discussion when Mr Brealey KC and Mr Carrall-Green are tag-teaming on the submission about funding.

If I can summarise what is going on here: if one looks back at page 2029 in the bundle of Authorities my learned friend just took you to, on the left-hand column subparagraph 3 there is a reference to the multiplier. In *Gormsen* terms, it had a multiplier that runs up to 14, based on what was said to be project costs and committed costs. Then there

was some analysis given in subparagraph 4 in *Gormsen* that referred not to a multiplier of project costs, but to a ratio between the total exposure --

THE PRESIDENT: I am so sorry, Mr Beal, it is entirely my fault. I went to the wrong place. Can you give me the reference?

MR BEAL: Bundle E, 853, is where the transcript is. Six pages of quite detailed discussion about -- this is the mischief which comes from comparing project costs with total exposure.

THE PRESIDENT: Can you give me the page again?

MR BEAL: 853. The point Mr Carrall-Green makes at the bottom of the page is that 8.3, which is referred to as not being defensible, is in fact a multiple of the exposure, which is £90 million, and not the £50 million, which is the project cost. The multiplier was 14, but the ratio between the total exposure of the funder and the amount of the return was 8.3. That exposure ratio is problematic.

If we then look over at page 855, the analysis of Mr Brealey comes back into play and reminds the Tribunal that the exposure in our case was 5.1, contrasting Gormsen's 8.3. So it depends what one is comparing with what.

Then there was quite a detailed section where the Tribunal, in the form of both the learned President and Mr Bankes, dealt with: well, have the terms changed? What is the meaning of that particular -- the President saying these were the terms? That's where the concept of ratcheting and softening comes in.

The Tribunal was blessed in the carriage judgment, which it isn't currently blessed with, with the Gormsen terms, which is one of the documents. In fact, it was Mr Carrall-Green who took you through the terms and said that's where the 14 comes in, that is still the multiplier. What changed was the waterfall points at which different multipliers would be applied. So it is a change in the dates and stages in the funding and commitment being multiplied at various stages in the waterfall litigation.

So that was the change. The 14 didn't change. The correct comparison in our case is between 14 and 9; and if one wants to look at exposure, it will be a maximum of 5.1X

That's all I want to say on funding. On opt-out versus opt-in, 21 years ago I was a junior in --

THE PRESIDENT: Yes, you need not address us on opt-out.

MR BEAL: Thank you very much. I don't have to drag my disgrace before you. It didn't work very well.

The third point, pass-on. The burden of course is on the defendants to establish pass-on. It is both legally and evidentially to prove it as, according to the Supreme Court in the Sainsbury's case, there is a high burden on the claimants to make the information available to make it possible to hear it.

Of course if Amazon, as Mr Derbyshire made clear, is in a position where it can work out how consumers have responded to price changes in, for example, FBA sellers' (inaudible) products, they will have data available on consumer responses to price changes as a result of running their very data-heavy marketplace.

But on any view, what Dr Houpis has done is to posit a conservative estimate of 50 per cent before pass-on in order to derive a preliminary estimate of the cost. He doesn't need to develop a methodology for that. Much of our case is the loss has been passed on --

THE PRESIDENT: The 50 per cent I think we put to one side. He's just saying I will make that assumption to come up with a figure. He's not saying I think it may be 50 per cent, or I have done any work to suggest it is. But clearly pass-on will be an issue.

MR BEAL: Yes.

THE PRESIDENT: I think it is something that was raised in one of the cases. It might

have been -- it might have been *Trucks*, but I am not sure.

So it is relevant that he has a methodology for addressing it because we can all anticipate it is going to be in the case.

MR BEAL: Yes. It will come about as and when Amazon pleads against us --

THE PRESIDENT: Yes.

MR BEAL: Obviously that portion of our case based on lost sales, they can't include pass on --

THE PRESIDENT: No, I understand that.

