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**IN THE COMPETITION**  
**APPEAL**  
**TRIBUNAL**

Case Nos: 1673/7/7/24, 1408/7/7/21, 1378/5/7/20

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP  
(Remote Hearing)

Tuesday 15<sup>th</sup> July 2025

Before:  
Bridget Lucas KC  
(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

**Professor Barry Rodger**

**Class Representative**

- And -

**Elizabeth Coll**

**Class Representative**

- And -

**Epic Games, Inc. & Others**

**Claimant**

- V -

**Alphabet Inc. & Others**  
**Google LLC & Others**

**Defendants**

**A P P E A R A N C E S**

David Scannell KC and Hugh Whelan on behalf of Epic Games, Inc & Others (Instructed by  
Norton Rose Fulbright LLP)  
Kassie Smith KC and Jack Williams on behalf of the Defendants (Instructed by RPC)

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(10.30 am)

(Proceedings delayed)

(10.36 am)

Housekeeping

THE CHAIR: Good morning everyone. Apologies for the slightly late start. There are technical issues which I'm afraid are way beyond my abilities to even begin to describe. But anyway, I think you are both here now, and you look like you can both hear me. Thank you.

Before we start, I have to read the usual live stream warning. So some of you are joining us live stream on our website. I start, therefore, with the customary warning. An official recording is being made and an authorised transcript will be produced. But it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court. Thank you.

So this is the resumed hearing of the Disclosure CMC we had, before I had the pleasure of going away on holiday for a couple of weeks. I think it's listed for half a day. It's to deal with User Choice Billing issues and Spotify, as I understand it.

MR SCANNELL: Yes, madam, there is one further item of business which relates to request E17.

THE CHAIR: The CMA investigation.

MR SCANNELL: CMA investigation materials. I hope that that will be a short point.

THE CHAIR: Yes.

Mr Scannell, I think it makes sense for you to go first.

MR SCANNELL: I'm grateful, madam.

1 Discussion re E13 to E16

2 Submissions by MR SCANNELL

3 MR SCANNELL: So, could I get straight to it then and turn to requests E13 to E16?

4 These, as you have pointed out, madam, relate to User Choice Billing and Developer

5 Only Billing. User Choice Billing refers to a situation where within an app, users have

6 a choice as to whether to use Google's In-App Billing system or a different billing

7 system for in-app purchases. Developer Only Billing refers to a situation where in

8 those apps, Google's In-App Billing is not available at all.

9 As we understand it, the take-up of User Choice Billing and Developer Only Billing has

10 been extremely low, and we've pleaded to that effect. But we cannot know the true

11 take-up rates for sure. And that is one of the reasons why disclosure is required. As

12 to Epic's pleaded case, User Choice Billing and Developer Only Billing is relevant to

13 Epic's tying claim and to its excessive pricing case.

14 As to the tying claim, we contend that there is no good reason to tie the Google Play

15 Store to Google's In-App Billing. Even if an app is downloaded from the Google Play

16 Store, there is no reason why purchases made within that app should go through

17 Google's billing system and be subject to what we say are Google's excessively high

18 commissions.

19 Google's response to that contention has been, at least superficially, ambivalent. I say

20 ambivalent because on the one hand, Google says that the Google Play Store and In-

21 App Billing are inseparable. But, on the other hand, it has rolled out User Choice

22 Billing and Developer Only Billing in other jurisdictions. And in March this year, it rolled

23 it out in the UK, albeit for non-gaming apps only.

24 I say "*superficially*" ambivalent because we say it is tolerably clear that where Google

25 has deigned to permit User Choice Billing and Developer Only Billing, it has done that

26 simply as a way of diverting regulatory attention away from what we say is its

1 | stranglehold on billing and its wider abuses.

2 | Although it is impossible to confirm without the disclosure that we're now seeking and  
3 | that Google is resisting, User Choice Billing and Developer Only Billing seem to have  
4 | been devised as a sort of Potemkin village, something that looks good to regulators  
5 | but is actually empty of substance. Because even when developers provide in their  
6 | apps for User Choice Billing or Developer Only Billing, Google continues to charge  
7 | them very high commissions: 26 per cent on every in-app purchase where User  
8 | Choice Billing is offered, and 27 per cent where only the developer's billing system is  
9 | offered.

10 | Now, in short, we say that there are two possibilities when it comes to User Choice  
11 | Billing and Developer Only Billing. The first is that it is correct to say that they are  
12 | a Potemkin village or a fig leaf that changes nothing and doesn't actually affect  
13 | Google's business as usual. Developers can't afford to develop and administer  
14 | alternative billing systems to incorporate into their apps because 26 per cent and  
15 | 27 per cent commissions are simply too high.

16 | The second possibility is that that is not correct, and that User Choice Billing and  
17 | Developer Only Billing represent a genuine decoupling of Google's billing system from  
18 | Google Play Store. And if that is the case, then we say that it undermines Google's  
19 | case that Google's In-App Billing system is inseparable from the Play Store. So that's  
20 | the tying case, and the relevance of User Choice Billing and Developer Only Billing to  
21 | that.

22 | On the excessive pricing claim, we say that Google's commissions are excessive.  
23 | Google says that they are not. We say that the fact that Google charges substantially  
24 | all of its commissions, even where User Choice Billing and Developer Only Billing are  
25 | available, shows that there is no reasonable relationship between the commissions it  
26 | charges and the services it provides. And that's expressly pleaded in Epic's fifth

1 amended Claim Form at paragraph 149(a)(i).

2 As to why we need disclosure in respect of the tying claim. That broadly encompasses  
3 two perspectives on the question of whether User Choice Billing and Developer Only  
4 Billing changes anything: the developer's perspective and Google's perspective.

5 On the developer side, we need to know how extensive the take up of User Choice  
6 Billing and Developer Only Billing by developers has been and what their experience  
7 with that has been, particularly in circumstances where they have to pay 26 and  
8 27 per cent commissions. On the Google side, we need to know whether User Choice  
9 Billing and Developer Only Billing has had any meaningful effect on the bottom line of  
10 Google's business.

11 On the excessive pricing claim, we need disclosure, in particular, in relation to the  
12 costs that Google is prepared to shoulder to introduce departures from its In-App  
13 Billing only model, and the value that Google ascribes to the provision of a billing  
14 system. In that respect, Google's evidence is that the 3 to 4 per cent reduction in the  
15 commissions payable to Google that apply in the User Choice Billing and Developer  
16 Only Billing contexts is, in its words, sufficient to enable developers to cover the cost  
17 of offering an alternative billing system.

18 More broadly, the experts will need disclosure to assess the fairness of Google's  
19 commissions, and that has to take account of the comparative costs and economic  
20 value both of the in-app-billing-only model and a variance from that model.

21 Now, as to what we are requesting, request E13, as originally framed, sought  
22 disclosure in relation to the decision to launch User Choice Billing in any jurisdiction.  
23 Epic has refined and narrowed that request since the filing of the consolidated Redfern  
24 schedule. And to see what is now sought, could I ask you to turn up supplemental  
25 bundle 1, please, and turn within that to tab 11?

26 I hope, madam, that your bundles have been updated, but you should see behind that

1 tab a letter from Norton.

2 THE CHAIR: Just bear with me. I've got... So I've got four supplemental bundles.

3 I've just found the first one, tab 11. Yes, letter of 22 June.

4 MR SCANNELL: I'm very grateful. That's exactly what I want to refer to.

5 Now, this letter was sent, as you can see, before the last hearing that we, that we had.

6 And in it, Norton Rose Fulbright narrowed a request, E13, we say significantly. It  
7 wasn't responded to by RPC until Wednesday last week, and I'll get to the points that  
8 they make in just a moment.

9 The revised proposal can be seen at the foot of the page at paragraph 2, and one sees  
10 there that Epic is content to confine the request to the extension of UCB and Developer  
11 Only Billing to gaming apps in the EEA in March 2024, and the launch of User Choice  
12 Billing in the United Kingdom with a date range between 8 June 2022 and  
13 29 March 2025.

14 Pausing there, the significance of the 8 June date, madam, is that the US discovery  
15 provided by Google under the Tribunal's 6 December 2021 Order in the Epic  
16 proceedings covered the period up to 8 June 2022, but not beyond that point.

17 THE CHAIR: Yes.

18 MR SCANNELL: And the disclosure includes, over the page:

19 "(i) the financial impact for Google of introducing UCB;

20 (ii) Google's decision to reduce the commission by 4% [the words 'in any jurisdiction'  
21 have gone];

22 (iii) analysis prepared by third parties on the launch of UCB; and

23 (iv) potential alternatives to UCB in the United Kingdom specifically, including but not  
24 limited to the introduction of Developer Only Billing in the United Kingdom or special  
25 deals for individual developers." [as read]

26 Request E13 has therefore become a carefully tailored request, focusing on narrow

1 aspects of Google's User Choice Billing and Developer Only Billing strategy. The  
2 particular focuses are the extension of UCB and DOB to gaming apps in the EEA in  
3 March 2024 and the launch of User Choice Billing in the United Kingdom.

4 Now, both the introduction of User Choice Billing and Developer Only Billing in multiple  
5 jurisdictions, including the EEA and of course the UK, is directly in issue on the pleaded  
6 cases. And so is the difference in approach that Google has taken to gaming apps  
7 compared to non-gaming apps based apparently on the comparative lucrativeness of  
8 the former over the latter. I can take you to the pleadings if that is helpful, but I was  
9 not proposing to turn those up at this point in time.

10 THE CHAIR: If you could give me the references, that would be sufficient.

11 MR SCANNELL: So, in the fifth amended Claim Form, the references are  
12 paragraph 114A, 114B, 114C.

13 THE CHAIR: Yes.

14 MR SCANNELL: Including little (a), (b) and (c) of 114C, and then the third amended  
15 Reply, paragraph 9C.

16 THE CHAIR: Yes. Thank you.

17 MR SCANNELL: On the basis of the pleaded cases, madam, Epic could plainly have  
18 sustained its originally framed request for full disclosure by Google of all UCB relevant  
19 material across all relevant jurisdictions in which Google has introduced UCB and  
20 DOB. I would suggest that the narrower version of request E13 that Epic is now  
21 pursuing is unanswerable.

22 Turning to the remainder of what is requested by Epic. If we could turn back, please,  
23 to supplemental bundle 1, tab 11, and the second page of Norton Rose's 22 June  
24 letter under request E13(b). Epic seeks "Documents and Communications relating to  
25 the take-up rates of UCB and/or DOB in the territories in which they are available."  
26 [as read], and so that you can see where the language used in that request comes

1 from.

2 Could I ask you please to turn up bundle C1, please. That's bundle C, tab 1.

3 THE CHAIR: This is the reference -- it's one of the witness statements isn't it?

4 MR SCANNELL: It is, madam. And if you're already there, we don't need to turn it up,  
5 but it is a reference from Mr Feng's evidence, Mr Feng being Google's Vice President  
6 of Product Management based in California. And he makes the point that User Choice  
7 Billing and Developer Only Billing has been taken up in the territories in which they are  
8 available. So the wording of request E13(b) has been taken verbatim from Mr Feng's  
9 witness statement.

10 THE CHAIR: Yes. We don't need to go to that. I've read it.

11 MR SCANNELL: Mr Feng, I should say for completeness, also puts the viability of  
12 User Choice Billing and Developer Only Billing in issue, because he makes the point  
13 that the reductions in commission from 30 per cent to 26 per cent or to 27 per cent  
14 enable developers to make sufficient money to develop their own billing systems.

15 THE CHAIR: Yes.

16 MR SCANNELL: To see the remaining elements of Epic's UCB disclosure requests,  
17 I'm afraid we need to return to the Redfern Schedule, if you still have that, madam.  
18 I want to look at page 115 of that Schedule. If you have it in loose copy, it's 115. If  
19 you don't, it's bundle A, tab 4, page 115.

20 THE CHAIR: Yes, I have it.

21 MR SCANNELL: I'm grateful.

22 So at the bottom of page 115, request E14 is very important. That's designed to pick  
23 up documents pertaining, as you can see over the page, to developer feedback on  
24 UCB and DOB between the same dates as request E13. We fully expect that to show  
25 that developers have no enthusiasm for UCB or DOB, because it is uncommercial.

