Neutral citation [2025] CAT 42

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

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

24 July 2025

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
CHARLES BANKES
KEITH DERBYSHIRE

Sitting as a Tribunal in England and Wales

BETWEEN:

ROBERT HAMMOND

Proposed Class Representative

- v -

(1) AMAZON.COM, INC.
(2) AMAZON EU S.À.R.L.
(3) AMAZON EUROPE CORE S.À.R.L.
(4) AMAZON UK SERVICES LTD

Proposed Defendants

AND BETWEEN:

PROFESSOR ANDREAS STEPHAN

Proposed Class Representative

- v -

(1) AMAZON.COM, INC.
(2) AMAZON EUROPE CORE S.À.R.L.
(3) AMAZON EU S.À.R.L.
(4) AMAZON UK SERVICES LTD
(5) AMAZON PAYMENTS UK LTD

Proposed Defendants

Heard at Salisbury Square House on 6 to 8 May 2025

JUDGMENT (CPO)

APPEARANCES

Philip Moser KC and Ben Rayment (instructed by Hagens Berman EMEA LLP and Charles Lyndon Limited) appeared on behalf of Robert Hammond.

Kieron Beal KC, Laurence Page, and Hannah Bernstein (instructed by Geradin Partners) appeared on behalf of Professor Andreas Stephan.

Jon Turner KC and Oscar Schonfeld (instructed by Herbert Smith Freehills LLP) appeared on behalf of Amazon.com, Inc and Others in respect of the Hammond application.

Daniel Piccinin KC and Kristina Lukacova (instructed by Covington & Burling LLP) appeared on behalf of Amazon.com, Inc and Others in respect of the Stephan application.

CONTENTS

A. INTRODUCTION

1. This judgment follows the joint hearing of two applications for a collective proceedings order ("CPO") under s. 47B of the Competition Act 1998 ("CA"). The respondents to both Applications are five companies in the Amazon group.[1] It is unnecessary for present purposes to distinguish between them so we shall refer to them collectively as "Amazon".

2. In each application, the proposed class representative ("PCR") seeks a CPO on an opt-out basis. The application by Mr Hammond (the "Hammond Application") is on behalf of a class of consumers. The application by Professor Stephan (the "Stephan Application") is on behalf of a class of retailers ("merchants" or "sellers"). Both the proceedings brought by Mr Hammond (the "Hammond Action") and the proceedings brought by Professor Stephan (the "Stephan Action") seek an award of aggregate damages for alleged abuse of a dominant position by Amazon contrary to the Chapter II prohibition in s. 18 CA and, for the period until 31 December 2020, Art. 102 of the Treaty on the Functioning of the European Union ("TFEU"). While the two proposed classes are distinct, the specific heads of alleged abuse, which we describe in more detail below, in the two proceedings overlap, but Professor Stephan alleges further forms of abuse which are not alleged by Mr Hammond.

3. Both applications were heard following the Tribunal's determination of 'carriage disputes' with alternative PCRs seeking to bring collective proceedings on behalf of virtually the same classes. As regards the consumer claims, on 5 February 2024, the Tribunal decided that the Hammond application should be preferred over an application brought by Ms Julie Hunter: [2024] CAT 8 (the "*Hammond/Hunter* Judgment"). As regards the merchant claims, on 20 January 2025, the Tribunal decided that the Stephan Application should be preferred over an application brought by BIRA Trading Ltd ("BIRA"): [2025] CAT 6, [2025] Bus LR 1172 (the "*Stephan/BIRA* Judgment"). Permission to appeal against both those judgments was refused by the

[1] Four of the five Defendants are identical in the two actions and nothing turns on the distinction as regards the Fifth Defendant.

Chancellor (see CA-2024-00539 and CA-2025-000403). In both cases, the competing CPO application was not dismissed but was stayed, so that Ms Hunter or BIRA could apply to restore their application in the event that the Hammond or Stephan Application, respectively, was refused after a substantive hearing.

4. Notice was given to potential class members ("PCMs") in each case by publication on a claims website by the respective PCR of the application for a CPO. No PCM from either class has applied to make submissions objecting to the application: see r. 79(5) of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules").[2]

B. AMAZON

5. Amazon operates the well-known electronic marketplace through which purchasers can buy a very wide range of products. In the UK, the website is Amazon.co.uk. Amazon also operates an app on which the settings can specify the UK as the region in which the customer is shopping (the "App"). The website and the App together are referred to as the "UK Amazon Marketplace".

6. In addition, Amazon itself acts as the retailer selling many products on the UK Amazon Marketplace, and that aspect of its business is referred to as "Amazon Retail." Amazon also hosts multiple third-party merchants on the UK Amazon Marketplace. Therefore, as well as supplying merchants with listing and payment services, Amazon, through Amazon Retail, competes with many of those merchants in the sale of many products.

7. Amazon offers merchants on the UK Amazon Marketplace the option to use its logistics centres and delivery network to store, pack and deliver their products to consumers. The supply to customers of products using this service is referred to as fulfilment by Amazon, or "FBA". We refer to the use of other logistics and delivery arrangements (whether supplied by the merchant directly or through a third party) as fulfilment by merchant, or "FBM". Some retailers use

[2] All references to rules in this Judgment are to the CAT Rules.

FBA for some of their products; and FBM for others. Therefore it is appropriate to distinguish between the two forms of logistics fulfilment on a product by product basis rather than on a retailer by retailer basis.

8. Amazon offers consumers using the UK Amazon Marketplace the option to subscribe to its "Amazon Prime" service ("Prime"). In exchange for a subscription fee, Prime customers receive a range of services, including fast delivery on a wide range of Prime products at no additional cost and free returns. Amazon gives merchants the option to fulfil their offers under the "Prime" label, which will then be displayed alongside their offers on the UK Amazon Marketplace and will show Prime customers that these offers will bring the benefits of the Prime programme, such as no additional shipping costs and fast (e.g. next day) delivery. The number of Prime customers in the UK is very substantial and such customers are responsible for the great majority of purchases on the UK Amazon Marketplace.

C. REGULATORY PROCEEDINGS AND DECISIONS

9. There have been a number of regulatory proceedings and decisions initiated or taken by competition authorities regarding aspects of Amazon's operation or conduct of its various national Marketplaces. We repeat below the summary of four of those decisions or proceedings which are of particular relevance to the present applications as set out in the *Stephan/BIRA* Judgment.

(1) The CMA Decision

10. On 3 November 2023, the Competition & Markets Authority ("CMA") issued a decision (the "CMA Decision") to accept binding commitments from Amazon following a one year investigation into suspected infringement by Amazon of the Chapter II prohibition under the CA. The competition concerns identified by the CMA included, in summary, the following:

    (1) The ability of Amazon Retail to access and use competitors' data which is not publicly available. Under the terms of the agreements which merchants had to enter into with Amazon in order to sell on its UK

Amazon Marketplace, merchants had to provide, and permit Amazon to use, certain data in relation to or derived from their commercial activities in connection with any Amazon product or service. The access to such non-public seller data ("NPSD") may give Amazon Retail an advantage over competing merchants, and in particular could be used to inform its business decisions, such as when to start and stop offering products, to identify and negotiate more effectively with suppliers, and as regards planning inventories of products.

(2) The process of selection by Amazon of the "Featured Offer which appears in what is commonly known as the "Buy Box". For any given product, the product page displayed to the consumer prominently features the offer of one particular seller in the so-called Buy Box, through which the product can be purchased with a one-click option. Since over 75% of purchases on the UK Amazon Marketplace are made via the Buy Box, being selected as this Featured Offer is a considerable benefit to sellers. The CMA considered that:

(i) when both Amazon Retail and independent merchants offered a product, the process of selection by Amazon for the Buy Box appeared to favour Amazon Retail; and

(ii) the process of selection may unfairly favour products that are FBA over products that are FBM.

The CMA was concerned that any bias or discrimination in the selection process may reduce competition between sellers on the UK Amazon Marketplace and/or reduce the scale and competitiveness of fulfilment service providers that serve merchants on the UK Amazon Marketplace.

(3) The criteria for qualification of merchants' products under the Prime programme. Products are eligible for the Prime label only where the merchant used either Amazon's FBA service or a logistics/delivery service under Amazon's "Seller Fulfilled Prime" ("SFP") programme, which involves using an approved "SFP Carrier". There are a limited

number of such SFP Carriers and (except when the carrier is Royal Mail) Sellers were unable independently to negotiate terms with the SFP Carrier but had to accept rates and terms that were specified in a separate agreement which Amazon had entered into with the relevant carrier. The CMA was concerned that this may:

(i) disadvantage merchants who might otherwise be able to obtain better rates and terms from SFP Carriers;

(ii) reduce SFP Carriers' ability to compete against Amazon's fulfilment services;

(iii) lead to higher prices for consumers by way of the passing on of higher fulfilment costs.

11. The CMA did not make a decision finding any infringement by Amazon of the Chapter II prohibition. Instead, as noted above, the CMA Decision accepted commitments from Amazon pursuant to s. 31A CA, to make a series of specified changes to its conduct and arrangements in relation to the UK market, which the CMA considered addressed the competition concerns which it had identified. Accordingly, there is no finding either that Amazon holds or held a dominant position or that it abused such a position.

(2) The EC Decision

12. On 20 December 2022, the European Commission ("the Commission") published a decision under Article 9 of Regulation 1/2003 accepting commitments from Amazon and concluding two investigations it had been conducting: Cases AT.40462 *Amazon Marketplace* and AT.40703 *Amazon Buy Box* (the "EC Decision").

13. The EC Decision concerned the French, German and Spanish markets. It did not cover the UK. The Commission's preliminary view was that Amazon[3] held a

[3] The Amazon companies that are addressees of the EC Decision are the first three proposed defendants to the present cases.

dominant position on each of those national markets. The competition concerns identified by the Commission in its investigations were:

(1) the use by Amazon of non-publicly available data regarding merchants' listings and transactions for the purpose of Amazon's own retail operation ("the Data-use conduct");

(2) the conditions and criteria that governed the selection of the offer that features in the 'Buy Box' ("the Buy Box-related Conduct"); and

(3) the conditions and criteria that governed the eligibility of merchants to Prime and of their offers to the Prime label ("the Prime-related Conduct").

14. The Commission reached "preliminary concerns" that each of these three conducts constituted an abuse of a dominant position within Art 102 TFEU. As regards the Data-use conduct, the Commission's preliminary concern was that this was likely to give Amazon Retail an advantage over merchants as regards its decisions to start listing (i.e. selling) a specific product; in its pricing decisions; in its inventory management and planning decisions; and in its vendor selection decisions (i.e. choice of supplier): recitals (181)-(197) of the EC Decision. The EC Decision states, at recital (222):

> "The potential effects that Amazon's Data-use Conduct may generate, and which essentially stem from the impact on the individual data-use cases that feed into Amazon Retail's various retail operation decisions, are independent of the potential effects of Amazon's Buy Box-related Conduct and Prime related Conduct. Nevertheless, as a result of the three Conducts taking place simultaneously on Amazon's e-commerce platforms, and distorting competition between Amazon Retail and third-party sellers, their potential effects complement each other in so far as such effects are ultimately all capable of marginalising third-party sellers by limiting their ability to grow and/or partially foreclosing them from the sale of highest demand products, thereby depriving them of scale, and thus lessening competitive pressure on Amazon Retail."

15. However, the Commission found that the final commitments offered by Amazon effectively met its preliminary competition concerns. The Commission therefore did not make a final decision finding an infringement of Art 102 TFEU.

16. It will be evident that the CMA Decision in part reflects similar concerns to the EC Decision.

(3) The AGCM decision

17. On 9 December 2021, the Italian national competition authority (the Autorità Garante della Concorrenza e del Mercato) ("AGCM") issued a decision finding that Amazon[4] had infringed Art 102 TFEU by abusing its dominant position on the Italian market and imposed a €1.13 billion fine ("the AGCM Decision").[5]

18. The abuse found by the AGCM concerned Amazon's favouring of merchants who used FBA for the sales they made on the Amazon marketplace in Italy. FBA sellers were found to have preferred access to the Prime label. The AGCM held that this restricted the development of competing third party providers of logistics and delivery services, to the advantage of Amazon. Secondly, the AGCM found that Amazon's conduct reduced competition from alternative providers of e-commerce platform services since it increased the costs of multi-homing[6] by merchants and therefore discouraged them from also selling on other e-commerce platforms.

