IN THE COMPETITION Case No:1424/5/7/21,1589/5/7/23,1596/5/7/23, 1636/5/7/24
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17th July 2025

Before:

The Honourable Mr Justice Roth

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

Kelkoo.com (UK) Limited & Others

And

Defendants

Google UK Limited & Others

A P P E A R AN C E S

Sarah Love & Matthew O'Regan (Instructed by Hausfeld & Co LLP, Linklaters LLP and Preiskel & Co LLP) on behalf of Foundem, Kelkoo, Ciao and Connexity

Meredith Pickford KC & Julianne Kerr Morrison (Instructed by Herbert Smith Freehills Kramer LLP and Bristows LLP)
on behalf of Google

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Thursday, 17 July 2025

(10.30 am)

(Proceedings delayed)

(10.35 am)

Housekeeping

THE CHAIR: Good morning. Like all proceedings in this Tribunal, these proceedings are being live-streamed and it's therefore necessary to begin with a warning. An official recording of the proceedings is being made. It is strictly prohibited for anyone to make any unauthorised recording or to take any visual image of the proceedings. If anyone should do so, that is punishable as a contempt of court.

I see that in the documents, there are some marked confidential. In fact, I think there are two Outer and Inner Confidentiality Rings, so I think I should make an order under, I think it's Rule 102, sub-Rule 5, prohibiting any use or any request for those documents, even though they may be referred to in the hearing or have been read by the Tribunal. If someone can draw up that order in an appropriate moment.

There have been further inserts into the bundle about half an hour ago. It's very unhelpful when we keep getting very last-minute inserts, and I really think that people should be able to get things in order and before the morning. Obviously, I haven't looked at those at all.

I think of the two days we have, it's sensible to deal with the Claimants' general applications today. They will no doubt spill into tomorrow. I don't know how far the Google applications are still live or to some extent, I think there's been some agreement.

MR PICKFORD: There's been some agreement. There has also been some very last minute, 180-degree changes by the Claimants in relation to them, which I have not yet had an opportunity to take stock of, as of last night.

THE CHAIR: Yes.

MR PICKFORD: So I think those will be best addressed tomorrow.

THE CHAIR: Right. Well, that sounds very sensible. We'll do that. There are also quite a large number of specific documents -- I think they are referred to as SS-- disclosure, which I have not worked through and can be quite time consuming. I mean, if documents are referred to in other documents, generally, one is minded to grant an order for a reasonable and proportionate search to be made to find them. We can have a lot of argument as to whether what's been done goes far enough and so on, but I would hope that parties could make a further effort to try and narrow the position on those specific document requests, because they are quite time consuming and there are an alarming number of them. That's all I can say at the moment.

MS LOVE: Sir, we're grateful for that indication. While they are numerous, they have narrowed, and I would also add, Sir, that as you rightly apprehended many of them, in fact, most, I believe, are for specific documents or to follow up specific references in a document. I'm cautiously optimistic that they can be cracked through, insofar as they remain by tomorrow at a pace that is belied by the density of these materials.

THE CHAIR: Well, I hope your optimism proves well-founded.

The other preliminary thing I want to say is regarding the Product OneBox. There is, of course, the outstanding application now filed, I think, on 19 June -- quite late -- for Strike Out of those paragraphs, which I think is now listed for the week of 6 October. I note what the Claimants say, that one can consider the disclosure request relating to them on the assumption that those paragraphs are struck out and then see whether they would be granted. On the other hand, if they're not struck out -- if the Strike Out fails -- then some of the opposition to the disclosure will fall away. So it does seem rather a waste of time when we've got quite a lot else to deal with, to be doing that on

an assumption that may prove unfounded and, indeed, you hope will prove unfounded, in which case, some of this argument is, I say, completely unnecessary.

So, my inclination is to postpone that to the same day as the hearing, on the basis that the Strike Out won't take more than half a day. The Tribunal will be able to indicate straight away, even if it has to give reasons subsequently, what the position is. In other words, whether the strike-out succeeds.

My understanding, from having looked fairly quickly -- I must say -- at your application, Mr Pickford, is it's not based on evidence that there are no witness statements for a summary judgment, its limitation and so on. Then one could go on either outcome to consider the disclosure that same afternoon, and deal with it then. I appreciate that means there's delay getting the material. On the other hand, you're likely to get quite a lot of material in the meantime. If necessary, there can be a sort of supplemental witness statement, from factual evidence, dealing with the result of that disclosure at a slightly later date than the date for the other witness statements, which is I think -- I think 23 October, under the Directions.

So that does seem to me a more sensible way of using our time. But I think it's first place for -- I know you're on your feet, Mr Pickford, but I think it's Ms Love, the Claimants, who are pushing for this to be heard today.

MS LOVE: We are concerned that if this is only resolved in October, there is a knock-on effect on the timetable, and Mr Hunt has just nodded behind me to endorse that proposition. We also say that the various reasons that are given for why the inclusion or exclusion of these particular paragraphs really don't add up to much, and we can deal with them. I was actually anticipating that I would start with that, deal with it now, because we say that we're going to need these categories of information regardless.

There is also one specific matter in relation to the allegation of abuse of process that, in fairness to my clients and to Mr Hunt, I would wish to address you on briefly, in any event.

I suggest it may be more convenient for me to take you through that briefly, and if there are concerns that arise in relation to particular categories of document, or of data that have been requested, where on considering the matter further you really think, "Well, I'm not sure how this will stand if these paragraphs 94C to F fall", then we can take it in the context of that specific request, because otherwise we're going to have a rather fragmented situation in which certain data really does come very late.

THE CHAIR: Yes. I mean, it's not structured today, given that Mr Hunt and his team will have a lot of other data to work on in the meantime. I mean, I say it's a pragmatic approach thinking that, if they're not struck out -- the Strike Out fails -- I think some of the opposition to your disclosure application falls away. That's my understanding. Is that right, Mr Pickford?

MR PICKFORD: In a sense, Sir, it is. But there is one aspect of Ms Love's submissions that we actually agree with, which is: we say that the OneBox issue can largely be addressed in this hearing and, hopefully, there should be time to do that. The interrelationship with the Strike Out is as follows: there are effectively two components to the Strike Out.

The first argument is that we say a OneBox claim has not been pleaded but for paragraphs 94C to F of the Foundem claim, and those were sought to be added in December of last year. So that's the first point. Then the second is: that new claim is a new claim, and there isn't an application as yet under rule 32 to allow it, but even if there were, we say it should be rejected. So those are the essential two components of what we would have to grapple with in the Strike Out.

Now, the first of those is not strictly only a Strike Out issue. It's an issue that would arise on any application for disclosure, which is -- first thing one does in an application for disclosure is one looks to see whether the material that's being sought reflects something that's in the pleadings. And we can address that in this hearing. I've come prepared to address that. I understand that Ms Love is prepared to address that. That, we say, actually really cuts through on the issue of whether the OneBox disclosure should be permitted. Because if they're right about that -- if they are right -- that the claim is already there, then obviously it's a pleaded claim, and subject to issues of proportionality and what data we hold, then they are entitled to appropriate disclosure in relation to it. And that's something we can determine without having to determine the full extent of our Strike Out. So we're happy with that.

On the other hand, if they are wrong about whether they have in fact previously pleaded a OneBox claim, we say that the only component that remains is whether they will be permitted to bring one in. But that's a new claim, and as at present, they haven't even sought permission for it as a new claim, because their position is, "It's not a new claim. It's just an articulation of what we've already said". So that wouldn't actually be, as of today, a justification for seeking disclosure, because the first thing the Tribunal would have to do would be to determine it.

So, in our submission -- I think in agreement with Ms Love -- we say it would be appropriate to deal with the OneBox claim in the way that the parties have canvased it in this case in arguments today, and that may well cut through a lot of it.

THE CHAIR: I'm content to proceed that way. My concern was really a timing point, that if we spend a lot of time on that and, as you say, if the claim is already there, but if it's not and can come in, then things may be looked at again and that would be unfortunate. But if you, between you, think we shall manage in our two days to deal

with that, let's do so, because clearly the more we can do, the better. So I'm content to have a go and see where we are.

MR PICKFORD: I am very grateful, because we do actually also share the concern of Ms Love. But we're very concerned about there being too much disclosure that's being sought, and I'd like to make a few submissions on that in a moment. But the last thing we really want is actually -- would be dealing with disclosure again --

THE CHAIR: In November.