26 As to the dates for disclosure under request E14, Norton Rose has, since the last



1 hearing, been able to conduct at least an initial review of the infamous harmonisation  
2 disclosure that we discussed at the last hearing, and it has been able to ascertain that  
3 some of the documents Epic is seeking under request E14 are contained among those  
4 documents. Epic has accordingly, and I would suggest very reasonably, agreed to  
5 limit the date range of request E14, so that instead of covering the period from  
6 8 June 2022 to 29 March 2025, it only covers the period not covered by the  
7 harmonisation disclosure, which is 1 June 2023 to 29 March 2025.

8 THE CHAIR: Yes.

9 MR SCANNELL: On page 116 of the Redfern schedule, request E15 addresses the  
10 unfair pricing specific aspects of DOB and UCB, and you can see, madam, from  
11 column E on this page, that in light of Google's response, request E15 has been  
12 narrowed, so that what is now requested are documents relating to Google's payment  
13 processing costs when its billing system is used within an app that offers User Choice  
14 Billing, not within all apps as originally requested. And that request has been narrowed  
15 further still since the last hearing --

16 THE CHAIR: Can you just break that down for me? Sorry, what's the distinction? The  
17 narrowing?

18 MR SCANNELL: So originally, Epic was seeking payment processing costs disclosure  
19 arising from all of Google's apps; that's no longer pursued, and what is sought,  
20 according to column E, is disclosure relating to Google's payment processing costs  
21 only when its billing system is used within an app which offers User Choice Billing.

22 THE CHAIR: Yes, that's right.

23 MR SCANNELL: Yes. That is the narrowing.

24 THE CHAIR: Yes, thank you. Yes.

25 MR SCANNELL: I'm grateful.

26 And I was about to say, madam, that that request in column E has been narrowed

1 further still since the last hearing, by confining the date range for request E15 to the  
2 same date range as request E14, 1 June 2023 to 29 March 2025.

3 I should say in that regard that the date range I've just given is the correct date range.  
4 The range 1 June 2023 to 31 May 2025 was erroneously referred to in the letter which  
5 was sent to the Tribunal yesterday, and that caused some confusion within Google.  
6 But Norton Rose has already clarified that with RPC, so I take it that that is tolerably  
7 clear.

8 THE CHAIR: Yes, and is it for all jurisdictions? Is that right?

9 MR SCANNELL: That is for all jurisdictions.

10 THE CHAIR: Yes.

11 MR SCANNELL: The E15 disclosure is important, because the financial data that  
12 Google has provided to date is now hopelessly out of date. The only documents that  
13 Google referred to in the Redfern schedule pre-dated the start date of the original date  
14 range. And of course, the date range has now been narrowed, so that the starting  
15 point is 1 June 2023 and not 2022, and that makes the documents that have been  
16 referred to by RPC even more distant from the start date.

17 Google has disclosed a data set within the new E15 date range, dated  
18 17 November 2023, but that data set is not up to date. It has been looked at by Epic's  
19 experts, and they say that it cannot be used to ascertain or even estimate Google's  
20 payment processing costs when User Choice Billing is available. The data set is not  
21 broken down by jurisdiction, and it's not possible to say how Google arrived at the  
22 figures that appear in it.

23 Then the final UCB request, request E16, requires us to return to the 22 June letter at  
24 SB1, tab 11 at page 2 of the letter.

25 THE CHAIR: Yes.

26 MR SCANNELL: You can see there, madam, that Epic proposed replacing request

1 E16 as it appeared in the Redfern with a request that Google provide an updated  
2 version of a particular data set. Google has agreed to provide that updated data set.

3 So request E16 is, I'm happy to report, agreed --

4 There is just one point to observe in respect of the request, and that is that RPC  
5 indicated in the letter it sent to the Tribunal yesterday evening, that request E16  
6 overlaps with request E13(b): that is wrong, and both need to be ordered.

7 Now, request E16 refers to a single data set relating to take-up rates of UCB and DOB.  
8 Request E13(b) covers a much wider category of documents and communications  
9 relating to take-up rates.

10 Could I deal finally with Google's remaining objections to the disclosure requests I've  
11 just described? They're set --

12 THE CHAIR: Can I ask about E16? Are you still seeking further information  
13 about -- oh, actually, I'm not sure I'm right about this one. No, I think I'm thinking about  
14 the CMA investigation. Where you seek further information about the disclosure you're  
15 going to get, that's not relevant to E16, is it? That's relevant to E17.

16 MR SCANNELL: It's not relevant to either of the outstanding requests that we're  
17 dealing with today. It came up in the context of other requests that were addressed in  
18 the last hearing, where witness --

19 THE CHAIR: I'm sorry, I've taken you slightly out of order, but I had understood there  
20 was something where Epic required confirmation from Google relating to investigation  
21 materials, that it was a complete set, or something like that.

22 MR SCANNELL: I'm terribly sorry, madam, you're absolutely right; that is an issue  
23 under E17.

24 THE CHAIR: 17, not 16?

25 MR SCANNELL: Yes, I do apologise.

26 THE CHAIR: No problem. I got it wrong, so don't worry about that. Right, yes. You

1 wanted to make some submissions.

2 MR SCANNELL: Yes. We'll get to E17 in just a moment. I was just going to deal with  
3 the outstanding objections that have been raised by Google to these disclosure  
4 requests relating to UCB and Developer Only Billing. They're set out in RPC's belated  
5 reply to the letter we've just been looking at. And from that letter dated  
6 9 July 2025 -- we won't turn it up, but for your note, it's in supplemental bundle 3, tab 7,  
7 page 18 --

8 THE CHAIR: Yes.

9 MR SCANNELL: -- it would seem that there are three main objections that, that  
10 remain.

11 The first is that Epic should only be entitled to disclosure relating to UCB and DOB in  
12 the United Kingdom, because it's claiming injunctive relief in this jurisdiction.

13 The second seems to relate only to Epic's request for developer feedback under E14.  
14 And there Google says that it has already disclosed enough.

15 And the third relates to request E15 and Epic's request for Google's up to date  
16 payment processing costs, and there RPC makes, so far as we can discern, three  
17 points:

18 The first is that harmonisation disclosure, which it has already given, is enough; the  
19 second is that Epic has not explained why Google's general ledger data from  
20 November 2023 is insufficient to determine the relevant costs; and relatedly, the third  
21 objection is that Google's general ledger data has apparently been good enough for  
22 the Coll Class Representative's accounting expert Mr Dudney, and so it should be  
23 good enough for Epic, too.

24 THE CHAIR: And in relation to that last point, I think you've referred to Mr Dudney not  
25 in fact addressing that particular point in his expert report. Is that right?

26 MR SCANNELL: That is absolutely correct.

1 THE CHAIR: Yes.

2 MR SCANNELL: He says twice in his first expert report that he has not done what  
3 Google says he has done. Moreover, he says that he could not do so because he  
4 doesn't have the information required to do so.

5 THE CHAIR: Yes.

6 MR SCANNELL: Now, to those three objections, I should add that in the  
7 Redfern Schedule, Google also complained that Epic had not proposed custodians  
8 and search terms for these requests, and it's unclear whether Google maintains that  
9 objection, but I can deal with that in 30 seconds at the end.

10 As to each of those objections, first, it's not necessary and neither would it be  
11 appropriate in my submission, for Epic to confine its UCB and DOB disclosure  
12 requests to the UK only, and there are three points there.

13 The first is the pleading point, which we discussed at the last hearing, madam, so  
14 I trust you already have the point. But each of the markets that Epic alleges that  
15 Google has abused a dominant position on is a worldwide market, excluding China.  
16 And so the point, that we are seeking injunctive relief in the United Kingdom, is really  
17 a red herring.

18 The second point is that Epic has quite reasonably confined the international aspect  
19 of this request to the EEA only, save only for take up rights. It no longer seeks  
20 disclosure in respect of all of the jurisdictions in which Google has introduced UCB  
21 and DOB.

22 And the third point is that, and this really is a very important point, the only way to  
23 obtain meaningful information about UCB and DOB is to order disclosure that is wider  
24 than the United Kingdom alone. Google only introduced UCB in this jurisdiction a few  
25 months ago in March, so confining disclosure to the UK alone would mean that Google  
26 could effectively evade giving any meaningful disclosure. As against that, Google

1 introduced UCB and DOB in the EEA in 2022 and extended it to gaming apps in the  
2 EEA in March last year. The disclosure that Google can give in respect of that is highly  
3 relevant, because as far as we can see, there is no significant difference between the  
4 UCB and DOB models that Google has introduced in the EEA, and the model it  
5 proposes to introduce in the United Kingdom, save only that Google has apparently  
6 not yet felt under sufficient regulatory pressure in this jurisdiction to consider it  
7 expedient to extend the UK model to gaming apps.

8 So for those reasons, we say that the first objection is unfounded. The second  
9 objection is that it has already given enough, particularly in respect of developer  
10 feedback and the request we make at E14. That is simply not the case; the US  
11 disclosure only covers the period before 8 June 2022; the Australian disclosure, we  
12 discussed that at the last hearing, that essentially adds nothing; and the harmonisation  
13 disclosure is not an answer any longer. That disclosure contains nothing beyond  
14 1 June 2023, and as I've explained, Epic has now agreed to limit request E14 to  
15 disclosure beyond that date. So attempts to construct search strings within the  
16 harmonisation disclosure that might reveal documents containing the word "*developer*"  
17 within five words of "*feedback*", for example, is irrelevant. More recent feedback than  
18 1 June 2023 is imperative, not least because User Choice Billing was only extended  
19 to gaming apps in the EEA in March last year and was only introduced at all in the UK  
20 in March this year.

21 And then, as to Google's objections to request E15, at the first of those again, is that  
22 the harmonisation disclosure is enough. That doesn't work for E15 either, for exactly  
23 the same reason as I've explained. We are restricting the date range of E15 disclosure  
24 now, so that it begins on 1 June 2023.

25 The second of Google's objections to E15 is that Epic has not explained why Google's  
26 general ledger data from November 2023 is deficient. We find, I must confess, that

1 objection incomprehensible. The position was explained by Norton Rose on behalf of  
2 Epic in the Redfern Schedule at column E on pages 116 to 117. It was further  
3 explained at paragraph 5(d) of their letter to RPC on the 22 June, which we looked at  
4 a moment ago, and it was explained yet again at paragraph 18 of its letter to RPC  
5 yesterday, which is in supplemental bundle 4 at tab 1, page 6.

6 Much of that explanation is confidential, as you may have seen, madam, from the  
7 relevant letters of the Redfern. But the guts of the point, which comes from the experts  
8 with whom Epic is liaising in respect of these points, is that the general ledger data  
9 provided by Google does not enable them to ascertain Google's payment processing  
10 costs when UCB is offered.

11 As to Google's point about Mr Dudney, we have addressed that already: it's simply not  
12 true.

13 And finally, on disclosure custodians and search terms, there is nothing to those  
14 objections in my submission. Norton Rose Fulbright has written to Google's solicitors  
15 twice since March, asking them to propose custodians for this disclosure, and that  
16 correspondence has not been responded to. As to custodians, Epic does not know  
17 who the appropriate custodians are within Google. That's for Google to say. It's  
18 whoever within Google has had responsibility for UCB and DOB pilots that launched  
19 over the last two years, particularly whomever it was that addressed the launch of UCB  
20 in the United Kingdom in response to the CMA's investigation.

21 As for search terms, Epic has proposed search terms in column E of the  
22 Redfern schedule on page 113. But again, we had expected Google to engage with  
23 those terms and to propose amendments or search terms of its own, which could be  
24 agreed. Google is obviously better placed to devise search terms than Epic is, which  
25 will disgorge relevant documents.

26 That's the last of the objections to the disclosure requests. In my submission, there is

1 nothing to those objections, and for those reasons, I commend the UCB and DOB  
2 requests.