19. Accordingly, the AGCM Decision has similarity with some of the concerns identified in the CMA Decision. But the AGCM Decision did not address the use by Amazon of non-publicly available data.

(4) US Proceedings

20. On 26 September 2023, the US Federal Trade Commission ("FTC") started proceedings against Amazon in the US District Court for the Western District of Washington, alleging that Amazon[7] "is a monopolist" that deploys an "interconnected strategy to block off every major avenue of competition".

---

[4] The Amazon companies that are the addressees of the AGCM decision are the second and third proposed defendants to the present cases and two Italian subsidiaries in the Amazon group.
[5] Amazon appealed the AGCM decision and the judgment of the Regional Administrative Court for Lazio on the appeal is pending.
[6] i.e. offering a product for sale on more than one e-commerce platform.
[7] The lawsuit is against only the first proposed defendant to the present cases.

21. As amended on 14 March 2024, one of the allegations in the complaint brought by the FTC together with 19 State Attorneys General (the "FTC Complaint") is that, when Amazon detects that a seller is offering a product elsewhere online at a price cheaper than that charged on the Amazon marketplace, "Amazon punishes that seller. It does so to prevent rivals from gaining business by offering shoppers or sellers lower prices" (para 13). Acknowledging that Amazon had removed a contractual requirement barring sellers from offering lower prices anywhere else, first in Europe and then in 2019 in the US, the complaint alleges that Amazon continues to use "other anti-discounting tactics to discipline sellers who offer lower-priced goods elsewhere". Those include the exclusion of such sellers from the Buy Box; and the complaint further alleges (para 16):

> "For especially important sellers, Amazon keeps in place a targeted version of the contractual requirement it supposedly stopped using in 2019. If caught offering lower prices elsewhere online, these sellers face the ultimate threat: not just banishment from the Buy Box, but total exile from Amazon's Marketplace."

22. In addition to what is described as Amazon's "anti-discounting tactics", the FTC Complaint alleges that Amazon makes eligibility for the "Prime" status, with all the benefits that brings in terms of increased sales, dependent upon the merchant using Amazon's FBA service. That is alleged to have foreclosed rival online marketplaces from achieving the scale to compete effectively with Amazon, since merchants are deterred from using third-party logistics and delivery providers on Amazon and accordingly would have to use different providers if they were to sell on other marketplaces, which makes multi-homing less attractive. This allegation is accordingly very similar to the abuse found in the AGCM Decision set out in paragraph 18 above.

23. The FTC Complaint concerns only the US market. We should make clear that these are allegations and that the US Proceedings are continuing, with trial currently set for February 2027.

D. THE ALLEGED ABUSES

24. Both the Hammond Action and the Stephan Action allege that Amazon held, and continues to hold, a dominant position. Neither that allegation nor the method by which the PCRs seek to establish it are in issue at this stage.

(1) Stephan

25. Professor Stephan on behalf of a class of retailers or merchants alleges five distinct forms of abuse. They are set out in detail in his claim form, enumerated as Abuses 1-5, as follows:

(1) Use of NPSD. This reflects the CMA and EC Decisions.

(2) "Self-preferencing of Amazon Retail". This refers to Amazon's selection of the "Featured Offer" that appears in the Buy Box. It is alleged that the criteria and method which Amazon applies favours offers by Amazon Retail as compared to offers by merchants. This reflects the second competition concern identified in the CMA Decision and the Buy Box-related Conduct set out in the EC Decision.

(3) "Self-preferencing of offers using FBA". This also refers to Amazon's selection of the Featured Offer for the Buy Box and alleges that the criteria and method for selection favour offers that use FBA as compared to offers that use FBM. The criteria are alleged to be non-transparent and discriminatory, including the way adjustments are made to the delivery promise for products which are FBM. Although related to Abuse 2, the harm alleged to result is different: this conduct is alleged to affect competition in logistics and fulfilment services for merchants as between Amazon and third parties offering those services, artificially stimulating demand for FBA and preventing FBM providers from achieving scale. Further, this reduces merchants' incentives to engage in multi-homing, and thereby reduces competition between on-line marketplaces, so increasing the fees which the Amazon Marketplace charges to merchants. These allegations reflect an aspect of the second

competition concern identified in the CMA Decision and part of the Buy Box-related Conduct identified in the EC Decision.

(4) Conditioning access to Prime on the use of FBA. Professor Stephan alleges that Amazon effectively makes access to the Prime label conditional on the use of FBA, and that the criteria for access to Prime are not transparent or non-discriminatory. This is alleged to have similar effects to Abuse (3). It reflects the abuse found in the AGCM Decision and also in the FTC Complaint.

(5) "Anti-discounting practices". Professor Stephan alleges that, in practice, Amazon places sanctions on merchants who sell their products elsewhere at lower prices than they charge on the Amazon UK Marketplace, or at least that its published policy and guidance makes merchants aware that it may do so. This is alleged to deter merchants from setting lower prices for their products off Amazon, and therefore reduces their incentives to engage in multi-homing, thereby reducing competition as between Amazon and rival on-line market places (and also reduces demand for FBM logistics services). This allegation is effectively the same as that being pursued in the US Proceedings by the FTC Complaint.

(2) Hammond

26. Mr Hammond on behalf of a class of consumers also alleges abuse as regards the selection of the Featured Offer for the Buy Box by way of Amazon's favouring of offers that are from Amazon Retail or products supplied using FBA over products which are supplied using FBM. This effectively equates to Professor Stephan's Abuses (2) and (3).

27. Mr Hammond further alleges that Amazon discriminated against or imposed unfair conditions on merchants who used FBM by restricting the basis on which products delivered using FBM could qualify for Prime status. This appears to be equivalent to Professor Stephan's abuse (4).

28. Mr Hammond also alleges that this conduct has restricted competition in the fulfilment (or "logistics") market, potentially enabling Amazon to charge higher prices for FBA and limiting the scale of rival logistics firms, and thereby also restricted competition from other online marketplaces, which is alleged to have enabled Amazon to charge higher fees to merchants.

29. Since Mr Hammond's claim is brought for a class of consumers, he alleges that Amazon's higher fees to merchants were passed on "in whole or in part" in the prices those merchants charged to consumers. We should observe that the expert retained by Professor Stephan also acknowledges that a part of the higher fulfilment and marketplace fees would have been passed on, and recognises that this element would fall to be deducted in the calculation of damages in the Stephan Action.

30. However, there is nothing corresponding to Professor Stephan's Abuse (1) or Abuse (5) in the Hammond Action.

E. AMAZON'S POSITION

31. Amazon did not make any application to strike out any part of either claim form or seek reverse summary judgment pursuant to Rule 79(4). Accordingly, it is not said that the PCRs have no real prospect of success on either dominance or in showing that damage was caused by any of the alleged heads of abuse, since damage is an essential element of the cause of action for breach of statutory duty. Moreover, although Amazon contended that if, contrary to its primary argument, the Stephan claim were allowed to proceed, then that should be on an opt-in not an opt-out basis, that contention was not based on any submission regarding the merits: Rule 79(3)(a).

32. In summary, Amazon opposed the granting of CPOs under the following heads:

    (1) the funding arrangements;

    (2) the expert methodology in each case; and

(3) as regards the Stephan claim, there was a conflict within the class.

33. We address each of these in turn, along with other considerations of which the Tribunal has to be satisfied even if they are not raised by the respondent to a CPO application. We then address the opt-out/opt-in question as regards the Stephan Application.

F. CONDITIONS FOR CERTIFICATION

34. As is well known, there are two conditions for the granting of a CPO:

(1) the Authorisation Condition - the Tribunal has to be satisfied that it is just and reasonable for the PCR to act as the class representative in the proceedings: CA s. 47B(5)(a) and (8)(b), and Rule 78;

(2) the Eligibility Condition - the claims included in the proceedings must:

(i) be brought on behalf of an identifiable class of persons;

(ii) raise common issues; and

(iii) be suitable to be brought in collective proceedings.

See CA s. 47B(5)(b) and (6), and Rule 79.

35. Rules 78-79 set out further considerations to be applied in determining whether these conditions are satisfied.

G. THE AUTHORISATION CONDITION

36. As regards both Professor Stephan and Mr Hammond, by its judgments in the carriage disputes, the Tribunal has effectively determined that they are persons able to conduct their respective proceedings competently and effectively. Both PCRs have the assistance of an advisory committee. Professor Stephan's includes a former president of the UK Supreme Court and a lawyer with extensive experience of commercial litigation. Mr Hammond's includes a

solicitor who was previously involved in litigation at a major City of London firm and now works at CEDR (the Centre for Effective Dispute Resolution).

37. Neither Professor Stephan nor Mr Hammond has any personal conflict of interest with the class that they seek to represent.

38. As regards adverse costs liability:

    (1) Professor Stephan's potential liability for adverse costs is covered not by insurance but by a guarantee of up to £5 million up to the grant or refusal of a CPO and up to £20 million thereafter. The guarantee is from two entities in the Elliott group: a Delaware partnership and a company registered in the Cayman Islands. Amazon had raised concerns as to its right to enforce the guarantee, but that has since been resolved by a direct undertaking provided by those two Elliott group entities. The fact that the amount of costs cover is higher in the Stephan Action than in the Hammond Action (see below) in our view properly reflects the fact that Professor Stephan raises a wider range of allegations than Mr Hammond.

    (2) Mr Hammond has ATE cover of £15 million. Amazon has not sought to argue that this is inadequate. It is a very significant sum, and we are satisfied that it should be sufficient to enable Mr Hammond to pay Amazon's reasonable and proportionate costs, if ordered to do so.

39. Both classes are represented by experienced solicitors and specialist counsel. In the Hammond Action, there are two firms of solicitors working together. Mr Hammond explains that this is because they have complementary capabilities, capacity and expertise: one firm is related to the US firm which has been litigating the same matter against Amazon in the US, while the other has experience in bringing collective proceedings before the Tribunal. He says that they have allocated the responsibilities between them to ensure that there is no duplication of tasks or increase in costs. We note what is said and do not regard the engagement of two firms as objectionable in principle. However, if any costs orders should be made in favour of Mr Hammond, it will be necessary on

assessment to scrutinise the amount of costs claimed to ensure that there is no unreasonable overlap in the costs incurred.

40. Both PCRs have prepared litigation plans in some detail, including details of how they will keep PCMs informed of the claims and the progress of the actions. We have reviewed those plans and find them well thought through and acceptable.

Funding arrangements

41. Both PCRs have entered into litigation funding agreements ("LFAs") with commercial funders. The LFAs, with only minimal redactions for confidentiality, were before the Tribunal. The Stephan LFA was already on the Stephan claim's website and, at the Tribunal's request, the Hammond LFA was posted on the Hammond claim's website. We should make clear that this should be standard practice for all opt-out proceedings.

42. LFAs for collective proceedings give rise to a number of issues. The funding provided must be adequate to enable the PCR to cover their costs budget and therefore effectively pursue the proceedings. Further, the Tribunal is concerned to ensure that the PCR remains in essential control of the proceedings for the benefit of the class. Therefore the Tribunal in particular considers the provisions of the LFA:

(1) concerning settlement;

(2) concerning termination by the funder;

(3) for control of legal costs; and

(4) concerning payment to the funder, including its return.

We address these factors in turn for the two applications.

(1) Stephan

43. The terms of Professor Stephan's LFA were subject to scrutiny and adversarial argument in the carriage dispute hearing. We held that we were satisfied as to the level of funding under the LFA (a maximum of £32.9 million). Although we noted that the funder's level of return seemed "remarkably high", we did not find that to be an obstacle to certification on the basis that it would be subject to subsequent review by the Tribunal at the conclusion of the case: *Stephan/BIRA* Judgment at [55].

44. The settlement provisions were considered and accepted in that judgment, rejecting the contrary submissions of BIRA. Amazon sensibly did not seek to renew that objection. And although we had been concerned about the provision in the LFA dealing with termination, in the face of criticism from the Tribunal, Professor Stephan and his funder agreed to amend that provision. We have since been provided with an appropriate amendment to address this concern.

