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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1606/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 18th– 20th September

Before:

The Honorable Mr Justice Meade
Mr John Davies
Mr Robert Herga

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Nikki Stopford

v

Defendants

Alphabet Inc and Others

A P P E A R AN C E S

Ben Lask KC, Mehdi Baiou on behalf of Nikki Stopford (Instructed by Hausfeld)

Meredith Pickford KC, Josh Holmes KC, Narinder Jhittay and David Gregory on behalf of Google and Others (Instructed by Simmons and Simmons)

1 Wednesday, 18 September 2024
2 (10.30 am)
3 (Proceedings delayed due to a technical problem)
4 (10.40 am)
5 THE CHAIR: Some people are joining live on our website so
6 I start with the customary warning: an official
7 recording is being made and an authorised transcript
8 will be produced but it's strictly prohibited for anyone
9 else to make an unauthorised recording, whether audio or
10 visual, of the proceedings and breach of that provision
11 is punishable as a contempt of court.
12 Yes, Mr Lask.
13 MR LASK: May it please the Tribunal, I appear for the
14 proposed Class Representative, Ms Nikki Stopford, with
15 my learned friend Mr Baiou. My learned friends
16 Mr Pickford, Mr Holmes and Ms Jhittay appear for the
17 proposed defendants, Google.
18 Before I go on, may I check the Tribunal has the
19 relevant bundles. It should have, firstly,
20 a core bundle, consisting of three volumes; secondly,
21 the correspondence bundle consisting of one volume; and
22 then an electronic authorities bundle consisting of
23 five volumes which has recently been supplemented by
24 what I will call a core authorities bundle which was
25 prepared at the Tribunal's request.

1 THE CHAIR: Yes.
2 MR LASK: Thank you.
3 Sir, the purpose of this hearing is to consider the
4 PCR's application for a collective proceedings order
5 under section 47B of the Competition Act. Following the
6 exchange of written submissions, the issues in dispute
7 between the parties have narrowed to the point where the
8 only basis on which Google opposes a CPO is its
9 application for strike out or summary judgment in
10 respect of certain elements of the claim.
11 As the Tribunal will have seen from our skeleton,
12 the PCR is content for that application to be heard,
13 notwithstanding what we say was a failure by Google to
14 bring the application in accordance with the Chair's
15 order of 12 April. We are, of course, conscious that
16 there may be other issues which the Tribunal wishes to
17 be addressed on, beyond those raised by Google's
18 application. We will, of course, endeavour to assist on
19 any such issues.
20 Beyond that, we are in the Tribunal's hands as to
21 the order in which it wishes to take matters but if it
22 wishes to start with Google's application, which is
23 probably the meat of the hearing, then I will sit down
24 and allow Mr Pickford to open it.
25 THE CHAIR: Yes, that is what we think is the right way to

1 go. Thank you.
2 Yes, Mr Pickford.
3 Submissions by MR PICKFORD
4 MR PICKFORD: Mr Chairman, members of the Tribunal, I'm
5 going to address you on the first substantive point that
6 we have raised which concerns the AEC principle.
7 Mr Holmes is then going to address you on the other
8 points we raise, on counterfactuals, on limitation and
9 on funding.
10 There are two essential issues for me to cover. The
11 first is whether, as we say, the AEC principle applies
12 in a case such as the one that Ms Stopford, the Proposed
13 Class Representative, makes in relation to Google's
14 arrangements with Apple to secure default status on
15 Apple's Safari browser. The second point is, if the AEC
16 principle is applicable, whether, as Ms Stopford says,
17 her claim form sufficiently gives effect to that
18 principle so as to constitute a non-strikeable case.
19 Those are the essential two points to cover.
20 Now, the AEC principle, or more fully the
21 As Efficient Competitor principle, has several
22 interrelated aspects. For the purposes of this
23 application, the most important one is that the standard
24 for assessing whether conduct on the market is an abuse
25 of dominance is answered by considering whether the

1 conduct has the actual or potential effect of
2 restricting competition by foreclosing as efficient
3 competing undertakings. That is the nub of it, but
4 there are further aspects to it which I will come on to
5 develop.
6 Now, the PCR's alleged iOS abuse which is the part
7 of the case that I'm focused on, like its Android abuse,
8 concerns an alleged abuse of dominance under Article 102
9 of the Treaty on the Functioning of the European Union
10 and Chapter II of the Competition Act. The abuse is
11 concerned with Google's arrangements -- as I say, with
12 Apple -- for the use of Google search as the default
13 search engine on Safari. Now Apple is obviously a very
14 well known leading manufacturer of premium computing
15 products. Its default web browser, Safari, is therefore
16 clearly a very desirable place to be installed if you're
17 a search engine. There's no dispute about that.
18 Equally, we say, as the world's best search engine,
19 Google would make a highly desirable partner for
20 a company in Apple's position. And evidently in this
21 case, the two companies found a mutually agreeable deal,
22 where Google was installed as a default search engine
23 on Apple's own default web browser, Safari.
24 The European Commission evidently saw nothing wrong
25 in that deal at all. On the contrary, I would like just

1 very briefly to quote from the submissions of counsel
2 for the Commission at the Google Android hearing before
3 the General Court. Could you go, please -- I don't
4 think this will be in your select bundle, I think this is
5 in the broader bundle -- to authorities 5, tab 133 and
6 the page number is 11899.
7 THE CHAIR: Say that again? Tab 133. Right. Thank you.
8 MR PICKFORD: Tab 133, yes. When we are not in
9 the Tribunal's select bundle, is it convenient to
10 generally use page numbers? If you are looking at those
11 electronically, I generally find that is the easiest way
12 round but obviously I'm in the Tribunal's hands as to
13 what you find the most helpful.
14 THE CHAIR: Yes, page numbers.
15 MR PICKFORD: Thank you. So we have here an Opus 2
16 transcript, Google and Alphabet v Commission --
17 THE CHAIR: Sorry, I'm ...
18 MR PICKFORD: 11899, tab 133. I hope.
19 THE CHAIR: I have opened this up from the versions that
20 I had. Okay. Yes.
21 MR PICKFORD: Thank you, sir. So we have a title page. It
22 doesn't actually say which case it's in but if you go to
23 the next page and look at internal page 3 at the top,
24 the first few lines you will see submissions in fact by
25 me (several inaudible words) challenging Google's

1 decision in Google Android. This is the Android
2 transcript. And then if one then goes to external
3 page 11943, and that is internal pages 173 and
4 following, we see -- about halfway down page 175, at
5 line 16, this is Mr Khan, who was appearing for the
6 Commission. He is referring to some recitals in the
7 Commission's decision and then he says:
8 "... which also refers to this arrangement between
9 Google and Apple in respect to Google being default on
10 the Safari browser.
11 "I should also take the opportunity to emphasise
12 that neither I, nor, as I understand it, my friends
13 appearing for the supporting interveners are suggesting
14 there is anything improper, that this infringes any rule
15 of competition law. This is simply a commercial
16 arrangement between Google and Apple so we're not
17 suggesting that there is anything untoward about it."
18 So that was the Commission's position on this
19 agreement. Now the Commission is hardly known for
20 taking a laissez faire approach to Google's activities,
21 quite the contrary.
22 We say what Ms Stopford seems to be saying that
23 competition law requires in this situation is , on
24 the one hand, it was okay for Apple to install Safari as
25 a default web browser on all the devices it manufactured

1 but, on the other hand, it was unlawful for Google to
2 have its search engine installed as the default search
3 engine whenever Safari was itself installed.
4 Apparently, at least as we understand their theory
5 justifying damages, Apple had to produce at least some
6 different devices which had a -- a significant
7 proportion of them which had a different and, we say, inferior
8 search engine installed instead. One implication of the
9 fact that the Commission saw nothing wrong in Google's
10 arrangements with Apple -- because obviously this is
11 a stand-alone case and the PCR needs to establish her
12 case in its entirety from scratch. And in that context,
13 I'm going to give a very, very quick, I hope, overview
14 of how Article 102 fits together, so that we can place
15 the particular arrangements that we are concerned with
16 in their general context.
17 Within 102 there are broadly two types of case. The
18 first type, which I will call exploitative abuses, is
19 ones which directly target consumers, say by charging
20 an unfair price. So that is one category.
21 The second category is ones where the effect on
22 consumers is liable to be felt indirectly because the
23 conduct undermines competition on the market by unfairly
24 hampering rivals. So in that second category the
25 ultimate concern is still consumers. That's what the

1 purpose of competition law is, is there to protect, it's
2 the people buying the products. But the effect on them
3 can arise indirectly through its impact on the
4 competitive process. And I am going to call those cases
5 of foreclosure.
6 We are within the second category in the allegations
7 that are made by Ms Stopford.
8 Now, again, there's a further subdivision it's
9 useful to have in the back of one's mind. Within the
10 category of foreclosure cases, you can make
11 a distinction, broadly, between, again, two types of
12 case. So the first category accounts for the vast
13 majority of foreclosure cases. And that concerns where
14 the dominant undertaking forecloses rivals by acting on
15 the market in a way that rivals simply cannot meet
16 themselves and thereby forcing them off the market.
17 That includes lots of the standard conduct which is
18 considered to be abusive, such as predatory pricing --
19 or can be abusive, depending on the circumstances;
20 predatory pricing, margin squeeze, loyalty rebates and,
21 within that, potentially, exclusive agreements, such as
22 we are concerned with here.
23 So in my submission, that's the mainstay of the
24 foreclosure case law but there is a second, small
25 category of cases which concern a different issue and

1 I mention this for completeness because it's helpful
2 when one sees how it all fits together later. And that
3 second category is not how a dominant undertaking acts
4 on the market itself, through its commercial conduct,
5 such as its pricing or the agreements it enters into
6 with others, but rather -- its commercial agreements --
7 but it rather concerns the ability to influence a prior
8 stage in the competitive process by doing something
9 which really has nothing to do with normal operations on
10 the market. This is best described using some examples
11 of these other cases that I say fall into this second
12 bucket.
13 One example would be where the undertaking is in
14 a dominant position, that is both a competitor on the
15 market and also sets the rules for operating on the
16 market. An example of that is FIFA/UEFA which set
17 rules for football competitions, they also run football
18 competitions. By being the body that actually sets the
19 rules, they are able to potentially influence
20 competition in terms of the rules, by deciding who gets
21 on the market, even before anything further downstream
22 actually occurs on the market. So that is, in my
23 submission, a type of prior case.
24 Whether one has an as efficient competitor or a less
25 efficient competitor or a more efficient competitor in

1 that context is somewhat inconsequential, it's not
2 really going to the heart of the problem.
3 Another example would be if a company lies to patent
4 authorities and seeks to keep others off the market
5 through mischievous behaviour of that sort, or enters
6 into deals, settlement agreements, say, where they say:
7 no one else is going to compete on this market at all.
8 So they agree with their rivals that they will stay off
9 the market. In my submission, that's a kind of higher
10 order category of case which is where the difference
11 between As Efficient Competitors and other types of
12 competitors doesn't arise.
13 Now in our context, we are concerned with the
14 mainstream type of foreclosure case where the issue
15 regarding the difference between As Efficient
16 Competitors and less efficient competitors, as I will
17 show you in the cases, is particularly relevant.
18 At the heart of the issues the Tribunal is going to
19 need to grapple with is this: whether, on the one hand,
20 Google's conduct constituted competition on the
21 merits -- which is what I call it, I think my learned
22 friend calls it normal competition but they mean the
23 same thing, competition on the merits I think tends to
24 be used slightly more these days in the case law -- or,
25 alternatively, whether it deviated from competition on

1 the merits. That is going to be the one of the core
2 issues in this case, going forwards, if it were to go
3 forwards, but what we say is that the way that the
4 Proposed Class Representative has articulated their case
5 means she hasn't actually articulated a case which is
6 ever capable of properly satisfying the Tribunal that
7 there has been a deviation of competition or deviation
8 from competition on the merits.
9 Just before I go through the cases, some final
10 introductory points to make about how we say competition
11 law works, that one will see developed in the case law.
12 It is no criticism of a company that it is dominant and,
13 moreover, dominant undertakings are very much allowed to
14 compete. They are allowed to engage in conduct which
15 excludes their rivals from the market, by being more
16 efficient than those rivals, by having lower costs and
17 being able to offer better prices, by being able to
18 offer more attractive products to their customers than
19 their rivals. They are allowed to strike deals which
20 are only open to them because of their competitive
21 superiority, deals which a less efficient, lower
22 quality rival, might just not be able to persuade
23 a counterparty to strike. We say that that is inherent
24 in the very process of competition. It's not a race to
25 the lowest common denominator because that doesn't

1 ultimately benefit consumers and it's not required by
2 competition law.
3 Indeed, ensuring that less efficient competitors
4 remain in the market is, in my submission, somewhat like
5 saying that competition law reflects a failed industrial
6 policy from the 1970s, where, say, car manufacturers are
7 to be kept in the market, whether they make good products
8 that people want, whether they make them at the prices
9 that people want.
10 So in our submission, there is absolutely nothing
11 wrong with fierce competition from a dominant
12 undertaking. Where it can step over the line is if it
13 deviates from competition on the merits. And that
14 dividing line between the two types of conduct which is
15 essential to competition law is one that has evolved
16 over time in the case law.
17 In the reply of the Proposed Class Representative in
18 these proceedings, she pointed to what we would say in
19 competition law terms is a fairly ancient case of
20 Hoffmann-La Roche to argue that exclusivity agreements
21 are inherently abusive because of their form. What we
22 say about that, and I will make it good very shortly, is
23 if it ever did reflect the court's approach it certainly
24 has not been good law for many years. A central theme
25 of now well-established competition law over the last

1 few decades is the importance of whether there's been
2 a deviation from competition on the merits and one
3 examines that by looking at the economic effects on
4 rivals, the economic effects, and doing so in the light
5 of all the surrounding circumstances.
6 So you can't simply look at the form of particular
7 conduct and say: ah, there you go, that is necessarily
8 abusive. You have to look at the effects on rivals and
9 you have to look at it in its full context.
10 In its skeleton for this hearing, or in her skeleton
11 for this hearing, Ms Stopford appears to have abandoned,
12 we say rightly, the Hoffmann-La Roche based approach,
13 the form-based approach to characterising exclusivity
14 agreements.
15 The question of effects on rivals therefore does
16 seem to be, now, a live one between the parties. It
17 seems to be the focus of attention. But the heart of
18 the difference between us is this: is it enough that
19 less efficient competitors will be excluded by the
20 conduct or is the issue, and is it necessary, that As
21 Efficient Competitors will be excluded by the conduct?
22 In my submission, there is a very clear answer to that
23 question in the jurisprudence. And the standard by
24 which one judges whether there is a deviation from
25 competition on the merits is by reference to as

1 efficient or equally efficient competitors.

2 So that's the introduction to explain where we are

3 essentially going to be going through the case law.

4 That is going to be a relatively lengthy exercise, but,

5 in my submission, it's invaluable because it's only by

6 doing that that one gets an understanding of what are

7 the core underlying foundation principles. It's also

8 only by doing that that one sees, in my respectful

9 submission, Ms Stopford's approach uses a pick and mix

10 selective use of extracts which are often taken out of

11 the wider, fuller context of those legal principles.

12 And in particular, what we say is an error that occurs

13 repeatedly in her position is confusing the AEC

14 principle, which is, we say, of general applicability in

15 this type of case, with the need to use a specific

16 numerical test, an AEC test, necessarily to prove

17 foreclosure, which we accept is not of general

18 applicability. It's often the most sensible way of

19 approaching it, but it's not necessarily always

20 required.

21 So with that introduction, if I can then please pick

22 up the --

23 THE CHAIR: Just pausing there, Mr Pickford -- that is very

24 helpful, thank you. We hear what you say about the way

25 you've divided your advocacy on your side. That is

1 absolutely fine, of course. We will do funding
2 arrangements separately.
3 MR PICKFORD: Of course.
4 THE CHAIR: But it seems efficient to roll the limitation
5 discussion into this tranche of the submissions.
6 MR PICKFORD: Thank you.
7 THE CHAIR: Can I just gently enquire how long we are going
8 to be on the things that remain in issue. Three days to
9 us feels excessive but we don't think it's realistic to
10 get through it in one day, so we are expecting to go
11 into tomorrow. But just give us some guidance as to how
12 long you expect to be on these various parts of your
13 submissions.
14 MR PICKFORD: I was certainly very relieved, sir, when you
15 said you were not expecting to do it in one day. I have
16 to say I have prepared on the basis on we had
17 three days. I agree, I don't think that we will take,
18 certainly, a full three days. If we can, we will seek
19 to get through this in two days.
20 THE CHAIR: We think we should.
21 MR PICKFORD: I will certainly do my best, sir.
22 THE CHAIR: Right.
23 MR PICKFORD: It depends a little bit, perhaps, on how
24 interesting our submissions appear to be and how many
25 questions they prompt from the bench, but, obviously,

1 you know, there are some things that are slightly out of
2 my hands.
3 THE CHAIR: Of course.
4 MR PICKFORD: But I will endeavour to be as --
5 THE CHAIR: We think it's quite a significant priority to
6 get through it in two days, Mr Pickford, because then
7 members of the Tribunal can gather and discuss the
8 judgment --
9 MR PICKFORD: Understood.
10 THE CHAIR: -- and start work on that. We just shouldn't
11 roll into three days if we don't need to and, of course,
12 the three days was allocated at a stage when it wasn't
13 known what was going to be in issue and, possibly being
14 very pragmatic, there is less in issue than might have
15 been expected. We do think this ought to be capable of
16 being done in two days and that's what we are going to
17 aim for.
18 MR PICKFORD: That is well understood, I hear that loud and
19 clear. In terms of -- I might be raising something that
20 is entirely irrelevant because it doesn't necessarily
21 arise. It might be helpful, perhaps, towards the end of
22 today, if we take stock to see whether we need to maybe
23 see if we can squeeze an extra half-hour in somewhere.
24 THE CHAIR: We will see where we get to later in the day or
25 at the end of the day.

1 MR PICKFORD: Thank you.
2 THE CHAIR: Also can I just say, are you taking it as read
3 that we understand what the summary judgment standard is
4 or are you going to cover those authorities at some
5 point?
6 MR PICKFORD: I was going to come back to them very briefly.
7 But from what you've said, sir, I might come back to
8 them perhaps less briefly than I was going to.
9 THE CHAIR: It's on the agenda anyway.
10 MR PICKFORD: Yes, that is well noted. I will make sure --
11 there's one composite authority that I say quite
12 helpfully summarises both the standards in relation to
13 pleadings in competition law claims and also the summary
14 judgments standard; and hopefully, by reference to that
15 authority, I can deal with it relatively quickly.
16 THE CHAIR: Okay.
17 MR PICKFORD: If I could begin, please, with the case of
18 Deutsche Telekom which I believe in your supplementary
19 bundle should be at tab 28; in my one -- I don't know
20 whether you are using -- is that electronic or is it
21 physical?
22 THE CHAIR: I'm going to be using the physical one.
23 MR PICKFORD: I confess I relatively hastily, and also with
24 some assistance from my junior --
25 THE CHAIR: Okay, I have it.

1 MR PICKFORD: I have added in what I hope are the right
2 additional references to it. If I've got one of those
3 wrong, please forgive me.
4 THE CHAIR: If you just give me the tab number, I will be
5 able to find my way.
6 MR PICKFORD: I think it's tab 28 of your bundle.
7 THE CHAIR: Yes, it is.
8 MR PICKFORD: For those using the main bundle, it's
9 volume 2, tab 72 and it's page 5115 that the judgment
10 begins.
11 MR DAVIES: We have the electronic produced bundles, so
12 I think I want page numbers in the electronic --
13 MR PICKFORD: Excellent. I will give you those. So
14 page 5115 which you will find in volume 2. Most of the
15 cases that I'm going to are in volume 2 because I'm
16 looking at the European jurisprudence.
17 THE CHAIR: And I will need internal numbers or the ones in
18 the bundle.
19 MR DAVIES: We do have a reduced bundle electronically. So
20 if you put the page number -- it doesn't work in that.
21 MR PICKFORD: Okay.
22 MR DAVIES: I can go to the main authority, that's fine.
23 MR PICKFORD: Just cards on the table, I have prepared by
24 reference to the original bundles but I will obviously
25 endeavour to give you whatever additional references

1 that you would like.
2 THE CHAIR: You go with the original bundles, that's fine,
3 and you will give the page numbers in those. For my
4 benefit, I just need the tab and then, when you get to
5 it, tell me the internal number and I will be able to
6 find that quite quickly.
7 MR PICKFORD: Great.
8 THE CHAIR: Thank you.
9 MR PICKFORD: Deutsche Telekom is a foundational case on
10 margin squeeze. That is when a dominant undertaking
11 leaves an insufficient margin between its upstream and
12 downstream price for a competitor to compete. Margin
13 squeeze in Deutsche Telekom related to the price charged
14 by Deutsche Telekom for -- rather, the price left
15 between wholesale access to the telecommunications loop
16 and the price it charged for its own retail broadband
17 services. That's the context.
18 Then if we could go, please, to -- it's
19 paragraph 176, and it is, of the original bundle,
20 external page 5190. I believe it's supplementary bundle
21 page 2024.
22 We here have a very primary statement of the law,
23 "Since Article 82", as it then was, "EC :
24 thus refers not only to practices which may
25 cause damage to consumers directly, but also to those

1 which are detrimental to them through their impact on
2 competition, a dominant undertaking, as has already been
3 observed in paragraph 83 of the present judgment, has
4 a special responsibility not to allow its conduct to
5 impair genuine undistorted competition on the common
6 market".
7 "It follows from this that Article 82 EC prohibits
8 a dominant undertaking from, inter alia, adopting pricing
9 practices which have an exclusionary effect on its
10 equally efficient actual or potential competitors, that
11 is to say practices which are capable of making market
12 entry very difficult or impossible for such competitors,
13 and of making it more difficult or impossible for its
14 co-contractors to choose between various sources of
15 supply or commercial partners, thereby strengthening its
16 dominant position by using methods other than those
17 which come within the scope of competition on the
18 merits."
19 So that is an essential statement of what it means,
20 at least at this stage in pricing terms, to adopt
21 a pricing practice which is not in accordance with
22 competition on the merits.
23 It's clear that the concern is not to ensure that
24 any old competitor can compete, it's to ensure that As
25 Efficient Competitors compete, as it says "equally

1 efficient" in terms.