3 THE CHAIR: In relation to the objection of Google that Epic hasn't explained why the  
4 general ledger data is insufficient, would one answer to that be for Google, if they say  
5 it is possible to ascertain that information from the general ledger, to provide a short  
6 witness statement, as we've done in, I think, the Coll case before, explaining how it's  
7 done, explaining how you do it, from the data that's there?

8 MR SCANNELL: Yes, in short. What they can't do is say, "*You have the information,*  
9 *it's there somewhere, unlock it for yourselves*", when experts have looked at it and  
10 they're unable to do so. As you say, madam, in fact, your suggestion is a very sensible  
11 one, if I may say so. If Google says that it is possible to ascertain all of this information,  
12 by all means explain how.

13 THE CHAIR: Thank you. (Pause)

14 MR SCANNELL: I was going to proceed to request E17.

15 THE CHAIR: I was wondering whether, so that I can pigeonhole things correctly in my  
16 brain and it appears in the right order on the transcript, whether I could ask Ms Smith  
17 to respond to that group of requests first.

18 Reply submissions by MS SMITH

19 MS SMITH: Thank you, madam.

20 Can I start by saying that, despite the impression that may have been given to the  
21 Tribunal by Epic's counsel's submissions, the starting point that I would stress, and  
22 that the Tribunal should bear in mind for these requests E13 to E16, is that Epic has  
23 already received extensive disclosure from Google on User Choice Billing and  
24 Developer Only Billing and the introduction of those UCB and DOB in alternative  
25 jurisdictions, in other jurisdictions, all around the world, as a result of the disclosure  
26 that has been provided to it, from the US proceedings, the Australian proceedings, the



1 Coll proceedings further disclosure, and most recently, the harmonisation disclosure.  
2 It's in that context, I say, the Tribunal should consider these further disclosure requests  
3 from Google. They're not new, first-bite-of-the-cherry disclosure requests, they're  
4 further disclosure requests that Epic is now making to the Tribunal, and the purported  
5 basis of those further disclosure requests was Google's extension of the User Choice  
6 Billing pilot to the UK on 27 February 2025, which for your note was explained in  
7 Mr Feng's Third Witness Statement, paragraph 24, bundle C, tab 7, page 204. So that  
8 was the basis upon which Epic seeks to get this further disclosure.

9 The further disclosure that Epic originally sought is summarised in paragraph 25 of its  
10 Counsels' skeleton argument. I'm not going to take you to it, but for your note, it's  
11 bundle A, tab 2, page 31, and that comprised four categories of further disclosure.

12 E13:

13 "documents and communications [both] internal and external relating to the decision  
14 to launch UCB in any jurisdiction... between 8 June 2022 and 29 March 2025..." [as  
15 read].

16 If I could ask you, madam, to bear in mind that start date of 8 June 2022; I'll come back  
17 to that.

18 The second category of further disclosure was request E14, that's the "internal and  
19 external communications relating to developer feedback on UCB or DOB programs"  
20 [as read] in any jurisdiction for the same period.

21 The third category:

22 "documents and communications relating to the payment processing costs incurred  
23 by Google [when using UCB] ..." [as read].

24 Again, in all jurisdictions for the same time period. That's request E15.

25 And the fourth category, request E16:

26 "documents or datasets regarding the transaction value and volume [of payments

1 processed] via UCB/DOB." [as read].

2 Some of those categories of requests for disclosure have been amended to a limited  
3 extent since the last hearing. Some have not. And if I may, madam Chair, I'll address  
4 you briefly on each of them in turn.

5 THE CHAIR: Yes.

6 MS SMITH: First of all, request E13.

7 Google's position was that we confirmed in correspondence before the last CMC  
8 hearing back on 23 June that in response to request E13, we would be prepared to  
9 conduct reasonable and proportionate searches for documents concerning the  
10 extension of the UCB pilot to the UK and that we were prepared to agree appropriate  
11 categories of documents, the applicable time period and other search parameters with  
12 Epic for that disclosure. But Epic did not and has not engaged with that proposal. So  
13 we offered further disclosure that goes to the very basis of the reason for the requests  
14 now made by Epic, the extension of the UCB pilot to the UK in February 2025.

15 We say that that's a proportionate, reasonable proposal for disclosure and that the  
16 Tribunal does not need to and should not go any further. Any further disclosure under  
17 request E13 is both disproportionate and unnecessary.

18 And I'll make two submissions, if I may, madam, to support that point. I'd ask the  
19 Tribunal to bear in mind first, as I've previously submitted, Epic's claim and the  
20 Tribunal's jurisdiction is limited to the UK. I'll not go back to all the material that I took  
21 you to at our last hearing to make good that point, but if I could just ask you to look at  
22 one part of Epic's pleaded case, which is the relief sought by Epic. That's in hearing  
23 bundle B, tab 1, page 61.

24 THE CHAIR: Yes.

25 MS SMITH: And that is the relief sought by Epic, paragraph 164 of their five times,  
26 four times re-amended Claim Form. And you'll see -- I took you to this when we last

1 met -- all of the relief in subparagraphs 8(a) through to (g) is limited to the UK.

2 THE CHAIR: Yes. And what do you say about Mr Scannell's point that actually the  
3 market is a worldwide one and the claims relate to abuse of dominance on the world  
4 market?

5 MS SMITH: Well, there are two points that I make in response to that. I'll make one  
6 initial point and then I'll come on to the second submission I was going to make in  
7 response in any event.

8 The first point -- and I'll make the point and then I'll find the reference -- Epic  
9 themselves have accepted in their Redfern schedule under these categories of -- for  
10 these categories of disclosure that the reasoning -- and I think the reasoning, I think  
11 you'll find the exact wording -- but the basis upon which, or the reasons and the impact  
12 of the launch of UCB in the UK and other jurisdictions, will effectively be the same.

13 I could find the reference. Yes, I hope it is. Bundle A, tab 3, page 113 under the  
14 heading jurisdictional scope of Epic's request in column E.

15 THE CHAIR: Yes.

16 MS SMITH: You'll see at the second bullet point, this is a response by Epic to our  
17 objection to their request E13:

18 "As explained in Column C, while the geographic scope of Epic's relief is limited to the  
19 UK, UCB is offered in the UK on the same terms as in all other jurisdictions. If evidence  
20 from other jurisdictions shows that UCB/DOB is anti-competitive [etcetera]... the  
21 conduct will be analogous in the UK and would be relevant to the issues in the case."  
22 [as read].

23 So that is Epic's position. They accept that UCB is offered on the same terms and that  
24 the conduct is analogous in the UK as in other jurisdictions. And that then leads me  
25 to the second point that I was going to make to you, madam, which is that Google has  
26 already given extensive disclosure relating to UCB and DOB in these other

1 jurisdictions where UCB and DOB was launched before it was launched in the UK.  
2 But importantly, that disclosure that Google has already given as regards these other  
3 jurisdictions, covers documents, significant number of documents, which go to the  
4 period now requested by Epic, so the period after 8 June 2022.

5 So any justification on the basis of "*Well, we need updating disclosure for other*  
6 *jurisdictions*" is a bad point. Can I take you in that regard to ...

7 THE CHAIR: I mean, is there anything after June 2023, which I think is the new date  
8 proposed by Epic?

9 MS SMITH: Yes, there will be if I can take you -- sorry, I'm just jumping about because  
10 I'm aware that this goes to requests E14 and E15 as well, but I'll deal with this point if  
11 I may. Can I deal with this point step by step perhaps, because it's important that you  
12 see exactly what has been given in this regard.

13 So if I can start by -- I'm just going to make sure I don't lose the other points I'm going  
14 to make. But if I can start by taking you -- in fact, you may already have it -- Epic's  
15 Redfern schedule, which goes to requests E13 through to E16. That's bundle  
16 A, tab 3. If you could go back to page 110.

17 THE CHAIR: Yes.

18 MS SMITH: So page 110, column E, under the heading "Google's response does not  
19 engage with Epic's disclosure request". Second bullet point:

20 "Epic is very aware of Google's existing disclosure on UCB. As explained in Column C,  
21 E13 is specifically framed by reference to the period 8 June 2022 to 29 March 2025.  
22 Google's response suggests that, because it has disclosed a small number of  
23 documents since 8 June 2022 in other productions that are incidentally relevant to  
24 UCB, this should stand in lieu of a proper disclosure production [et cetera]."

25 But if you look at what is actually described, perhaps, I would say, slightly misleadingly  
26 in the body of this Redfern schedule as "*a small number of documents*" that have been

1 disclosed since 8 June 2022. If you actually look at the detail of that, in footnote 39,  
2 you'll see that what we're actually talking about is not, in my submission, a small  
3 number of documents. Footnote 39:

4 "Based on Epic's review, Google has disclosed approximately 2,223 documents that  
5 may relate to UCB, DOB or any discussion of billing optionality and are dated after  
6 8 June 2022." [as read].

7 So Epic accepts that it has, as a starting point, over 2,000 documents, relevant  
8 documents, for the period after 8 June 2022. So that's my first point in response to  
9 your Ladyship's question.

10 My second is if I can take you to my instructing solicitors' letter to Epic's solicitors on  
11 9 July, which is in supplemental bundle 3. Page 18 it starts. And on page 19,  
12 paragraph 4.

13 THE CHAIR: Yes.

14 MS SMITH: Sorry. Perhaps I could start with paragraph 3, which goes to E13. You'll  
15 now see E13 has been reduced. The request for E13 disclosure has been reduced  
16 by Epic from "*disclosure as regards all jurisdictions*" to "*disclosure on the UK billing*  
17 *pilot*", which we've said we will give you, and "*the extension of UCB to non-gaming*  
18 *apps in the EEA*" and we say no, that goes too far.

19 And we therefore make the point that Google's decision to extend UCB and DOB to  
20 gaming apps in the EEA is not relevant to Epic's pleaded case. Because of the relief  
21 sought, it's not supported by Epic's pleaded case or the relief sought, which, as I've  
22 shown you, is limited to the UK, and Google's decision to extend the UCB pilot to the  
23 UK will be reflected in the documents concerning that decision, which we are going to  
24 give you. And then we've already given you substantial disclosure in connection with  
25 the launch of the UCB pilot in other jurisdictions.

26 But before I go on to show you that, can I make the point -- you asked about markets

1 and Epic's pleading of markets that are wider than those in the UK. You will recall,  
2 madam, that in the last hearing I showed you section 18 of the Competition Act 1998.  
3 I won't take you back to it unless you want me to, but that made it clear that regardless  
4 of the definition of the market, which is in dispute in the case, what is important for  
5 the purposes of a breach of UK competition law under section 18 of the Act is that  
6 there has to be shown to have been a dominant position in the UK, and there has to  
7 be found an impact on markets in the UK.

8 That, together with the relief sought by Epic, which is expressly limited to the UK,  
9 means that, we say, in all those circumstances our offer for further disclosure of the  
10 extension of the UCB pilot to the UK in February 2025 is absolutely more than  
11 adequate in this case, given the substantial disclosure on other jurisdictions that has  
12 already been given. And in that regard --

13 THE CHAIR: I looked at the transcript of that passage, actually, those exchanges,  
14 before this hearing, and Mr Scannell made the point that they plead that it's  
15 a worldwide market dominance and he needs to establish his pleaded case. So he  
16 needs to establish that. And he says it would, therefore, if I establish that, it follows  
17 that in the UK market, I think. Have I expressed that correctly, Mr Scannell?

18 MS SMITH: Yes, I think that's the point, madam. But, madam, what that goes to is  
19 the distinction between market definition, which is a prior question to the question of  
20 then what is the impact and effect of the conduct. And then, after that, the subsequent  
21 question of what is the relief sought?

22 We may have an argument over -- we will have an argument over market definition.  
23 And they say it is a global market. We say it actually is a different product market from  
24 the market that Epic contends. But there's a question as to what is the ambit, the  
25 geographic scope of the market.

26 THE CHAIR: Yes.

1 MS SMITH: Then the question is, what is the conduct that is at issue? What is the  
2 effect of that conduct, the conduct about which Epic complains and to which this  
3 disclosure goes, is tying and tying of the billing system to Google Play and excessive  
4 pricing, the level of the prices that Google imposes for billing.

