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)

Thursday, 19 September 2024

(9.30 am)

THE CHAIR: Yes, good morning.

Submissions by MR LASK

MR LASK: Good morning. Mr Chairman, members of the Tribunal, I'm going to address the issues today in the same order that my learned friends took them in, namely the iOS conduct, followed by the Android counterfactual, followed by the iOS counterfactual. Followed by limitation. I would like to start, however, by addressing you very briefly on the legal framework for applications for strike out and summary judgment. We don't understand there to be a dispute between the parties as to the relevant principles. We accept that the principles set out in the Easyair case which Mr Pickford showed you yesterday by reference to the Forrest Foods case, are applicable, but they don't tell the whole story. So if I may, could I ask you to turn up the case of Richards which is in the select authorities bundle at tab 31, please.

This is a Court of Appeal case, involving an action for professional negligence against a chartered accountant, and the defendant sought strike out of the claim by some of the claimants on the basis that he owed them no duty of care. The application was refused

by the judge and the Court of Appeal dismissed the appeal. If I could ask you to turn to page 2091, please.

This is the judgment of Lord Justice Peter Gibson. Paragraph 22:

"I start by considering what is the correct approach on a summary application of the nature of Mr Richards's application at this early stage in the action, when the pleadings show significant disputes of fact between the parties going to the existence and scope of the alleged duty of care. The correct approach is not in doubt. The court must be certain that the claim is bound to fail. Unless it is certain the case is inappropriate for striking out."

Then he refers to the Barret case, where Lord Browne-Wilkinson added:

"[I]n an area of the law which was uncertain and developing… it is not normally appropriate to strike out. In my judgment it is of great importance that such a development should be on the basis of actual facts found at trial, not on hypothetical facts assumed, possibly wrongly, to be true for the purpose of the strike out."

And what Lord Justice Peter Gibson says is particularly pertinent in this case, because as in that

case, we are at a very early stage in the proceedings and one might anticipate there will be significant disputes of fact on the pleadings.

Just for completeness, paragraph 28 on page 2093, we see here the threshold being applied and the judge says:

"In light of the authorities, I would accept that Mr Richards [that's the defendant who was seeking strike out] has a strongly arguable case that the parents and not the children are owed a duty of care in respect of the investment claim. However, I would not go so far as to say that it is certain that the children's claim will fail in the particular circumstances of the case."

So what this shows is that it's a high threshold that Google must meet in this case. The Tribunal must be certain that the claim is bound to fail. And one sees from paragraph 28 that even if Google had a strongly arguable case, that would not be sufficient on its own. That's all I propose to say on the legal framework. I will turn, if I may, to the iOS conduct. This is the standalone claim relating to Google's arrangements with Apple in relation to iOS devices.

I propose to address the iOS conduct in three parts. First, I want to make some preliminary observations on the nature of the PCR's claim and the evidential basis

for it. In my submission it is important to place Google's application in its proper context.

Second, I will address Google's argument that the PCR is, as a matter of law, required to plead and prove that the iOS conduct is capable of excluding AECs as efficient competitors and I will show that that argument is clearly wrong in law and has indeed been rejected by both the Court of Appeal and the Court of Justice.

Third, I will address Google's argument that insofar as it is necessary to plead an effect on AECs, the PCR's pleading to that effect is defective by virtue of the preliminary AEC test carried out by Dr Latham. And I will show that Google's argument elevates technical purity over economic reality and impermissibly seeks to dress up a dispute on the merits of expert methodology, which is quintessentially a matter for trial, as a pleading point capable of summary determination.

Turning then to my preliminary observations. The iOS claim, in a nutshell, is this. Google has, through its arrangements with Apple, secured exclusive default status on a Safari browser across all Apple devices. In doing so, the claim says, it has foreclosed access to Apple devices for competing search providers, because users typically stick with the default service that is presented to them. And it has done this, the claim

says, through means which given the extraordinary size of the payment involved and the coverage of the arrangements, no rival could hope to replicate.

The claim is that this restricts competition in general search services, depriving rivals of the volumes, the user volumes, that they require to improve the quality of their search engines and develop as effective competitors. It thereby cements Google's dominant position. So in short, Google has used the power conferred on it by its dominance in search to drive users inexorably towards Google's search engines and shut out potential rivals.

Google says this claim is bound to fail. It relies on grounds that are relatively narrow and we say, with respect, hopeless. But before addressing those grounds, I want to make four preliminary observations that are, in my submission, relevant to any assessment of the claim's prospects and arguability. And, therefore, they provide the proper context for Google's application.

First, the iOS claim supported by Dr Latham's expert economic assessment. That assessment is grounded in factual evidence and examines Google's conduct holistically, applying a standard economic framework. It is necessarily preliminary at this stage but it shows that the claim has a sound economic and factual

underpinning. Second, the iOS conduct shares important fundamental similarities with the Android conduct which has already been found to be unlawful. Both of them deploy Google's market power to ensure that Google Search is the default and predominant search service on the relevant type of device, thereby driving consumers towards Google Search automatically and diverting volume away from its rivals. The similarities between the two conducts are explained by Dr Latham and they are apparent from the European Commission's Android decision. They do not prove the iOS conduct is unlawful but they provide a strong indication the claim is, at the very least, arguable, has a realistic prospect of success.

We understood Mr Pickford to accept yesterday that there were at least some important similarities between certain aspects of the two conducts.

Third preliminary observation, the iOS conduct itself has been found by the CMA to be having an exclusionary impact and harming competition between search engines on mobiles and those concerns were so significant that they led the CMA to recommend pro-competitive regulatory intervention, designed to restrict Google's ability to secure default positions on mobile devices.

In my submission there is an air of unreality to the suggestion that conduct which has been found by the UK's expert Competition Authority to be harming competition, is not even arguably anti-competitive for the purposes of competition law.

Fourth and finally, the exact same conduct that is the target of the PCR's iOS claim has been found to be unlawful in the US. The legal framework is obviously not identical but that was a decision reached following a lengthy trial and extensive evidence. It would, in my submission, be surprising if a claim that has in fact succeeded in the US was unarguable in this jurisdiction.

Those are the four preliminary observations. If I may, I will show you some of the underlying materials that support them, starting with Mr Latham's analysis which is in core bundle 3 at tab F27. If we could turn to page 528, one sees at the bottom of page 528 a summary of Dr Latham's analysis of the iOS conduct. Could I ask you, please, to read paragraphs 37 to 42.

(Pause)

That sets out Dr Latham's overall approach to analysing this conduct. We see that followed through in section 6 of the report which begins on page 601.

Paragraph 287 is important:

"The concerns around the iOS and Android conduct

rely on essentially equivalent economic mechanisms, and so the theory of harm around the Apple payment relies on substantively the same chain of reasoning to that of the Android conduct. In essence, the concern is that: a. Google's payments to Apple since 2005 for default status act to drive consumers towards Google's search engine, thereby diverting search volume away from rivals b. That there are factors, including the role of scale and network effects, preventing rival search engines from bidding effectively for default status on iOS. c. That the agreements, by closing off the option of obtaining default status on some or all iOS devices increased barriers to entry and expansion for rivals in search, impeding their ability to scale and hence the quality of their search and advertising offerings and reducing their ability to compete effectively. d. That there was an interactive effect between the Android and iOS conduct, because the iOS conduct secured default status on the only material set of devices not already impacted by the Android conduct."

That deals with the similarities between the two conducts. Moving on to page 602, paragraph 291:

"I consider that the most natural economic framework to assess the iOS conduct is the economics of exclusive dealing, (i.e. situations where a supplier contractually agrees with a customer that the customer will procure all their demand from the supplier and not source volumes

from rivals)."

I don't need to dwell on this but I draw attention to it. But I don't think there is any dispute that that is an appropriate -- at least for the purposes of (Inaudible due to overspeaking) --

I draw attention to it because it's well-established and still well-established that exclusivity arrangements by dominant firms are problematic in competition terms. I don't need to rely on Hoffman La-Roche for that, I rely on Unilever which is a much more recent case. I'm going to come to that in due course but for your note, it's Unilever paragraphs 46 and 51. As I say, I'm going to come back to that.

So back to the report. We see at page 612, Dr Latham's preliminary analysis of whether Google's payment meets the Intel conditions. And the Intel conditions, you will see from yesterday, refer to that part of the Intel judgment that said one needs to look at all the relevant circumstances, including the extent of the dominance, the nature of arrangements, the coverage, et cetera. What he's doing there, Dr Latham, is applying those factors. And again, we don't understand there to be any dispute that those factors are relevant, the difference between us is on whether one needs to go further and apply the AEC standard. But

at the very least, the factors are relevant and that appears to be common ground.

If I could invite you, please, to read paragraphs 344 to 351 which just sets out his initial analysis. (Pause)

So Dr Latham's assessment is that Google's iOS conduct meets all of the Intel conditions and thus those characteristics that are likely to trigger anti-competitive effects. And you will see on page 614 of paragraph 352, he addresses the relevance of the AEC test:

"It is my preliminary view that the right economic framework through which to assess as an efficient competitor is to consider a rival who would be as efficient as Google, were it to achieve a minimum viable level of scale to train its search algorithms and build advertiser relationships. This is because the strength of scale and network effects and the extent of Google's dominance are such that it seems to me unreasonable to expect a rival to be already as efficient as Google, before it can build traffic and scale."

That explains his scepticism as regards the AEC test but as we saw yesterday and as I will come back to, he goes on to carry out two versions of the AEC test.

Just finally, at page 622, section 6.4, he sets out

1 further analysis he would propose conducting with some
2 of the further disclosure he would need and then his
3 conclusions at paragraph 408. That's all I want to say
4 about Latham 1 at this stage.
5 But what it shows, in my submission, is that the iOS
6 claim is underpinned by an independent expert
7 assessment, necessarily preliminary but grounded in the
8 available facts and the relevant economic framework.
9 And that is plainly supportive of the proposition that
10 the claim is arguable at the very least.
11 Next thing I would like to show you is the Android
12 decision. I was going to take you to claim form first
13 but it may be that you feel sufficiently familiar with
14 it to understand what the claim was about. The
15 submission I want to make is to draw parallels between
16 the claim and the Android decision. I can go to the
17 claim form first.
18 THE CHAIR: I think you don't need to do that to lay the
19 basis for these submissions, we might look at some bits
20 of it later, I'm sure.
21 MR PICKFORD: I'm grateful, thank you. If we go straight to
22 the Android decision which is in the select authorities
23 bundle at tab 21. The relevant section is on page 1604
24 of the bundle. You see above recital 752, "Summary of
25 the abusive conduct", and this summarises the two

elements of the abusive Android conduct:

"Since at least January 2011, Google has tied the Google Search app with the Play Store. The Commission concludes that this conduct constitutes an abuse of Google's dominant position in the worldwide market…" for Android app stores."

Then 753:

"Since 1 August 2012, Google has tied Google Chrome with the Play Store and the Google Search app. The Commission concludes that this constitutes an abuse of Google's dominant positions in the worldwide market… for Android app stores and the national markets for general search services."

Then one goes to page 1606, please. Recital 773:

"The Commission concludes that the tying of the Google Search app, with the Play Store is capable of restricting competition because it: (1) provides Google with a significant competitive advantage that competing general search services providers cannot offset…; and (2) helps Google to maintain and strengthen its dominant position in each national market for general search services, increasing barriers to entry, deters innovation and tends to harm directly or indirectly consumers."

That effect is then summarised over the page at recital 775, where the Commission gives five reasons. For present purposes, I want to focus on the second of

those five reasons which is dealt with on the same page at recital 778 and 779. This is the effects of pre-installation, or the importance of pre-installation:

"pre-installation is an important channel for the distribution of general search services on smart mobile devices. It is "important for service providers because it can increase significantly, on a lasting basis, the usage of a service provided by the app. This significant increase in usage is the reason why service providers, including Google, remunerate OEMs and MNOs for pre-installing their apps on an exclusive or nonexclusive basis, for setting their services as default… and/or placing apps in a premium position."

So that's premium placement.

So pre-installation can generate significant and lasting increase in use and the Commission draws a parallel between the pre-installation which is the Android conduct and default status which is the iOS conduct.

And then on the opposite page, 1608, it elaborates recital 781 and 782.

781:

"The reason why pre-installation, like default setting, or premium placement, can increase significantly on a lasting basis the usage of the service provided by

an app, is that users that find apps pre-installed and presented to them on their smart mobile devices are likely to "stick" to those apps."

782:

"Users are unlikely to look for, download, and use alternative apps, at least when the app that is pre-installed, premium placed and/or set as default, already delivers the required functionality to a satisfactory level."

And then over the page 1609, recital 786:

"the importance of pre-installation is confirmed by internal Google documents."

Then one sees at 787(2), an interesting extract from an internal Google document, where a Google executive acknowledged that "[p]re-loading remains valuable… because most users just use what comes on the device. People rarely change defaults." That is straight from the horse's mouth.

And then moving on, please, to page 1634 of the bundle, recital 858 onwards, the Commission is dealing with the second effect of this conduct. 859:

"Google's conduct makes it harder for competing general search services to gain search queries and respective revenues and data needed to improve their services."

And then 861:

"Google's conduct increases barriers to entry by shielding Google from competition from general search that could challenge its dominant position."

And then the second limb of the abuse which is dealt with in section 11.4.4.2 which begins on page 1660. This is also relevant because the second limb was concerned with the tying of Chrome. So the requirement that OEMs had to pre-install Chrome on which Google is the default search engine. It's relevant because Chrome is to Android what Safari is to iOS. And one sees at recital 969 on page 1660:

"For the reasons set out in this section, the Commission concludes that the tying of Chrome with the Play Store on the Google Search app deters innovation in relation to mobile web browsers, tends to harm, directly or indirectly, consumers and helps to maintain and strengthen Google's dominant position in each national market for general search services."

And then over the page, 972 to 976 are important. Perhaps you could just scan those recitals briefly because they explain why being a default search engine on a web browser, like Google is on Safari, helps strengthen dominance in search. (Pause)

Just for completeness while we are here -- you don't

need to read it but recital 977, there are a number of examples of where competing search services have been able to grow their market share when they have had an opportunity to be in the default position. That is relevant to the counterfactual matter. That I will come to later on. But to sum up on this point, we do say the essential concern with the iOS conduct is very similar to the concerns that the Commission had with the Android conduct. The core reason why the Android conduct was abusive was that pre-installation increased usage significantly and on a lasting basis, giving Google a competitive advantage that its rivals couldn't off-set. We say the iOS conduct does the same thing.

MR DAVIES: Is there anything in the decision or elsewhere as to why the Commission didn't pursue the iOS conduct?

MR LASK: Just going to come on to that because Mr Pickford started his submissions yesterday by drawing attention to some submissions that the Commission's representative made at the appeal hearing, where Mr Khan, for the Commission, said "I'm not saying anything to suggest that the iOS conduct was unlawful." Of course he wasn't because there was nothing to that effect in the decision. We, on the PCR side, we don't know whether the Commission ever investigated the legality of the iOS conduct or if it did, why it didn't reach a decision on

that matter. It may be that Google can assist with that but the key point, in my submission, is that the absence of findings in the Android decision, the absence of findings that the iOS conduct is unlawful, are irrelevant. They don't undermine the claim that we make that it's abusive, all they tell us is that there's been no finding to that effect as yet.

As I say, the essential point is that on our case, the iOS conduct does the same thing, essentially, as the Android conduct.

It must follow from that, in my submission, that the iOS conduct gives rise, at the very least, to a real triable issue on the question of abuse.

Just quickly if I may, I will show you the CMA report. It was the online platform from the digital advertising report that I referred to when summarising my preliminary observations. The relevant part is in appendix V which is in the select authorities bundle at tab 37. If you are using the hard copy, that's volume 4. This is part of its final report on online platforms and digital advertising. It was a market study that was then followed a couple of years later by the mobile ecosystems market study and report and has ultimately led to primary legislation in this area which Google draw attention to in their skeleton and the

establishment of a digital markets unit to regulate these sorts of issues. Appendix V is important because it explains the CMA's concerns about Google's default positions. Paragraph 1, page 2513:

"This appendix sets out our assessment of potential interventions aimed at addressing the concerns identified in Chapter 3, regarding the level of competition between general search providers. These concerns include a number of barriers to entry and expansion, such as the extensive default positions held by Google and advantages to scale in cost and data which together limit the competitive threat faced by Google."

Then over the page, paragraphs 7 and 8, here the CMA are discussing demand side remedies, so remedies that might involve things like giving users choice screens, where they select their default search engine. Paragraph 7:

"Google Search holds extensive default positions across nearly all UK mobile devices… This limits the distribution opportunities for competing search engines and has been consistently described by these parties as a significant barrier to growing their user base, monetising their operations and improving the quality of their search results.

"In the interim report we considered interventions."

Then it explains the demand side interventions and possible choice screens.

Then moving on. Page 2517, CMA refers to the Android investigation at paragraphs 23 and 24. It said at 24:

"Safari is the only web browser pre-installed on these devices [Apple devices] and Apple has set Google as the default search engine on Safari in the UK."

Then paragraph 26:

"in addition, there are other restrictions that prevent non-Safari browsers being launched by default."

So that reinforces the influence of the search default position. Paragraph 25 above that discusses the impact on consumer behaviour. I should, while we're here, acknowledge paragraphs 27 and 28, in case they are raised against me. Apple submitted, as Mr Pickford submitted yesterday, that there had been no action taken by the European Commission in relation to these arrangements. And what the CMA says here is: we are not looking now at whether they are lawful, we are looking at whether they warrant some sort of regulatory intervention.

And I acknowledge that. This report doesn't find they are unlawful. Mr Pickford also suggested yesterday this tribunal can take some comfort from the regulatory

provisions put in place for pro-competition interventions. He said there's no gap in enforcement but the question for this Tribunal is not whether there are other means by which the iOS conduct may be addressed, it's whether there a triable case on our abuse.

And then just finally, the key paragraph is paragraph 31, CMA's conclusion:

"Consequently, given the impact of pre-installations and defaults on mobile devices and Apple's significant market share, it is our view that Apple's existing arrangements with Google are having an exclusionary impact and harming competition between search engines on mobiles. As such, we consider there to be a strong case for restricting Google's ability to acquire the default position on Apple mobile devices in the UK."

As I say, this does not amount to a finding of abuse but it is consistent with and supportive of the PCR's case on the iOS conduct. The UK's expert competition regulator is of the view that Google's arrangements with Apple harm competition between search engines on mobiles. That is case that the PCR wishes to have heard at trial.

I'm not going to take you to the US decision. In case it's of interest, it's at tab 2 of the select

authorities bundle and the pages you may find particularly interesting are pages -- these are bundle pages, 44, 144, 247 and 259.

So those were the four preliminary points I wanted to draw attention to.

In my submission they demonstrate that there is an air of unreality in Google's case, that the claim should be struck out as unarguable or as having no realistic prospect of success. I don't say this dispenses of the need to examine Google's specific argument but it does, in my submission, indicate that Google has a formidable hurdle to overcome if this application is to succeed.

Turning then to Google's case on the iOS conduct. There are two limbs to it. It says that the PCR's pleading is defective because, firstly, it does not plead that the iOS conduct is liable to foreclose AECs and secondly, insofar as it does plead that, that pleading is based on a defective AEC test. I'm going to deal with the point of law firstly and then make submissions on the AEC test.

Starting point on the law is that Google accepts that there is no legal compulsion to apply an AEC test in every case. That much at least is common ground. It nevertheless contends that even where the AEC test is

inapplicable or irrelevant, the so-called AEC principle remains. And according to Google, this requires in every case or almost every case, that in order for conduct to be abusive, it must be proven that it's capable of excluding an As Efficient Competitor. That is the cornerstone of Google's application as regards the iOS conduct but it is simply wrong in law.

Firstly, it is premised on a false distinction between the AEC test and Google's so-called AEC principle. That distinction has no rational basis and is in fact incompatible with essential reasoning contained in the relevant authorities. Secondly, and importantly, the exact same argument Google makes now was rejected by the Court of Justice in Google (Shopping), a case that Google is obviously familiar with. Lots of case law is cited in the submissions and Mr Pickford took you through a number of cases yesterday. You may be relieved to hear I'm not proposing to go back through all of those cases but for my purposes, I only need to take you to three. They are Royal Mail, which is a domestic case, Unilever and Google (Shopping). I will start with Royal Mail which is a Court of Appeal case. It's in the select authorities bundle at tab 18. Mr Pickford didn't go to this case yesterday. He explained he didn't need to

because it was only concerned with the AEC test and not the AEC principle. In my submission that's not right.

The Royal Mail case concerned a pricing based abuse by Royal Mail and Royal Mail itself had tested its pricing plan by reference to an AEC test. Ofcom held that it was neither necessary nor appropriate to carry out an AEC analysis and found that Royal Mail had abused its dominant position. And Ofcom's decision was upheld by the CAT, which agreed that an AEC test wasn't appropriate in the circumstances and found that other evidence indicated an abuse, irrespective of what the AEC test showed.

Royal Mail's appeal was dismissed by the Court of Appeal.

I would like to pick up the Court of Appeal's judgment, please, at paragraph 21 which is on 1144 of your bundle. This is the judgment of Lord Justice Arnold and he says:

"It is common ground that there is no obligation on a competition authority, considering whether a dominant undertaking has abused its position by a pricing practice, to test the effects of that practice by reference to a notional competitor which is as efficient as the dominant undertaking and thus has the same costs."

That is what he calls the AEC test. Pausing there, I don't intend to base my case on semantics but for what it's worth, that doesn't suggest that Lord Justice Arnold is only thinking about a numerical test of the kind that Google say isn't required. In my submission he's thinking generally of testing the effects of a practice by reference to an As Efficient Competitor.

And then at paragraph 23 onwards, he reviews the EU case law and he covers five of the seven or eight EU cases that Mr Pickford took you to. And so, one can approach the Court of Appeal judgment as reflecting the Court of Appeal's view of the EU case law from Deutsche Telekom, all the way up to Intel. Could we go then, please, to what he says about Post Danmark which is on page 1149, paragraph 32.

I thought it more efficient to deal with Post Danmark as it appears in the Court of Appeal's judgment --

THE CHAIR: Yes, okay, understood.

MR LASK: -- rather than going directly to the case. He quotes the relevant passages at paragraph 33 and over the page you will see most of the pages taken up with quotes from Post Danmark. And paragraphs 57 onwards are very important, in my submission. 57:

"It follows that as the Advocate General stated… it is not possible to infer from Article --"

THE CHAIR: Where is that?

MR LASK: This is paragraph 33 of the judgment which begins on page 1149.

THE CHAIR: I'm with you now.

MR LASK: Then over the page on 1150. That's at paragraph 57 of the Post Danmark judgment, the second Post Danmark case:

" it is not possible to infer from Article 82 EC or the case-law of the Court there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor-test. Nevertheless, the test may be relevant and should not be excluded."

Then paragraphs 59 and 60 are crucial:

"On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred inter alia by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor-test is of no relevance, inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically

impossible. Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by high barriers ..."

You will recall what Dr Latham said about that:

" ... the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking."