45. As regards legal costs and other disbursements, cl. 4.2(h) of the LFA provides that Professor Stephan will "review" invoices in respect of fees, disbursements and expenses prior to submission to the funder for payment, to ensure that the sums have been incurred in accordance with the LFA and are within the approved budget, and that he also has to certify that he is not aware that they would cause an increase in that budget. Clause 4.4 provides that, at the reasonable request of the funder, Professor Stephan will seek to have those fees assessed. We recognise that these provisions provide some protection against unreasonable fees. However, we think it is important that the PCR, independently, should be in a position to subject claims for costs to proper scrutiny. The funder's interests are not identical to those of the class because, if the action results in recovery for the class, the funder's expenditure on costs will be reimbursed out of the sum recovered, potentially at the expense of the class. It is no disrespect to Professor Stephan to say that for litigation of this scale we do not think he is in a position effectively to review and challenge bills for legal costs without assistance. That is a common situation for class

representatives. Reflecting this position, in *Bulk Mail Claim Ltd v International Distribution Services PLC* [2025] CAT 19 at [22], the Tribunal recently observed that measures may need to be put in place to ensure that the PCR gets costs specialist advice on legal fees to provide assistance in approving any costs arrangements and fees. As in that case, we indicated that we would wish for Professor Stephan to be assisted by a costs specialist, and we consider that should become the standard approach in collective proceedings.

46. After this was raised by the Tribunal in the CPO hearing, Mr Beal KC told the Tribunal that Professor Stephan was prepared to instruct specialist cost lawyers and that this could be accommodated within his existing budget. On 29 May 2025, his solicitors wrote to inform the Tribunal that Professor Stephan was instructing independent lawyers at a costs firm who will provide him with monthly oversight reports "and where appropriate, identify any queries arising from the invoices, and provide commentary to assist Mr Stephan in determining whether further clarification and/or adjustment should be sought." This arrangement satisfies our concern.

47. As regards the funder's return, Professor Stephan explained in his pleaded Reply dated 14 April 2025 that he had taken advice from leading costs counsel both before concluding his original LFA in June 2024, and then again in late October 2024 prior to agreeing the amended terms concluded on 14 November 2024. The advice which Professor Stephan received is obviously privileged. We do not think it is a ground for objection that he had originally agreed to more generous funding terms when he was subsequently able to negotiate a lower funder's return, and we do not accept that it is appropriate for the Tribunal to require details of that negotiation process. As the Chancellor stated in his reasons for refusing permission to appeal against the *Stephan/BIRA* Judgment, "it is hardly conducive to promoting the interests of the class members to deny a class representative the chance to improve the funding terms when faced with competition from a rival." Although raised in its skeleton argument, we note that Amazon did not place weight on this point in its oral submissions.

(2) Hammond

48. Unlike Professor Stephan's funding arrangements, these matters were not addressed in the *Hammond/Hunter* Judgment because they were not raised as a basis for distinction between the two rival applications.

49. Mr Hammond's LFA went through a number of revisions. It was originally entered into on 7 June 2023. In *R* (*PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594 ("*PACCAR*"), the Supreme Court held that a LFA where the funder's return was calculated as a percentage of the damages recovered came within the scope of s. 58AA(3) of the Costs and Legal Services Act 1990, which meant that most LFAs in current use at that time were unenforceable. Following that judgment, Mr Hammond's LFA was amended on 1 November 2023 in two particular respects. First, the funder's return was changed from a percentage of damages to a fixed fee basis of remuneration. Second, the priority of distribution of the proceeds recovered in the action was changed by incorporation of a Priorities Deed which provided that, subject to any order of the Tribunal to the contrary, the amounts payable to the funder shall be paid prior to distribution of the sums recovered to the class members.

50. Following the Tribunal's judgment of 14 January 2025 in *Riefa v Apple Inc & Ors* [2025] CAT 5, [2025] Bus LR 417, Mr Hammond obtained further legal advice and negotiated further amendments to the LFA. This revised LFA was formally entered into on 5 May 2025, just before the start of the hearing of the present CPO applications.

51. The funder is FourWorld Global Opportunities Fund Ltd, a Cayman Islands company which is managed by FourWorld Capital Management LLC, a SEC registered investment advisor based in New York (together, "FourWorld"). Funding is provided in an amount of just under £16.7 million. Mr Hammond's 'provisional litigation plan budget' is just over £19.8 million, but his solicitors and counsel are working on partial conditional fee arrangements and the budget is discounted to reflect that. On that basis, we are satisfied that Mr Hammond has a sufficient level of funding in place under the revised LFA.

52. A preliminary point was raised by Amazon that FourWorld is not a member of the Association of Litigation Funders ("ALF") and therefore is not subject to the Code of Conduct adopted by the ALF, which is designed to ensure certain basic protection for funded parties, including as to capital adequacy. By letter from its solicitors dated 13 March 2025, FourWorld confirmed that it would act in accordance with the provisions of the Code as regards capital adequacy, and provided details of extensive assets held under management. In the light of that, Amazon does not suggest that FourWorld would be unable to meet its commitment to fund the proceedings.

53. Following various revisions, cl. 3.1 of the LFA states:

> "… The Parties also recognise that, in accordance with The Association of Litigation Funders of England & Wales Code of Conduct, nothing in this Agreement entitles the Funder to attempt to and/or to control the conduct by the Solicitors and/or the Class Representative of the Action and/or the Proceedings." Further, under cl. 4.1.3, FourWorld is under a duty of good faith in dealing with Mr Hammond and his lawyers.

54. Settlement is addressed in cl. 15. Mr Hammond has a right to settle or reject an offer of settlement of the proceedings, but only on advice from his solicitors or counsel that this is reasonable. If he decides to continue the action despite advice that he should settle, the funder can treat that as a material breach of the agreement, but that is subject to a dispute resolution process involving reference to an independent KC under cl. 23. We regard this provision as satisfactory.

55. Termination is addressed in cl. 24. Apart from the usual provision (including the right of the funder to terminate on a material breach which is irremediable or not remedied), this includes the following:

> "24.3 The Funder may terminate the Agreement, at any time, by giving the Class Representative 15 Business Days prior written notice that:
>
> > 24.3.1 the Funder reasonably ceases to be satisfied about the merits of the Action, such a view to be reached based on independent legal and, where appropriate, expert advice that has been provided to the Funder;
> >
> > 24.3.2 the Economic terms agreed by the Class Representative, the Solicitors and the Funder prior to the date of this Agreement (and as set out in the Priorities Agreement on the date of this Agreement) are required to be amended so that they are less favourable to the Funder in order to proceed with the CPO; and/or

> 24.3.3 the Funder reasonably believes that the action is no longer commercially viable, such a view to be reached based on independent legal and, where appropriate, expert advice that has been provided to the Funder.
>
> …
>
> 24.6 Any dispute arising between the Funder and the Class Representative arising out of the exercise of their rights under this clause shall be subject to the dispute resolution process in Clause 23."

We consider that these provisions give satisfactory protection to the class while safeguarding the legitimate interests of the funder.

56. As in the Stephan Action, we were concerned that there should be effective control of costs. Cl. 7 sets out provisions regarding legal costs, but essentially involves the solicitors, "on behalf of" the PCR, transmitting their legal invoices to the funder for payment. Subsequent to the hearing, by letter from his solicitors dated 23 May 2025, Mr Hammond stated that he would instruct a costs draftsman who will undertake a review of future interim invoices submitted, on at least a quarterly basis, and who "will apply to those invoices the level of scrutiny that a corporate client would apply when receiving invoices from a solicitor as to the reasonableness of the rates and time taken to which the interim invoices relate." He will then assist Mr Hammond regarding any clarification or adjustment to be sought regarding those invoices. We find this satisfactory in meeting our concern.

57. As noted above, the funder's remuneration arrangements under the LFA have undergone several changes. Upon "Success" in the proceedings (meaning any order, whether by judgment or approval of a settlement, whereby Amazon is obliged to pay damages), under the amended LFA of November 2023, in terms which are unchanged in the further revision, the "Funder's Fee" is calculated in cl. 9.2 in the following way:

1. a sum equal to its outlay;
2. a further £40 million;
3. if Success occurs after the Stage A Date (the period ending on the date falling 90 days after a CPO is granted) but before the Stage B Date (the

date on which the list of documents are first ordered to be exchanged) a further £40 million; or

4. if Success occurs after the Stage B date, a further £60 million; and
5. a "Commitment Fee" of 15% per annum of the maximum aggregate amount stipulated in the litigation plan budget as the estimated costs of the action.

58. Although on the wording of cl. 9.2.4 concerning the Commitment Fee the 15% might be read to apply to the total budget referred to above (i.e. £19.8 million), Mr Moser KC explained at the hearing that the "Litigation Plan Budget" is not the same as the Provisional Litigation Budget exhibited to Mr Hammond's witness statement. Following the hearing, by an undated letter from FourWorld to one of Mr Hammond's solicitors, sent to the Tribunal by his other solicitors with a letter dated 15 May 2025, the funder stated expressly that this percentage is levied on the funder's committed amount of £16.9 million. It therefore amounts to some £2.5 million p.a. By a further letter dated 9 June 2025, Mr Hammond confirmed that he agrees that this is the correct meaning of cl. 9.2.4. On that basis, FourWorld says this amount is justified as the economic return which it is expected to earn on capital, and that as a result of the funder's commitment under the LFA it is "unable" to deploy this sum elsewhere.

59. Amazon raised two main challenges to this remuneration package for the funder:

(1) it is capable of rewarding the Funder with very substantial returns, much higher than those permitted in other cases; and

(2) it is inappropriate to allow a Commitment Fee on Committed Funds, given that in practice these funds will not be allocated to the case until needed. By calculating the return on committed funds, rather than funds drawn down, the Funder's return is further inflated.

60. Amazon criticised the overall return as "excessive" – and in several realistic scenarios, "wildly excessive" and "indefensibly high". In that regard, Amazon

relied on the Tribunal's observations in *Gormsen v Meta Platforms Inc* [2024] CAT 11 at [36]:

> "… there do come points where funding arrangements contain provisions that are sufficiently extreme to warrant calling out or in extremis a blanket refusal to certify…."

61. Amazon further submitted that the fact that Mr Hammond could agree to such arrangements meant that he was not suitable to be authorised to represent the interests of the class: cp. *Riefa*, where the Tribunal refused to grant a CPO largely because of concern about the competence of the PCR demonstrated by her lack of understanding of her LFA.

62. However, since *PACCAR* precluded the use of a 'percentage of damages' model of remuneration for funders, the use of committed funds as a basis for calculation of the return is a model which has been used in several LFAs where CPOs have been granted: as well as *Gormsen* itself, see e.g. *BVS Claims Limited v Bittylicious Ltd & Ors* [2024] CAT [48]; *Alex Neill v Sony* [2023] CAT 73.

63. In the hearing, counsel for Amazon and for Mr Hammond respectively put forward estimates of the possible return to the Funder under this model. Mr Hammond's estimates were between 3.02x and 7.74x Committed Funds. Amazon's were considerably higher. However, it quickly became clear that the structure of the payment is such that the return will vary considerably over time.

64. Moreover, the definition of the Funder's Fee as comprising the constituent elements set out above is prefaced, at the start of cl. 9.2, by the words: "Subject to an order of the [Tribunal] to the contrary". At the end of the day, the amount of the funder's fee or return which will be paid is subject to the scrutiny and approval of the Tribunal. That is in line with the approach now authoritatively set out by Court of Appeal in its judgment in *Gutman v Apple Inc* [2025] EWCA Civ 459, where the Court emphasised the discretion of the Tribunal at the time of a judgment, and the same approach clearly applies if the Tribunal is asked to approve a settlement. The recent judgment in *Merricks v Mastercard, Inc* [2025] CAT 28 ("Merricks") demonstrates the exercise of that discretion to allow the funder considerably less than had been provided under the LFA in

circumstances where the proceedings had a very poor result. That approach is particularly apposite here since, as the two sides' competing examples demonstrated, the question whether the return stipulated under the LFA is exorbitant will be affected by the timing of the event triggering payment.

65. We note also that in the carriage dispute where Ms Hunter was arguing that her competing application was preferable for the proposed class, and where she would have had every incentive to criticise the level of return to the funder under Mr Hammond's LFA, no objection to that LFA was raised. Ms Hunter's LFA is not now before us, but Mr Moser told us that her funder's return under their LFA were not radically different.