MR BEAL: -- but insofar as that portion of our case goes to overcharge, if the pass-on defence is raised so that the proper level of the overcharge is what we have paid reduced for whatever we have been able to pass on downstream to the consumer, then the responsive point to that is volume effect and both experts have a methodology for working out what the appropriate estimate for pass-on is.

Unlike, I think, the Chair has been involved historically. He spent the larger part of February and March this year dealing with pass on and a variety of different methods articulated for estimating. And this Tribunal will have the benefit of that pass-on judgment at the trial of this case, all being well.

So it can be done, as my learned friend Mr Moser said. It will be done if it is raised in our case as a defence against us to the overcharge estimates.

That is pass-on. The next point is methodology. I am going to turn back, if I may, briefly to some submissions made by Mr Turner because he sought to suggest that the regulatory decisions that we relied on evidentially could only be taken so far and that Amazon had not been in a position to respond to them.

If I can simply give you some dates by reference to the decision, at page 3607 of the bundle of authorities -- I don't need to turn it up, I will just give you the dates -- the marketplace investigation was initiated on 17 July 2019. That led to a statement of

objections in that investigation dated 10 November 2020.

On that same date the statement of objections was issued by the Commission, they opened a separate investigation into Buy Box on 10 November 2020. There is a preliminary assessment in the Buy Box investigation dated 15 June 2022. So 15 June 2022 is a preliminary assessment, and initial commitments of profit by Amazon on 8 July. So three weeks after the preliminary assessment, Amazon has a ready made set of commitments to offer to the EU Commission to deal with their concern. The Commission decision then finally approving the amended commitment on 22 November 2022.

To the extent that any part of the preliminary assessment was objected to or took Amazon by surprise or raised deeper concerns, it would have been highly unusual to respond within three weeks saying, "Here's what we are prepared to do". I simply make that short point.

In terms of the overall approach to the methodology, I confess that it was difficult at times to understand, with the greatest respect, what my learned friend Mr Piccinin wanted the Tribunal to find. Did he, for example, want the Tribunal to find that there was no methodology at all? I suspect not, he didn't go that far; and in any event it is clearly not right.

Did he suggest at any point that this was a methodology that simply cannot work? I respectfully suggest there he didn't go that far either. What he sought to do was to poke holes in the methodology and say key parts of it were unlikely to have problems, or he may end up finding that this has all been a terrible waste of time. That's not the same as saying at this stage that this Tribunal can comfortably conclude both methodology --

THE PRESIDENT: I think for certain aspects he was, as I understood it, submitting there isn't a methodology to follow each step through, the missing steps which are not

covered by the methodology, and some of the methodology just wouldn't work to achieve the result that it's supposedly seeking to obtain.

MR BEAL: To the extent that the submission is the methodology is no more than a description of the documents we have already sought -- as he put it pejoratively, a fishing expedition -- the case law I took the Tribunal to on Tuesday makes it clear that it is part and parcel of this process that disclosure will be given, and therefore it is necessarily implicit, coming up with a preliminary methodology, you need to fill in the gaps. Coupled with that observation from both the Court of Appeal and *Merricks* is the fact that methodologies will change in the light of disclosure. That's inevitable because of the asymmetry of information between the parties.

With the greatest of respect, saying you will need to have data and documents to plug into your methodology is never going to be an answer at certification stage because it would apply to everyone. What one has to do is to say: assuming you can get hold of the data, will the methodology you propose work? The Tribunal needs to be satisfied that if you can't get the data, there is a plan B. That's why throughout Dr Houpis has plan A, if I get the data; and plan B if I don't get the data.

You will be aware that quite a lot of the analysis at different stages of both liability/causation involves a before and after assessment. At estimate of loss stage, quantum of loss stage, it also can involve that process. In a sense, that's the easier process to deploy because based on objective criteria, professional analysis will be conducted and there will be an infringement variable in the usual way, and that will either produce results or it won't because of the methodologies.