5 The conduct is conduct in the UK, and the relief sought is injunctions to prevent us  
6 from continuing with that conduct in the UK. And that is what this disclosure goes to.  
7 It goes to the conduct, the effect of the conduct and the relief sought, which is to  
8 prevent us engaging in this conduct. And all of those issues are solely UK issues.

9 THE CHAIR: Yes. Thank you. That's very helpful.

10 MS SMITH: So, madam, actually it's almost without prejudice to that point that we  
11 then say, but in any event, you have been given extensive disclosure of the operation  
12 of the UCB pilots in other jurisdictions. So it is, in fact, a without prejudice point, really.  
13 In any event, they have been given extensive disclosure on UCB and DOB in other  
14 jurisdictions. And then, if I can continue taking you through the letter of 9 July, which  
15 is at supplemental bundle 3, page 19.

16 Paragraph 4 goes directly to request E14 on developer feedback.

17 And in paragraph 4(a), we refer to the "13,000 documents originally disclosed in the  
18 Coll proceedings".

19 And the Epic acknowledgement that I've already taken you to, that:

20 "Google has disclosed, of those 13,000 documents, approximately 2,223 documents  
21 that may relate to UCB / DOB billing optionality dated after the 8 June 2022." [as read]

22 Over and above that, since the documents that were originally disclosed in the Coll  
23 proceedings were provided to Epic, Epic has been provided with further harmonisation  
24 disclosure, which you'll see from paragraph 4(b) of this letter of the 9 July:

25 "Google's harmonisation disclosure contains over 2,000 documents that are  
26 responsive to relevant keywords related to Epic's requests E13 to E16" [as read]

1 And, specifically, subparagraph (c):

2 "There are 1,000 results within Google's harmonisation disclosure that are responsive  
3 to the following search term", that is, "choice billing", "UCB", "developer only" or  
4 "billing", but importantly, "AND 'developer' within five-words of 'feedback'." [as read]  
5 So that's a search term that specifically goes to the request made under E14 of  
6 documents and disclosure relating to developer feedback. There are already  
7 1,000 results within the harmonisation disclosure that are responsive to a search term  
8 developed designed to address that issue.

9 So that's E14.

10 THE CHAIR: Yes.

11 MS SMITH: And, just for your note, madam, that does refer back to paragraphs 20  
12 to 21 of our letter dated 20 June 2025. I don't think I need to take you back to that,  
13 but for your note, that's at supplemental bundle 1, page 36.

14 THE CHAIR: Yes.

15 MS SMITH: As regards request E15, "payment processing costs", if I could ask you  
16 to look at paragraphs 5 through to 7 of my instructing solicitors' letter of 9 July -- we're  
17 still there in supplemental bundle 3, page 19 through to 20.

18 First of all, at paragraph 5, the disclosure that was given underneath for the purposes  
19 of the Coll proceedings contains documents, so this is documentary disclosure,  
20 relevant to that issue.

21 And I would ask you to look at the extent of -- the focus of the documentary disclosure,  
22 the custodial disclosure in the Coll proceedings. You'll see that Google conducted  
23 searches for custodial documents, including documents postdating 8 June 2022, up  
24 to 31 May 2023 -- I'll come to the period after 2023 in a moment, if I may, madam, but  
25 just to cover that year's period -- it was custodial documents from 16 individuals by  
26 reference to search strings that were specifically intended in this context to capture



1 material related to UCB, DOB and Google's payment processing costs. And those  
2 search strings are set out. I'm not going to read them out, but you'll see that those  
3 were specifically designed to capture these types of documents.

4 THE CHAIR: Yes.

5 MS SMITH: So a disclosure exercise has already been carried out for these types of  
6 documents, those requested under E15. But in addition to documentary disclosure,  
7 Google has disclosed financial data at a very granular level, and you'll see the  
8 reference in paragraph 6 to, the general ledger data that Google has provided to Epic  
9 in these proceedings.

10 THE CHAIR: Yes.

11 MS SMITH: Now, we heard Mr Scannell's submission -- again based only on what  
12 was set out in solicitors' correspondence and one assumes what he has been  
13 instructed -- that Epic's experts have not been able to discern the data to enable them  
14 to work out payment processing costs from Google's general ledger data. We find that  
15 surprising.

16 I would first say, obviously, that the ambit of the expert evidence that Epic can put in  
17 in this case is still in issue and will be determined by the Tribunal at the 1 August CMC,  
18 but in any event, assuming for the purposes of this hearing that Epic will be given  
19 permission to put in expert evidence on these issues, the data to which they have been  
20 given, Google's general ledger data, provides data at a profit centre and cost centre  
21 level. And as we have said, at this granularity it is and has been sufficient for experts  
22 to determine and discern payment processing costs.

23 There is no evidence before the Tribunal from Epic's experts to the effect that they  
24 cannot discern that data from the general ledger data. There have only been  
25 submissions by Epic's lawyers, and we say that is not sufficient in order to provide the  
26 foundation for this sort of disclosure application. In order to enable the Tribunal to

1 consider this issue properly, if a statement is to be provided to the Tribunal, that  
2 statement should not be from Google, but it should be from Epic's expert actually  
3 giving evidence that they are not able to ascertain payment processing costs from the  
4 general ledger data. That is the issue on which we must start, and the Tribunal, in my  
5 submission, if it is going to entertain this application, should be where the Tribunal  
6 should be looking.

7 THE CHAIR: So in your clients' case, it can be done, the data that's being requested,  
8 it can be done. I mean, call me, perhaps, a bluff old traditionalist, but isn't the sensible  
9 thing to do to save costs all round for your clients to explain where the data that's being  
10 sought is found?

11 MS SMITH: Well, my Lady, we've already referred to -- sorry, I haven't got  
12 Mr Dudney's expert report, but it is addressed in the expert report of Mr Dudney. This  
13 is Epic's application for disclosure. And it is Epic's, in my submission, on their  
14 shoulders to prove that the extremely granular financial data that has already been  
15 provided to experts and on which, I should stress, two rounds, three rounds now of  
16 expert reports, which cover exactly these issues -- they cover UCB and DOB, and they  
17 cover payment processing costs. We've already had three rounds of expert reports  
18 from Google's experts and from Coll's experts which address exactly these issues on  
19 the basis of the general ledger data, which your Ladyship will recall and will appreciate  
20 is extremely granular data.

21 If the Tribunal is to go any further, then the starting point must be that Epic makes out  
22 its case that it's inadequate, which it hasn't done. And we say submissions on  
23 instructions and submissions in solicitors' letters are not good enough in that regard.  
24 Also --

25 THE CHAIR: If you are telling me that it's been explained in Google's expert report,  
26 then surely the simple thing to do is to say, look, our expert actually explains how you

1 can get this and this is where he deals with it in his expert reports.

2 MS SMITH: Yes. My Lady, the information as to how one finds the material is set out  
3 in paragraph 6 of the letter and in paragraph 7, which refers to further financial data,  
4 which explains how you read across -- I'm sorry, I see this is confidential, so I need to  
5 keep this at a high level -- but it takes the general ledger data and it explains how you  
6 find and read and use that general ledger data as set out in subparagraphs (a), (b), (c)  
7 of paragraph 7.

8 So in so far as Epic's experts need a route map to reading the general ledger data and  
9 a route map to finding the relevant cost level data in Google's general ledger data, that  
10 has already been provided to them, and is specifically referred to in paragraph 7,  
11 subparagraphs (a) through to (c), of this letter.

12 So they've received the data itself, they've received the route map, they've received  
13 the explanation in the correspondence. If they are now going to say that's not good  
14 enough, we say you cannot, that's not the sort of submission that the Tribunal should  
15 entertain solely on the basis of legal submissions.

16 Perhaps I can move on from that to the point about disclosure post-2023. And this is  
17 documentary disclosure, not data, which is going back to the point in paragraph 5 of  
18 this letter about the date ranges of the previous harmonisation disclosure and the  
19 Coll disclosure.

20 Madam, in this regard, you were referred to Epic's pleading -- I won't take you back to  
21 it -- to the Five-Times Re-Amended Claim Form. Mr Scannell referred to  
22 paragraphs 114A, 114B and 114C, you'll recall, which refer to the CMA's investigation.  
23 In that regard, can I ask you to turn back to Epic's Redfern schedule, which is in  
24 bundle A, tab 4, page 111.

25 THE CHAIR: Yes.

26 MS SMITH: And in column D these are "Google's reasoned objections".

1 You'll see under the heading "Further disclosure of responsive / relevant documents  
2 to be given by Google". And then you'll see under the bullet point:

3 "As noted in response to request E17 below [although this was a response to the  
4 request E13], Google will be providing Epic with the same CMA investigation material  
5 as provided to the Class Representative in the Coll proceedings." [as read]

6 And then if I could ask you to read to yourself, madam, what's in highlighted yellow  
7 that goes over the page?

8 THE CHAIR: Yes.

9 MS SMITH: And it says these submissions were made after 8 June 2022. So this is  
10 material that takes us beyond 2022 and into and after 2023.

11 THE CHAIR: Yes.

12 MS SMITH: I should also stress, madam, of course, that what Epic are concerned  
13 with, and you can see this when you look back at what they've asked for under E13  
14 through to E16, is they're concerned with the launch of the UCB and the operation of  
15 UCB in various other jurisdictions, including the UK. In all other jurisdictions, the  
16 launches of the UCB and DOB were in 2022-2023. So the disclosure that goes to the  
17 launch of UCB in other jurisdictions will be found during those periods. It's the launch  
18 in the UK that has taken place subsequently, February 2025, and disclosure leading  
19 up to the launch of the pilot in the UK in 2025, so the documents relating to 2023 and  
20 2024 are most likely to be documents relating to the launch in the UK, which we have  
21 offered to Epic. (Pause)

22 Before I leave, these requests E13, E14 and E15 -- sorry, I'm jumping about a bit,  
23 madam, and I apologise for that -- but going back, if I may, to the point about data --

24 THE CHAIR: Yes.

25 MS SMITH: -- on payment processing costs -- I was going to make this point, but  
26 I wasn't sure I could, but it's been confirmed that I can -- I took you to my solicitors'

1 letter of 9 July, and said, "*here is the explanation of how to read the general ledger*  
2 *data*". You will recall that, as well as the explanation given in the correspondence and  
3 in the various route maps that were provided by way of disclosure, those referred to in  
4 paragraph 7(a) through to (c) of the letter of 9 July, you'll recall that evidence was  
5 given by Google's witness, Ms Kourakina, in the court proceedings, about how the  
6 financial data works. I believe that statement has been made available to Epic. I'm  
7 afraid it's not in the bundle, but I can read -- the explanation is there, as to how the  
8 general ledger data works and how one finds its way through it, and I can read from  
9 Ms Kourakina's First Witness Statement, dated 24 November 2023, paragraph 37.

10 And she says in terms:

11 "Transaction processing costs by third party providers are identified separately in the  
12 Google Play P&Ls and in the general ledger accounts." [as read]

13 And then this has been -- I'm being handed things left, right and centre. Thank you  
14 very much -- this has actually been made clear to Epic, and if I could ask you in this  
15 regard to look at bundle A, page 48, in these proceedings. And yes, this actually, to  
16 be fair, is the Google Redfern schedule. But it makes the point -- and it's the  
17 Google Redfern schedule, and it's information or submissions by Google made in  
18 support of its application for documents and data relating to the profitability of the EGS.  
19 Page 48, far right-hand column. You will see if you have that, madam.

20 THE CHAIR: Yes.

21 MS SMITH: Reference to Ms Kourakina's witness evidence. It explains that  
22 Ms Kourakina's First and Second Witness Statements were produced to enable the  
23 Class Representative's expert to understand the financial data, et cetera, and to  
24 explain details and explanations. Ms Kourakina's First Witness Statement included  
25 evidence on Google's revenue accounting policies and practices, including an  
26 explanation of how Google Play is accounted for within Google, and the following

1 material was provided alongside Kourakina 1.

2 Following Kourakina 1, a further tranche of financial data, including Google Play P&Ls  
3 at the general ledger level.