66. We consider that we have good reason to be cautious at the certification stage. The Tribunal cannot embark on an inquiry into the funder's assessment of risk or internal expectation of likely damages, since that would involve seeing privileged material. Nor can we look at the negotiations between the funder on the one hand and the solicitors and the PCR on the other. By contrast, after judgment or settlement, the parties would be in a position to disclose privileged material: see *Merricks*. And we note that the full Federal Court of Australia, in a jurisdiction with much more experience of class actions, across a wide field of claims, said *in Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 at [11]:

> "…Court approval of a reasonable funding commission rate is to be left to a later stage when more probative and more complete information will be available to the Court, probably at the stage of settlement approval or the distribution of damages."

67. Nonetheless, we should emphasise two matters:

(1) The Tribunal at certification wishes to be satisfied that the PCR has made proper efforts to secure favourable funding terms. Here, we were told that the amended LFA which introduced the current basis for the Funder's Fee was negotiated soon after the *PACCAR* judgment and that the existence at that time of a competing application for certification (i.e. the Hunter action) made it harder to secure funding. At the request of the Tribunal, Mr Hammond provided during the hearing a further

witness statement which gave much more information of the evolution of the final form of the LFA. We consider that it should be standard practice for the PCR to address in their evidence the steps they took to secure an LFA on appropriate terms.

(2) The fact that we do not reject the funder's remuneration at this stage as excessive should not be taken as in any way an indication that we approve the specified Funder's Fee. We do find that it could potentially result in an exceptionally high return. As regards the Commitment Fee element, we cannot accept FourWorld's justification that it is unable to earn any return on the total of £16.9 million. Nothing like that amount is required immediately on certification, instead the outlay is spread over several years (e.g. some 29% of the litigation budget is allocated only to "pre-trial" and trial stages). We have determined only that the question of whether the total Funder's Fee is unreasonable is for more detailed consideration at another time.

68. There is a further concern which was raised not by Amazon but by the Tribunal. This arose from the amendment to the LFA which enabled the PCR to seek an order for payment of the Funder's Fee in priority to distribution of the monies recovered to the class, i.e. that it was not left to be paid out of undistributed damages. It was not clear why Mr Hammond had agreed to a change which appeared less favourable to the class. However, the circumstances were satisfactorily explained in Mr Hammond's second witness statement, and the terms of cl. 9.1.3 which deal with this point were clarified during the hearing. That clarification was then confirmed by a subsequent correcting amendment on 14 May 2025, such that it now states:

> "9.1 In the event of Success, the Class Representative, assisted by the Solicitors, shall:
>
> …
>
> 9.1.3 subject to an Order of Court to the contrary, instruct the Solicitors to apply to the Court for an Order that the Stakeholder Fees are to be paid from either:
>
> 9.1.3.1 the Undistributed Damages; and/or

> 9.1.3.2 where it is appropriate in all the circumstances, from something other than Undistributed Damages (including from the Proceeds),
>
> having regard to: (i) the quantum of the Funder's Outlay; (ii) the quantum of the Funder's Fee; and (iii) the quantum of Proceeds; and (iv) the level of the Stakeholder fees. If there is any dispute about whether it is appropriate in all the circumstances to make such an application as envisaged by this Clause 9.1.3 such dispute shall be resolved through the dispute resolution process in Clause 23; …."

Accordingly, there are two stages: (a) such an application shall be made only when it is "appropriate in all the circumstances" having regard to the matters specified in (i)-(iv); and (b) the Tribunal will in any event determine whether to accede to such an application. We consider that this appropriately protects the interests of the class.

69. Having regard to the information in Mr Hammond's second witness statement on the genesis of the amendments and the advice which he took, we do not consider that the fact that he agreed to these amendments, whether to the Funder's Fee or to the priority on distribution, suggests that he would not act adequately in the interests of the PCMs. The position is markedly different from that in *Riefa.* Amazon very properly did not pursue that suggestion in light of the further information in that witness statement.

H. THE ELIGIBILITY CONDITION

(1) Identifiable class

70. In the Stephan Action, the class is defined as:

> "All UK-domiciled Sellers[8] that used Amazon's e-commerce marketplace services to reach customers in the UK within the Relevant Period".

The Relevant Period is six years, or in the case of claims governed by Scots law, five years before the 26 June 2024 when the claim form was issued.

71. This is a clearly identifiable class.

[8] Defined as non-Amazon merchants who held a professional selling account or equivalent with Amazon.

72. In the Hammond Action, the class is defined as:

> "All natural consumers who purchased at least one product from Amazon's UK based e-commerce marketplace at Amazon.co.uk between at least 1 October 2015 and 7 June 2023 … including the personal representatives or administrators (where appointed) of such purchasers who are deceased at the date of the granting of the CPO."

The class is accordingly confined to individuals and excludes corporate purchasers, as noted in the *Hammond/Hunter* Judgment.

73. Moreover, the claim form states that the loss claimed for relates to purchases of products sold either by Amazon Retail or a third party merchant if supplied using FBA. As Mr Moser confirmed in the hearing, the Hammond Action does not claim in respect of the effect of increased fulfilment costs on purchases of products supplied using FBM. In theory, therefore, the class definition is too broad, since a consumer whose purchases on Amazon were supplied entirely through FBM would have no claim. This point was not explored in the hearing but, as we understand it, given the length of the claim period, the prospect of a consumer purchasing on the UK Amazon Marketplace without making a single purchase from either Amazon Retail or from a merchant who supplied using FBA is remote. Moreover, most consumers who purchase from a merchant on Amazon would be unaware whether that merchant was supplying on the basis of FBA or FBM. To amend the class definition to exclude those whose purchases were supplied exclusively using FBM would therefore make it difficult to determine whether or not a PCM was within the class, a factor which would count against the eligibility condition: Rule 79(2)(e). As the Tribunal observed in *Mark McLaren Class Representative Ltd v MOL Europe Africa) Ltd* [2022] CAT 10at [60]:[9] "a simple, clear definition is preferable…. it is not fatal that some of the class members have not suffered damage in a manner that would be quantified by the proposed methodology." On a similar basis, we therefore consider that the definition is acceptable here. The class it defines is clearly identifiable.[10]

---

[9] This conclusion was not challenged on appeal: [2022] EWCA Civ 1701.

[10] Although within any aggregate damages that may be recovered in the Hammond Action, the actual loss suffered by a consumer who bought e.g. 50% FBA and 50% FBM would be different to the loss suffered by a consumer who purchased 100% FBA, there is no requirement that the distribution of aggregate damages reflects actual compensation of individual class members: *Merricks v Mastercard* [2020] UKSC 51, [2021] 3 All ER 285.

(2) Common issues

74. There is clearly a range of significant common issues in both proceedings. This was not in dispute.

(3) Suitability

75. Amazon directed a significant challenge under this head. First, for each of the two proceedings, Amazon raised a wide ranging challenge to the methodologies put forward by the PCRs' respective experts. Secondly, as regards the Stephan Action, Amazon alleged that there is a significant conflict within the class which makes the proceedings unsuitable for the class as defined. We address these two grounds in that order.

76. The general approach to the assessment of the expert methodology put forward at the certification stage is set out in what has come to be known as the *Microsoft* test, based on the Canadian Supreme Court decision in *Pro-Sys Consultants Ltd v Microsoft Corpn* [2013] SCC 57, where Rothstein J stated, at para 118:

> "In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (ie that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

77. Application of the *Microsoft* test to certification under s. 47B CA was introduced by the Tribunal in *Merricks v Mastercard Inc* and approved by the Supreme Court in that case: [2020] UKSC 51, [2021] 3 All ER 285 ("*Merricks SC*"). The approach under the test was considered in particular by the Court of Appeal in *London & South Eastern Railway Ltd v Gutmann* [2022] EWCA Civ

1077 ("*Gutmann*"). The following propositions can be drawn from the appellate authorities:

(1) The test is about practical justiciability. The Tribunal is to determine whether the methodology is workable at trial and whether it will advance the resolution of the issues: *Gutmann* at [60];

(2) It must be recognised that the methodology is formulated prior to disclosure and is therefore necessarily provisional and might properly identify further refinements and work to be carried out after disclosure: *Gutmann* at [55];

(3) The Tribunal is entitled to apply intuition and common sense in its assessment of the methodology: *Gutmann* at [57];

(4) The methodology is not required to achieve perfection. The Tribunal should bear in mind that it is armed with a broad axe by which it can fill gaps and plug lacunae in the methodology: *Gutmann* at [58];

(5) The "some basis in fact" test requires only a minimum evidentiary basis and is not an onerous condition: *Merricks SC* at [41].

(6) The Tribunal should avoid conducting a mini trial: *Merricks SC* at [113]

78. The following passage from the Court of Appeal's judgment in *MOL Europe Africa) Ltd v Mark McLaren Class Representative Ltd* [2022] EWCA Civ 1701, [2023] Bus LR 318 at [47] bears emphasis:

> "…The level of detail of a methodology required by the CAT will always be fact and context sensitive and will turn upon such matters as the availability of evidence. However, underlying the *Microsoft* test is the proposition that *if* a claim is certified then the methodology offered by the class representative will provide an initial blueprint for the parties and the CAT of the way ahead to trial. That is of course not to say that the class representative's methodology is cast in stone. It can, as in the instant case, be challenged by the defendants, and Rule 85 of the CAT Rules contains "*wide powers*" for the CAT to stay, vary or revoke a CPO ([*Merricks SC*])). In short, the CAT has power at any point to revisit the methodology."

79. We make the following further points:

(1) Whereas at trial the expert's methodology can be subjected to full scrutiny and the expert can be cross-examined, giving him or her full opportunity to defend and elaborate on the methodology, that is not the approach followed at certification, where assessment of the methodology has to be made at a higher level and argument is conducted by way of concentrated submissions. That does not mean that inadequacies or significant lacunae in the methodology can be glossed over, or that the *Microsoft* test has no substance. But it means that intense, granular dissection of the methodology is generally inappropriate. The question at this stage is whether the method is plausible, coherent and workable, as opposed to purely hypothetical or unclear or impractical. If it were otherwise, it would be almost impossible for the Tribunal to apply the test without cross-examination of the expert and giving them a full opportunity to respond to the criticisms. But that would be precisely the kind of mini trial which the Tribunal must be careful to avoid. The Microsoft test should not lead to a "battle of the experts": UK Trucks Claim Ltd v Stellantis NV & Ors [2022] CAT 25 at [265] ("Trucks"). In the Microsoft case itself, the Canadian Supreme Court rejected the defendant's contention that the court should assess the expert methodology by weighing the evidence of both parties at the certification stage; and see also the Court of Appeal of British Columbia in Ewert v Nippon Yusen Kabushiki Kaisha [2019] BCCA 187 at [17].

(2) The Tribunal is not at the certification stage directly concerned with liability (in the absence of an application to strike out or for reverse summary judgment), and therefore with whether the impugned conduct does or does not constitute an abuse. We heard much argument from Amazon to the effect that it would have had no incentive to engage in the allegedly abusive conduct, or that the conduct in fact had pro-competitive effects. Those will be matters which Amazon can advance at trial, and it is always open to Amazon to seek to show objective justification for conduct that might otherwise constitute an abuse. However, those are not matters relevant to assessment of whether the

expert's methodology is adequate. We do not accept, therefore, that it is necessary for the expert to distinguish between the anti-competitive theory of the case which the PCR advances and a pro-competitive theory raised by Amazon. For example, if Amazon's use of NPSD is found to be competition on the merits, then Professor Stephan's alleged abuse (1) will fail. At this stage, what the Tribunal has to determine is whether Professor Stephan's expert has a workable method of determining, allowing for the broad axe, the extent of use of NPSD and what effect that had on third party merchants compared to the counterfactual. We therefore recognise that the method has to provide a means of estimating the extent of the impugned conduct and its effect. If Amazon seeks to argue that none, or not all, of that conduct infringes competition law, that is a matter for trial; and in that event there may be a question as to whether the method allows for potential adjustments.

