IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1408/7/7/21

BETWEEN:

ELISABETH HELEN COLL

Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE COMMERCE LIMITED
(5) GOOGLE PAYMENT LIMITED

Defendants

and

THE COMPETITION AND MARKETS AUTHORITY

Intervener

REASONED ORDER

UPON the Defendants' application and enclosures dated 30 June 2023 to vary the terms of the Confidentiality Ring Order dated 13 April 2023 ("**CRO**") ("**the Application"**), the Class Representative's reply submissions filed on 4 July 2023, the Defendants' submissions in response dated 5 July 2023, and the Class Representative's further response dated 6 July 2023

IT IS ORDERED THAT:

1. The CRO shall be varied in the form of the Amended Confidentiality Ring Order made and drawn on 14 July 2023.

2. At the Case Management Conference ("**CMC**") to be fixed also to consider outstanding issues of disclosure (1) the Defendants shall update the Tribunal as to the approach that has been taken when designating information as Confidential Information under the CRO and the reasons for it; and (2) the parties shall update the Tribunal as to any dispute regarding the designation by Google of "Confidential Information", and as to the proposals for identifying and highlighting such information in the expert reports.

3. The way in which documents containing Confidential Information are to be produced and used at trial shall be included in the agenda for the pre-trial review ("**PTR**").

4. The costs shall be costs in the case.

REASONS

1. On 13 April 2023 a CRO was made in these proceedings. For reasons explained in the Reasoned Order of that date, the Class Representative ("**CR**") in this case has access not only to information disclosed by the Defendants (together referred to as "**Google**") that might be regarded as "confidential" but also to information that is "highly" confidential. As such the CRO in this case does not reflect the two-tier structure which is sometimes used and which provides for an "inner ring" to which the CR is not admitted, and an "outer ring" of which the CR is a member. The CRO also only includes one definition of "Confidential Information", as it is not necessary also to identify information that is "Highly" Confidential", the latter in this case being included in the former.

2. Paragraph 1 defines Confidential Information which includes, for present purposes, documents which the "Disclosing Party" or the Tribunal has designated as confidential in accordance with paragraph 2 of the CRO.

3. Paragraph 2.2 refers to paragraph 7.35 of the Guide, which in turn reflects the provisions of paragraph 1 of Schedule 4 of the Enterprise Act 2002, and provides a description of the sort of information that may be designated as Confidential Information. This includes: *"commercial information the disclosure of which could significantly harm the legitimate business interests of the person(s) or undertaking(s) to which it relates."*

4. Paragraph 3 of the CRO deals with the designation of "Confidential Information" for the purposes of the CRO. It provides:

> "**3. DESIGNATION OF CONFIDENTIAL INFORMATION**
>
> 3.1 Any document containing Confidential Information shall be designated as such by the Party that introduces the document into the Proceedings. The following procedures shall apply:
>
> 3.1.1 the Disclosing Party must notify the Receiving Party in writing (in compliance with paragraph 7.46 of the Guide) that it is disclosing a document containing Confidential Information;
>
> 3.1.2 a designation of 'not confidential' means that the document does not contain Confidential Information. For the avoidance of doubt, in the event of a designation of not confidential, Rule 102 continues to apply (to the extent it would otherwise have applied);
>
> 3.1.3 failure to provide a designation for a document at the time the document is disclosed means the document shall be deemed not to contain Confidential Information;
>
> 3.1.4 a Party may alter the designation of a document/information to correct an incorrect designation by notice in writing to the receiving Party; and
>
> 3.1.5 the designation of any document as containing Confidential Information by a Party may be challenged in accordance with paragraph 4 of these Confidentiality Terms.
>
> 3.2 Each Party shall be responsible for labelling and highlighting any Confidential Information in documents disclosed by them in the following ways:
>
> 3.2.1 Any bundle index will state which documents contain Confidential Information and identify the Party to which the Confidential Information relates.
>
> 3.2.2 The specific text in a document that is Confidential Information will be highlighted."

5. Google seeks to vary paragraph 3.2 of the CRO so that it reads: *"Each Party shall be responsible, in respect of any document to be introduced at any hearing in the Proceedings, for labelling and highlighting any Confidential Information in documents disclosed by them …."*

6. This variation is to address a point that has been taken by the CR as to what is required when a party designates documents as "Confidential Information". In short, the CR maintains that paragraph 3.2 as currently drafted (1) requires Google to label and highlight within the documents it designates as containing Confidential Information, the specific information over which confidentiality is asserted, and (2) that that must be done at the time that the documents are disclosed.

7. Google maintains that the requirement to highlight Confidential Information in disclosed documents should apply only to those documents which are to be referred to at trial or any other hearing, and seeks to vary the order to make this clear. Google submits:

   (a) The burden of disclosure in this case falls on Google (the CR is not anticipated to have any (or very little) disclosure to provide). Given the sheer volume of documents to be disclosed by Google, it is disproportionate, time-consuming, cost-intensive and impractical for Google to be required to label and highlight the specific text in each document it regards as confidential. On Google's proposals, it will be disclosing in the region of 300,000 documents. Even if the documents are to be reviewed for relevance, that is a different task to reviewing for confidentiality. It is not a task can be done at the same time, or with little or no additional time being required.