MR PICKFORD: -- in November. If we can knock it on the head now, we'd like to.

THE CHAIR: Yes. Very well. Okay. Then, let's get stuck in, Ms Love. I've read, of course, the skeletons, and I've principally worked off the Scott Schedule, which I think largely supersedes the Annex to Mr Wisking's Eighth witness statement. I think it's an --

MR PICKFORD: That's right. It does say. But before we embark on the Scott Schedule, if I may, there are some important opening submissions I'd like to make. And it's important to make them at the beginning and not at the end.

THE CHAIR: Well, maybe Ms Love wants to make --

MR PICKFORD: I --

THE CHAIR: -- some submissions, if she wants.

Yes. Well, let me hear from -- if we're dealing with the Claimants' applications today, then I think, Ms Love, you go first. If there's something you want to say by way of general introduction.

Submissions by MS LOVE

MS LOVE: I'm grateful. There are three matters that I want to canvas at the outset. The first is the question of the principles that are applied in disclosure applications of

this sort. The second is the various complaints by Google about the timing of these requests and the alleged lack of co-ordination. The final one was going to be whether the Strike Out application that Google has made in relation to certain paragraphs of Foundem's claim affects how you should deal with any of the categories of disclosure being sought, bearing in mind both Foundem's previous pre-2008 claim and also the Kelkoo pre-2008 claim, which Mr Pickford did not feature in his tempting preview of what might happen.

I'm going to actually take those in reverse order so that I can just deal with this Strike Out matter now.

THE CHAIR: Well, then we agree that we will go ahead looking at those applications notwithstanding the Strike Out application -- the pending Strike Out application.

MS LOVE: I'm grateful for that confirmation, but there is one particular matter that, in fairness, I want to address now. That is an allegation -- and I imagine it will feature in Mr Pickford's opening remarks as well -- that the Expert-Led Disclosure Process and indeed the expert document requests, are essentially misusing this as a vehicle for the Claimants to recycle previously unsuccessful requests for disclosure of documents. What I have in mind, in particular, is paragraph 3 of Mr Pickford's skeleton argument, and the reference there -- I'm sorry, I see it's in -- I don't know if you're working from hard copies or electronic bundles, Sir, but if you are, it is --

THE CHAIR: I've got hard copies of the skeleton --

MS LOVE: Excellent.

THE CHAIR: -- and the Scott Schedule, and a few things, other things. Paragraph 3.

MS LOVE: And I refer in particular to the sentence beginning:

"Nonetheless, it is concerning that the Claimants are misusing the expert data disclosure process as a means of again seeking documents which they have already

sought and failed to obtain (or could have previously sought), and doing so at a very late stage."

I'll come back to "very late stage". So to be relevant to various things, we're free to instruct Mr Hunt in good time for November.

And then the final sentence there ends over the page:

"Merely cloaking a yet further round of document disclosure as being sought by Mr Hunt doesn't give it ... special status."

And the theme is resumed in paragraph 20, which is internal page 8. And I'll let you have a look at that. (Pause)

So, you'll see that --

THE CHAIR: Yes, about Kelkoo's application.

MS LOVE: -- these requests are now being voiced as being made by Mr Hunt.

Now, it seems to us that the suggestion there is that this is not material that Mr Hunt would otherwise want, but behind this language of “voicing” and “cloaking”, is a suggestion that he is asking for things for the clients. And that is, if I may say so, an inappropriate and unwarranted allegation. Can I ask you briefly, Sir, to turn to the letter of 29 April 2025, in which these document requests were first made? And so you'll find that in electronic Bundle 4, and you will find it behind tab 14 at page 102, I believe.

THE CHAIR: It's a letter from --

MS LOVE: It's a letter from Linklaters.

MR PICKFORD: I do hesitate to rise. It may just assist Ms Love if I make clear, we are not questioning Mr Hunt's *bona fides*, in the fact that he would like these documents. That is no part of our case. Our case is: they could have sought these documents before, and in some cases, they have sought these documents before,

and turning up again and saying Mr Hunt wants them -- which he no doubt does, and we're not questioning that -- doesn't mean that the past gets erased. That's our point.

THE CHAIR: Okay.

MS LOVE: So, I'm grateful for that clarification, because I must say the language of “voicing” and “cloaking”, in that respect, was somewhat unfortunate. So, and if I may say so, Sir, what is clear from looking at this letter is that what has happened is that in the interest of efficiency, Mr Hunt has considered what he'll need, and I don't think we need to go through it all. But the long and short of it is that the Claimants have carefully reviewed the existing disclosure that's been provided by Google, and sought to assess whether it covers the documents that he needs, and they prepared requests in relation to the gaps. So these are requests that reflect gaps that the jointly instructed independent expert thinks he will need. I can then go forward to, I think, tab 42 and page 365.

THE CHAIR: Just a moment. (Pause)

You say tab --

MS LOVE: Tab 42, page 365.

THE CHAIR: That's Mr Hunt's letter of 19 June.

MS LOVE: Which accompanied the applications.

THE CHAIR: Yes.

MS LOVE: And you will see, Sir, that in paragraph 5, Mr Hunt says he is summarising the categories of data and documents and he's explaining the process. You will see he's dealing specifically with the document requests and the process that was undertaken in relation to those.

THE CHAIR: I think the only point, as I understood it, was that under the December Order, the expert process was about data. That was the direction, that they should

seek to agree the data that's needed, and if not, then set out their different views. But as far as documents disclosure, there is no need for it to go through a Joint Expert's discussion at all. You just make the document disclosure application, and you say that our expert says these documents are important.

But that wasn't part of the Joint Expert discussion that the Tribunal envisaged, and it seems to have got developed into that, in a way that was not ordered, and that it really could have been done just by straightforward document application rather earlier. That's the point I understand, and that seems to me there's some force in that, but we are where we are, and these applications are here, and the question now is whether they're relevant, necessary and proportionate.

MS LOVE: Yes, quite, and we have never suggested that this is part of the disclosure process that has culminated in the two JESs, these are separate, and as I took you to that previous letter to show, this was a parallel process that was done in the interests of efficiency.

So, as I understand it, there is that complaint, but there is also a separate complaint that it is an abuse of process for us, because we're basically repeating the same applications.

THE CHAIR: Yes.

MS LOVE: Now, obviously it is an abuse of process to keep making the same applications for the same reasons if they fail, but that is actually not what the Claimants are doing. These are requests that we are making, on the basis that this is material that are jointly instructed independent expert considers to be necessary, and they are being made for a different reason for that which was advanced before, and it's not fishing, it's not a roving inquiry, and perhaps the most convenient way of cutting through this is to look at the transcript that is being made in relation to the repetition of

the requests. And I'm sorry, Sir --

THE CHAIR: Sorry to interrupt you, but I don't think we need, really, to spend time on that. I'm not terribly concerned about that. If we get to a particular application, which it's then said, "Oh, you asked for precisely this last November and it was refused", we can then consider, well, was it the same application and on what basis is it now being made, and deal with it as it arises rather than doing it at this high level.

MS LOVE: I'm very grateful for that indication, Sir. If I may say so, that seems a sensible way forward, because we do say that these allegations of abuse of process go nowhere.

So then my final two points, well, firstly, some general observations on timing and then on the principles. I am going to pick up Google's more specific complaints as I go through each category.

THE CHAIR: Yes.

MS LOVE: But if I can cut a long story short, the Claimants, who support each other's requests and whose requests do not duplicate, don't agree that there has been a want of co-ordination, and nor that there has been some sort of unexpected deluging of Google with requests, and we reject the characterisation of the position in paragraphs 13 and 14 of Google's skeleton, and in paragraph 23 and onwards of Mr Wisking's Eighth witness statement.

Some of these applications, that the meat of what we're going to be dealing with today, arises out of the Expert-Led Disclosure process that the Tribunal set in train; some arise out of the disclosure that Google was ordered to give back in November 2024 at the last CMC; some of it arises out of earlier disclosure, as the Claimants have been reviewing it or developments in relation to the Commission's Digital Markets Investigation into self-preferencing by Google, and I certainly am not going to ask you

to have a trawl through the correspondence bundle, Bundle 6, everyone's favourite. But we say that what that correspondence actually reveals is the Claimants having to pursue issues repeatedly with Google, letter after letter after letter, to get anywhere, and that includes addressing earlier inadequate disclosure, issues with document formats and inappropriate claims of confidentiality and privilege.