4 And then her Second Witness Statement regarding common and allocated costs,  
5 WACC, et cetera, as well as details of the related material, including the Coll  
6 proceedings, including: one, the financial data at the general ledger level, as well as  
7 at profit centre and cost centre levels; two, financial data underpinning the relevant  
8 Android P&L at the general ledger level, as well as at the profit centre and cost centre  
9 levels; and account hierarchies and a mapping key for the general ledger data.

10 So, Epic has been told the level of granularity -- well, they are aware, but in any event,  
11 even for the purposes of this application -- they've been told the level of granularity of  
12 the data that they have been provided with, cost centre level data, which in my  
13 submission includes the data at the level of card transactions by definition, and  
14 account hierarchies and a mapping key for the general ledger data.

15 And then a further explanation, Kourakina 2, Google produced further related material  
16 in the Coll proceedings and gave them worked examples, et cetera.

17 In light of this material, which is all in front of Epic, for the purposes of this application,  
18 it is surprising in my submission, to say the least, that the best they can do is say, on  
19 instructions, "*our experts have thrown up their hands*". That's not good enough, in my  
20 submission.

21 So, if I can finally address -- I think I've addressed everything I wanted to say in  
22 respect of E13, E14 and E15.

23 THE CHAIR: Yes.

24 MS SMITH: We say, what you already have is more than adequate, when we have  
25 also offered to provide updated disclosure relating to the introduction of the UCB in  
26 the UK.

1 Request E16 is agreed. Request E16 goes to the transaction value and transaction  
2 volume, and in our submission, E16 does address the issue of the take up rates, which  
3 were stressed by Mr Scannell at the start of his submissions. He says: "*We need to*  
4 *know take up rates for UCB and DOB to effectively make good our case, that no one*  
5 *is taking up UCB or DOB because you're not offering them a good enough deal or*  
6 *a good enough price*".

7 However, he also says: "*As well as the actual data, we need documents and*  
8 *correspondence on take up rates. See our request E13(b).*"

9 But we say no; that is an unnecessary, disproportionate fishing expedition. In order to  
10 make a case on low take up rates, the data in our submission is sufficient and in line  
11 with the Tribunal's approach to only ordering disclosure that is relevant and  
12 proportionate. We say that E13(b), in the light of what has already been given to Epic  
13 in these proceedings on these issues, is disproportionate and unnecessary.

14 So, my Lady, I think those are my submissions on E13 through to E16.

15 THE CHAIR: Thank you, thank you.

16 Mr Scannell, I know we're due a transcriber break. Would it be helpful to take  
17 five minutes now, or how long do you think you'll be in reply?

18 MR SCANNELL: I'm conscious of time and very keen that we don't impinge any further  
19 on your time, madam. We're due to finish at 1.00 pm. With that in mind, I was hoping  
20 to keep the reply short, particularly because none of the points you've just heard were  
21 not anticipated in the submissions that I've already made. So I would hope to be no  
22 more than ten minutes.

23 THE CHAIR: Okay, so if I can put a flag in for the transcriber that, by midday, we  
24 should get a break.

25 MR SCANNELL: Yes.

26 THE CHAIR: Thank you.

1 | Reply submissions by MR SCANNELL

2 | MR SCANNELL: As to the point that Google has already given enough disclosure,  
3 | which is a refrain you heard quite a lot from Ms Smith, I'm going to take it that the  
4 | Tribunal has my point, that that simply is not the case: the US disclosure runs out  
5 | in 2022; the Australia disclosure does not add anything to that; and the harmonisation  
6 | disclosure, it's very important to appreciate, that that runs out in June 2023.

7 | Now, there have been some documents found in the harmonisation disclosure relating  
8 | to UCB after June 2023, but the totality of that documentation is five documents. It's  
9 | very important to Epic's case that it has recent disclosure relating to UCB and  
10 | Developer Only Billing, so it is imperative that we get disclosure after 1 June 2023,  
11 | and the harmonisation disclosure, which is the high watermark of my learned friend's  
12 | submissions in relation to the disclosure already given, is not an answer to that.

13 | In the Redfern schedule, Google offered disclosure only in respect of the extension of  
14 | the UCB pilot in February 2025, and my learned friend says that that is enough. Well,  
15 | that would clearly not be enough. If disclosure is confined to the extension of the UCB  
16 | pilot in February 2025, very little will be given in the way of disclosure, and we will just  
17 | have a few weeks of disclosure for Google to give. The fact that the UCB that has  
18 | been introduced in other jurisdictions has apparently been offered on similar terms to  
19 | the terms that apply in the United Kingdom is not a reason to confine disclosure to the  
20 | United Kingdom, it's a reason to order that there be disclosure in relation to UCB in  
21 | other jurisdictions, because that will be directly relevant to the UK position. (Pause)

22 | THE CHAIR: Yes, you say you'll see what happened because they are ahead of the  
23 | game. You'll see what happened when it was introduced there.

24 | MR SCANNELL: Yes, and that is very important, given the way that the UCB and  
25 | DOB issues are pleaded in the respective cases.

26 | My learned friend took you to a footnote of the Redfern schedule where



1 Norton Rose Fulbright, again, frankly and honestly, accepted that there had been  
2 limited disclosure of documents which were, broadly speaking, relevant to UCB, in the  
3 sense that they may have mentioned UCB after 8 June 2022. But the point that's  
4 made in the Redfern schedule itself, at the very point where that footnote appears,  
5 which my learned friend did not take you to, is that that desultory disclosure, which is,  
6 as it were -- it arises by serendipity, cannot stand in lieu of proper disclosure based on  
7 selected search terms which are designed to capture relevant documents on User  
8 Choice Billing, particularly when what is now of the utmost importance is that  
9 disclosure be given in the period following 1 June 2023, and none of those documents  
10 are documents that post-date 1 June 2023. They only post-date the 8 June 2022.  
11 Our claim that Google has abused a dominant position on worldwide markets is not,  
12 with great respect to my learned friend, a market definition point; it's the essence of  
13 Epic's claim. That can't simply be pushed to one side as being pure market definition.  
14 But even if it were -- and I repeat, it's not -- but even if it were, disclosure would have  
15 to be given in relation to that relevant issue of market definition. That is no reason at  
16 all to evade disclosure obligations.

17 And as to the general ledger data, the point that's made against me there is that the  
18 submissions that I have made to you, madam, are submissions that I have made on  
19 instruction, and without a witness statement in support and without a further witness  
20 statement from an expert. As matters stand, of course, we don't yet have permission  
21 to lead expert evidence.

22 But all of that is, in any event, irrelevant. If the Tribunal is not minded to take my word  
23 for it, take Mr Dudney's word for it. Mr Dudney has explained in his expert report at  
24 paragraph 5.1.1 and also at footnote 31, that it is not true that Google's general ledger  
25 data contains payment processing costs information, and here are some important  
26 following words: "when UCB and DOB are offered".

1 It is true, of course, that the general ledger data contains information relating to  
2 payment processing costs, but not in the context of UCB and DOB, and that is the  
3 critical point to understand. That point is very clearly made by Mr Dudney, and he  
4 explains -- he doesn't just make that remark as a throwaway remark -- he explains, by  
5 reference to the data that he has received, why it is that he's comfortable in saying  
6 that he has not received sufficient information to conduct the sort of analysis that I am  
7 now talking about. He explains that payment processing costs, when UCB is offered,  
8 is not a separate sub-segment of Google's general ledger data.

9 It is not true either, I'm afraid, that paragraph 7 of RPC's letter of 9 July at the third  
10 supplemental bundle, tab 7, page 20, provides what my learned friend described as  
11 "*a route map*". It does nothing of the sort. I mean, one only has to read paragraph 7  
12 to see that it's not a route map, and it could not be a route map. If it were a purported  
13 route map, it would be a route map to something which, so far as we're aware, based  
14 on what Mr Dudney has said, does not exist.

15 THE CHAIR: Yes.

16 MR SCANNELL: As for Ms Kourakina's evidence, I don't have Ms Kourakina's  
17 witness statement before me, but on the basis of the quotation given to you, madam,  
18 by Ms Smith, she is not either saying that Google's general ledger data contains  
19 payment processing cost information in the context of UCB and DOB, she's talking  
20 about third-party payment processing information. Those instructing me have  
21 reviewed Ms Kourakina's evidence, and I'm told on the basis of instructions,  
22 I forthrightly say, that Ms Kourakina's evidence was carefully reviewed when Epic was  
23 putting together its UCB and DOB disclosure requests, and when it was narrowing  
24 those disclosure requests, and those instructing me are satisfied that Ms Kourakina  
25 does not say that Google's payment processing costs are discernible from the general  
26 ledger data in the context of UCB and DOB, and that her evidence, Ms Kourakina's

1 evidence, does not assist on this point. (Pause)

2 I'm told that I can read this out to you, madam, and I'll finish with this point. I'm quoting  
3 from paragraph 37 of Ms Kourakina's first witness statement. And at paragraph 37,  
4 she says in the third sentence:

5 "There are no costs of Google Play's billing system identified separately in the  
6 Google Play P&Ls or in the general ledger accounts." [As read]

7 THE CHAIR: Yes, thank you.

8 MR SCANNELL: Thank you.

9 THE CHAIR: So we will rise now for, I think, five minutes. Otherwise we'll just eat too  
10 much into the next session. And so I'll come back at just after 12.05.

11 MR SCANNELL: Thank you.

12 (12.02 pm)

13 (A short break)

14 (Restart delayed due to technical issues)

15 (12.09 pm)

16 THE CHAIR: Right, I think that brings us on to the CMA investigation materials, which  
17 I hope is going to be a relatively short point.

18 MR SCANNELL: Yes, okay.

19  
20 Discussion re CMA investigation

21 Submissions by MR SCANNELL

22 MR SCANNELL: So, this is a request for investigation materials within the meaning  
23 of Schedule 8A, paragraph 33 to the Competition Act, arising in the context of the  
24 CMA's 10 June 2022 investigation into Google's alleged breaches of the Chapter Two  
25 prohibition.

26 THE CHAIR: Yes.

1 MR SCANNELL: Google has proposed to give Epic what it is disclosing in the Coll  
2 proceedings, pursuant to paragraph 7 of the Tribunal's 1 May Order, and Epic has  
3 agreed to that, but subject to three conditions. And if I could just ask you, please,  
4 madam, to turn to page 118 of the Redfern schedule.

5 THE CHAIR: Yes.

6 MR SCANNELL: You can see what those conditions are. My submission to you will  
7 be that they're perfectly straightforward and reasonable conditions. They're set out in  
8 column E, so there's a black bullet followed by white bullets, and it's the first three  
9 white bullets. The date is no longer important but we've asked Google to confirm that  
10 the materials that they gave to Ms Coll include all of the investigation materials within  
11 the meaning of Schedule 8A for the period 10 June 2022, up to and including the date  
12 on which the CMA closed its investigation.

13 The second condition is that Google is to identify which documents within the two  
14 productions of CMA material provided to Ms Coll were submitted to the CMA. As we  
15 understand it, some were and some were not.

16 And finally, Epic has asked that Google should supplement the Coll disclosure to  
17 ensure that it does comprise all of the investigation materials, if what was given to  
18 Ms Coll was incomplete. In other words, what matters in relation to this is not what  
19 was given to Ms Coll. What matters is what were the investigation materials, and if  
20 what was given to Ms Coll is not the investigation materials, then the balance of the  
21 investigation materials still needs to be given. That's really what those conditions are  
22 driving at.

23 Until yesterday evening, the Defendants gave no indication as to whether those  
24 conditions were acceptable or not. We now know that they are not acceptable to  
25 Google. And the reason given by RPC is that not all of the investigation materials will  
26 necessarily be in Google's possession or control. So that's the point that they make

1 at paragraph 11 of their letter to you, yesterday evening.