2 Then over the page, or a couple of pages on, 5193,

3 three pages on in the original bundle -- in your bundle,

4 sir, it should be page 2027. Just above paragraph 187,

5 we see a subtitle, "The complaint concerning the

6 misapplication of the as-efficient competitor test."

7 So this is later on in the judgment, having set out

8 what I describe as the principle, which is the standard

9 for assessing foreclosure is whether it forecloses As

10 Efficient Competitors, the court then goes on to look at

11 the As Efficient Competitor Test separately. At

12 paragraph 198, which is just a couple of pages on in the

13 bundle, it says as follows, having set out some general

14 principles:

15 "It must be borne in mind that the Court has already

16 held that, in order to assess whether the pricing

17 practices of a dominant undertaking are likely to

18 eliminate a competitor contrary to Article 82 EC, it is

19 necessary to adopt a test based on the costs and the

20 strategy of the dominant undertaking itself ... The Court

21 pointed out, inter alia, in that regard that a dominant

22 undertaking cannot drive from the market undertakings

23 which are perhaps as efficient as the dominant

24 undertaking but which, because of their smaller

25 financial resources, are incapable of withstanding the

1 competition waged against them."

2 And then on bottom of this page, paragraph 202:

3 "Such an approach [as it's just described] is

4 particularly justified because, as the General Court

5 indicated, in essence, in paragraph 192 of the judgment

6 under appeal, it's also consistent with the general

7 principle of legal certainty, insofar as the account

8 taken of the costs of the dominant undertaking allows

9 that undertaking in the light of its special

10 responsibility under Article 82 EC, to assess the

11 lawfulness of its own conduct. While a dominant

12 undertaking knows what its own costs and charges are, it

13 does not, as a general rule, know what its competitors'

14 costs and charges are."

15 So it's making the, we say, important point that

16 when it comes to an AEC test -- I say actually this

17 reflects in this case that's the principle too -- legal

18 certainty is provided for by having a test based on what

19 the dominant undertaking can actually know about; and

20 that is an important principle.

21 We then move on to the next case in the series which

22 is at page 5078 of the general bundle and in the select

23 bundle -- ah, I'm not sure it is in the select bundle,

24 I'm afraid.

25 THE CHAIR: Okay.

1 MR PICKFORD: So we will have to look -- it's in authorities
2 2, the main authorities. It's at tab 71 and the page
3 number is 5078. This is the case of --
4 THE CHAIR: Just one second. 5078. I don't have a 5078.
5 MR PICKFORD: In authorities bundle 2?
6 THE CHAIR: Hang on -- okay. Yes, okay, thank you.
7 MR PICKFORD: Thank you, sir. So this is the case of
8 TeliaSonera. It's a judgment of 17 February 2011. The
9 last judgment we saw was a 2010 one. It's another
10 margin squeeze case. If one goes, please, to
11 paragraph 39 which is on page 5093. Could I ask
12 the Tribunal, please, to read paragraphs 39 through to
13 40.
14 Those paragraphs again setting out what I call the
15 AEC principle by reference back to the case of Deutsche
16 Telekom we saw before. And then paragraphs 41 -- and
17 you don't particularly need 42 -- 41 and 43 go on to
18 describe on AEC test. Again, in familiar terms, given
19 what I showed you from Deutsche Telekom.
20 (Pause)
21 THE CHAIR: Okay.
22 MR PICKFORD: Thank you. So again, it's not particularly
23 developing it but it's reinforcing the centrality of the
24 equal efficient competitor again. The next case does
25 begin to develop the law further. And that's Post

1 Danmark I. I am afraid this is also not in the
2 supplementary bundle. It's in tab 70 of the bundle that
3 you are in, and it begins at page 5070. This is Post
4 Danmark. Do the Tribunal have that?
5 THE CHAIR: Yes.
6 MR PICKFORD: Thank you. So Post Danmark had a monopoly in
7 the delivery of addressed mail and it had a dominant
8 position in the delivery of unaddressed mail and its
9 main rival accused it of selective discounting. The
10 questions for the court are set out -- or the ones that
11 are of interest to us are set out at paragraph 19, just
12 a couple of pages on, at 5073:
13 "By its questions, which may appropriately be
14 examined together, the court making a reference asks, in
15 essence, what the circumstances are in which a policy,
16 pursued by a dominant undertaking, of charging low prices
17 to certain former customers of a competitor, must be
18 considered to amount to an exclusionary abuse, contrary
19 to Article 82 EC, and, in particular, whether the finding
20 of such an abuse may be based on the mere fact that the
21 price charged to a single customer by the dominant
22 undertaking is lower than the average total costs
23 attributed to the business activity concerned, but higher
24 than the total incremental costs pertaining to the
25 latter."

1 Then the court goes on, at 21, to say this:
2 "It is settled case-law that a finding that
3 an undertaking has such a dominant position is not in
4 itself a ground of criticism of the undertaking
5 concerned [references]. It is in no way the purpose of
6 Article 82 EC to prevent an undertaking from acquiring, on
7 its own merits, the dominant position on a market ... Nor
8 does that provision seek to ensure that competitors less
9 efficient than the undertaking with the dominant
10 position should remain on the market."
11 Critical point, in my submission:
12
13 "Thus, not every exclusionary effect is necessarily
14 detrimental to competition ... Competition on the merits
15 may, by definition, lead to the departure from the
16 market or the marginalisation of competitors that are
17 less efficient and so less attractive to consumers from
18 the point of view of, among other things, price, choice,
19 quality or innovation."
20 So that is, in my submission, of central importance
21 to the issues on this application.
22 Having dominant position, not a ground of criticism.
23 Conduct which excludes competitors, not necessarily
24 abusive. Article 102 doesn't seek to ensure that less
25 efficient competitors even remain on the market. The

1 critical question is whether a dominant undertaking is
2 excluding As Efficient Competitors.
3 And in that regard, efficiency encompasses
4 attractiveness to rivals from the point of view of,
5 among other things, price, choice, quality and
6 innovation.
7 Then at paragraph 23, a point that then comes back
8 in the next Post Danmark case. We see, final sentence:
9 "When the existence of a dominant position has its
10 origins in a former legal monopoly, that fact has to be
11 taken into account."
12 So the court may take a more critical view of
13 an undertaking taking advantage not of their superior
14 offering, or their superior efficiency, but something
15 that they gained from their incumbency because of
16 a statutory monopoly.
17 Then if I could ask the Tribunal, please, to just
18 read paragraph 25 which re-affirms a point from 21 and
19 22 about the centrality of the effect on As Efficient
20 Competitors. (Pause)
21 THE CHAIR: Thank you.
22 MR PICKFORD: Just to be clear, what it says in that
23 sentence, it uses "and" in the middle but what it's not
24 saying is that you need to prove both an exclusionary
25 effect and methods other than those that are part of

1 competition on the merits, because if you prove the
2 exclusionary effect on As Efficient Competitors, as we
3 saw in the earlier case of Deutsche Telekom, that is
4 demonstrating that that is not part of competition on
5 the merits. So next we have Post Danmark II. This is
6 a judgment of 2015 and it's found in the main
7 authorities bundle at tab 66, on page 4229 and we are
8 back in the Tribunal's traditional bundle here at
9 tab 24. For the main bundle, 4229 is the page.
10 THE CHAIR: Okay.
11 MR DAVIES: Sorry ...
12 MR PICKFORD: Mr Davies, do you have that?
13 MR DAVIES: Yes.
14 MR PICKFORD: Thank you. So this is Post Danmark II and
15 this is a case which is relied upon against me by my
16 learned friends, but we say it is fully consistent with
17 our case. We are dealing with Post Danmark again and
18 amongst its monopolies it had a statutory monopoly in
19 the delivery of letters but it also competed in the bulk
20 mail market, including for direct advertising. Its main
21 rival in direct and marketing bulk mail was called Bring
22 Citymail and it accused Post Danmark of operating
23 a rebate scheme which had the effect of preventing Post
24 Danmark customers switching to Bring Citymail. So the
25 idea being that if there's an increasing rebate that you

1 get effectively for loyalty, that can be loyalty
2 inducing -- I mean there's no economic incentive for the
3 customer to go to a rival.
4 The Danish Competition Authority made a finding
5 consistent with the complaint and one of the points that
6 is of relevance in this case is if you go to
7 paragraph 14, which is just a few pages on from the
8 title page, you see that Post Danmark enjoyed
9 significant -- this is the final sentence, paragraph 14:
10 "Post Danmark enjoyed significant structural
11 advantages conferred, inter alia, by the statutory
12 monopoly, given that during the relevant period over
13 70% of all bulk mail in Denmark was covered by
14 that monopoly, as well as unique geographical coverage
15 encompassing all of Denmark."
16 Then if we could go, please, to paragraph 51. So
17 that's on original bundle page 4236 and new bundle, if
18 I call it that: page 1849. We see at paragraph 51 that,
19 "By the third and fourth subparagraphs of Question 1, the
20 referring court asks, in essence, the Court to clarify
21 the relevance to be attached to the as-efficient-
22 competitor Test in assessing a rebate scheme under
23 Article 82 EC".
24 So this is about the test, it's not about the
25 underlying principle, it's about when you have to have

1 a numerical means of proving a case by a reference to
2 the principle. At paragraph 56 over the page, we see
3 reference to the case of Tomra. The Court of Justice
4 said:
5 "As regards the comparison of prices and costs ..."
6 This is at the essence of certainly most AEC tests,
7 they are based on comparisons of prices and costs:
8 " in the context of applying Article 82EC to
9 a rebate scheme, the Court has held that the invoicing
10 of 'negative prices', that is to say, prices below cost
11 prices, to customers is not a prerequisite of a finding
12 that a retroactive rebate scheme operated by a dominant
13 undertaking is abusive."
14 And then it continues to explain why that is said to
15 be. If I could ask the Tribunal, please, to read from
16 paragraph 57 through to 61 for why the test is not
17 always required by the court. (Pause)
18 This case is authority for the proposition you
19 certainly don't have to have an AEC test in every case,
20 it's one tool amongst others, and the court didn't
21 consider it would be helpful in this case because Post
22 Danmark had a statutory monopoly during the relevant
23 period of over 70 per cent of the market. So as
24 a matter of law there could never be any challenge to
25 that dominant position as a matter of statute.

1 The court does make reference, in the passage that
2 I just asked the Tribunal to read, to less efficient
3 competitors potentially intensifying competitive
4 pressure in a market. In my submission, that reference
5 is obiter. It may be true, but it remains the case --
6 as we saw in the earlier cases that I took you to, in
7 particular Post Danmark I -- that it is no part of
8 Article 102 to protect less efficient competitors and
9 ensure that they remain on the market. The court in
10 Post Danmark II was not purporting to overrule that
11 principle we saw in Post Danmark I and indeed we see the
12 principle re-affirmed not only in later cases, but even
13 in this very case of Post Danmark II.
14 THE CHAIR: Sorry, are you saying this is obiter or are you
15 saying it's wrong?
16 MR PICKFORD: Sir, I'm saying it's obiter because what they
17 are grappling with here is the test. And they are not
18 purporting to overrule what we saw was -- the
19 fundamental principle that we saw in Post Danmark I,
20 that it is no part of Article 102 to protect less
21 efficient competitors and ensure they remain on the
22 market. It depends I think, sir, in answer to your
23 question, whether it's obiter or wrong depends on what
24 one reads into the comment. If it is understood solely
25 as a comment in passing, that less efficient competitors

1 might intensify competitive pressure, then that's
2 obiter, it's just a comment in passing. If it is read
3 as saying: and therefore, because of that observation,
4 it is the job of competition law to protect less
5 efficient competitors, then it's wrong. Because it's
6 directly contrary to the clear statement of principle
7 that we saw in Post Danmark I.
8 In my submission, I don't need to go that far
9 because -- what I have articulated as the alternative is
10 merely an inference that I think my learned friend seeks
11 to draw from what I say is effectively a passing
12 observation. Does that --
13 THE CHAIR: Right. (Overspeaking) --
14 I follow you so far, but when you say it's obiter,
15 paragraph 60 is the one you say it's obiter, then in
16 paragraph 61, they say "thus it's just one tool", and in
17 paragraph 62, they say "consequently, the answer to the
18 question is that it's not a necessary condition". It
19 seems to flow directly into the answer to the question
20 that is being posed to the court. So why is it obiter?
21 MR PICKFORD: Well, in my submission, it isn't a necessary
22 or critical part of the reasoning, the logical path by
23 which the court comes to its conclusion about the AEC
24 test. It's also the case -- and we may yet see this in
25 some of the other European cases we go to -- that, as

1 I'm sure, sir, you will know, the European Court tends
2 to have its own particular way of writing judgments,
3 particularly because they are collective judgments and
4 they have to bring together lots of different views. So
5 what it tends to do, it has a list of points, some of
6 which may be more or less necessary to the ultimate
7 conclusion, and then it tends to say -- "here are some
8 points", and then -- "taken all together, we conclude",
9 and that is how the European Court pretty well writes
10 all of its judgments.
11 In my submission, it would be seeking to extrapolate
12 too much, from that approach to writing judgments, that
13 every single sentence that is written by the court prior
14 to the conclusion is necessarily core and central and
15 necessary for the conclusion they come to.
16 THE CHAIR: Okay.
17 MR PICKFORD: And in my submission, that paragraph 60 is
18 not. But in any event, even if it were, it's talking
19 about the AEC test here. What it's not seeking to do is
20 overrule the principle. What it's saying is when we are
21 down in the weeds of numerical means of trying to prove
22 one thing or another about what is happening in the
23 market, ultimately its conclusion is: well you don't
24 have to necessarily use an AEC test on all occasions.
25 It's not about what I say the underlying principle is of

1 Article 102 which is -- it is never to protect less
2 efficient competitors. I say that based on the Post
3 Danmark case we saw before, I say it based on the cases
4 we are going to come to, which then reiterate it, and
5 I also say it on the basis of what the court does about
6 the next question, question 2, in Post Danmark II
7 itself.
8 THE CHAIR: Just before you move on to that, I have
9 appreciated from your skeleton what you said this
10 morning, that you draw a distinction between the test --
11 MR PICKFORD: Yes.
12 THE CHAIR: -- which you accept is not mandatory --
13 MR PICKFORD: Yes.
14 THE CHAIR: -- and the principle which you say is.
15 MR PICKFORD: Yes.
16 THE CHAIR: In 55, in this case, the court is talking about
17 the test having been applied in earlier cases.
18 MR PICKFORD: Yes.
19 THE CHAIR: Where are we going to find or where have we
20 already found in the cases the statement that the
21 principle is ubiquitous, compulsory, never to be
22 departed from, but it's different from the test which
23 you can depart from. Where are we going to find
24 a canonical statement of that sort, if we are?
25 MR PICKFORD: I'm not sure we are going to find a canonical

1 statement quite of that sort, but what we do see -- and
2 this case is an example, but I say there are better ones
3 that I am going to come to -- repeatedly the court
4 addresses what I call the AEC principle, about whether
5 it is ultimately the purpose of competition law to
6 protect less efficient competitors on the one hand. It
7 addresses that separately from an operaisation -- not
8 quite the right word there, operationalisation of that,
9 through possibly the AEC test. And this case is one of
10 them, there are questions that are directed to the test,
11 and then there are other questions which potentially are
12 directed to the principle. Normally, actually, it's the
13 other way round. This case deals with the principle
14 second, but normally there's like a section of
15 the judgment that is dealing with the principle and then
16 a section that then goes on to deal on the test.
17 The reason why -- obviously, they are related, but,
18 in my submission, the difference is that the Court is
19 willing to sign up to the principle, because it is not
20 ultimately in the interests of consumers for less
21 efficient undertakings to be protected so that they
22 remain on the market. That is a core principle.
23 When it then comes to arguments about who did what
24 and on whom the burden lay and whether it was necessary
25 for, say, the Commission to prove something by reference

1 to the test or whether it was incumbent on the dominant
2 undertaking to lead evidence and say: well actually, we
3 say this didn't have an effect on As Efficient
4 Competitors, et cetera, that is a different
5 conversation. And we'll see that, I will say,
6 particularly in Intel which we are going to come to
7 pretty shortly.
8 So it's in the structure of the judgments and it's
9 in the different ways in which those two different
10 things are put. Whenever we are talking about not
11 protecting As Efficient Competitors, we see they are put
12 in absolute terms. Whenever we are talking about test,
13 we see that that is more qualified. It's still,
14 obviously, if it can be done, a very sensible way of
15 bearing on the principle. But what the court has been
16 keen to do is not to overburden the Commission to say:
17 no matter what, you always have to do a test, even if
18 it's basically impossible. And so that's why it's held
19 back from it.
20 THE CHAIR: Okay.
21 MR PICKFORD: In this case, could we go to paragraph 63,
22 question 2. "By Question 2 and the second
23 subparagraph of Question 3, which should be answered together,
the
24 referring court asks, in essence,
25 whether Article 82 EC must be interpreted as meaning

1 that, in order to fall within the scope of that article,
2 the anti-competitive effect of a rebate scheme, such as
3 that at issue in the main proceedings, must be, on the
4 one hand, probable and, on the other, serious or
5 appreciable."
6 The point it is actually dealing with is a question
7 about degree of probability that needs to be attached to
8 effects, but the way it answers that, in my submission,
9 is telling because even a court that's gone as far as it
10 has in the earlier passages dealing with the test, at
11 paragraph 66 says this:
12 "The Court has also held that, in order to establish
13 whether such a practice is abusive, that practice must
14 have an anti-competitive effect on the market, but the
15 effect does not necessarily have to be concrete And it is
16 sufficient to demonstrate that there is
17 an anti-competitive effect which may potentially exclude
18 competitors who are at least as efficient as the
19 dominant undertaking."
20 So when it come back to talking about what the
21 underlying principles are, as opposed to the particular
22 numerical test that one might employ to seek to prove
23 them, we are back in, in my submission, a generalised
24 statement about the principle, not qualified by saying:
25 well, sometimes less efficient, sometimes as efficient.

1 THE CHAIR: Okay.

2 MR PICKFORD: If we could then go, please, to the next case,
3 which is, I hope, actually, instructive on the question,
4 sir, you asked me. It is Intel. This is an important
5 judgment in this area of law. It's in your bundle at
6 tab 16, and it's in the main bundle at authorities 2,
7 tab 64, page 3993.

8 MR DAVIES: Do you have a page number in the reduced --

9 MR PICKFORD: In the reduced bundle, it's page 1028.

10 MR DAVIES: Thank you.

11 MR PICKFORD: So this case concerned, amongst other things,
12 a system of conditional rebates in return for either
13 exclusive or nearly exclusive purchasing of chip sets
14 from Intel. We can pick up the court's analysis of
15 what, in this case, was Intel's first ground of appeal
16 at page -- if we are working from the extracts it's
17 page 1048, or page 4009 in the main bundle. The
18 findings of the court begin at page 129. It answers the
19 question in this way:

20 "In the first place, by its first two parts of its
21 first ground of appeal, Intel, supported by ACT, argues,
22 in essence, that the General Court accepted that the
23 practices at issue --"

24 THE CHAIR: Sorry, what paragraph are you on?

25 MR PICKFORD: Paragraph 129 on, I hope, page 1048 of your

1 bundle.
2 THE CHAIR: Yes. Go on.
3 MR PICKFORD: "... could be considered an abusive dominant
4 position within the meaning of Article 102 TFEU without
5 first examining all of the circumstances of the present
6 case and without assessing the likelihood of that
7 conduct restricting competition."
8 MR DAVIES: You are reading a paragraph which is different
9 from what we are looking at.
10 MR PICKFORD: I beg your pardon. So ...
11 THE CHAIR: What was the case --
12 MR PICKFORD: I have a different bundle. I'm slightly --
13 are you looking at -- is your paragraph 129 the -- it's
14 not the Advocate General on that page, is it, that I've
15 given you?
16 MR HERGA: I have it 4009.
17 THE CHAIR: Main bundle.
18 MR PICKFORD: Yes. I will need to double-check -- it might
19 be that I've got a bad page reference for you here.
20 THE CHAIR: We have the right paragraph number, that's the
21 curious thing.
22 MR PICKFORD: Is that section saying "Findings of the
23 court"?
24 MR DAVIES: I'm okay now. (Pause)
25 MR PICKFORD: I think I gave you a bad reference. But I'm

1 going to give you a good reference ... 1782. I've got
2 a new bid, it's 1782.
3 THE CHAIR: Of?
4 MR PICKFORD: Of your selective authorities. Page 1782.
5 THE CHAIR: Tab?
6 MR PICKFORD: Tab 16.
7 THE CHAIR: Tab 16?
8 MR PICKFORD: I'm sorry, I think we, in the rush this
9 morning, failed to provide the extra -- tab 22,
10 page 1782. I thought there was going to be an error
11 somewhere and we struck oil.
12 THE CHAIR: 1782 and 129, yes. Okay, thank you. I'm there.
13 MR PICKFORD: Thank you. I apologise --
14 THE CHAIR: That's all right. No, no, those things happen.
15 MR PICKFORD: So why don't I just begin at the beginning
16 again of 129. First place, two parts of -- it appears
17 Intel argues that:
18 "the General Court accepted that the practices at
19 issue could be considered an abuse of dominant position
20 within the meaning of Article 102 without first
21 examining all of the circumstances of the present case and without assessing
22 the likelihood of the conduct restricting competition."
23 And then:
24 "In the second place, by the third part of its first
25 ground of appeal, Intel criticises the General Court's

1 analysis, carried out for the sake of completeness,
2 inter alia, in paragraphs 172 to 197 of the judgment
3 under appeal, concerning the capacity of the rebates and
4 payments granted to Dell, HP, NEC, Lenovo and MSH to restrict
5 competition in the circumstances of the case."
6 "In that context, Intel challenges, inter alia, the
7 General Court's assessment of the relevance of the AEC
8 test applied by the Commission in the present case."
9 That's the context for the questions that the court
10 is then going to come on to look at. Then if we go to
11 the beginning of the court's reasoning, that's at 133,
12 and it says as follows:
13 "In that respect it must be borne in mind that it is
14 in no way the purpose of Article 102 TFEU to prevent
15 an undertaking from acquiring, on its own merits, the
16 dominant position on the market. Nor does that
17 provision seek to ensure that competitors less efficient
18 than the undertaking with the dominant position should
19 remain on the market. Thus, not every exclusionary
20 effect is necessarily detrimental to competition.
21 Competition on the merits may, by definition, lead to
22 the departure from the market or the marginalisation of
23 competitors that are less efficient and so are less
24 attractive to consumers from the point of view of, among
25 other things, price, choice, quality or innovation."

