

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its  
2 judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public  
3 hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The  
4 Tribunal's judgment in this matter will be the final and definitive record.

5 **IN THE COMPETITION**

6 **APPEAL TRIBUNAL**

Case No: 1378/5/7/20

7  
8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Wednesday 25 May 2022

13  
14 Before:  
15 The Honourable Mr Justice Marcus Smith  
16 The Honourable Lord Young  
17 Dr Catherine Bell CB  
18 (Sitting as a Tribunal in England and Wales)

19  
20  
21 **BETWEEN:**

22  
23 Epic Games, Inc. and Others **Claimants**

24  
25 v

26  
27 Alphabet Inc., Google LLC and Others **Defendants**

28  
29  
30 **A P P E A R A N C E S**

31  
32 Mark Brealey QC and Will Perry (On behalf of Epic Games, Inc. and Others)  
33 Thomas Sebastian (On behalf of Alphabet Inc., Google LLC and Others)  
34 David Bailey (On behalf of the Competition and Markets Authority)

35  
36  
37  
38  
39  
40  
41 Digital Transcription by Epiq Europe Ltd  
42 Lower Ground 20 Furnival Street London EC4A 1JS  
43 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
44 Email: [ukclient@epiglobal.co.uk](mailto:ukclient@epiglobal.co.uk)

1  
2 **Wednesday, 25th May 2022**

3 **(10.30 am)**

4 **MR JUSTICE MARCUS SMITH:** Mr Brealey, good morning.

5 **MR BREALEY:** Good morning, Sir.

6 **MR JUSTICE MARCUS SMITH:** Before we begin, just a couple of housekeeping  
7 matters. First of all, you will see that we are sitting as a two. That is not  
8 actually the case. You will see Lord Young on the screen there. He tested for  
9 Covid on Monday morning and for that reason can't participate in person. So,  
10 this is slightly unexpectedly a hybrid hearing. I hope it won't inconvenience  
11 anyone for that reason.

12 Secondly, these proceedings are being live-streamed and I must give the customary  
13 warning, which is that although an official recording is being made and  
14 a transcript will be produced, no-one else should record, transmit or  
15 photograph what is being transmitted by us and a breach of that would be  
16 a contempt of court.

17 Subject to that, we have read with care the written submissions from all of the parties  
18 and their reading lists. So, thank you very much. And we have received very  
19 lately, but we have also read, an order which appears to have a complete  
20 absence of square brackets in it, which we take as a good sign.

21 **MR BREALEY:** There has been lots of cooperation between the parties. So,  
22 hopefully we can take this quite quickly.

23 **MR JUSTICE MARCUS SMITH:** Well, indeed.

24 **MR BREALEY:** Just for good form, if I can take the agenda:

25 "To consider what UK supplemental disclosure is actually ordered."

26 Then you will have picked up, sir, that that is now agreed in paragraph 1. That's

1 basically UK specific Fortnite and EGS data.

2 Number 2:

3 "For the parties to indicate the number and range of witnesses of fact."

4 We can pick that up from the skeleton, our skeleton, at 3(c). Both parties have  
5 indicated that they intend to adduce between ten and twelve witnesses of fact.

6 I believe that can still be accommodated in the six-week provisional timetable.

7 "In accordance with paragraph 12 of the order to consider the number of expert  
8 witnesses."

9 Again, you will have seen this, sir, at paragraph 4 of the agreed order. There are  
10 three areas of expertise, which is eminently sensible: economic, security and  
11 payment systems.

12 "To consider any directions as to the CMA's proposed intervention."

13 I think all the parties are agreed on this. Mr Bailey may wish to make submissions,  
14 but essentially they are going to have access to certain documents, but  
15 inspection will be held off to a certain date. They wish to make written  
16 submissions. We obviously don't object to that. No-one objects to that. They  
17 reserve their right to make oral submissions. So, it is a fairly neutral  
18 intervention at the moment.

19 Those are the substantive matters I believe.

20 **MR JUSTICE MARCUS SMITH:** I am very grateful. Mr Sebastian, do you have  
21 anything you wish to add?

22 **MR SEBASTIAN:** No.

23 **MR JUSTICE MARCUS SMITH:** I am very grateful. Mr Bailey, if there's anything  
24 you want to say about the CMA's position on this, then do feel free.

25 **MR BAILEY:** Very briefly, sir. Just simply to say that the thinking behind the draft  
26 directions that we have proposed and agreed with the parties is that the CMA

1 wishes to see the full picture of the evidence, both factual and expert, before it  
2 puts in its written observations, which it has a right to do under Rule 50. As  
3 my learned friend Mr Brealey said, there is a pragmatic compromise reached  
4 in relation to disclosure and inspection. It is thought that there is no need to  
5 trouble the parties with unnecessary disclosure, which may well be very  
6 extensive at this stage. But the CMA does want to have the opportunity once  
7 it has seen the factual evidence, to request specific documents and one  
8 hopes that will be proportionate.

9 It has been agreed by my learned friends that the way the confidentiality regime  
10 would work is that the CMA would write to the parties indicating any  
11 documents it wishes to inspect and at that stage put forward suitable  
12 confidentiality arrangements.

13 Then the only other point really to add is that it was thought appropriate, in terms of  
14 timing, that the CMA would lodge its written observations under Rule 50 six  
15 weeks after the expert reports are filed. That was hopefully sequenced so  
16 that it would come after the evidence was complete but in sufficient time  
17 before written openings in September next year. Then, as my learned friend  
18 says, the CMA may wish to apply for permission at the pre-trial review to  
19 make oral submissions.

20 **MR JUSTICE MARCUS SMITH:** I must say that's extremely sensible. I am going to  
21 look at both Lord Young and Dr Bell to see if there are any further points, but  
22 I see none.

23 The only point, Mr Brealey, that we would like to ask, and I think we know the answer  
24 to it, but we raise it for good order, obviously the directions in this case have  
25 been made with a very close eye on what's going on in the US proceedings,  
26 and we anticipate that if something had happened to make a difference to

1 how we ought to be trying these matters, the parties would have raised it. So,  
2 we assume that the US proceedings are proceeding exactly as we expected  
3 them to proceed last time we were here last December.

4 **MR BREALEY:** Absolutely. I think the only difference is that the US trial has been  
5 put back a little bit. I believe it is 3<sup>rd</sup> April 2023 but otherwise it is exactly the  
6 same as it was before.

7 **MR JUSTICE MARCUS SMITH:** Indeed. It is simply because we have well in mind  
8 that we wanted to ensure a minimum of duplication and a maximum of  
9 efficiency. But, of course, if something happened to either derail or cause the  
10 US proceedings to vanish with the UK proceedings still in train, then obviously  
11 we would need to have a discussion about that. But what you have said  
12 reassures us on that level.

13 **MR BREALEY:** It's exactly the same.

14 **MR JUSTICE MARCUS SMITH:** Very grateful. We will make an order in these  
15 terms. Very grateful to the parties for the care that they have given to ensure  
16 that this matter is proceeding in so efficient a way. So, thank you very much  
17 and we will issue an order in these terms as soon as we can. So, thank you  
18 very much.

19 **MR BREALEY:** I hope Lord Young gets over COVID very quickly.

20 **MR JUSTICE MARCUS SMITH:** Well, fortunately it has not disabled him from  
21 attending at all. It has been a need to isolate, but it hasn't rendered his  
22 presence impossible. So, we are very pleased about that, but thank you all  
23 very much. I will adjourn the hearing now. Thank you.

24 **(10.38 am)**

25 **(Hearing concluded)**

26

1  
2  
3  
4  
5  
6  
7  
8  
9