I would also add, Sir, that this rhetoric of 69 further requests, of which 45 are in issue, doesn't actually give a fair impression of what is being sought, because many of them, and I include the 13 that are made by Connexity, are -- as you've already said, Sir -- they are requests relating to specific documents that are requested in another document that was disclosed earlier. One of Connexity's requests is just for a document that has been designated as Legal Eyes Only confidential to confirm it doesn't actually have confidential information.

And so we do endorse your remark, that it should have been possible to resolve these sooner, cooperatively, and we say that the sheer number of rows in this Scott Schedule that are greyed out or greened out, actually suggests that if Google had been engaging constructively sooner, these applications really could and should have been much narrower.

And Sir, we have heard your comments in relation to the correspondence bundle, and I apologise for the inconvenience that's caused, but what it does show is that even at the last hour, we are continually discontinuing or reducing requests, in the light of proportionality considerations or to focus.

So, with those observations, if I could turn very briefly to the principles on disclosure.

THE CHAIR: Yes.

MS LOVE: Google's summary of the principles is at paragraph 12 of their skeleton argument. Ours is at paragraphs 14 to 17. I don't think I need to turn up cases,

because I think that there is very little, if anything, between us. We agree that the questions are relevance, which is determined by reference to the pleaded issues and proportionality. We agree that in assessing what's reasonably necessary and proportionate in a case, you look at a range of factors. Those include the nature of the proceedings, the nature of the issues, the cost of providing disclosure, the anticipated benefits of it, and whether there are alternative ways to get the information. And on that, a key question will be the significance and the utility of the disclosure that is sought. And so you'll see we've cited in our skeleton the question about whether it may well be useful, which was in the *Ryder Limited & Another v MAN SE & Others* matter.

Of course, Mr Hunt and I have borne that well in mind in making and focusing our applications.

THE CHAIR: Yes.

MS LOVE: We also agree with Mr Pickford that where searches for data or documents are ordered, they should be reasonable and proportionate. We probably part company about what that means in the circumstances of this case.

There is only one further topic I need to mention on principles, which is the role of experts. Because Google has said, in paragraph 8(b) of its skeleton argument, that we are asking for data on the sole basis that Mr Hunt has asked for the data, and it said that that's not adequate.

Now, our position is not what Mr Hunt wants, Mr Hunt gets. That's not actually an accurate summary of why we're asking for the data in the two JESs or the document requests. It's not a proper statement of the law. We completely accept that there should be some explanation of how the requests link to the analysis that the expert intends to undertake in relation to the pleaded issues, which Mr Hunt has provided,

and we also accept that one needs to keep proportionality in mind, and in fact, what we are now asking for is only a minority of what Mr Hunt has requested, and many requests are not pursued, or they are reduced in scope for proportionality reasons. And we, of course, accept that it is ultimately for the Tribunal to decide what disclosure is appropriate.

But the Tribunal has recognised previously in the *Trucks* judgments that the decision as to what disclosure to order is informed by the views of the economic experts, and the Tribunal has also noted, and I'm not going to click through the case law, in the *Trucks Second Wave Proceedings* judgment from 2024, the emphasis in an Expert-Led Disclosure Process, such as that which you've ordered in this case, is on assisting experts to get the information that they need to conduct their analysis and to fulfil their responsibilities. Because, of course, those are ultimately responsibilities that fall to the Tribunal, and it is about the Tribunal having the evidence it needs to determine the issues fairly, and we do say that you should be slow to refuse to order disclosure, where it is necessary and proportionate for the fair trial, the proceedings.

The final point I think I need to pick up, before Mr Pickford sets out his opening speech, concerns methodology. Because a repeated refrain of Google and of Mr Noble is about Mr Hunt having allegedly failed to specify what methodology he would use in analysing the data he has obtained from the extensive requests -- that's how they put it in their skeleton. Phrases such as "testable hypothesis" crop up regularly, and indeed "empirical methodology", in paragraph 42 of Mr Noble's witness statement.

Now, the difficulty with that, Sir, is that Google hasn't to date actually disclosed any data in response to a request by Mr Hunt, and what he's working with is the quantitative information that has already been disclosed in the proceedings, and he's reviewed it, and he has found it to be insufficient for his reasonable purposes. I don't

want to state the obvious, Sir, or belabour the point, but until he actually gets the data that he considers is relevant and necessary to assess Abuse and Counterfactual, he's not going to know exactly what hypotheses he should apply, or what statistical or econometric or other techniques are the most appropriate.

And this is a particularly acute issue in relation to the Counterfactual, of course, because Mr Hunt doesn't actually know what explanations and what evidence Google will advance to support its pleaded case. So what factors he should be comparing, what relationships between variables he will need to explore to test those explanations. And he just can't say.

And we have noted in our skeleton argument -- I don't ask you to turn to it, but for your note, it's footnote 11 to paragraph 23 -- the way in which the Court of Appeal employed the concept of methodology in the collective proceedings in the *London and South Eastern Railway Limited and others v Justin Gutmann* case. The methodology acts as a broad blueprint, identifying the issues for trial and how they are to be resolved, and provides important material from which the CAT can determine whether issues are common and suitable for certification.

Now, I fully accept that that quote is directed to collective proceedings, so the end bit isn't relevant, but I do say that in circumstances where no data has yet been disclosed under the expert-led process, and there's been no evidence in relation to the pleaded Counterfactuals, it's a helpful concept. The methodology is just a blueprint to identify the issues and how they might plausibly be resolved, because it is important to avoid the sort of quest for false precision about the specific form and content of empirical analyses at what is still for Mr Hunt and Mr Noble, a relatively early juncture in these proceedings. And I do say, Sir, that the risk of going down the route that Mr Noble and Google advocate is that this is basically going to turn into a sort of preliminary

ruling on economic methodologies, and the effect will be that data will be shut out and data --

THE CHAIR: I've got that point.

MS LOVE: I'm grateful, thank you.

THE CHAIR: (Overspeaking).

MS LOVE: And we do say that would be unfair to the Claimants.

Now, Sir, those were my intended introductory remarks. I anticipate Mr Pickford may want to have his say at this juncture so I shall sit down.

THE CHAIR: Mr Pickford, you wanted to -- excellent.

Submissions by MR PICKFORD

MR PICKFORD: Thank you, Sir. I should say as a preliminary point, before I begin on those, that I'm going to be making submissions and then also Ms Morrison will be making some submissions on the remedy and strategy disclosure requests, insofar as they remain live.

So my opening comments concern the global impact of what is now being sought by the Claimants through their 69 different categories of disclosure. And in a nutshell, the problem, we say, with these applications is this: we are 11 months out from a six-week hearing. The preparation of factual evidence is already well underway and the sheer volume taken together of the disclosure that's now being sought and the demands the Claimants seek to place on Google to go off on what in many cases are wild goose chases, is simply not compatible with where we are in the timetable for trial. We say that there is a complete lack of realism by the Claimants in their aggregate requests, and I emphasise the word "aggregate" because of course, one can lose sight as one goes through each individual line in the Scott Schedule and think, okay, well,

maybe this could be done. The problem is when that's multiplied by 69. We say they are seeking the moon on a stick. Or one might say the moon on a USB stick, but for the fact that it's not a USB stick's worth of data they're after. They're after data farms worth of data and documents.

Now, you've already had some interchange with Ms Love about the reasons for the data disclosure process and that is what this hearing was originally set down to deal with. It was set down to deal with disputes that came out of the data disclosure process, not more generally. Now, we're not saying, of course, that that is a complete bar on sensible and proportionate and focused further requests for disclosure. And we strongly reject Ms Love's submission that we have not been constructive in dealing with these applications. We have sought to respond individually to each one and to explain our position on them.

THE CHAIR: Yes.

MR PICKFORD: The reason why I make that point is because of where we are today and the fact that disclosure has now been going on in this case for many years and at some point, effectively, it has to come to a stop. Two years ago, Mr Justin Turner KC, was criticising Kelkoo for an overly expansive approach to its disclosure requests, and he said they needed to make much more targeted applications. That was the July 2023 CMC. And that is what the Claimants were purporting to do back in November of last year. And we are concerned that, nonetheless, we are back here today, in July, at this point, with such an expansive set of further requests, not just for data, but the expert document requests, the remedy disclosure requests, the Strategy disclosure requests, the specific disclosure requests. I mean, they go on and on.