1 So that is a very clear presentation, in my
2 submission, of the AEC principle.
3 Then the court goes on to deal with the question of
4 the dominant undertaking’s special responsibility, not to
5 allow its behaviour to impair genuine undistorted
6 competition.
7 Then it goes on at 136, and following, to deal with
8 the Hoffmann-La Roche judgment in that context. Could
9 I could ask the Tribunal, please, to read 136 to 137
10 which sets out the law, effectively, as stated in
11 Hoffmann-La Roche.
12 (Pause)
13 So has the Tribunal had an opportunity to read it?
14 THE CHAIR: Yes.
15 MR PICKFORD: Thank you. What the Court of Justice says
16 here, having set out what Hoffmann-La Roche says about
17 exclusivity agreements, it then goes on to say at 138:
18 "However, that case-law must be further clarified."
19 That is the Court of Justice's very polite way of
20 seeking to say that Hoffmann-La Roche didn't get it
21 entirely correct:
22 "where the undertaking concerned submits during the
23 administrative procedure, on the basis of supporting
24 evidence, that its conduct was not capable of
25 restricting competition and in particular producing the

1 alleged foreclosure effects. In that case the
2 Commission is not only required to analyse, first, the
3 extent of the undertaking's dominant position on the
4 relevant market and, secondly, the share of the market
5 covered by the challenged practice, as well as the
6 conditions and arrangements for granting the rebates in
7 question, the duration and their amount; it is also
8 required to assess the possible existence of a strategy
9 aiming to excluding competitors that are at least as
10 efficient as the dominant undertaking from the market.
11 [There referring to Post Danmark that we saw before.]
12 The analysis of the capacity to foreclose is also
13 relevant in assessing whether a system of rebates which in
14 principle, falls within the scope of the prohibition laid
15 down by Article 102 TFEU, may be objectively
16 justified. In addition, the exclusionary effect arising
17 from such a system, which is disadvantageous for
18 competition, may be counterbalanced, or outweighed, by
19 advantages in terms of efficiency which also benefit
20 the consumer."
21 Just pausing there, I hope this is familiar, what
22 the court is dealing with here is the part of
23 Article 102 which is that even if something is
24 restrictive of competition, that's not the end of the
25 debate necessarily. A dominant undertaking can say: but

1 nonetheless, it's objectively justified, it has these
2 countervailing benefits; and then they have to be
3 weighed. Then the critical sentence:
4 "That balancing of the favourable and unfavourable
5 effects of the practice in question on competition can
6 be carried out in the Commission's decision only after
7 an analysis of the intrinsic capacity of that practice
8 to foreclose competitors which are at least as efficient
9 as the dominant undertaking."
10 So in my submission, by the time we've got to the
11 final sentence of 140 here, we see that it is clear that
12 the court is re-affirming that the standard that we are
13 ultimately concerned with is the capacity to foreclose
14 competitors which are at least as efficient as the
15 dominant undertaking. That must follow from the
16 statements that it made a few paragraphs earlier on,
17 from the fact that it is no part of Article 102 to
18 protect less efficient competitors. In my submission,
19 the standard is the corollary of that primary
20 articulation of the principle.
21 What the court was also doing in paragraphs 138 and
22 139, which I read, was making a point about the
23 administrative procedure in EU law which relates to when
24 it is incumbent on the Commission in its decision to
25 make an assessment by reference to the AEC principle.

1 So for example, what they are saying is: well if the
2 principle is never even an issue because there's no
3 denial of the foreclosing effect, then the Commission
4 hasn't necessarily done anything wrong if it hasn't
5 grappled with that in its decision, but that doesn't
6 affect the basic principle that the Commission does need
7 to prove anti-competitive foreclosure, insofar as
8 foreclosure is an issue in the case, by reference to
9 As Efficient Competitors, not less efficient
10 competitors. Otherwise it's in breach of the
11 fundamental principle that it is not the job of
12 Article 102 to protect less efficient competitors or to
13 stop them leaving the market.
14 There's a point there about burden of proof, but the
15 essential principle, in my submission, is really very
16 clear when one takes the paragraphs that I have referred
17 to. I have a little bit more to say on Intel, like
18 about five minutes or so.
19 THE CHAIR: Let's not break that one in the middle, so
20 finish Intel and then we will take a break.
21 MR PICKFORD: Ms Stopford seeks to point to Intel. This is
22 in her -- for your note, I'm not asking you to turn it
23 up, but it's at skeleton paragraph 21.1. What she says
24 is that you can distinguish between two options,
25 effectively, in terms of a framework for assessing

1 anti-competitive effects. There is the Intel framework,
2 which looks at things like coverage, or there is the AEC
3 framework which is the one that I have been seeking to
4 explain to the Tribunal is an overriding principle. In
5 my submission, that is not a distinction that is
6 recognised in the jurisprudence. They are part and
7 parcel of the same exercise.
8 Intel, in my submission, isn't merely consistent
9 with the AEC principle, it is a leading case which makes
10 clear that the principle applies not only to conduct
11 such as margin squeeze but also to other conduct more
12 generally under Article 102, such as rebate schemes
13 intended to create exclusivity. There's no pick and
14 choose in terms of the framework, the standard is
15 always -- the question, ultimately, with which we are
16 concerned is, is the conduct -- does it have the
17 capability of foreclosing As Efficient Competitors? And
18 one answers that by looking at the other things that the
19 court points to in Intel, such as, for instance, the
20 scope of the agreement. But that's not a separate
21 framework, it's all part of the same framework. You
22 look at all the surrounding circumstances, which is the
23 point I emphasised at the beginning, and you look at
24 potential effects and you look at them by reference to
25 the AEC standard. There is one framework.

1 If there were two frameworks, in my submission that
2 would be nonsensical to have a system of law where you
3 pick and choose. Do you like the rigorous one which is
4 foreclosure of As Efficient Competitors? Or do you feel
5 today, like the Commission, we're just going to do it by
6 reference to less efficient competitors and we'll have
7 a look at some sort of airy-fairy-er criteria. In my
8 submission that is not how the system of law works here.
9 The final point to say on this issue is that when
10 Ms Stopford seeks to articulate what she says the test
11 is, because she doesn't have the AEC principle as the
12 test, she says: well it's an abuse if Google adversely
13 affects the effective competitive structure of the
14 market and does so by ways and means other than those
15 which govern normal competition. Sir, that is skeleton
16 28. But in my submission, that doesn't take anyone
17 further forward, that is circular.
18 What we are seeking to do is unpack what those means
19 other than which govern normal competition actually means
20 in the context of the question of effects on
21 competitors. My principle, our principle, gives effect
22 to that and, with respect, Ms Stopford doesn't have
23 a coherent standard.
24 THE CHAIR: Okay.
25 MR PICKFORD: Sir, if that's convenient, I will pause there.

1 THE CHAIR: That's a convenient time, thank you very much.
2 (11.55 am)
3 (A short break)
4 (12.10 pm)
5 MR PICKFORD: Thank you. The next case I would like to look
6 at, please, is the case of ENEL which is in tab 15 of
7 the select bundle, page 951, and in the original bundle,
8 it's tab 60 page 3357.
9 ENEL was the previously vertically integrated
10 incumbent monopolist for electricity generation in Italy
11 and it was also active in distribution, and it had been
12 unbundled into two companies. There is SEN, which made
13 supplies to customers in a protected market, and there
14 was EE, which sold energy on the free market; and the
15 idea behind the liberalisation was that customers were
16 to be transitioned from the protected market, over time,
17 to the free market. For this purpose, SEN, one part of
18 ENEL, gathered consents to be contacted by the free
19 market suppliers. The way it created its form, it
20 favoured its downstream operation EE and EE managed to
21 gain 70 per cent of the ticks for "Please can we contact
22 you", and all of its competitors only gained 30 per cent
23 of approval. So that is the context, set out at
24 paragraphs 2 to 11 of the judgment.
25 The Italian (inaudible) later found that to be

1 an abuse of dominance, and then various questions were
2 referred to the Court of Justice. We can pick those
3 questions up at paragraph 65 of the judgment, on
4 page 101 and 106 of the Tribunal's bundle or 3422 for
5 others.
6 Paragraph 65:
7 "By its first question, the referring court asks, in
8 essence, whether Article 102 TFEU must be interpreted as
9 meaning that a practice which is otherwise lawful outside
10 the context of competition law may, when implemented by
11 an undertaking in a dominant position, be characterised
12 as abusive for the purposes of that provision, solely on
13 the basis of its potentially anti-competitive effects or
14 whether such characterisation also requires that that
15 practice be implemented by means or resources other than
16 those governing normal competition. In that second
17 scenario, that court is uncertain as to the criteria for
18 distinguishing the means or resources which come within
19 the scope of normal competition from those which come
20 within the scope of distorted competition."
21 So it's aiming at one of the fundamental questions
22 that we are seeking to grapple with. And it goes on at
23 paragraph 69 to say that:
24 "With regard to the practices that are the subject
25 matter of the disputes in the main proceedings ... if such

1 conduct is to be characterised as abusive, that
2 presupposes that that conduct was capable of producing
3 the alleged exclusionary effects which form the basis of
4 the decision at issue."
5 And then at 71:
6 "in order for such characterisation to be
7 established, it is sufficient that that practice was,
8 during the period in which it was implemented, capable
9 of producing an exclusionary effect in respect of
10 competitors that were at least as efficient as the
11 undertaking in a dominant position."
12 Referring back to Post Danmark:
13 "Given that the abusive nature of a practice does
14 not depend on the form it takes or took ..."
15 So contrary to what one might have read from
16 Hoffmann-La Roche:
17 "... but presupposes that that practice is or was
18 capable of restricting competition and, more
19 specifically, of producing, on implementation the alleged
20 exclusionary effects, that condition must be assessed
21 having regard to all relevant facts."
22 Then at 73:
23 "That said, as recalled in paragraph 45 of the
24 present judgment, it is in no way the purpose of
25 Article 102 TFEU to prevent an undertaking from acquiring on

1 its own merits - on account of its skills and abilities
2 in particular - a dominant position on a market, or to
3 ensure that competitors less efficient than
4 an undertaking in such a position should remain on the
5 market."
6 Pausing there, with reference to "on account of its
7 skills and abilities in particular", consistent with
8 what we saw in Post Danmark, with the court potentially
9 treating an undertaking who's only in the position that
10 it is because of its statutory monopolies somewhat
11 differently from one that has won its position through its
12 own endeavours.
13 It goes on:
14 "Indeed, not every exclusionary effect is
15 necessarily detrimental to competition since competition
16 on the merits may, by definition, lead to the departure
17 from the market or the marginalisation of competitors
18 that are less efficient and so less attractive to
19 consumers from the point of view of, among other things,
20 price, choice, quality or innovation."
21 It's exactly the same words as we saw in Intel, and
22 making it very clear it is not the job of Article 102 to
23 protect less attractive consumers from the point of view
24 of -- sorry, undertakings whose products are less
25 attractive to consumers in relation to their price,

1 choice, quality, et cetera.

2 Then at 75 to 76, we see how the court begins to

3 answer the question that's posed to it and it brings

4 together the concept of the AEC principle. It says that

5 is the means by which one answers the question about

6 what is a deviation from competition on the merits:

7 "although undertakings in a dominant position

8 can defend themselves against their competitors, they

9 must do so by using means which come within the scope of

10 ‘normal’ competition, that is to say, competition on the

11 merits.

12 "By contrast, those undertakings cannot make it more

13 difficult for competitors which are as efficient to

14 enter or remain on the market in question by using means

15 other than those which come within the scope of

16 competition on the merits. In particular, they must

17 refrain from using their dominant position in order to

18 extend that position over another market by means other

19 than those which come within the scope of competition on

20 the merits ..."

21 And then an important paragraph, in my submission,

22 at 77, is this:

23 "Any practice the implementation of which holds no

24 economic interest for a dominant undertaking, except that

25 of eliminating competitors so as to enable it

1 subsequently to raise its prices by taking advantage of
2 its monopolistic position, must be regarded as a means
3 other than those which come within the scope of
4 competition on the merits."
5 So the point being made here is it's okay on the one
6 hand to make life harder for your competitors if all you
7 are doing is using the advantage that comes from your
8 efficiency, but if you conduct yourself in a way that
9 holds no economic interest for you because it wouldn't
10 even be profitable for you as a dominant undertaking,
11 i.e. your pricing doesn't satisfy the As Efficient
12 Competitors test, say, then you will be acting
13 abusively, precisely because that's -- that's
14 effectively the dividing line between something that
15 is -- or one articulation of the dividing line, looking
16 at it between whether it's reasonable for you to do that
17 as part of generally competing or whether you can infer
18 that you must just have an ulterior motive because you
19 are doing something that even you given, your
20 efficiency, you couldn't support.
21 And 78 develops that point in relation to conduct
22 such as refusal to supply an asset. That's the context
23 of Google Shopping which we are going to come to
24 shortly.
25 Then 79 emphasises again the importance of the AEC

1 principle.

2 And then 80 to 81 go on to talk separately about the
3 AEC test. So everything up until the end of 79 has
4 been, in my submission, in generalised and absolute
5 terms.

6 We then get to 80 through to 81 which is the AEC
7 test as a means of operationalisation, giving effect to
8 the AEC principle, and again you see the familiar point
9 there that it's not essential. It's just potentially
10 useful.

11 It's instructive in this case to also look at the
12 opinion of Advocate General Rantos because he gives
13 careful thought to the AEC principle and the AEC test
14 and how they fit in this part of article 102. So that
15 is earlier on in your selection at page 979, if you can
16 pick it up, and for the general bundle users it's 3385.

17 THE CHAIR: Okay, thank you.

18 MR PICKFORD: So at 52 and 53 he's basically posing the
19 question again which has been addressed by the court,
20 that I have been looking at with the Tribunal.

21 Then at 55 -- sorry, the quickest -- ask
22 the Tribunal, please, to read 55. (Pause)

23 He is basically, in that paragraph, making the point
24 that anti-competitive effects is no longer a form-based
25 approach it's an effects-based approach. So in as far

1 as it was once good law, as articulated in
2 Hoffmann-La Roche, it is no longer.
3 Then could I ask you to please continue reading 57
4 and 58. (Pause)
5 That's setting out the context for the question of
6 competition on a the merits. And then 62, over the
7 page, on page 982.
8 In my submission what that's doing is -- that
9 corresponds to the point that the court made at
10 paragraph 77, of the judgment, it's explaining it
11 slightly more fully along the lines that I explained to
12 the Tribunal.
13 And then 68 and 69, on the next page, deals with the
14 AEC principle and there is a footnote it may be helpful
15 to look at there. At footnote 52, the Advocate General
16 refers to an exceptional case. Remember, at the
17 beginning I said that there were some cases that didn't
18 fit within the norm about conduct on the market, they
19 were entirely outside that realm. He gives one example
20 there of AstraZeneca making misrepresentations to public
21 authorities. The issue there is not so much could
22 someone that was as efficient make misrepresentations,
23 it's not really a pertinent issue in a case such as
24 that. The point there is you just shouldn't be making
25 misrepresentations at all if are a dominant undertaking

1 because you are liable to muck up the ability of others
2 to compete at all, irrespective of whether they are as
3 efficient, less efficient, more efficient.
4 The end of paragraph 70 reaffirms the principle of
5 legal certainty and why that is given effect by the As
6 Efficient Competitor principle.
7 Then at 91 and 93, a couple of pages on, we see
8 again a discussion which builds on the point I have been
9 make about the need for the effects-based approach and
10 the approach in Hoffmann-La Roche no longer being the
11 appropriate approach in competition law. So it's not
12 just me making it up, that's well reflected in what
13 leading judges say about it.
14 So that's the ENEL case.
15 We should get to the theory before lunch. The next
16 case is Google Android. That is in supplementary --
17 sorry, selection bundle, tab 13, page 728; regular
18 bundle, tab 58, 3098.
19 THE CHAIR: Yes, thank you.
20 MR PICKFORD: This is obviously an important judgment from
21 Mr Stopford's perspective, given it's the basis for the
22 follow-on part of the claim, the Android part; and also
23 because Ms Stopford tells us, on its own case, that the
24 iOS conduct, they say, is fundamentally similar in
25 nature to the Android conduct. So we can take it that

1 they won't object to potentially what may be read
2 between the two.
3 THE CHAIR: What do you mean?
4 MR PICKFORD: They say the iOS conduct is fundamentally
5 similar in nature to the Android conduct and I'm going
6 to -- I think that's all I really need to say.
7 THE CHAIR: Okay, all right. But you disagree with that
8 anyway?
9 MR PICKFORD: Well, we disagree with aspects of the
10 analogies that they draw.
11 THE CHAIR: Right.
12 MR PICKFORD: It is not to say that there are not some
13 important similarities between certain bits of the
14 conduct. What we disagree with is -- that principle
15 without any qualification, we say that is not correct.
16 Their case on iOS is somewhat different from their case
17 on Android. However, if you look at parts of the
18 Android judgment, there are points of the Android
19 judgment that bear heavily on their iOS case. And I'm
20 going to come on to them.
21 THE CHAIR: Okay.
22 MR PICKFORD: So if you could pick it up, please, at
23 page 828 of your bundle, 3198 of everyone else's. This
24 is a section of the Android judgment dealing with proof
25 of the abusive nature of an exclusivity payment. So

1 this is the part of Android which does have a direct
2 bearing on the iOS abuse, because this is about
3 exclusivity payments to secure some kind of status on
4 a device. That is at the heart of what the iOS abuse is
5 allegedly, it's the payments of sums of money to Apple
6 to secure the exclusive rights to be the default on
7 Apple products.
8 THE CHAIR: Right.
9 MR PICKFORD: So this is a part which has a close bearing,
10 we say, on the iOS abuse.
11 THE CHAIR: Okay.
12 MR PICKFORD: The court says that, according to the
13 decision, the purpose of the portfolio-based RSA -- they
14 were the agreements by which Google had rights to
15 pre-install its general search services on mobile
16 devices:
17 "That practice leads to a result which is, in essence,
18 identical to that of 'loyalty' rebates that were central
19 to the case giving rise for judgment in Intel."
20 So what it's saying here is that there's a direct
21 correspondence between loyalty intended to induce
22 exclusivity, what Intel was concerned with, and
23 agreements which are just exclusivity outright. In
24 economic terms they are doing the same thing and
25 therefore the Intel criteria are applicable in this

1 context too. And it says at 639:

2 "It follows from the caselaw that, in

3 a situation in which, as in the present case, the

4 undertaking concerned by proceedings under Article 102 TFEU that

5 may lead to a finding of abuse of a dominant position

6 claims, during those proceedings, that its conduct was not

7 capable of restricting competition and, in particular,
8 of producing the alleged exclusionary effects,

9 it is then for the Commission, in order to establish the

10 culpability of that undertaking, to analyse the various

11 circumstances that demonstrate the restriction on competition.

12 So that's the burden of proof point we saw in Intel.

13 Then the next paragraph, 640, sets out, yet again,

14 and approves Intel criteria in the context of

15 exclusivity payments, i.e. the type of allegation that we

16 are concerned with here.

17 That's 640.

18 I am happy to give the Tribunal an opportunity to

19 read it, it's basically repeating the same test as you

20 have seen in Intel.

21 Then if I may, is it convenient for me to continue?

22 THE CHAIR: Yes.

23 MR PICKFORD: At 641 the court then goes on to discuss the

24 As Efficient Competitor Test. So it set out the

25 principle, it then goes on to the test and at this

1 point, yet again, it makes the point, which is now
2 becoming well understood, that the test itself is not
3 mandatory, doesn't have to be used, but critically in
4 642 it makes the point that if you are going to use it,
5 in addition to price in order to be considered as
6 efficient as the dominant undertaking that hypothetical
7 competitor must also be as attractive to that
8 undertaking's customers in terms of choice, quality or
9 innovation. Again, what I hope now is a familiar
10 refrain.
11 A point is taken against me here, where they say,
12 "Ah, actually if you look at the words there, it says
13 'choice, quality or innovation'." So the Commission, or
14 in their case the Class Representative, has an option
15 which of those it's going to equalise to. That's
16 a misreading of 642, because 642 is a copy and paste of
17 the words that we saw in Post Danmark before, I took the
18 tribunal to Post Danmark 1 at paragraph 22. I don't want
19 to go back to it unless the Tribunal would like me to,
20 but for your note it's -- I don't -- I don't have your
21 reference -- I'm going to look at my notes.
22 I beg your pardon, it's because it's not in your
23 selection, it's only in the main bundle. So it's
24 authorities 2, tab 70, 5073.
25 What the Android judgment is doing is just copying

1 and pasting the description of a less efficient
2 competitor from Post Danmark and obviously in that
3 context the "or" makes sense, and the "or" is slightly
4 clumsy here because here it's talking about actually
5 when it's defining an AEC. But if you look back at Post
6 Danmark, it's absolutely clear what they must mean, it's
7 that they have to be as efficient in all of those terms
8 and that reflects Post Danmark, it reflects all the
9 other cases that describe what an AEC is. So it's just
10 a slightly clumsy cut and paste there, the "or" is not
11 as telling as suggested by my learned friend.
12 The important point then that we draw from this case
13 is application of AEC to the very circumstances we are
14 concerned with, exclusivity agreements, as it's just
15 like Intel and rebate schemes.
16 The next case is Unilever Italia.
17 THE CHAIR: Mr Pickford, one thing I want to understand in
18 relation to the Android case we have just been looking
19 at. The point made by Ms Stopford, on behalf of
20 Ms Stopford, is there is difference between some
21 exclusivity and exclusivity for absolutely everything,
22 so they can't get their -- nobody else can get their
23 foot in the door, because exclusivity for some category
24 of devices which left them free to try and get in on
25 some other one and build up some scale on that would

1 be different. What was in issue here?