And there are two points I wish to make on that. Firstly, this reasoning is incompatible with the proposition that in order to establish an abuse, one must always demonstrate the foreclosure of AECs. If an AEC test is inappropriate because in the market concerned the emergence of AEC is practically impossible or because less efficient competitors exert a valuable constraint, then it is equally inappropriate to require proof of an effect on AECs by some other means.

If a test is inappropriate, so too is Google's so-called principle.

That's the first key point.

The second key point is that if the Court of Justice had considered whilst an AEC test was not essential in every case, it was essential to prove an effect on AECs by some other means, it surely would have said so. It

didn't say so in Post Danmark 2 and didn't say so in any of the other cases Mr Pickford took you to. When pressed on those passages, Mr Pickford said that they were obiter or wrong. I will come on to show you that the Court of Appeal rejected a submission that this part of Post Danmark 2 had been somehow overruled by Intel, so there is no basis for saying those passages are wrong. And nor is there any basis for saying that they're obiter because as the Chairman pointed out yesterday, the reason given in 59 and 60 then followed through to the conclusion in 62. We also see this reasoning reflected in the later case law, Unilever, Google (Shopping) which I'm going to come to. Even if this was obiter, it still highly persuasive and it's good enough for my purpose, good enough to defeat a strike out application.

Just for your note, Dr Latham opines, for the same sorts of reasons given in Post Danmark, an AEC test was inappropriate in this case and that's Latham 1, paragraph 41 and 353. He also cites published economic analysis, explaining that foreclosure of less efficient competitors can still harm consumers and raise prices. That is paragraph 309 of Latham 1.

Continuing through the judgment, paragraphs 34 and 35 address Intel. And you will see at paragraph 139 of

Intel, the court said,

"in circumstances where a dominant undertaking puts forward analysis and evidence disputing the alleged foreclosure effects: "In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount, it's also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market."

So one sees there the Intel conditions that Dr Latham applies and the reference to what the Commission has to do if the dominant firm puts forward evidence and analysis relating to As Efficient Competitors. It has to analyse that, it has to deal with it. That was the crux of Intel, that that analysis, when relied on by a dominant undertaking, cannot be ignored.

And then continuing on. Sorry, I have a version of the Royal Mail judgment that doesn't have the new page numbers. I'm just going to --

THE CHAIR: Just give us the paragraph numbers, I think we

will be able to manage.

MR LASK: Thank you.

Lord Justice Arnold set out his conclusions at paragraphs 37 onwards, his conclusion on the case law. 37:

"It's clear that an AEC test may be relied on by a competition authority."

Paragraph 38:

"In my judgment, however, the case law does not establish that an AEC test which is relied upon… must be treated as highly relevant to, let alone determinative of, the question of whether a pricing practice is anticompetitive. On the contrary, it is clear from Post Danmark II…that the AEC test is one tool among others for the purposes of assessing whether there is an abuse… It's clear from that case at [59]-[60] that there may be circumstances in which carrying out an AEC test is either impracticable or inappropriate. I don't consider that those statements are only applicable to rebate schemes, in particular because [they] are consistent with what the CJEU said in the context of a margin squeeze in TeliaSonera."

Then 39:

"I don't accept the submission… that it is only legitimate to disregard an AEC test where the emergence of an AEC is practically impossible, which is contradicted by… TeliaSonera… and Post Danmark II."

So the circumstances in which one doesn't need to test the effects by reference to an AEC are not closed.

Then paragraph 40:

"Nor do I accept… that Post Danmark II too has been silently overruled or qualified by Intel."

That is where he says what Intel is essentially about.

Then 41:

"... Above all, as the CJEU has consistently held, all of the circumstances of the case must be considered. There may be other evidence which establishes that a pricing practice is anti-competitive, even if an AEC test relied upon by the dominant undertaking appears to show otherwise."

That proposition --

THE CHAIR: That is a slightly different point, isn't it? That's if there is an AEC test from the dominant undertaking, that's not the end of the story.

MR LASK: That proposition would make no sense, in my submission, if it remained necessary in all cases to establish an effect on AECs, because he is saying there may be other evidence. What Lord Justice Arnold is saying there is that an assessment of the impact on AECs, in that case by way of a test, isn't necessarily determinative because there may be other evidence

sufficient to establish an abuse.

THE CHAIR: That is just proving that the test doesn't work, that the test has come up with a bad result.

MR LASK: What he says in paragraph 38 is that an AEC test isn't always determinative, doesn't say it's not always determinative where it comes out with a particular result, but the thrust of this is that there may be other evidence. To support that, I will show you how that mattered on the facts of this case, because that's what the Tribunal held, it said:

"We don't really find the AEC test very helpful, in fact the whole concept of an AEC is meaningless in this case. There is other evidence that establish abuse."

And the Court of Appeal upheld that.

I will show you where it did that.

THE CHAIR: It's just that this a case where an AEC test was in play at least, because Royal Mail had itself done it when it was considering whether the conduct it was planning was lawful or not.

MR LASK: That's right. What the Tribunal did -- I'm going to come on to show you this -- is it didn't find the AEC test helpful. It went further than that, it said the whole concept of an AEC is problematic here.

THE CHAIR: Okay.

MR LASK: For similar reasons to those that we rely on. So

it said, "... we find all of this other evidence sufficient to establish ..."

THE CHAIR: Let's have look at that then.

MR LASK: So paragraph 47 onwards, under the heading "The Judgment", he summarises the judgment below.

At 51, this is a point I have been making:

"The Tribunal considered issue 3 at [532]-[548]. It identified two reasons for thinking that "the concept of an AEC is in any event inappropriate in this case". The first was that no e2e competitor would attempt to set up its own direct delivery operations in all 83 [areas, I think that is], but only in some of them. The second was that [Royal Mail's] special status as the designated universal service provider gave it certain advantages, (such as exemption from VAT) and disadvantages (such as a need to comply with the… USO… which would not apply to any entrant. The Tribunal therefore concluded that "the concept of an AEC is highly problematic in the context of this case".

Royal Mail, as you see there, had advantages and disadvantages that wouldn't apply to any realistic potential competitor, so that made it difficult to assess Royal Mail's conduct by reference to an AEC.

As I say, Dr Latham has identified similar difficulties, for your note, Latham 1, 352 to 353 and at

364.

If it's helpful on this point, we can go to underlying tribunal judgment to see ...

THE CHAIR: I think that's good enough.

MR LASK: Very good, thank you.

Anyway, Royal Mail directly challenged that conclusion of the Tribunal. The conclusion that the concept of an AEC wasn't appropriate in this case. It argued that conclusion wasn't open to the Tribunal as a matter of law.

That argument was rejected by the Court of Appeal at paragraph 68:

"So far as the substance of the Tribunal's reasoning as to the persuasiveness of the AEC test relied upon by [Royal Mail] is concerned, counsel for [Royal Mail] argued that the Tribunal's conclusions that the concept of an AEC was highly problematic in the context of this case and that [Royal Mail's] test was neither robust nor informative were ones that were not open to Tribunal as a matter of law. For the reasons given in paragraphs 38-41 above however, I do not accept this. Accordingly, the Tribunal made no error of law when it concluded that abuse of [Royal Mail's] dominant position was established by other evidence, although the AEC test relied upon by [Royal Mail] purported to show that even a less efficient

competitor would be able to compete".

That, in my submission, demonstrates in addition to the points I made on the relevant passages from Post Danmark, it demonstrates that Royal Mail isn't just about the AEC test, it goes beyond that. Because the Tribunal went beyond that at first instance, that was challenged as wrong in law and that challenge was rejected.

Then just finally, if I may, the concurring judgment of Lord Justice Males begins on paragraph 72. He also goes through some of the case law.

At 77 he addresses the TeliaSonera case, I'm going to come back to this but I just ask you to note for present purposes the last sentence of paragraph 77:

"The case demonstrates that what matters is not the carrying out of a test according to rigid rules, but the extent to which the test provides useful and relevant information."

79 summarises Post Danmark 2, at the last sentence of 79:

"These points confirm that an AEC test will not always be necessary or even useful and that the question whether such a test is useful in any given circumstances requires an exercise of judgment, having regard to the limitations of what such a test can show and the

featureless of the particular market."

When he says "these points confirm", he is talking about paragraphs 59 to 60 of Post Danmark 2. As I have submitted, if in light of those points in a given case an AEC test is inappropriate, then so too is any attempt to assess the conduct by reference to some broader AEC principle.

At paragraph 81 he sets out the propositions he derives from these authorities.

82, no obligation to carry out a test.

83:

"While a test has been a useful tool for determining whether there has been abusive conduct in some pricing cases…such a test is not always relevant… that will be the position in particular where the dominant undertaking holds a very large market share together with structural advantages which make the emergence of an "as efficient competitor" practically impossible. However, I see no reason to conclude that this is the only situation in which such a test will be irrelevant. Whether the test is relevant depends on whether and to what extent it provides useful information… This is a matter of economic judgment rather than law."

As already submitted, if an AEC test is inappropriate for those reasons then so too is any

requirement that an effect on AECs be established by other means.

Paragraph 84 is also important, it picks up on what he said about the TeliaSonera case:

"[a]lthough there are rules which indicate how such a test should be performed, those rules must yield to economic reality where that is necessary to ensure information which is comparable to the cost which an efficient competitor would actually have to incur."

This is relevant to Google's next argument, but my submission is that that need to yield to economic reality applies not only to the source of the data, but to the construct of the test, and an AEC test constructed by reference to an AEC that could never emerge would not provide useful information.

Then at 87:

"even an AEC test that supports the dominant firm isn't necessarily decisive, it's capable of being outweighed by other factors."

Again, in my submission that would make no sense if, as Google says, there was always this residual AEC principle that had to be satisfied. What he's saying there, as Lord Justice Arnold said, is that there may be other evidence that may be sufficient to establish an abuse.

This is starkly illustrated by paragraph 89:

"Would, if necessary, go further. The [Tribunal] found that the pricing changes announced by Royal Mail were intended and expected to restrict competition by excluding competitors… from the relevant market, that they did not constitute competition on the merits, and that they did have precisely the anti-competitive effect intended by causing Whistl to suspend its roll out of the end-to-end bulk delivery services… In those circumstances common sense would suggest and it would not be surprising if the CAT had concluded that a hypothetical AEC test conducted after the event would need to say the least to be particularly compelling in the dominant undertaking's favour in order to outweigh these considerations. For the reasons given by the CAT, the test relied on by Royal Mail did not come close to doing so."

Before leaving the Royal Mail case, there is one part of the underlying first instance judgment I would like to show you, because it's relevant to the often repeated passages in the EU case law that Mr Pickford emphasised yesterday about the purpose of article 102 not being to protect Less Efficient Competitors. Those really were at the heart of Mr Pickford's submissions on the AEC principle and they are very helpfully explained

by the Tribunal in the Royal Mail case in terms that are similar, if I may say so, to an observation that the Chairman made yesterday. If we could turn please to Royal Mail in the CAT, it's not in the select bundle, it's authorities 1, tab 51. It may help to go straight to the page, it's page 2752.

Hopefully you can see paragraph 474 on that page. At 474 the Tribunal sets out the two passages from Intel that you saw several times yesterday:

"no purpose of article 102 to prevent an undertaking from acquiring a dominant position, nor does that provision seek to ensure that Less Efficient Competitors remain on the market, thus not every exclusionary effect is necessarily detrimental to competition."

At 475:

"These two paragraphs are linked by the word '[t]hus' and must be read together, it which case they demonstrate two important propositions. The first is that a less efficient competitor cannot simply claim the protection of Article 102 to preserve its position in the market if it is forced to exit as a result of any action on the part of a dominant undertaking. Article 102 does not ensure or guarantee its presence on the market."

476:

"This first proposition does not mean however that the possibility of abuse is inevitably excluded merely because affected competitors are less efficient than dominant undertaking. Where there is sufficient evidence from the nature of the conduct and the other circumstances to demonstrate that the dominant undertaking had engaged in competition other than on the merits and has thereby allowed its conduct to impair genuine undistorted competition, that is a sufficient basis for a finding of abuse unless it is objectively justified. The second proposition, which explains the first, is that no automatic assurance is afforded to less efficient undertakings because the exit of any competitor may be the natural effect of competition on the merits… Such exit may result from the excluded undertakings being unable or unwilling to make an attractive counteroffer. In those circumstances there is no reason of policy to restrain… the dominant undertaking."

478:

"But this does not excuse a dominant undertaking from its special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market… This special responsibility is not merely a threshold to determine whether or not to engage

in an AEC test; it is, rather a minimum obligation on the part of a dominant undertaking in all circumstances."

Those passages in my submission provide a very helpful explanation of what the key propositions from Intel that underpin Mr Pickford's case, what they actually mean. They don't mean that there is some AEC principle that requires in every case, or almost every case, that an effect on AECs be established. They mean that article 102 doesn't guarantee the presence of Less Efficient Competitors.

I would like to turn next please to the Unilever case, which is in the select bundle at tab 10. This is relevant for a number of reasons, one of which is that it involves exclusivity arrangements, this is the ice cream case, the Italian ice cream case. Involves exclusivity arrangements, which it seems to be common ground are what we are dealing with here.

In that case the dominant firm's distributors had imposed exclusivity clauses on retailers, obliging them to obtain all of their ice cream from the dominant firm. If we could start please at paragraph 34, which should be on your page 659. Paragraph 34, this was a preliminary reference case:

"By its second question the referring court asks in essence whether Article 102 TFEU must be interpreted as

meaning that, where there are exclusivity clauses in distribution contracts, the competent competition authority is required in order to find an abuse of a dominant position to establish that those clauses have the effect of excluding from the market competitors that are as efficient as the dominant undertaking and whether in any event where there are a number of contested practices that authority is required to examine in detail the economic analyses produced, where applicable by the undertaking concerned in particular where they are based on an as efficient competitor test."

One sees from first part of that paragraph that the question to the Court of Justice was a broad one, it wasn't just concerned with the test. It was concerned with whether a Competition Authority must establish that the clauses had the effect of excluding from the market competitors that are as efficient as the dominant undertaking, not limited to the AEC test.

Paragraph 36:

"That concept [i.e. the concept of article 102] is… intended to penalise the conduct of a dominant undertaking which on a market where the degree of competition is already weakened because of the presence of the undertaking concerned adversely affects

an effective competition structure."

Mr Pickford criticised a passage in -- I think it was our reply yesterday, that submitted that that was what we were aiming at with our pleaded claim. I think his submission was that was the wrong target, it was wrong test, but actually it's the touchstone of abusive conduct, as set out here in Unilever.

37:

not the purpose of article 12 to ensure that Less Efficient Competitors should remain on the market, competition on the merits may lead to their exit.

But it's qualified, that passage. It's qualified not only by Post Danmark, as we have seen, but also by the following three paragraphs in this case.

38:

"However, dominant undertakings, irrespective of the reasons for which they have such a position, are not to allow their conduct to impair genuine undistorted competition on the internal market."

39:

"Thus abuse of a dominant position could be established inter alia where that conduct complained of produced exclusionary effects in respect of competitors that were as efficient as the perpetrator of the conduct in terms of cost, structure, capacity to innovate,

quality or where that conduct was based on the use of means other than those which come within the scope of 'normal' competition, that is to say competition on the merits".

So that is really important, because what it's saying is that an abuse may be established either where the conduct produces exclusionary effects on AECs or where the conduct was based on a deviation from the normal means of competition. That, in my submission, is a very clear indication that the exclusion of AECs is not in all cases an essential ingredient.

Paragraph 40:

Authorities must consider all relevant circumstances.

Then paragraph 46, which is a point I alluded to earlier:

"with regard more specifically to exclusivity clauses, it is true that the Court has held that clauses by which contracting parties undertook to purchase all or a considerable part of their requirements from an undertaking in a dominant position, even if not accompanied by rebates, constituted by their very nature an exploitation of a dominant position ..."

And that the same was true of the loyalty rebates.

That is the Hoffman La-Roche case.

Then the Tribunal goes on to explain how the case law has been clarified, not least by Intel.

At 51 it concludes:

"in addition to the fact that such an interpretation appears to be consistent with the first clarification provided by the court in… Intel… it must be held that although by reason of their nature exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic."

So we accept both parts of that, we accept that an abuse is not automatic. But it does say that exclusivity arrangements by dominant firms give rise to legitimate competition concerns.

I should mention paragraph 52, because Google relies on this, it says:

"where a competition authority suspects that there has been an infringement of Article 102, and where the undertaking disputes that by reference to the exclusion of AECs the authority must ensure at the stage of classifying the infringement that those clauses were… actually capable of excluding competitors as efficient as that undertaking from the market."

That is relied on by Mr Pickford and I accept that read in isolation it appears to support his case, but it is qualified by what follows. If one carries on --

sorry, not only by what followed but by what went before it.

If one carries on to paragraph 55:

"Where the undertaking in a dominant position produces an economic study… the competition authority cannot exclude the relevance of that study without setting out [its] reasons."

Implicit in that that if it sets out its reasons and those reasons are sound it can exclude the study.

Then 56 refers to the AEC test.

Then 57 is important:

"A test of that nature may be inappropriate, in particular in the case of certain non-pricing practices, such as a refusal to supply or where the relevant market is protected by significant barriers. Moreover such a test is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects; moreover, that method takes into consideration only price competition. In particular, the use by a undertaking in a dominant position of resources other than those governing competition on the merits may be sufficient, in certain circumstances, to establish… an abuse."

So like Post Danmark and Royal Mail, that passage identifies cases in which an AEC test will be

inappropriate, and as already submitted, that reasoning is incompatible with some sort of residual requirement to prove an effect on AECs by other means. That is made plain by the second part of paragraph 57.

Then just finally paragraph 62, the conclusion:

"In the light of all the foregoing considerations, the answer to the… question is that where there are exclusivity clauses in distribution contracts, a competition authority is required in order to find an abuse of a dominant position to establish in the light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct… to exclude [As Efficient Competitors] that those clauses are capable of restricting competition. The use of an [AEC test] is optional."

What that is saying is that if the dominant firm puts forward an AEC analysis, that has to be taken into account but the ultimate question is whether the clauses are capable of restricting competition. The ultimate question is not simply whether they are capable of excluding AECs.

That's Unilever.

Then the final case is Google (Shopping), which is hot off the press, came out on the 10th, the same day

our skellies were due. This is at tab 1 of the select authorities bundle. The case concerned the more favourable positioning and display on Google search page of its own comparison shopping service compared to competing comparison services. The Commission found that to be an abuse of Google's dominant position in search.

The appeal to the General Court was dismissed on all but one of the grounds and the fine was maintained in full.

Then the further appeal to the Court of Justice was also dismissed.

The case is at tab 1, the fourth ground of appeal is particularly important, in fact it's directly on point. It's at page 35 of the bundle. Note this is a Grand Chamber case, so it's as good as you can get from the Court of Justice.

Paragraph 252:

"By the fourth ground… the appellants claim that the General Court erred in law… in finding that the Commission did not have to examine whether the conduct at issue was capable of foreclosing as efficient competitors."

That is the General Court rejecting the very case that Google make before you. This is Google appealing,

challenging, that rejection by the General Court.

253:

"in support of that ground of appeal, the appellants, submit in the first place that the General Court was wrong to hold… that the application of the as efficient competitor test is not warranted in cases that do not concern pricing practices. In so doing the General Court confused the formal as efficient competitor price cost test, the application of which is not always necessary, with the general principle established in the case law of the Court of Justice, in particular… Post Danmark… and… Intel…, according to which the objective of article 102… is not to protect less efficient undertakings. The applicability of that principle is independent of whether or not the alleged abuse concerns pricing, so that it is always necessary to examine whether the conduct concerned is capable of foreclosing as efficient competitors, particularly where that conduct leads to product innovation and leads to an improvement in the choices and quality of the offers to consumers."

Just to be absolutely clear, that last sentence --

THE CHAIR: That's the argument.

MR LASK: -- is the argument, yes, it's not the court's view.

That is exactly the same argument that Google are making on this application. Perhaps not unsurprising, because this was Google's appeal before the Court of Justice so it's something that Google believes in and it's an argument it has been pursuing in several different places, but that is exactly what the court had to consider.

Mr Pickford, I think, said yesterday this case is only really about the sort of burden of proof and what the regulator must establish, depending on what evidence is placed before the regulator. But this introductory section of the fourth ground of appeal, in my submission, shows that actually it's concerned with the fundamental point of law that Google now relies on in support of strike out. Namely: is there an overriding AEC principle that requires that every case or almost every case of abuse must prove a foreclosure effect on AECs?

Then if one goes next to paragraph 263 on page 37, this is where the court is dealing with that argument:

"As regards the question whether Article 102… imposes a systematic obligation on the Commission to examine the efficiency of actual or hypothetical competitors of the dominant undertaking, it follows from the cast law of the Court of Justice cited [at] 163 to 167… that, admittedly the objective of that

article is not to ensure that competitors less efficient than the dominant undertaking remain on the market. Nonetheless, it does not follow that any finding of an infringement under that provision is subject to proof that the conduct concerned is capable of excluding an as efficient competitor."

That is key. That is a straightforward rejection of the cornerstone argument on which Google bases its application for strikeout. It's not limited to the AEC test, it's expressed in general terms, it's directed exactly at the argument that Google now makes and it makes crystal clear that a finding of abuse need not be based on proof of an effect on AECs.

At 265 to 266 the court explains that an AEC assessment may be relevant where a dominant firm submits evidence to that effect and in those circumstances the Commission must examine it.

And 267 and 268 explain why an AEC test wasn't relevant in the circumstances of that case.

At 267:

"the Commission found given that a comparison shopping service's ability to compete depended on traffic that this discriminatory conduct on Google's part had had a significant impact on competition, [because] it had enabled Google to redirect, in favour of its own

comparison shopping service a large proportion of traffic previously existing between Google's general results search page and comparison shopping services belonging to its competitors, without the latter being able to compensate for that loss of traffic by using other sources of traffic, since increased investment in alternative sources was not an economically viable solution."

The Commission there was evidently not applying an AEC principle.

At 268:

"The General Court was therefore right ... to state, without that finding being invalidated by the appellants, which merely make the allegations in principle that it would not have been possible for the Commission to obtain objective and reliable results concerning the efficiency of Google's competitors in the light of the specific conditions of the market in question."

So the Commission found an abuse without applying an AEC test, or an AEC principle. Its reasons, as set out at 267, echo points that we rely on. Rivals cannot break Google's stranglehold on Apple, Apple devices, because it's not an economically viable option to do so.

THE CHAIR: Just a moment ... (Pause)

I'm not quite sure what is being referred to in the

last few lines of 267:

"... without the latter [that's the other comparison shopping services] being able to compensate for that loss of traffic by using other sources of traffic ..."

What's it talking about?

MR LASK: Attracting -- this is the inability of the competing shopping comparison services to replace the traffic that they were previously getting from Google through other means.

THE CHAIR: Yes, what would those be?

MR LASK: I can't answer that question off the top of my head, I'm sorry. We can certainly look into that.

THE CHAIR: No, don't worry.

MR LASK: I don't know what the other options available were, maybe other search engines.

THE CHAIR: Anyway it was something that wasn't economically viable, whatever it was.

MR LASK: Yes.