THE CHAIR: Disclosure requests arise out of disclosure.

MR PICKFORD: Well, that is true.

THE CHAIR: So I don't think that criticism can be directed to that and no doubt they were raised in correspondence. The data disclosure requests are what was envisaged. So there can be no criticism of that. So what you're really dealing with is the sort of categories of documents.

MR PICKFORD: Well, expert document requests, as an example. Those are things that could have been and indeed often were sought previously and coming back and saying, "Well, our expert says he would like them" doesn't give them a new magical status, which means that they should now be granted when previously they were declined. So, there's that point.

But there is, Sir, a really important point about the aggregate effect of all this. Data, of course, was contemplated as being something that was sought at this hearing. But still, it needs to be, targeted and proportionate requests that take account of where we are in this timetable and how much we can reasonably deliver.

To respond to the point that Ms Love was making about the fact that we have criticised the lack of articulation by Mr Hunt of testable hypotheses. We entirely reject the submission that until you get the data, you can't say what it is that you hope to test. In my submission, that is an unscientific approach. The correct approach for an economist, as any social scientist or scientist, is to be able to state in advance what it is that you're hoping to test and then to test it. There's a serious problem if you simply bring in all the data first before you're willing to commit at all to what it is that you say you're seeking to test, that you then formulate the hypothesis that you're seeking to test by reference to what the data shows you.

THE CHAIR: Mr Pickford, be realistic. It's not what you're seeking to test. One knows that. It's what method you're going to use, and the method you can use will depend on what material you have to work on. That's the issue. I mean, obviously what's

(inaudible) on seeking to test on the primary loss is, you know, the degree of diversion that took place, the degree of promotion, how much effect it had during the alleged -- the determined infringement period and for two of the Claimants, the earlier period when they say there was an infringement. On the Counterfactual and at the moment, there's a finding that Google abused its dominant position. It will be just as much for your client to put forward the Counterfactual on what it would have done.

MR PICKFORD: Yes.

THE CHAIR: The Claimants don't know what you're going to say yet. Have you set out an articulated Counterfactual as yet?

MR PICKFORD: They do know what we -- we've set out in our pleading what we say the Counterfactual would have been.

THE CHAIR: Yes.

MR PICKFORD: And in particular, the essential element of it is that we would have actually brought forward the Remedy that we ultimately imposed -- sorry, not imposed, that we ultimately implemented to the period when there was the finding of abuse over the Decision, because that's how we corrected our behaviour, at that time, and we would have done the same thing earlier. And we've pleaded that. So it's simply not fair, for Ms Love to say that we haven't pleaded a Counterfactual.

MS LOVE: Sorry, I do need to rise. We accept that there is a pleading saying this is what would have happened, but what we don't know is what is going to be said about why it would have been done and why -- I'm paraphrasing in broad strokes -- why that is the realistic and likely Counterfactual, as opposed to the plethora of other possibilities.

MR PICKFORD: If I could respond, Sir, on the point that you make about methodologies and testable hypotheses. This hearing is to decide -- the forthcoming

hearing is to decide two things. Was there an abuse in periods when the Commission didn't find one? And what's the Counterfactual in particular for the period when we know that there was an abuse. In that context, we say, it is incumbent on Mr Hunt to explain, for example, what is the testable hypothesis that he needs Google's profitability data for, because one of the issues we'll come on to is that there are large, wide-ranging requests for incredibly granular and incredibly expansive profitability data from Google. And we say, what are you going to do with that? How are you going to use that?

THE CHAIR: I understand that point, and that's why I do find it difficult to deal with these sort of submissions in general. I appreciate you want to get these off your chest and no doubt your clients are urging you to do it. But there will be certain particular requests, and categories, when we get to them, where it struck me when reading it, well, what on earth is the point of this and where does it go? But there are others where one can see where it might go and the fact that Mr Hunt hasn't explained precisely how he's going to use it at this stage seems to me understandable.

So one can point to certain ones and that's why I think getting stuck in, frankly, is the most productive way of dealing with this rather than having more generalised debates about, you know, what one could do and so on. I've no doubt some of the requests could have come earlier. The question is, is it feasible to do them in the time now available? Others, I think, the data requests, were envisaged at this hearing following the expert exchange.

MR PICKFORD: I well understand that, Sir, and I'm not proposing to detain you very much longer on this at all. I mean, you're quite right that ultimately we can only decide -- my submission is not that this should all be rejected at this stage. My submission is, we must bear in mind when we're going through this quagmire of

69 discrete points on which disclosure is sought, what the cumulative effect of this is going to be and whether what is being sought is really going to take matters incrementally further.

In my submission, it's a common problem with economics and economic analysis in this field that the economists trying to be very helpful come along and say, "We can do all this economic analysis, it's going to help you in all these ways" and ultimately, what one discovers is actually the contemporaneous materials are key, not a very extensive economic analysis. I'm not ruling, obviously, economic analysis out, but I'm saying it has to be put in its proper context and that is an overarching submission.

THE CHAIR: I'm sure one can agree with that, yes.

MR PICKFORD: So finally, just to make good on why we say there is a potential problem if we are sucked into a huge disclosure exercise at this point. There are two reasons why that's going to cause problems.

One, it becomes a distraction for the legal teams that are seeking to get on with trial preparation in terms of factual evidence and then expert evidence.

Secondly, it may even mean that factual evidence and the taking of evidence from witnesses has to be revisited because Google has already begun that process on the basis of the documentary evidence that we currently have. And it is going to be problematic if, months down the line, there are more documents and we have to start seeking to parse those into evidence and 11 months -- I can tell you from the draft timetable that's been proposed by the Claimants -- is not very long left given everything we have to complete and the rounds of expert evidence, *et cetera*, that we're going to have to do.

So that's it on my opening submissions. I quite appreciate that you can only ultimately determine this by going through the Schedule but they remain important points, in my

submission.

THE CHAIR: Well, I've got them -- okay.

MS LOVE: Moving finally, Sir, to the actual applications, I want to start on abuse data. These are the A requests, and they're covered in Tables 1 through to 6 of the draft Kelkoo order. They begin in -- sorry, I think it's because it's an insert into your Bundle 2. They begin on page 121 of Bundle 2.

THE CHAIR: Yes.

MS LOVE: For your note, the Expert Disclosure Process is described by the parties in their evidence to skeletons. It's paragraphs 15 to 24 of Ms Radke's First witness statement, and paragraphs 33 to 40 of Mr Wisking's Eighth witness statement. I intend, Sir, to batch these as far as possible, on a table by table basis. We have an exciting array to get through, six tables for abuse. Before getting into the weeds of the tables, there are some common threads. There are --

THE CHAIR: Just so I'm clear, when you say "table by table basis" ...

MS LOVE: The Abuse JES, Sir.

THE CHAIR: The abuse -- so we're going through the -- yes, the Abuse JES and the corresponding --

MS LOVE: Scott Schedule.

THE CHAIR: -- Scott Schedule. Yes.

MS LOVE: I apologise. I should have made that clear.

THE CHAIR: Yes.

MS LOVE: There are some common themes that crop up in Google's responses to all of these and there are the criticisms in relation to the testable hypotheses in Mr Noble's witness statement. I'll just give you the references. We'll pick them up as we go along. Paragraphs 12(b), 22, 37, 40 and 42 of Mr Noble's witness statement

and paragraphs 8(b), 33 to 34, and 45 of Google's skeleton. So I think it's probably helpful if I start by showing you what Mr Hunt has done, because in my submission, then a lot of this will fall into place.

Mr Hunt has set out what we say is an appropriate methodology and testable hypotheses, first and foremost in section 1 of the Abuse JES, and he has done that separately for the Pre and Post-Decision periods. Now that is in your Bundle 2, which you should have in hard copy, Sir.

THE CHAIR: Yes, I've got it.

MS LOVE: Someone's had a lot of fun folding things in my bundle, so I apologise. It's a bit cumbersome.

THE CHAIR: (Inaudible) in paragraph 1.7 onwards, is it?

MS LOVE: Yes. Well, in particular in relation to the Pre-Decision period, one looks at paragraph 1.11 through to 1.21, and that starts on page 6.

THE CHAIR: Yes.

MS LOVE: In relation to the Post-Decision period, one goes forward to page 8, and it's paragraphs 1.22 through to 1.25. Perhaps a more convenient sort of précis of that is to be found in the first Hunt letter, which is the one we saw in Bundle 4. Page --

THE CHAIR: That's the letter of 19 June.