(3) This case is unusual in that, although neither the CMA nor the Commission made positive findings of infringement, they raised competition concerns as regards all the allegations here except for abuse (5) in the Stephan Action, and Amazon gave binding commitments in response to both the Commission investigation and in response to the CMA investigation to change its practices and cease the conduct criticised, all of which were enshrined in formal decisions. On the present applications, Amazon sought to distinguish those decisions as of little relevance. We do not here consider what evidential value such decisions may have on the question of liability.[11] But we consider that the commitments have relevance to the expert methodology in two respects:

(i) The commitments were to be in place under the EC Decision by June 2023 and under the CMA Decision by May 2024. This means that, insofar as the experts will be seeking to measure the impact of the impugned conduct, where that corresponds to the

[11] See Case C-547/16 *Gasobra SL v Repsol Comercial de Productos Petroliferos SA*, EU:C:2017:891 at para 29.

subject of the regulatory decision, this provides comparative 'during and after' periods during which the position of Amazon and third-party merchants can be observed and assessed. Of course, there may be other possible explanations for relative performance which may have to be taken into account, and there may be lingering effects of the conduct after the commencement of the commitments. But this feature provides a factual basis on which to build an estimation of probable effect.

(ii) The commitments were offered and agreed to by Amazon, and it is well-known that the giving of commitments usually follows a period of negotiation with the competition authority. Amazon is of course a highly sophisticated company, and we regard it as highly likely that Amazon will have carried out some internal evaluation of the likely effect on its business of the commitment it was offering, and possibly of potential alternative arrangements. Amazon will have to disclose such evaluations, which we expect should assist the experts' assessment.

(4) In the absence of disclosure, the experts are relying heavily on information gleaned from the regulatory decisions to which we refer above. However, the CMA Decision is framed at a very high level with little detail. The EC Decision has considerable detail, but significant points are redacted in the published version. If the actions proceed, we assume that, subject to any suitable confidentiality undertakings, the experts should have access to the unredacted version of the EC Decision. Furthermore, the binding commitments by Amazon to the CMA and to the Commission to change its practice are in each case subject to reports to the respective authority by a monitoring trustee. We anticipate that those reports would also be disclosable.

80. Against that background, we turn to the respective methods put forward by each PCR through their appointed expert, and the criticisms levelled by Amazon against them.

a. Stephan

81. Professor Stephan's expert is Dr George Houpis, a director at Frontier Economics - an economics consultancy. He has considerable experience as an economic consultant, including in giving competition economics training to regulatory authorities.

82. In support of the Stephan Application, Dr Houpis produced, on 26 June 2024, a report of over 200 pages with additional annexes, including one setting out the data to be requested and a six page supplement on 23 April 2025 explaining the sampling methodology used. On 24 March 2025, Amazon's appointed expert, Mr Derek Holt, produced a report criticising various aspects of Dr Houpis' methodology, and on 14 April 2025 Dr Houpis produced a further report of over 80 pages responding to Mr Holt. Dr Houpis' main report is comprehensive and very detailed.

83. At the Tribunal's request, both Dr Houpis and Mr Holt produced 20 page summary reports setting out their respective positions, which we found very helpful.

84. Although Professor Stephan alleges five distinct abuses, as set out above, the resulting losses for which damages are claimed are of three kinds: (a) loss of sales by independent merchants on the UK Amazon Marketplace; (b) increase in logistics/fulfilment fees due to distortion of competition in the fulfilment market; and (c) increase in marketplace fees/commissions charged by Amazon due to reduced competition from other online marketplaces.

85. Dr Houpis provides a different method for each of the five heads of alleged abuse, although there is some overlap to the extent that different abuses contribute to the same head of loss through a different causal route. For most forms of loss, Dr Houpis put forward a preferred method as well as back-up methods in the event that his preferred method could not be applied. If we were to describe Dr Houpis' methods comprehensively, this would be become a very long judgment. For the purpose of applying the *Microsoft* test, we summarise his approach in headline terms with some simplification, concentrating on the

criticisms advanced by Amazon which we think had most substance. Therefore we do not cover every point raised by Mr Holt, and if we do not discuss a particular criticism that is because in our view it is insubstantial or misplaced.

86. *Abuse (1) - use of NPSD*: as we have observed, this corresponds to the first competition concern of both the CMA and the Commission. The CMA stated, in its decision at para 4.7, that the potential effects of this practice included:

> "(a) a reduction in the scale and competitiveness of third-party sellers on the UK Amazon Marketplace;
>
> (b) a reduction in the number and range of product offers from third-party sellers on the UK Amazon Marketplace;…."

The Commission considered the potential effects in some detail, and its overall view is summarised in recital (183):

> "… the Commission preliminarily found that the Data-use Conduct could ultimately lead to largely foreclosing third-party sellers from the sale of the highest demand products where Amazon Retail is typically competing. Informing and adjusting Amazon Retail's offers based on third-party seller data enables Amazon to largely control the outcome of competition on its e-commerce platforms and cap the ability of third-party sellers to become viable competitors on Amazon Retail."

Both the CMA and the Commission obtained similar commitments from Amazon that it would not going forward use NPSD for the purpose of its retail operations in competition with third-party merchants.

87. Of the various potential effects of this alleged abuse recognised by the competition authorities, Dr Houpis has not specifically considered at this stage the effect of Amazon contacting the suppliers to third-party merchants.

88. Dr Houpis' preferred 'bottom-up' method is to explore how Amazon's operations in the UK used NPSD in an algorithm or in other automated tools to set prices, manage its inventory planning decisions and decide when to enter the marketplace with a new product and when to exit. Dr Houpis expects that access to each of these tools, alongside relevant documents and other information about how Amazon used NPSD in its decision making, would enable him to:

(1) re-run the tool on historical data with and without the NPSD in order to estimate how Amazon Retail's prices would have differed absent the abuse and how its share of wins in the Buy Box would have reduced; and

(2) estimate how Amazon Retail's inventory planning decisions would have been different in the counterfactual.

In a second step, Dr Houpis would combine this with Amazon Retail's historical sales volumes, to estimate how much more frequently Amazon Retail would have run out of stock, had it not had access to NPSD. In a final step, he will further assess the negative impact this advantage had on sales of third-party sellers.

89. For a sample of products that Amazon Retail began (and stopped) selling, Dr Houpis would access the automated tools which, according to the Commission, Amazon used to inform its decisions to start or end the sale of these products, along with the historical data (including NPSD) which it fed into these tools to inform these entry/exit decisions during the infringement period. This should enable him to model how Amazon Retail's decisions to start or end the sale of these products would have differed, had it not had access to NPSD.

90. Dr Houpis would conduct these assessments on a representative sample of products, weighted appropriately, to reflect the mix of Amazon Retail's sales across different product categories.

91. Amazon raised questions as to how far this method could be applied for the entire claim period, but its main criticism was that Dr Houpis does not distinguish between aspects of use of NPSD which Amazon contends are not anti-competitive. If that were so, then Amazon's commitments went further than was necessary. That is possible, although we observe that it would be surprising if Amazon accepted a commitment regarding the use of NPSD which had a significant adverse effect on its business, but which was not necessary to meet a legitimate competition concern. In any event, we see no reason why Dr Houpis' method could not be applied in respect of some, but not all, uses of

NPSD, albeit that in that eventuality, 'during and after' analysis based on the commitments would not be so useful.

92. If there should be problems in applying this method, Dr Houpis sets out an alternative 'top-down' approach in respect of pricing and inventory management decisions, analysing large merchants with products in dynamic markets (i.e. where there are frequent price changes) in which Amazon Retail did not compete, as a benchmark for the likely performance of Amazon Retail without access to NPSD. Amazon did not question the feasibility of this method but challenged its relevance. However, Dr Houpis explains that "products with a similar frequency of price changes are likely to have exhibited similar levels of volatility in demand and supply conditions, and therefore to have presented a similar level of challenge for inventory (and pricing) decisions." He adds that if Amazon can put forward legitimate reasons that could result in it having a better performance than this benchmark group, that can be taken into account. We find this method and rationale coherent, workable and acceptable at this stage.

93. For product entry and exit decisions, Dr Houpis is in fact cautious as to whether those caused loss to merchants, but here he also puts forward a top-down method to explore this by modelling the degree to which NPSD and publicly available data are correlated; and if they are not, then he would develop a statistical model of Amazon's decisions to start and stop selling a sample of products.

94. Dr Houpis considers the dynamic deterrence of third party merchants, which is a hypothesised effect of abuses (1) and (2) in that they make competition on the merits against Amazon Retail that much harder and thereby might discourage merchants from competing in products where Amazon Retail is present. Dr Houpis proposes to use a 'during-and-after' regression analysis on how the number of competing offers changed (in the products where Amazon Retail competes) after the implementation of the CMA commitments. Dr Houpis will use the results to estimate the change in Amazon Retail's percentage of Buy Box wins following the commitments, and, by applying this to the relevant pre-commitment sales, obtain a measure of the sales volumes that third-party merchants would have gained during the infringement period absent the

deterrence effect. Discussing dynamic deterrence in his first report, Dr Houpis noted (at fn 582), "based on my analysis of the Keepa data, c. 19% of Amazon Retail offers that won the Buy Box faced no rival FBA or FBM offer at all."

95. Amazon contended that one cannot reliably extrapolate from any change since the commitments given that the selling environment had changed. However, that point can be made about almost any comparison between different time periods. Disentangling the effects of the event of interest from the other differences is a standard task in time-series analysis, and closer to trial there will be several years of data to analyse. This is not a flaw in the method, and questions of how robust the results are will be matters for trial. Moreover, as noted above, we would expect that Amazon will itself have conducted internal analysis of the anticipated effect of the commitments to which it was agreeing.

96. Furthermore, aside from potential internal evaluations by Amazon (see para 80(3)(ii) above), we note that the Commission was apparently able to gather significant relevant evidence. For example, recital (186) refers to "evidence on the file" showing that:

> "Amazon Retail's entry decisions automatically and systematically lead to …a reduced presence of third-party sellers and, therefore, reduced competitive pressure on Amazon Retail in the sale of best-selling products on the Amazon e-commerce platforms. This systematically reduced presence of third-party sellers in higher volume products where Amazon is competing, is consistent with the systematic advantage of Amazon Retail stemming from the Data-use Conduct."

And at recital (188), the EC Decision states:

> "… it appears that third-party sellers typically exit the market when Amazon Retail enters."

97. *Abuses (2) and (3)- preferencing of Amazon Retail and FBA in the Buy Box.* This alleged abuse concerns discrimination in the Featured Offer selection process ("FOSP"). This was the second competition concern addressed in the CMA Decision. It is, however, necessary to distinguish between three potential effects because of the way the Stephan Action is advanced:

(a) discrimination in favour of Amazon Retail: that affected all third-party merchants by reducing their sales and may have deterred them from competing at all.

(b) discrimination in favour of FBA offers as compared to FBM offers, thereby reducing sales by merchants for their offers supplied by FBM;

(c) by reason of (a) and (b), a reduction in demand for rival fulfilment services (especially 'one-stop fulfilment services' which offered a competing service to FBA), thereby reducing their economies of scale while boosting demand for Amazon's own service (i.e. FBA) and consequently Amazon's opportunity to derive further economies of scale.

98. Effect (a) is to some extent analysed by Dr Houpis along with abuse (1) as set out above. So far as effect (b) on sales are concerned, that is not a part of the damages as quantified by Dr Houpis given that a sale lost by a merchant supplying via FBM was gained by a merchant supplying via FBA. In general terms, therefore, this did not result in aggregate loss to the class. Effect (c) was identified as a potential concern in the CMA Decision at para 4.12(d) and was the subject of the AGCM Decision. It is Dr Houpis' method for examining and evaluating this effect on the fulfilment market that is a key focus of Amazon's criticism.

99. Dr Houpis' preferred method is to estimate the extent to which third-party merchants would have won the Buy Box absent the discrimination by re-running the FOSP algorithm without the discriminatory criteria on a representative sample of products. Amazon contended that this was hugely challenging, since "adjustment of the algorithm is far from a simple process of excision", and the algorithm was continually being revised. However, this method is assisted by the fact that adjustments were made to the algorithm under the commitments. The extent to which it is possible to go back to earlier versions will become apparent only on disclosure which should reveal the basis of the adjustments. We note that a report from Mr David Dorrell, a data science expert assisting Dr

Houpis, submitted to the Tribunal for the carriage dispute, explained that there is a 'toolkit' of established techniques that can be used for this purpose. Amazon's criticism is not in our view a basis to find that this method is implausible.