2 That is, with respect, a rather curious objection because, of course, there is no  
3 expectation that Google will have to disclose documents which are neither in its  
4 possession nor its control. What matters is simply that they give disclosure of the  
5 investigation material within the meaning of Schedule 8A, and what that means is they  
6 have to give third-party material as well as their own, Google's own material. But, of  
7 course, the material does not include paragraph 28 material. By paragraph 28, I'm  
8 referring to paragraph 28 of Schedule 8A, which is the exempt material, of which there  
9 can be no disclosure; leniency statements and settlement submissions where the  
10 settlement has not been withdrawn.

11 THE CHAIR: Yes.

12 MR SCANNELL: The final point is RPC also refers in yesterday's letter, again  
13 at paragraph 11, to request E17 potentially covering what it calls other materials that  
14 do not fall to be disclosed by Google in these proceedings. We do not know what that  
15 means. But I would suggest that that form of words doesn't give substance to Google's  
16 objection. So I would suggest that the objection should be overruled, and Google  
17 should simply provide this disclosure and the confirmations that Epic requests.

18 THE CHAIR: Thank you.

19 Ms Smith.

20 Reply submissions by MS SMITH

21 MS SMITH: Thank you, madam. Google offered to provide Epic with the same CMA  
22 investigation material as provided to the Class Representative in the Coll proceedings,  
23 and in fact has provided that material to Epic on 11 June. As has been confirmed in  
24 solicitors' correspondence, this is the entirety of the disclosable material that is in  
25 Google's control and is disclosable arising from the CMA investigation into Google  
26 Play Billing.

1 Epic's three conditions are problematic. They can't be accepted by Google, and they  
2 should be rejected by the Tribunal because of the emphasis, or the use, that Epic  
3 wants to make of the definition of investigation materials under paragraph 3 of  
4 Schedule 8A of the Competition Act 1998. So you can see from Google's three  
5 conditions set out in their Redfern schedule, page A118, that they want us to provide  
6 materials that include all investigation materials within the meaning of paragraph 3 of  
7 Schedule 8A of the Competition Act 1998 for the period up to and including the date  
8 on which the CMA closes the investigation.

9 Insofar as the materials provided to Ms Coll don't constitute the entirety of the  
10 'investigation materials', we will supplement the disclosure to ensure that it does. The  
11 problem with that can be seen when you turn to Schedule 8A of the Competition Act,  
12 and the definition of 'investigation materials' under that Schedule. If I could ask you,  
13 madam, to turn to Schedule 8A, which is in the authorities bundle at tab 3.

14 THE CHAIR: Yes.

15 MS SMITH: So if you have the authorities bundle tab 3, Schedule 8A of the  
16 Competition Act, this is a Schedule that makes further provision about various  
17 procedural and other issues arising in claims for damages in the Tribunal. If I can ask  
18 you to turn first to page 194.

19 THE CHAIR: Yes.

20 MS SMITH: Paragraph 3(3) you will see the definition of 'investigation materials',  
21 which in relation to a competition authority, means:

22 "(a) information prepared by a person (other than a competition authority) for the  
23 purpose of an investigation by the competition authority into an infringement of  
24 competition law;

25 (b) information sent by the competition authority, during the course of such an  
26 investigation, to an undertaking which is the subject of the investigation;

1 (c) a settlement submission which has been withdrawn."

2 For completeness, "settlement submission" is defined in paragraph 5, which is on  
3 pages 196 to 197.

4 THE CHAIR: Yes.

5 MS SMITH: So, my Lady, we have -- and this might be where the problem arises,  
6 perhaps from a misunderstanding or a misapprehension of the definition of  
7 'investigation materials' for the purposes of Schedule 8A. There is a very broad  
8 definition of 'investigation materials', as your Ladyship will see, which covers all  
9 material prepared by Google during the CMA investigation, whether it was sent to the  
10 CMA or not, including drafts of submissions which may be subject to legal privilege  
11 and settlement submissions which, by definition, would be subject to without prejudice  
12 privilege.

13 Now, the term 'investigation materials' is defined in paragraph 3 of Schedule 8A for  
14 a specific purpose, and for a specific limited purpose. It is because provision is made  
15 in part 6 of Schedule 8A as regards disclosure and damages actions; disclosure by  
16 the CMA. If you turn to page 216 of the authorities bundle, you'll see paragraph 29 of  
17 part 6 of Schedule 8A. If I could ask you to read paragraph 29 to yourself.

18 THE CHAIR: Yes.

19 MS SMITH: And it is a negative obligation, in effect, prohibiting the Tribunal from  
20 making a disclosure Order before the day on which the competition authority closes  
21 the investigation to which the materials relate. So, in summary, there is a prohibition  
22 on the disclosure of defined terms, termed 'investigation materials', which is before an  
23 investigation is closed. Presumably, the purpose of this prohibition is to protect the  
24 integrity and confidentiality of the investigation process. So it's a prohibition on  
25 disclosure of these investigation materials before the date the investigation is closed.  
26 This does not mean, however, that all investigation materials as defined can or will be

1 disclosed after the day on which the investigation has closed. Disclosure after that  
2 date is, and should, and is, subject to the normal rules on disclosure and the normal  
3 rules on privilege. All that part 8A provides is that before an investigation closes, there  
4 shall be no disclosure of any investigation materials. And 'investigation materials' is  
5 broadly defined.

6 After that date, the day on which the investigation closes, the normal rules on  
7 disclosure, in my submission, will apply. And those include the normal rules on  
8 privilege. Now, as I have said, it is likely that Google's investigation material, broadly  
9 defined, may include draft documents that will be subject to legal privilege and  
10 settlement submissions that will be subject to without prejudice privilege. Google is  
11 not obliged, in my submission, to disclose those types of documents, subject to under  
12 an Order made by the Tribunal now, and should not be obliged to disclose those types  
13 of documents under an Order made by the Tribunal now. We therefore cannot agree  
14 to a condition that we provide disclosure of all investigation materials, broadly defined,  
15 within the meaning of paragraph 3 of Schedule 8A of the Competition Act.

16 What we can agree to and what we have offered, and in fact what we have already  
17 given, is all disclosable material that relates to and that was submitted by Google to  
18 the Competition and Markets Authority in the course of the market investigation. The  
19 conditions, we say, appear to have arisen as a result of a misunderstanding by Epic  
20 as to the impact of using the definition of 'investigation materials' in their conditions.  
21 Maybe; we don't know. They haven't given us an explanation as to why they have  
22 sought to impose those conditions on us. What we have done is given them everything  
23 that is disclosable arising from -- and this has been confirmed in solicitors'  
24 correspondence -- the CMA investigation into Play Billing. They have already been  
25 provided with that. We cannot agree to conditions in the form drafted and set out in  
26 the Redfern schedule.



1 THE CHAIR: Yes. So just so that I can get that clear in my own mind, so what you  
2 will have already disclosed will be documents that were submitted to the CMA?

3 MS SMITH: Yes.

4 THE CHAIR: Does it include the extent of third-party documents that you received in  
5 the course of the CMA investigation?

6 MS SMITH: We don't get provided with third-party documents that are provided to the  
7 CMA, insofar as we don't get provided with original third-party documents. We may  
8 be asked questions which arise from the CMA's consideration of other documents  
9 which we have answered, and those would be contained in the submissions that we  
10 make and the documents that we have provided. We do not get access to third-party  
11 documents provided to the CMA.

12 THE CHAIR: Not in general, no. Yes, I completely understand that. And you will not  
13 already have disclosed any correspondence about settlement, for example?

14 MS SMITH: That's correct. We haven't, as it was subject to without prejudice privilege.

15 THE CHAIR: Yes, thank you; that was just getting some clarity. Is there anything else  
16 you want to say about that, Ms Smith?

17 MS SMITH: No, my Lady.

18 THE CHAIR: So, Mr Scannell, that is what has already been disclosed. Do you still  
19 need your conditions?

20 Reply submissions by MR SCANNELL

21 MR SCANNELL: So long as Google can confirm that all of the disclosable material  
22 has in fact already been disclosed, which is what I understand my learned friend  
23 Ms Smith to be saying -- and incidentally, that's the first time it's been said -- then I can  
24 take instructions as to whether or not we maintain the conditions. But if it is truly the  
25 case that everything has been disclosed, as my learned friend says, one does rather  
26 wonder why it is that they don't simply agree to the conditions, since they would add

1 nothing in terms of a burden on Google. It has never been suggested, incidentally, by  
2 Epic that without prejudice privileged documents, or that other privileged documents,  
3 covered, for example, by litigation privilege, should be disclosed. It has always been  
4 accepted that they do not need to be disclosed. They cannot be disclosed.

5 THE CHAIR: I think that may be where the issue arises in relation to the rather broad  
6 definition of 'investigation materials', which, in theory, if I understand it correctly, might  
7 extend to drafts, which I think Ms Smith says she would consider not to be disclosable  
8 because they'd be subject to privilege, but might, in theory, be considered to be  
9 information prepared by a person for the purpose of an investigation.

10 MR SCANNELL: Yes. But of course, Epic is not asking Google, nor could it, to  
11 disclose privileged documents. And to the extent that there was any uncertainty about  
12 that, it's rather surprising that Google might have thought that that was what was being  
13 referred to. I can expunge that uncertainty and say that what is expected is  
14 investigation materials as a class of documents. But if within those documents there  
15 are privileged documents, then of course they don't have to be disclosed, but, with  
16 respect, this is how we always approach disclosure requests. We identify the class of  
17 documents to be disclosed. That identifies the universe of documents to be given.  
18 And, of course, within that universe there may be some documents which are covered  
19 by without prejudice privilege or litigation privilege, for example, and of course, they're  
20 not disclosable. Generally, it doesn't have to spell that out.

21 THE CHAIR: So then does it sound like the two of you are broadly on the same page  
22 as to your understanding as to what will be provided?

23 MS SMITH: My Lady, perhaps I could just clarify the point. Mr Scannell surprisingly  
24 says he was unaware that this was all the disclosable material. It was in fact made  
25 clear to his solicitors in our letter on 2 June of this year, so a long time ago, which is  
26 a --

1 THE CHAIR: You've gone on to mute, Ms Smith.

2 MS SMITH: Apologies. It's a letter of 2 June from RPC to Norton Rose Fulbright,  
3 that's Epic's solicitors, in the bundle of this case at D/186. If I could ask you to turn,  
4 my Lady, to paragraph 9 on page D/188, we made the position absolutely clear as  
5 regards the CMA Play Billing investigation material requested by Epic. You'll see just  
6 about halfway down paragraph 9:

7 "The material given to the Class Representative in the Coll proceedings represents  
8 the extent of the material that became disclosable upon closure of the CMA Play Billing  
9 investigation. For the avoidance of doubt, that is not limited to "*pre-existing Google*  
10 *documents.*" [as read]

11 So we made it absolutely clear that we gave them all of the material that became  
12 disclosable upon the closure of the CMA Play Billing investigation. And then we made  
13 the point in paragraph 10:

14 "*Settlement submissions are not disclosable pursuant to Schedule 8A of the*  
15 *Competition Act*" and so our position remains that "*settlement submissions are not*  
16 *disclosable in the Epic proceedings.*" [as read]

17 Despite that confirmation, the three conditions were requested after this letter was sent  
18 to Epic's solicitors. So they were perfectly aware, but nevertheless have pursued  
19 these slightly puzzling conditions by reference to definition of investigation materials,  
20 and I have explained why we cannot accept those conditions, given the broad  
21 definition of 'investigation materials', which includes privileged documents.

22 THE CHAIR: Yes.

23 MS SMITH: My Lady, and those submissions, Epic, we say, should withdraw these,  
24 these conditions.

25 THE CHAIR: So you're content for an Order to be made, but the condition should be  
26 removed? And I think your position is, in fact, they've already got it.

1 MS SMITH: Well, there is no need for an Order because all disclosable material has  
2 already been disclosed to Epic on 11 June and was disclosed on 11 June. And we  
3 have confirmed in correspondence that that is the extent, the full extent, of the  
4 disclosable material.

5 THE CHAIR: Yes. Thank you.

6 MR SCANNELL: My Lady, if I may make one further point, which is drawn to my  
7 attention by my instructing solicitors.