For completeness, because they are referred to in paragraph 263, I should show you paras 163 to 167, which begin on page 24. Here the court sets out some of the legal principles.

At 164 we see Google's favourite passage: not the purpose of article 102 to protect Less Efficient Competitors.

165, in order to categorise an abuse it's necessary as a rule to demonstrate the use of methods other than normal competition that they have an effect on excluding equally efficient competitors.

Pausing there, that is now about to be qualified, at 167:

"In addition [in addition], conduct may be categorised as ...abuse not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings ..., but also where it has been proven to have the actual or potential effect or even the object - of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits."

THE CHAIR: I think Mr Pickford would say that's a generic description of actually quite a specific situation, in European Superleague that is his prior total roadblock.

MR LASK: That is his exceptional category and I am going to make a number of points on that.

Firstly, the restatement of that principle in Google (Shopping) suggests that it's not limited to a European Superleague type case.

Secondly, it also has to be read against the background of the Post Danmark 2 principles, which set out other circumstances in which it may be inappropriate to apply an AEC principle. So, for example, where the emergence of an AEC is practically impossible, where there is a valuable restraint from Less Efficient Competitors, so this sits with that, it doesn't replace it, that is the second point.

The third point is we say Google's conduct does exactly what paragraph 167 says, it impedes competitors, potential competitors, through placing obstacles in the way of their access to users.

In any event, once it's accepted that an AEC principle isn't absolute, and that there are circumstances in which it may not be appropriate, it's a question of fact and assessment whether it's relevant in any given case, and that question can only be decided on a full assessment of the factual and economic evidence.

Finally, Mr Pickford -- this is where he ended up, that well okay there's an exceptional category but it is exceptional and it's all about prior conduct. He contrasted that with his normal conduct category, where the AEC principle still applies and he said, "Well, the Android conduct falls into the first category, the normal category, where the AEC principle applies".

Firstly, that's a matter for debate, because, as I say, the sorts of effects that are referred to in 167 are the sorts of effects we rely on. But also, when the Commission was examining the Android conduct it didn't apply the AEC principle. So it found that the MADAs were unlawful based on a more holistic assessment of competition. That directly contradicts Mr Pickford's point that the Android conduct falls into a category of conduct that must always apply the AEC principle. The Commission didn't do it and it wasn't criticised for not doing it by the General Court.

It's true that the RSAs were assessed by reference to an AEC test. But all that shows, in my submission, is that the usefulness of an AEC test depends on the type of conduct. That's something that would have to be considered.

Our pleading is based on a proposition that it's not always necessary and it's not relevant in this case. We will no doubt have a fight about that at trial, if it hopefully goes that far.

I do submit that Google (Shopping) settles the point. If there was any doubt prior to Google (Shopping) that doubt is resolved, a finding of abuse is not subject to proof that the conduct concerned is capable of excluding AECs, the relevance of an AEC

assessment depends on all the circumstances and as Lord Justice Males said in Royal Mail, it's a matter of judgment not a question of law.

Just to draw this all together if I may and summarise what we say the correct position is in law. The proposition that article 102 does not seek to protect Less Efficient Competitors is subject to important qualifications. In particular, there may be situations where the structure of the market and/or the strength of the dominant undertaking's position mean that the emergence of an AEC is practically impossible.

Equally, there may be markets where the presence of a Less Efficient Competitor exerts a valuable constraint on the dominant firm which warrants protection.

For these sorts of reasons a finding of abuse need not always be based on proof that the conduct concerned is capable of excluding AECs, whether by reference to an AEC test or by any other means of proof. The concept of an abuse covers any practice which through recourse to means other than normal competition on the merits is capable of adversely affecting an effective competitive structure.

Just for your note, that is neatly set out at paragraph 68 of the ENEL case that Mr Pickford took you to, which is authorities 2, tab 60.

Whether the AEC standard is relevant in a given case depends on all the circumstances and an assessment of the evidence. It's not a hard-edged question of law.

It follows that Google's principal attack on the PCR pleadings, namely that they are defective for failing to plead the foreclosure effect on AECs, is premised on a mischaracterisation of the law.

As I have said, there may well be a dispute down the line about whether in the circumstances of this case it's relevant to examine the effect on AECs. The PCR's position is that it isn't, we see that from the claim form, paragraphs 121 and 123 to 124, and we see it from Latham 1, paragraphs 41 and 352 to 353, but that is not a dispute that need or can be determined at this stage. The relevance of an effect on AECs must be assessed in the light of all the evidence, it is not a hard-edged legal requirement for the reasons already given.

That may be a natural --

THE CHAIR: Yes, I think it is.

(11.03 pm)

(A short break)

(11.15 am)

MR LASK: I turn then to the third part of my submissions on the iOS claim. This is Google's argument that the PCR's

pleading on AECs is defective by virtue of the preliminary AEC tests carried out by Dr Latham.

The starting point is that this issue does not arise if I'm right on the law, because if, as I have submitted, it is not necessary to plead and prove an effect on AECs, then any criticism of the AEC pleading would not be sufficient to strike out the iOS claim, even if such criticism were well founded on its own.

Insofar as the issue does arise, the PCR's position in summary is as follows.

Firstly, the PCR has pleaded effect on AECs in the alternative, it relies in part on Dr Latham's AEC tests but, as Google accepts, it need not be based solely on such tests. An AEC test is only one tool by which to prove an effect on AEC, and it is not compulsory.

Second, even insofar as the pleading relies on Dr Latham's AEC tests, Google's challenge is in substance a challenge to the merits of Dr Latham's methodology. It is therefore a matter for trial, or at best case management, it does not establish a valid basis for strike out.

Thirdly, Google's challenge to the merits of Dr Latham's methodology is in any event unsustainable. Dr Latham's approach reflects the standard economic

approach to AEC tests, and is grounded in the economic realities of this case. There is no hard-edged legal rule that precludes it. On the contrary, as we saw in Royal Mail, the authorities emphasise the need for any legal rules to yield to economic reality so that an AEC test can provide useful and relevant information.

I will now elaborate on those points.

Dealing with the first point. If we could go please to the claim form, at core bundle 2, tab b4, page 37, paragraphs 121 to 122:

"For the avoidance of doubt, it is not relevant to ask whether an as efficient competitor would be able to enter into an agreement with Apple which would replace Apple's agreements with Google since for the reasons explained above ..."

You have those reasons in paragraphs 117 and 118:

"... no undertaking, and in particular no rival seeking to compete with Google, (which would by necessity be starting from a position of low market share in the search sector) would be able to fund payments of the size required to replace those agreements or to shoulder the commercial risk involved in undertaking to do so. If, however, it is relevant to ask whether an as efficient competitor could replace those agreements, that test is not met in any event for the same reasons, namely that

no competitor, no matter how efficient, would in practice be able to do so in view of the size of the payments involved and the commercial risk such a course would present."

122:

"Even if one posits a rival with unlimited funds and an unlimited appetite for risk it would only be profitable for such a rival to seek to replace Apple's agreement with Google if the replacement search engine were able to win a sufficient proportion of searches as a result and to monetise those searches to a sufficient extent sufficiently quickly to cover the amount of those payments. A rival would not in practice be able to achieve such a feat, even if it were as efficient as Google." And Ms Stopford would rely on the expert report of Dr Latham, sections 6.3 to 6.5."

The pleading does rely in part on Dr Latham's analysis, including his tests, but it's common ground that the PCR is not obliged to rely on such tests, whether on their own or at all. In my submission it would be a matter for the PCR to bring forward such evidence as she sees fit to support the plea that no competitor, no matter how efficient, would able to replace Google's arrangements with Apple.

The PCR is not required to have a complete package

of such evidence ready and available at the certification stage. That would obviously be impossible given the information asymmetry between the parties and obviously the PCR's not yet adduced all of the evidence on which she will rely at trial. Of course, if this were an ordinary individual claim there would be no evidence at this stage.

What's the difference with a collective action? The difference is that a PCR has to bring forward an initial blueprint methodology, and that is what's been done.

For what it's worth, Dr Latham's report identifies Bing as the only rival search provider who might have the financial clout to compete with Google, but opines that even Bing would be unlikely to have the ability to replace the Apple arrangements. Just for your note, that is Latham 1, 355 to 356 and Latham 2, 72. That is a flavour of the evidence on which the PCR would wish to rely in this regard, beyond any AEC test that Dr Latham carries out.

Google may well say Bing is not as efficient as Google, not as good as Google, but that is a matter for evidence and a matter for argument at trial.

My second point on this part of the case, that even insofar as the pleading does rely on Dr Latham's AEC tests, the focus of Google's challenge is in substance

on Dr Latham's methodology. It does not establish a valid basis on which to strike out the PCR's pleaded case.

Firstly, Dr Latham's tests are necessarily preliminary and are subject to modification and refinement following disclosure. Again, for your note, Latham 1, 406 to 407, Latham 2, 89. It would in my submission be premature to reach a view on merits of Dr Latham's methodology at this stage, including their compatibility with the applicable legal framework. That the merits of expert economic analysis are quintessentially a matter for trial.

Second, even if Google had identified some material flaw in Dr Latham's proposed methodology, which it hasn't, this would be a matter of case management not strikeout.

Google doesn't frame its challenge as a challenge to the methodology, but that is what it is in substance in my submission. So the case law on the Microsoft principles is applicable. What Google can't do is avoid those principles by dressing up an attack on expert methodology as a pleading point.

Just to elaborate, if I could ask you to turn to the Ad Tech case, which is in select authorities bundle at tab 4. The relevant section begins on page 351. You

see the heading there "The Microsoft test".

You will see some familiar names in this judgment, including Dr Latham.

Paragraph 29:

"Latham 2 sets out the PCR's proposed methodology for determining damages in this case."

So the tribunal was focusing on the damages part of the methodology rather than the liability part. I say that doesn't make any difference to the applicable principles:

"We note ... [a] vast amount of detail will have to be marshalled by the experts to try this claim. Much of that detail is presently unknown to Ad Tech: some may be in Google's possession, some in the hands of third parties; some may not be available at all."

Same position here.

Subparagraph (2):

"It is a task of this Tribunal to manage cases between certification and trial to ensure that extremely complex issues of fact, economics, technology and law are resolved at a trial that takes place promptly and proportionately in accordance with Rule 4... The phrase “blueprint to trial” is particularly apposite, because it obliges the Tribunal to envisage how it proposes to bring complex proceedings to trial. The Tribunal's role

in case management is particularly evident in collective proceedings, beginning with certification but not ending with it. The Microsoft test properly understood is a continuing test at which the blueprint to trial is regularly tested against actual progress... In these circumstances, the Microsoft test looks not to a provision of answers but rather to whether the proposed class representative has asked the right questions as to how the case might be tried and has some idea (if not a final idea), as to how those questions might be answered."

In this case, insofar as it's relevant to ask whether an AEC could replace Google's arrangements with Apple, Dr Latham has articulated an idea of how to answer it.

Moving on to page 355, paragraph 36:

"We consider that Ad Tech has, through the expert evidence of Dr Latham, demonstrated that the averments in the Claim Form are triable and that - should the matter proceed to trial the harm to the class and the loss and damage suffered by it can be quantified."

That is all the PCR has to show when the question is whether the methodology is up to scratch.

Then just finally, paragraph 38 on page 357:

"The Microsoft test is not a barrier to access to

justice. If it were it would be clearly contrary to Merricks. The general rule in collective proceedings, as in the case individual claim is that arguable claims ought to proceed to trial... in the case of collective proceedings, there are a number of additional requirements [set out in the rules]. Clearly, where these requirements are not satisfied an application for a [CPO] should fail. The Microsoft test does not fall within this class of rule a precondition to certification... it

is only when the Tribunal can see no clear way of trying the case that the Microsoft test should act as a bar to certification. Even then, the [PCR] will be given the opportunity to re-visit the claim so as to render it triable... In our view, the approach encouraged by Google in the exchange above would go further than the Microsoft test and act as a barrier to justice by requiring a claimant to meet an unrealistically high threshold for the articulation of their methodology."

Google has conceded that methodological issues are cases for case management and not certification in this case, it obviously doesn't accept that its criticisms of the AEC test are methodological matters, but in my submission in substance that is what they are.

THE CHAIR: Yes.

MR LASK: Then the third part of the third part is that Dr Latham's tests are not in any event precluded by any legal rules. In my submission, Google's criticisms of his methodology are unfounded. Dr Latham has provided a cogent justification for his approach, which is based on a standard economic frame and reflects the economic realities of the relevant market. It's striking that there is no criticism of Dr Latham's approach from Google's expert Mr Matthew. Instead, all we have is a challenge from Google based solely on what it says is a hard-edged and immutable legal rule as to how the test should be conducted.

In my submission --

THE CHAIR: Well, I think that how it's put, it's a strike out of the AEC test. That's why they say it's not methodology, it's a strikeout. There's a definite legal test for what the AEC has to be --

MR LASK: Exactly.

THE CHAIR: -- and doesn't matter whether it's advanced by Dr Latham or in a pleading or anywhere else, if it's wrong it's wrong.

MR LASK: Yes. But that's my point. They said it was a hard-edged immutable legal rule. As to how the AEC test or the AEC standard or principle, how it needs to

be applied.

THE CHAIR: As you said yourself, we are now in the world where they are correct that you do have to apply the AEC principle --

MR LASK: Yes.

THE CHAIR: -- and we are now testing whether what is put forward in the claim form can meet the principle.

MR LASK: Yes. As we saw, the claim form is unsurprisingly pleaded in general terms. It pleads that there is no competitor, no matter how efficient, no matter how wealthy, no matter how willing to take risks, there is no competitor that could replace Google's arrangements with Apple. That's the pleading.

So it's difficult to see how that fails any formulation of the AEC principle. If it's accepted by the Tribunal that the principle that there is an AEC principle and that it requires proof of an effect on a hypothetical or an effect on competitors that are as efficient in all respects or almost all respects. That the pleading meets the point, because the pleading says however efficient.

MR DAVIES: Doesn't that depend on how you define "efficient" and the dimensions of that. I mean, if you really are effectively reproducing Google, so you -- or even going beyond, not only have unlimited funds,

unlimited appetite for risk but for example had the same ability to monetise, and crucially, as Mr Pickford was saying yesterday, can achieve the same volume, is that the difference, that last bit? There must be some difference, because otherwise by definition a perfect clone of Google could replace.

MR LASK: That's certainly our position, that there has to be some difference. Dr Latham explains why as a matter of standard economic approach there has to be some difference and Google has stepped back from the proposition that the AEC has to be a clone, but --

THE CHAIR: I don't think they say they have stepped back, they say they have never said that.

MR LASK: I accept that, I didn't mean to suggest otherwise. They are not adopting that position, but they still say that what Dr Latham has done is wrong, because the AEC that Dr Latham posits is not similar enough to Google, not as efficient in a sufficient variety of respects, if I can put it that way, but the point I was making a moment ago is that that's no criticism of the pleading. Because the pleading goes further than Dr Latham's AEC tests. The pleading says, "No competitor, however efficient, however risk averse, however wealthy, could do this".

MR DAVIES: Do you say "no competitor" or "no conceivable

competitor", are you talking about actual competitors or hypothetical competitors?

MR LASK: Rather than try and recall the exact wording, let me get the claim form out if I may, core bundle 2, B4, pages 37 and 38:

"[n]o competitor ... would in practice be able to do so."

It's not purporting to identify a real world competitor, but it is saying in practice no one would be able to do this.

MR DAVIES: 121 is saying they wouldn't have the ability to fund it.

Then 122 is saying, even if they could fund it, there is still a difference and the difference, I think, is the ability to win a sufficient proportion of searches and to monetise those searches. So those two elements are where the difference in the hypothetical competitor and actual Google lie, is that right in 122?

MR LASK: 122 doesn't have to rely on a competitor that is of lower quality than Google, I accept that no one says there should be a clone, so I accept it has to reflect some difference between the hypothetical competitor and Google.

But 122 isn't tethered to any particular formulation of the AEC test. Yes, it relies for present purposes on Dr Latham's preliminary analysis, but what it's saying

is even a rival with unlimited funds and an unlimited appetite for risk wouldn't be able to do it. And it is not excluding from that formulation a rival that has the same quality as Google.

If Google is right as to how the AEC test or the AEC principle has to be applied, then the PCR is going to have to bring forward different evidence from Dr Latham's current AEC tests, if Google are right that the AEC tests have got off on the wrong foot, then the PCR will have to bring forward other evidence to make good this pleading, but in those circumstances it is not the pleading that is deficient, it's Dr Latham's preliminary analysis.

I was going to take you next to Dr Latham's first report, which is core bundle 3, tab F27.

THE CHAIR: Just on that, a criticism being made, which wasn't pressed very hard, that procedurally you shouldn't really plead by incorporating by reference Dr Latham's evidence, but nonetheless you have done that.

So saying, "Well, it's not the pleading, it's just the evidence", when the pleading has incorporated the evidence by reference, that's a little bit breaking the rules and then taking the benefit of it, isn't it?

MR LASK: Well, I accept that the pleading incorporates the

evidence, but what I would say is the pleading doesn't have to rely solely on the evidence that is cited, the Dr Latham evidence.

That is all the PCR has at this stage, because we are right at the beginning of proceedings and there is an information asymmetry. So the pleading is citing what it has, but that doesn't mean it won't have different evidence, additional evidence, evidence that shows something else.

THE CHAIR: No, but my question was saying that the pleading is fine and any problem is with the evidence doesn't carry the same conviction when the pleading is incorporating the evidence by reference.

MR LASK: I accept the point, but in my submission it doesn't take Google all the way, because even if it is right in its criticism of Dr Latham's methodology, what that means is the PCR can't rely on the existing tests to support the pleading. It has to find some other evidence, but it would be wrong in my submission to say, "Well, the evidence that the PCR has at this very early stage is wrong, for the reasons Google gives, and because she doesn't have any other evidence at this stage [because there hasn't been any disclosure yet], her case has to fail".

THE CHAIR: While we are on this and since you have

mentioned information asymmetry, one of the points that Mr Pickford made which you haven't dealt with in covering the law is the point about legal certainty for the dominant undertaking. So Mr Pickford's point, I think, which does have some support in the authorities, is the advantage of the AEC test is that the dominant undertaking can do it because they have the information to do it and that doesn't apply to a less efficient competitor test, they don't have the same certainty. So what is your position on that?

MR LASK: So as you say, the legal certainty point is acknowledged in the Court of Appeal case. In Royal Mail.

THE CHAIR: And in the European authority.

MR LASK: And in the European authority. There isn't sufficient, at least not in Royal Mail, to make the AEC test indispensable or even decisive where it's carried out. So it's a valid consideration. And it may be a reason in any given case for arguing that an AEC test ought to be conducted but it doesn't go as far as Google needs it to go if it doesn't establish that an AEC test must always be conducted which Google accepts, or even the (inaudible) principle must always be applied.

THE CHAIR: The dominant undertaking might be able to say to itself: even without AEC test, I can at least ask myself

what the application of the AEC principle would be because, effectively, they are asking how it applies to their own business.

MR LASK: Sure.

THE CHAIR: And if you step away from that, then they don't have that comfort anymore --

MR LASK: I don't think we would accept that Google is incapable of assessing its conduct and potential for its conduct to effect competition only by reference to an AEC principle. There is in Latham 2, if I can find the reference, there is mention of internal Google evidence where it's assessing the ability of -- I think it's Microsoft, to replicate Google's agreement with Apple and I think the view is expressed that Microsoft can never do this. I will be corrected if I have misremembered that.

THE CHAIR: That rings a bell with me as well, so I think you are right.

MR LASK: I think it's there somewhere and that, in my submission, goes at least some way to answering your point, sir, because it shows that, actually, Google is capable of assessing its conduct by means other than the AEC principles.

THE CHAIR: Okay, alright, thank you. You were just going to Dr Latham.

MR LASK: I had a spillage.

Dr Latham. I will show you what he says about the AEC test, and how he carries it out, please. It's core bundle 3, tab F/27. I would like to start on page 605. On 605 you'll see the heading:

"The as efficient competitor Test as a tool to assess exclusionary effects."

Can I ask you, please, to read paragraphs 302 to 305. (Pause)

So from Dr Latham's perspective and his experience the AEC test must also allow for some advantage on the part of the dominant firm.

Then page 616, section 6.3.3, Dr Latham explains how he would conduct an AEC test and he provides the preliminary assessment, noting that he's unconvinced that an AEC test is helpful. That's paragraph 357. And then 358 identifies two conditions for a rival to be able to out-bid Google:

"For a rival search engine provider to out-bid Google for the default position on all Apple devices, two conditions need to be satisfied. (a) ... need to compensate Apple, such that Apple is no worse off than under its current agreement with Google; (b) it would need to at least break even from obtaining the default position."

And then at 359 to 360, he explains the formula that he uses. 361 to 363 explains how he would give effect to the standard economic approach:

"As explained above,

the as efficient competitor considered in the AECT is typically assumed to be efficient in terms of its cost structure, not in all relevant respects. The dominant firm is always assumed to have some advantage, leading to a share of must have or non-contestable demand... In light of this, I set out two As Efficient tests for a competitor that may have an equally attractive consumer facing offer but perhaps lacks the brand recognition that Google has. First, I consider a scenario where the competitor can generate the same level of monetisation per search as Google then go on to consider a more realistic scenario in which a competitor has a lower level of monetisation per search compared to Google. I use the data available to me... In both cases the necessary minimum share of Google's search queries on Safari an as efficient competitor would need to aquire to make outbidding Google feasible, is prohibitive."

And 364 is really the focus of Google's criticisms:

"In this scenario -- "

This is the first test, the as efficient on monetisation case:

" ... I consider an “as efficient on monetisation” competitor to Google. This implies that the rival search provider can monetise each search as efficiently as Google, such that ..."

Then you see the equation:

"However, the rival search provider would be less preferred than Google by consumers, as reflecting factors such as brand loyalty and recognition, less informative search results, due to less accumulated training data, or more paid relative to organic search results. This would likely be the case, as no entrant could match Google's search volume, and so in order to have equivalent revenue per search, would need to sacrifice the quality of search. Because of this lower quality of search, an as efficient on monetisation competitor would, in expectation, capture only a limited share of Google Safari search traffic from obtaining default status, as their lower quality search results would likely cause some users to switch search engine to Google or another rival. Google's built up brand image, in part obtained from its default positions, is also likely to induce some ... switch back."

This is an AEC that can monetise as efficiently as Google but is less preferred than Google by customers in some respects and he explains why it has to be the case

in his view. Because in order to be as efficient on monetisation, the rival would likely need to have more paid search results relative to organic. Because no entrant would have the same volume of search results as Google. So that is his view as to the appropriate approach.

No one has suggested that those are unrealistic assumptions. As I said, there is no criticism from Mr Matthew, Google's expert, of the approach Dr Latham has taken.

365 to 366 explains the formula that Dr Latham uses and essentially what that formula does is it calculates the minimum share of traffic that an AEC would have to capture in order to meet his two conditions. So in order to compensate Apple, so that Apple is no worse off, and still break even. Paragraph 367 explains the inputs.