We do say, with the greatest respect, we have ended up back in the position I started with, which is bringing the Tribunal's attention to the warning that this certification stage should not be a battle of the experts based on the competing experts' reports or a dress rehearsal for the trial.

I think it was suggested that Dr Houpis hadn't or had thought -- it is not entirely clear what the position was in the end -- whether or not he was seeking third party data. Could I invite you, please, to look in hearing bundle tab 22, bundle C, page 837. This is part of an indication from Dr Houpis of where he will be looking for information, the documents and information he's asking for.

THE PRESIDENT: Just a minute.

MR BEAL: One sees at the bottom of page 837 --

THE PRESIDENT: Just -- sorry.

MR BEAL: I am so sorry. Bottom of 837.

THE PRESIDENT: This is the documents and information to be requested.

MR BEAL: Yes. This is a schedule 2 to the previous one, and it sets out where Dr Houpis is hoping to obtain information from. That includes information on prices of parcel delivery made available to other fulfilment providers, and he proposes to conduct, for example, a survey of parcel delivery companies.

At page 839, second to last row on the table, in terms of revenue for alternative fulfilment providers in the UK, he is proposing a survey of one stop fulfilment providers.

At 840 --

THE PRESIDENT: Just a moment.

MR BEAL: Third to last and second to last rows:

"Evidence of duplicated costs of third party sellers using FBAs ... survey third party sellers... third party sellers by product category ..." and so on.

So there is a variety of different sources being mooted for obtaining information. Some of those of course will be in our claim and class third-party sellers, some of them won't. Just as a point of principle, this Tribunal did in the *Interchange* litigation obtain confidential data from both the payment systems regulator and from three separate merchant acquirers. That data was put into a confidentiality ring and experts, including

Mr Holt, were able to access it and prepare a report on the basis of it.

In terms of specifically on the question of fulfilment, I took you in opening to annex D which deals with economies of scale. The point is then also dealt with in more detail in annex H to the previous one, which is at C25, starting at 797. This is dealing with looking at the costs structure of fulfilment providers. If you would be kind enough to cast an eye over H4 to H7 --

THE PRESIDENT: Can you give me the page?

MR BEAL: 797.

THE PRESIDENT: Thank you.

MR BEAL: He recognises that:

"Actual information on actual marginal costs can be commercially sensible. Access to companies' internal data is generally possible to estimate marginal costs or variable costs. For example in the course of anti-trust investigations, the EC often circulates costs benchmarks using company data."

That's what the Amazon data would be used for, he goes on to say in H5. However, he also says at the top of page 798:

"I also plan to use this costs relationship to estimate the costs of rival smaller one stop fulfilment providers. I set out in annex I how I plan to estimate the volumes of FBM sales and the share of rival fulfilment providers."

I note that is the Bertrand differential point:

"I note also that there is evidence from academia on the evolution of average cost components ... at Amazon in the US which could be combined with data analysis of fulfilment volume in the US to estimate the margin of variable costs ...(Reading to the words)... in the US which could in turn inform the estimate of marginal variable costs of fulfilment services in the UK."

He then says in H6:

"If FBM sales were higher, FBM fulfilment providers would have been able to gain more scale and would have benefited from higher bulk discounts from cost of delivery providers leading to lower marginal costs being passed on through lower fees ... marginal costs."

He says:

"I will also take into account the extent to which in the counterfactual the growth of rival fulfilment providers had increased their market power. In order to do so, I would ideally use ...(Reading to the words)... alternate fulfilment providers and/or stylised differentiated Bertrand model discussed in more detail ..."

So he sets out exactly what the methodology will be. I should say he has also, in a different paragraph -- I will give you the reference in a moment -- indicated where he will take into account the countervailing impact on Amazon's market power, and indeed on Amazon's costs, but he recognises he won't be able to do that prior to disclosure.