2 MR PICKFORD: There were two types of exclusivity actually

3 in issue in Android. There were device-based agreements

4 and there were also portfolio-based agreements.

5 THE CHAIR: What does "portfolio" mean?

6 MR PICKFORD: What portfolio means is that across

7 potentially an entirely category of devices, potentially

8 an OEM's entire set of devices.

9 THE CHAIR: For that OEM?

10 MR PICKFORD: Yes. It doesn't have to be -- but I mean some

11 operated at that level. It's a difference between

12 something that operates just at the level of "here is the

13 Samsung device X", it operates at just a level of

14 a particular product, and one that operates across

15 a broad spectrum, potentially all products --

16 THE CHAIR: For that OEM.

17 MR PICKFORD: -- for that OEM.

18 So that distinction was made, because the Commission

19 did not have any objection to the device-based

20 agreements, it only had an objection to the wider

21 portfolio-based agreements, which are the ones that are,

22 we say, analogous to the sort that we are talking about

23 here.

24 THE CHAIR: Why are they analogous?

25 MR PICKFORD: Because they are --

1 THE CHAIR: Or put it the other way round, why is
2 Ms Stopford's argument that they are not analogous
3 because in ... as she alleges the iOS arrangement is
4 a total lockout for everything Apple. Why is that
5 analogous?
6 I just sense a bit of an argument that exclusivity
7 is okay, therefore any kind of exclusivity is okay.
8 MR PICKFORD: No. My argument is not exclusivity is okay,
9 therefore any exclusivity is okay, therefore go home.
10 My argument is when one is concerned with
11 an exclusivity agreement, you need to apply the same
12 principles as we have seen applied across a host of
13 different areas of competition law now through this
14 explanation of the AEC principle, which is that it's
15 only going to be considered to be abusive if it
16 forecloses As Efficient Competitors.
17 To make that more concrete, as an example, and this
18 has some relation to some of the things that Mr Latham
19 talks about, if it would be quite possible for a rival
20 to come along and say well -- you know, say it's
21 Microsoft or Apple itself, come along and say, "Well,
22 actually I'm going to be the person who is the default
23 now on these devices, I am prepared to do a deal where
24 I'll pay you to be a default". If someone can do that,
25 and they are as efficient as Google and the price that

1 Google paid to be the default doesn't lock them out, as
2 Google hasn't paid something that would be too high even
3 for an As Efficient Competitor to be able to present,
4 then it's not abusive.
5 If, however, Google has gone in and even if you were
6 as efficient as Google, you still could not beat that
7 price, what that tells you, Dr Latham would say -- this
8 is the theory -- is that there can be only one
9 explanation for that conduct, because the price of the
10 agreement that was entered into was so high that it's
11 not even profitable looked at in normal economic,
12 rational terms for Google to have entered into it.
13 Therefore it must be anti-competitive because what
14 Google must be, it is alleged, seeking to do in those
15 circumstances is just keep everyone else out of the
16 market, at the cost that's it's willing to actually lose
17 money on the deal itself.
18 So my argument is definitely not all exclusivity
19 agreements are per se legal, just as all exclusivity
20 agreements are not per se illegal.
21 My point is that the standard by which one judges
22 whether they are lawful or unlawful is whether they have
23 a foreclosing effect on As Efficient Competitors.
24 THE CHAIR: Just in terms of the facts: were there segments
25 of the Android market that were not covered by the

1 exclusivity agreements in the case we are looking at?
2 MR PICKFORD: I will need some assistance on ... This very
3 much comes within the domain of Mr Holmes's submissions,
4 he is going to be addressing you on this. So it is
5 probably better -- because he is focusing on this issue
6 himself -- if he addresses you on this, if it's okay.
7 THE CHAIR: Okay.
8 MR PICKFORD: Yes, I think where we were is I was seeking to
9 say that here, in the Android case itself, we see --
10 consistent with entirely orthodox principles that I have
11 been showing you now for some time -- an application of
12 the AEC principle to exclusivity agreements. That's the
13 way that one tests whether they are competitive or
14 anti-competitive. Indeed in this very case, in the
15 Google Android case, the portfolio agreements which were
16 criticised by the Commission, those findings were set
17 aside by the General Court because it said it hadn't
18 done a good enough job in relation to its analysis and
19 the effect on As Efficient Competitors.
20 If I may then turn to my next case, and we are
21 beginning to come to the end of the cases now. It's
22 Unilever Italia and its in tab 10 of the selective
23 bundle, tab 57 of the main bundle. It's page 653 of the
24 selected and 3086 of the main.
25 This is a case about a requirement for bars and

1 cafés to source all their individually wrapped ice
2 creams from Unilever. If we pick up, please, the
3 judgment on page 659 of your bundle, or 3092 of the main
4 bundle, at paragraph 34, could I ask the Tribunal,
5 please, to read paragraph 34, just to see the question
6 that the court is seeking to answer. (Pause)
7 Does it need to apply the As Efficient Competitor
8 Test in the context of these exclusivity agreements?
9 Then if we could go to paragraph 37, we see now
10 a very familiar refrain about it not being the purpose
11 of Article 102 to protect less efficient undertakings
12 and that exclusionary effects are not necessarily
13 detrimental to competition, it depends on whether they
14 foreclose the market to As Efficient Competitors.
15 Again, reference to a less efficient competitor not
16 just being less efficient in terms of cost, but also
17 price, choice, quality and innovation.
18 Then at 39:
19 "abuse of a dominant position could be
20 established, inter alia, where the conduct complained of
21 produced exclusionary effects in respect of competitors,
22 that were as efficient as the perpetrator of that
23 conduct in terms of cost structure, capacity to
24 innovate, quality."
25 It goes on:

1 "or where that conduct was based on the use of
2 means other than those which come within the scope of
3 'normal' competition."
4 In my submission, that must mean or otherwise,
5 because we saw previous cases say one answers what is
6 within the scope of normal competition by reference to
7 this test.
8 Then at paragraph 46, just a few pages on, it then
9 deals with Hoffmann-La Roche again, this is all becoming
10 very familiar. Essentially it says you can't read --
11 46, 49 -- you can't read Hoffmann-La Roche without
12 qualification. So it is repeating the Intel criteria we
13 have already seen.
14 Then 50 makes abundantly clear -- this is Court of
15 Justice rather than General Court, which was Android --
16 that the principle applies just as much to exclusivity
17 clauses as it does to the rebate schemes in Intel.
18 51, again the points that should now be familiar
19 that exclusivity clauses are not automatically to be
20 considered unlawful.
21 Then 52, through 53 and 54, making the point that we
22 saw from Intel that if the dominant undertaking is
23 contesting whether there is any foreclosure, the
24 Competition Authority needs to prove that it is
25 foreclosing and that the test there is based on AECs.

1 In particular, 56 through to 59 goes on -- having
2 repeated all of what I call the As Efficient Competitor
3 principle points, which are all in general and absolute
4 terms. Then at 56 and following it goes on to deal with
5 the test and it's at that point where it switches and
6 talks about the test itself is optional.
7 Then there are just two final cases, which I think
8 we can easily do before lunch.
9 The next one is European Superleague, which is not
10 in your selection I'm afraid. That is in authorities 5,
11 tab 129, page 11750. The members of the Tribunal may
12 recall that there were a number of elite football clubs
13 in both UK, England, Spain and other countries that
14 a few years ago considered setting up a European
15 Superleague and they got together and very quickly UEFA
16 and FIFA decided that they were going to squash that and
17 that no one was going to set up any sort of European
18 Superleague. So they said: we make the rules and if you
19 set up this league then you are out of all our
20 competitions and your players are out of all our
21 competitions et cetera. That was the context for the
22 case.
23 The question came before the Court of Justice as to
24 how to approach that as a matter of law. If we pick it
25 up at paragraph 123, which I'm afraid I don't have the

1 page reference for ... It's in general bundle 11778 and
2 in your bundle --
3 THE CHAIR: It's not in my bundle ...
4 MR PICKFORD: Yes, it's just 11778.
5 We have a section of the judgment which considers
6 the concept of an abuse of a dominant position. From
7 123 onwards it sets out what I have described now many
8 time as the orthodox position.
9 You can see in particular 126 and 127 articulating
10 the essential principle.
11 Then 129 bringing it together and saying:
12 "In order to find, in a given case,
13 that conduct must be categorised as an 'abuse of dominant
14 position', it is necessary, as a rule, to demonstrate,
15 through the use of methods other than those which are
16 part of competition on the merits between
17 undertakings, that that conduct has the actual or
18 potential effect of restricting that competition by
19 excluding equally efficient competing undertakings from
20 the market(s) concerned."
21 Then at 131 it goes on to talk about an exceptional
22 category of cases, where it distinguishes -- in the way
23 that I was describing at the beginning of my
24 submissions -- between cases that involve conduct on the
25 market, so ordinary commercial arrangements such as

1 exclusivity agreements that we have been considering,
2 and prior measures that simply stymie all competition
3 before it could even get off the ground. It gives the
4 example of Generics at the end of 131. Generic was case
5 where the dominant undertaking reached agreements with
6 generic manufacturers of a drug that they would stay off
7 the market. So it doesn't really matter in that case
8 whether they are less efficient, more efficient, as
9 efficient. It is just before anyone has even got into
10 the question of how you are going to operate in the
11 market to stymie competition at that earlier prior
12 stage.
13 The facts of the football case were another example
14 of FIFA just saying, "We control this market, we make up
15 the rules and we compete in that and you are not going
16 to compete against us". Again, it's an example of that
17 exceptional category.
18 But it's not us, because I showed the cases that
19 deal with exclusivity agreements.
20 A final case on the law, that's the Google Shopping
21 case which is relied on against us by Ms Stopford. That
22 is at tab 1, I believe, of the selected cases and at
23 tab 128 of bundle 5 of the general bundle. It is very
24 long page numbers, it's 11714.
25 If one could pick it up, please, at page 37 of your

1 bundle or page 11747. I don't know whether the tribunal
2 is familiar with the background to this case. It was
3 about the presentation by Google of results on its
4 search page when the Google search engine inferred from
5 someone's search that they wanted something to do with
6 a product that they might shop for. There was
7 an argument about the way that Google went about that
8 and findings were made that were adverse to Google in
9 relation to that.
10 At 263 and onwards there is effectively a recitation
11 of what is said in Intel. It begins with saying the
12 purpose of Article 102 TFEU:
13 "is not to ensure that competitors less
14 efficient than the dominant undertaking remain on the
15 market."
16 Then the point that is relied on against me is 264,
17 it says:
18 "Nonetheless, it does not follow that any finding of
19 an infringement under that provision is subject to proof
20 that the conduct concerned is capable of excluding an as-
21 efficient competitor."
22 What they then go on to explain is that a point
23 about burden of proof as to on whom that burden lies and
24 when it becomes, under the administrative procedure
25 governing actions before the Commission -- or

1 rather, governing investigations by the Commission,
2 when it becomes incumbent on the Commission to look at
3 that and that depends on whether the company being
4 investigated has said, "Well, this isn't going to
5 foreclose competitors".
6 What the court says is, "Well you, Google, didn't
7 really ever properly put that in issue" and, therefore,
8 it wasn't necessary for to the Commission to prove that
9 point, is the essence of what is being said here.
10 It makes that finding by reference to the procedural
11 points that arose in Intel.
12 THE CHAIR: Just explain what 268 means then?
13 MR PICKFORD: What the Court of Justice says is the General Court
was:
14 " right ... to state, without that
15 finding being invalidated by the appellants, which merely make
16 allegations in principle, that it would not have been
17 possible for the Commission to obtain objective and
18 reliable results."
19 What we were saying is in order to satisfy the
20 principle in this particular case you needed to
21 investigate the efficiency of the rivals. What was said
22 below is: that can't be done and you are just sort of
23 advancing that but you are not saying anything about
24 advancing any evidence about the efficiency of the
25 rivals; and therefore we are not going to say that the

1 Commission has failed because it hasn't done that
2 difficult thing which you haven't done either.
3 So as a matter of burden, taking account of the
4 approach that was adopted in Intel, that isn't good
5 enough to satisfy the Commission's decision. That is
6 the point that's being made.
7 THE CHAIR: Okay.
8 MR PICKFORD: But earlier on it states, as all the cases do,
9 that it isn't the job of Article 102 to protect less
10 efficient competitors. That remains good even with the
11 case that's taken against me here.
12 There are two areas of law that I don't need to go
13 to. One is the Commission guidance, it's relied on
14 quite heavily by my learned friend. In my submission --
15 I'm not going take the Tribunal to it because it's draft
16 guidance on Article 102 and, with respect to the
17 Commission, I say that it is in some respects a piece of
18 advocacy which sets out the law from the Commission's
19 perspective. It cannot and does not purport to displace
20 the rulings of the European Courts, which I sought to
21 carefully take the Tribunal through. It would have made
22 my earlier submissions even longer had I done this, but
23 if you were to go back and see what the Commission said
24 in all those cases we went through, the Commission was
25 consistently saying: we have absolute freedom, we don't

1 need to be tied down by this principle or that
2 principle, we always maintain the freedom effectively to
3 decide these cases in a way that we think is right.
4 That wasn't always accepted by the courts and we saw
5 principles that have been developed.
6 So it's unsurprising, I say, the Commission might be
7 seeking to shape the law through its currently only
8 draft guidance, but it doesn't alter what the law is and
9 I have shown you what the law is.
10 Then, secondly, they also make quite big play of the
11 English case in the Court of Appeal of Royal Mail. That
12 is a case about the need or otherwise for an AEC test.
13 It's not about whether there is a general AEC principle
14 in European competition law and therefore UK competition
15 law. And so I don't intend to address that now, I can
16 if necessary do it in reply.
17 Sir, that is the law in terms of the cases that
18 I wanted to take you to on the Article 102 point. What,
19 if it's convenient to the Tribunal, I propose to do
20 after lunch is to draw the strands from that together
21 and then apply it to our case.
22 THE CHAIR: Right. Okay, that's helpful, thank you. Do
23 I understand it's your -- can you just say in a couple
24 of sentences exactly what the AEC principle is?
25 MR PICKFORD: Yes, I can. I say -- the first point of

1 drawing all that together?

2 THE CHAIR: Yes.

3 MR PICKFORD: I say it has three interrelated strands. The

4 first is that it is in no way the purpose of Article 102

5 to ensure that competitors less efficient than the

6 undertaking that has the dominant position should remain

7 on the market. We've seen that repeated throughout the

8 authorities. It comes in first in Post Danmark I in

9 paragraph 21. So that's the first part of the

10 principle.

11 THE CHAIR: Right.

12 MR PICKFORD: The second part of three -- and it follows

13 directly from the first proposition, logically -- is

14 that not every exclusionary effect is necessarily

15 detrimental to competition. On the contrary,

16 competition on the merits may by definition -- by

17 definition -- lead to the departure from the market or

18 the marginalisation of competitors that are less

19 efficient and so less attractive to consumers from the

20 point of view of, among other things, price, choice,

21 quality or innovation. That Post Danmark 1 at

22 paragraph 22.

23 Then the third of those interrelated strands -- and

24 again it follows, in my submission, logically from the

25 first two -- is that the standard, therefore, for

1 assessing whether conduct on the market leads to
2 a deviation from competition on the merits is answered
3 by considering the question, whether the conduct has the
4 actual or potential effect of restricting competition by
5 excluding equally efficient competing undertakings from
6 the market concerned or by injuring their growth on
7 those markets, and --
8 THE CHAIR: Sorry, slow down. Excluding ...
9 MR PICKFORD: The question that needs to be grappled with is
10 whether the conduct has the actual or potential effect
11 of restricting competition by excluding equally
12 efficient competing undertakings or as efficient
13 competing undertakings from the market concerned or by
14 injuring their growth on those markets.
15 That's the test as it is put in European
16 Superleague, at 129, and also words to that effect are
17 found in a large number of the cases that I have taken
18 you through.
19 So that is, in my submission, what the AEC principle
20 is; it's three-fold and they are logically interrelated.
21 The third one is the one that really matters when it
22 comes to what the proposed class representative has
23 pleaded because that goes to whether they are aiming at
24 the right question that will ultimately demonstrate
25 a deviation from competition on the merits, or whether

1 they are aiming at the wrong target.
2 THE CHAIR: Okay. Just quickly to clarify and then we will
3 take the break. Your proposition 1, it's no way the
4 purpose of Article 102 to ensure a less efficient
5 competitor remains on the market. I follow that. That
6 would imply that somebody alleging an abuse can't come
7 along and say, per se: these less efficient competitors
8 have been driven off the market so there must be
9 an abuse.
10 MR PICKFORD: Yes.
11 THE CHAIR: Because them being driven off the market could
12 be just because they are no good.
13 MR PICKFORD: Yes.
14 THE CHAIR: That's fine. But that's not logically the same
15 as saying that what's happening to less efficient
16 competitors or might happen to them is never relevant;
17 they are not equivalent statements, are they? You can't
18 say: here are some less efficient competitors being
19 driven off the market, it must be an abuse. That
20 doesn't follow.
21 MR PICKFORD: Yes.
22 THE CHAIR: But on the other hand that's not logically the
23 same as saying that the fate or potential fate of less
24 efficient competitors is always irrelevant. It's not
25 exactly the same thing, is it?

1 MR PICKFORD: I don't think that my submission actually goes
2 quite as far as to say that the fate of a less efficient
3 competitor is always irrelevant.
4 THE CHAIR: Right.
5 MR PICKFORD: What my submission is based on is the
6 proposition that the standard for assessing whether
7 there has been a deviation from competition on the
8 merits is what happens to or would happen to an As
9 Efficient Competitor. So if I could build on that to
10 answer, sir, your question.
11 THE CHAIR: Yes.
12 MR PICKFORD: If -- and I'm not accepting this on facts, but
13 as a logical proposition. If it were possible to infer
14 from what happened to a less efficient competitor, what
15 would happen to an As Efficient Competitor, then in
16 those circumstances if that were possible on the facts,
17 which I'm not accepting, the effect on the less
18 efficient competitor would not be irrelevant, which
19 I think was the question that you were asking me.
20 THE CHAIR: Okay.
21 MR PICKFORD: But it is not the question we are seeking to
22 answer. It is only if that can bear on the ultimate
23 question which is concerned with the AEC not the LEC.
24 THE CHAIR: And you say that all those three principles
25 apply even in scenarios -- I know you don't accept this

1 on the facts but as a matter of principle -- where it is
2 not in fact possible for an AEC to emerge?
3 MR PICKFORD: Yes.
4 THE CHAIR: So that does mean that you are saying that that
5 bit of Post Danmark II is wrong, I think.
6 MR PICKFORD: Well, because, remember, that bit of Post
7 Danmark II is really about the test and it --
8 THE CHAIR: I know you say that. But let's just keep it
9 abstract for the moment. You say these principles apply
10 even if it's impossible for an AEC to emerge.
11 MR PICKFORD: Yes.
12 THE CHAIR: And even if the impossibility of the AEC
13 emerging is as a consequence of the incumbent's -- the
14 dominant undertaking's, business history, conduct.
15 MR PICKFORD: I'm not sure that is alleged against us.
16 THE CHAIR: I think it is. I think it is, because this is
17 the whole scale point. I'm not saying this is right or
18 wrong, but I think the argument that's put, certainly in
19 the skeleton, is you need scale to get good and if you
20 can't get a foothold at all you can't get scale so you
21 can't get good at search, so you can't be an AEC, you
22 are only ever going to be a less efficient competitor.
23 MR PICKFORD: I think you have to answer that question quite
24 carefully thinking about what point in time you are talking
25 about. If the allegation is there was a time before the

1 conduct began and then you started to do things which
2 foreclosed As Efficient Competitors, and therefore you
3 were acting unlawfully, you can't rely on that fact
4 having actually breached the 'done something unlawful',
5 as justifying your subsequent position, you have to
6 unravel in history and go back to the point in time when
7 you started foreclosing As Efficient Competitors.
8 THE CHAIR: Right.
9 MR PICKFORD: But that's always the critical question.
10 Merely foreclosing less efficient competitors is not
11 unlawful and therefore if all you have done ever is
12 foreclose less efficient competitors through what you
13 have done, then yes, I maintain that even in those
14 circumstances, even if you are then ultimately a lot
15 bigger than your rivals, that cannot be held against you
16 to find that you have abused a dominant position later
17 on. Because if that were right, if that were the case,
18 then what that would mean is that competition law
19 punished those that succeeded through being better than
20 their rivals, through offering better products, for
21 being more efficient, for offering higher quality
22 products; if that's how you have grown big then you are
23 allowed to take the advantages that come with that, yes.
24 And in my submission that is true even if one finds
25 oneself in a situation where there is a market where

1 there are less efficient competitors and it's going to
2 be difficult for them to displace you, at least,
3 you know, using the technology that they are currently
4 using.
5 It's also important I think just to stand back
6 a little bit and remember in a statutory monopoly that
7 is one thing where you can say there is literally no way
8 that this market can change, because as a matter of law
9 someone is guaranteed X share of the market, that is one
10 situation. Even in a situation where Google has
11 developed an extremely effective and extremely popular
12 product, and is currently obviously very much the
13 foremost search engine, that doesn't mean that will
14 always be the case. There were much bigger search
15 engines than Google initially and Google came up with
16 an innovative product that was better than the others'
17 ones. In TV everyone assumed, probably X number of
18 years ago, the way that TV was distributed was, if it
19 was pay TV, through linear channels and people like Sky,
20 and then Netflix comes along, seemingly out of nowhere,
21 and revolutionises the way that TV is consumed.
22 There are companies that break the ceiling and --
23 like IBM was a really big computer company and then
24 Microsoft came along and revolutionised the way that
25 computing and PCs worked. There are plenty of examples

1 where you have companies that are seemingly in very,
2 very powerful positions and someone else comes along
3 with a better idea and displaces them. And that is the
4 type of competition that we say competition law is
5 actually there to encourage and protect. What it is not
6 there to do, and we have seen repeated statements, is to
7 give a leg-up to less efficient competitors and
8 say: okay well, we have looked at this market and we
9 think it's going to be very difficult for other people
10 to penetrate it, given your current size, and you are
11 bigger and you are better than everyone else and
12 therefore we are going to hold that you abused your
13 position by being bigger and better than everyone else.
14 That is not the test.
15 If -- if -- a regulator or a government wants to
16 engage in that kind of management, then one looks to
17 regulation; and we see both at the European level and
18 the UK level that governments have done that. There is
19 the Digital Markets Act.
20 THE CHAIR: Yes, that is in your skeleton. We have steered
21 slightly off the question, Mr Pickford, and I have your
22 answer to my question I think.
23 MR PICKFORD: Thank you.
24 THE CHAIR: So we will -- I'm afraid, owing to my question
25 we have slid on a bit. So we will start again at 2.10.