Pausing there, the lower quality of Dr Latham's AEC forms no part of these inputs into the formula that produces the minimum shares which we see over the page in table 1. Google appear to dispute that in the skeleton but it's mistaken and it's clear from paragraph 367, where Dr Latham explains that all of the variables that he has to populate are based on Google's own characteristics. As set out in the bullet points at

367. For the purposes of producing his minimum shares, he is not assuming lower quality. That comes in at the stage of his conclusions.

THE CHAIR: Okay.

MR LASK: So the output of his test is at table 1 on page 619. This contains the minimum share that an AEC would have to capture under three assumed margin scenarios, in order to compensate Apple for the loss of Google's 12 billion in default arrangements and in order to break even. So you see the percentages, 47 per cent, 41 per cent, 37 per cent.

And at 377:

"Data from Yahoo's acquisition of default status on Firefox suggests that competitors would not capture anything like this share of search traffic as a result of securing default status. As discussed in more detail in section 5.3, a loss of default status on Firefox appears to have resulted in a 23 per cent decline in Google's share of traffic ... Overall, I consider, based on the data available to me, that an "as efficient in monetisation" competitor would be unable to profitably match the payments Google make to Apple for default status."

So whilst the lower quality of hypothetical AEC doesn't affect the input of Dr Latham's formula, we

accept it informs his overall conclusion at 377 to 378. So when he is thinking about would this hypothetical rival be able to capture sufficient share, he's taking into account his assumption that its search results would be of a lower quality than Google. We accept that.

But that is significant because it means even if Google were right in what they say and what's required on an AEC, what that would require is for Dr Latham, when he develops his analysis post-disclosure, to reconsider that conclusion on the basis of a different AEC, an AEC that was as efficient on quality or as good on quality and as efficient on monetisation. What it doesn't require is for the whole test to be broken down and built up again. It doesn't require my change to the methodology or formula.

Now Dr Latham is quite clear that it would be inappropriate to posit an AEC of that nature because it would be unrealistic. And we saw paragraph 364 earlier. I would also like to show you Latham 2, please, at tab F30 of core bundle 3. Page 907. You will recall at paragraph 364 of Latham 1, he said it's unlikely that a rival would emerge who could monetise searches as efficiently as Google and have the same quality of search and I have said that is not contested. And then

here, Dr Latham defends Google's criticisms of that. If I could just ask you to read paragraphs 86 and 87.

(Pause)

So Dr Latham has interpreted Google's position as being -- you need a claim. That is what Dr Latham understands Google to be saying that criticises him. Google have now said that's not its position. There is, in my submission, a narrowing of the differences between Google and Dr Latham. Common ground that it's right on this formulation of the test for the AEC to be as efficient on monetisation. It's common ground that the AEC shouldn't be a clone. And the only difference is that Google says: but it should have the same quality search results and Dr Latham says that is unrealistic. And that is quite a narrow difference and as I say, it goes not to his formula, it goes to his conclusions. It's a narrow difference, it's a very narrow difference on which to strike out a claim and in any event, Dr Latham is justified in his position. He has provided a cogent explanation of his approach that reflects what he regards as standard economic methodology and it reflects what he regards as the economic realities.

MR DAVIES: Just on a point of clarification, am I right in thinking that Dr Latham's AEC in the Latham 1 that we just looked at, either assumes equivalence on

monetisation or on search quality because I think he's saying if they were to monetise as much as Google, as in the sort of main case, their search would be less attractive to consumers, but if they made it equally attractive to consumers, they would have to do that by reducing the monetisation?

MR LASK: Exactly. Those are the two tests. The first one is as efficient on monetisation but lower on quality and the second is equal on quality, less efficient on monetisation.

MR DAVIES: Thank you.

THE CHAIR: It just feels a little bit like saying they are less good on quality, it's just exactly the anthesis of saying that they're as efficient. I mean that's exactly what we are concerned with here, is search quality.

I understand saying there is some non-contestable demand because of what you might call sheer brand loyalty, mere brand loyalty or just because of a variety of other reasons but those might be reasons unrelated to what you would normally call efficiency. Saying: we can't get the scale we need because our search just isn't as good, just seems like the antithesis of being equally efficient.

MR LASK: I accept the hypothetical rival, on his first test, is not as efficient as regards quality. But it is

as efficient as regards monetisation.

THE CHAIR: Yes.

MR LASK: Able to make money as efficiently as Google. It doesn't have the same quality of search results. So I do accept that. And Dr Latham's reason for adopting that approach is that he considers it unrealistic to have even a hypothetical competitor to be as efficient on both respects. So he is saying: from an economic perspective, this is how I think it needs to be done and as I've said, that's not contested from an economic perspective, it's only contested from a legal perspective. And what Google says is: well now that's just wrong in law. Pausing there, it does sort of take me back, really, to the first part of this argument, the legal argument, which is, you know, it's a strange situation to be in, where Google are saying: well first you have to show as a matter of law that this conduct is capable of excluding As Efficient Competitors, regardless of whether any such competitors could really emerge in this market. And secondly, when you are testing that, whether by test or some broader principle, you have to assume a rival who couldn't emerge because that's what's implicit in the challenge of Dr Latham's approach. It's uncontested that such a rival is unrealistic, so it has to be Google's argument that even

if it's unrealistic, that's what you have to do. As a matter of law. And it does have a feeling of, well, how can PCR or any claimant any win in that situation? How can we ever get to trial if that really is the law? And that would be a surprising outcome, in my submission.

THE CHAIR: You mean in a case where an AEC can't emerge?

MR LASK: Sorry?

THE CHAIR: In many cases an AEC could emerge. Lots of these cases we have looked at where they could, so there's no problem there.

MR LASK: No, but I am talking about this sort of case. A case where, as I say, for present purposes we have to assume that Dr Latham is right when he says an AEC that was as efficient on quality and monetisation is unrealistic. The proposition is: never mind that, that's what you have to do. And you have to do it now or you don't get to go to trial.

THE CHAIR: Mr Pickford's other point on this part of the case was that it's absolutely fine for the dominant undertaking to be efficient in terms of search quality. That's the whole point. They are entitled to do that and they are entitled to develop a commanding position by being efficient. So when you come to say: what is the AEC? Say: well they are less efficient. Why are

you taking out of account a dimension of efficiency which is completely legitimate?

MR LASK: What Dr Latham is trying to do, and recalling that he doesn't think an AEC test is particularly informative but what he is trying to do if he is going to do an AEC test is construct one which reflects economic reality. And so it's not a judgment on whether it's good to be efficient on quality, or bad to be efficient on quality, it's not a criticism of Google for being good on quality but simply it's a way of testing whether a hypothetical but realistic rival could replicate Google's agreement with Apple. That's what he's trying to do, reflect economic reality because otherwise, how does the test help you? How is it meaningful if you are testing Google's conduct against a hypothetical rival that could never actually emerge? What's it showing you? I think Mr Pickford said yesterday: well, actually, it is meaningful because it would show you the test -- depending on the result, it would show you that this is rational conduct from Google's perspective, so you could infer it's not doing anything wrong. But in my submission, the fact that a domestic firm's conduct makes commercial sense from its own perspective or at least is profitable, doesn't imply that it's necessarily lawful. Of course, abusive conduct is always likely to

be commercially advantageous for the dominant firm. The question is whether it distorts competition.

I wanted just to make two submissions on why we say Google's position on the law is unsustainable. The first is really a point I've just alluded to which is that Google fails to explain, in my submission, how an AEC test that is detached from economic reality would be informative. And the second is that it would be surprising, in my submission, if the law were so inflexible as to require an AEC test or standard that is detached from economic reality. It would, at the very least, in my submission, require an unambiguous statement to that effect in the authorities. And Mr Pickford hasn't identified any such statement, in my submission. On the contrary, where the courts have considered these matters in any detail, they have emphasised the need for legal rules to yield to economic reality.

And I will, if I may, take you briefly back to Royal Mail in the Court of Appeal. And actually in the CAT, but Court of Appeal first because it's directly on point. If Royal Mail and the Court of Appeal is in the select bundle at tab 18, it should be page 1159. Paragraph 76. This is Lord Justice Males' judgment. He's looking at the EU case law. He starts with

Deutsche Telekom and at the end of paragraph 76 he said:

"Accordingly, the case holds that, in an appropriate case, a regulator is entitled to rely upon an AEC test for a finding of abuse and that, when such a test is carried out, it should be based on the dominant undertaking's costs."

And then over the page, paragraph 77, he deals with TeliaSonera and he says:

"TeliaSonera shows, however, that this is not an inflexible rule."

It was also a margin squeeze case ... The question arose whether an AEC test had to be based solely on the dominant undertaking's costs or whether it could be legitimate to base the test on the costs incurred by competitors. The [Court] held at [41] that the:

"The test should, as a general rule, be based on the costs of the dominant undertaking, but at [45] that there

could be circumstances where the costs of competitors were relevant."

It gave as examples cases where

(1) the costs structure of the dominant undertaking is not precisely identifiable, (2) the dominant undertaking uses an infrastructure whose production cost has already been written off and

(3) Particular market conditions mean that the level of the dominant undertaking's costs is attributable to the competitively advantageous situation in which its dominant position places it."

Then next sentence deals with the first example but following that:

"In the second and third examples, to use the dominant undertaking's own costs would be possible, but to do so would produce a result which was not “economically comparable to the costs which its competitors have to incur”. Accordingly, although the judgment goes on... to say that it is only where use of the dominant undertaking's own costs is possible that the costs of competitors should be used, the examples given demonstrate that this is too narrow a view. Thus, TeliaSonera holds that, although in general an AEC test should be carried out by reference to the dominant undertaking's own costs, there are exceptions to that principle which are necessary to ensure that the test produces an economically valid comparison between a dominant undertaking and the notional “as efficient competitor”. The case demonstrates that what matters is not the carrying out of a test according to rigid rules but the extent to which the test provides useful and relevant information." [as read]

In my submission, by the same token, it must be acceptable -- for the same reasons. It must be acceptable in principle to posit a hypothetical rival that has lower quality search results, if that is realistic, and if it's needed for the test to provide useful and relevant information.

MR DAVIES: When you say for the same reasons, do you mean both number 2 and number 3 in the list -- in that paragraph?

MR LASK: Well, it's not immediately obvious how number 2 -- maybe number 2 does apply -- yes. I do rely on both of them. But, frankly, that would require Dr Latham's opinion rather than mine. Yes, at least in principle, I say they both apply.

Then at 84 -- this feeds into his paragraph 84, where Lord Justice Males says:

"Although there are rules which indicate how such a test should be performed, these rules must yield to economic reality where that is necessary, to ensure information which is comparable to the cost which an efficient competitor would actually have to incur."

Or as the Advocate General put it in Post Danmark:

"The issue of price based exclusionary conduct cannot be managed simply by applying some form of mathematical formula based on nothing more than the

price and cost components of the businesses of the undertakings concerned."

One sees this in action in the first instance judgment in Royal Mail which is in -- it's not in the select bundle, it's in authorities 1, tab 51.

I would like to start, please, at paragraph 534 which I think is on page 2768 of the bundle. Do you have that?

THE CHAIR: Yes.

MR LASK: You see the heading "Issue 3. Is an as-efficient competitor an appropriate concept in this case."

It's a matter I was addressing you on earlier. I acknowledge that in this part of the judgment, the Tribunal is looking broadly at whether it's appropriate at all to assess the case by reference to an AEC but in the course of doing that, it's also considering how would you do it. And, actually, that's one of the reasons it ultimately concludes that you shouldn't do it because it's a bit meaningless and it says at 532:

"There are two reasons for thinking that the concept of an AEC is in any event inappropriate. The first relates to the scale of entry and the second to certain advantages and disadvantages that have accrued to Royal Mail."

And it deals with those two issues in turn. On the scale of entry at 534, it deals with some criticisms advanced by Mr Parker, who was Whistle's expert, in respect of Mr Dryden's report. Mr Dryden was Royal Mail's expert. And Mr Parker is saying that Dryden's gone wrong because he's posited a rival that has smaller coverage than Royal Mail and so that's a less efficient rival. You see that at 534. The entrant is not as efficient as a dominant firm. And at 535 to 536 you see Dryden's response and at 537:

"Accordingly, we conclude that, in this particular context, the concept of AEC, interpreted as a clone for Royal Mail, is not appropriate and that what is being tested for is a possible profitable entry of some other type of entrant that is as efficient as Royal Mail in a more localised sense."

So yes, it's rejecting the clone approach which Google doesn't adopt. But it's going beyond that. It's saying: you need to look at -- it's essentially accepting Dryden's approach and saying: you do need to look at efficiency on a more localised approach.

And then under the next heading "Advantages and disadvantages of the USO":

"Mr Parker argued that Royal Mail enjoyed certain advantages that would not be available to any realistic

entrant and proposes that, instead of an AEC, one should examine instead the profitability of entry of what he called a slightly less efficient operator ... who did not enjoy these advantages."

And Royal Mail's response to that at paragraph 540 was to say: well, but we have disadvantages as well as advantages because of our obligations. And then at 542:

"The question arises how to treat all these elements of cost advantages and disadvantages. In relation to Royal Mail's VAT advantage, we are not persuaded by Mr Dryden's argument that it was not necessary to consider the VAT advantage because "an AEC would be, by definition, as efficient as Royal Mail and therefore also possess the tax advantage.""

So what Mr Dryden was saying is you can leave the VAT advantage out of account. Even though, in reality, only Royal Mail has that VAT advantage, for the purposes of the AEC test, you assume that everyone has it, you assume that the hypothetical rival has it and therefore it cancels it out. The Tribunal says:

"In our view, this elevates logical consistency and technical purity above the reality that the VAT exemption is conferred only on the universal service provider, Royal Mail. It thereby runs the risk of making a false positive and allowing actions that could

foreclose potentially beneficial entry."

And that really is bang on point. The Tribunal is considering exactly the sort of problem that we are faced with with Google's argument and it's saying: we need to get real, we can't elevate technical purity over economic reality. That is entirely consistent with what the Court of Appeal says on appeal.

So the high water mark of Google's case on this issue is the Android judgment which is in your select bundle, tab 13. And it's page 829, paragraph 642:

"The AEC test concerns a competitor which hypothetically is equally efficient and which, it is assumed, charges customers the same prices as those charged by the dominant undertaking, while facing the same costs as those borne by that undertaking [TeliaSonera]. Furthermore, in addition to price, in order to be considered 'as efficient' as the dominant undertaking, that hypothetical competitor must also be as attractive to that undertaking's customers in terms of choice, quality or innovation."

"Or", not "and" and in my submission, all that means is that the AEC should be as attractive in some respect other than price. Choice, quality or innovation, not in every respect. I'm not sure there's a huge amount between us because I don't think Mr Pickford was saying,

ultimately, that it has to be as efficient in every respect because that would suggest a clone.

THE CHAIR: No, but I think he was saying that should be "and."

MR LASK: He was saying if you trace back through the authorities, he says it should be "and", but he doesn't need to go that far, if he accepts that it doesn't have to be as efficient in all respects. He doesn't have to show his hand and if he is submitting it has to be efficient in all respects, then we are in clone territory which it seems to be common ground, isn't the appropriate approach.

But in my submission -- and unlike the other authorities Mr Pickford relied on, this is the only place, I think I'm right in saying, where the EU courts are actually looking at the how you do the test. And it's not difficult to comprehend what is being said there. It's saying that where the AEC standard applies, a hypothetical rival must offer customers some benefit in addition to equal efficiency and price, in order to warrant the protection of Article 102.

And when Dr Latham does his first test, he leaves open the possibility of as efficient in some respects other than monetisation. All he's doing for the purposes of that test is assuming less efficient in one

respect which is the quality of the search results. There could be other benefits that a search engine brings to the table. It could have -- privacy provisions, or other features that customers like. So if I'm right on how 642 should be interpreted, then Dr Latham's analysis is entirely consistent with it and I say I have to be right, given what we have seen in Royal Mail.

And just standing back -- and we've submitted this in our skeleton at paragraph 35 -- the PCR's complaint here is that Google has, by its conduct, deprived its rivals of the scale required to be as attractive to customers. And the notion that that complaint must be tested by reference to a rival that is as attractive to customers, is perverse, in my submission. And for the reasons given, it has no basis in law.

That was all I was proposing to say on the first part of the case, the iOS conduct.

THE CHAIR: Yes, okay.

MR LASK: Proposing to move now to the counterfactuals.

THE CHAIR: Yes.

MR LASK: It's the first step in her case on causation. The PCR pleads that competing search engines would likely have been able to secure a higher market share in the absence of the Android and iOS conducts. The plea is

supported by Dr Latham's preliminary analysis and by several real world examples in which rival search engines have secured a high market share when given the opportunity to do so. The analysis is obviously subject to refinement, following disclosure, as Dr Latham makes clear, but in my submission, it provides a sound and evidence based foundation for the PCR's plea.

Google nevertheless asserts that the PCR's plea is defective and should be struck out. In fact, it would, in effect, strike out the whole claim because you would have liability but no arguable case on causation. The case would die.

Before addressing the basis for Google's assertion, I want to make three preliminary observations. Firstly, the PCR's plea concerns the counterfactual. Identifying what would have happened in a world without Google's abusive conduct is necessarily hypothetical. It depends on disclosure that's not yet been given and economic analysis hasn't yet been carried out, so there are real practical limits to what can be pleaded at the outset of a claim. We are not pleading past facts.

Second, the authorities reflect this and indicate that the standard that must be met by a counterfactual plea at this stage is a modest one. If I could show you first Merricks, please, which is in the select bundle,

tab 19, page 1178. The Tribunal may be familiar with the Merricks case which was --

THE CHAIR: Yes.

MR LASK: -- leading Supreme Court case on collective proceedings. What it's doing at 1178, it's beginning its analysis of the Tribunal's refusal to certify, on the basis that it was just going to be too difficult to work out the loss. And what Lord Briggs starts by doing is sort of comparing the collective proceedings regime with the normal requirements of anyone bringing a claim. At paragraph 46 he says:

> "The issues which gives rise to the forensic difficulties which led to the CAT's refusal of certification in the present case all relate to the quantification of damages, both at the class level ... and at the individual level... In this follow-on claim, Mr Merricks and the class he seeks to represent already have a finding of breach of statutory duty in their favour [which we have in relation to Android but not in relation to iOS]. All they would need as individual claimants to establish a cause of action would be to prove that the breach caused them some more than purely nominal loss."

That is causation:

> "In order to be entitled to a trial of that claim,

they would (again individually) need only to be able to pass the strike-out and (if necessary) summary judgment test: i.e. to show that the claim as pleaded raises a triable issue that they have suffered some loss from the breach of duty."

He is dealing there with individual claims but there's no suggestion that there is any different standard in relation to collective proceedings on this point. And indeed at 59 -- I don't need to take you to it -- Lord Briggs says that the CAT rules, 41 and 43 on strike out summary judgment, apply to collective proceedings, as they do to individual claims.

And then at 48, Lord Briggs emphasises that when you are having to work out what happened in the counterfactual, you may have to resort to informed guesswork. Now, he's specifically now talking about quantification which is obviously one step further along than causation. But in my submission, the same point applies. One has to allow for the difficulties when carrying out a hypothetical exercise, particularly a very early stage in the proceedings and before there's been any disclosure.

And that is consistent with what the Tribunal said about this issue in Ad Tech which is at tab 4 of the select bundle and which Mr Holmes took you to yesterday.

Tab 4. And the relevant passages begin on page 348. Paragraph 18:

"An arguable claim.

"Google does not contend that any of the three abuses set out above cannot arguably be pleaded. Rather Google contends that Ad Tech's case is defective because no sustainable "counterfactual case" is pleaded."

In paragraph 22, after dealing with the case law:

"We endorse all that has been said about the importance of "counterfactuals" which are an important tool in competition cases for the reasons given above."

THE CHAIR: Sorry, where are you reading? 22.

MR LASK: Sorry, it's the bottom of 349:

"More generally in analysing the effects on a market of what are alleged to be anti-competitive practices [it] must be pleaded with sufficient specificity. What constitutes sufficient specificity is a matter that turns on the case that has to be pleaded."

And then it says:

"Thus, where (for example)an allegation is pleaded that a term in an agreement is anti-competitive, it is necessary to say something about what would have happened in a likely and realistic "counterfactual" world, in the absence of this infringing term."

We are obviously in a slightly different place

because we are not now looking at liability, we are looking at causation. So we are not looking at infringement, we are looking at the effects of the infringement but I don't seek to make any point on it.

So you need to say something about what would have happened in the counterfactual world:

"It's a necessary averment to say that in this "counterfactual world", the competitive situation would have been different on the relevant market."

And then at 23, it deals with the specific pleading in that case:

"The Claim Form pleads a single or continuous infringement comprising three abuses, each of which are said to comprise individual measures amounting to "sub-abuses"."

It says (at [265]):

" the counterfactual requires removing the infringing conduct and assessing how the relevant markets would likely have operated without it."

So that's the pleading. And then the Tribunal says:

"For each allegation of discrimination or preference therefore, the pleaded counterfactual world is a world where the discrimination or preference did not take place, where all similarly placed participants were

1 treated alike, and the market operated ... indiscriminately.
2 In a sense, the difference between the “real world” (where
3 there is discrimination and preference) and the
4 “counterfactual world” (where the discrimination or
5 preference is obviated is contained in the
6 description of the abuse. We accept the Claim Form
7 could have more explicitly explained the relevant
8 counterfactual(s), which were expanded upon in Dr Latham's
9 reports. However, having regard to our comments in the
10 paragraph above, we consider the PCR's counterfactual to
11 have been sufficiently pleaded for Google to know the
12 case it has to meet.
13 "Google's suggestion --"
14 This is paragraph 25:
15 " ... that it is necessary for Ad Tech to specify how the
16 non-discrimination could have been avoided by Google is not, in
17 our judgment, something that needs to be pleaded. In
18 our view, the authorities above support the contention
19 that there is no requirement for a counterfactual to
20 take a particular form."
21 So what's required of the pleadings in relation to
22 a counterfactual is a modest requirement. That's what
23 I draw from these cases. And the key question, is
24 whether the pleading is sufficient to allow the
25 defendant to know the case it has to meet.

My third preliminary observation is that the PCR's counterfactual plea is intuitive and it's supported by factual evidence. It is that the rivals would have increased their market share in the counterfactual.

Now, the focus of Google's challenge again is on Dr Latham's analysis, the analysis that he has proposed as part of his proposed methodology. But working out precisely what would have happened in the counterfactual is a matter for trial. It requires disclosure that hasn't yet been given and expert analysis that hasn't yet been carried out. That is why Dr Latham is clear that his analysis is provisional and subject to disclosure.

And in my submission the PCR is not required at this stage to plead a precise counterfactual. All she is required to do is articulate the case that Google has to meet and identify a triable issue. And that is what she's done. I'm going to take you to the claim form again. Before I do, because the attack is, as I say, focused on Dr Latham's analysis, I would like to show you quickly the Gutmann case at tab 14 of the select bundle. Tab 14, page 928, please. These are, I believe, Lord Justice Green's observations on the Microsoft test which, as we have seen, is the test that is applied when considering what's required of an expert

methodology at this stage. And paragraph 54:

"The test is counterfactual: The methodology is based upon a counterfactual model of how the market would have operated absent the abuse. It is quintessentially hypothetical and, for this reason, will use assumptions and models and, frequently, regression analysis. It is therefore not a fair criticism of a methodology that is hypothetical; though equally, the CAT will expect to see "some" factual basis for the assumptions and models deployed."