MS LOVE: Yes, starting at page 365. I'm sorry, Sir, I need to click between screens. I'll be as dexterous as I can be. You see, Sir, for the Pre-Decision period, let's pick it up on page 368, paragraph 17. So I invite you just to read, perhaps to read again those paragraphs. (Pause)

THE CHAIR: I have read this before. It's paragraph 17, from paragraph 2 --

MS LOVE: Yes.

THE CHAIR: -- which is very much focused on the OneBox.

MS LOVE: Yes, Sir. That's because it's concerned with the Pre-Decision period.

THE CHAIR: Yes, and that was the -- and that's why I raised the concern at the outset. But -- and, obviously, that's being relied on, at least in the Foundem case, as part of the infringement, alleged from 2006 onwards, in the Pre-Decision period.

MS LOVE: Sir, I will come back to that, because there is the Kelkoo claim as well.

THE CHAIR: Yes. The Kelkoo claim is only about demotion, I think, in the Pre-Decision period.

MS LOVE: Well, Sir, if we return perhaps it's easier --

THE CHAIR: The Foundem claim is both promotion and demotion. That's my understanding.

MS LOVE: Well, Sir, paragraphs -- if we're back in -- I'm sorry that we're dotting about, but if we are back in the Abuse JES.

THE CHAIR: Yes.

MS LOVE: Paragraph 1.11. You'll see that there are three questions that are articulated there.

THE CHAIR: Yes. And question 1, Mr Hunt quite correctly relates to the claim --

MS LOVE: Now questions 2 and 3 --

THE CHAIR: -- and currently about demotions. And that's Kelkoo, and Foundem, indeed.

MS LOVE: Questions 2 and 3 -- and I will return to this because Mr Hunt has specifically addressed in a letter the question of why one would need the OneBox information that is being sought. Still to answer those questions.

Questions 2 and 3. In relation to Question 3, he doesn't specifically consider if the OneBox operated by Google amounted to exclusive promotion. But Sir, he is still considering the question of competitive advantage manifesting in a variety of ways.

And I'm sorry, Sir, I'm actually going to just skip out of order and go to the letter in which the need for this, notwithstanding the OneBox, is explained. That I believe is in correspondence Bundle 6. I think is in Bundle 6, Tab 20, page 97.

THE CHAIR: This is the letter of 30 June, is it?

MS LOVE: No, this is --

THE CHAIR: Is it the 8th? I think the letter about the OneBox is this. There's three letters; it is the one on 30 June, which is page 83.

MS LOVE: Sir, you are ahead of me.

THE CHAIR: Paragraph 9, he's sort of explaining what's in this, those questions you've just taken me to.

MS LOVE: Yes. And he's making the point there that, in order to consider Kelkoo's Pre-Decision claim of abuse, he needs to look at the relative benefit to Google's Comparison Shopping Service. For example, through an increase in traffic, which might include traffic from the OneBox directly to merchants, as compared to traffic to other CSSs in the Pre-Decision period.

So, I would also add, whilst we're in this letter, that he notes over the page, in paragraph 10, that there is a question regarding the Counterfactual issue during whichever period -- or periods -- Google is ultimately found to have been infringing Article 102, of what the realistic non-infringing alternatives were, and which of those Google would have chosen.

THE CHAIR: Yes.

MS LOVE: Just interjecting here. Obviously, if an abuse is established before 2008, there is a question whether Google would have acted in the same way in relation to the OneBox in the Counterfactual before 2008. One has to look at the whole picture there, and you will recall in the Preliminary Issue Judgment of last week that the

Tribunal endorsed the Claimants' submission on the meaning of the expression "Google Inc.'s own Comparison Shopping Service".

In paragraph 53, you endorse Mr Moser's description of it as the "whole ecosystem", not just a standalone website. And it's the ecosystem, it's the CSS, it's the positioning of the box -- and I intentionally keep it ambiguous, the shopping boxes -- it's all part of the Comparison Shopping Service.

Now, the Product OneBox was the predecessor to the Product Universal, and it was in place in the UK and Germany from 2005 to 2008. It was clearly a part of that ecosystem until it was replaced by the Product Universal. So to consider whether there was an abuse in the Pre-Decision period and what the options were in the counterfactual, you need to understand the whole ecosystem. You can't take a sort of salami-slicing approach.

Kelkoo and Foundem have pleaded cases that Google's conduct was abusive before January 2008. The OneBox was part of that conduct, and to that extent, at least, it is part of the unlawfulness. If those cases succeed, you'll have to consider what Google would have done in a non-infringing world.

Now, obviously -- and I anticipate a point from Mr Pickford's skeleton -- if those cases don't succeed and there is no Pre-Decision abuse, the question of the Counterfactual for the Pre-Decision period -- for pre-2008 -- doesn't arise, but we're not looking at alternatives to lawful conduct. But even in that case, Sir -- just to anticipate a point that will come up in the Counterfactual -- the question of the Counterfactual from January 2008 still arises, that the clock ticks from 31 December 2007 to 1 January 2008, and the question is: what would Google have done? Mr Hunt needs to understand the ecosystem, and he needs to understand the alternatives for the Decision period, one of which might well have been continuing with the OneBox. He

needs to understand the thinking behind them, and he needs to understand how attractive they were, because the Counterfactual is about options and incentives.

Now, Sir, I have digressed a bit -- because we were in the Abuse JES -- but whilst we're in this letter, it's a convenient point to pick it up, and you'll see, carrying on through this letter, and we'll pick them up in the context of the specific categories on page 85 onwards.

Mr Hunt has explored specifically how each of the categories -- I think it's A0, A8, A13 and A26 -- which are now impugned as OneBox contingent, are still needed for him to answer Question 2 and Question 3. And in Question 3, a repeated refrain is this is a multi-stage theory of harm, and one needs to understand whether and how Google is accruing a competitive advantage Pre-Decision. One facet of that, one means of that competitive advantage could have been the OneBox. So traffic to the OneBox, when it's triggered, what it looks like, it's all part of the picture.

THE CHAIR: Good.

MS LOVE: So we've been through Mr Hunt's initial letter -- the key passages -- we've seen what he has to say on the need to understand the OneBox, irrespective of these pleaded paragraphs. I'm now going to go through the third Hunt letter, which I think is where I was initially, which is Bundle 6, Tab 20. We're going to page 97 here. This is responding, of course, to the evidence of Mr Noble.

THE CHAIR: Yes. (Pause)

MS LOVE: Can I ask you to have a look, Sir, at paragraphs 1.4 to 1.7, and in particular the discussion in paragraph 1.6 on why diversion of traffic -- which is basically all that Mr Noble plans to do -- isn't sufficient to assess the impact of Google's conduct, and you need additional data, as well as the traffic data. (Pause)

THE CHAIR: Yes. (Pause)

Finally, I understand what is being said. It's not only diversion to Google's own CSS, but also this the point -- also direct to merchants from the Google SERP. In other words, away from the Claimants' shopping sites and direct to merchants and not to Google's, not necessarily to Google's CSS. Is that what he's saying in 1.17 of the Abuse JES? Because he says, "I agree with Mr Noble that that's relevant -- clearly -- and I'm going to do that", but then he says, "I'm also going to do something else".

MS LOVE: Sir, I'm so sorry. Sir, may I confirm which document?

THE CHAIR: I'm looking at the letter which you asked me to look at. The 8 July letter, paragraphs 1.5 and 1.6. In 1.5, he summarises what Mr Noble considers is relevant, namely diversion of traffic from the Claimants' CSSs to Google CSS. And in 1.6, Mr Hunt says, "Yes, I agree and I'm going to do that also". So they're on common ground. Then he goes on, "However, [he says] that's not the end of the story. It's not sufficient to just focus the effect on traffic", but it's not very clear in 1.6 what is the additional thing he's going to look at. That's what I find I'm struggling with, so I'm trying to get an answer to that question by looking at his introduction to the Joint Expert Statement at paragraph 1.17.

So because in 1.6 he says, "I'm going to do what Mr Noble says is relevant" -- and that's my 1.16. And then he says, "I'm (inaudible), but focusing exclusively on that is not enough", so he's going to do something else as well. I'm trying to understand what is the "something else" as well. Maybe you can tell me.

MS LOVE: If you turn forward to the diagram and to 1.13.