   (b) 120,000 documents fall within the category known as the "US Production". Assuming that these are not required to be re-reviewed for relevance, to require a confidentiality review at the point of disclosure will deprive the parties of much of the benefit of that decision because the documents would then need to be reviewed again. There is a real risk that a requirement to label and highlight confidential information would derail the timetable for disclosure altogether.

(c) Early disclosure has been ordered of documents known as the "Market Study" documents. That was done in order to assist the CR with the identification of custodians and search terms. There is no need to review these documents for confidentiality now in order for the CR to be able to do that.

(d) The wording now sought would track the wording in the CRO made in *Dr. Rachael Kent v Apple Inc. & Another*. The proceedings are similar, and Google points out that the circumstances of the disclosure are also very similar in that the repositories of voluminous documents produced in similar actions abroad will form the starting point for the UK proceedings. The same legal team is involved in those, and these proceedings, and it is not clear why the *Kent v Apple* wording should not also apply here.

8. The CR's position is that Google's approach is wrong as a matter of principle, and that Google's objections based on practicality and proportionality are overstated. The CR suggests that Google's Application disregards the long-term practical benefits to the parties and the Tribunal of ensuring that any Confidential Information is designated promptly, and in a time-efficient manner. The CR suggests that disclosure from the various separate repositories of documents identified by Google may require a different approach, depending on whether the documents are going to be subject to individual review anyway. Where they are, the CR suggests that it is not disproportionate also to simultaneously review for Confidential Information, and that the reviewers can be issued with appropriate instructions to cater for this. As regards the Market Study documents which the Tribunal ordered should be individually reviewed, again, a confidentiality review could, and should have been done at the same time. In relation to certain other repositories the CR suggests that a decision can be taken at a later stage as to what should be done once further information is available.

9. On a practical level, the CR points to the fact that any Confidential Information reproduced in other documents, for example, skeleton arguments or witness statements produced for the purposes of hearings is subject to restrictions (including the need to highlight Confidential Information) pursuant to the CRO, and it is unsatisfactory if this is only identified at a late stage. In particular, it is said that the CR will be at a particular unfair disadvantage because she will be required to write to Google listing documents

which she has identified that she may wish to refer to, and enquire as to whether or not the information is confidential.

10. The CR also objects in principle to Google's approach. Unless Google is required to identify Confidential Information at the point of disclosure, the CR maintains there is a risk of "over designation" of Confidential Information. The CR drew my attention to the fact that confidentiality regimes are not the norm; to the decision in *BGL Holdings Limited & Others v Competition and Markets Authority* [2021] CAT 33, and to Rule 101 of the Tribunal Rules.

11. The CR's reply submissions prompted a short response from Google to address the concern that Google intended to designate all of their disclosure as Confidential Information. That, Google said, was not its intention: documents not containing Confidential Information would not be so designated. Google also reiterated the point that a line-by-line review for confidentiality is different to a review for privilege or relevance, and may require specific instructions to be taken. Google maintain that this would be wasteful, in particular given the number of documents that would not ultimately be referred to at trial.

12. This prompted a further response from the CR referring to paragraph 7.46 of the Tribunal Guide which refers to the need to identify and mark up confidential information (when making a request to the Tribunal for confidential treatment of a document). The CR submitted that the CRO simply does not permit a document to be designated in its entirety as "Confidential Information" without the actual confidential information being identified, and that if the CRO were to be amended to give effect to Google's proposed variation, paragraph 3.1.1 would also need to be amended to remove the reference to paragraph 7.46 of the Guide.

13. The legal position can be summarised as follows:

    (a) Rule 102 makes clear that a party to whom documents are disclosed are not permitted to use that document other than for the purpose of the proceedings unless the Tribunal otherwise orders. That restriction ceases to apply if, for example, the document is read to or by the Tribunal in a public hearing.

(b) Rule 101(1) provides that a party may make a request for confidential treatment of a document or part. That request must be made in writing, indicating the relevant words, figures or passages for which confidentiality is claimed, and be supported in each case by specific reasons. Rule 101(2) refers to the factors that the Tribunal will have regard to in deciding whether or not to accord confidential treatment to a disputed document, and these include the factors set out in paragraph 1(2) of Schedule 4 of the Enterprise Act 2002. Paragraph 7.46 sets out the information that should be provided on such an application, and the need to label and highlight the information that is said to require confidential treatment. Rules 101(1) and 101(2) therefore presuppose that the party making the request has the document, and is, at the time the request is made, in a position to identify any confidential information.

(c) Rule 101(3) provides that *"The Tribunal may direct that documents, or parts of a document, containing confidential information are disclosed within a confidentiality ring"*. Such directions are frequently sought at an early stage in proceedings, prior to the disclosure process and before it has been possible to identify which documents contain confidential information (and precisely what that information is), but where all parties anticipate that the disclosure is likely to include such information. These proceedings are a case in point. In such circumstances, the CRO facilitates the disclosure process, allowing documents to be provided without a formal request being made to the Tribunal relating to each one, and deferring disputes over designation (if any) to a later date.