55:

"Absence of disclosure:

"The methodology is subject to a certification assessment prior to disclosure and is thereby necessarily provisional and might, properly, identify refinements and further work to be carried out after disclosure. In many competition cases there will be a distinct informational asymmetry between a claimant and a defendant which might be exacerbated and aggregate damages top down cases, where the relevant information might predominantly be in the possession of the defendant. At the certification stage all that might be possible is for the class representative to advance a methodology identifying what might be done following disclosure. This is why in Microsoft, the Court

referred, in prospective terms, to there being “some evidence of the availability of the data to which the methodology is to be applied."

Then you see at 56, "Issues not answers."

That's what was to be identified at the certification stage by the methodology.

So the authorities impose a relatively modest standard as regards the pleadings and the authorities recognise that when you are dealing with a hypothetical, there is really only so much at this early stage in the proceedings that an expert methodology can do.

So against that background, if we could pick up the claim form, please, core bundle 2, tab B4. Page 38. Paragraph 124:

"By foreclosing access to the market to competing general search services, through the arrangements described above, Google deprived rivals and potential rivals of the scale they require to develop as effective competitors."

And then 134 on page 41:

"As Dr Latham's explains, absent Google's arrangements concerning Android and iOS, as set out above, competing search engines would likely have been able to secure a higher market share. Dr Latham relies for this conclusion on a number of real world examples."

Then you will see at A, B and C, real world examples of rival search engines being able to increase their market share, where given the opportunity to do so.

So the pleaded counterfactual is that absent Google's conduct, rival search engines would have been able to increase their market shares. And this is the natural converse of the pleaded harm at 124. And a similar plea was apparently held to be acceptable in Ad Tech and this plea is supported by the facts pleaded in paragraph 134 itself, the real world examples and it's supported by Dr Latham's analysis. You may recall earlier, when I took you to the Android decision at recital 977, there was a list of real world examples as well. I don't need to go back to it. Recital 977 of the Android decision. That has some further examples in it.

Back at the claim form, you will see paragraph 135 pleads Google's decision to introduce a choice screen, following the Android decision. And paragraph 136 addresses why its effects may have been limited. And that is echoed or echos Dr Latham's counterfactuals, as we will see, because one of the counterfactuals he envisages is one in which there was a choice screen.

There is more detailed support for this in section 5.3 of Latham 1 but I don't think I need to take

you there. What it does is it elaborates on the importance of default positioning for search traffic and it elaborates on some of the real world examples.

So in my submission, there is a sound and evidence based foundation for the PCR's plea. Even before one gets into the weeds of the hypothetical exercise, one sees a straightforward factual basis for it, real world examples. And moreover, it articulates the case that Google needs to meet. It identifies a triable issue on the causation counterfactual. So it's more than adequate, in my submission, to meet the modest standard articulated in the case law.

I'm going to now come on to Google's specific criticisms, all of which are unfounded but my primary submission is that they missed the mark because what we have is a highly technical attack on a provisional expert methodology that is subject to disclosure and refinement. What that doesn't show is that the pleaded case is defective.

I will start, as Mr Holmes did, with the Android causation counterfactual. If we could please pick up Latham 1, core bundle 3, F27. Page 624, please. I'm going to come back to paragraph 413 which was the focus of Mr Holmes' fire. But I want to start with paragraph 415 which is where Dr Latham sets out his

actual potential counterfactuals for the Android conduct. He says at 414, he doesn't think he needs to be overly prescriptive but he says:

"Potential counterfactuals to the Android conduct include: 1. Google foregoing the tying arrangements entirely and allowing OEMs to install Google Play without ancillary obligations. This was the approach taken with remedies to the Android conduct in Turkey. 2. Google not making Google Search the default within Chrome but instead introducing a choice screen. This was the approach taken with the remedies to the Android conduct in Europe and Russia."

And you will also see in relation to the choice screen which Dr Latham also posits as a potential iOS counterfactual, you see at 417, he says that the former scenario -- halfway through:

"The former scenario which is the choice screen, is in line with an approach endorsed by Google executive in an internal discussion of the iOS conduct cited in the Android decision: "I think we should encourage them to have Yahoo as a choice in a pull down or some other easy option. I don't think it's a good user experience nor the optics is great for us to be the only provider in the browser."

That is in relation to iOS but it's evidence from

within Google, envisaging a choice screen type approach. As Dr Latham says in 415, that is what Google actually chose to do in the EU, following the Android decision.

For your note, if you would like to see further details of those arrangements at 415, that dealt with the paragraphs 271 to 272 in Latham 1.

The starting point, in my submission, is that it's very hard to see any valid basis for criticism of this approach at this stage of the proceedings. Dr Latham has identified two possible counterfactuals for the Android conduct, both of which reflect what actually happened in the real world, when Google was required to bring its Android conduct to an end. Counterfactual 1 reflects what happened in Turkey and counterfactual 2 reflects what Google chose to do in the EU, following the Android decision.

And these -- yes, they're further explained above.

Now whether these are the correct counterfactuals is obviously a matter for trial and again, Dr Latham has made clear he wants to refine his analysis post-disclosure and the authorities make clear that only so much could be expected at this stage. But again, it bears emphasis that Google's own expert, Mr Matthew, has not criticised these counterfactuals as being unrealistic. Google has not produced any factual

evidence to suggest that they are unrealistic. Mr Holmes suggested that these counterfactuals relate only to the removal of the infringing conduct, not Dr Latham's prior exclusion. That is not right, in my submission. Dr Latham is here addressing what comes after the infringing conduct is removed. That is exactly what counterfactual analysis requires.

So Mr Holmes focused his fire on paragraph 413 of Latham 1. And he's focused not so much on the positive counterfactuals that Dr Latham advances but an earlier step in his analysis, where he says: I think you have to rule out certain things. And Mr Holmes' essential point, as we understand it, is that Dr Latham is wrong to have discounted a counterfactual in which Google reaches default arrangements with the vast majority of OEMs, as it did in the actual. That's what he's excluding at 413.

THE CHAIR: Yes, that's the point.

MR LASK: The short answer, in my submission, is that is a matter for trial. If Google wishes to argue that that is an appropriate counterfactual, it would have to produce evidence in support, which it hasn't done. And that evidence will need to be considered by the experts and ultimately the Tribunal.

Merely asserting that it's a realistic

counterfactual on the basis of a detailed analysis of the Android decision doesn't reveal any error in Dr Latham's approach, let alone provide a basis for strike out. However, I will unpack the point a little. The case as put by Mr Holmes yesterday is that Dr Latham has made an error of law in principle because he has discounted conduct that Google actually engaged in in the real world and which is perfectly lawful. But that isn't a fair reflection of the position, in my submission. And let's see what Dr Latham actually says. Starting at paragraph 409:

"I now turn to the question of quantification... To develop the suitable quantitative methodology there are four main issues to resolve. [First,] determining the counterfactual without the conduct. This requires specifying a non-abusive counterfactual and coming to a view on how competition would have evolved in this counterfactual world."

So that's what he's then doing at 412 and 413. He is applying that approach and he's excluding a counterfactual that would, in his view, amount to abusive conduct.

412:

"What would Google have done instead? The counterfactual needs to remove the anti-competitive

conducts [that is common ground] and, in the case of the iOS conduct ..."

Yes, sorry, the Android conduct, illegal tying and the iOS conduct, the payments of default. "I understand it must also not involve conduct [to] have the equivalent object or effect as the original abuse."

I.e., you can't have an abusive counterfactual.

413:

"My interpretation of these requirements is that the counterfactuals to the Android and iOS conducts must not involve Google reaching de-jure or de-facto default arrangements with the vast majority of OEMs as it did in the actual. They must rather allow for rival search engines having the ability to enter or expand by paying OEMs or otherwise agreeing with them to a preferred positioning or default status."

Just pausing for a moment, 409, The need to specify a non-abusive counterfactual. That is obviously the correct approach and I think Mr Holmes accepted that it was a correct approach and in any event, it's clear from the authorities -- and just for your note, the case of Dune --

THE CHAIR: You are right, Mr Holmes didn't take us to that to disagree with that.

MR LASK: That's the starting point. It's correct to

exclude from the counterfactual, abusive conduct. What 413 does is explain that in Dr Latham's view, reaching de jure of de facto default arrangements with the vast majority of OEMs, as it did in the actual, would fall foul of that requirement."

So he isn't rejecting a specific counterfactual proposed by Google because there isn't one. But his starting point is you can't be abusive and I think that would be abusive, so I'm leaving that out of account for now.

MR DAVIES: Isn't there a bit in between which is the last sentence of 412?

MR LASK: The last sentence of 412 is applying his paragraph 4.9(1). So he is saying: you can't have abusive conduct and he's saying: therefore, that's why you can't have conduct that would have the equivalent object or affect because that would be abusive. And he elaborates on this, for what it's worth, in Latham 2, in response to Google's criticisms and that is in the same bundle, tab F30.

MR DAVIES: But is the last sentence of 412 common ground?

MR LASK: Well it's common ground that the counterfactual can't involve abusive conduct. Unless Mr Holmes interprets the last sentence of 412 differently, it must be common ground that the last sentence of 412 is

correct.

So Latham 2, F30, page 902. Paragraph 64:

"I disagree that the counterfactual could involve Google making payments for default status resulting in no difference to market outcomes."

He is discussing both iOS and Android here. And he says, 66:

"First, I understand from my instructions that a legally valid counterfactual must not itself involve unlawful conduct."

What we saw in paragraph 409 of Latham 1. No objection to that.

"From an economic perspective, I have explained ... that the competition concerns around the Android ... contract and [the] exclusionary payments..., whether [it be] through default settings in a browser or through pre-installation, are effectively equivalent. It would seem perverse if one were to argue that one form of exclusionary conduct caused no harm on the basis that the impugned firm would engage in another exclusionary conduct with equivalent effects instead."

And then secondly, he deals with the RSAs and how they were treated in the General Court. And he says that his understanding is that the RSA case that the Commission had made, was:

" dismissed ... by the General Court on the basis that these RSAs had limited market coverage and because of concerns with the Commission's reliance on a specific implementation of the [AEC] test. I do not believe it is correct to conclude from this that Google would be permitted to engage in exclusionary payments that covered a large share of the market, as would be required for the counterfactual to involve the same anti-competitive outcomes as the actual. For the avoidance of doubt, it is possible that the counterfactual could involve Google implementing RSAs or default agreements with some OEMs on some devices, that still left open enough traffic to competitors or potential entrants to compete effectively.
Post disclosure I would want to understand better what conducts Google would have been likely to pursue and evaluate whether they would raise competition issues. As I explain below, my methodology can be adapted if the counterfactual involves such conduct."

So that's Dr Latham's position. And in my submission, it's entirely unobjectionable. What he's saying is that the counterfactual should not involve conduct that has the same effect as the unlawful MADAs in the Android case, but achieve that effect from different contractual arrangements. Because he thinks

that would be abusive.

Now Mr Holmes' core argument is this impermissibly excludes from the counterfactual, the arrangements that Google in fact operated in the real world which were exonerated by the General Court, namely the RSAs. That is incorrect for two reasons. Firstly, the RSAs which Google in fact operated, did not have the same effect as the unlawful MADAs. What Dr Latham is excluding is something with the same effect as the unlawful MADAs. That is not what the RSAs that were operating in the real world did. And I will show you the basis for that. Turn to the Android judgment in the select bundle at tab 13. We see on page 732, please, paragraph 16, top of this page, this is the court setting out the contractual restrictions identified in the contested decision:

"Firstly, restrictions contained in the Mobile Application Distribution Agreements ["MADAs"] under which Google require OEMs to pre-install its general search app ... and browser app ... in order for them to be able to obtain a licence to use its app store."

That was the positive obligation, you must pre-install Google. Then you have the Anti-fragmentation Agreement which I don't need to refer to then finally, the RSAs:

"Restrictions contained in the RSAs under which Google granted OEMs and MNOs a percentage of its advertising revenue, provided that those manufacturers, or operators had agreed not to pre-install a competing general search device on any device within an agreed portfolio."

That's the negative obligation that acts as a complement to the positive obligation in the MADAs. Just to complete the point, at page 800, one sees at paragraph 451, the court referring to the complementarity of Google's various practices and:

" ... the need to take into account and as stated in the contested decision, the combined effects of the MADAs and the RSAs."

So it's saying that whether or not the infringement in relation to the RSAs is upheld, you need to take their effects into account. But the key point is the reference to complementarity. The MADAs and the RSAs work together.

452:

"Taking into account the factual element of the combined effect does not depend on the RSAs being abusive."

So as I say, the MADAs and the RSAs were complementarity. The RSAs didn't have the same effect

as the MADAs. One might see them as a top-up to the MADAs. You could have the MADAs without the RSAs. They might be less attractive to Google. In theory you could. It doesn't matter for present purposes. The two work together. The RSAs did not do the same thing as the MADAs. Now when it comes to the counterfactual, once you remove the MADAs, as you must to because that is the abusive conduct, it's a matter for evidence whether, in that counterfactual, OEMs would still have signed up for RSAs that were identical to what happened in the real world. It may be unlikely, given the complementarity between the two. One certainly can't assume that the market would have looked the same and that everyone would have behaved the same way, absent the abusive conduct but those are all matters for trial. The key point is that in excluding conduct which has the same effect as the MADAs, Dr Latham isn't excluding the RSAs which are actually operated by Google because they didn't have, at this moment, the same effect.

THE CHAIR: But he doesn't include them anywhere.

MR LASK: He doesn't go that far.

THE CHAIR: Well he doesn't include them anywhere, does he?

MR LASK: His positive counterfactuals do not discuss RSAs. He doesn't --

THE CHAIR: No.

MR LASK: -- expressly incorporate RSAs into his positive counterfactual.

THE CHAIR: Implicitly, it's just not in there.

MR LASK: It's not dealt with. He doesn't go there. I think Mr Holmes' submission was that it's implicit in 413 of Latham 1, that he is excluding the real world. He is excluding what happened and what was lawful and my response is no, he's not.

THE CHAIR: He is because he is excluding the RSAs. He is excluding any effect for the RSAs, he just doesn't give them any effect.

MR LASK: Well he's -- no, he's not saying you have to include the RSAs, he is saying you have to exclude something which has the same effect.

THE CHAIR: But thereafter, he does not exclude the RSAs. I think Mr Holmes' position is, effectively -- he might well say: okay, downstream, counterfactual may evolve. That is fine, it doesn't have to be perfect but I think what he is saying is it's definitely wrong because clearly you have to include the effect of the RSAs. Clearly you have because it's lawful and it would have an effect. If you have a counterfactual that does not include them, it is definitely wrong.

MR LASK: Two --

THE CHAIR: I think that's the argument.

MR LASK: Yes. Two problems with it though. First, as I've submitted, you can't assume that if you remove the MADAs, the RSAs that were actually in place continue in the same way. Because they worked with the MADAs. If you remove the MADAs, you have no obligation on anyone to pre-install Google, you simply have an obligation not to install anyone else.

THE CHAIR: Can you say that again?

MR LASK: If you remove the MADAs, you are left with no obligation on the OEMs to pre-install Google.

THE CHAIR: To pre-install the Play Store?

MR LASK: Yes. To pre-install Chrome and the search app with the Play Store. The MADAs was the tie; If you want the Play Store, you have to have the rest. So if you take those out which you have to do, there's no obligation on the OEMs to pre-install anything Google.

Now, in that scenario, you can't assume that the RSAs, in my submission, were actually in force, would still be in force because all they did was prevented the OEMs from pre-installing anyone else. It could be a counterfactual where Google doesn't impose an obligation on OEMs to pre-install Google but it does impose an obligation on OEMs which OEMs are willing to accept. I don't know why they would but maybe they would. An obligation for them not to pre-install anyone

else. It could happen.

MR HERGA: Isn't that the same thing? If you can't install anyone else, then you have to install Google?

MR LASK: You don't have to pre-install any search app, you don't have to pre-install anything, it could all be downloadable by the user. But pre-installation is valuable to Google. But the point is it certainly doesn't follow as a matter of logic that the RSAs that operated in the real world would have to be a feature of the counterfactual. Because once you take away the MADAs, it's not really clear what those RSAs are doing. Whether they are really doing anything that anyone wants. That's a matter for evidence. And if Google wants to say: no, that is what would have happened, but then it has to have evidence to that effect. I can't get that from the Android judgment. All the Android judgment does was find that there were errors in the Commission's analysis as regards the RSAs and so infringement couldn't be upheld. It didn't find that the RSAs were lawful and in any event, as I say, the RSAs were complimentary to the MADAs. So you absolutely can't assume that once you remove the MADAs, the RSAs are still there. You just can't reach that conclusion.

THE CHAIR: When you say are still there, you mean would --

MR LASK: Would still be there in the counterfactual.

THE CHAIR: You have to travel back in time to a point where Google were putting all its arrangements in place. It couldn't put MADAs in place, didn't put MADAs in place because that is abusive conduct. Then you have to ask yourself what agreements would Google have sought and would it have got.

MR LASK: Yes.

THE CHAIR: You are saying well you don't know if they would have got the RSAs.

MR LASK: You don't know. There's no evidence.

THE CHAIR: Okay.

MR LASK: And as I say, the key point is that Dr Latham isn't necessarily excluding what actually happened in the real world. What he's excluding is a scenario where there are arrangements that have the same effect as the abusive conduct. Same effect. That's not the RSAs.

Now if Google propose a counterfactual which entered into different RSAs or more extensive RSAs with the vast majority of OEMs, then Dr Latham would have to consider that and consider whether it was likely to have the same effect as the MADAs. But that is for another day.

I have made the point on the judgment. For your note, the relevant passages are 687, 693, 698 and 800 to 802. The key point, as I've said, is that the finding was that the Commission had erred in its analysis. The

finding was not that RSAs, as operated, were necessarily lawful. And, of course, it doesn't follow from the finding that differently structured RSAs or more extensive RSAs would be lawful. There's certainly no clean bill of health for such a scenario in the General Court's judgment.

THE CHAIR: Just to look down the track a bit, let's assume you are successful on this hearing, and -- this is a hypothesis -- we disagree with Mr Pickford and we say that the counterfactuals may not be perfect but they are good enough, and Google then say: well, we would have had the same RSAs because they hadn't been held unlawful.

MR LASK: Yes.

THE CHAIR: What happens then, when your client wants to plead that they would be unlawful? What happens then? Given that this is a follow-on case.

MR LASK: Yes.

THE CHAIR: How does that work?

MR LASK: Well, that wouldn't be unprecedented, firstly because that's what happened in Dune, which is a follow-on claim. Partly a follow-on claim. But in that case the Court of Appeal was dealing with argument from the claimant that -- this was at strike out summary judgment stage. And at that stage, even though it was

an early stage, the credit card scheme, Mastercard and Visa, had brought forward evidence from the businesses, saying: this is what we would have done in the counterfactual. And the claimant said: well you couldn't have done it in the counterfactual because that would be unlawful. And the Court of Appeal accepted that you can't have a counterfactual that's unlawful but went on to say they can't possibly decide at summary judgment stage whether the particular counterfactual that was evidenced by the schemes would be lawful. That is a matter for trial.

THE CHAIR: So we would have to have a trial, even though this is a follow-on claim, of whether some other conduct similar to -- potentially similar to the impugned conduct, was (inaudible).

MR LASK: In theory, yes. First, Google needs to provide disclosure in evidence, setting out its case on an appropriate counterfactual and Dr Latham needs to consider that. And this issue --

THE CHAIR: No, but I'm asking these questions because, you know, assuming that we certify, which is yet to be decided, because we haven't ruled on it yet, but assuming we do, we are tumbling pretty obviously, I think, towards a situation where Google will plead that it could have had some RSAs that got it much the same

thing and where your client's going to allege that that would have been unlawful as well. So I just want to be realistic about where this is all going and what it means.

MR LASK: It may happen.

THE CHAIR: Right. And your position is on the basis of Dune is that can happen.

MR LASK: Yes.

THE CHAIR: So as part of assessing the counterfactual in a follow-on claim, the Tribunal would have to make a first finding that something else, the counterfactual, was unlawful.

MR LASK: Potentially, yes. Just for your note, it's paragraph 48 of Dune.

THE CHAIR: Right.

MR LASK: Where the Court of Appeal said it's impossible to reach a conclusion on whether a particular counterfactual would be unlawful on a summary basis.

THE CHAIR: Right.

MR LASK: It's a matter for trial.

THE CHAIR: Okay.

MR LASK: And just to add to that, even if it could be said conclusively now that a particular scenario involving RSAs would be lawful, that still doesn't mean it's necessarily an appropriate counterfactual, let alone the

only realistic one. That is all a matter for evidence.

THE CHAIR: That goes back to really what is the factual point which is that if the MADAs hadn't existed, the RSAs might not have been made.

MR LASK: Yes. That's a point that Google will need to address in its evidence.

THE CHAIR: Right.

MR LASK: Finally, Mr Holmes submitted that Dr Latham's counterfactual approach was contrary to paragraph 100 of the claim form. If I could just pick that up, please. Core bundle 2, tab B4. Page 32. Mr Holmes placed some emphasis on paragraph 100 which refers to the fourth infringement, the RSAs. The General Court set aside the relevant finding:

> "The PCR does not therefore rely on them as such herein [so it's not bringing a claim in relation to the RSAs] (save in that they remained an element of the factual background against which the effects of the other three infringements fall to be assessed)."

So all that is doing is acknowledging that the RSAs that were actually operated are part of the factual background that would have to be considered. But that does not include Dr Latham, having considered those RSAs, from concluding that they shouldn't be part of the counterfactual. And still less does it preclude him

from concluding that a different counterfactual that had the same effect as the MADAs would be appropriate.

THE CHAIR: But PCR is holding back, is holding on to the ability to argue in due course, if Google puts forwards a counterfactual that is the exact same set of RSAs, to argue that they are unlawful.

MR LASK: Well in theory, yes, but that's not really what Dr Latham is saying.

THE CHAIR: No, it's not what Dr Latham is saying but in fact you might read this as saying the RSAs -- we're not going to say the RSAs are anti-competitive but you are reserving the right to do that if they are put forward as the counterfactual tribunal.

MR LASK: Yes, if, on a full analysis, that is the conclusion, then yes, that is the case we would want to make. As I submitted, it's not immediately obvious how a counterfactual without MADAs would necessarily involve the actual RSAs. It might involve different RSAs --

THE CHAIR: Sure, but it seem pretty obvious that if we certify the claim, a counterfactual put forward by Google will be the same RSAs. I mean it's an obvious strategic choice that they've clearly been thinking about and probably will make, and just clarifying your position, which is you reserve the right to say that they would be unlawful, non constat, paragraph 100.