1 (1.10 pm)

2 (The short adjournment)

3 (2.10 pm)

4 THE CHAIR: Yes.

5 MR PICKFORD: Thank you, sir. Before the short adjournment

6 I explained what I said that the AEC principle reflected

7 and there were three interrelated strands.

8 THE CHAIR: Yes.

9 MR PICKFORD: The second point that I draw from the case law

10 is that the AEC principle, as I had explained it,

11 applies in all cases concerning the question of whether

12 conduct on the market is foreclosing rivals. So that

13 includes cases which concern, for instance, the pricing

14 of a dominant undertaking, goods or services, such as

15 margin squeeze, predatory pricing cases and it also

16 includes other types of acting on the market, including

17 loyalty rebates and exclusivity agreements. The

18 authorities that are relevant to the latter include

19 Intel, Unilever Italia and Google Android. The third

20 point I draw from the cases that we've considered before

21 the short adjournment, there are some exceptional

22 instances where the court doesn't consider it necessary

23 to worry about the question of As Efficient Competitors

24 or less efficient competitors, and those exceptional

25 cases do not concern commercial conduct on the market,

1 they concern something special and particular about the
2 activities of the undertaking prior to there being any
3 competition on the market at all. So the examples
4 I showed you, where someone gets to set the rules even
5 to appear on the market. In my submission, it's not
6 that those cases are saying that a less efficient
7 competitor is the standard there, they are just not --
8 they don't need to be concerned with whether it's a less
9 efficient competitor or as An Efficient Competitor or
10 a more efficient competitor. The point is if there is
11 some prior behaviour that's preventing any competition
12 on the market at all because that dominant undertaking
13 sets the rules, then that is an exceptional case.
14 THE CHAIR: Yes. Prior to what exactly? Prior to?
15 MR PICKFORD: I use the word prior because that's the term
16 that was used in European Super League at paragraph 131,
17 where it was talking about this different category of
18 cases, so it talks about prior. What I understand it
19 means by that is to distinguish between two given
20 scenarios; on the one hand, the category that we are in,
21 the exclusive purchasing agreement and other examples.
22 What one is focused on there is conduct that is in some
23 sense -- whether it's competition on the merits or not
24 on the merits, it's still some type of potentially
25 ordinary conduct on the market that involves the

1 activities that one would associate with normal -- never
2 use the word "normal competition" because that's too
3 loaded -- that one would associate with being present on
4 a market, doing the normal commercial things that one
5 does on the market. You might be doing them in
6 an anti-competitive way but if you are pricing or
7 entering into agreements with other people on the
8 market, that is one thing and the question there is can
9 your competitors meet what you are doing -- or rather,
10 could an efficient competitor meet what you are doing?
11 It's about meeting some behaviour, and using that
12 meeting question to determine whether your behaviour is
13 normal and legitimate or anti-competitive. Whereas the
14 exceptional category of cases doesn't involve any question
15 about normal activity on a market of any sort, they are
16 concerned with a prior issue, is how it's described in
17 the case law, where the question is, is there something
18 special here, where, for example, an undertaking has
19 entered into settlement agreements with its rivals that
20 prevent anyone from competing on the market. That is
21 not a sort of ordinary commercial thing to do, to sign
22 up with a group for the rivals, where you said to your
23 rivals you don't compete anymore. That is indeed the
24 antithesis of competition. And in those circumstances,
25 when it's at that prior stage, if you can call it that,

1 it doesn't matter whether we are talking about as
2 efficient or less efficient competitors. That is not
3 the benchmark for distinguishing those behaviours,
4 legitimate or not, it's just everyone is excluded, that
5 is what you are trying to do. That's the point. I don't
6 find the very -- I was thinking, is there a better word
7 that I can use than prior, because that's the wording in
8 the case law. It may be there is a better word. I
9 haven't quite managed to find a single word that sums it
10 up. I have tried to explain the difference as best
11 I can in that answer.
12 THE CHAIR: Okay.
13 MR HERGA: Wouldn't it also be an exception if there was
14 evidence of the conduct under question -- if there is
15 evidence of an intent for that to drive people from the
16 market?
17 MR PICKFORD: That is an interesting question. Because
18 intent has a rather interesting (inaudible) in
19 competition law. There are competing authorities on
20 intent. On the one hand there are authorities which
21 continually refer to the question of abuse of dominance
22 being an objective one and it ultimately not mattering
23 particularly what the intent was. So, for example, if
24 you have plan to exclude your competitors, but you
25 totally fail in that plan because you are utterly inept

1 in executing it, then there is not an abuse of
2 dominance. And there is authority for that proposition.
3 I think it's one of the authorities that we have in our
4 bundle but I can certainly give you that authority if
5 that would be helpful.
6 So on the one hand that is that strand of law which
7 says, basically, that it's an objective concept; on the
8 other hand, there are some strands of law which look
9 at -- that say: well it's relevant at least to consider
10 as part of the factual matrix, what your intentions
11 were. In my submission, to reconcile those two
12 seemingly conflicting strands of law, one has to say:
13 well it might be okay to look at your intention as part
14 of the factual matrix and you might perhaps be able to
15 infer things from that. It might be that some adverse
16 findings are made about your conduct, given that there
17 is some memo saying: let's destroy our competitors by
18 this. So it's certainly been considered to be something
19 that the courts could look at and could be pointed to as
20 further evidence. Equally, I don't actually think it
21 can be sufficient in and of itself, given the other
22 strand of case law which says ultimately, it's an
23 objective question. And the particular example, if it
24 is given in those cases, where if you try, and you
25 totally fail, you haven't actually committed an abuse.

1 MR DAVIES: Still on this distinction between the two types
2 of case, is part of the distinction that in the second
3 category of case, what you are calling prior, the abuse
4 happens in one market and then the effects are actually
5 felt in a second one, where would the purely Android
6 side of these proceedings fit within your framework?
7 MR PICKFORD: So in my framework, Android is very much
8 within the -- I would call it the ordinary commercial
9 dealings. The things that were looked at in Android
10 were, for example, the arrangements that Google had with
11 OEMs and whether those arrangements had tie-in in them
12 that was unlawful. And having distribution agreements
13 is something that you ordinarily do in a market,
14 having -- having a distribution agreement with your
15 downstream suppliers is normal, in that sense, so the
16 question is: well, was that particular distribution
17 agreement an unlawful one? One examines that, in my
18 submission, under the general and orthodox system of
19 law.
20 And that's the conclusion from the same market or
21 another market.
22 MR DAVIES: But there's a difference, isn't there, because
23 in the case of the sort of purely Android side of
24 things -- I mean, whether someone is an As Efficient
25 Competitor in search or not is not going to have any

1 bearing on whether -- Google tying its dominance of
2 the Android operating system to certain advantages
3 through its Apple product. So in a sense that is
4 upstream from and prior to the effects in the search
5 market. I'm just wondering where the As Efficient
6 Competitor would have to arise in that. We are mainly
7 talking about iOS here, so there is just a little bit of
8 a side issue, I accept.
9 MR PICKFORD: In my submission it needs to arise in the
10 market in which it is said that the competitors are
11 being foreclosed. So that's where one focuses. It is
12 true that you can have a dominant position in market A
13 but its anti-competitive effects of your conduct if you
14 are doing bad things is felt in market B. And in that
15 situation, in my submission, that -- we are not in an
16 exceptional category there, we simply need to look at
17 the effects in market B and look at whether what we are
18 doing in market A is capable of foreclosing market B to
19 As Efficient Competitors in market B. So the principle
20 is still there. Because in the hypothetical that we
21 posited, one is seeking to differentiate between, on the
22 one hand, conduct that is legitimate and conduct that is
23 illegitimate, by reference to whether it's normal or
24 not. All those cases I have shown you say -- the basic
25 point we get that is by the As Efficient Competitor and

1 it's only these further exceptional cases, where we
2 don't. That's not because in any of those cases they
3 are saying it's sufficient merely to be foreclosing
4 a less efficient competitor, the point is in those
5 cases, it is just not pertinent to worry about the
6 difference between As Efficient Competitor or a less
7 efficient competitor. It's just not a relevant issue.
8 I would say that the principle in the background is
9 still there, it's just it's not going to help you answer
10 those particular cases.
11 And our case, iOS exclusivity agreements, is very,
12 very firmly in the main box, because we have all of the
13 cases that I have taken you to which say that that is
14 how we consider those are the principles that apply when
15 considering exclusivity agreements.
16 MR DAVIES: Thank you.
17 MR PICKFORD: The fourth point I take from the case law is
18 that there are two core reasons why the standard for
19 assessing foreclosure in those cases is whether an As
20 Efficient Competitor is foreclosed. The first reason
21 is, as I say, it's the corollary of the other two parts
22 of the principle that I enunciated before lunch. It's
23 the logical corollary of the fact that it isn't the job
24 of Article 102 to ensure that LECs remain on the market
25 and that, indeed, competition by definition --

1 competition on the merits, by definition, may lead to
2 the departure from the market of less efficient
3 competitors. That's the whole point of competition.
4 Second reason for that standard is it's because it's
5 consistent with the principle of the legal certainty to
6 have a principle that is based on the dominant
7 undertaking itself. So it can know in advance whether
8 its conduct is lawful or not. That is an important
9 principle. It's reflected in Deutsche Telekom at
10 paragraph 202 and in my submission, whilst there might
11 be practical exceptions when it comes to applying an AEC
12 test, when one is operationalising the principle, where
13 for instance, if the dominant undertaking won't give any
14 information about its costs, well then you might have to
15 look at some other costs as a proxy but that is
16 different from whether the principle should be based on
17 undertaking its own costs, for reasons of legal
18 certainty.
19 Fifth point that I take from the cases is that
20 within the administrative procedure that is adopted by
21 the European Commission and that it has to satisfy,
22 whether the Commission needs to prove a case by
23 reference to the As Efficient Competitor standard,
24 depends on whether an undertaking under investigation
25 puts in issue the question of foreclosure or indeed,

1 raises objective justification for its conduct. So if
2 you are the Commission and you send a statement of
3 objections to a party and they roll over, and they don't
4 bother to put any of those things in issue, then you are
5 not going to have to make a positive case about them in
6 your decision. But if they are going to be an issue, then
7 they need to be properly grappled with and the cases on
8 that are Intel, 138 to 139; Unilever Italia, 52 to 54;
9 Google Shopping, 263 to 269.
10 Now in my submission, the procedural issue in EU
11 administrative law that we see in Intel does not
12 translate well into party-to-party private
13 litigation in English law. We say that if there's
14 a principle of law that underpins the test the court is
15 ultimately going to be asking itself, then it's
16 incumbent on the claimant or the representative of
17 the claim to plead a case which is consistent with and
18 accords with that principle, otherwise there is going to
19 be confusion and lack of clarity about the issues that
20 are ultimately going to need to be decided. And that is
21 particularly important in collective proceedings. And
22 if I could go, please, to the Gormsen -- the first
23 tribunal case in Gormsen which is, I think, not in this
24 selection. It's in authorities bundle 1, tab 38 and
25 it's page 1398. It begins a little earlier. I'm afraid

1 I don't have the page reference for the very first page
2 of the case. This is a case that concerns allegations
3 against Meta for alleged abuse of dominance and the
4 paragraph that I want to pick up is on page 1398 at
5 paragraph 39 and following, where it is dealing with the
6 case law in relation to collective proceedings, says
7 there's been a lot of it and then makes various points
8 about it at paragraph 40, including at 40(2):
9 "The Tribunal bears a heavy responsibility as the
10 gatekeeper in collective proceedings. As we have
11 described, this role reflects the Tribunal's management
12 responsibilities in all cases that come before it, but
13 in collective proceedings - for the reasons given in
14 paragraph 38 above - the gatekeeper function is of
15 particular importance. The duty is a proactive as well
16 as a reactive one, and the essential object is to ensure
17 that there is in place a blueprint for the parties and
18 for the Tribunal of the way ahead to trial."
19 Then 3:
20 "This point can be shortly stated but ought to be
21 unpacked."
22 Then the critical point on the next page at (ii) is what
23 the Tribunal describes as the "not my problem" fallacy
24 ." And they say:
25 "Often, a proposed class representative will assert

1 it is not for them to make good - even in terms of
2 "blueprint" - points that will be part of the defence
3 of the respondents, should the case proceed. We stress
4 that such a contention will rarely be satisfactory. Of
5 course, we appreciate that there will be points on which
6 the proposed defendants will bear the burden of proof. But
7 where - at the certification stage - a proposed
8 defendant makes clear that a certain point will be
9 taken, then, whilst the proposed class representative
10 does not have to have an answer to the point, it is
11 incumbent on the proposed class representative to show
12 how, methodologically speaking - the point can be addressed.
13 The two-sided nature of the market in this case presents
14 an excellent example. As we shall come to describe,
15 Meta contended ..."
16 The point there is even -- I don't know whether this
17 point is actually going to be taken against us -- in
18 fact this is more of a reply point -- but even if it
19 could be said: well this is going to crystallise later
20 on, we say that wouldn't be good enough in
21 a situation --
22 THE CHAIR: I'm not so sure where you see them taking that
23 point -- where do you see this point biting?
24 MR PICKFORD: It may be I'm fighting a strawman.
25 THE CHAIR: Yes, let's move along and we'll see if this

1 matters.

2 MR PICKFORD: Okay. Sixth of my seven points that I draw

3 from the case law, when it comes to proof of the

4 standard for foreclosure, a numerical AEC test is the

5 natural place to focus and it may be very useful but it

6 is not mandatory. For example, Google Android at 641.

7 And then seventh, when one does rely on an AEC test as

8 the means of showing foreclosure by reference to the AEC

9 principle, the AEC must be as efficient as a dominant

10 undertaking, not just in terms of cost structure but

11 also in terms of its attractiveness to customers on

12 measures such as choice, capacity to innovate and

13 quality. And that is Google Android at 462. It's

14 Unilever Italia at 39. It's Post Danmark at 22. It's

15 ENEL at 73 and it's Intel at 133. It's repeated again

16 and again.

17 So those are my principles that I draw from the

18 cases that we went to before.

19 I then, in response to the point from the Tribunal

20 before lunch, I'm going to go to the case of Forrest

21 Fresh which I say conveniently sets out the test for

22 both the standard of pleadings and strike out summary

23 judgment. And then having done that, I'm going to go

24 and look at the pleadings of the PCR.

25 So Forrest Fresh is not in your selection, it's in

1 authorities 5 at tab 132, beginning, I think, on
2 page 11878. This was a claim against Coca Cola, and Coca
3 Cola contended that the claim was not sufficiently well
4 articulated against it and then the Tribunal, at
5 paragraph 22 and following, so that's on page 11885,
6 paragraph 22 and following, sets out the test for
7 striking out / summary judgment, and makes reference to
8 rules that permit it, then said at 24 that: “In [the
9 previous CAT case of] Wolseley v Fiat Chrysler
10 Automobiles
11 the Tribunal adopted with approval the
12 principles governing applications for summary judgment
13 set out by Lewison J in Easyair v Opal Telecom
14 ... "
15 Those included principles of relevance to us in this case:
16 "(i) The court must consider whether the claimant
17 has a 'realistic', as opposed to a 'fanciful' prospect
18 of success ...
19 "(ii) A 'realistic' claim is one that carries some
20 degree of conviction. This means a claim that is more
21 than merely ‘arguable’ ..."
22 And then at (vii), it says:
23 "it is not uncommon for an application under Part 24
24 to give rise to a short point of law or construction and,
25 if the court is satisfied that it has before it all the

1 evidence necessary for the proper determination of the
2 question and that the parties have had an adequate
3 opportunity to address it in argument, it should grasp
4 the nettle and decide it. The reason is quite simple:
5 if the respondent's case is bad law, he will in
6 truth have no real prospect of succeeding on his claim
7 or successfully defending the claim against him, as the
8 case may be."
9 So the court being urged to grasp points of law
10 which are potentially determinative. And then 25,
11 the Tribunal in Wolseley also noted that for the
12 purposes of the application in that case, there was no
13 difference between the test for striking out summary
14 judgment and I'm not seeking to argue that there is any
15 particular difference here.
16 Then the Tribunal goes on to talk about the need for
17 a properly particularised claim, and the essential point
18 it makes is that that's necessary for the parties to
19 know where they stand, and it's particularly important
20 in competition claims, given the breadth of the
21 allegations that arise in competition claims and the
22 seriousness of them. If I could just ask the Tribunal
23 please to read 26 through to the end of the quote at 28.
24 That sets out those principles. (Pause)
25 So if I can then apply those principles to the

1 pleading. If we go, please, to Ms Stopford's claim form
2 which is to be found in the core volume 2 at tab 4, and
3 we go to page 35 of that. (Pause)
4 Paragraphs 113 through to 121, first sentence, set
5 out various considerations that are relied upon by the
6 PCR as demonstrating foreclosure on the search market.
7 It seems to be common ground between 113 and 121, first
8 sentence, he is not seeking to conform with the AEC
9 principle. In my submission, it's essentially based on
10 a Hoffmann-La Roche type approach which looks at form.
11 To some extent it's extended by some other
12 considerations in relation to the market but it never
13 talks about the -- none of the pleadings are by
14 reference to an As Efficient Competitor. So, so far, so
15 good, in that the claimant -- I think both of us agree
16 that if I'm right about there being an AEC principle,
17 these parts of the pleading don't satisfy it.
18 THE CHAIR: Right.
19 MR PICKFORD: And in my submission, therefore, unless they
20 are -- they are ultimately going to fall to be struck
21 out, together with all the parts of the foreclosing
22 effect on the search market, unless there a bit that we
23 can identify here that satisfies the AEC principle. The
24 bit to focus on is what we now come onto which is the
25 rest of 121 and 122. So it's at that stage that the

1 claimant or proposed claimant representative, begins to
2 confront the As Efficient Competitors in some senses.
3 So firstly she says that, basically, it isn't right to
4 ask the question about foreclosure by reference to As
5 Efficient Competitor. Then she says:
6 "But in any event, if however, it is right to ask
7 that ..."
8 I.e., if we are right, effectively, then they say the
9 test is not met in any event.
10 And they go on to explain why the test isn't met in
11 any event. In paragraph 122, they say this:
12 "Even if one posits a rival with unlimited funds and
13 an unlimited appetite for risk, it would only be
14 profitable for such a rival to seek to replace Apple's
15 agreement with Google if the replacement search engine
16 were able to win a sufficient proportion of searches
17 as a result, and to monetise those searches to a
18 sufficient extent sufficiently quickly to cover the
19 amount of those payments. A rival would not in
20 practice be able to achieve such a feat, even if it
21 were as efficient as Google. Ms Stopford will rely in
22 this respect on the expert report of Dr Latham at Latham
23 1, sections 6.3, 6,4, and 6.5."
24 So what they -- I mean we find it -- those
25 paragraphs a little unclear. They are not pleading by

1 reference to the As Efficient Competitor principle,
2 per se, they are jumping to the test, and they are
3 saying: okay, we are going to say we do satisfy the test
4 and I think as I understand it, that's their way of
5 saying: well we therefore will satisfy your As Efficient
6 Competitor principle, if there is one, which they
7 initially dispute. What we have to do to understand
8 what they are really saying here is then look at what
9 Dr Latham is saying in sections 6.3, 6.4 and 6.5 of his
10 report because that is the basis. They say it's the AEC
11 test that is going to get them home if they have to do
12 the job of considering foreclosure by reference to
13 an AEC. If one looks at Dr Latham's report, one sees
14 very clearly that he is not looking -- he is expressly
15 not looking at an AEC. He sets the test out, we will
16 come to it in just a moment. So you know where I'm
17 going with this, he says the As Efficient Competitor
18 test and then he goes on to explain what his As
19 Efficient Competitor Test looks like and his As
20 Efficient Competitor test is based on a hypothetical
21 competitor that is much lower quality than Google. That
22 is at the heart of his analysis. And so he says: well
23 I have got this AEC test, and I apply it to
24 a hypothetical competitor that's much lower than Google
25 and I find on the basis of that analysis that no one

1 could compete -- that the As Efficient Competitor
2 couldn't compete and therefore I conclude that my AEC
3 test is satisfied. And that appears to be what the PCR
4 is relying upon as satisfying an AEC principle.
5 And in my submission, that AEC test is just totally
6 wrong on the authorities, and therefore it could never
7 be any means of satisfying the AEC principle as I've
8 described it. They didn't have to adopt an AEC -- they
9 didn't have to say: here's how we do it by reference to
10 an AEC test because an AEC test is optional -- but if they
11 are going to do it which is what they purport to do in
12 this paragraph, they need to get the AEC test right, it
13 needs to be in accordance with the authorities and their
14 test isn't. So if we could go, please, to Dr Latham's
15 report to make that good.
16 THE CHAIR: Just before we do that, Mr Pickford, what do you
17 say about 123 and 124? Where does that fit in? So they
18 say -- it's actually impossible -- you may say it's
19 wrong on the facts but this is the strike out, so they
20 say that in fact it's not possible to become
21 an effective competitor because of scale. And as I read
22 it, that refers back not only to where they do accept
23 the AEC but the previous section as well. One of their
24 reasons why I think you don't make the enquiry. How
25 does that fit in? Are you taking that on board at the

1 moment or not?

2 MR PICKFORD: I say that that doesn't -- that's not

3 an adequate -- that's their answer --

4 THE CHAIR: Yes.

5 MR PICKFORD: -- but it's not an answer that is consonant

6 with the authorities. And it goes back to the exchange

7 that we had before the short adjournment. I think you

8 asked me a very similar question.