100. Moreover, if this method proves impracticable, Dr Houpis proposes as a back-up a regression analysis where the probability of 'winning' the Buy Box is estimated by applying the parameters used in the FOSP (e.g. offer price, delivery times, etc) and estimating the counter-factual outcome by adjusting the inputs to remove discriminatory features. As for Amazon's criticism that Dr Houpis would have no means of distinguishing discriminatory features from objective ones, that appears to be precisely what Amazon has itself done in carrying out its commitments. Commitment (3) given to the CMA includes:

> "…. if a Featured Offer is displayed, Amazon will apply objectively verifiable, non-discriminatory conditions and criteria for the purposes of determining which Offer, whether from Amazon Retail or Sellers (including Sellers using FBA), will be displayed as the Featured Offer. These conditions and criteria will include any parameters and weightings such that the conditions and criteria can and will be applied equally to both Amazon Retail and Sellers…. These conditions and criteria will apply independently of the Seller's choice of carrier(s)."

101. As regards the effect of this conduct on the level of fulfilment fees, Dr Houpis again proposes alternative or supplementary approaches: (a) a top-down regression equation of the evolution of FBA fees before and after Amazon became dominant, with an infringement indicator to identify the alleged excessive fee-setting; and (b) a bottom-up approach, examining the costs function of fulfilment provision based on information on volumes and costs from Amazon and from some independent fulfilment providers, with estimated pass-on to merchants. As a further back-up, if needed, Dr Houpis proposes a Differentiated Bertrand model, which is explained in Annex I to his first report.

102. A further indirect effect alleged of abuses (3) and (4) is a reduction in competition between online marketplaces. That was indeed the finding in the AGCM decision. Both the higher prices for independent fulfilment services and the inefficiency involved in using two different fulfilment providers deterred

merchants from multi-homing. This reduction in competition is alleged to have led to higher commission charges by Amazon to merchants on its platform. Dr Houpis' proposed method to establish and estimate these indirect effects combines 'bottom-up' study and analysis of relevant information, and a 'before-and-after' econometric approach to assess whether the relationship between the cost of providing marketplace services and the overall marketplace-related fees charged by Amazon has changed after 2017 (when Amazon is alleged to have become dominant). Dr Houpis has set out the data and information that he will seek for his 'bottom-up' study, including: (a) number of active sellers 'by category' on Amazon and rival platforms over time; (b) information or data on the degree of multi-homing by merchants across online marketplaces in the UK over time; (c) market research and similar reports commissioned or obtained by Amazon; (d) take-rates (percentage of marketplace share of gross revenues from third-party sellers) over time in the UK of Amazon and potentially of other online marketplaces; and (e) the costs of running the UK Amazon Marketplace over time.

103. The econometric approach is a multivariate linear regression, ideally with data from 2006 to 2024, to understand the relationship between marketplace-related fees and costs before the relevant potentially abusive conducts began. The dependent variable is marketplace-related fees in the factual. The explanatory variables may include: (a) price indices of the inputs into the provision of the services required to operate a marketplace platform; (b) Amazon's costs for providing marketplace services; (c) other potential drivers of Amazon's marketplace-related fees including indicators of changes in the quality of the service offered; and (d) any other variables that may be identified following disclosure as relevant and unrelated to the potentially-abusive conduct. Dr Houpis intends to assess whether the relationship between marketplace-related fees and the cost-drivers for providing the relevant services has changed since 2017 using an "infringement indicator" in the regression. The estimated coefficient associated with the infringement indicator will show the extent and direction in which marketplace-related fees have changed as a result of the infringement.

104. We do not accept Amazon's criticism of this head of loss as an over-speculative "ripple effect" or an "unusually long and precarious causal chain". On the contrary, in our view, it is standard economics and, moreover, has been directly considered by some of the competition authorities that have investigated Amazon's conduct. The AGCM Decision records that it found that the preferencing of FBA increased demand for FBA in Italy by about 40%, and that the result of Amazon's conduct was that the presence of such merchants on other marketplaces was drastically reduced to the detriment of competition to Amazon from other e-commerce platform operators. The FTC Complaint makes similar allegations.

105. Amazon further contended that the diversion from third-party fulfilment providers cannot be large enough to have had the alleged impact on their charges as it was spread between several providers and, in the counter-factual, FBA would have been more expensive (as it was deprived of economies of scale), a 'benefit' that may exceed the effect on rival fulfilment providers where any impact on scale was divided between a number of providers. However, it is not just the size of the switching between FBA and FBM which matters but also the sensitivity of the unit cost curve to increasing size and where precisely on that cost curve Amazon and rival fulfilment providers sit in the factual and counterfactual. These arguments do not, in our view, impugn Dr Houpis' methodology, but concern the outcome, which is an empirical matter that can be examined following disclosure and then scrutinised at trial.

106. As to the workability of Dr Houpis' method, particular criticism was directed by Amazon at the proposed regression in respect of FBA fees because of what Amazon claimed was an omitted variable in respect of FBM fees (which could influence FBA fees). On the information presently before us, we incline towards Dr Houpis' opinion that because his model "aims to capture the systematic exogenous variation in FBM fees via the other controls in the regression, any remaining variation in FBM fees is either all random (and will not bias anything) or the result of the conduct and will be picked up by the infringement indicator". In particular, we find that his approach provides a sufficient 'blueprint to trial'; in due course, the actual model can be subject to various diagnostic tests and

sensitivity analyses, including assessment of the variable parameters for statistical significance and economic plausibility.

107. *Abuse (4) - discrimination in selection for Prime.* The question arises as to how far the availability of SFP was a realistic alternative to FBA given that SFP expanded over time (until 2018, Amazon Shipping was the only approved carrier). Dr Houpis intends to look at the degree of take-up of SFP, consider disclosure from Amazon regarding the introduction of SFP and the subsequent changes made in that category, any internal Amazon financial forecasts, and then to conduct a comparison of the price for a third-party merchant to use SFP as compared to the effective price of using FBA. We think that, taken together, this is a plausible method of establishing whether, prior to the commitments, SFP was a realistic means of accessing Prime, and whether the SFP arrangement was discriminatory. Moreover, although the commitments in this regard are not as extensive as the abuse alleged by Professor Stephan, we consider that a 'during-and-after' analysis of the take-up of SFP following the commitments is likely to be instructive and valuable. It will provide a basis for Dr Houpis to estimate whether sales have been lost by third-party merchants through unjustified exclusion from Prime status. Although Mr Piccinin KC, who argued this part of the case for Amazon, emphasised that Amazon's commitments under the CMA Decision are narrower in this regard (since they are confined to the right of merchants to negotiate charges with existing SFP Carriers, not of other carriers to qualify for SFP or of merchants using alternative one-stop fulfilment providers to qualify for Prime), we consider that insofar as Dr Houpis is able to isolate and assess the impact of allowing third-party merchants to negotiate charges with SFP Carriers, that would produce an under-estimate of their alleged loss in terms of exclusion from Prime, which therefore would not prejudice Amazon.

108. As regards the indirect effect on fulfilment fees and marketplace fees, as for abuse (3) this is inevitably more challenging. We have said that we find that Dr Houpis' methodology to establish if the SFP programme was discriminatory appears sound. If that turns out to be anything other than competition on the merits, he refers to three sources for estimating the extent of "modified SFP" in

the counterfactual: (a) during-and-after analysis; (b) a survey of third-party sellers; and (c) analysis of changing terms and conditions and take-up over time.

109. We recognise that all three approaches suffer potential problems. The before-and-after analysis suffers from the fact that, as Mr Holt pointed out, the post-commitments world includes matters that form no part of abuse (4). The survey might produce answers that are not objective and/or in some sense self-serving. And given the low level of take-up, the historical analysis might give ambiguous results. However, there is no reason to believe all three approaches cannot be implemented and the results compared and triangulated to assess the potential impact of abuse (4). Having established the degree to which this caused merchants to use FBA, the impact on fulfilment fees and marketplace fees then falls to be assessed using the same method as for abuse (3), discussed above.

110. *Abuse (5) - anti-discounting practice.* Assessment of the alleged abuse depends on disclosure from Amazon and Dr Houpis explains that he intends to investigate how and to what extent this policy was implemented. We consider that this seems practicable based on likely disclosure, including of any algorithm used for the application of the policy. To estimate whether that led to a reduction in multi-homing, and therefore reduced competition between marketplaces, Dr Houpis will seek data on the extent to which multi-homing changed over time, as Amazon became dominant or increased its market share. Dr Houpis' method to estimate the effect on Amazon's marketplace fees is the multivariate linear regression discussed at para 104 above. Of course, if Dr Houpis' analysis finds that Amazon does not routinely monitor merchants' prices on competing marketplaces or penalise them for pricing lower there than on the Amazon Marketplace, the anti-discounting practice alleged will not be made out and this abuse falls away.

111. Should it be necessary to allocate the estimated indirect effects as between different alleged abuses, Dr Houpis intends to collect survey evidence from third-party merchants. Further, Dr Houpis expressly acknowledges that for both any higher fulfilment fees and any higher marketplace fees, there would likely have been an element of pass-on by merchants to their customers. Dr Houpis explains that he will estimate the pass-on rate by using Amazon data on changes

in its prices to merchants and then analysing the degree to which this affected merchants' prices to their customers. He recognises that there may be a difference in the pass-on rate depending on whether or not the product is one where Amazon Retail is competing, so that the rate of pass-on may not be uniform. However, we do not accept Mr Piccinin's submission that this method needs more development at this stage. The data needed to apply this approach should be available and we consider that this is a reasonable and workable method going forward.

112. Accordingly, we largely reject Amazon's criticisms of Dr Houpis' methodology; and where we do find some force in those criticisms, it is not such as fundamentally to undermine Dr Houpis' approach which, in many instances has a preferred and back-up method for quantification. We are satisfied that it passes the *Microsoft* test and provides an adequate, initial blueprint to trial.

b. Hammond

113. Mr Hammond's expert is Dr Chris Pike, the managing director of Fideres LLP, an economics consultancy. He was for over 5 years an economic competition expert at the OECD, and previously an economics director at the UK Healthcare Regulator (Monitor).

114. Dr Pike's original report which accompanied the Hammond Application was updated in March 2024. The updated report runs to almost 100 pages, but of that some 30 pages are devoted to questions of market definition and dominance. Mr Holt, retained by Amazon, produced a report in response in May 2024, and Dr Pike produced a reply report in July 2024.

115. As in the Stephan Action, both experts produced helpful 20 page summaries of their position at the Tribunal's request.

116. As we noted above, the Hammond Action is of less extensive scope than the Stephan Action. In effect, Mr Hammond combines abuses (2) and (3) of the Stephan Action as a single claim of abuse by preferencing products sold by Amazon Retail or FBA over products sold using FBM. Since the class

comprises consumers, the damages claimed are for allegedly higher prices paid in purchasing those products at retail.

117. Dr Pike's report is put at a higher level and has less detail than Dr Houpis' report. Dr Pike considers the impact of the alleged discrimination under two theories of harm: (a) exploitative abuse (direct) and (b) exclusionary abuse (indirect):

(1) the exploitative abuse concerns direct harm to the consumer by their being inappropriately directed towards the Buy Box and potentially paying higher prices;

(2) the exclusionary abuse has indirect effects. By discriminating in favour of sellers that purchase FBA services, Amazon restricts competition in the fulfilment market, which also serves to reinforce Amazon's dominance as a supplier of marketplace services (which Dr Pike calls "intermediation services"). The exclusionary abuse is relatively under-developed in Dr Pike's main report and was heavily criticised by Mr Holt and by Amazon.

"Exploitative abuse"

118. For the exploitative abuse that involves selection of the Featured Offer in the Buy Box, Dr Pike has a preferred method and an alternative method to estimate the degree to which this affected the selection of offers for the Buy Box. His preferred method is to re-run Amazon's algorithm used in the FOSP without the discriminatory variables. He recognises that, at this stage, without greater knowledge of the algorithm, he cannot specify how each such element would be removed, but he provides some illustrations. Dr Pike also seeks to assess the degree to which access to the Buy Box is significant in achieving sales.