There were then some general submissions made about the nature of the commitments. I don't think I have time, I am afraid, to go back through those. If I can make a short point: the CMA decision for these purposes is dealt with at pages 3356 and 3357 of the bundle of authorities. That's the PDF reference. It looks at the reasons given by the CMA decision for accepting the commitments. The commitments themselves were at pages 3356 to 3363 and the CMA commitments are both to require the cessation of the practice of using Prime eligibility for Buy Box, and also to require different delivery companies to be able to negotiate directly with FBM sellers for the purposes of being able to get the Prime label.

Those are the two commitments. What you don't have is the CMA commitment, which as I referred to in my opening was a requirement specifically to use objective non-discriminatory criteria for the Prime eligibility. That commitment does exist at the EU level as the EU commitment. Again, I am afraid I don't have time to take you to it

specifically, but it is dealt with at the bundle of authorities internal page 3635, so PDF 3641, recitals 236 and 269.

The commitments themselves, there are three separate clauses which matter. They are to be found between bundle of authorities page 3582 internal, and 3584, and they are clauses 5, 14 and 19. . What that means is that Amazon did commit to providing non-discriminatory, et cetera, conditions for Prime eligibility as part of its commitment. That's within the body of the commitments itself.

There was a foreclosure argument about whether or not our abuse 1 showed sufficient foreclosure through the methodology. For your note, this is dealt with in Houpis 3, paragraphs 79 to 85. There was also a finding in the EC Commitments decision, recital 171, page 3632, that the likely impact of this non-public seller data abuse had been to materially harm the competitive structure of the market. So when looking back through those recitals, that is where it is dealt with, recital 171.

In terms of the overall approach to setting the criteria for --

THE PRESIDENT: It is capable of distorting the competitive process.

MR BEAL: Yes, because it raised preliminary concerns --

THE PRESIDENT: Yes, but --

MR BEAL: -- not reaching a final conclusion, but identified the means by which the detriment would be established.

THE PRESIDENT: Yes.

MR BEAL: There was then a question about the identification of criteria for the Buy Box. Essentially this is abuses 2 and 3.

The short point obviously is that consumers ought to be able to decide for themselves why they prefer certain offers rather than others. The key mischief here is that Amazon essentially arrogates to itself the right to decide the basis upon which consumers ought to be picking certain offers over others. If that is done on an open, non-discriminatory

basis, there can be no objection to it in principle.

The concern happens where you stack the odds in favour of either your own retail proposition, or in favour of those sellers who are sending large sums of money to your preferment service. That's where the mischief lies.

In terms of it being suggested that this Tribunal and/or the economic experts can't identify what is discriminatory from what is non-discriminatory, I suggest that is of no concern. It is what the Tribunal does all the time. It's what happens all the time in any discrimination case. One has to identify are the two comparables truly comparable and has there been a different treatment to appropriate comparables. And where you have a supposedly neutral marketplace, sellers within them are comparable. If different criteria apply -- can I perhaps for the purposes of selection of the offer in the Buy Box or the selection for the Prime eligibility -- then you have a prima facie case of discrimination.

In terms of identifying bias through the methodology, that is dealt with in Houpis 3 at paragraphs 92 to 101, especially at paragraph 94. Dr Houpis specifically says how he's proposing to deal with it. Amazon's response may well be in due course at the substantive trial they disagree with Dr Houpis in what they advance, but with respect, that is not something it is sensible to be dealt with now.

Moving on to abuse 4 and the specific conditions. Again, that's dealt with in the following paragraphs. As a methodology, Houpis 1 is 423 to 424, and Dr Pike is 121 to 128. They both set out a methodology for looking at the Prime eligibility commissions point. There's a separate point obviously about reserving for yourself the right to negotiate the carrier delivery rate , and there is obviously a different point there.

But in a sense, if you are looking at conditions in the marketplace, why is Amazon choosing to interfere in what prices should be charged by a separate delivery company

to a third-party seller for the purposes of conferring Prime delivery? If they are themselves using third party delivery services, they must trust that delivery service to be capable of performing to a sufficient standard. The question is actually why are different criteria being applied to a third-party seller, an FBA seller, in terms of Prime eligibility.