THE CHAIR: Yes.

MS LOVE: You see that what he's planning is to test the impact of the relevant demotions, which we've now narrowed to the algorithms in question and the manual

on divisibility and traffic, and also on other relevant metrics, such as the number and quality of merchant relationships. Because as I think was canvassed in relation to Question 3, what we're considering here is a sort of multi-stage theory of harm. So the demotions have happened, the traffic is being diverted, and the question is to where and to what end? And is Google beginning to benefit in a way that may ultimately be cashed out, as it were, in a subsequent period?

And you need to understand all of the aspects of where the traffic is going and what is happening. And I would also add -- and this will be a theme I return to -- traffic alone is only part of the picture. There's the question of visibility. If a CSS says, "Well, my clicks have fallen by 50 per cent", then there is a question: “why?” Why has that happened? Is it about you going down the SERP? Is it about the click-through rate? The proportion of the occasions on which you're displayed and which you're clicked? Is it where you're appearing? Is it what format you're appearing in? So you can't -- the traffic is important. We are all agreed the traffic is important, but the question is whether traffic alone is enough, particularly in a situation where he's considering that Google has possibly begun to develop a competitive advantage, at least to -- also a weakening relative.

THE CHAIR: I mean, that's an aspect of traffic. But I'm looking at the box five in the table and it says, "Traffic from different parts of the SERP to: CSSs, Google CSS…". And I think Mr Hunt is saying, "Well Mr Noble says you stop there", but there's also merchants and merchant platforms. That's another possible place to which traffic may be diverted and that's why 1.16 is not enough. Although it does say it there as well, "direct to merchants" as well. And that's why -- 1.16 is not right, it's 1.5 of the letter -- he says, "You don't stop there. You do look at more".

MS LOVE: So my understanding of what Mr Noble wants is Mr Noble is interested

only in box five, and indeed possibly only in parts of box five. And if I may say so, I think that 1.16 and 1.17 are also intended to be an explanation of why box five isn't the complete answer. You look at boxes one, two, three, four, and six. You contextualise it. And that's the point I was making, for instance, about visibility. And it's the point we'll come back to in (inaudible) in relation to SERP configuration.

THE CHAIR: Yes.

MS LOVE: So what he's really saying here is that he needs to understand all the boxes. Five is central but five isn't enough.

THE CHAIR: Yes, well they lead to -- one, two, three, four lead to box five. But I think it's -- well my understanding is that box five is more than just diversion to the Google CSSs.

MS LOVE: Yes, Sir, we agree. You have to know where they were diverted from and to.

THE CHAIR: Yes. And that is, it seems to me, the difference between them. That's how I understand what's said in paragraph 1.5, 1.6 in Mr Hunt's letter. But maybe, I mean, Mr Hunt is here, so can you just confirm with him that that's the point he's making in those two paragraphs? (Pause)

MS LOVE: It is both. It is both that you need to look to merchants as well. You need to look beyond traffic going to other CSSs or Google's CSS, you have to see where the traffic is going. But he is also making the point that you have to look beyond the traffic data. (Pause)

So we then move on, in this 8 July letter, the Post-Decision period. And here the differences between the experts become, if anything, more stark because Mr Noble, whose approach I'll come to in due course, sees this as a conceptual, a purely conceptual matter.

Mr Hunt explains, in paragraph 1.8, that what he is interested in is whether the Compliance Mechanism or the "Remedy" as Google terms it, Compliance Mechanism as we do, actually ended the Abuse that was found by the Commission and ensures that there is competition on the merits. And that is, in a nutshell, a richer and wider question, than just looking at whether there's equal access to Shopping Unit boxes and he'll need to analyse data. In particular, foreshadowing a point that will come up in relation to the Post-Decision period.

If you turn on to paragraph 1.10(a) of his letter, which is on internal page 99, he wants to look at the proportion of traffic that goes through, and he wants to look at discriminatory demotions. He basically wants, again, to understand what the world looks like. So that's, in a nutshell, what he plans.

In terms of specific data requests, there is the question of demotions and penalty data, which we'll come back to in relation to A15 and A16 and you will have seen that that was an aspect of the first Hunt letter in paragraph 17 that we looked at. And in his third Hunt letter that we've just seen, he wants to date on the penalties applied to CSSs.

Just to flag another --

THE CHAIR: I'm not sure about 1.10(c) of the 8 July letter. Your clients, not Foundem, but the others, they will know what the financial position is in trading under the Compliance Mechanism and what margin they're making. And it's not about how much revenue Google has.

MS LOVE: It's about how much of the margin is -- how much of the total value to merchants from participants (overspeaking) --

THE CHAIR: They'll know their own position, and there's no reason to think they're necessarily different from others.

MS LOVE: Sir, we need to understand the whole picture, because of course, there are, four of us.

THE CHAIR: Why do you need to understand the whole picture? The question is whether the amount retained by CSSs enables them to make sufficient margin. That's something your clients will know.

MS LOVE: Sir, if you then read on to hypothesis (d).

THE CHAIR: Yes.

MS LOVE: I mean, there is an overall question of what competition on the merits looks like. And if the reality is that when you look at how the margin is being spread and how traffic is being controlled, the net effect is that Google's profitability remains very, very high and that is in stark comparison with those of other Comparison Shopping Services. There isn't much change, for instance, from the Decision period, the Post-Decision period. That may be illuminating, that may well be illuminating on the question of what the Compliance Mechanism has done and whether it's actually restored competition on the merits across the whole market.

THE CHAIR: Right. Okay.

MS LOVE: Sir, contrasting that, in particular with Mr Noble's approach, I do think it is worth looking briefly -- because again, this will set up a lot of the debates that we're going to have subsequently -- the question of how Mr Noble wants to look at these things.

In the Pre-Decision period, he's going to analyse the possible abuse, which relates to the more favourable positioning and demotions and the question whether Google is gaining a competitive advantage. He's going to look at traffic data. That's it. And that is really what Mr Noble says in paragraphs 17 and 18 of his witness statement at page 226 of Bundle 1. But we don't need to go there. And you'll have just seen why

Mr Hunt says that that is not sufficient.

In relation to the Post-Decision period, he starts from the position that, and I quote:

"*Prima facie*, the Remedy provides equal treatment across Google's CSS and other CSSs."

Now, just pausing on the "*prima facie"*, which seems to be doing a lot of heavy lifting there. There are some assumptions there. There is an assumption about whether the Compliance Mechanism is actually ensuring equal treatment, as a matter of fact, which is for the Tribunal to determine at the First Trial. There is possibly another assumption that is built in there about whether in circumstances where the Compliance Mechanism involves charging Comparison Shopping Services to appear in boxes and requires them to change their business model that that's actually addressing the abuse found by the Commission.

Sir, as you'll have anticipated from the Preliminary Issue trial, our case is that insofar as it's addressing anything, it's a different thing to what was part of the abuse found by the Commission and confirmed by the European courts. And again, those are matters for the Tribunal to determine. The answer will be key to assessing what's happened in the Post-Decision period.

Mr Noble says that this is basically a Remedy design issue, and whether the Remedy ensures there's competition on the merits and it's a conceptual market design question for which no data, no data is required. No quantitative analysis.

Now, Sir, our case is not conceptual. Our case is a real case about the real effects of Google's conduct, even after the introduction of the Compliance Mechanism, on competition in a real market, or at least what's left of it, for Comparison Shopping Services - whether there's real competition on the merits in that market.

Now, I don't demur from the proposition that there will be points of principle the

Tribunal will have to grapple with to decide whether that's the case -- and we've alluded to the business model change -- but you cannot reduce this all just to theory. And you've seen, Sir, Mr Hunt's third letter, paragraphs 1.8 to 9. He wants to know what has actually happened.

Now, Mr Noble says that Mr Hunt hasn't actually set out -- and we come back to the magical testable hypothesis for abuse based on an analysis of the data and what insights you would draw from it -- and he criticises Mr Hunt in paragraphs 37 to 39 of his witness statement.

Now, that's also wrong, because if we can go back to the Abuse JES -- and I apologise that we're on something of a paper chase -- page 8, paragraph 1.24(a):

"Mr Hunt currently envisages undertaking assessment of how the Compliance Mechanism has worked and its impact on competition in the market. This is likely to involve a qualitative assessment of the operation of the Compliance Mechanism and whether it ensures competition on the merits. It will also be important to understand whether quantitative market outcomes resulting from the Compliance Mechanism are consistent with outcomes one may expect where rival CSSs can compete on the merits to replicate traffic (and other outcomes such as revenue and profitability) that could have been achieved absent any infringing conduct."