119. This method is broadly equivalent to the preferred approach of Dr Houpis for abuses (3) and (4) in the Stephan Action: see para 100 above. For the same reason, we find that it is in principle an acceptable method and that it may be achievable in practice. Indeed, if both the Stephan and the Hammond Actions

are certified, efficient case management suggests that this should be conducted as a single exercise applicable in both proceedings. Mr Turner KC, appearing for Amazon on the Hammond Application, realistically recognised that this would be an appropriate approach.

120. Dr Pike's alternative method is to model an approximation of the algorithm with weightings attributable to objective, non-discriminatory criteria, such as price and customer star rating, and then adding a discrimination indicator to estimate the effect of not-using FBA services has on the outcome. He says that this would enable him to 'turn off' the estimated discriminatory term to predict the Buy Box winner in the counterfactual.

121. Dr Pike's preliminary explanation of this alternative approach appeared to disregard delivery speed, which Amazon understandably regards as important, and this was in our view a powerful criticism. However, Dr Pike said that after disclosure from Amazon he would be able to enrich the model using more detailed data on the relevant variables and inputs, and the skeleton argument for Mr Hammond made clear that this would include such factors as delivery speed.

122. Dr Pike's next step was to consider the resulting loss to consumers through higher prices. For that purpose he considers how Amazon Retail and sellers supplying FBA would have acted in a 'level playing field' where there was no discrimination in the FOSP. For that purpose, Dr Pike posits two extreme counterfactual scenarios: a "constant-prices" scenario ("CPS") and a "constant volumes" scenario ("CVS"). Under CPS, prices would have remained the same, with the result that some offers from Amazon Retail or sellers supplying FBA would fail to be selected for the Buy Box, and those merchants would lose sales. Under CVS, Amazon Retail and/or merchants would reduce their prices in order to remain in the Buy Box and retain their volume of sales. In either case (or in reality some combination of the two) consumers who bought from sellers supplying FBA would have paid less for the same purchase by either buying from a lower priced alternative (FBM) supplier or from the same supplier at a lower price. Dr Pike sets out three approaches to investigating the likely behaviour, including analysis of:

(i) sales and offer data pre-2006, or (as suggested as an alternative by Mr Moser during the hearing) following the commitments;
(ii) sellers who switched to FBA after a period using FBM; and
(iii) Amazon's own analysis of likely seller behaviour, when Amazon considered and prepared for the commitments given to the CMA and the Commission.

123. Amazon submitted that Dr Pike has no method of estimating the real alleged loss to consumers. If under a revised FOSP a cheaper offer supplied FBM would have 'won' the Buy Box, that may have involved slower delivery speed, which is a significant factor for consumers, but Dr Pike has no method to take account of this detriment. The same criticism was directed at other 'non-price' factors. However, we consider that if such factors are taken into account in the revised algorithm (or the modelled, approximated algorithm) then they are already incorporated into the counterfactual FOSP, in which case we are not persuaded at this stage that any additional credit is required. The argument will be open to Amazon, but the question now before the Tribunal is whether Mr Hammond has a plausible method for advancing his arguable case. Moreover, if necessary, as Mr Turner recognised in the course of argument, the weightings which Amazon attributes to delivery speed (and other non-price factors) in its algorithm could be used to provide a reasonable allowance to be set against the price difference. The fact that Dr Pike has not put this forward is not, in our view, sufficient to undermine his approach.

124. Amazon further argued that CSV is very unlikely given that the tight margins on most products supplied on Amazon Retail or FBA leaves no scope for further price reduction. However, as set out above, Dr Pike puts forward three methods for analysis of the possible pricing behaviour in the counterfactual. If none of these bears fruit and Dr Pike fails to establish a robust basis for estimating the degree to which CVS applied (with a reduction in prices by Amazon Retail or sellers supplying FBA), then provided that the non-price factors (such as delivery speed) referred to above are taken into account, the more conservative CPS stands as a practical option for estimating loss.

125. Overall, therefore, we find that the methodology for the exploitative abuse is at a sufficient level for certification. Each of the two proposed methods for establishing harm and quantifying the loss appear workable and will no doubt be refined. The methodology for estimating the consequence in the FOSP of the alleged abuse is certainly not hypothetical or speculative, and most of the data identified to inform the methodology should be available. The difficulties raised over the unrealism and potential overcompensation of the constant volume and constant price scenarios are not insurmountable.

"Exclusionary abuse"

126. The indirect effects which Dr Pike places under the head of "exclusionary abuse" concern the prices in two related markets: (a) the supply of fulfilment services, and (ii) the supply of online marketplace services. Therefore these allegations in the Hammond Action have similarity to Dr Houpis' assessment of the indirect effect of abuse (3) in the Stephan Action, but with one significant difference. As regards the loss due to allegedly higher prices paid for fulfilment services, Dr Houpis seeks to estimate both the effect of a potentially higher price for FBA services due to artificially increased demand *and* the potentially higher price for FBM services due to the suppliers of such services being deprived of economies of scale. By contrast, for the purposes of the claim for an overcharge in the price of fulfilment services in the Hammond Action, Dr Pike considers only the effect on price of FBA services and does not take account of any potential effect on FBM charges: i.e. his analysis does not include any attempt to estimate loss paid by consumers for products sold on the UK Amazon Marketplace supplied using FBM, due to pass-on of the higher charges the sellers may have paid for fulfilment services (although paradoxically he does then consider the effect on FBM charges in the context of rival marketplaces: see below). And as regards the potentially higher prices paid by consumers for products supplied using FBA, Dr Pike takes the view that although there may have been such an 'overcharge' by Amazon for FBA services, it is possible that there was not, and that this would in any event be covered by his method for estimating the damages for the 'exploitative' abuse. We can follow this reasoning where under Dr Pike's CPS the seller in the counterfactual would be using FBM instead of FBA. But insofar as Dr Pike's CVS applied, we find this

difficult to follow, since if the seller was supplying FBA in the counterfactual then the exploitative abuse claim would not, as we understand it, capture any overcharge for fulfilment. In any event, we do not consider that Dr Pike has properly set out a proposed method for estimating the effect on the charge for FBA.

127. The substantive claim which Dr Pike does advance for the 'exclusionary abuse' is for the effect on the marketplace service, on the basis that the reduction in competition between online marketplaces enabled Amazon to charge higher commission to third-party sellers, which they then passed on to consumers. In that regard, as we understand it, Dr Pike's approach is that (a) there was an overcharge in the prices of rival fulfilment services (i.e. rivals to FBA) since they were denied the economies of scale they would have achieved in the counterfactual; (b) the additional scale achieved for Amazon's FBA may have enabled it to reduce FBA charges; (c) the result of (a) and/or (b) was to raise the relative costs for third-party sellers using marketplaces other than Amazon and so deterred them from multi-homing; and (d) this increased the demand to sell on the Amazon UK Marketplace which enabled Amazon to raise its marketplace fees..

128. However, Dr Pike's articulation of his method for estimating this loss is not merely highly generalised but scant: he says that he will seek to benchmark Amazon's FBA fulfilment fees against those of rivals, in terms of price and cost, relying on any internal analysis by Amazon or his own analysis based on public data (Dr Pike states explicitly that he does not expect to need third-party data) and assess the elasticity of demand for fulfilment services, either on the basis of any internal Amazon analysis or by doing his own. He then stated:

> "To identify whether the discrimination raises the costs of rival marketplaces, I will assess whether the associated smaller scale of rival fulfilment services in certain categories of fulfilment in turn raises their costs and hence the ability of rival marketplaces to compete. To do so I will need data and internal documents form Amazon that allow me to test the relationship between the scale and costs of a logistics network …. I will then also review the importance that Amazon and other marketplaces put on the offer of 'free-shipping' on order to understand the importance of more expensive shipping on rival marketplaces."

129. That is taken a little further in Dr Pike's summary report, where he says that he proposes to conduct a 'before-and-after' analysis of the commission fees charged by Amazon from pre-2006 (when FBA was introduced). But again, it is wholly unclear how Dr Pike would do that in any meaningful way given that, as Mr Turner pointed out, market conditions for online marketplaces have fundamentally changed since 2006. Dr Pike proposes an alternative approach which relies on Amazon data and research on the cross price elasticity of demand and the elasticity of demand with respect to the commission charged by the marketplace. The former would show the relationship between higher fulfilment costs on rival platforms and demand for the Amazon marketplace and the latter would show how the increased demand led to higher marketplace fees on the Amazon platform. The pass-on to consumers would be the damages claimed. However, even if Amazon has such studies, we do not consider that they would provide a robust means of establishing whether, and to what extent, Amazon charged higher commission to sellers.

130. In short, we consider that Dr Pike has not set out any clear or coherent methodology as to how he seeks to go forward to achieve the necessary analysis: how he will seek to establish the extent to which the costs of, and charges by, rival fulfilment services[12] were raised, or how Amazon's commission charges to third-party sellers in the factual compare to the commission it would probably charge in the counter-factual, which is of course the only basis on which to estimate this head of loss.

131. In response to the criticism levelled by Mr Holt, Dr Pike states in his response report, at para 82:

> "In general, I note that the methodology that I have set out in relation to the direct damages from the exclusion is at a higher level than that which I provided in relation to the damages from the exploitative abuse or the collateral damage from the exclusionary abuse. However, I would suggest this is proportionate given the detail provided on the exploitative abuse and the collateral damages from the exclusionary abuse, and the possibility I have

[12] In the hearing, Mr Turner assumed that this concerned the prices of operators such as Royal Mail and Evri, but as we understand it, they are primarily carriers not providers of one-stop fulfilment which is the equivalent of FBA. Any comparison may therefore need to focus on the latter category of providers, as considered by Dr Houpis.

> acknowledged that Amazon may not yet have taken the opportunity to overcharge, despite having created the capability to do so."

We do not agree. It cannot be right to justify the lack of development of one part of a claim by reference to a more developed method for another part of the claim. This would effectively emasculate the *Microsoft* test as regards a portion of the claim. And we regard the suggestion that this is proportionate as inconsistent with the Tribunal's gatekeeper function to maintain collective proceedings within proper bounds and to ensure that defendants are not confronted with sprawling, speculative claims.

132. In our view, s. 47B CA entitles the Tribunal to certify proceedings regarding only part of the claims advanced. It cannot be the position that, for example, because one of four distinct aspects of an action meets the eligibility criteria, the Tribunal has no alternative but to grant a CPO for the entirety of the action, including the other three aspects. Therefore, we consider that one possibility is for the Tribunal now to grant the Hammond Application as regards the "exploitative abuse" and allow Mr Hammond to come back and seek to amend the CPO if his expert can put forward a more developed and plausible methodology for the "exclusionary abuse".

133. However, it is clear to us that it would be sensible for the Stephan and Hammond Actions to proceed together. They have some common issues, and it would be inefficient, wasteful of the Tribunal's resources and indeed a burden on Amazon, to decide those issues separately following two separate trials. For the reasons set out above, we are satisfied that in the Stephan Action, Dr Houpis has put forward a more developed and realistic method for estimating the effect of the same alleged abuse on both Amazon fulfilment charges (i.e. the cost of FBA) and on marketplace services. Since, in our judgment, Dr Houpis' method seems practicable and a plausible means for estimation of any significant effects, it would be unsatisfactory if Professor Stephan could advance that claim, where he expressly acknowledges that some part of the effect would in all probability have been passed-on to consumers (and where Amazon may then contend for a higher pass-on rate) if the parallel claim action heard for a consumer class which bore the passed-on charges was unable to recover them.

134. As we have observed, in the hearing Mr Turner accepted that where there was a common analytical issue across the two actions, it could be put forward for both classes on the basis of a single method. We would go further and say that in those circumstances it *should* be put forward by a single method, or at least by a single expert who may wish to rely on alternative methods, where there is no conflict on the issue as between the two classes. Dr Houpis explains that he will be able to distinguish between the effect on marketplace fees of the different abuses (e.g. only abuse (3) and not (4) or (5)). Accordingly, insofar as the claims in the Hammond Action allege higher fulfilment and marketplace fees (i.e. the exclusionary claim), that part of the action may rely on Dr Houpis' methodology.

135. This is subject to the proviso that in estimating damages, Professor Stephan claims in respect of higher marketplace fees charged by Amazon to all third-party sellers whereas Mr Hammond, unless any application should be made to amend his proceedings, claims only in respect of the pass-on in the prices to consumers of those fees on products supplied FBA. However, on the basis that the relative proportion of sales made FBA to FBM should be readily ascertainable, it should not be difficult to quantify the relevant proportion of higher fees passed on in respect of the Hammond Action.