For example, if an FBA seller who has a high degree of cancellation of orders or is routinely failing to meet delivery -- because the person who has been approved by Amazon is simply missing the target -- why does that not stop the Prime label being applied? Why is it still being used as 99 per cent criteria? The answer, for example, why is that being used against third-party sellers if they are effectively waiving that problem with FBA sellers? Because they use the third-party delivery services as a subcontractor for FBA, but there may well be examples of a third-party retailer using FBA failing to meet the delivery targets they set for another third-party seller that isn't using them. It is that analysis which underpins Dr Houpis' methodology.

Moving on to abuse 5. Again, there is an element of why is Amazon getting involved in a private marketplace and stipulating what prices should be charged on a rival marketplace? It isn't a special regulator, economic regulator, it is a private company. No matter how big and powerful it has become, it's not really its job to tell sellers in the market how much they should be charging on a different marketplace, no doubt seeking non-discriminatory ways of how pricing should happen on their marketplace if they think it is appropriate to do so. I do question why it should be said that if, for example, we establish and the evidence indeed shows that the FBA charges have increased substantially since 2017, why can't somebody who is selling on a rival marketplace reflect the lower marketplace -- say, they pay for a rival market at a lower price (inaudible) in a rival, why is that problematic? That's exactly what this abuse 5 recognises: Amazon is constraining, price competition on its face is being constrained.

The methodology, should one need to refresh one's memory of it, is set out principally in Houpis 3 at 1465in bundle C. Dr Houpis goes through how he is proposing to show the impact of the so-called fair pricing policy as it is applied in practice. Clearly in order to understand how it is applied in practice, he will need to have further information. That doesn't make the methodology that underpins it redundant. It simply means that the information to be plugged into the analysis is not there.

THE PRESIDENT: As I understand it, this application of that particular feature of it -- and it is only that feature of it, I think, that is being attacked if I am right --

MR BEAL: Yes.

THE PRESIDENT: Mr Piccinin took us through the other aspects of it. You have no quarrel with those so far as this case is concerned. It's not done algorithmically. It's not suggested, is it, that --

MR BEAL: We don't know how they come to the conclusion as to what is within the permissible range of a price being charged on a rival marketplace.

THE PRESIDENT: Yes.

MR BEAL: So it says "significantly higher", but we simply don't know what that means.

THE PRESIDENT: Yes. But the decision to remove it from the Buy Box -- or delist, as it were, altogether -- I do not think it has been suggested anywhere that is done algorithmically, is it? We don't know, but there is no such suggestion that has been made that we are looking at the working of an algorithm. We appreciate you don't know, but there is nothing in the materials before us to suggest that it is.

MR BEAL: The evidential basis for this particular head of abuse is predominantly to be found in the FTC complaints.

THE PRESIDENT: Yes.

MR BEAL: They focus primarily on exclusionary intents as expressed in various statements and also practically.

So people have been complaining to us that they have been shut out either from the Buy Box or more generally disciplined for prices they have charged. That doesn't appear to be a consequence of the imposition of an algorithm which suggests perhaps it is ad hoc, but the difficulty, with respect, of a very large case with very data intensive operations is one simply doesn't know what they have put in. Given the extent of AI and algorithmic involvement in complex -- complicated share trading as one understands, it is not beyond the realms of possibility that there is an algorithmic aspect to this, I would not want to rule it out, but we don't have any prima facie evidence of that.

THE PRESIDENT: Yes.

MR BEAL: I am very conscious of the time that has elapsed.

THE PRESIDENT: Yes. Well, you can certainly have ten minutes.