8 Ordinarily, in disclosure, where a claim is made to privilege, whilst what I submitted  
9 a few moments ago is correct, one doesn't produce that document to one's opponent,  
10 or to the court or Tribunal. One does include that document in the disclosure list. And  
11 it may be that what ultimately gets disclosed is a redacted form of the document, or  
12 that the entire document is redacted, or it's not available for inspection. As we  
13 understand it, Google has not, in fact, provided all of the investigation materials to  
14 Ms Coll. It remains entirely unclear to us whether that is the case.

15 MS SMITH: My Lady, that's a completely new point that has arisen out of the blue.  
16 This approach to listing privileged documents has not been taken in any of the  
17 numerous disclosure orders that have been made to date in these proceedings. It is  
18 wholly unnecessary and improper to ask for it at this stage. It is also unclear what  
19 purpose such a list would serve, except to form the basis for some fishing expedition  
20 down the line.

21 Insofar as there is now in reply a submission that we have not given them everything  
22 we gave to Ms Coll, that is firmly rejected. We have given Epic exactly the same  
23 documents that we have given to the Coll Representative. And any submission on the  
24 hoof, – in counsel's submissions on instructions to the contrary, is improper, in my  
25 submission.

26 MR SCANNELL: Madam, with respect, there is nothing controversial about what I'm

1 saying. It is not an answer -- just so that we're clear about this -- as I said at the outset,  
2 it is not an answer to request E17 to say, "*we've given you what we gave Ms Coll*".

3 THE CHAIR: Yes, I have that point.

4 MR SCANNELL: We simply don't care what Ms Coll has been given. What we care  
5 about is that the investigation materials are disclosed, and we're simply trying to get  
6 comfortable with the notion that Google, whatever it might have done with Ms Coll, is  
7 going to give disclosure of those investigation materials. There's nothing improper  
8 about that submission.

9 THE CHAIR: No, no, I have your point on that. Yes. Thank you.

10 Did anyone else want to say anything else about the CMA investigation materials? I'm  
11 quite conscious that we've got to get on to Spotify.

12 MR SCANNELL: No, madam.

13 MS SMITH: No.

14 THE CHAIR: Mr Scannell, do you want to crack on and deal with Spotify then?

15  
16 Discussion re Spotify

17 Submissions by MR SCANNELL

18 MR SCANNELL: Thank you, madam. This is also a shorter point, just to set your  
19 mind at ease. I think that we are on course to finish on time.

20 THE CHAIR: So I thought the CMA investigation point was a short one. It proved not  
21 to be. So, yes, let's crack on with Spotify.

22 MR SCANNELL: Very true. So E18 to E23 is what we're dealing with Spotify, they're  
23 similar to requests which were made in the context of the United States proceedings,  
24 in response to which Google was ordered to give discovery of all relevant materials  
25 relating to Spotify. In these proceedings, Google resists the requests.

26 Now, as to how the requests arise in the present case, they again arise from the tying

1 claim and the excessive and unfair pricing claim in respect of Google's commissions  
2 on in-app purchases. I won't go over that material again.

3 As to what the 2022 Spotify Addendum is, madam, it's a form of developer distribution  
4 agreement between the Defendants and Spotify. It's significant because it departs  
5 from what Google says is the structure of its User Choice Billing and Developer Only  
6 Billing arrangements.

7 I'm afraid I cannot say, publicly, how precisely it departs because of confidentiality  
8 concerns, but how it departs is set out at paragraphs 34 and 35 of Epic's skeleton  
9 argument for the June hearing, which is in the A bundle at tab 2, page 34. And, if  
10 I could ask you, madam, to take a quick look at that so that you can see just how  
11 dramatic the Spotify Addendum actually is in that respect. So it's tab 2, page 34.

12 THE CHAIR: Yes, I have actually read it.

13 MR SCANNELL: I'm very grateful.

14 As to what is requested, the wording of request E18, as it appears on page 119 of the  
15 Redfern has now changed in the light of a proposal Epic has made since the last  
16 hearing to narrow the request. And to see the amended wording, could I ask you to  
17 turn up the third supplemental bundle at tab 2, page 9, please.

18 The original request E18 sought disclosure of all documents relating to the Spotify  
19 Addendum, but as I hope you can see from paragraph 5 of this letter, the new request  
20 E18 is narrower than that. It seeks only documents which record the impact on  
21 Google's business of the Spotify Addendum and/or which evaluate the performance  
22 of the Addendum. That disclosure is expected to include documents that appear in  
23 red at subparagraphs (a) to (c).

24 Those subparagraphs, incidentally, are unchanged from the Redfern version of  
25 request E18, and we understand it to be common ground that they are relevant  
26 because Google proposed before the last hearing to provide disclosure in respect of

1 | them. You can see that from page 120 of the Redfern at column D.

2 | THE CHAIR: Yes.

3 | MR SCANNELL: I should say before I continue that as you may have seen from  
4 | RPC's letter of Wednesday last week in tab 7 of supplemental bundle 3, paragraph 8,  
5 | Google has refused to give the disclosure sought by request E18. It hasn't given  
6 | a reason for that refusal, other than to assert, as it did in respect of the Redfern  
7 | request, that the request is overly broad. We don't accept that that is the case at all.  
8 | Epic's lawyers have worked hard to provide a narrow version of E18, which is tailored  
9 | to the particular needs presented by the litigation. It should be perfectly  
10 | straightforward, we say, for Google to disclose documents showing the impact on its  
11 | bottom line, and on its business generally, of a single agreement with Spotify, that  
12 | those documents are bound to be readily available, we say.

13 | RPC has added in its letter to the Tribunal yesterday evening that the words, "*whether*  
14 | *formally or informally*", which now appear, are new. Well, of course they're new.  
15 | They're contained in a proposal made by Epic since the last hearing. I'd suggest that,  
16 | really, that the focus should not be on those words which don't actually add any  
17 | additional burden to Google. Google should simply grapple with this narrowed  
18 | request, which to date it has failed to do.

19 | Returning to the Redfern on page 121, requests E19 and E20 are designed to capture  
20 | internal and external Google communications relating to the Spotify memorandum. It  
21 | will be important at trial to test Google's pleaded case that the Google Play Store is  
22 | inseparable from its billing system, its assertion that its commission rates up to  
23 | 30 per cent are fair when it can apparently offer much lower rates to the likes of Spotify,  
24 | and the value that Google ascribes to its In-App Billing service. Requests E19  
25 | and E20 are important in the context of those disputed issues.

26 | Epic needs to understand the basis on which Google is, apparently, content to

1 separate the Play Store from the In-App Billing system when it comes to Spotify. It  
2 also needs to understand how it is, internally, that Google has reconciled the rates it  
3 applies to Spotify with the commissions it charges others. Epic has narrowed  
4 request E19 since the last hearing in an effort to get Google to engage with these  
5 requests. The new version of E19 can be seen again in Norton Rose's 1 July letter at  
6 tab 2, page 9 of the third supplemental.

7 So the original request E19 sought disclosure of all internal communications relating  
8 to the memorandum. The new, narrower version seeks only communications, which  
9 again, subject to the same sort of qualification as we've just seen for E18, record the  
10 impact on Google's business and evaluate the performance of the memorandum.  
11 That, too, has been rejected by Google, for your note, madam, purely on the basis that  
12 it's overly broad and we don't accept at all that it is.

13 The documents relating to negotiations, for any extension or variation of the Spotify  
14 agreement, are also highly relevant and requests E21 to E23 target those  
15 negotiations. Google has said in the Redfern schedule that those additional requests  
16 are new. That's not the case. They've been the subject of correspondence between  
17 the parties since February this year. And it was in February that it became known in  
18 the US proceedings that counsel for Google had informed the court that Google is still  
19 negotiating with Spotify. So there are aspects of the deal that are still under  
20 negotiation. That may or may not now be out of date, I cannot say.

21 But if I could ask you, madam Chair, to look at paragraph 38 of our skeleton argument  
22 at tab 2 of the A bundle, page 36, and the red text that appears there, you can readily  
23 see that the same consideration continues to apply to requests E21 and E23.

24 THE CHAIR: Yes.

25 MR SCANNELL: It's extremely important that the Defendants provide disclosure in  
26 respect of any ongoing negotiations pertaining to a new Spotify agreement. We don't



1 accept at all that it would be enough for Google to disclose nothing more than  
2 a finalised agreement if a finalised agreement ultimately emerges.

3 Looking at page 122 of the Redfern and column E and the yellow highlighted text at  
4 the top of the column, in particular, the text next to the bullet point, Epic explains the  
5 reasons for the submission I've just made.

6 THE CHAIR: Yes.

7 MR SCANNELL: I'd make one final point on the importance of the pre-final negotiation  
8 documents, and it's this: madam, you can take a view as to the likelihood that there  
9 will or will not be a new Spotify agreement by the time we come on for trial based on  
10 what I have directed you to in the way of confidential information.

11 If there were a new Spotify agreement by the time we come to trial and there had been  
12 no disclosure before the finalisation of the agreement, the result would be, I'm sure,  
13 another unfortunate document dump on the eve of trial, just as we've seen with the  
14 harmonisation disclosure. That would not be satisfactory, particularly because the  
15 expert reports will by then have been finalised.

16 If, on the other hand, there are no negotiations in contemplation or on foot, then there  
17 would be nothing to disclose. But if negotiations are presently on foot or in  
18 contemplation, then, of course, documents relating to that should be disclosed.  
19 They're relevant and they're important in the context of the proceedings, whether  
20 Google likes that or not.

21 And that leaves only the questions of appropriate custodians for the requests, and  
22 search terms. So as to custodians, we've again sought to be as reasonable as we  
23 can be by naming just four people to be custodians for these requests. Now, two of  
24 these, Ms Kochikar and Mr Harrison, whom we mention on page 121 of the Redfern  
25 schedule, where, as we understand it, involved in the negotiation of the 2022 Spotify  
26 Addendum. So they're very obviously appropriate custodians.

1 The other two are named in Norton Rose's 1 July letter to RPC. I may not be able to  
2 mention those names out loud for reasons that aren't entirely clear to me. But the  
3 names appear at paragraph 7 of the letter in supplemental bundle 3, tab 2, page 10.

4 I would suggest that Epic's proposal to confine the Spotify requests to only four  
5 custodians is eminently reasonable, narrow and proportionate, and Google has offered  
6 nothing to contradict that. So I commend those custodians to the Tribunal.

7 And then, finally, as to search terms. Epic cannot propose those. There is an  
8 information asymmetry between Epic and Google in respect of the relevant  
9 documentation because we've had no Spotify disclosure since 2022. We're very  
10 happy to agree search terms with Google, but Google will have to desist from the  
11 stonewalling approach and actually propose them in the first instance, and that should  
12 be perfectly straightforward.

13 THE CHAIR: Thank you. Ms Smith?

14 Reply submissions by MS SMITH

15 MS SMITH: Madam, Epic's requests for disclosure relating to the Spotify Addendum  
16 fall within two categories, and I'll deal with them in those two categories.

17 First of all, requests E19 and E20, which are internal and external documents relating  
18 to the 2022 Spotify Addendum.

19 And the second category, which encompasses requests E21 to through to E23, are  
20 documents and communications in relation to negotiations for the extension and/or  
21 variation of the 2022 Spotify Addendum.

22 Now as regards each of those categories, Google has made reasonable, constructive  
23 and proportionate proposals, in my submission. And those proposals -- we have made  
24 proposals for further disclosure, contrary to the impression that you may have  
25 received.

26 Can I take you to our letter of 9 July, which summarises those proposals, but is not the

1 first time in which those proposals were made. It's, our letter of the 9 July, SB3,  
2 page 20.

3 THE CHAIR: Yes.

4 MS SMITH: Most recently we summarised it again. So the letter starts SB3, page 18,  
5 a letter of 19 July, and we reiterated the proposals that we had already made in  
6 paragraph 9 on page 20.

7 There are two proposals you'll see there, madam. The second relates to the first  
8 category of documents I described, requests E18, E19 and E20, and we have agreed  
9 to disclose -- as well as the Addendum itself, which has already been disclosed -- the  
10 further material -- I'll put it no higher than that -- extensive material referred to in  
11 various clauses of the Spotify Addendum.