They then give some examples. Over the page, 1.24(b) looks at the key metrics.

Now, Mr Noble said the Remedy is by nature different from what preceded it, but that doesn't mean that you shouldn't attempt these comparisons. It doesn't mean that you can say now that comparisons are not going to be informative. (Pause)

THE CHAIR: Yes. I mean, we'll get to those categories. I find it a little difficult, at the moment, sitting where I am at this stage of the case, quite understanding why just the measure of Google's profitability will tell you whether this is competition on the merits,

because you don't know whether they might be more successful than others anyway. It doesn't mean that it's the result of anything abusive if they're highly profitable. So I'm slightly sceptical --

MS LOVE: We'll come to it.

THE CHAIR: -- of what -- in the sense that Google has to be less profitable to a certain extent, I don't know what extent, otherwise there isn't competition on the merits. That seems to me a rather difficult proposition.

MS LOVE: We'll come to it. But obviously, the difficulty is that we're looking at a period from at least 2008 to 2017 when there has been abuse and the market has been made to change in certain ways and we're looking across time and seeing what has happened. We're trying to get a sense, a comparative sense, of what competition on the merits might look like. And of course, our case is that there still isn't competition on the merits, and we're looking for additional --

THE CHAIR: I can see you might say there's a lingering effect, which goes to your damages, but in terms as to whether there is abusive conduct in what Google is doing, that's the question we're concerned with, Post-Decision. The fact of how profitable Google is doesn't seem to me a very sound basis for saying whether what Google is doing is abusive.

MS LOVE: Sir, we're also looking at it for Pre-Decision and Post-Decision abuse. (Overspeaking)

THE CHAIR: Well, I'm looking at this -- what you're looking at with -- you were directing me to Post-Decision and Mr Noble's approach and contrasting Mr Hunt's approach. So I think we're in the Post-Decision period at the moment. That's where you said there's this sharp contrast and that's where you're pointing me to in these paragraphs. I have some misgivings about an approach trying to rely on just

profitability.

MS LOVE: I hope to allay them. We come to A23 and other similar categories, we just say --

THE CHAIR: Well, we will as I say, all of these things will become sharper when we get to the particular categories. And I'm a bit concerned, it's now 12.00 and we haven't even started.

MS LOVE: Moving on to the categories, obviously, Google's general objections to disclosure are multi-tiered. They largely rely on Mr Noble's opinion and say things aren't relevant or necessary. One thing that we will see is that even when Mr Noble accepts that some things are relevant or necessary, they refuse for some things -- some of it's about the OneBox, but some of it is about concerns about proportionality. I'll come to those in the specific context of it. But we do say that even if we're looking at best alternative sources, the proportionality concerns are vastly overblown.

THE CHAIR: We have to address them, obviously, on their merits, as we come to them.

MS LOVE: If we could start then, Sir, in Table 1 of the Abuse JES --

THE CHAIR: Yes.

MS LOVE: -- which is the trigger data. To click forward, I think it begins at page 14. We're going to go table by table as well. So I'm in your hands. Mr Pickford asks if we're going item by item or table by table.

MR PICKFORD: The reason why I ask is because we have a Scott Schedule, which is what the Tribunal asked for.

MS LOVE: Yes.

MR PICKFORD: I have prepared for this hearing on the basis that we're going to go

through the Scott Schedule item by item.

MS LOVE: If it's about references --

THE CHAIR: The Scott Schedule tracks the JES.

MR PICKFORD: Yes.

THE CHAIR: So I've got them both open. A lot of that has been copied into it, understandably so.

MS LOVE: On that, Sir, Mr Pickford and I are in agreement.

Now, on Table 1. Table 1 is "Trigger data". So it's what users see in terms of the shopping box and other commercial links and when they're on the Google SERP. And there is, I believe I'm correct in saying, there is one row in Table 1 that remains in dispute and that is Request A0. And that's in internal pages 3 to 5 of the Scott Schedule, but it's on page 121. The rest are no longer pursued by Mr Hunt. And A0 is Mr Hunt requesting data on the formatting and display features of the Shopping Boxes from the introduction of the OneBox, and he's not requesting similar for the Product Universal or Shopping Unit, because the OneBox is the priority at this stage, in terms of relative lack of data. I'm taking that from the bottom of page 14 of --

THE CHAIR: When he says in each country to give me that, I can't recall which country is the OneBox, but it's each Decision country, isn't it?

MS LOVE: UK and Germany are the only ones that had a OneBox.

THE CHAIR: It's only the UK and Germany, is it?

MS LOVE: So, Mr Noble --

THE CHAIR: So we're just looking at the first column, request in the draft order, when it says in each country, it's the UK and Germany.

MS LOVE: It says the UK and all EEA countries where the Product OneBox was launched, and before I lead you astray --

THE CHAIR: There's a footnote saying "TBC".

MS LOVE: I apologise.

THE CHAIR: Is it Germany?

MS LOVE: UK and Germany.

THE CHAIR: So we can just say UK and Germany?

MS LOVE: TBC is Germany.

THE CHAIR: Yes.

MS LOVE: Now, Mr Noble agrees in principle that it's relevant information, but he says it's a qualitative factual matter and it doesn't need data analysis, and also, of course, he's only interested in the traffic data.

Google objects on two grounds: the first is the point about the Foundem OneBox Claim; and the second is that the data is not available in the form that was requested, and so it would need to be reconstructed, which would be disproportionate. I would also add -- and I'm not going to invite a further paper chase here -- but it's said in the Annex to Wisking 8 that the exercise would only provide data on the format and not on the actual content.

THE CHAIR: You're asking for the format display features. The format, and then the --

MS LOVE: Well, Sir, I think it might be helpful to turn to the template that Mr Hunt put forward. I emphasise on his behalf that this is his attempt to think about what the useful parameters might be. If there are other, different, better parameters, then we're all ears. But you can find the template behind Tab 2 of Bundle 2 on page 59. (Pause)

THE CHAIR: Sorry, this is page 59, at --

MS LOVE: Oh, sorry, I --

THE CHAIR: Yes, I see.

MS LOVE: Mr O'Regan reminds me that on page 57 he's made it clear that it's just an

example, and the rows are for illustrative purposes only and it's based on his best understanding.

THE CHAIR: I'm just trying to get my head around what's actually being asked. Data on the format display features of the Product OneBoxes, and you've been given screenshots of the different iterations of the OneBox, I think. (Pause)

MS LOVE: The display of the box is an important part of influencing consumer behaviour. The Commission considered the format of the box, the rich format, the pictures, to be an important factor in establishing the abuse. And I don't need to take you to the Decision recitals, which includes the click through rates. And those recitals are all binding. And the same importance, by inference, must be true of the OneBox, and it needs to be tested empirically. And having this data will assist Mr Hunt to interpret traffic flows with greater precision.

Yes, there may be some qualitative aspects to the information, but if I may say so, Sir, speaking from a common sense perspective, quite apart from any expert economist, it is obviously important as far as possible to ensure that there is an accurate, complete and structured account of what users were seeing on the SERP and when. Looking at Mr Hunt's template, I say it's really just an attempt to make sure that everyone is on the same page about what it actually looked like. One could almost regard this as a sort of tabular version of a teach-in about what happened over time. So you'll recall the Tribunal asking for, for example, pictures. Now -- understanding which features at what points are driving the traffic.

Now, as regards the concern that Mr Wisking expresses, that we'll get format but not content, that's not an issue. We don't need to understand the contents of the box, the object of the picture isn't because we all want to see garden furniture or trainers or whatever, it's to understand the format and the shape. Mr Hunt can confirm that he

doesn't want data on the actual content of the boxes, if it's not available, and it's not essential.

Now, we do say, Sir, this is something that is obviously useful. In fact, a sort of structured tabular explanation of what was on the page, what was triggered when over time, is likely to be necessary, just to ensure that everyone is talking about the same thing and we don't have a 'ships in the night'-issue.

Now, Mr Wisking hasn't given any specific explanation of why populating this template -- or whatever the better version of it is -- would actually be disproportionate. He has alluded to it, proportionality and burden, in very general terms. And we do say, in view of the obvious usefulness of attempting to systematize and structure the data, and in the absence of any detailed justification, and given the importance of this sort of table to Mr Hunt's analysis, we ask you to grant Request A0. I don't know if you want to hear from Mr Pickford.