MR BEAL: Thank you very much. Loss of profits, diversion from Amazon Retailers is a pretty obvious cause of loss. If a supposedly neutral marketplace has in fact snagged a significant profit line based on, for example, the data obtained from -- non-publicly obtained from a leading seller that is in the market and selling something that Amazon thinks is going like hot cakes, "we are going to jump in", and they then snaffle a particular demand, then that is a pretty obvious case of anti-competitive behaviour and we say calculating losses is going to be difficult; but the diversion of sales from a seller that is genuinely in the market to a marketplace that is dominant and uses its dominance to divert the search.

Once we have established loss the case law confirms that everything else is to come out in the wash, i.e., you apply the draw backs, look at the detail, estimate. But that's a pretty obvious way in which one can envisage different experts having a different estimate as to what the scale of diversion is and therefore loss of sales is and then applying that to the marginal rate of profit for different sectors and one can come up

with a figure. So the methodology is there.

In terms of the overcharge, again the methodology is there, because Dr Houpis has taken care to go through separately in separate annexes how he would calculate -- and indeed in the main body of his report -- how he would calculate both the overcharge on FBA and the overcharge on FBM.

That's pretty important, because he's clarified exactly how he will go about doing it. He's identified the methodology he will use. It isn't simply something that we are encouraging you to take his word for: he's identified, for example, a supply side effect, for instance scale would have been obtained from rival providers in the event that it had not taken place. So other rival providers would have been able to go to scale and as a result charge less money because lower fees would have been paid in the counterfactual by the sellers -- both FBA sellers and FBM sellers as it happens. He's also identified on the demand side, for example, how excessive demand being channelled to FBA, because of their abusive conduct that we have been describing, would lead to excessive pricing for FBA charges. We have seen in the real world those charges have outstripped inflation by a margin.

So the FBA overcharge itself is dealt with in the bundle at 571. Then annex I has the differentiated Bertrand model, which fills in on the detail.

Without going back through all of those different methodologies at this stage, all I can encourage the Tribunal to do, with respect, is to look at the care with which Dr Houpis has dealt with these issues and responded to the points being taken against him -- this is not a case in which methodology that is passed is somehow not based on fact. It has been clearly articulated and whether it works or not is not for now.

You have, with respect, been treated to a series of attempts to undermine the merits of that methodology without success .

If I then deal with conflicts, which follows on from the suggestion that there is

divergence of interest -- divergence of obligation, I think it was put as -- between representing FBA sellers and FBM sellers.

So the first point is that in Dr Houpis's primary line of analysis under this rate of diversion point, there is no need to look at the rate of diversion at all. That's because as I said in opening you have a situation where FBA sellers are claiming FBA overcharge and the marketplace fee overcharge. They are not claiming for lost sales under abuse 3, because by definition they have not lost sales, they have gained sales. What we see in the counterfactual is that FBA offers in the counterfactual are treated as being sales gained through FBA offers, so the actual assessment of preliminary damages has not taken loss of profit from those offers into account. That's the netting effect of Houpis, tab C21, page 732.

So in that sense, there is not any conflict if the way that the estimate of loss has been calculated for the total class doesn't arise. The aggregate size of damages pot is higher if abuse 3 is raised, and that is in the interests of all members of the class.

As a matter of fact, it is wrong to suggest that Dr Houpis' methodology does not contemplate a diversionary rate. In Houpis 3 at paragraph 284 that you were taken to at page 1505, he sets out both how he would use an infringement indicator to model for the estimate of the impact of the abusive conduct, and also, and importantly, how he could modify that infringement indicator by changing the calibration, changing the factors going into it in order to deal with a variant diversionary rate should it prove necessary to do so. So he has had a methodology where you can give an estimate of the evolution of the diversion ratio over time if you need to as part of the theory of harm. That's dealt with at Houpis 3.

The second point on diversion ratio -- the sixth point to add to the four I had in opening -- is that the level of overcharge has to be posited from the FBA -- what we are dealing with here is the contrast between the alleged benefit from diversion from

FBM to FBA and of the FBA overcharge. So we have to posit a very low level of overcharge for diversionary -- how can I put this?

