



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1424/5/7/21

BETWEEN:

- (1) KELKOO.COM (UK) LIMITED**
- (2) KELKOO SAS**
- (3) JAMPLANT LIMITED**
- (4) KELKOO INTERNET S.L.**
- (5) KELKOO AS**
- (6) KELKOO SRL**
- (7) KELKOO NETHERLANDS BV**
- (8) KELKOO AB**
- (9) KELKOO DEUTSCHLAND GmbH**
- (10) KELKOO DANMARK A/S**
- (11) JOLT LIMITED**

Claimants

- v -

- (1) GOOGLE UK LIMITED**
- (2) GOOGLE IRELAND LIMITED**
- (3) GOOGLE LLC**

Defendants

ORDER

UPON the European Commission having issued a decision in Case AT.39740 Google Search (Shopping) on 27 June 2017 (the “**Decision**”)

AND UPON the Third Defendant and third parties having provided, prior to the date of the Decision, the European Commission with documents in connection with Case AT.39740 (the “**Pre-Decision Commission File**”, comprising the “**Google Pre-Decision Commission File Documents**” and the “**Accessible Third Party Pre-Decision Commission File Documents**”)

AND UPON the confidentiality order dated 8 July 2021 (the “**Confidentiality Order**”) providing for confidential information to be designated as Confidential or External Adviser Only Confidential (“**EAO**”) Information, and providing for the creation of a Confidentiality Club and an External Adviser Only Confidentiality Club

AND UPON the Defendants having notified the European Commission of the intended disclosure of the Pre-Decision Commission File and the European Commission having informed the Defendants by letter dated 27 February 2023 that it is not opposed to the intended disclosure on terms described therein

AND UPON the order of the Tribunal made on 23 March 2023 and drawn on 21 April 2023 which ordered, *inter alia*, that the Defendants disclose to the Claimants all Accessible Third-Party Pre-Decision Commission File Documents into the EAO Confidentiality Club under the terms of the Confidentiality Order (the “**Disclosure Order**”)

AND UPON the Claimants and Defendants (each a “**Party**”, together the “**Parties**”) exchanging disclosure on 6, 7 and 11 April 2023

AND UPON the Claimants reviewing the Accessible Third Party Pre-Decision Commission File Documents and identifying a list of such documents that are likely to require review by members of the Claimants’ commercial and technical team and which the Claimants request be re-categorised from External Advisor Only Information to Confidential Information (the “**Relevant Re-Designation Documents**”)

AND UPON the Parties collating a list (the “**Contact List**”) of postal addresses and email addresses corresponding to the contact details of the third parties to whom the Relevant Re-Designation Documents relate (the “**Relevant Third Parties**”)

AND UPON the Parties setting out their proposals as regards the Relevant Re-Designation Documents in a letter to the Tribunal dated 23 May 2023

AND UPON a case management conference having been listed for 26 July 2023 (the “**July CMC**”) in these Proceedings

IT IS ORDERED BY CONSENT THAT:

1. Within 10 business days from the date of this Order, the Defendants shall send a copy of the letter set out in the Schedule to this Order, a copy of the Confidentiality Order, the Disclosure Order and a copy of this Order to all Relevant Third Parties requesting that they express any objection to the re-designation of the Accessible Third-Party Pre-Decision Commission Documents provided by that Relevant Third Party to the European Commission as Confidential Information, using the contact details collated by the Parties in the Contact List.
2. Where the Parties have been unable to ascertain the physical address of a Relevant Third Party, the Parties are authorised under rule 111(1)(d) of the Competition Appeal Tribunal Rules 2015 (the “**Rules**”) to send the letter set out in the Schedule to this Order to the Relevant Third Parties by email to the email address specified in the Contact List. The time for delivery of such communications shall be determined in accordance with rule 111(4)-(6) of the Rules.
3. Any Relevant Third Party wishing to raise an objection to the re-designation of their documents should do so within 28 days of the date of the letter.
4. A Relevant Third Party may object by sending written representations to the Defendants which the Defendants will then place before the Tribunal. A Relevant Third Party wishing to object should provide written reasons for the objection.
5. If a Relevant Third Party does not respond within 28 days of the date of the letter, the Relevant Third Party’s Accessible Third-Party Pre-Decision Commission File Documents shall be automatically re-designated as Confidential Information.
6. A Relevant Re-Designation Document shall automatically be re-designated as Confidential Information without the need to follow the procedure set out in paragraphs 1 to 5 above where:
 - (a) the details of the Relevant Third Party have been wholly redacted in the corresponding Relevant Re-Designation Document;

- (b) the Parties have otherwise been unable to identify the Relevant Third Party from the contents or document metadata of a Relevant Re-Designation document; or
 - (c) the Relevant Third Party to which a Relevant Re-Designation Document relates has been dissolved.
7. At the July CMC, the Defendants shall provide the Tribunal with:
- (a) All objections received from Relevant Third Parties pursuant to paragraph 4 of this Order;
 - (b) A list of all the Relevant Third Parties who did not respond and whose Accessible Third-Party Pre-Decision Commission File Documents have been re-designated as Confidential Information pursuant to paragraph 5 of this Order; and
 - (c) A list of all the Relevant Third Parties whose Relevant Re-Designation Documents have been re-designated as Confidential Information pursuant to paragraph 6 of this Order.
8. Costs in the case.
9. There is liberty to apply.