9 THE CHAIR: Yes.

10 MR PICKFORD: And my submission is you can't, in an abuse of

11 dominance case, where the result -- if we have abuse of

12 dominance, we are open to the damages claim, we are open

13 to potentially huge fines, it's a quasi --

14 THE CHAIR: I know that but it is important.

15 MR PICKFORD: It is important, it is important --

16 THE CHAIR: I know it's important as general background,

17 Mr Pickford, but just on this analytical point, do you

18 have a problem with accepting for this being

19 a strike out, that we should be dealing with it on the

20 basis that because Google has, as it were, got all the

21 scale, nobody actually can come along and be an equally

22 efficient competitor?

23 MR PICKFORD: Yes.

24 THE CHAIR: You do accept that?

25 MR PICKFORD: I obviously do not make my factual concession

1 about that but you're entirely right, sir, I accept that
2 for the purposes of my application, the Tribunal is
3 entitled to assume that what they have pleaded there is
4 factually true.
5 THE CHAIR: Right.
6 MR PICKFORD: And I say it doesn't make any difference.
7 THE CHAIR: Because it's different from ice creams, isn't
8 it? Somebody could come along with some ice creams:
9 here are my ice creams, they're just as good as
10 Unilever, was it, but I can't get in the market because
11 of the allegedly dominant position. This is different
12 because you can't just come along with another search
13 engine precisely because of the dominant undertaking's
14 behaviour, it is alleged. Is that not different?
15 MR PICKFORD: That is what is said. In my submission, no,
16 because otherwise you are violating the core As
17 Efficient Competitor principles that I say can be
18 extracted from the case law.
19 THE CHAIR: Okay.
20 MR PICKFORD: I do come back to the point that I made before
21 lunch, which is this. If that seems surprising or
22 unpalatable, which I don't accept but insofar as there
23 is concern about that, it is very important to
24 understand the context here and the context here is that
25 the proposed class representative wants to find that

1 Google abused a dominant position and did a bad thing
2 and should be punished for that bad thing. And you
3 cannot rely, in that context, on the fact that Google is
4 just bigger and more efficient and has a better product.
5 That is not permissible. If that is a competition
6 concern -- I'm not saying that there is not the
7 possibility of a regulator saying: well, actually, we
8 are concerned about the fact that Google has very large
9 amounts of market power in this particular market and we
10 would like to see that changed.
11 THE CHAIR: You made that point in your skeleton and you
12 made that just before lunch, I've got that.
13 MR PICKFORD: In my submission that's a critical answer
14 because abuse of dominance case law doesn't do all the
15 work of competition policy, it punishes undertakings who
16 have acted wrongly. They have acted outside a situation
17 where there is competition on the merits. And it is in
18 that context that I do say -- I say that yes, even if
19 there is an undertaking where, in practice, it would be
20 very difficult to compete against them because of their
21 size, you cannot have a test for whether they are
22 abusing their dominance, which is framed by reference to
23 a less efficient competitor. Because otherwise the
24 implication of that, and the effect of that is that you
25 are punishing them for their superior efficiency and

1 that violates the AEC principles that I explained.
2 So yes, I -- that's very helpful in clarifying --
3 I put my case on that basis. And --
4 THE CHAIR: Yes. Because it feels a little bit like, it's
5 not really resourced, but it feels like scale is a sort
6 of resource you need to get in the market because you
7 have to have some scale to make your product worth
8 using, otherwise your product is not very good until
9 you've used it at scale and I think what is said is:
10 well, Google's bought it all up.
11 MR PICKFORD: Yes. And the question --
12 THE CHAIR: You are allowed to do this.
13 MR PICKFORD: The question is did they do that fairly or
14 unfairly? It did it unfairly if it bought it up at such
15 a price that, actually, even for Google, it didn't make
16 economic sense. Because then you can say: ah well,
17 okay, it's paid such a high price for this capacity,
18 that even Google couldn't actually -- even though like
19 a replica Google couldn't come along and profitably
20 replicate that deal and so what we can infer from that
21 is that the reason why it's doing it is
22 anti-competitive. That is paragraph 77, I think it's
23 ENEL, which makes that point. And therefore, if that is
24 how Google is behaving, then it can be punished for that
25 because it has gone too far. It has done something with

1 the aim of distorting competition, one can infer.
2 Because that's the only reason why it would pay that
3 much.
4 If, however, it has signed an exclusivity agreement
5 that makes commercial sense, even -- it doesn't have to
6 exclude anyone for it to make commercial sense, it's
7 just here's a way of balancing capacity and it's paid
8 a fair price for that, then that is not an abuse of its
9 dominant position and if it were, then you would be
10 punishing it for being more efficient and that is no
11 part of article 102.
12 THE CHAIR: Okay.
13 MR DAVIES: Could I ask about this phrase "even a replica
14 Google" that you used just then. So is the As Efficient
15 Competitor a replica Google and if it is, is there ever
16 going to be a circumstances in which that company is
17 excluded by Google's behaviour? I mean what is
18 different in an abusive situation about Google keeping
19 a replica Google out of the market? Or is it assumed
20 that the incumbent Google has got -- what would it have
21 to be assumed that the incumbent Google has got that's
22 its challenger has not got?
23 MR PICKFORD: I think there are two parts to that question.
24 The first is, as I understand it, it how similar does
25 the As Efficient Competitor need to be to Google and it

1 certainly doesn't have to be identical. It has to be as
2 efficient, as explained by what that means in the case
3 law. And that means as efficient in terms of its costs
4 structure and it means as efficient in terms of its
5 ability to offer as attractive products to consumers on
6 the market, including its quality. That does not mean
7 that it has to be the same company. There may well be
8 ways -- and as I've said, Google itself is an example of
9 this. Back in history, it was Yahoo and there were
10 various other search engines that everyone used and they
11 were the dominant ones. And Google came along with
12 something better. So does not have to be identical but
13 it does have to satisfy the test that we've seen in case
14 law. So it has to be as efficient on those dimensions.
15 MR DAVIES: Maybe related to that, if the conduct that we
16 are concerned with, just to sort of make it a bit more
17 extreme and simple, was a payment for absolute
18 exclusivity in the market, then is the As Efficient
19 Competitor Test satisfied by someone else being able,
20 alternatively, to be that monopolist?
21 MR PICKFORD: Yes. It's a contestability point. It's
22 a contestable market, I think it was Baumol, as far as
23 I recall, who's the key economist that proposed that
24 theory. Yes. That's precisely it. Indeed, for what
25 it's worth, that way of articulating it is precisely how

1 Professor Vickers articulated it in his speech before
2 the Tribunal a few months ago. We can provide it. It's
3 not in the bundle but he says that the AEC test, as
4 applied in that context, is about the contestability of
5 the market, so someone else can compete in that sense.
6 And there are some very big companies in this
7 market. Obviously, it's not part of my submission
8 today. I'm taking the facts as alleged against me there
9 and I'm saying that doesn't displace my point of law.
10 We don't accept those facts either.
11 MR DAVIES: And just finally to follow up on that, was that
12 where you were saying earlier on, I can't remember your
13 precise words, but where you said something like: you
14 might feel uncomfortable about this and this is why
15 competition law isn't everything and one needs to go to
16 regulation? That effectively what you are talking about
17 is the replacement of a Google monopoly with
18 an alternative monopoly by a company not called Google
19 as being your AEC test or did you mean something
20 different by that?
21 MR PICKFORD: Well I haven't thought it through that far.
22 I don't know whether I'm confined merely to replacing
23 one company like Google with another company Google
24 size. It might be but there could be another company
25 that comes along that doesn't fully replace Google, they

1 just -- for instance, if somebody replaced Google for
2 Apple but Google remained able to have relationships
3 that it does with OEM as for Android, then there might
4 be two competitors who are similar in the market.
5 I don't think it necessarily follows that it's always
6 going to be one. But if, as a --
7 MR DAVIES: I'm speaking hypothetically about this sort of
8 simplified position of a bid for exclusive access to
9 a single market.
10 MR PICKFORD: But if what you are seeking to achieve as
11 a regulator is to -- if you are worried that perhaps
12 there's a natural monopoly situation and what you want
13 to do is you think: okay, that's all very well but
14 actually, I prefer there not to be -- I want to see lots
15 of smaller undertakings here, well then there may be
16 tools that you can use to achieve that, regulatory
17 tools, but you cannot punish a dominant undertaking
18 that's merely achieved its position because of its
19 superior efficiency and is not continuing to achieve
20 that position other than by using its efficiency. And
21 I don't know whether there is any remaining part of your
22 question that you feel I haven't answered but I think
23 the only -- what I detected might be (inaudible) is that
24 the distinction -- again, it's the point I think I made
25 to the Chairman -- is between whether what is being done

1 by Google, it's something that Google can afford itself,
2 in which case, given its efficiency, that is legitimate
3 or if it's something that Google can't afford, in which
4 case you can infer that it was doing something
5 anti-competitive because what it was doing was pricing
6 at such a level, paying such a large sum, that even it
7 couldn't actually be profitable on that basis but it had
8 an ulterior motive for doing so, which was to keep
9 everyone out, and that's where the AEC test bites.
10 I said we were going to go to Dr Latham and we can
11 do that, hopefully, quickly. If we go to core bundle 3,
12 tab 27. It says external page 616 but I think if you
13 are using an electronic bundle, please type in 599 but
14 if you are not using electronic bundle, then please go
15 to page 616. I think there is a discrepancy between
16 those two ... Do the members of the tribunal have --
17 THE CHAIR: Yes.
18 MR PICKFORD: Thank you. So this is in a section entitled
19 "How would I assess whether the Apple payments risked
20 foreclosing even an as-efficient competitors?"
21 So this is where Dr Latham is proposing to carry out
22 an analysis which will satisfy the AEC principle and he
23 says at 361, towards the bottom of the page:
24 "the ”as-efficient” competitor considered in the AECT
25 is typically assumed to be efficient in terms of its

1 cost structure not in all relevant respects. The dominant firm is

2 always assumed to have some advantage leading to a share

3 of must-have or non-contestable demand."

4 So pausing there, when he says “always”, if you were

5 to reflect the case law that I have taken the Tribunal

6 through, what he actually needs to say is “never”.

7 Because that makes clear that the As Efficient

8 Competitor is assumed to be as efficient in all material

9 respects. Not identical, not an identical company but

10 nonetheless, as efficient. And then he goes on at

11 paragraph 364 to explain how his approach to the rival is

12 a rival that -- rival search provider, that would be

13 four lines down:

14 "less preferred than Google by consumers

15 reflecting factors such as brand loyalty and

16 recognition, less informative search results due to less

17 accumulated training data, or more paid relative to

18 organic search results."

19 So he makes very clear there and again, later,

20 through that paragraph, that what he is envisaging, as

21 his hypothetical, is a rival with significantly lower

22 quality than Google. And in my submission, that simply

23 is not permissible by reference to the case law that

24 I took you through, that showed the qualities that one

25 requires of an As Efficient Competitor, both in a test

1 and in terms of the principle. Because although the
2 test might not be mandatory, if you are going to adopt
3 a test, then use that as your means of satisfying the
4 principle, then obviously the two need to match up. And
5 the authorities repeatedly explain that the As Efficient
6 Competitor principle and the As Efficient Competitor
7 Test posit a competitor which is as efficient, both in
8 cost terms but also quality terms.
9 THE CHAIR: Just pausing there, he says that no entrant
10 could match Google search volume. So you say that the
11 PRC has to postulate an AEC which has the same search
12 volume as Google?
13 MR PICKFORD: It has to postulate one that is as efficient
14 as Google.
15 THE CHAIR: Well it can only be as efficient as Google,
16 Dr Latham is saying, if it has the same search volume
17 because your searches are less good if you don't have
18 the same volume. That's the argument here.
19 MR PICKFORD: Well if he is right about that, obviously
20 that's quite a big assumption --
21 THE CHAIR: That's definitely what he's saying.
22 MR PICKFORD: Yes.
23 THE CHAIR: That's what he's saying, so that does mean,
24 doesn't it, that the AEC has to have the same search
25 volume as Google?

1 MR PICKFORD: If it were true that the only way of being --
2 that's the only way, because the AEC doesn't need to be
3 identical, it just needs to be of the same quality, and
4 so --
5 THE CHAIR: Sorry to interrupt, this is a strike out. The
6 pleading that we have looked at says that the quality
7 depends on your volume.
8 MR PICKFORD: Yes.
9 THE CHAIR: So we have to assume that's true.
10 MR PICKFORD: Yes.
11 THE CHAIR: This says, therefore, you have to assume an AEC
12 that has the same volume --
13 MR PICKFORD: Yes.
14 THE CHAIR: -- as Google.
15 MR PICKFORD: Yes.
16 THE CHAIR: In fact that's impossible.
17 MR PICKFORD: It's not.
18 THE CHAIR: How can you do that? How can two people both
19 have the same search volume as Google?
20 MR PICKFORD: Because it would displace Google as the party
21 offering services -- to take the simple example that
22 Mr Davies gave, let's just assume that -- it's very
23 simple, and that there's just -- there's Google and then
24 there is one means of accessing the market, and Google
25 has an exclusive supply relationship, with the only

1 means of accessing the market, and it has 100 per cent
2 of that. And if Google is to be displaced from that,
3 hypothetically, we assume -- not that it's going to be
4 200 per cent in the market, but that someone else will
5 come along and win that contract instead of Google.
6 It's about the market itself being contestable that
7 matters.
8 And the reason it matters -- because what we are
9 trying to see is whether Google did a bad thing or just
10 took advantage of its own efficiency.
11 THE CHAIR: I'm just trying to understand -- this may be
12 naive of me but I had assumed with an AEC, you say:
13 here's the incumbent -- the alleged dominant
14 undertaking, they have these characteristics. Here is
15 the AEC, they don't have to be identical but they have
16 to be equivalent in these characteristics. Let's
17 imagine them coming along whilst the dominant
18 undertaking is there. Can they compete, or are they
19 foreclosed? You've got a match of two -- not identical,
20 but two equals but you can't really have that in this
21 rather unique market because you can only achieve
22 quality if you have scale. And you can't both have all
23 the scale. To put it another way, does the AEC test not
24 involve asking yourself what happens when these two
25 great beasts meet in the market, can they both be there?

1 MR PICKFORD: Well, I'm not going to rule out now on this
2 application that it might. We haven't got there. We
3 haven't got to that stage of the case yet in terms of
4 our position on how one judges an AEC in that respect.
5 But what we do know is that everyone's AEC needs to be
6 at least as efficient and at least as high a quality as
7 the dominant undertaking. So that, in my submission --
8 there are two answers to your point. The first answer
9 is the one that I gave earlier to Mr Davies which is
10 that one can still -- it's still a logical question to
11 ask, even if one is asking it at the level of whether
12 the new company can come in and replace Google. Because
13 then the question is about contestability of the market.
14 That is whether Google has priced its contract with
15 Apple at a level that doesn't foreclose someone who is
16 as efficient as Google. Let's say Microsoft comes along
17 and says: actually, know what, we are going to invest
18 a lot more in search and we are going to create -- we
19 are going to create something that's just as good as
20 Google. We are going to get our AI team on it and here
21 is how we are going to do it. And they come along and
22 they do that and one AEC test is one that actually
23 replaces Google, in my submission. The second
24 alternative -- I'm not able to commit to this now to
25 whether this will be what we say is the right test,

1 because we haven't got to that part of our case yet but
2 an alternative hypothetically is what, sir, you are
3 suggesting to me, which is that well at that stage, one
4 looks at two beasts in the market together, two big
5 companies, both who are sharing demand and they are then
6 still as efficient as each other but potentially, each
7 has lower volumes than Google originally had.
8 THE CHAIR: Neither is as efficient then as the dominant
9 undertaking. They are both less efficient.
10 MR PICKFORD: It's efficient as the new dominant
11 undertaking. It's certainly not less efficient than the
12 dominant undertaking. What I'm saying, I'm not ruling
13 out that that is a possibility of how one might conceive
14 this but I'm not saying that that is how one should do
15 it, I'm just saying that always how one should do it is
16 to have a company that is as efficient. The purest way
17 of doing that is to adopt my first approach which is to
18 say: well we just look, therefore, at contestability of
19 the market as a whole. There is a less purist form
20 which is to say: okay, well, we are now going to posit
21 two that share the market that are as efficient as each
22 other now, in our hypothetical world.
23 THE CHAIR: Okay.
24 MR PICKFORD: That might be an alternative. If that's what
25 their case had been, then by my concession that that

1 might be a way of doing it, then I won't be able to
2 continue to make my point. But that is a very long way
3 away from what Dr Latham is saying, because Dr Latham's
4 case is that the rival has substantially inferior
5 quality product. It has worse brand, it has less
6 accumulated data, it has more advertising, it has worse
7 results. And on no measure is that an As Efficient
8 competitor. He hasn't posited anything close to either
9 of the options that I have canvassed.
10 THE CHAIR: Okay.
11 MR PICKFORD: In response, what Ms Stopford has initially
12 said in her reply was that we misunderstood paragraph
13 364 of Dr Latham here and while he talked about his less
14 efficient rival, when he went on to produce his formulae
15 which follow, that didn't have a less efficient rival
16 built into it. And we say no, that's wrong. In our
17 rejoinder we say: no, you are wrong about that and in
18 their skeleton, I don't see them pursuing that point at
19 all. They do not now say that Dr Latham's analysis
20 proceeds on the basis that the As Efficient Competitor
21 is as efficient in the respect that we say it is. They
22 seem to accept that 364, as you might assume, reflects
23 what he's actually purporting to do. So I'm not
24 proposing to address that unless my learned friend says
25 something different in his submissions, in which case

1 I will address it in reply.
2 They make a number of points which they say are the
3 answer to our reliance on AEC. A number of them
4 actually reflect points that we have been canvassing
5 already. Once we've dealt with those, that's the end of
6 everything I have to say on this topic. I can either do
7 that -- I wasn't proposing to pause here, what I was
8 going to say is essentially the Tribunal has an option.
9 These are essentially responsive points that I'm about
10 to make, so they are anticipating arguments that my
11 learned friend --
12 THE CHAIR: If you are dealing with things that you know
13 that they have said in their skeleton where you have
14 something to say, then you should say it now. Otherwise
15 we won't hear what you are saying about it until they've
16 got no more opportunity to speak. So I think you should
17 do that now. We will also take a short break now and
18 then you can conclude your part of the submissions with
19 that out of the way.
20 (3.10 pm)
21 (A short break)
22 (3.20 pm)
23 THE CHAIR: Yes.
24 MR PICKFORD: Thank you, sir. So Ms Stopford makes five
25 points against us on the AEC test issue and I can

1 hopefully be fairly swift because to some degree we have
2 covered a number of these points in the exchanges that
3 have just happened. First point she makes in
4 paragraph 32 of her skeleton is that she says: well
5 Google has accepted that it isn't for now to determine
6 whether an AEC test should be used in this case and so
7 they have difficulty in understanding how we can strike
8 out paragraphs of their claim that plead to such a test.
9 So let me help with that. The reason we say is
10 straightforward. Our ultimate point is that Ms Stopford
11 hasn't pleaded by reference to the AEC principle which
12 we say is the core thing. She has two answers. First
13 answer is she doesn't need to, so that's the first
14 question the Tribunal has to decide and the second
15 answer is that she has done so. That is the second part
16 of 121 to 122 of that pleading and in that regard, she
17 points to a section of her pleading which relies on
18 Dr Latham's AEC test.
19 Now, one might question whether it is appropriate
20 for the PCR to cross-reference the expert evidence to
21 satisfy a pleading requirement but let's just put that
22 aside and assume it is. If that's the way that she
23 herself is saying she satisfied the AEC principle, then
24 it's obviously legitimate to examine the test that is
25 posited there. And when we deal with it, we see that it

1 doesn't satisfy the requirements of an AEC test because
2 it's posited on a competitor which is less efficient
3 because it's not as high quality as Google. So that's
4 the first point.
5 Second argument against me, which is at paragraph 33
6 of her skeleton, is that it's said Dr Latham has good
7 reasons for adopting his approach and this is suddenly
8 what was being put to me by the Tribunal, to which my
9 answer is that is irrelevant. Whether they are good
10 reasons or bad reasons, they don't match the
11 requirements of the test that we have seen in the
12 authorities.
13 The third point which is taken against me is that at
14 paragraph 34 of the skeleton, where they say that we are
15 alleging that the AEC needs to be a perfect clone and
16 they say that's silly: that isn't our case. That's
17 a strawman. We don't say there needs to be a perfect
18 clone in all respects, all we say is that it needs to be
19 as efficient, as regards the quality of its services.
20 And that includes the points we have already discussed
21 just before the break.
22 Their fourth point is that an AEC test which is
23 based on an AEC which is as efficient as the dominant
24 undertaking, they say is tautological and meaningless.
25 And we say that is wrong, for three reasons. The first

1 and foremost reason is that it is no part of Article 102
2 to protect less efficient undertakings and
3 maintain their presence on the market. And so it does
4 follow from that that if rivals are, as they allege,
5 assuming these facts, are going to inevitably remain
6 small because Google is larger and has better quality
7 results than those rivals then, in my submission, so be
8 it. That is not something to punish Google for. You do
9 not punish Google for being more attractive and being
10 bigger than its rivals. That is something if you're
11 worried about it, you deal with it in other ways.
12 In fact I will just put two of my points together.
13 The other answer is that the test is meaningful for the
14 reasons that I was canvassing before, because what it
15 looks at is the commercial rationality of what the
16 undertaking, the dominant undertaking is doing from its
17 own perspective. And that tells you something,
18 potentially, very meaningful. It tells you whether the
19 amount in this case that Google has paid for exclusivity
20 is rational, given its own efficiency, in which case you
21 cannot infer from that, that it was doing anything bad;
22 or if it has paid too much, even on its own costs, on
23 its own level of efficiency, then one could potentially
24 infer that it had an anti-competitive object because
25 they will say and, indeed, Dr Latham does say this later