(d) If the Tribunal makes a direction pursuant to Rule 101(3), in addition to the protection provided by Rule 102, a CRO goes further: it generally restricts who within the parties' respective teams may see it (although not in this case), and has the result that even if the information designated as "confidential" under its terms is to be referred to in the course of the proceedings, it cannot be used other than for the proceedings (see Rule 102(2) and (3)), and steps will be taken to ensure that it is not disseminated to third parties or the public at large.

(e) There is a public interest in ensuring that claims to confidentiality are constrained only to what is necessary. The starting point as regards a Rule

101(1) request is paragraph 1(2) of Schedule 4 of the Enterprise Act 2002. The same must be true of the approach to confidentiality in a CRO: a fact that the CRO in this case expressly recognises at paragraph 2.2. But as paragraph 7.41 of the Guide makes clear, the Tribunal will consider questions of confidentiality not only with regard to the interests of the parties, but also with regard to wider public interest, and will be alert to reject excessive claims to confidentiality, even if they are agreed between the parties (or, I might add, designations are not challenged by the receiving party pursuant to a CRO). In other words, over-designation of confidentiality is something that the Tribunal will be alert to, and seek to avoid: *BGL Holdings Limited & Others v Competition and Markets Authority* [2021] CAT 33.

(f) Any CRO must be responsive to the particular circumstances of the case. In particular, early identification of what a party claims to be "Confidential", or "Highly Confidential" information, and on what basis, is plainly important if there are restrictions as to whether clients, or particular members of a party's legal team and advisors may see certain documents. It is also obviously necessary in terms of effective case management when it comes to hearings if inadvertent reference to information that is properly to be regarded as confidential is to be avoided, in particular in the course of cross-examination.

(g) In determining what directions to make in relation to a CRO, the Tribunal will also have regard to the governing principles set out in Rule 4.

14. I will make the variation sought by Google and, in addition, amend paragraph 3.1.1 to remove the reference to paragraph 7.46 of the Tribunal Guide. My reasons are as follows:

(a) The risk of "over-designation" ought not to arise if the principles I have referred to are properly adhered to. If the CR has concerns that they are not, then it will no doubt be brought to the Tribunal's attention. Similarly, if the Tribunal has concerns, it will raise them.

(b) In light of there being a single tier CRO in this case, there is no issue as regards the CR, or any of her advisors, being excluded from receiving any evidence regarded by Google as confidential (or highly confidential).

(c) These proceedings are currently at the disclosure stage, and that exercise takes place as between the parties. There is no question of the receiving party generally being permitted to make any use of the documents other than for the purposes of these proceedings or disseminating any information received in disclosure to the public at large. Questions of the wider public interest arising out of Google's designation of its documents are unlikely to arise until documents are filed, or in relation to hearings in the Tribunal.

(d) The sheer volume of documents likely to be disclosed in this case is likely to make a confidentiality review – in the sense of requiring each and every item of confidential information to be highlighted and labelled at the time disclosure is made - disproportionate and impractical. That is particularly so when the Tribunal has now ordered that a re-review of the US Production for relevance is not required. To require Google nevertheless to review its disclosure to highlight and label each and every reference to confidential information would be time consuming and wasteful of resources when, in all likelihood a relatively small proportion of the documents disclosed by Google will ultimately be referred to in documents to be filed in these proceedings, or at trial.

(e) To require such an exercise to be undertaken is likely to disrupt the timetable for disclosure. At the recent CMC on 21 June 2023, the CR emphasised to the Tribunal the need for disclosure to take place as soon as possible. It is difficult to see how a requirement for Google to review, label and highlight its documents for confidentiality would assist in that aim.

(f) I do accept that it is necessary for the CR, and the Tribunal, to have a clear understanding of the approach that Google has taken when designating information as confidential, and the justification for that approach. I also accept there will need to be an agreed approach as to how this information should be identified in the course of these proceedings. This should be done in good time,

and before trial. Leaving it to the last minute is not an option. However, I consider that this can best be dealt with by way of case management, and it should be an agenda item at the next CMC, and at the PTR.

15. I note the CR's concern that she will have to give prior notice to Google of the documents on which she may rely, and that this may put her at a strategic disadvantage, but that is not intended to be the outcome of this process. In this case the CR is not prevented from accessing any of the disclosure documents and so ought to be in a position properly to give instructions to her team, and prepare her case. It may be that labelling and highlighting confidential information (the burden of which would be on Google) can be accommodated after the CR has produced such documents as are required in the litigation (and time factored into the timetable to accommodate this). There may be other options that the parties wish to consider. With that in mind, I will direct that they should, in the first instance, discuss and seek to agree a proportionate way forward.

Bridget Lucas KC
Chair of the Competition Appeal Tribunal

Made: 14 July 2023
Drawn: 14 July 2023