Justin Turner KC
Chair of the Competition Appeal Tribunal

Made: 13 June 2023
Drawn: 14 June 2023

Schedule

[On the letterhead of the Defendants' solicitors]

[Address of Relevant Third Party (or email address where postal address is unknown)]

[Date]

By email

Dear Sirs / Madams

Proposed disclosure to Kelkoo of your submissions to the European Commission

1. We act for Google in Case 1424/5/7/21 (T): Kelkoo.com & Ors (together, "**Kelkoo**") v Google UK Limited, Google Ireland Limited and Google Inc. (together, "**Google**") (the "**English Proceedings**"). These proceedings relate to the European Commission (the "**Commission**") Decision dated 27 June 2017 (the "**Shopping Decision**") in Case Number AT.39740 Google Search (Shopping) (the "**Shopping Case**")¹ and are being heard in the English Competition Appeal Tribunal.
2. Please ensure that a copy of this letter and its enclosures are provided to your firm's legal counsel and/or an employee who is authorised to make decisions about the confidentiality of company information.
3. We are writing in connection with certain documents and/or data that your firm provided to the Commission during the course of its investigation in the Shopping Case and to which Google was granted access by the Commission in accordance with the 'access to file' procedure. For the avoidance of doubt, the right of access to the file does not extend to documents and/or data that your company designated (and the Commission accepted) as business secrets or other confidential information, and accordingly documents of this nature are not in Google's possession or control. Kelkoo

¹ See https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

and the Competition Appeal Tribunal have both been made aware that we are writing to you.

4. At a hearing at the Competition Appeal Tribunal on 23 March 2023, Google was ordered to disclose to Kelkoo the Commission's investigative file in the Shopping Case (as constituted at the date of the Shopping Decision). The details of that disclosure are set out in the enclosed order dated 21 April 2023 (the "**Disclosure Order**"), which provides at paragraphs 2 and 3 that Google shall disclose *inter alia* the documents in its possession or control that were provided to the Commission by third parties, including your firm, in connection with the Shopping Case (the "**Third-Party Documents**"). Disclosure took place on 6 April 2023 subject to the requirement at paragraph 5 of the Disclosure Order that all Third-Party Documents be disclosed into the External Adviser Only Confidentiality Club under the terms of the enclosed order of HHJ Johns QC of 8 July 2021 (the "**Confidentiality Order**").
5. The Confidentiality Order provides for two levels of confidentiality: (1) 'External Adviser Only Confidential Information', meaning only Kelkoo's and Google's external advisors and a small number of in-house legal counsel will have access to the disclosed information; and (2) 'Confidential Information', meaning a limited number of Kelkoo's and Google's management, in-house legal counsel and external advisors will have access (see paragraph 1 of the Confidentiality Order as well as the amended Schedule). Under the terms of the Confidentiality Order, those people that have access to confidential information are under strict obligations of confidentiality.
6. Pursuant to paragraph 7 of the Disclosure Order, Kelkoo wrote to Google on 21 April 2023 to request that certain Third-Party Documents belonging to your firm be re-categorised as Confidential Information on the basis of their relevance to the English Proceedings. This would mean that a limited number of Kelkoo's and Google's management would have access to those documents subject to the obligations of confidentiality set out in the Confidentiality Order.
7. Google does not object to this request and considers this approach to be appropriate in the circumstances. Notwithstanding the age of the Third-Party Documents (which are at least 8 years old), they will still be treated as confidential and subject to the obligations imposed by the Confidentiality Order.

8. If you are content with the re-categorisation of your firm's Third-Party Documents as 'Confidential Information', you do not need to respond to this letter. However, if you are not content with this proposal, we would be grateful if you could respond by [4 weeks from letter date] confirming that your firm wishes to challenge the re-categorisation of its Third-Party Documents. At the same time, please provide written representations as to why your firm objects to the re-categorisation of its Third-Party Documents in this way, which Google will place before the Competition Appeal Tribunal for its determination.
9. Any response should clearly indicate that it is supported by a relevant person who has authority for your firm. Google can provide further information about the relevant documents on request.
10. In the absence of a response by [4 weeks from letter date], your firm's Third-Party Documents will automatically be re-categorised as 'Confidential Information'.
11. We intend to provide Kelkoo's solicitors at Linklaters LLP with a copy of this letter and any further correspondence. If you object to this course, please inform us in your response and explain your reasons.
12. If you have any questions, or to respond to this letter, please contact our team at google-kelkoo@hsf.com.

Yours faithfully

[draft]

Herbert Smith Freehills LLP