1 in his report, that would be the only thing that you
2 could -- that would be a reasonable inference to draw
3 from having paid too much. So a test based on one's own
4 costs and own efficiency is not tautological. It does
5 allow one to differentiate between legitimate behaviour
6 and illegitimate behaviour.
7 And then the fifth point that's taken against us in
8 footnote 41 of their skeleton is they say we misread the
9 law and the case law doesn't require, in an AEC test, to
10 be an AEC. And for that, they refer to the way the
11 point is put in Google Android and I took you to that,
12 and I explained that the use of "or" there as read by
13 the PCR to suggest that they only need to be as
14 efficient as the dominant undertaking in some respects.
15 And you can pick and choose which ones from a menu is
16 not the correct reading of that passage. That passage
17 in Google Android is referring back to paragraph 22 of
18 Post Danmark I and it's very clear that the As Efficient
19 Competitor needs to be as efficient on all of the
20 dimensions, not just a few of them.
21 So those are, as I understand it, the five points
22 taken against me in the skeleton and those are my
23 responses to them. So I say in conclusion that in the
24 light of the submissions that I have made, Ms Stopford's
25 claim form does not ultimately articulate a legally

1 admissible case on abuse. For the most part it ignores
2 the AEC principle. And when it purports to give effect
3 to the AEC principle, it needs to refer to an AEC test,
4 but when one scratches the surface of that test, one
5 sees it is positing a vastly less attractive competitor
6 to Google and therefore it is not an AEC test, so it
7 can't satisfy the AEC principle. And therefore
8 Ms Stopford fails to articulate a case on iOS in her
9 claim form or her reply which is capable of succeeding
10 at trial and therefore the Tribunal should either strike
11 it out or grant reverse summary judgment on it.
12 THE CHAIR: Thank you very much.
13 Submissions by MR HOLMES
14 MR HOLMES: Good afternoon, sir, members of the tribunal.
15 I am tasked with addressing you on the remaining three
16 points that Google advances as part of its application
17 for summary dismissal. The first relates to the case on
18 causation of loss and more specifically the
19 counterfactual and the third relates to limitation.
20 THE CHAIR: Yes.
21 MR HOLMES: So beginning with causation, this is supported
22 by the evidence of Dr Latham and if I could first show
23 you what he says. So this is core bundle 3. I'm
24 working from physical copies, so I may need to adjust
25 the electronic bundle references. It's tab 27, page 522

1 of the rolling numbering, which I think may be page 505
2 for those who are following electronically. Starting at
3 paragraph 4, he summarises his instructions and these
4 include at paragraph 4(a) that he should:
5 "Opine on whether there is a plausible
6 case that the Conduct ... caused the Proposed Class to be
7 overcharged for purchases of products and services
8 made from 1 January 2011 for the Android Infringements
9 and from 1 October 2015 for the iOS Infringements."
10 Which he defines as the relevant period. So a key
11 purpose of the report is to consider causation; and in
12 passing if I could ask you, please, to note the time
13 periods identified for the claim, as they are relevant
14 when we come to consider the limitation point.
15 Turning on to page 523, the following page, from
16 paragraph 7 Dr Latham sets out his preliminary
17 conclusion and first of these, in paragraph 8, is that:
18 "There is a coherent and empirically-validated
19 economic mechanism by which the conduct will have
20 resulted in harm to the class."
21 And if I could ask you, please, to read the
22 remainder of that paragraph. (Pause)
23 THE CHAIR: Okay.
24 MR HOLMES: You see there the three steps in the PCR's case
25 on causation. First, the allegation that Google's

1 conduct reduced competitive pressure to which it was
2 subject in online search. Second, that that allowed
3 Google to raise advertisers' costs by displaying more
4 search ads. And third, that those increased costs were
5 then passed on by advertisers to their customers. It's
6 the first of those steps, lower competitive pressure by
7 reason of the conduct, to which Google's present
8 arguments are directed. Dr Latham expands on that first
9 step in section 7 of his first report, where he turns to
10 consider the quantification of loss to the class. That
11 begins on page 624 of the rolling numbering. I think it
12 may start on page 607 of the pdf bundle. In
13 paragraph 409 at the top of the page you see that he
14 identifies four main issues to resolve and first of
15 these is determining the counterfactual without the
16 conduct:
17 "This requires specifying a non-abusive
18 counterfactual and coming to a view on how competition
19 would have evolved in this counterfactual world".
20 So the recognition of the need for a counterfactual
21 analysis is step one which compares competition as it
22 has operated in the real world, with the competition
23 that would have eventuated, absent the conduct at issue.
24 Dr Latham then expands on step one under heading 7.1,
25 "the counterfactual without the conduct", in the middle of

1 the page. And at paragraph 411 he identifies two
2 questions to be asked when thinking about the
3 counterfactual. First, what would Google have done
4 instead, and second, how would competition have evolved
5 if it had behaved in this way.
6 And in relation to the first of those questions,
7 paragraph 412, he notes that the counterfactual needs
8 to remove any conduct that is found to infringe
9 competition law. So in the case of the Android conduct,
10 one needs to remove the tying of Google Search and
11 Chrome to the Play Store, which was the conduct found by
12 the Commission to infringe 102 and which survived the
13 subsequent appeal and it is the conduct which is the
14 subject of the PCR's follow-on damages claim. And for
15 the iOS conduct, one needs to remove the payments for
16 default status in the Safari browser which is the
17 conduct alleged to be unlawful under the PCR's standalone
18 case. Then in the final sentence, Dr Latham says
19 this:
20 "I understand that it [that's the counterfactual]
21 also must not involve conducts which have the equivalent
22 object or effect as the original abuse."
23 And Dr Latham explains in his second report that
24 this understanding was based on instructions received
25 from the PCR's legal team. Just briefly to show you

1 that. So if we could keep our place in Latham 1 and
2 just look ahead to tab 30 of the same bundle, CB tab 30 at
3 page 892 of the rolling page numbering, at paragraph 10.
4 Do you have that?
5 THE CHAIR: Yes.
6 MR HOLMES: You see there that Dr Latham disagrees that the
7 counterfactual could involve payments for default status
8 for the same exclusionary effects as the original
9 conduct and that is because he understands from his
10 instructions that a legally valid counterfactual must
11 not involve conduct with the same effect as the unlawful
12 conduct. So a legal underpinning of the PCR's case on
13 causation which has, in turn, informed Dr Latham's
14 analysis as to the plausibility of harm, is that the
15 counterfactual must not involve conduct having the same
16 effect as the infringing conduct.
17 And returning to Latham 1, core bundle 2, tab 27,
18 page 624, to see where those instructions have taken
19 him. We've seen paragraph 412, and the understanding
20 the counterfactual must not involve the same object or
21 effect. In paragraph 413, Dr Latham's interpretation
22 of these requirements is that the counterfactuals to the
23 Android and iOS conducts must not involve Google
24 reaching de jure or de facto default arrangements with
25 the vast majority of OEMs, as it did in the actual. So

1 he proceeds on the basis that the counterfactuals must,
2 as a matter of law, not include default arrangements
3 with the same extensive coverage as in the actual.
4 We say that this conclusion, that such default
5 arrangements must be excluded from the counterfactual,
6 is not well-founded. It's wrong in law to suppose that
7 such default agreements are necessarily unlawful and
8 must be removed from the counterfactual and we say that
9 this error undermines the PCR's case on causation as it
10 relates to both the Android and the iOS conduct.
11 I will develop that submission in a moment but
12 I should just briefly show you how Dr Latham's
13 counterfactual features in the PCR's pleaded case on
14 causation. If we could go, please, to the amended
15 claim form which is in core bundle 2 at tab 4, page 41.
16 At the top of the page, paragraph 134, it states that:
17 "As Dr Latham explains, absent Google's arrangements
18 concerning Android and iOS as set out above, competing
19 search engines would likely have been able to secure
20 a higher market share."
21 And a range of examples are given to show the
22 benefits of obtaining default status in terms of growth
23 in market share.
24 So we say that Dr Latham's counterfactuals, based on
25 an a priori exclusion of default arrangements with

1 equivalent coverage to those in the actual, underpin the
2 pleaded case on causation of loss. And in our
3 submission, those counterfactuals, both as they relate
4 to the Android conduct and the iOS conduct, reflect
5 a common error of approach. Beginning with the Android
6 limb of the case, I propose first to give you our case
7 in a nutshell and then provide the supporting detail.
8 We say in overview that the PCR's exclusion of
9 widespread default agreements from the counterfactual
10 removes contractual arrangements of a kind which Google
11 in fact operated with Android handset manufacturers
12 during the relevant period. Arrangements which have not
13 been found unlawful in the EU process which serves as
14 the basis for the claim, and which the PCR is not
15 otherwise challenging in these proceedings as unlawful.
16 And we say that that exclusion results in
17 a counterfactual which is unrealistic. It amounts to
18 an error of approach and it sets the case off on the
19 wrong course.
20 Can I now develop that submission. It breaks,
21 effectively, into six points. First, the PCR's case in
22 relation to the Android conduct is pursued only as
23 a follow-on claim. In other words, the PCR does not
24 advance any independent case on liability. As respects
25 liability, she simply relies on findings in the European

1 Commission's decision, to the extent that they were
2 upheld by the General Court.
3 Second, those findings of infringement relate to
4 certain specific contractual provisions concluded
5 between Google and manufacturers of Android phones or
6 OEMs, as they are referred to. In particular, they
7 relate to provisions contained in agreements between
8 Google and OEMs, known as Mobile Application
9 Distribution Agreements or MADAs and associated
10 Anti-Fragmentation Agreements or AFAs. Those provisions
11 were found by the Commission to have tied the
12 distribution of Google Search and Google Chrome to the
13 Google Play Store and the effect was that Search and
14 Chrome were pre-installed on relevant devices.
15 Third, the infringement findings on which the PCR
16 relies do not extend to other contractual arrangements
17 between Google and OEMs, under which Google could and
18 did obtain default status on Android devices in the
19 actual. In particular, they do not cover the Revenue
20 Share Agreements, or RSAs that were in place between
21 Google and the main Android OEMs during the period
22 covered in the decision. Under the RSAs, OEMs received
23 revenue share payments, a share of the Google Search
24 revenues, advertising revenues, and in exchange, agreed
25 not to pre-install other search devices.

1 One type of RSAs known as device based RSAs, applied
2 on a device by device basis at the OEM's election and
3 they could decide which devices were subject to the RSAs
4 and which were not. And this type is referred to in the
5 Commission decision but it was not found by the
6 Commission to be unlawful. And another type of RSA
7 known as portfolio based RSAs, was considered by the
8 Commission to constitute an infringement. And this type
9 of RSA applied, as Mr Pickford explained, across
10 a portfolio of devices produced by a given OEM
11 counterparty.
12 Fourth, in reaching that conclusion, the Commission
13 assessed whether an As Efficient Competitor could
14 profitably have matched Google's payments under
15 portfolio based RSAs and it thereby recognised that such
16 agreements were not per se unlawful. Their legality
17 could only be determined following an assessment of
18 whether they would foreclose an As Efficient Competitor.
19 Fifth, the Commission also assessed the coverage of
20 both the portfolio-based and device-based RSAs which
21 Google concluded with OEMs and it found that they
22 covered the large majority of Google Android phones
23 supplied in the EEA during the period considered. This
24 comes back to your question, sir, to Mr Pickford, about
25 the coverage of the RSAs. If I may, I will show you the

1 relevant parts of the Commission decision and the
2 General Court's judgment that relates to that decision.
3 The Commission's decision is in the authorities bundle,
4 volume 2 at tab 63. It's also in the reduced
5 authorities bundle, tab 21, beginning at page 1732. If
6 it's convenient, given the time, I will just give you
7 references to the reduced authorities bundle, if
8 everyone is following on that. So reduced authorities
9 bundle tab 21, page 1732. You see near the foot of
10 the page there is the heading "Google's portfolio-based
11 revenue share agreements covered a significant part of
12 the relevant markets". And then in recital 1286, the
13 relevant markets under consideration are the national
14 markets for general search services. Various reasons
15 are then given for the conclusion that Google's
16 portfolio-based RSAs covered a significant part of the
17 market. In recital 1287, the agreements covered both
18 the most significant OEMs distributing Google Android
19 Smartphones in the EEA, in terms of share of sales and
20 three OEMs are then identified. And over the page they
21 also covered the major MNOs or mobile network
22 operators active in the EEA at the time. In recital
23 1288, you see that the sales made by OEMs that have
24 entered into portfolio-based RSAs, covered approximately
25 80 to 90 per cent of the Google Android smartphones sold

1 in Europe in 2011 and 2012. Table 21 then shows the
2 shares of Android smartphones sold by OEM under the
3 portfolio-based RSAs for other years and in 2011, you
4 see a figure of 70 to 80 per cent. And the share then
5 falls in 2013 and 2014 to 20 to 30 per cent and five to
6 10 per cent respectively. But turning on a page to
7 1734, recital 1292 provides the context for this fall.
8 It explains that as of 2013, Google began to replace
9 portfolio-based Revenue Share Agreements with the
10 device-based agreements, and that these covered 50 to
11 60 per cent and 60 to 70 per cent of the GMS smartphone
12 sales -- GMS is just Google Android smartphones -- sold
13 in 2013 and 2014 respectively.
14 Taken together, the shares show for the
15 portfolio-based RSAs, in Table 21, and for the
16 device-based RSAs in 1292, one sees that the Commission
17 found that the overall share of Google Android devices
18 that were subject to RSAs remained in the 80 to 90 per
19 cent range in 2013 and 2014. And as already noted, the
20 Commission's overall conclusion, having regard to the
21 coverage and the alleged impact of the portfolio-based
22 RSAs on an As Efficient Competitor, was that they
23 amounted to an infringement.
24 The sixth and final point in relation to the Android
25 counterfactual is that the General Court struck down the

1 finding of infringement. It concluded that the
2 Commission had committed various errors, both in its
3 application of the AEC test and its assessment of
4 coverage. As regards coverage, it found in particular
5 that the Commission had not shown that the RSAs affected
6 a significant share of general search services, once
7 account was taken of other sources of search queries
8 sent via PCs, MacOS and iOS. Importantly, however, it
9 did not call into question the underlying factual
10 findings as to the significant proportion of OEM handset
11 sales which were covered by the RSAs in the Commission
12 decision which I showed to you. The General Court's
13 judgment is in authorities bundle 2, tab 58 or in the
14 reduced authorities bundle at tab 13, and the court's
15 findings relating to coverage begin at page 3205 of the
16 authorities bundle, page 835 of the reduced authorities
17 bundle, under the heading "Findings of the court".
18 At paragraph 679, the court notes the need to
19 analyse the share of the market covered by the contested
20 practice at the end of the paragraph, when assessing
21 whether a practice involves exclusivity -- involving
22 exclusivity -- was capable of restricting competition. At
23 paragraph 681, the court notes that the Commission found
24 that the portfolio-based RSAs covered a significant part
25 of the national markets for general search services

1 within the EEA, and at paragraph 682, the important
2 point, that those markets encompass all general searches
3 from all types of device, including non-Android mobile
4 devices and PCs. At paragraph 683 you see the point
5 that in previous cases, the Commission had found
6 coverage to be significant, at levels between
7 39 per cent and 85 per cent share of the relevant
8 market.
9 684 records Google's estimate that the coverage of
10 the contested practice on the wider general search
11 market was less than 5 per cent and at 685, the
12 Commission contends that this analysis underestimates
13 the number of devices in use that were covered by the
14 RSAs. But the court nonetheless considers that Google's
15 calculation is plausible. And at 687, the key reason,
16 the Commission's arguments in the contested decision
17 relate either to just one segment of the various relevant
18 markets, that of
19 general search queries from a smart mobile device, or to
20 matters unrelated to the effect of the contested
21 practice on those markets.”
22 Over the page, at page 836, the court develops this
23 in a series of points. At paragraph 688 the
24 General Court notes that the data in recitals 1287 and
25 1289, that's the share of Android devices which I showed

1 to you, do not support a finding of significant coverage
2 in the wider market for general search services because
3 they relate to only one segment, the market for mobile
4 search services, whereas the share of portfolio-based
5 RSAs declined in the period from 2011 to 2014. But you
6 have seen the switch to device-based RSAs during that
7 period.
8 At paragraph 689, the court notes that the
9 portfolio-based RSAs were replaced by device-based RSAs
10 but as the court points out, the coverage of
11 an allegedly anti-competitive practice involving
12 exclusivity cannot, in principle, be established by
13 taking into account practices which are not themselves
14 considered anti-competitive. In other words, you cannot
15 just assume that the device-based RSAs are
16 anti-competitive and lump them together with
17 portfolio-based RSAs. In paragraph 691 you see the same
18 point made in relation to the Apple RSA agreement. The
19 Commission bases the allegedly significant coverage of
20 the national markets for general search services by
21 portfolio-based RSAs on the finding that Google Search
22 is set as default on the Safari browser. However, as
23 Google submits, its agreement with Apple is not among
24 the portfolio-based RSAs referred to in the contested
25 decision.

1 And finally, if I could ask you, please, to review
2 paragraph 692. Just quickly to review that, please.
3 (Pause) .
4 So the court performs a hypothetical calculation
5 there. Assume all Android devices were covered by
6 portfolio-based RSAs and, given the proportion of search
7 queries from Google Android devices and the theoretical
8 coverage of the portfolio-based RSAs, it found it could not
9 exceed 10 to 20 per cent which was below the threshold
10 of significance previously applied by the Commission.
11 And so the court's overall conclusion at paragraph 693:
12 "In those circumstances, the share of the relevant
13 markets covered by the contested practice cannot be
14 characterised as significant."
15 So the Commission erred in finding that the
16 portfolio-based RSAs accounted for a significant share
17 of general search queries across all types of device but
18 the judgment did not identify any error in the
19 Commission's finding that a large majority of OEMs
20 Android smartphone sales were covered by RSAs of one
21 kind or another during the period that it considered.
22 And the court then goes on to consider the Commission's
23 AEC calculations and finds fault there too, and the
24 infringement finding in respect of portfolio-based RSAs
25 was therefore set aside.

1 So as a result of the General Court's judgment, the
2 PCR expressly disavows any reliance on the Android -- on
3 a claim that Android RSAs infringed competition law. It
4 says that very clearly in the claim form, core bundle 2,
5 tab 4, starting on page 29. You see the heading, "D1.
6 The Android infringement". And below that paragraph 89,
7 the PCR explains that the section concerns Google's
8 infringement of article 102 and Chapter II in relation
9 to the arrangements concerning Android. She notes that
10 this part of the claim amounts to a follow-on action and
11 therefore the section summarises the Android decision.
12 Paragraph 91 records the four separate infringements
13 that were identified in the decision and in the first at
14 paragraph 92 you have the tying of Search and Play.
15 Over a page at paragraph 95 the tying of Chrome with
16 Search and Play. Over a page again, paragraph 98,
17 a third infringement, the requirement to enter into
18 Anti-Fragmentation Agreements which the Commission also
19 found restricted scope to develop rival operating
20 systems.
21 And then at page 32, paragraph 100, you see the
22 fourth infringement found by the Commission in relation
23 to portfolio-based Revenue Sharing Agreements but the
24 paragraph explains that the General Court set aside that
25 finding and in the final sentence:

1 "The PCR does not therefore rely on them as such
2 herein, save in that they remain an element of the
3 factual background against which the effects of the
4 other three infringements fall to be assessed."
5 So the upshot is that these arrangements to secure
6 a default status were not found to be unlawful. The PCR
7 does not allege unlawfulness but has chosen instead to
8 pursue only a follow-on case against the Android
9 conduct. And as the PCR explains, the Revenue Sharing
10 Agreements are therefore an element of the factual
11 background against which the effects of the other
12 infringements ought to be assessed. One cannot write
13 them out of the counterfactual as though they were also
14 unlawful.
15 But we say that that is what Dr Latham on
16 instructions appears to be proposing to do. We saw from
17 paragraph 413 of his first report that he considered
18 that the counterfactual to the Android conducts must not
19 involve Google reaching de jure or de facto default
20 arrangements with the vast majority of OEMs as it did in
21 the actual.
22 So on the Android follow-on case, we say that the
23 PCR and her expert have got into a tangle. They seem to
24 be proceeding on the basis that default agreements must
25 be excluded from the counterfactual on the basis that

1 they have the same effect as other conduct that has been
2 found to infringe article 102. With respect, that is
3 clearly incorrect. On the one hand, as both the
4 Commission decision and the General Court's judgment
5 makes clear, default arrangements must be analysed and
6 found to infringe competition law by reference to
7 a proper assessment before they can be identified and
8 excluded from the counterfactual as unlawful. The fact
9 that their effects may be the same as other arrangements
10 that have been found to infringe article 102 does not
11 mean that they too are to be treated as unlawful, and
12 nor can they be excluded, we say, from the
13 counterfactual for that reason.
14 On the other hand, in the circumstances of this
15 case, the proposed requirement to exclude other default
16 arrangements is unreal in circumstances where such
17 arrangements were in fact in place in the form of the
18 RSAs, those arrangements were found to cover the major
19 OEMs and the large proportion of sales of Android
20 Smartphones and those arrangements were not found to
21 infringe article 102 following a careful forensic
22 examination. And so in those circumstances we say that
23 to specify that the counterfactual, and I quote "must
24 not involve Google reaching de jure or de facto default
25 arrangements with the vast majority of OEMs", as it did

1 in the actual, flies in the face of reality. It's
2 an impermissible shortcut. It treats as unlawful
3 arrangements and types of arrangement which were
4 challenged and upheld in the very legal process which
5 the PCR relies upon to establish liability.
6 Now, in her skeleton argument the PCR offers several
7 responses in relation to the Android counterfactual. If
8 we can turn that up, it's in core bundle tab 1, page 19.
9 At paragraph 42 you see the preliminary point that
10 Google's case challenges Dr Latham's views rather than
11 the PCR's pleading and that these are matters for trial.
12 As to this, the pleading as we saw relies on
13 Dr Latham's analysis of causation. It offers no
14 independent counterfactual analysis of its own.
15 Counterfactual analysis, is moreover, a necessary and
16 important part of the PCR's case and it must be set out
17 with sufficient specificity. This can be seen from the
18 Tribunal's recent judgment in the AdTech certification
19 case which the PCR's skeleton cites. It's in the
20 reduced authorities bundle at tab 4, and the relevant
21 passage starts on page 349, paragraph 22. If I could
22 ask you, please, to review that paragraph.
23 (Pause)
24 So we rely in particular on the fact that
25 counterfactuals are identified as an important tool in