MR LASK: Yes, that is my position.
THE CHAIR: Okay.
MR LASK: Just finally on this issue, and this is a case that -- I have a submission that is certainly made in Google's skeleton. I'm not sure if Mr Holmes maintained it yesterday. But in the skeleton at paragraph 51, Google says that Dr Latham's positive counterfactuals, the two alternatives, reflect the measures taken by Google in the face of regulatory remedies and that isn't the same as a realistic counterfactual for the purposes of damages assessment. So that's the argument that's made but in my submission, that can't assist Google for present purposes because it's entirely evidence dependent. If Google wishes to argue that its conduct in the counterfactual would have been different, real world responses --
THE CHAIR: You mean like the choice screen and so on?
MR LASK: Yes. If it wants to say: well that was in a regulatory intervention world, this would be different. You need evidence for that and we don't have that.

That brings me to the end of the Android counterfactual. I only have the iOS counterfactual which is a short point, and limitation left. I'm on --
THE CHAIR: We will finish well within the afternoon

I think, at the current rate. It strikes me we will start again at 2.05.

(1.05 pm)

(The short adjournment)

(2.05 pm)

MR LASK: Just before I turn to the iOS counterfactual, there is a reference from the earlier session that we have found that I would like to give you. It relates to the legal certainty point that you put to me. I said somewhere in the papers there was some evidence from Google, where it was assessing Microsoft's prospects of being able to do what it did with Apple. So I will give you the reference if I may. In fact, if we turn it up, please. It's in the US judgment in the reduced authorities bundle at tab 2. It's tab 2. It's page 156 of the bundle. Paragraph 328, it says:

"Google has also analyzed what Microsoft would need to offer Apple in order to win the Safari default. It called this study 'Alice in Wonderland', with Alice referring to Microsoft. ... The analysis concluded that in order for Microsoft to match Google's financial contribution, it would have to pay Apple 122% of Bing's revenue share, just to equal Google's then 33.75% revenue share. ... Google thus determined that "it will not be possible for Alice to match our

payments profitably[.]" ... Accordingly, during ISA negotiations, Google understood that Bing was not a viable option, which minimized Apple's leverage."

So that goes to my point that there is evidence of Google having the ability to assess the impact on competitors and what they may or may not be able to do.

THE CHAIR: Okay, thank you.

MR LASK: Turning then to the iOS counterfactual which I'll deal with more briefly because it seems to us that Mr Holmes ultimately accepted yesterday that his case on the iOS counterfactual somewhat collapsed into Mr Pickford's case on the AEC principle. But insofar as there is anything left, I will address it. If we could start, please, in Latham 1, core bundle 3, F27, page 625. We see section 7 which the Tribunal will now be familiar with. Paragraph 417:

"For the iOS conduct I suspect that the counterfactual would be that, rather than large payments for default status, Google offered to pay a lower amount to have Apple include Google as an option on a choice screen on Safari." But "[a]lternatively, Google may have not pursued a contractual arrangement with Apple and allowed it to set up a default agreement on its devices as it saw fit."

The former scenario is the choice screen scenario

and you have seen that extract from Google evidence.

So again, Dr Latham's first counterfactual is similar to what Google chose to do in the real world, following the Android decision and it's consistent with Google's internal evidence. You may recall it's also dealt with in the claim form, the choice screen issue at paragraph 135, and Dr Latham's second counterfactual reflects his view as to one possible alternative at this very early stage, in proceedings without disclosure.

As with the Android counterfactual, in my submission it's very hard to see any valid basis for criticism at this stage of the proceedings. Again, Mr Matthews does not say they are unrealistic and, again, there's no factual evidence from Google to contradict them.

Mr Holmes submitted yesterday that if the iOS conduct were held to be unlawful, one would have to allow for a counterfactual in which Google still secured default status on a Safari browser across all Apple devices, just like in the present, but it paid less for the privilege. And in my submission, there are three answers to that. Firstly, the argument, Mr Holmes' argument assumes that the amount paid by Google for default status is the sole offending element of the iOS conduct. But that isn't the PCR's case. The amount paid is an important element but it's not the whole

story. Just to illustrate that, may I show you, please, the claim form in core bundle 2, tab B4. It's page 36, paragraph 115, where we plead:

"The agreements between Google and Apple make it impossible for competing search providers to compete to be the default search provider on any Apple devices, since the said agreements cover all Apple devices. Those arrangements thus restrict competition in comparison with agreements which entitled Apple to a share of Google's search revenue on any Apple devices on which Google was installed as the default. Such an arrangement would not prevent a rival search engine from competing to be the default provider on some Apple devices, without having to compete to be the default on all of them."

You will see footnote 39:

"Either pursuant to an arrangement with Apple or by allowing the device owner to choose."

Second possibility is the either choice screen type option.

So as you see, a core objection to the iOS conduct is that it covers all Apple devices, so all types of iPhone, all types of iPad, and thereby prevents rivals from competing for default status on at least some of them. And it also specifically posits a counterfactual

in which rivals can compete for default status via a subset of Apple devices. For your note, Dr Latham deals with this in Latham 1 at 354, where he explains it's unlikely to be possible or attractive for rivals to have to purchase default status across the whole range of devices. He explains that is not realistic.

So it does not follow that in order to remove the abuse, the iOS conduct, one needs simply to reduce the amount paid by Google. Second, even if the price paid by Google were the sole element of the abuse, it still wouldn't follow that the appropriate counterfactual was one in which Google still secures default status across all Apple devices because if the price paid is the problem and the only problem, the counterfactual, by definition, must involve a price that is lower enough to give rivals a realistic opportunity to out-bid Google. In those circumstance, it isn't inevitable that Google still wins.

Dr Latham details with this in Latham 2. This is core bundle 3, F30, page 903. You see at the bottom of page 903, paragraph 69:

"If the payment to Apple is found to be exclusionary on the basis that it foreclosed rivals then the counterfactual would need to be one without the same exclusionary effects. As such, any payment would need

to leave open the opportunity for an actual or potential competitor to compete with and out-bid Google for default status or alternatively, entail a less onerous obligation, such as a payment to Apple to implement a choice screen, as opposed to a payment to make Google the default. A lower payment that met this requirement would, almost by definition, have permitted at least some entry in expansion by rivals."

And then paragraph 70 is important:

"Google's CPO Response argues that the analysis in Latham 1 "implies that there is a lesser payment which Google could have made pursuant to which it could have retained its default status, but without the alleged abuse"."

That is the counterfactual that Mr Holmes has criticised Dr Latham for excluding. He says:

"I believe that this passage misrepresents my views. The passage which Google refers to exclusively covers my AEC test. It seems to me entirely standard that such a test, and approach to determining abuse, should focus on the amount paid by Google as the relevant (and sole) offending aspect. As set out in Latham 1 ... 286, I analyse the iOS conduct by "applying the conditions set out in the judgment in Intel" and "I then explain why the strength of network and scale effects in search are such that I do not believe the AECT is the right

framework to assess anti-competitive effects. Notwithstanding this I also conduct an AECT analysis". It is clear from Latham 1 that my assessment of Google's iOS conduct will be more holistic in nature and will take account of the various "Intel conditions" for whether a conduct is likely to be exclusionary."

And he refers to the Intel conditions further at 72.

So what Dr Latham is saying is that the price paid isn't the sole problem here, but insofar as it is, it needs to be reduced to an amount that leaves open the possibility for other rivals to out-bid Google. So it doesn't follow that the counterfactual is Google still getting the same thing for less money.

Thirdly, insofar as Google positively asserts that in the counterfactual, it would have retained its arrangement with Apple for a lower price, it's provided no factual evidence for that assertion and it's obviously a matter for trial. So to conclude, there is no basis for strike-out or summary judgment in respect of the iOS counterfactual.

That leaves me with limitation which I can deal with briefly. PCR's submission is that the Tribunal should not attempt to determine the limitation defence now which I think is still submitted for by Google, but should instead leave it over until trial. In summary,

there is no material benefit in seeking to determine it now but there are significant disadvantageous in doing so. By contrast, there is no material disadvantage in leaving it over until trial. And I make four points. First, Google's limitation defence does not preclude the making of a CPO. That is common ground. Second, determining the limitation defence would not dispense with any of the issues of liability or loss and damage that will need to be determined at trial in any event. Nor would it have any impact on disclosure, witness evidence or expert analysis. At most, only a small part of the claim period would be struck out. That's common ground. It only affects the period 1 October 2015 to 7 September 2017.

Third, the merits of the limitation defence depend on significant points of law that are currently pending before the Court of Appeal. We have referred in our reply to the Volvo limitation case. That case concerns the cessation requirement which is a requirement that time cannot start to run for limitation purposes until the infringements have ceased. In that case the CAT held there was no such requirement in EU law, and in any event, that the Volvo case that the claimants relied on wasn't binding on the Domestic Courts, it was a post-IP completion case. However, it granted permission to

appeal on the basis that there was a real prospect of success and the Court of Justice has subsequently issued judgment in the Heureka case which is another Google case which cast significant doubt on the CAT's conclusions as regard the cessation requirement. In addition, since filing our reply. Permission to appeal has also been granted in a further matter that may have implications for Google's limitation defence and that is the Merricks collective action. That case concerns the knowledge requirement which is a requirement that a limitation period cannot run until the injured party knows or could have been expected to know the information necessary to bring its action for damages. And the issue in Merricks is whether the knowledge requirement was part of pre-Brexit EU law, in which case it would be binding, and if so, how it applies in the case of collective proceedings. Whose knowledge is it that needs to be examined. Is it the PCR's, is it the members of the class? Again, the CAT decided those matters in the defendant's favour but it also granted permission to appeal.

So if the Tribunal determined limitation now, whichever party lost the point would inevitably have to appeal on a protective basis, pending the outcome of those appeals and that would involve the incurrence of

time and costs for no good reason. On the other hand, the appeals are likely to have been decided by the time this trial comes on, if certification is granted. The Volvo limitation appeal is listed to be heard on 3 December this year, I understand. I am not aware there's a listing date yet for the Merricks limitation appeal.

But by the time we get to trial, if certification is granted, there ought to be authoritative guidance on these points from the Court of Appeal. Indeed, the point may even fall away as between the parties.

But fourth and finally, the course we advocate for was the course adopted by the Tribunal in Ad Tech. I don't need to take you to it. It's in the select bundle at tab 4 and it's dealt with at paragraphs 44 and onwards.

Then finally, finally, if the Tribunal were not comfortable with deciding now that the issue should be left to trial, then we would, as a secondary position, agree with Mr Holmes' submission that the matter could be revisited as a case management issue, once the appeals have been determined.

THE CHAIR: Right.

MR LASK: So unless I can assist the Tribunal further, those are my submissions.

THE CHAIR: I think Google's position is they want their course followed so that they have a chance to have their say in the Court of Appeal, on these appeals.

MR LASK: Well, as I understood it, Mr Holmes' submission was if you decide it now, you have to decide it in Google's favour, so it's the PCR that would then have the opportunity to -- the PCR doesn't want to be involved in the Merricks --

THE CHAIR: No, of course you don't but you might feel constrained to appeal. You probably would.

MR LASK: Yes. Well I suppose what we would do is put in a protective appeal and ask for it to be stayed, pending the outcome, rather than pitch up at the Court of Appeal in December and --

THE CHAIR: And you will say: we don't want it stayed, because we want to ... Yes, okay.

MR LASK: But that's the position. And in the real world, neither party has fully argued this case on the papers, let alone orally.

THE CHAIR: No.

MR LASK: So the Tribunal isn't realistically in a position to decide it and it may be that that's why Mr Holmes said at the outset yesterday that this is probably a case management issue now. Those are my submissions. I have assistance to offer on funding if needed --

THE CHAIR: We will hear Mr Pickford and Mr Holmes in reply on those points, then we will do funding all at once.

MR LASK: Thank you.

Submissions in reply by MR PICKFORD

MR PICKFORD: Thank you, sir. Firstly, I submitted yesterday, in response to a question from the bench about the role of intention in competition law -- I explained what the principles were but I said the name of the case wasn't on the tip of my tongue. The case I was referring to is in the bundle. It's the Unilever Italia case and the paragraphs I was referring to are 43 and 45. I'm not planning to go to them but just for your note, to make that good.

THE CHAIR: Yes, I mean intention is pleaded actually in this case, isn't it, but it just hasn't been a focus of much of the argument.

MR PICKFORD: The core point which is a point I made yesterday, is that intention alone is not good enough. Intention may be relevant in a wider context but you cannot base a case on intention because it needs to be objective.

Okay. So responding then to Mr Lask's submissions from this morning. First point he made was about the appropriate test for strike out and he referred to the case of Richards and he focused there on the need for

certainty before the Tribunal can strike out or grant summary judgment.

THE CHAIR: Yes.

MR PICKFORD: There are two areas where uncertainty can arise and they are referred to in that case. The first is uncertainty as to the facts, and the second is uncertainty because the point concerns an issue of developing law, where one needs to determine the facts first, to then work out what the law is. And in my submission, that doesn't provide a basis for refusing my application because I've pursued the application assuming all the facts against me. I'm not requiring or asking the Tribunal to accept any facts, as advanced by us. I am taking his pleaded case as it's set out and I'm saying that pleaded case, on its facts, doesn't get him home because of the fundamental legal problems that he has.

And in relation to the developing principle issue, that issue is crystallised now, we don't need more facts to determine that. Because I'm prepared to accept his facts and I say --

THE CHAIR: No, no, but that's not what happens in those developing law situations. There the court wants to have actual facts to develop the law and, you know, you are accepting the facts for this hearing which is why

you say the first point doesn't apply.

MR PICKFORD: Yes.

THE CHAIR: But you would be arguing for a more benign view of the facts at trial.

MR PICKFORD: Yes.

THE CHAIR: And then the court wants to develop the law with the actual facts. That's always the case. That's what happens in that second category.

MR PICKFORD: Yes, well I was going to then come to my second point which is if it needs to develop the law but my submission is we are not in a developing area of the law. I rely on the AEC principle and I rely on what an AEC is. Those are the two points I draw from the case law, and we say they are both fundamental and well-established and the court has all of the necessary authority to find for me on those points. It's been developed in all the cases we went through yesterday. So that's my answer to his point on Richards.

Next point -- and indeed, I would say additionally, we would say it makes practical sense to decide this point now because it's going to shape the cases that the parties bring to the court and therefore the economic evidence that is led in this case. Because if we are right about it being wrong to focus on less efficient competitors, then we don't need to have lots of economic

evidence and legal arguments about the impact on less efficient competitors, we can focus in on the impact on As Efficient Competitors.

THE CHAIR: You are saying they don't have case on that either, you are trying to strike the whole thing out, so when you say it will shape the case, it won't shape the case, it will finish the case.

MR PICKFORD: Yes, that is -- I mean, that's true, if I'm right on both of my parts of my proposition. I'm sorry, I was --

THE CHAIR: Yes.

MR PICKFORD: Put that down slightly hastily at lunchtime. It's correct that if I am wrong on both parts, then we are done. If I only win on one part, nonetheless that will inform the shape of the case. So if I win on my AEC principle part, but there is a question mark about exactly how that's implemented and, potentially, whether he has pleaded sufficiently to it, that would be helpful. I mean, for example, a way through, potentially, would be that the court said: "well, we don't agree with you, Mr Pickford, that he hasn't sufficiently pleaded to it. We agree with you on the law, we think you are right on the law, but we think he's pleaded to the point" - in which case the court should grapple with it and decide it now, even if I lose

because it will be making it clear what the terms are for the parties going forwards. And that would be, in my submission, a helpful, practical thing to do in a case such as this, in particular because that accords with everything that the Tribunal has been saying in many cases now, about getting a clear blueprint for trial.

THE CHAIR: Okay.

MR PICKFORD: So I then turn to Mr Lask's four preliminary observations and deal with each of those briefly. The first one was that he said Dr Latham shows that there is a sound economic underpinning to the claim. So it's said. Our answer to that is: not if he has either misdirected himself or been misdirected in law as to what an As Efficient Competitor is for this purpose. And what we say is that both Ms Stopford's approach and Dr Latham's approach is founded on the contention that it is unlawful for a dominant undertaking to act in a way which forecloses the market to less efficient competitors. And we say that is a fundamentally flawed proposition. It is contrary to the jurisprudence that I showed you. Now, at its highest, in terms of the cases that have been argued to be against me, there is reliance placed on Post Danmark and what is drawn from Post Danmark 2 and Royal Mail. And I say that all that

says is that you may not be able to use an AEC test at all in a case of, in particular, a statutory monopoly which is actually what Post Danmark 2 was about. But even Post Danmark 2 doesn't say that, in those circumstances, what one does when considering the standard for assessing foreclosure is that you lower the bar and that you replace an As Efficient Competitor standard - with a less efficient competitor standard because that would be to breach the fundamental aspects of the As Efficient Competitor principle. Namely that it's no job of competition law to prevent less efficient competitors from being foreclosed.

And indeed, as I pointed out yesterday, Post Danmark goes on to reaffirm that principle at paragraph 66 and if there were any doubt about it from Post Danmark, the principle is firmly re-affirmed in Intel and subsequent cases, as I showed you yesterday. Insofar as there is an outlier or an aberration here, it's Post Danmark. I have sought to explain how it can in fact be reconciled. If you are not with me on that, I say that's the outlier, you need to look at the body of the rest of the cases. In particular, those that follow.

The second point made by Mr Lask was that the Android conduct was found to be unlawful and similar to the iOS conduct and, therefore, that the Tribunal should

place some weight on that in its deliberations on my application. In my submission, that is a bad point. The conduct that the iOS conduct is similar to is not a tie to a product which is part of the Android operating system, namely the Play app. That is the MADA abuse. The conduct that it's similar to is the exclusive arrangements that were the RSAs. That's the part of the Android case that the current conduct is similar to, because Mr Lask himself said that it wasn't a dispute between us that we are concerned here with exclusivity arrangements. And it's the RSA part of the Android case that is concerned with exclusivity arrangements. And it's also the case that in that part of Android, the court assessed the lawfulness of Google's conduct by reference to the AEC principle and whether the AEC test that had been used by the Commission to satisfy the AEC principle was good. So it is telling, we say, that Mr Lask went to the wrong bit of Android. He went to the bit about MADAs which are not the bit that is analogous to the conduct that we are dealing with here.

THE CHAIR: I think he means analogous in its effect. I mean it may be it's a different legal creature but I think his point is that both of them have the effect of an across the board coverage versus the RSAs which to

a debatable degree, leave some of the field not covered.

MR PICKFORD: Well in my submission, that is not the pertinent point that one draws from that.

THE CHAIR: He is only making this point at a broad level. This isn't part of the analysis, this is part of the colour.

MR PICKFORD: Yes. What I actually say is it's a bad point on colour because it's against him because if you look at the pertinent aspect to similarity, you actually see that it's a point for us, not a point for him.

THE CHAIR: Okay.

MR PICKFORD: Third point he makes is that the iOS conduct was found to have an exclusionary impact by the CMA and in my submission, this is another bad point. For the avoidance of doubt, we deny that the iOS conduct is anti-competitive. We are putting that to one side just for now because that deals with the facts. My case is not that there is no arguable case which could be made that the iOS conduct has competition implications which might wish to be examined by a regulator: that is not what I'm seeking to prove to win on my strike out. My submission is that under Article 102, and under the case as it has been advanced by the PCR, that case isn't arguable because she refuses to acknowledge that it is only open to her to make such a case by reference to the

proposition that Google foreclosed As Efficient Competitors. That is my point. And therefore the fact that the CMA looked at Google's conduct in this area and said: "actually, we think there might be something to investigate and this is part of a regulatory investigation," again is a point I would say is against Mr Lask - because had there been a good Article 102 case here, you might have expected that the CMA would have opened it. After all, this is, on their submission, a very big market, it has very big implications. So it can hardly not have been an administrative priority for the CMA. They looked at it, they haven't opened a 102 case, so it's a point, in my submission, that goes to support the point I made yesterday about there being other avenues to examine the sorts of things that ultimately underpin the economic concerns raised by Ms Stopford.

Fourthly, US cases. Different jurisdiction, different law. Mr Lask didn't really pursue that so I'm not going to say anything more about that.

Then on to his main submissions. Mr Lask opened by saying that I had drawn a false distinction between the AEC principle and the AEC test. We say, however, that that distinction is clear in the approach of the courts over and over again. And I'm not going to, obviously, go

back to it all but you saw it in all of the cases that I went through yesterday, that there was an explanation about the fundamental principles. And then there is a different question about how one, in practice, does or doesn't prove a case and what is incumbent on the Commission in particular to prove, given what else has been raised in the case by way of defence.

Now we say that the distinction that I've drawn is in fact the means by which the courts have dealt with what might otherwise be said to be a tension in the law between, on the one hand, the objective of competition law in this area, and the fundamental question that the court has to decide, which is about, in particular, it not being the purpose of competition law to prevent less efficient competitors from being foreclosed; and on the other hand, how one, in practice, goes about proving such a case. Those are different questions. Sometimes they may produce some issues where they -- there is some possible tension between the two and the way that courts have dealt with that is to separate out those two issues of principle and test.

And in my submission it's only our approach that has offered a necessary re-reconciliation of those.

Mr Lask, for his part, has no answer to what I say is the fundamental point against him which is if he is

right, the standard by which one judges a deviation from competition on the merits in a case such as this is not an As Efficient Competitor. Logically, he is saying it's sufficient to show that less efficient competitors are foreclosed and that he can win his case on that basis. And there are two problems with that. Firstly, the courts have never said that that is the standard. On the contrary, they have said the opposite. And second, if it were sufficient to show that less efficient competitors had been foreclosed, that would be irreconcilable with what I have repeatedly said is the first and fundamental part of the AEC principle.

Now what is clear is that that principle doesn't require a numerical price cost test in every case. But that is a different issue. So for example -- I mean, if I could illustrate that. It might be very obvious that in a case involving, say, a company in the biotech area that has a patent on a particular process and it’s relevant to them in the drug that they produce but it's also indispensable, let's say, for competition on another market. And there may be all sorts of other potential competitors that will be just as efficient at producing the drug as the dominant undertaking. And the drug that they produce could be just as good. But if the dominant undertaking says: “tough, and okay, it's

indispensable, I am just not sharing that at all, my IP is my IP and I am keeping it," there might be a question about whether that is permissible. And you wouldn't need to look at an As Efficient Competitor Test, a price cost an efficient competitor test, to determine the lawfulness of that conduct. You could look at other factors and come to the view: well we have established, as the Competition Authority, that that's not appropriate because we say it's indispensable for competition and irrespective of the costs or the prices or any of those things, we think that is an abuse. So that is an example of where you don't need, necessarily, to always have an AEC test, to come to a conclusion about whether competition law --

THE CHAIR: What you're (inaudible) sort of IP version of European Super League? It's just -- competitors can't get in the game so that's it, so we don't need to worry about whether they're AECs or not.

MR PICKFORD: Possibly. You might see it in those terms.

THE CHAIR: Okay.

MR PICKFORD: I think whether it's Super League or whether it's in my other category, my general category, I think depends a bit on whether one considers the behaviour in the market of that sort to be sort of normal or prior. I'm not sure I need to take a position on that either

way. But I accept that it's certainly arguable that it's in my alternative category.

THE CHAIR: Okay.

MR PICKFORD: I have dealt with that.