Table 1, I think, in Houpis 1 has an estimate of loss. The estimate of loss from FBA overcharge is somewhere approaching 1000 million). By contrast the level of loss attributable to FBM overcharge 70 million. So the FBA overcharge in Dr Houpis's estimate based on Dr Houpis's analysis is very substantial. Therefore, the benefit from any diversion of contract is going to have to be very substantial to overcome that and turn that into a negative. That's in essence the reasoning behind Mr Carrall-Green's submissions in the carriage dispute which the Tribunal is familiar. The level of diversion that is going to be required is importantly high effectively to get to a result where this matters.

A further point has been taken that somehow the diversionary rate will decrease -- sorry, the rate of loss attributable at distribution stage to FBA sellers decreases as the diversion rate increases --

THE PRESIDENT: The two graphs?

MR BEAL: Yes. The answer to that is given in Dr Houpis's third report if we turn that up, please, at page 1504, paragraphs 281 to 283. What we say at 280 --

THE PRESIDENT: Just a second.

MR BEAL: I am sorry. It is 1504.

THE PRESIDENT: 86.

MR BEAL: At 280 he says there is a causal link between the FBA overcharge and the diversion. At 281 he says that's because the more impactful an abuse of conduct is in terms of advantaging FBA to the detriment of the FBM, the stronger the impact it will have on demand.

In other words, the more successful Amazon is at the self-preferencing, the more people are going to want to say, well, the only way I am going to make any money is

by using FBA. The demand for FBA increases and therefore overcharging.

It follows therefore, see 282, that the predicted response in the graph does not reflect Dr Houpis's case. It doesn't predict a downward sloping line. What he says is:

"As the level of diversion increases, the level of FBA overcharge would also be expected to increase and damages would also rise for so-called FBA third party sellers. Therefore the line presented on the left-hand side ...(Reading to the words)... is expected to be upward sloping rather than downward sloping in the marketplace."

He then says -- at 284 he deals with the possibility of different diversionary rate.

There is a more fundamental point here. Turn, please, to C28, page 1382, which is in Houpis 2. At footnote 25 --

THE PRESIDENT: This is the summary, is it?

MR BEAL: It is in the summary. I have called it Houpis 2 but it is the summary of his first report. I am just going to use this to give you some figures that are derived from Dr Houpis's analysis. He says:

"As set out in Houpis 1, [his] methodology allows him to allocate damages ... (reading to the words) ... through buy box abuse is £150 million."

So he is recognising that to the extent that it is appropriate, we say, not to confer a reduction in damages on the basis of the benefit, the effect of that is estimated to be £150 million. So in other words, the benefit equals £150 million --

THE PRESIDENT: Sorry, you are in?

MR BEAL: Footnote 25 at the bottom of the page.

THE PRESIDENT: Yes.

MR BEAL: The figures I am giving you are relevant overcharge from the FBA under abuse 3 is £350 million. Of that, the countervailing benefit to which it is said we need to give account at distribution stage is £150 million. In other words, on his analysis you have a ratio between overcharge £350 million, benefit £150 million. That's a ratio

of effectively 7 to 3 or 2.33 recurring to 1. That shows you that for every increase in the benefit of a -- the transfer, you get 2.3 times the overcharge.

That necessarily is based on an implicit diversion rate which I am afraid I don't have time to go through the mechanics of. There is one there where you can find the figures.

Just focusing in on the 2.33 ratio, the 2.33 to 1. In order to get to a position where a diversionary ratio changes and makes it negative, you would have something below 1:1. A 10 per cent rate increase in the diversionary rate changing the ratio between overcharge and benefit such that it was 1 to something that was less than 1.

So on Dr Houpis's analysis you have a 2.3 to 1 ratio. You need to predict a diversionary rate above that which suddenly switches things, and instead of being an upward-sloping curve you suddenly flip and go into a downward-sloping curve, but you must necessarily posit a ratio of 1 to less than 1. Mathematically that would require you to show evidentially why having had an assumed diversion ration of 2.3 to 1, circumstances suddenly changed with a diversionary rate that was suddenly much higher so that the overall structure of the curve almost went parabolic.