1 competition cases which must be pleaded with sufficient
2 specificity and that it is necessary to say something
3 about what would have happened in a likely and realistic
4 counterfactual world in the absence of this infringing
5 harm. And in light of those observations we say that
6 it's appropriate to consider what Dr Latham says because
7 it's the only analysis we have as to the counterfactual
8 on which the PCR intends to rely to make good the first
9 step in the chain of causation. And nor in our
10 submission is this a matter of reasonable disagreement
11 between experts which can be left to trial. The PCR's
12 case appears to rest on a prior exclusion from the
13 counterfactual of default arrangements of a kind which
14 in fact operated and were exonerated in the actual, and
15 which the PCR does not herself challenge as unlawful.
16 Dr Latham has explained that he excludes such
17 arrangements on the basis of an instruction and I quote
18 that "a legally valid counterfactual must not involve
19 conduct with the same effect as the unlawful conduct".
20 That is in Latham 2, paragraph 10.
21 We say that this is an error of principle which
22 underlies the basis on which the claim is being
23 advanced.
24 The PCR then makes three points in its skeleton
25 argument. First at paragraph 43 it says that Dr Latham

1 has identified two potential counterfactuals for the
2 Android conduct which are not expressly criticised.
3 Those are counterfactuals in which Google foregoes the
4 tying arrangement in the decision and/or introduces
5 a choice screen within Chrome. But these address only
6 a removal of the infringing conduct, they do not relate
7 to Dr Latham's prior exclusion of default arrangements
8 with like effect. They are altogether silent about such
9 arrangements, including the RSAs, which as we have seen
10 from the Commission decision on which the PCR relies
11 were widespread. And we say that that is the difficulty
12 with Dr Latham's approach.
13 Second, in paragraphs 44 through to 47, the PCR
14 seeks to address that exclusion. And paragraph 45 puts
15 a new gloss on Dr Latham's reports. It says that the
16 proposed exclusion from the counterfactual is confined
17 to conduct that is unlawful and that the adoption of
18 default arrangements with the vast majority of OEMs
19 would fall foul of the requirement that there should be
20 no unlawful conduct.
21 Paragraph 46 defends the proposition that unlawful
22 conduct must be excluded and paragraph 47 suggests that
23 the lawfulness of default agreements covering most OEMs
24 will be a matter for consideration at trial.
25 This repositions the PCR's case but it doesn't

1 resolve the underlying difficulty. Of course unlawful
2 conduct must be excluded from the counterfactual. The
3 difficulty is that Google's RSAs were not found to be
4 unlawful, notwithstanding the Commission's findings that
5 they covered the large majority of OEM Android sales
6 during the period considered. And the PCR has expressly
7 disavowed any case that they are unlawful. In
8 paragraph 100 of the claim form she accepts that they
9 must be taken into account as part of the factual
10 background when assessing the affects of the
11 infringements, and the PCR cannot exclude such
12 arrangements from the counterfactual, we say, by simply
13 assuming them to be unlawful, given the procedural
14 history of the case and the follow-on nature of the
15 claim.
16 Third, in paragraph 48 of the skeleton argument the
17 PCR seeks to address this difficulty. It is said that
18 Google's expert has not proposed a counterfactual which
19 includes RSAs. Google's objection, however, goes to
20 a foundational problem with Dr Latham's counterfactual,
21 based on his instruction to exclude default
22 arrangements, notwithstanding the Commission's findings
23 and the General Court's judgment. It is not a debate
24 between counterfactuals, but concerns, instead, the
25 proper approach to counterfactual assessment and we say

1 that there is an error of principle.

2 Then it's said that the Google Android judgment did

3 not find RSAs for default status for the majority of

4 OEMs were necessarily lawful and they have been found

5 unlawful under US law. Now, with respect we say that's

6 a hopeless submission. The PCR has no basis to say that

7 the RSAs are unlawful, having brought a follow-on claim

8 based on the Commission decision from which the RSA

9 infringement findings have been removed following

10 careful judicial scrutiny; and plainly the gap cannot be

11 plugged through any reliance on a decision under US law.

12 THE CHAIR: I think they just put it there to show that it's

13 not irrational.

14 MR HOLMES: Perhaps not irrational but this is a follow-on

15 claim --

16 THE CHAIR: I understand what you are saying but they are

17 not trying to do more than that, I don't think.

18 MR HOLMES: I understand.

19 THE CHAIR: They seek to give it credibility.

20 MR HOLMES: Yes. If that's the only basis on which they

21 include that --

22 THE CHAIR: That's how I read it.

23 MR HOLMES: -- then that's well and good. The key point is

24 that there is a gap, a gap that arises from the fact

25 that the Android process specifically considered RSAs,

1 widespread RSAs, covering the great majority of OEM's in
2 the market during the period considered and found no
3 unlawfulness. And in those circumstances to exclude
4 widespread arrangements RSAs on the basis that they have
5 the same effect as the conduct that was found unlawful
6 is not, we say, well-founded; it's an error of approach.
7 THE CHAIR: The General Court didn't find that the RSAs were
8 of equivalent effect to the tying, I mean that wasn't
9 something they had to think about, was it?
10 MR HOLMES: No.
11 THE CHAIR: So they may have had some effect but there's no
12 finding in the General Court's decision that the RSAs
13 were of equivalent effect. They might have been of some
14 effect but lesser effect.
15 MR HOLMES: Yes, that's correct, yes. But whatever effect
16 they had, they were not found to infringe competition
17 law and the fact that a practice might have the same
18 effect which exists in the actual provides no basis for
19 excluding it from the counterfactual. And that is our
20 critique of the approach that Dr Latham and the PCR
21 propose to take, as we understand it, in order to show
22 the causation of loss in relation to the Android
23 conduct.
24 THE CHAIR: Right. It feels a bit like the PCR's claim on
25 Android is: Google perpetrated the tying, that's

1 unlawful as follow-on claim. Google's answer is: well
2 we could have achieved the same effect by lawful means.
3 That's a matter for Google to raise, isn't it?
4 MR HOLMES: Yes. If that was as far as it went there would
5 be no difficulty. The difficulty as we see it is that
6 their expert apparently on instruction proposes to
7 exclude a priori from the counterfactual the inclusion
8 of any possibility of arrangements with the same
9 coverage. And the particular difficulty which arises in
10 relation to Android is that he apparently proposes to
11 ignore the arrangements that were in place in the
12 actual, which have not been found to be unlawful. And
13 we say that can't be the correct approach to
14 counterfactual analysis because it renders the
15 counterfactual unrealistic.
16 THE CHAIR: Right. But is not the practical thing for
17 Google to say: this is what the RSAs would have
18 achieved? Your counterfactual is wrong, here is
19 a better counterfactual in which the RSAs would have
20 achieved 50 per cent of what the tying did; I mean
21 Google could do that.
22 MR HOLMES: Yes. Certainly --
23 THE CHAIR: Sorry, just to follow that thought, I think --
24 that doesn't seem to put us in the strike out world.
25 That seems to put us in a world where Google wants to

1 actively raise a point that it could have achieved some
2 of the effect, possibly, I suspect, it's going to say
3 all of the effect, by different means.
4 MR HOLMES: But certainly if the case were to proceed that
5 is likely to be a significant argument at trial.
6 THE CHAIR: Sure.
7 MR HOLMES: The question -- in this particular regime we
8 have the requirement for certification consideration of
9 the claim at an early stage. We have a clear indication
10 in recent AdTech certification ruling that
11 counterfactual analysis is important and it requires to
12 be properly specified as an element of the pleading.
13 THE CHAIR: Right.
14 MR HOLMES: In this case the only source that one finds for
15 the counterfactual is the analysis of Dr Latham and that
16 appears to proceed on the basis of what we say is
17 a basic error of law, and because of that basic error of
18 principle there is no properly specified case at present
19 of a case that is capable of showing causation of loss.
20 It proceeds on the wrong footing because it excludes
21 a priori conduct having the same effect.
22 THE CHAIR: Well, it doesn't negate all causation, does
23 it? It reduces the quantum.
24 MR HOLMES: As the first step of their case they need to
25 show a negative effect on Google and they are proposing

1 to do that on a basis which is, we say, unreal, because
2 it excludes a priori any possibility of equivalent
3 arrangements in circumstances where there were in fact
4 widespread arrangements in place. We see that as
5 an error of principle, which we're raising with the
6 Tribunal for that reason.
7 THE CHAIR: They are just being practical about this. That
8 all sounds like a very strong hint that Google is going
9 to say that it could have achieved exactly the same
10 thing by RSAs instead of tying.
11 MR HOLMES: Yes, and I -- my point is that we don't
12 currently have a case that is articulated on a correct
13 footing by the PCR because it proceeds on the basis that
14 one can exclude, as a matter of law, apparently,
15 arrangements having equivalent effect to those in the
16 actual. And we say that that is wrong in principle,
17 that's not the right approach to take to counterfactual
18 analysis.
19 THE CHAIR: Right. Okay. Then the other element of what
20 they say here is that the General Court didn't find that
21 it was -- positively find that RSAs were lawful.
22 MR HOLMES: No.
23 THE CHAIR: It knocked out the finding that they were
24 unlawful --
25 MR HOLMES: Yes.

1 THE CHAIR: -- because of specific procedural reasons,
2 specific to that setting.
3 MR HOLMES: But in the context of a follow-on claim, where
4 they take the conclusions of infringement in the
5 Commission decision as the basis for their case, they
6 don't have any basis for alleging the unlawfulness of
7 the RSAs because they have confined themselves to
8 a follow-on case without any standalone allegation of
9 infringement in relation to the RSAs which survived the
10 process, the EU process, which they used to found
11 liability. So how is the Tribunal to assess the
12 lawfulness of that without a claim that they are
13 unlawful? We say that's part of the tangle that the PCR
14 has got themselves into and it's an impermissible
15 shortcut to just excise those arrangements from the
16 counterfactual in circumstances where they existed in
17 the actual and where they were not found to infringe on
18 the basis of the case --
19 THE CHAIR: I understand.
20 MR HOLMES: -- which the PCR relies upon. So that's the
21 first of my three arguments.
22 The second --
23 THE CHAIR: It's a bit of an odd one. It just seems odd
24 that a party who's being subject of a successful
25 Commission investigation, fined and so on, comes along

1 and says: well I could have done the same thing by other
2 means; that's my defence. The PCR says: you can't run
3 that, that's unlawful. And the dominant undertaking
4 says yes, but nobody's found that's unlawful so you
5 can't say it is. That sounds a bit --
6 MR HOLMES: You can certainly see how in considering the
7 counterfactual there are practices which are clearly
8 unlawful which would exclude and take out of account --
9 the difficulty we have here is that these aren't only
10 hypothetical or putative practices that could have been
11 adopted in the alternative, they are the actual. Google
12 in fact had RSAs in place which have not been found to
13 infringe competition law and which are not being
14 challenged in these proceedings as infringements of
15 competition law. And we say there that in fact the
16 pleaded case which says that they are then to be taken
17 into account as part of the factual background has it
18 right, and Dr Latham in his counterfactual has it wrong
19 in suggesting that they need to be taken out of account
20 and ignored.
21 THE CHAIR: Okay.
22 MR HOLMES: The second argument concerns the PCR's iOS
23 counterfactual and on this I think I can be brief. I'm
24 conscious of the time, sir, and I --
25 THE CHAIR: It's logical to finish that certainly and then

1 we are going to have a little short discussion about
2 timing for the rest of the hearing.
3 MR HOLMES: Very good, sir.
4 You have Mr Pickford's submission that the Apple RSA
5 agreement could be shown to infringe competition law
6 only if it not be profitably matched by an As Efficient
7 Competitor. You've seen this was indeed the approach
8 taken by the Commission and the General Court when
9 assessing the lawfulness of other Android RSAs. If the
10 PCR were able to show that the payments made under the
11 agreement were in excess of a level that an AEC could
12 match, we say that one cannot assume that in the
13 counterfactual Google would not conclude an alternative
14 agreement at a price compatible with the AEC, and yet
15 Dr Latham's analysis of the counterfactual appears to
16 exclude this a priori. If we could please return to his
17 counterfactual discussion in core bundle 3, tab 27,
18 page 624. We have already seen paragraphs 412 and 413
19 where Dr Latham excludes, on instruction, conduct which
20 has the equivalent effect of the original views.
21 Turning over a page this feeds through in
22 Dr Latham's preliminary views as to the iOS
23 counterfactual. He proposes, at paragraph 417,
24 a counterfactual in which Google pays to have the option
25 but not the default on a Safari choice screen; or

1 alternatively he suggests Google -- he suggests
2 an absence of any contractual arrangement between Google
3 and Apple at all but he doesn't countenance on the
4 possibility of a default agreement on terms that are
5 compliant with the AEC test. And similarly if we could
6 turn up Latham 2 at tab 30 of core bundle 3, page 892.
7 We have seen paragraph 10 where Dr Latham explains that
8 he understands on instruction that a legally valid
9 counterfactual must not involve conduct with the same
10 effect as the unlawful conduct. And at paragraph 11 on
11 this basis he sets out his view that the Android
12 counterfactual should exclude RSAs with most OEMs. You
13 have my submissions on that.
14 At paragraph 12 we see the conclusions he draws from
15 this about iOS counterfactual, based on his
16 understanding of what constitutes a legally valid
17 counterfactual. He disagrees that a realistic
18 counterfactual to the Apple payment is one with a lower
19 payment which still resulted in Google being the default
20 on iOS devices. "If Apple's payment were found to be
21 exclusionary in the actual, then any lower
22 non-exclusionary payment would need to result in greater
23 scope for entry and expansion and leave open the
24 opportunity for an actual or potential competitor to
25 compete with and out-bid Google for default status."

1 So again Dr Latham appears to exclude
2 a counterfactual in which a non-infringing payment is
3 made from the outset on the basis that it is legally
4 impermissible simply because the effects would be the
5 same. And we say again that that amounts to a basic
6 error of approach.
7 The final point concerns limitation.
8 THE CHAIR: Sorry, I think in a sense what you are saying is
9 that there is a mandatory counterfactual that has to be
10 considered -- I mean they might have other ones as
11 well -- but they must consider this one. Just tell me
12 again what it is -- what's the level of payment that
13 Google makes?
14 MR HOLMES: What they cannot do is exclude from the
15 counterfactual conduct simply because it has the same
16 effect as conduct which is unlawful. That is because
17 it's not enough to show, for all of the reasons that
18 Mr Pickford has developed, that conduct has affects on
19 competitors. One needs to show that they are
20 anti-competitive or foreclosing in a meaningful sense
21 because they exclude an As Efficient Competitor based on
22 the case law that he took you to.
23 So there might well be a payment which is compatible
24 with the As Efficient Competitor Test in which Google
25 still secures default status in the counterfactual. One

1 can't rule that out simply on the basis that the effects
2 are the same and insofar as Dr Latham purports to do
3 that on the basis of a legal understanding of what the
4 counterfactuals require, we say that that goes wrong,
5 that is an error of approach which again undermines the
6 counterfactual analysis on which the PCR relies.
7 THE CHAIR: Right. What's troubling me with this I think is
8 if we accepted Mr Pickford's submissions -- we have yet
9 to hear the other side of the argument -- but if we
10 accept Mr Pickford's submissions then it's all struck
11 out anyway. So we must approach this on the
12 hypothesis -- I stress hypothesis -- that we don't agree
13 with Mr Pickford -- we haven't struck the whole thing
14 out, and that it is at least arguably enough to survive
15 the strike out and abuse to make a payment which
16 prevents anybody else getting a look-in at all. And if
17 that's so then what's the counterfactual that you are
18 positing that Dr Latham must have considered but hasn't
19 considered? What's the lower level --
20 MR HOLMES: I'm sorry, I'm not trying to be prescriptive
21 about what Dr Latham does and doesn't consider --
22 THE CHAIR: He has some counterfactuals but you don't accept
23 that, what you say is he can't leave out --
24 MR HOLMES: It's wrong to leave out conduct on the basis
25 that it has the same effect.

1 THE CHAIR: Yes.

2 MR HOLMES: And I think --

3 THE CHAIR: If Mr Pickford's wrong --

4 MR HOLMES: If I understand the question correctly, you are
5 asking if there is any daylight -- whether my submission
6 in relation to the iOS counterfactual stands or falls
7 with Mr Pickford's submission.

8 THE CHAIR: In a sense. I think that's the same as what I'm
9 saying. I'm saying if Mr Pickford is wrong and we have
10 declined to strike out the case on the basis he urges on
11 us, so that it can be an abuse for Google to pay enough
12 so that nobody else gets any scale, what then is the
13 alternative lawful conduct that has to go into the
14 counterfactual?

15 MR HOLMES: It's certainly true, I think, that this argument
16 in relation to the iOS counterfactual heavily depends on
17 the submissions that Mr Pickford has made.

18 THE CHAIR: Agreed.

19 MR HOLMES: You can still imagine, I think, some space
20 between -- let's say that the Tribunal ultimately
21 determines at trial that there is an adjusted AEC test,
22 a particular level reasonably efficient operator test
23 which is to be applied with some adjustment to the
24 characteristics of Google which results in a level of
25 payment below that of an As Efficient Competitor, in

1 those circumstances if Google's products are still
2 considered better, which is what Dr Latham says, if it's
3 still of superior quality, you could imagine in those
4 circumstances that OEMs would still have a powerful
5 incentive to adopt Google's product as the default in
6 preference for others, and that might mean that Google
7 would still win this tendering process for default
8 status.
9 If it was said that that possibility is to be
10 excluded a priori on legal grounds because it has the
11 same effect as the conduct in the actual, we would say
12 that is an error of approach. One cannot exclude
13 conduct from the counterfactual simply because it has
14 the same effects as conduct which has been found to
15 infringe competition law. The same result might occur
16 for other reasons. And yet, Dr Latham appears to think
17 that no counterfactual can permissibly include
18 an outcome with the same effect. And we say that's
19 incorrect. The counterfactual process is one of
20 considering what realistically may have happened, and
21 one doesn't need to exclude all conduct having the same
22 effect which may nonetheless be lawful.
23 Does that address --
24 THE CHAIR: It does, yes.
25 MR HOLMES: -- your question. Sir, I'm conscious of

1 the time.

2 THE CHAIR: We will do limitation and then we will --

3 MR HOLMES: It's actually, believe it or not, a short point.

4 THE CHAIR: I don't think there is probably much to add to

5 the skeletons.

6 MR HOLMES: Indeed. Where it's left, I think, is with

7 a dispute about case management.

8 THE CHAIR: That's what we thought.

9 MR HOLMES: You have the point that under the existing

10 English rules which apply during the relevant period it

11 is Limitation Act rules which apply.

12 THE CHAIR: Yes.

13 MR HOLMES: And that takes one back only to September 2017.

14 The case seeks to pursue, as we saw from Dr Latham's

15 instructions earlier and has been confirmed in

16 correspondence, the case the PCR seeks to pursue is from

17 1 October 2015, in the case of the iOS conduct; and from

18 2011 in the case of the Android conduct. We say that

19 for the period between October 2015 and September 2017

20 that limitation bites under the existing rules.

21 THE CHAIR: Yes.

22 MR HOLMES: The Tribunal has adopted that conclusion in the

23 Interchange Fee ruling. So that's the current state of

24 the law in this tribunal. We say considerations of

25 judicial comity would ordinarily suggest that unless

1 there is some argument that its conclusions are clearly
2 wrong, and none have been advanced, you would follow the
3 same conclusion. I can show you those passages if it's
4 helpful, I'm just conscious --
5 THE CHAIR: No, no, I think we have got that.
6 MR HOLMES: There is a pending appeal just before the
7 Court of Appeal. And what the PCR says, as you have
8 seen, is that we should not take any action while that
9 is hanging. Now, to that we say we are considering the
10 certification of cases under a procedure which decides
11 whether they should be permitted to proceed. There's
12 a short point of law and it's appropriate to grasp the
13 nettle now. That would allow the party that was
14 unsuccessful on the point to appeal and to seek to
15 pursue that point in tandem with the current appeal
16 which before the Court of Appeal and to participate in
17 the appellate process, and that would be the appropriate
18 course.
19 There is no great cost in doing that because if it
20 turns out that a different conclusion is the correct
21 one, the relevant aspects of the case that have not been
22 certified now could then be certified but there's no
23 reason not to grasp the nettle as a matter of case
24 management. This case differs from the AdTech case
25 which was recently considered by this tribunal on which

1 there was a refusal to grasp the nettle now in that what
2 we have, as we understand it, is purely a point of law.
3 There's no factual element to the limitation argument
4 which needs to be discussed or would require
5 consideration in the light of factual evidence at trial.
6 So really there's no reason not to crystallise the point
7 now.
8 If you are not with us on that we do strongly urge
9 you not to follow the course which was taken in the
10 AdTech case of postponing all of this to trial. We say
11 that this could very well have implications for case
12 management and the appropriate course in that case, if
13 you are not with me on deciding it now, is to wait for
14 the outcome of the appeal which is pending, but then to
15 consider the point at that stage as a matter of case
16 management as the case progresses, but not to postpone
17 it for what could be several years. That would not be
18 the correct or the appropriate course.
19 THE CHAIR: Yes.
20 MR HOLMES: I should say that that point is, as I understand
21 it, subject to a pending application for permission to
22 appeal in the AdTech case, so the Tribunal's conclusion
23 that it should all be punted off into the long grass.
24 Those are my submissions --
25 THE CHAIR: I think we got the shape of that from the

1 skeletons. As I say, the skeletons cover that fairly
2 comprehensively, it's not a big point -- it's
3 not a multifaceted point like these other ones.
4 MR HOLMES: I'm grateful.
5 THE CHAIR: So in relation to timing, the members of
6 the tribunal are willing to start early tomorrow to
7 promote the chances of finishing within the day. Is
8 that all right with the parties, does anybody have
9 overwhelming difficulty? We will have a short break and
10 let you know what time we are going to start if we are
11 going to start early we may as well add significantly to
12 day so might well be 9.30 but we will have a word and
13 let you know.
14 (4.41 pm)
15 (The hearing was adjourned until
16 the following day at 9.30 am)
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