Next point, Mr Lask said my case rests on the proposition one must always demonstrate foreclosures of AECs in every case. And that isn't quite right. There are two exceptions. The first one is the one we were just discussing. You don't have to do it in the European Super League type case. And secondly, at least in the case law, if you are the Commission, you don't have to do it if, in the administrative process, the issue has not sufficiently come up because the dominant undertaking has never disputed foreclosure and, therefore, it's not incumbent on you to make your case on that basis. So there are two exceptions.

THE CHAIR: Right.

MR PICKFORD: And those two exceptions explain the entirety of the exceptions to needing to prove your case by reference to an AEC that one sees in the case law. In my submission.

In our case it is relevant because we are in the exclusive purchasing box and I showed you the cases that say the AEC standard applies there, so tick there. And it's most definitely an issue in this case: there's a tick

there. So we are not in either of the two exception categories.

And, indeed, that is the answer to the reliance placed by Ms Stopford on Google (Shopping). It's based on the Intel point. I took you through that yesterday --

THE CHAIR: Just unpack that a little bit. Google (Shopping).

MR PICKFORD: In Google (Shopping) there are some paragraphs towards the end of the AEC part which is the fourth ground of appeal -- I don't have the exact paragraph reference to hand but what they do is they respond to a case that was being made by Google that there had been a failure by the Commission to investigate the efficiency of competitors in that case. That was what we were saying. So Mr Lask is right when he says that we had quite a broad attack on what the Commission did and subsequently, what the General Court did in confirming the Commission's decision on this basis. So if you just look at our attack, it looks quite broad. And there are some similarities to the point we are making now. However, the critical point is if you look at the way that the Court of Justice deals with our attack, they deal with our attack on a narrow basis and they recite the criteria from Intel as to when it becomes necessary for the Commission to engage with the

As Efficient Competitor principle. And they say that's only necessary where the dominant undertaking itself in the administrative procedure has put forward a case which basically engages the point. And then they go on to say it wasn't contradicted by Google before the General Court but we didn't sufficiently do that. The paragraph references, for your help, are 26 --

THE CHAIR: You are going to have to help me with the tab bundle 4.

MR PICKFORD: It's in the select bundle at tab 1 at page 36. The findings of the court begin at paragraph 260. At 263 there is a question about:

"As regards the question of whether Article 102 imposes a systematic obligation on the Commission to examine the efficiency of actual or hypothetical competitors of the dominant undertaking, it follows from the case-law ... that, admittedly, the objective of that article is not to ensure that competitors less efficient than the dominant undertaking remain on the market. Nonetheless, it does not follow that any finding of an infringement under that provision is subject to proof that the conduct concerned is capable of excluding an as-efficient competitor."

Then it explains why and it sets out the Intel

criteria and then it says in 267 that in this case, in essence, and in 268, that we, Google, didn't sufficiently put the issue on the table, essentially. We were blaming the Commission, saying the Commission needs to look at the efficiency of competitors. The General Courts said: well that's very difficult and you haven't done anything to suggest, in effect, that they weren't efficient and, therefore, we don't think that the issue arises, is something that the Commission had to grapple with.

That's 268.

THE CHAIR: So just so I understand, what was it that Google were saying meant that there wasn't a breach of Article 102 then? It wasn't challenging foreclosure but it was what, saying that it was objectively justified or something?

MR PICKFORD: So in the General Court and the Court of Justice, we said that there was a failure by the Commission to examine the efficiency of rivals. We said it's looked at evidence --

THE CHAIR: No, I understand that and the court says you don't have to if foreclosure isn't challenged. That's 265. My question is a simpler one. What was it that Google were saying? If it wasn't challenging foreclosure. What was it saying?

MR PICKFORD: There's a difficulty here, sir. This is the last word. It's the word of the Court of Justice on what it says it saw. I'm not sure I would accept that we weren't challenging somewhat more than that but the Court of Justice has decided that we didn't sufficiently challenge these issues.

THE CHAIR: Foreclosure.

MR PICKFORD: Yes.

THE CHAIR: So what else was there? I'm just asking -- (overspeaking) --

MR PICKFORD: But in my submission, we did.

THE CHAIR: No, I understand that. I'm asking what else was there in the case.

MR PICKFORD: Okay. So there was quite a lot in that case.

THE CHAIR: I don't mean that. What else was there in the case that Google said meant that it didn't infringe Article 102? So who must have had a case: even if we are foreclosing, it's okay because ...

MR PICKFORD: Yes.

THE CHAIR: What follows the "because"?

MR PICKFORD: Two points. First of those, certainly by this stage -- I won't be able to tell you every point --

THE CHAIR: Just give me a flavour.

MR PICKFORD: By this stage, yes. So the first one was that the essence of the case against us was that we were

refusing to supply an essential input. There was something that competitors needed which was to appear on a box in our page and we were telling the competitors: no, sorry, you can't be in the box on the page. We said that is a particular species of case called refusal to supply and in order to make a good refusal to supply case. The box in this case needs to be indispensable. And you haven't proved that, so you lose. We lost on that point because the Court of Justice said: we don't think that what's called the Bronner test which is the test I just referred to, is necessary in this case. We think this is a different sort of species.

THE CHAIR: So that's another limb to your bow --

MR PICKFORD: The next point is we said: well if it's not that, you need to tell us what it is that we did wrong. And you haven't sufficiently told us what we did wrong, you have just pointed to, allegedly, some effects and actually, you need to go further than that and explain what we did that was arbitrary, effectively, in a way that we approached --

THE CHAIR: That answers my question, thank you.

MR PICKFORD: So that's what I have to say about Google (Shopping). Google (Shopping) is the second category of exclusion and it's really a much narrower point than the one Mr Lask sought to draw from it. It's really about

burden of proof and how matters ultimately arise by the time they've got to the Court of Justice and who has done what, in its view.

So that's that.

Next point is Royal Mail in the Court of Appeal. That was relied upon, against us, fairly heavily. It might be helpful to turn that up in fact. That's in the reduced bundle at 18, beginning on page 1157. If I could ask the Tribunal, please, to read paragraph 62 -- some preliminary points. (Pause)

THE CHAIR: Where are you at?

MR PICKFORD: I'm on page 1157, under ground 1 of RM's first ground of appeal and at 62, there are some preliminary remarks by --

THE CHAIR: That's Mr Justice Arnold there.

MR PICKFORD: That's Mr Justice Arnold, yes. Males comes later. Sorry, Lord Justice Arnold.

THE CHAIR: Okay.

MR PICKFORD: Yes, and so the nub of it is at the end there, that the essence of the Tribunal's reasoning was that it didn't find that Royal Mail's AEC test -- sorry, it didn't find that the AEC test relied upon by Royal Mail was persuasive in terms of demonstrating that the pricing differential was other than anti-competitive. That's the context for this debate. And then we go on

to see the conclusions on this ground at 68 which were the ones that Mr Lask took you to. And in my submission, those conclusions have to be seen in the context of the fact that, ultimately, Royal Mail was unable to persuade the Court of Appeal there was anything wrong in the CAT's approach and the CAT's approach was that Royal Mail's own AEC test wasn't sufficiently informative in that case and it had a host of problems with it.

THE CHAIR: It does seem a bit broader than that though, doesn't it? Going back to paragraph 62, you have (iii) and "the concept of an AEC was highly problematic in this case", and then that is repeated a bit in this paragraph.

MR PICKFORD: They were saying: there are all sorts of problems here. But ultimately, what they were dealing with was not a purely conceptual point which is on all fours with the point that our case is about, about the AEC principle; they were dealing with a concrete attempt to articulate an AEC test, and they had serious concerns about the concrete application of that AEC test. They don't say that you couldn't -- you know, possibly you couldn't have done something else. You might say they come close to that but in particular, this is essential to understand, what they do not say is that given the

problems that they saw, both potentially, particular and more general, that the answer then is that you rig the AEC test and you apply a less efficient competitor test to analyse abuse. What they say is you don't do an AEC test at all. And that is really important. It's never been part of my case before this Tribunal for this application, that they had to do an AEC test.

THE CHAIR: We got that.

MR PICKFORD: But if there is a problem with the AEC test, the question is what happens next.

THE CHAIR: Yes.

MR PICKFORD: And I say that it is very, very clear. None of the cases that have been referred to by Mr Lask tell you that what you do then is you do a test that's based on an LEC. They don't say that, they just say you don't do an AEC test. So his reliance on those cases does not get him home when he has chosen to do an AEC test. If he has chosen to do an AEC test as his means of allegedly satisfying the AEC principle, then he has to do a lawful AEC test and that means that he cannot rely on results based on assuming that the As Efficient Competitor is not as efficient because their product is not as good.

THE CHAIR: So, Mr Pickford, I understand what you are saying about paragraph 62 which is that what the

Court of Appeal were specifically grappling with to decide the appeal was the Royal Mail actual AEC test.

MR PICKFORD: Yes.

THE CHAIR: But another point made by Mr Lask is that if we look back at the tribunal's decision in Royal Mail which we did, they were saying that the concept of AEC just didn't work. The concept, not the test, the concept of an AEC didn't work because in the Royal Mail circumstances, you couldn't really get an AEC, it couldn't happen --

MR PICKFORD: Well --

THE CHAIR: -- because of the historical background and so on. And although you are right that (iii), in paragraph 62, isn't carried through, perhaps, into the actual disposition of this case by the Court of Appeal, they don't cast any doubt on it and it's still a decision of this tribunal saying that sometimes you just can't think of things in terms of AECs.

MR PICKFORD: Well, in my submission, I think we probably need to go to the tribunal decision because those comments about the difficulty of conceptualising the AEC are made within the context of its analysis of the test.

THE CHAIR: Right.

MR PICKFORD: And that is important because one should not read them as seeking to make a more fundamental

objection to the AEC principle. That would be wholly contrary to well-established case law from the Court of Justice, that it wasn't remotely purporting to say was wrong, that I showed you yesterday, that affirms again and again and again, the AEC principle. So insofar as -- it was saying: well we had difficulties in conceptualising an AEC. They mean conceptualising in an AEC in the context of actually applying this particular test. And so it may come down --

THE CHAIR: We can go back and read it ourselves with that submission in mind. But also, you haven't gone to the bit of the Court of Appeal's judgment or Lord Justice Arnold's judgment where he deals with Post Danmark 2 and TeliaSonera which is back in 37 to 40 which we went to with Mr Lask.

MR PICKFORD: I'm going to come on to that.

THE CHAIR: Okay.

MR PICKFORD: Or shortly because that was in the context of the test. And I am currently --

THE CHAIR: You say it was but I mean -- all right. Anyway, you are coming on to that.

MR PICKFORD: I will come to that very shortly. What I'm seeking to do at the moment is I'm going through, basically, the points that Mr Lask raised in the order that he raised them and at this point in his

submissions, he was dealing with the principle. If I may, however -- if we could, just on the principle, go to the Royal Mail case which is in authorities 1 at page 2753. The paragraph I want to go to which is 476. He pointed to paragraphs 476 through to 478, and then made a submission along the lines of: well there you go, Mr Pickford must be wrong because look what the Tribunal said here. So if I could just allow the Tribunal to re-familiarise itself with those paragraphs. (Pause)

THE CHAIR: Okay.

MR PICKFORD: So in my submission, there is nothing inconsistent with my case and 476. We are not saying that the possibility of an abuse is excluded merely because the effected competitors are less efficient than the dominant undertaking. That is how Mr Lask mischaracterises my case. That is not my case. To be very clear, my case about the As Efficient Competitor, the As Efficient Competitor is a hypothetical construct, it's intended to test lawfulness of conduct. And in my case I say it could be satisfied in a case such as this if what Google did was pay so much to Apple for the right to be the default on Safari, that even a competitor that was as efficient as Google couldn't afford that payment. Because if it did that, one could reasonably infer, using the analysis in ENEL at

paragraph 77, that the conduct was anti-competitive because on its face, it doesn't seem rational. Why would Google pay so much to Apple that it wasn't even profitable for it to do so in terms of the revenue it got back. Reason: potentially because there was an anti-competitive object there which is in doing so, it kept everyone off the market. And if it does that, then that is unlawful.

So it is quite possible for Ms Stopford to make a case that is non-strikeable at this stage but it has to be based on exclusion of an As Efficient Competitor. It is not the case that our submission has anything to do with the particular facts of the particular competitors on this market. We haven't developed any submissions about those facts yet because we are not at that stage.

THE CHAIR: So where the dominant undertaking in fact drives all the competitors from the market and they are less efficient, that could be an abuse.

MR PICKFORD: Yes.

THE CHAIR: But only if the behaviour would also have driven As Efficient Competitors from the market.

MR PICKFORD: Correct, yes.

THE CHAIR: And you say they are saying that is what the Tribunal is saying at 476.

MR PICKFORD: It is not -- no, I'm not saying the Tribunal is explaining it in the terms that I have done, I'm saying that the proposition that the Tribunal is making is entirely consistent with the case that I have just explained because what it says is that the possibility of an abuse is not inevitably excluded merely because the competitors are less efficient. That's a factual assertion which is that in a market where there are less efficient competitors, there could never be an abuse and we don't say that. We don't say that just because competitors are less efficient, there could never be an abuse.

THE CHAIR: Okay.

MR DAVIES: It may be in a similar vein. I think I am right in saying that you are saying that the As Efficient Competitor is not a clone of Google.

MR PICKFORD: Yes.

MR DAVIES: What is the difference between the As Efficient Competitor that you would want to use in an AEC test and a clone of Google? In what way is it different?

MR PICKFORD: It's not incumbent on me, with respect, at this stage to articulate what our As Efficient Competitor would look like in an As Efficient Competitor Test. That is going to be for our economists to do if the case gets that far and I don't think I can -- what

I can tell you is that it will be compliant with the law and the law is as I have shown you yesterday which is that it needs to be as efficient on all the dimensions that are set out in the law which means it needs to be as efficient in terms of its cost structure and also in terms of its pricing, and its attractiveness to consumers. So it has to satisfy those tests and I can say that to the Tribunal now.

What I don't think that I can do, because we haven't had disclosure, we haven't had the economists opine on this, is say the precise respects in which the As Efficient Competitor might be different. I can speculate, I can give examples of how it could well be different. But I can't say what we would say is the right approach in this case, we just haven't got there yet on the pleadings. But to speculate, to give you an example, it might be that an appropriate As Efficient Competitor to consider would be something along the lines of Microsoft using AI as a new means of producing results which doesn't rely on the same volumes of results that Google has and is able to be just as efficient and produce just as good results and has no cost disadvantage but doesn't do it as an identical clone to Google. So that is --

MR DAVIES: Because it doesn't have the same link with scale

that Dr Latham --

MR PICKFORD: That is an example on my part. I'm not saying that is our case, for the reasons that I just gave but it explains that you can satisfy -- what it does do is explain how you can satisfy the conditions that I say are always required to be satisfied, at the same time as not being a clone.

MR DAVIES: Okay.

THE CHAIR: You do agree that the differences may leave the result there is some part of the market, some part of Google customer base that is not contendable by the AEC?

MR PICKFORD: I'm not sure I'm able to take a position on that yet. What I'm not saying is that merely by having said that, that that is the problem with Dr Latham that shows that their approach must be unlawful.

THE CHAIR: His report says that a conventional AEC test does include, does build in some part that's non-contendable and I'm just asking if you accept that. I mean, the non-claimness must extend to characteristics that give rise to that result.

MR PICKFORD: I certainly don't make that concession as a general matter in this litigation because that's an economic question, I think.

THE CHAIR: For the purposes of this strike out.

MR PICKFORD: For the purposes of this strike out, what I can say is I don't base my criticism of Dr Latham on that aspect of his report.

THE CHAIR: Right.

MR PICKFORD: Coming back to the Royal Mail case in the Tribunal. 476 and following we say are not inconsistent with our position. And I think 476 is the critical one but hopefully that --

THE CHAIR: Okay.

MR PICKFORD: The Tribunal's is able to understand from that, from the point that I made on that, why through 477 and 478, we are not taking issue with what the Tribunal is saying there. Certainly insofar as I understand 478, I have slight difficulty in fully following what the Tribunal is saying at 478 but I don't, on the face of it, see anything inconsistent there with our position.

THE CHAIR: Okay.

MR PICKFORD: Certainly, as long as what the Tribunal is not saying is that we have a special responsibility to allow less efficient competitors to compete. That's not what they seem to be saying and as long as that's not what is implied by this, then there isn't a problem, there's nothing between us on it.

If the Tribunal is saying there is a special

responsibility to allow less efficient competitors to compete, then they've misunderstood the case.

THE CHAIR: Mr Lask is not saying that, so it doesn't matter.

MR PICKFORD: Then the test.

THE CHAIR: Yes.

MR PICKFORD: Rather than principle. And how that is effective through the pleading. I think the first point is one that, sir, you well had in exchange with Mr Lask which is: that his pleading, in our submission, in the pleading itself, should really have set out the particulars that he relied upon, when he said "we say that we meet the principle in any event and here is our AEC test that meet it" and the 'why' to that should have been in the pleading.

THE CHAIR: I wasn't saying that, I was saying that he was saying that a lesser standard applied to what was in Latham 1 because it was in evidence and not in a pleading and I was saying: well, no, you've incorporated it by reference, so surely it must be --

MR PICKFORD: Sorry, absolutely, sir. Sorry, I was --

THE CHAIR: Have you finished with Royal Mail -- because I do want to understand what you say about the earlier bits where the Court of Appeal deal with Post Danmark.

MR PICKFORD: Sorry, if I may come back to it in the context

of the test again, simply because I was just writing notes as Mr Lask was speaking and I am just going to need to go through the same sequence that he did, I'm afraid, otherwise I will get in a horrible muddle.

THE CHAIR: Okay.

MR PICKFORD: But I am coming back to it, I'm not trying to pull a fast one.

THE CHAIR: Okay.

MR PICKFORD: So -- yes, sorry, I didn't make myself at all clear. I entirely agree, the point is if he is going to rely on Dr Latham as giving, effectively, the particulars to his plea there, then it's perfectly appropriate to apply the same standards to what Dr Latham says, as one would apply to the pleading. You can't have it both ways.

THE CHAIR: Let's go forward on that basis.

MR PICKFORD: And indeed, additionally, although it's not so clear from 122, as you, sir, pointed out to me, 123 and 124 of their pleading appear to be making essentially a very similar point to the point Dr Latham makes which is in practical terms, a competitor is going to be less efficient than Google because it doesn't have the size and that is at the heart of his approach to the AEC.

THE CHAIR: Yes.

MR PICKFORD: So we see it both in Latham and indeed in 123

and 124.

We say if the standard in this context for the test is a less efficient competitor, it's not an As Efficient Competitor, how far does one have to go? If I decided to set up a small and rather unappealing search service, is Google required to ensure that I stay in the market - that would seem pretty mad - but where does one draw the line on the less efficient competitor, if that's the standard for the test? In my submission, there is a reason why the courts, if they had difficulty with the AEC test, don't say: right, we will now apply an LEC test. They just stop altogether and say: this price cost test isn't going to help us. Because as soon as one goes away from an AEC standard, there is no tangible place where one stops and one can say: well this is the standard now, by which we are going to decide whether you have or haven't breached competition law.

Then in terms of what Dr Latham himself does, I think, actually, there isn't really anything between us, ultimately, although the way Mr Lask puts it -- in my respectful submission it's slightly confusing. He accepts that Dr Latham defines his hypothetical competitor as being less efficient in terms of quality. He then says: aha, well look at the variables in the equation, they are not less efficient. Well of course

they are not because that's not where the quality aspect of the efficiency comes. The quality aspect of efficiency, if you work through Dr Latham's methodology, is in his alpha minimum. What he says, when it comes to his conclusions which Mr Lask does accept bring back in Dr Latham's essential assumption that it's a lower quality rival, is that a lower quality rival couldn't get to the levels of alpha that are needed to be profitable - is essentially what he said.

So the fact that it's Dr Latham's conclusion that might be wrong, a point emphasised by Mr Lask, in my submission it doesn't take him anywhere because it's his conclusion that they rely upon at paragraph 122. It's not that he has developed a model that they rely upon, they rely upon the factual conclusion that they say: look, an AEC couldn't compete. And the problem is Dr Latham is not looking at an AEC, he is looking at an LEC and therefore, his approach is bad in law. It's said to be a narrow difference. Well it may be but it's one of fundamental importance to whether they've got a good case or a bad case in law.

Secondly, Mr Lask answered your question, Mr Davies, about whether in the second test, Dr Latham assumes that there was the same quality but worse monetisation and in my submission, his answer to that was wrong. The only

difference between the two formulations that Dr Latham uses is in the first they are only worse because they have worse quality and in the second, they are worse because they have worse quality and they have worse monetisation. So it's a more extreme scenario than the first one and I don't really have time to go through the detail of his analysis but that's my submission on it. If one was going to go back and look carefully through those paragraphs, I'm not sure it matters desperately but that is what, in fact, he does.

And then Mr Lask submitted that the standard we set was meaningless because it foreclosed him from making any case. I think I actually addressed that in answer to the Tribunal earlier on, when I explained why our standard does mean something and it's on all fours with the case law, ENEL, at 77.

MR DAVIES: Sorry, if I could come back on Dr Latham's modeling again. So previously, the Chair asked Mr Pickford about whether you accepted that an As Efficient Competitor might not be able to access some parts of the market.

MR PICKFORD: Yes.

MR DAVIES: So another way to do Dr Latham's model which I don't think is what he does, is to set out that equation you just referred to but then instead of

blaming a sort of inefficiency for the ability of the competitor only to reach a certain proportion of the market, to say that, in effect, some proportion of the market is unavailable to it because lacking Google's brand image or whatever, it can never achieve more than a certain chunk of the market. Would that reformulation be any different, in your view, from the way that he's characterised it already?

MR PICKFORD: Not if the basis for that hypothetically different version were that the problem was the worse brand, because in my submission, then there would be, again, an inferior competitor. And the reason why I gave the careful answer that I did to the Chair earlier on in relation to this is that I don't need to take a position on this issue about an element of contestable demand or not. Because there is a very clear problem that begins in -- well, it's clearest from paragraph 364, I should begin slightly earlier, that runs through his whole analysis, where he is clearly not focused on an equally desirable competitor. If I was looking at a different report, I would obviously have to investigate very clearly what the reasons were for -- the reasons why he said that the alternative was not as profitable as Google. It's hard for me to address that because it's not the report that we are currently faced

with. So I've just focused on the glaring error, as opposed to what might be a different error in a different report.

MR DAVIES: I understand that but in practice, what he does is he just appeals to the Firefox example to get an estimate of how much extra market share the competitor could obtain.

MR PICKFORD: Yes.

MR DAVIES: So even though that might be interpreted as that competitor being less efficient -- I mean in a sense it's just a fact, it's just a proclaimed fact, it's just an observation.

MR PICKFORD: Yes. Well there is then the possibility of argument about whether that evidence is good evidence for an As Efficient Competitor or not good evidence for an As Efficient Competitor. That is not something that I can deal with on this application. But it obviously would be something that we would no doubt debate if this case got that far.

MR DAVIES: Okay.