136. Mr Hammond has also to establish pass-on to his PCMs. That is the same exercise which will arise in the Stephan Action, although on this issue the interests of the two classes are potentially opposed. However, it seems to us that, although he addresses this only briefly, for pass-on Dr Pike proposes in effect the same method as Dr Houpis. In our view, this is not such a complex matter and, as stated above, their method is satisfactory. Whether the Tribunal will allow both experts independently to carry out this exercise is a matter for later case management.

137. Accordingly, on the basis explained above, we find that the Hammond Action, on the basis that it will be heard together with the Stephan Action, satisfies the eligibility criterion.

(4) Alleged conflict in the Stephan class

138. The allegation that there was a conflict within the class in the Stephan Action was advanced strongly by BIRA in the carriage hearing and rejected in the *Stephan/BIRA* Judgment at [78]-[87]. However, that judgment does not bind Amazon, which was therefore entitled now to advance this as a ground of opposition. Moreover, Amazon did so on a somewhat different basis than BIRA: Amazon did not seek to allege that the conflict affected the overall amount of damages being claimed.

139. Before addressing the substance of this challenge, we observe that, unlike BIRA which was seeking to represent many of the same PCMs, Amazon's stance is totally opportunistic. Although Amazon expresses concern about the conflict between sellers who sold primarily using FBA and sellers who sold primarily using FBM, Amazon's real interest is to throw up obstacles to certification of this large claim against it. Moreover, as Amazon acknowledged in its submission that, if certified, the class should be on an opt-in basis (which we address below), the class in the Stephan Action includes some very large retailers. It is notable that no PCM, including such large retailers who can be expected to be very cognisant of their commercial interest, has sought to object to certification on the basis that Professor Stephan would be hampered by a conflict which could adversely affect their interests.

140. The alleged conflict raised by Amazon concerns only abuses (3) and (4). There is no suggestion that Professor Stephan faces any conflict regarding his pursuit of abuses (1)-(2) or (5).

141. For abuses (3)-(4), the basis of Amazon's argument is that they involve, compared to the counterfactual, a diversion of sales from sellers who sell primarily using FBM to sellers who sell primarily using FBA (for convenience, at the expense of accuracy, we will refer to them as "FBA sellers" and "FBM

sellers").[13] Put another way, in the absence of these alleged abuses, FBM sellers would make more sales and FBA sellers would make less.

142. However, Dr Houpis' estimation of the effect of abuse (3) does not include quantification of potentially lost sales by FBM merchants or, correspondingly, take account of potentially gained sales by FBA merchants, on the basis that in consequence there was no loss to the class as a whole. His estimation of the effects of these abuses, and his methodology for quantification, is in terms of the demand for FBA and FBM and of the resulting higher fulfilment fees for both. The fact that, if the class comprised only FBM merchants, then there might be additional damages sought for lost sales does not mean that there is any conflict in the manner in which the claims are actually being advanced by Professor Stephan. The effect on fulfilment fees and marketplace fees is the result of the diversion from FBM to FBA that inflated the demand for FBA and reduced the demand for FBM, so the higher the rate of diversion the greater the effect, and the higher the damages for all PCMs - until one in theory reached a point where the diversion was so high that the volume of FBA sales in the counterfactual was so small that even higher FBA fees are outweighed by the loss of sales.

143. The submission by Amazon that the higher the diversion, the lower the damages which FBA sellers can recover is therefore a significant over-simplification. And Dr Houpis is clear on his, albeit preliminary, estimates, that the diversion was not so high that FBA sales become insignificant in the counterfactual. We cannot imagine that at trial Amazon will wish to argue that its preferencing policies, which both Professor Stephan and Mr Hammond allege were abusive, had still greater impact.

144. Amazon did not, as we understood it, seek to re-run the argument advanced by BIRA that there would have to be credited against the damages otherwise recoverable the 'benefit' to FBA merchants of preferenced sales which they would not make in the counterfactual. Even on that contention, on Dr Houpis'

[13]As explained in the *Stephan/BIRA* Judgment at [79], many third-party sellers choose FBA for some products and FBM for others. And an 'FBA merchant' would not necessarily also use FBA to the same extent in the counterfactual.

estimation that benefit is greatly outweighed by the impact of higher fulfilment fees which he estimated as about a 25% overcharge for FBA, producing aggregate damages under that head alone, and after allowing for 50% pass-on, of around £1 billion. We heard nothing to impugn the view set out in the *Stephan/BIRA* Judgment in that regard at [84]. Amazon has not put forward any likely diversion rate that would produce a different result and, in our judgment, there is no conflict in the way that Professor Stephan, through the expert evidence of Dr Houpis, seeks to advance his case.

145. Although the conflict point was put forward also regarding abuse (4), that was not developed by Amazon in either written or oral submissions. Abuse (4) is the preferencing in the selection of offers for the "Prime" label. Therefore while this would cause sales to be lost by FBM sellers, those sales would be at the expense of Amazon Retail as well as at the expense of FBA sellers. Accordingly, although (unlike for abuse (3)) a claim is advanced for lost sales, the point about conflict has little force as a loss by a FBM seller does not equate to a gain by an FBA seller. Moreover, the point about the effect on fulfilment fees for both categories of seller applies in the same way.

146. The position in the Stephan Action is therefore wholly different from the *Trucks* collective action brought by the Road Haulage Association, where the class comprised both purchasers of new trucks and purchasers of used trucks, and the claims were for an overcharge in the purchase prices which the class members had paid: *UK Trucks Claim Ltd v Stellantis NV and others* [2023] EWCA Civ 875, [2024] 1 All ER (Comm) 543. There, pass-on of the overcharge on the resale of a truck was fundamental to the claims of purchasers of used trucks, who would therefore wish for a high rate of pass-on, whereas purchasers of new trucks would wish for a low rate of pass-on since that fell to be deducted from their damages. Establishing the rate of pass-on was integral to the quantification of damages, and there was accordingly a direct conflict of interest since higher damages for purchasers of new trucks could mean lower damages for purchasers of used trucks, and vice versa.

147. We therefore reject the objection to the Stephan Action based on alleged conflict of interest.

I. OPT-OUT OR OPT-IN?

148. Amazon submitted that if the Stephan Application were to be granted, the CPO should be only on an opt-in basis.

149. Rule 79(3) states:

> "In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—
>
> (a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

150. No submission was made on ground (a), the strength of the claims.

151. Amazon emphasised that the PCMs in the Stephan Action are businesses not consumers. Its argument was summarised in its skeleton argument as follows:

> "[Professor] Stephan seeks to bring these proceedings on behalf of a highly diverse class of businesses that have benefited greatly from the access that Amazon has provided them to its Store and logistics infrastructure.… this is not a claim in which the PCR should be permitted to sweep in class members without them being given a chance to decide whether this is a claim that they actually wish to pursue. It is undoubtedly the case that different sellers have different interests and would have different views on the allegations made by Stephan purportedly on their behalf this litigation, if they turned their minds to it.
>
> …. there is also a very small number of class members with much larger (theoretical) claim values, who must cumulatively account for a significant bulk of the claim value. It is striking that none of them have chosen to bring their own claims."

152. The fact that the PCMs comprising Professor Stephan's class are diverse and the fact that a very small minority of them have much larger claims than the rest are very likely to be correct. The same points can be made in many collective cases, but they are not the primary consideration. Indeed, there is no single, governing consideration: a decision whether to certify as opt-out or opt-in involves a multi-factorial assessment ("taking into account all matters it thinks fit"). However, one aspect expressly identified in the rule is practicability. That is a broad concept, as the Court of Appeal explained in *Le Patourel v BT Group*

PLC [2022] EWCA Civ 593, [2023] 1 All E.R. (Comm) 667 ("*Le Patourel*") at [83]:

> "Practicability, in any case, will be highly fact and context sensitive and will include, as one facet of this broad analysis, the Tribunal using its expert judgement to envisage how the costs and benefits of litigation will play out upon an opt-out or opt-in basis. The view the Tribunal takes will be a conclusion reached by an expert body with a growing depth of experience in the conduct of collective proceedings. Ms Ford QC for BT did not demur from this analysis of legislative language. She did argue that practicability meant "*doabilty*"; if it can be done then it is practicable and if it is therefore practicable then it pointed powerfully in favour of an opt-in process. With respect we do not agree. Practicability includes being "*doable"* but goes further; it requires the court to ask whether it is not only "*doable*" but also reasonable, proportionate, expedient, sensible, cost effective, efficient etc, to do it. There are many things that might be doable but where to do them would amount to a poor exercise of judgment."

153. Accordingly, the mere fact that the PCMs are businesses, not consumers, who could potentially be contacted individually with the assistance expressly offered by Amazon to provide Professor Stephan with their contact details, does not mean that it is necessarily practicable to proceed by way of opt-in proceedings. Here, other relevant factors are, in our judgment:

(1) the very large number of PCMs. Dr Houpis' estimate, without any information from Amazon, is that the class numbers about 211,000. Amazon has not sought to contest that figure or suggest that it is exaggerated; cp. the *Trucks* case, where the class size was about 18,000. For the PCR to contact each of 211,000 undertakings individually, and then administer these proceedings on an opt-in basis, potentially involving regular communications with them, would be very burdensome and inefficient. And unlike the Road Haulage Association which is the class representative in *Trucks*, there is no trade association or representative body which has regular interaction with many of the class members.

(2) Although a minority of the PCMs are large merchants, most are small ones. Dr Houpis estimates that only about 2% have monthly sales over $250,000.

(3) This is not a case where the individual claims are for loss on the sale or purchase of a few items involving a large capital outlay, which in behavioural terms would provide an incentive for PCMs to join in the action and expose themselves to potential disclosure requests. Dr Houpis estimates that the average loss per PCM is around £13,000, and the damages arise from the continuing accumulation of small losses. As the Court of Appeal said in *Le Patourel* at [73], after citing from the judgments in the Supreme Court in *Lloyd v Google Inc* [2021] UKSC 50, [2022] A.C. 1217, and *Merricks SC*:

> "Both judgments demonstrate that the practicalities of collectively organised litigation might favour an opt-out solution where there are large numbers of potentially affected parties and relatively small sums at stake which might otherwise deter the take up of opt-in proceedings."

(4) Professor Stephan submitted that since many PCMs need to continue to sell on the UK Amazon Marketplace, they may be intimidated to take active steps to identify themselves in litigation against an essential trading partner. We are in no position to evaluate this concern, but we accept that it is not fanciful.

154. Taking all these matters into account, we are satisfied that it is appropriate for the Stephan Action, like the Hammond Action, to be brought as opt-out proceedings.

155. However, we note that the basis for a decision as between opt-in and opt-out collective proceedings is a matter currently pending before the Supreme Court in the appeal in the *Forex* proceedings: *Michael O'Higgins FX Class Representative Ltd and anr v Citibank NA and others*. Amazon understandably reserved its right to make further submissions after the Supreme Court judgment. We can if necessary then vary the CPO order under Rule 85(1): see Rule 85(2)(a).

J. CONCLUSION

156. For the reasons set out above, we will accordingly:

(1) grant the Stephan Application to bring opt out collective proceedings, on the basis of the arrangement by Professor Stephan to instruct independent costs specialists to assist in scrutiny of the lawyers' invoices;

(2) grant the Hammond Application to bring opt out collective proceedings on the basis (a) of Mr Hammond's amended LFA; (b) of the arrangements by Mr Hammond to appoint a costs specialist to assist in scrutiny of the lawyers' invoices; and (c) that Mr Hammond will proceed as regards the alleged indirect effects on fulfilment and marketplace fees (i.e. the exclusionary claim) on the basis of Dr Houpis methodology, whether by joint instruction of Dr Houpis for that purpose or other agreement.

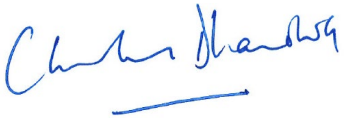
157. The parties are asked to prepare draft orders accordingly.

158. This judgment is unanimous.

The Honourable Mr Justice Roth
(Chair)

Charles Bankes

Keith Derbyshire



Charles Dhanowa C.B.E., K.C. (*Hon*)
Registrar

Date: 24 July 2025