12 We have also -- the first proposal summarised in paragraph 9 goes to the second  
13 category. The negotiations for the extension or variation of the 2022 Spotify  
14 Addendum.

15 Insofar as any new agreement is reached between Google and Spotify, Google will  
16 produce that agreement to Epic and that has the effect therefore of, if a new agreement  
17 is entered into with Spotify before trial, it will be provided to Epic. That is the proposal  
18 that we have made. So, we say, in light of those proposals for further disclosure, any  
19 Order by the Tribunal for the disclosure sought by Epic in request E18 through to E23  
20 is unnecessary and disproportionate.

21 Dealing with each of the categories in turn: requests E19 and E20. These are  
22 documents that are internal and external, included, but I stress not limited to -- this is  
23 E18 -- data or analysis which records the impact on Google's business of the Spotify  
24 Addendum and evaluates the performance of the Spotify Addendum. So E18 is all in  
25 documents generally including, but not limited to, data or analysis. E19, internal  
26 communications, limited to the impact and evaluating the performance.

1 And then, I stress, E20, which has not been limited. E20 is a request for all external  
2 documents from 8 June 2022 to 31 May 2025 between Google and Spotify in relation  
3 to the 2022 Spotify Addendum. So no attempt has been made to narrow the ambit of  
4 E20. And, in any event, we say that the purported narrowing of the ambit of E18  
5 and E19 is not a particular narrowing. It's all documents relating to the impact on  
6 Google's business of the Addendum and evaluating the performance of the  
7 Addendum. But, I stress, E20 has not been limited at all.

8 We say, as a general proposition, in light of the proposals that we have made to  
9 provide the Addendum themselves itself -- we have already provided the Addendum  
10 itself, of course -- and all the documents to which reports to which reference is made  
11 in the Addendum. Any further disclosure of internal and external documents regarding  
12 the Addendum is unnecessary and disproportionate.

13 There are two points I make in support of that submission. First, I explained in the last  
14 hearing, and I'm not going to make those submissions again, why we say internal and  
15 external communications about an agreement above and beyond the impugned  
16 agreement themselves are not relevant to Epic's pleaded case. It's the effect of the  
17 agreements which is relevant to Epic's pleaded case, not the history of how they were  
18 arrived at or why the parties agreed to them. But that is what is sought when one  
19 looks at E18, E19 and E20.

20 The second point I make is, in any event, Google has already provided extensive  
21 disclosure of internal and external documents relating to the Spotify Addendum as part  
22 of its previous disclosure in these proceedings. And if I could take you back in that  
23 regard for the detail to my instructing solicitors' letter to Epic's solicitors of the 20 June;  
24 could I ask you to turn it up? It's in supplemental bundle 1 starting on page 33, the  
25 letter starting the 20 June.

26 You may recall this was sent shortly before our last hearing and requests E18 to E20

1 are addressed starting on paragraph 27 on page 37 of the letter. We there say we  
2 have "*already agreed to conduct a reasonable and proportional search*" for all these  
3 reports to which reference is made in the various clauses of the Spotify Addendum.

4 THE CHAIR: Yes.

5 MS SMITH: "Epic's continued request for all documents in relation to the Addendum  
6 across the date range" ... "is entirely unnecessary and disproportionate, in  
7 circumstances where Google has already agreed to the specific categories of  
8 documents identified by Epic, and where Epic recognises that Google has already  
9 provided '*extensive disclosure*' in respect of Google's agreement with Spotify."

10 [as read]

11 And that's a reference to Epic's Redfern schedule.

12 THE CHAIR: Yes.

13 MS SMITH: The reference there in footnote 13. We reject the relevance of those  
14 communications as I've already made, that's my first submission.

15 But, in any event, our second submission is that it's "*unnecessary and*  
16 *disproportionate, in light of the extensive disclosure already provided by Google*", and  
17 specifically, "*the harmonisation disclosure that Google has provided includes*  
18 *substantial material*" that relates to these requests. [as read]

19 This is E18 to E20.

20 "*A search across the harmonisation disclosure using relevant keywords*", those are  
21 set out in footnote 14 as "*Spotify*", it "*returns about 2,500 hit results, and it does include*  
22 *external internal and external communications relating to the Addendum.*" [as read]

23 An example is given of one of those documents.

24 THE CHAIR: Yes.

25 MS SMITH: So, my Lady, we've already given extensive disclosure that goes to  
26 requests E18 to E20.

1 As regards the second category of documents sought, that is requests E21 to E23,  
2 that go to the extension and/or variation of the 2022 Spotify Addendum, that is  
3 addressed in the letter of 20 June, paragraphs 30 to 32, and you'll see what is said on  
4 pages 38 to 39 of supplemental bundle 1.

5 THE CHAIR: Yes.

6 MS SMITH: You'll see in paragraph 30:

7 "The parties have already agreed that, to the extent that any further agreement is  
8 agreed between Google and Spotify which amends or extends the terms of the  
9 Addendum, Google will produce that relevant agreement." [as read]

10 So there is "*no basis for a further fishing expedition for additional unspecified*  
11 *documents*", and I stress, "*in connection with a future agreement that may or may not*  
12 *come into effect.*"

13 And this is important because we make the point, and I've already made the point, if  
14 a new agreement is entered into before trial, we will provide it to Epic. Disclosure of  
15 negotiation documents about a new agreement that may or may not be agreed, that  
16 may or may not contain the terms that are being discussed, is an unjustified fishing  
17 expedition, and that is made good by the example that we give in paragraph 32 of that  
18 letter:

19 "Epic has identified a single document for the purpose of purportedly justifying the  
20 relevance of its request for external communications under E23, but this document in  
21 fact underlines why it is completed agreements, rather than communications relating  
22 to negotiations, that are relevant to Epic's claims. In this case, '*this particular*  
23 *document (being a heads of terms prepared by a counterparty during the course of*  
24 *negotiations)*', [in fact] concerns negotiations which never resulted in any concluded  
25 agreement between Google and the counterparty." [as read]

26 So we say, documents about a new agreement that may or may not be entered into

1 do not comprise relevant or proportionate disclosure.

2 THE CHAIR: Yes.

3 MS SMITH: So, my Lady, those are my submissions on requests E18 through to E23.

4 THE CHAIR: Thank you, Ms Smith. Mr Scannell.

5 Reply submissions by MR SCANNELL

6 MR SCANNELL: Thank you, madam. Again, I think I can keep this tolerably short.

7 I've already addressed you on the question of whether a finalised Spotify agreement  
8 would suffice. Plainly it wouldn't. At the outset of my submissions, in respect of  
9 Spotify, I explained why it was that the Spotify agreement is likely to be very important  
10 at trial. It's likely to provide a real insight into the value that Google places on its In-  
11 App Billing system. It's likely to provide very important context when it comes to  
12 deciding whether or not commissions up to 30 per cent are fair and reasonable.

13 Taking those dynamics into account, one can readily see that having a finalised  
14 agreement and little else in the way of documentation will not be enough, for forensic  
15 purposes. Pre-finalisation negotiation agreements and internal documents pertaining  
16 to the Spotify agreements, as well as external, are likely to be, in fact, far more  
17 significant, because they will provide those insights into how Google is thinking about  
18 these questions and how it's reconciling what it's offering to Spotify with what it is  
19 offering to the world at large.

20 My learned friend says that there has been no real attempt to narrow the requests that  
21 are being made in relation to Spotify. I'm afraid we don't accept that at all. A request  
22 for all documents relating to the Spotify Addendum is obviously very much broader  
23 than a request for all documents showing how the Addendum is affecting Google's  
24 business, and also showing how that agreement is actually working. Logically, Google  
25 won't necessarily reveal those points to Spotify, but it may very well consider it, both  
26 of those questions, internally. And so its internal documents assessing, evaluating

1 | how the Spotify agreement is working, are likely to be very important when it comes  
2 | to cross-examining witnesses and instructing experts.

3 | Finally, if I could address the point that what has already been given in relation to  
4 | Spotify is sufficient. Again, we don't accept that at all. In fact, almost nothing has  
5 | been given in respect of Spotify disclosure to date. And in that context, could I ask  
6 | you, please, madam, to turn up bundle SB4 -- so that's the fourth supplemental  
7 | bundle -- at page 7. (Pause)

8 | So, this is Norton Rose's letter to RPC yesterday.

9 | THE CHAIR: Yes.

10 | MR SCANNELL: And this very point is addressed on internal page 5, page 7 of the  
11 | bundle, at paragraph 22. It's pointed out there that of the four custodians identified by  
12 | Norton Rose, the only custodian who has actually provided any disclosure in the Coll  
13 | proceedings was Ms Kochikar. Her documents were not searched for Spotify specific  
14 | documents in the Coll proceedings, although RPC does acknowledge that some of her  
15 | UCB specific search strings may have had the potential to include Spotify documents.  
16 | But based on Epic's review to date, there appear to be 34 Spotify documents in the  
17 | harmonisation disclosure responsive to requests E18 to E20, which were incidentally  
18 | captured by unrelated search strings, and Norton Rose makes the point then, that that  
19 | piecemeal disclosure is no acceptable substitute for a comprehensive search. All  
20 | I can do is repeat that, and underline it, because it's clearly true.

21 | THE CHAIR: Is there anything else, Mr Scannell? (Pause)

22 | MR SCANNELL: My apologies, madam. Not on the Spotify requests. There is a very  
23 | short ten second point to be made, in relation to the CMA point, before we're finished.

24 | THE CHAIR: Okay, thank you for your submissions on Spotify. If there's nothing else  
25 | on that, we will have your ten seconds, and we will start the clock running straight  
26 | away.



1 MR SCANNELL: It has been addressed in correspondence, the point that we made  
2 in relation to privileged documents and the overall approach that I commended to the  
3 Tribunal in the course of my submissions. It's not true that any of those points are  
4 new.

5 THE CHAIR: And do you have any references for me on that?

6 MR SCANNELL: Bundle D, tab 41, page 147, paragraph 12.

7 THE CHAIR: Thank you. (Pause)

8 Yes, thank you.

9 Ms Smith, unless there's anything else, I think that probably concludes business for  
10 this morning. (Pause)

11 You're on mute.

12 MS SMITH: Apologies, my Lady, I was just checking if there's anything else that  
13 anyone at my end wanted to raise. For the purposes of today's hearing, I think the  
14 answer is no. (Pause)

15 THE CHAIR: So --

16 MS SMITH: Sorry, my Lady, I know I am looking concerned; you've picked it up.

17 My Lady, sorry, there are two points, just to make sure it's on the record.

18 Further to the hearing that took place on 23 June, I should make your Ladyship aware  
19 that the parties are in discussions as to the ambit of disclosure of Epic's financial  
20 forecasting reports that, you will recall, was the subject of our application G5. I'm not  
21 going to say anything further about that, but if -- and I hope it doesn't happen -- but if  
22 we do need to come back to the Tribunal, we will seek to do that in writing, I think  
23 would be most efficient.

24 There is also a point about disclosure that relates to Epic's application to put in further  
25 witness evidence, but as I understand it, that is a matter that will be addressed, if  
26 necessary, at the 1 August hearing. So there may be -- and I hope it doesn't come to

1 | this -- but there may be a disclosure point to that extent that will come back in front of  
2 | the Tribunal on the 1 August hearing.

3 | THE CHAIR: Thank you very much, I will look forward to that.

4 | Right, on that basis, thank you for your submissions. Obviously, I'll take it away and  
5 | think about this, and obviously I still have to let you know my views relating to the  
6 | submissions at the last hearing. So, I'll do that as soon as I can. I'm very conscious  
7 | that we have the CMC coming up, so I'll try and get my skates on and get that to you  
8 | before then. And unless there is anything else, it's just thank you very much for your  
9 | clear work on the Redfern schedule, the attempts to reach some common ground in  
10 | between, and your clear submissions today.

11 | MS SMITH: Thank you very much, my Lady.

12 | MR SCANNELL: And thank you to you and the Tribunal staff for accommodating this  
13 | remote hearing.

14 | THE CHAIR: Thank you. I'll pass that on.

15 | (1.06 pm).  
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