MR PICKFORD: What it doesn't do either is take you away from the basic standard. The argument there, the argument we should be having, if that is where we go, is does Firefox represent an As Efficient Competitor and, therefore, we could rely on what happened or might

happen in relation to Firefox to satisfy the standard. What you cannot do is say: we are having difficulty with the AEC and, therefore, we are not going to require that standard to be met anymore. It's just good enough if you exclude a less efficient competitor because in my submission, there is no case where that stops.

MR DAVIES: Okay.

MR PICKFORD: And it's not consistent with the rest of the law.

I think really I was going to respond to the point that Mr Lask made about it being said that our approach is detached from economic reality. I think it's really basically the same point we've been canvassing, essentially. It's not detached from Google's economic reality and it's Google's economic reality that is the relevant standard here, for the reasons I have given. Because isn't the job of competition law to say: we think that if Google continues to behave in the way that it's doing, it's not going to allow these less efficient competitors into the market. If you want to do that, you have to do something on a regulatory side, if that's available to you on that side. What you can't do is say that the mere fact that Google is acting in a way which doesn't allow less efficient competitors in as much as they would like to be, is inherently abusive. What you

have to look at is whether what Google is doing is foreclosing As Efficient Competitors.

TeliaSonera. I said I would get there. This is the point that's also referred to --

THE CHAIR: I think I'm more interested in what the Court of Appeal in Royal Mail say about Post Danmark 2 and TeliaSonera because it's all very well you making submissions about it but the Court of Appeal have told us what propositions those cases stand for. So --

MR PICKFORD: Very good. In which case I will, with a little bit of help from my junior, go and deal with it in the context of a judgment that I'm going to need -- I had planned to deal with it at root by reference to TeliaSonera and I --

THE CHAIR: Yes, but I'm not going to stop you looking at TeliaSonera but I think a better way to do it is to look at Royal Mail and see what it says TeliaSonera decides, before we look at TeliaSonera. Because if you make submissions about what that decides or the same with Post Danmark 2 and you are saying it says something different from what the Court of Appeal thinks it's saying, then that's not an efficient way to do it, is it?

MR PICKFORD: I'm happy with that.

THE CHAIR: And I think may help just to flag, not saying

he's right or wrong, that Mr Lask is relying very heavily on Post Danmark 2, so that's possibly the one that's more important.

MR PICKFORD: Yes. Well, I hope I have addressed you on Post Danmark 2. My position on Post Danmark 2 is --

THE CHAIR: Well you take your course, Mr Pickford. Let's do TeliaSonera quickly, the way you want do it, then we will go and look at the Court of Appeal and see what that says.

MR PICKFORD: Thank you. Indeed, it might be convenient once I have done TeliaSonera, for us to have a short --

THE CHAIR: Let's take the break first and then you can cast your eyes back over paragraphs 37 to 41 of the Court of Appeal before you do the two European authorities.

MR PICKFORD: Thank you.

THE CHAIR: Okay.

(3.25 pm)

(A short break)

(3.37 pm)

MR PICKFORD: So we were at the Court of Appeal's judgment in Royal Mail.

THE CHAIR: Yes.

MR PICKFORD: I'm going to address, firstly, the paragraphs that deal with Post Danmark 2 and then paragraphs that

deal with TeliaSonera. Sir, you referred me to paragraphs 37 and following that deal with Post Danmark 2. The proposition that was being advanced by the Royal Mail was that an AEC test relied upon by the undertaking under investigation, must be treated as highly relevant or even determinative of the question of whether their pricing practice as anti-competitive. That is what they were trying to establish because it was their test. They were saying: look, there's a problem here because you didn't, effectively, afford sufficient weight to our test. And all that the Court of Appeal does here by reference to Post Danmark 2, I say uncontroversially, is to say: that is not a requirement of the law. There's no requirement that a case has to be proved by reference to an AEC test. There may be circumstances in which an AEC test isn't practical or appropriate. In which case, going back to the point I made before, what's the answer? You don't use an AEC test at all.

What you don't do, what the court doesn't say you do here and what Post Danmark doesn't say you do either, is at that point you say: okay, well, we are going to find against a defendant that they breached competition law by reference to a less efficient competitor test. Because if do you that, you are going to be applying the

wrong standard. And that is possibly a small distinction but it is an important distinction between the two. So whilst the undertaking itself may not necessarily be able to always rely on its AEC test, and say: "there you go, here is my AEC test. I think my AEC test is great, I satisfy it, therefore I'm off the hook." And all that is being said here is: no, there can be circumstances where I'm afraid that doesn't work. But one doesn't derive from that, the proposition that Mr Lask makes - which is that if there is a problem with an AEC test, what you do is you prove a case against a company in Google's position by reference to whether it excludes less efficient competitors. Because that violates the core principle that the Tribunal will no doubt be bored of me repeating but the one that I've --

THE CHAIR: Okay.

MR PICKFORD: So that's what we have to say about this section. Just for completeness, although I think I said it earlier, if you go even in Post Danmark itself to paragraph that aren't referenced here, 66, one sees the As Efficient Competitor principle being re-affirmed. And it is reaffirmed yet again in Intel and all of the subsequent cases based on Intel. And it's notable that subsequent cases are based on Intel. That comes back time and time again in terms of what the court goes on

to refer to as setting out the essential principles and they, in turn, are based, in fact, on Post Danmark 1 and the principles that are set out in Post Danmark 1 which I took you to yesterday. Which is the original source for the essential points that we say comprise the elements of the AEC principle.

I think that's what I have to say about the Royal Mail judgment and how it deals with Post Danmark.

THE CHAIR: Okay.

MR PICKFORD: Then turning to Lord Justice Males' judgment at paragraph 76 and following, this is where he deals with TeliaSonera. So it starts with Deutsche Telekom and notes that:

"in an appropriate case, the regulator is entitled to rely upon an AEC test for a finding of abuse and that, when such a test is carried out, it should be based on the dominant undertaking's costs"

That is the proposition there.

He goes on to say, based on TeliaSonera, that that is not an inflexible rule.

And he says that was also a margin squeeze case. "The question arose whether an AEC test had to be based solely on the costs of the dominant undertaking or whether it could be legitimate to base the test on the costs incurred by competitors.

The [Court] held [firstly] that the test should as a general rule be based on the costs of the dominant undertaking, but [then] at [45] ...

there could be circumstances where the costs of competitors were relevant."

And there are three examples. The first of those is where the costs structure of the dominant undertaking is not precisely identifiable. So I think just pausing there, considering that one. Obviously an example of that would be if the dominant undertaking was unable to or unwilling to provide information on its own costs and in that circumstance, one might need to look at other costs as a proxy. That is what the first point is going to. The second point is where the dominant undertaking uses an infrastructure whoseproduction costs have been written off. In my submission, that's just, effectively, an accounting point about not being misled by the way that the dominant undertaking accounts for use of its assets, as opposed to taking a proper economic approach to their costs which wouldn't permit you just to say: " well there's zero cost here," if in fact they are economically useful assets.

The third one, the one that Mr Lask seeks to derive most benefit from, is that particular market conditions mean that the level of the dominant undertaking's costs

is attributable to the competitively advantageous situation in which its dominant position places it.

What I say there is that what the court -- I'm going to come back to TeliaSonera in a moment but what the court must be referring to, what TeliaSonera is referring to, and therefore, implicitly, all that had been endorsed by the Court of Appeal here, is that where that advantage was obtained because of an abuse of dominance, then you can't judge whether a dominant undertaking has abused its dominant position by reference to the costs that it then finds itself -- the position that it then finds itself in. Because in that situation, it is allowed to take advantage of its own abuse. So this comes back to a point I made yesterday - that one needs to be careful about the particular point in time that one is carrying out the analysis and you have to go back in time and think: okay, so what was the situation when this abuse allegedly started? If the means by which the dominant undertaking obtained its position was unlawful, then you can't allow it to rely on that efficiency because that's unlawfully obtained efficiency. If, however, it is efficiency that it has obtained simply by virtue of its own conduct on the market, then in my submission, it would in fact be wrong to then hold it to account under competition law by

a less efficient competitor standard, for all the reasons that I have given. Therefore, one needs to be very careful in not interpreting these words which are not the ratio of this case. The ratio of the case is simply what do we need to find in order to determine that it wasn't necessary to look at Royal Mail's test? And the Court of Appeal upheld the CAT, saying it wasn't necessary to look at the Royal Mail's test or at least insofar as it was considered, Royal Mail's test didn't get them home. That is what this case is, therefore one needs to be careful what one reads into TeliaSonera. I would like to go back briefly to TeliaSonera because it does help to see what the court said there. In particular, to deal with what the Lord Justice goes on to say here about paragraph 46. I saw you probably reading ahead of my submissions. At 46 of TeliaSonera, that's referred to by Lord Justice Males and he says:

"although the judgment goes on at [46] to say that it is only where use of the dominant undertaking's own costs is not possible that the costs of competitors should be used, the examples given demonstrate that this is too narrow a view."

If you actually go back, as I'd now invite the Tribunal to do, to authorities bundle 2, and page 5094, we see the paragraphs that are being referred

to in the Royal Mail judgment here --

THE CHAIR: Sorry, I'm not quite in the right place.

MR PICKFORD: It's authorities bundle 2. I don't think this is in the select --

THE CHAIR: Thank you.

MR PICKFORD: Page 5094.

THE CHAIR: Yes.

MR PICKFORD: Paragraph 45 at the bottom of the page.

THE CHAIR: Yes.

MR PICKFORD: So this is the paragraph being referred to by Lord Justice Males. And it begins, having set out the general principle:

"It cannot be ruled out that the costs and prices of competitors may be relevant to the examination of pricing practice at issue in the main proceedings. That might in particular be the case ...".

So it's put in, in my submission, somewhat speculative terms. It's not saying it is in this case, it's saying here are some examples of where it might be relevant to consider something else. And it then goes on, however, to conclude in the narrower terms that Lord Justice Males referred to. And with respect to the Court of Appeal and Lord Justice Males, paragraph 46 and the way it is put there, is how it is put in the operative part of the decision. I can take you to that

but it's in the same terms word-for-word, I think, as paragraph 46. The operative part of this decision tells us what the ratio is, so therefore, we do need to be very careful about how we interpret paragraph 45 which is a relatively, in my submission, broad brush speculation by the court in that case, of other circumstances where things might be relevant. Those are not the circumstances that they were having to deal with in that case. That is important to bear in mind. And, therefore, whilst I can envisage a particular situation where category 3, that is market conditions, mean you can't look at the dominant undertaking's costs - and my version is it's because of the dominant undertaking's own abusive conduct that it gets into that position - I say you can't go beyond that and say just generally, just because the dominant undertaking has lower costs because of the position it's in, therefore you judge whether it's acted lawfully or unlawfully by reference to a less efficient competitor cost standard. Because that violates all the other principles that I set out.

So those are my submissions on Royal Mail in the Court of Appeal, by reference to those two judgments of European law.

Then penultimately, I think, going back to the Royal Mail in the Competition Appeal Tribunal, Mr Lask drew

attention to comments made at paragraph 532, where the court talked in the context of the test about elevating technical purity over economic reality.

Those comments cannot undermine the basic AEC principle, firstly. And secondly, they don't justify proving a case by reference to a less efficient competitor test. At most - a point I have made before but it's the same conclusion - at most, what they justify is not applying an AEC test. Not rigging it, so that you find an abuse merely because less efficient competitors, by virtue of being less efficient, were not able to get into the market.

Finally, I would just note that the Court of Appeal didn't put its reasoning in those terms. See what the Court of Appeal just said.

Then finally, the last submission that Mr Lask made was that the comments about what an AEC must look like in the context of a discussion of the AEC principle, don't tell us what an AEC must look like in the context of applying an AEC test. He said there is only one case that looks at the test, and that is the Google Android case and that everywhere elsewhere where they are talking about an AEC, that's in the context of discussing the principle. Those other cases, just to remind the Tribunal for the future, are Unilever Italia,

Post Danmark 1, ENEL and Intel and they are all against him on the definition of an AEC. And in my submission, it's logically incoherent to seek to differentiate between the principle and the test, if one is going to say that you can satisfy the principle which is of general applicability, by applying a test, where rather than adopting an AEC, you adopt an LEC. You cannot show that you have satisfied the principle that foreclosure is to be shown by reference to whether the conduct excludes As Efficient Competitors by coming along with a test, where you say: look, I showed that it excluded a less efficient competitor, therefore I win. That is logically, in my submission, incoherent. But Mr Lask is driven to that, in order to maintain his case. Those were my submissions. Thank you.

THE CHAIR: Thank you very much.

Submissions in reply by MR HOLMES

MR HOLMES: Good afternoon. I will try and be crisp.

I have six points on counterfactual. First, Mr Lask made a series of framing submissions. He emphasises the importance of disclosure and evidence to counterfactual assessment. He said it was a hypothetical exercise involving informed guesswork and he cited Ad Tech for the proposition that it may be appropriate to do no more than to plead that competition would be greater in a

world without the infringing conduct. None of those points is in issue but none of them, we say, addresses Google's argument. Our argument is directed at the limiting rule which we understood the PCR to apply to any counterfactual that her expert might subsequently choose to advance in these proceedings and that is the constraint which Dr Latham has apparently been instructed to observe, that any counterfactual must not involve conducts with the same effect as the unlawful conduct. That is Latham 1 paragraph 412 and Latham 2 paragraph 10. We say the correctness of this additional constraint can be considered now without evidence or disclosure.

To the extent that the PCR's case applies such a constraint, it relies on a counterfactual which goes beyond the mere absence of the infringing conduct, in contradistinction to Ad Tech and it's appropriate to consider at this stage what that constraint means and whether it is an appropriate one.

Second, Mr Lask appeared at times to suggest the fact that the constraint was contained in evidence rather than on the face of the pleadings, showed that Google's argument was misdirected and not appropriate for summary determination. The pleading, however, expressly relies upon Dr Latham's counterfactual

analysis that can be seen from paragraph 134 of the claim form. His analysis is incorporated by reference and we say that the PCR's case should be considered as a whole.

The practical examples in paragraph 134 of the claim form to which Mr Lask refers, are nothing to the point. They suggest what would have happened if there are greater opportunities for competitors to obtain default status, they do not go to the design of the counterfactual on the basis of which the PCR intends to show that this would be the case.

Third, Mr Lask suggested that it cannot be assumed that removal of the MADAs would mean that OEMs kept the RSAs intact in the counterfactual, and that this would be a matter for trial. That's not a point that we detected anywhere in the claim form or the accompanying evidence and we're sceptical as to the basis for Mr Lask's submission that OEMs would not retain RSAs. These involved them sharing a proportion of Google's search revenues in exchange for pre-installing Google Search. And it wasn't clear to us why Mr Lask says that such arrangements which benefit OEMs and their customers would not continue absent MADAs. As the CMA's report records, RSAs have continued to apply since the Android remedies. And we give the relevant citations in our

skeleton argument at footnote 37.

But in any event, Mr Lask's argument does not affect our submission. The new suggestion that OEMs would not adopt RSAs without MADAs is not the basis on which Dr Latham indicated that RSAs should be excluded which was by reference to the PCR's sale effect constraint. And we say that it is wrong to exclude RSAs from the counterfactual simply because their affects may be the same. It is that prior exclusion that we take issue with.

Fourth, Mr Lask submitted that the removal of the arrangements with equivalent effect was intended to exclude only arrangements which are themselves unlawful. That is not how we had understood Dr Latham's evidence. If the intention had been to exclude only other unlawful conduct, he would have said as much. On their face, his reports proceed on the basis that one must remove both unlawful conduct and other conduct with the same effect as such conduct, and we therefore took it that Dr Latham intended to exclude more than merely unlawful arrangements but also arrangements which achieve the same effect by lawful means. If he and those who gave the relevant instruction did not mean to go so far, it is difficult to see why the widespread RSAs which in fact operated, could be ruled out of account at this

stage, in circumstances where they have not been found to be unlawful, and no argument has been advanced as to unlawfulness in these proceedings.

Fifth, Mr Lask suggested that Dr Latham did not need to exclude the Android RSAs which in fact operated in the market. He said:

"The key point is that in excluding conduct which has the same effect as the MADAs, Dr Latham isn't excluding the RSAs which are actually operated by Google because they didn't have the same effect."

He went on to suggest that Dr Latham meant only to exclude from the counterfactual RSAs that were more extensive than was the case in the actual.

If it were the PCR's position that the actual Android RSAs may be excluded in the counterfactual, the difficulty that we see arising would be resolved. But we find that hard to reconcile with the statements in Dr Latham's evidence. He says expressly that the Android counterfactual must not involve Google reaching default arrangements with the vast majority of OEMs, as it did in the actual, and he refers specifically to the RSAs in that context.

Finally, when pressed, Mr Lask indicated that he did not exclude the possibility that the PCR may seek to challenge the lawfulness of the RSAs through the back

door of the counterfactual. This is not reflected in the PCR's claim form. Indeed, it's at odds with the specific indication in paragraph 100 of the claim form, which states that the PCR does not rely on the RSAs as a separate abuse, and that instead, they remain part of the factual background.

If this were the PCR's approach, we say it should be pleaded and set out as part of the blueprint to trial. The purpose of certification is to test these matters and none of Google's submissions on this point can have come as any surprise to the PCR. The relevant paragraphs of Dr Latham's evidence are clearly seeking to grapple with the RSAs that have operated in the actual which were exonerated in the EU Android procedure.

So the case, if it is that they are unlawful, should be transparently reflected in the pleadings and the evidence and in the litigation plan. None of that has been done and we say that this is a problem with certifying the case that is currently before you, with implications for case management at subsequent stages of the process.

As regards the iOS counterfactual, Mr Lask placed reliance in particular on paragraph 70 of Latham 2 and he says that he would undertake a holistic analysis by

reference to all the Intel criteria, the case is therefore not confined to an allegation that the amount paid by Google was too high.

As to this, we say the criteria set out in Intel, paragraph 139, are not in the alternative, they are expressed as cumulative, and the other criteria such as coverage do not dispense with the need to assess capacity to assess an efficient competitor and in this case the Commission's analysis in the Android decision shows the need to consider both whether the coverage of the arrangements were sufficient to produce foreclosure effects, and to assess the capacity to foreclose by reference to an AEC test.

So we maintain our submissions that the iOS counterfactual is flawed, to the extent that it rules out of account the possibility of Google winning default status absent the RSAs, the RSA which were in fact concluded with Apple.

On limitation Mr Lask makes two points. First he says that you shouldn't decide the point now; and secondly he says you should leave it over until trial. He says that there is no material benefit in deciding the point now, or in short order. But we say that there is. There are pending Court of Appeal cases, now more than one, which the PCR says to be relevant, and

a decision now or in short order will allow the parties to this case to participate in the pending appellate process, if so advised. It seems that the hearing in one of those cases is listed for 3 December 2024, that could in principle permit an intervention. And Merricks has not yet been listed, so that remains at large, and there is scope to participate. They will yield authoritative guidance and the parties to this case, insofar as a like issue arises, should have at least the opportunity to the participate in that process.

Mr Lask also says no material disadvantage in leaving limitation to trial. He says that it wouldn't dispense with any of the issues of liability and damage, it wouldn't affect factual expert evidence and disclosure, and that only a small period of the claim would be struck out. Again we say there is value in not positively deciding now to postpone this to trial. The issue would remove a material period of two years, that could well affect the matters that need to be covered in factual and expert evidence, a two-year lacuna in the currently pleaded case as to infringement. It seems very likely that that would have implications for the evidence and the framing of the evidence and for the disclosure that needs to be given on various issues. So the Tribunal shouldn't at this point, we say, set its

face against determining the matter in advance of trial.

Finally, Mr Lask says that the point isn't ripe for determination, it hasn't fully been argued. Now, our position, we say, is set out fully and clearly. We say that the statutory rule set out in section 47E of the Competition Act applies as it says on its face. The PCR's failure to engage with detailed responsive submissions should not make its position a fait accompli. If the Tribunal considers that further argument is needed it could give directions for this to happen so that it is in a position rapidly to decide the point. So I maintain our submission that this should be determined now. If you are not with me on that, I maintain my submission that it should not be punted off into the long grass and left for final determination at trial.

So subject to any questions those are my responsive submissions.

THE CHAIR: Thank you.

MR HOLMES: I'm grateful.

MR LASK: Apologies for rising. There was just one point in Mr Holmes reply that if I heard it correctly does require clarification.

THE CHAIR: Okay.

MR LASK: It looks as though Mr Holmes suggested the RSAs

had operated in the actual, the real world RSAs, and involved sharing a proportion of Google's search revenues in exchange for pre-installing Google search. If that is what is being suggested by Mr Holmes we do say it's wrong, and I showed you the relevant passages from the General Court's judgment where it summarised what the RSAs did. They imposed a negative obligation requiring the OEMs not to pre-install competing search services. But they didn't impose an obligation in exchange for revenue to pre-install Google search because the pre-installation of Google search was provided for by the MADAs.

I hope that's clear.

MR HOLMES: I must say, sir, that I find that a very unusual submission. The suggestion that one could have a device sold to consumers which didn't contain a pre-installed means of search seems extraordinary. And if that is the submission it's not one that should --

THE CHAIR: I think Mr Lask was just making a factual point --

MR LASK: Yes.

THE CHAIR: -- about what the RSAs did. He says that you said -- you may have said, that they were for sharing a percentage of Google's revenues for pre-installing.

And he says no, they weren't, they were an obligation not to pre-install a competing one. And that is a straight question of fact about what it says in the judgments.

MR HOLMES: Yes.

THE CHAIR: I think what you are focusing on is a different question perhaps, which is if --

MR HOLMES: I see your point, sir. Whether it's realistic that there would be any difference in effect if the factual position were as Mr Lask has stated it. So I'm not in a position --

THE CHAIR: I think Mr Lask was just rising to make the factual point. I appreciate he did in the course of his main submissions say, in response to Mr Herga's question, I think it was: well you might not pre-install anything; and you are saying that is unrealistic.

MR HOLMES: Yes.

THE CHAIR: I must say for myself I haven't turned my mind to ...

Okay, thank you very much.

So just the funding then. Mr Lask, I think I may have misunderstood what you said earlier, that there is some material in Google's skeleton and I wasn't sure if you were wanting actively to say something about it or if you were just saying you would answer questions if we

had any.

MR LASK: All I was saying, if the Tribunal required my assistance on funding I could provide it. But I'm not positively seeking to make submissions, save to say that the points raised in Google's skeleton were addressed in a letter that we sent to Google earlier this year. I could give you the reference --

THE CHAIR: Okay. It probably is somewhere but I don't have it to mind. Give us the reference -- here is the correspondence, yes. Okay.

MR LASK: It's correspondence bundle B44. I think I'm right in saying that the points made in Google's skeleton were raised previously by Google in correspondence rather than in its response to the claim form. So this letter of 3 July is a response to that correspondence.

THE CHAIR: Okay. So that's what you would want to say because it's already in the correspondence.

MR LASK: That's our answer, unless the Tribunal has questions or requires further assistance.

THE CHAIR: Okay. I will put my cards on the table, I haven't studied that letter so I think what we will do is we will read it and if we do have any questions we will communicate them in writing.

Thanks to all the counsel and representatives for very well presented hearing, and we're grateful that we

have fitted it into the two days, we will be reserving our judgment and communicating it in due course.

(4.10 pm)

(The hearing concluded)