There is simply no countervailing evidence from Amazon, certainly at this stage, to suggest that that is plausible. And that's captured. So that mechanically and mathematically shows you the underlying analysis when you add the two together that is captured in the common sense proposition that the more the abuse is successful, the higher the overcharge will be. Then you would anticipate an upward-sloping curve and that's what Mr Houpis has anticipated.

So with the greatest of respect, this point was run -- albeit perhaps not with the laser-like precision Mr Piccinin brought to it in terms of diversion ratios -- it was run below. It was rejected in the carriage decision for the reasons that this Tribunal gave and additional reasons that have been advanced. They don't advance them for the simple reason that it ignores the way the case is put, the evidence from Dr Houpis,

and the evidence and mathematics that at this stage has a sound basis and is sufficient to explain why there is no conflict between the two different members.

If the Tribunal was troubled by this particular point, I could give a more detailed analysis of exactly what the diversionary rate is. I could give the figures and everything else but that requires pulling out various figures from various reports to show you what the relationship between them are. We can do that on a two side, three side piece of paper --

THE PRESIDENT: Yes, just a moment.

No, we don't need any more submissions.

MR PICCININ: I was going to say, Sir, my submissions on this topic were entirely foreshadowed in our skeleton argument. I can't understand why these matters were not dealt with in Mr Beal's opening. The suggestion that he needs to put in further material --

THE PRESIDENT: No, I just said we won't have any further material. But he's responding to the arguments you developed on conflict.

MR BEAL: That, happily, thank you very much for your indulgence, unless there is anything else -- I am reminded by my learned junior that you asked about the confidentiality order. Somewhat unhelpfully we have not been able to agree that. There are two different texts and you are, I think, being invited to chose between them.

THE PRESIDENT: It is just a standard order, isn't it?

MR BEAL: With respect, it beggars belief, but there we are. One of them invites you to find that the state of affairs doesn't exist --

THE PRESIDENT: We will have a look.

You are going to, I think, supply us with -- no, it's not you. It's Mr Moser, I think, is it? There is an updated CV, I think you said, of the member of your consultative panel?

MR MOSER: Yes. There is an update on that updated CV, which is that we are

minded, at least on reflection, simply to follow exactly the same line as Stephan and go with a costs draftsman. It will be much simpler and we need not trouble you with CVs.

THE PRESIDENT: I think that is probably wise, yes. You will write, like Professor Stephan's team will, with the details confirming arrangements you have made --

MR MOSER: We will.

THE PRESIDENT: -- in the course of next week?

MR MOSER: Yes. For the record, we don't mind, I think, about the draft of the confidentiality order.

THE PRESIDENT: Good.

Do you have anything, Mr Turner?

MR TURNER: Not on that, Sir. But when the conclusion of the proceedings comes there is a remark I would like to make.

THE PRESIDENT: We are at the conclusion of the proceedings.

MR TURNER: Thank heavens for that.

It was only on behalf of all parties to thank all members of the Tribunal for your attention and patience in listening to us all. And specifically, as regards Mr Justice Roth, and looking forward to your forthcoming retirement, we wished to pay tribute to the exceptional way in which you presided not just in this hearing but in all previous cases in this Tribunal that you have handled.

It has inspired general admiration and respect across the Competition Bar. Similarly, the way that you have led this Tribunal in your illustrious term as President. I speak for the entire Competition Law community in wishing you well.

THE PRESIDENT: Thank you very much. This indeed concludes the hearing and my last case as President.

We will endeavour to get out our judgment as quickly as possible. There is quite a lot of dense material, as I think you all appreciate, we have to get on top of, but thank you, not just members of the bar but those behind you, who have worked very hard, I know, in preparing the submissions in this case.

(5.13 pm)

(The hearing concluded)