THE CHAIR: Just, so, what you'd get would be the format, the shape and layout. From the reconstruction analysis. Yes?

MS LOVE: You'll know the size. You'll know the number of images, the size --

THE CHAIR: I'm not sure --

MS LOVE: Well, you'll know the size.

THE CHAIR: I'm not sure you will know the number of images. You'll know the size and the general form of it.

MS LOVE: Well, that is what has been asked for. I mean, I slightly struggle with the idea that the number of pixels is the straw that broke the camel's back from a proportionality --

THE CHAIR: Yes.

MS LOVE: And the date and the number of links was included.

THE CHAIR: Well --

MS LOVE: We want to make sure that we have, as far as possible, a complete and structured understanding of the format and nature and links in these boxes. And we say it's an eminently sensible thing to ask for.

THE CHAIR: The OneBoxes came in 2005, didn't they? Is that right?

MS LOVE: I think it's less than three years of information for two countries.

THE CHAIR: And why is it relevant before your claim period? Why is it relevant before the start of your claim period?

MS LOVE: So our claim is from at least 2006.

THE CHAIR: Well, it's from 2006. Nobody's claimed from before that.

MS LOVE: Sir, the pleading covers, at least, I don't --

THE CHAIR: Well, I think we can look at it. I think it's fairly -- I mean, it's Foundem and Kelkoo, isn't it? They're the only two who go back. Isn't that right? The other two don't. Is that not right?

MS LOVE: That is correct, Sir. And I think we're in --

THE CHAIR: And if you go to --

MS LOVE: -- paragraph 8, Tab 9. (Pause)

THE CHAIR: And it's Foundem paragraph 9J:

"Foundem's claim is not, however, limited to the period covered by the Commission Decision but covers the whole period from June 2006 to date." [As read]

Right? So Foundem starts in June 2006, very explicitly.

MS LOVE: I recall the language of at least 2006 --

THE CHAIR: That's in Kelkoo; were coming to Kelkoo.

Foundem, paragraph 9J. (Pause)

MS LOVE: Yes.

THE CHAIR: Right?

MS LOVE: Yes.

THE CHAIR: Pleadings bundle, tab 3, page 13, bottom of the page. Have you got that?

MS LOVE: Yes, Sir. That is June 2006.

THE CHAIR: Right, so Foundem claims nothing before June 2006. (inaudible)

MS LOVE: Sir, I agree.

THE CHAIR: Yes. Okay. Kelkoo is the other one. Kelkoo -- we look at their pleading -- Re-Amended Particulars of Claim, which is tab 9. They have at least the language, at least, 2006, which is what you've referred to. But they're not actually advancing allegations, as I conceive, from anything before 2006, because they talk about the Google Shopping infringement period, and it's at least 2006, so there's nothing actually being said, about what went on earlier.

MS LOVE: Sir, I'm reminded that Foundem's paragraphs 94C through to 94F, they refer to from at least 2006 -- although 94D refers to "... launched in the UK and Germany in 2005". And that's at the bottom of page 55 of Tab 3. So I'm also reminded --

THE CHAIR: That's why it was launched.

MS LOVE: Yes.

THE CHAIR: That's clearly correct. But the claim itself of Foundem starts it in --

MS LOVE: The language of "at least 2006".

THE CHAIR: And of course Kelkoo knows when the Product OneBox was introduced. (Pause)

But it doesn't tie the Shopping infringement period to that, which it seems to me starting in January 2006, seems appropriate.

MS LOVE: Obviously one would want a control period to assess the changes, in this context. Sir, I can take it --

THE CHAIR: Well, you're looking at how consumer behaviour was being affected in the period of abuse. I don't see why it should go earlier than January 2006.

MS LOVE: I can take instructions on that point now from Mr Hunt. But, Sir, if I may say so, the issue here is not a -- I don't understand Google's objection to be a 2005 versus January 2006 versus June --

THE CHAIR: Well, it's just disproportionality. The longer you have, the more disproportionate it gets. If you want to take instructions on that, I think it's a good moment to take a ten-minute break. We should probably have done it before because, although they're not in court, there is a transcriber working away. So I'll come back at 12.20 pm.

(12.14 pm)

(A short break)

(12.20 pm)

MS LOVE: Sir, I've taken instructions on the fought issue of January 2006 versus July 2005. The position is this: I'm reminded that disclosure in respect of other matters, including strategy, has gone back to 2005. And I am also told by Mr Hunt that more is better in the sense that if you see from when the OneBox started, you can then see what has happened subsequently and possible changes. So, I don't know, more pictures came in, what does that do to the traffic? That having been said, Sir, if it is the case that the proportionality of going back beyond that date is a less attractive calculation, I don't think January 2006 versus July 2005 is the ditch in which we're going to die.

THE CHAIR: Yes, but you want to know what it looked like, basically. I mean, I don't

think -- and therefore what likely effect it had. You're getting traffic data. You've had screenshots of different iterations of the design.

MS LOVE: I think in relation to the OneBox, there has been relatively little.

THE CHAIR: Well, it says you've -- no one's commented on what Google has given you about the OneBox and why that's inadequate, the documents that Google refers to in its comments and, insofar as that changed or there are material differences, they can be covered in a witness statement. I really do not see that it's proportionate to have a reconstruction exercise, which is not going to go very far, it'll just give you the shape and layout. It won't give you the content. That's explained. It's not possible. And I have to say, I really don't think that's necessary, from what you told me on the case. So I'm against you on this one.

We can indicate that Google should cover in a witness statement how the design of the OneBox changed by way of commenting on the documents that have been disclosed, as referred to in Google's column at A0.

MS LOVE: So that indication in relation to the need for clear and comprehensive witness evidence is understood and appreciated. In that case, cutting my cloth and mindful of time, I think we move on to the excitement of Table 2, as was, in the Abuse JES and we can now --

THE CHAIR: Can you just help me because I'm working through the Scott Schedule.

MS LOVE: Yes.

THE CHAIR: I've got A2, which says "Agreed saved as to timescale".

MS LOVE: I'm sorry. I beg your pardon, Sir, you've got?

THE CHAIR: A2 is the next one I've got in the Scott Schedule.

MS LOVE: A2. I understood that A2 is now agreed on the basis set out in pages 6 to 7 of the Scott Schedule, hence it's green. Is your version not green, Sir?

THE CHAIR: It is and it says, "Agreed save as to timescales".

MS LOVE: We'll have to return at the end, Sir, to the question of timing for all of this.

THE CHAIR: The timing might differ for different things. Would it be sensible to, I'm in your hands, we can come back to it, or we can do it as we work through. But this is agreed, which is excellent. But if we can now fix the time on it, then let's put it to bed completely.

Mr Pickford, would that be possible?

MR PICKFORD: We have one concern with that, which is that the estimates that we're provided here are for each item, assuming that we've got to do this item but focusing on that item. What we have not been able to do, because we don't know what the Tribunal's final order is going to look like, is how much time we would need to do everything in aggregate that we might be in order to do. So these are minimal, effectively.

THE CHAIR: Yes.

MR PICKFORD: But it wouldn't be sensible for us, at this stage, to commit to five weeks for one and three weeks for another and eight weeks for another, if ultimately at the end of it, actually we're going to need ten weeks to do all of this consecutively, so altogether.

THE CHAIR: A2 alone is five to six weeks.

MR PICKFORD: Yes.

THE CHAIR: That's what you're saying.

MR PICKFORD: Yes.

THE CHAIR: And when the Claimants say, it is not agreed as to timescale, I mean, are you saying the five to six weeks is too long?

MS LOVE: It is, I mean, these are data that are available and it's held by RBB. It can

be disaggregated. I mean, the short thing is that where it's agreed, what's stopping us? I mean, it's not a sort of new retrieval or a reconstruction exercise. And we'd have thought that this is one of the ones that we can tick off within a fortnight. I mean, let's make hay while we can.

THE CHAIR: I'm not sure it's disaggregated at the moment.

MS LOVE: Well, it can be disaggregated (overspeaking) --

THE CHAIR: It can be. Well, that's the work that has to be done. I mean, I -- yes. So. Okay. All right.

MS LOVE: Well, Sir, I don't understand that that work is being done by Google. Perhaps Mr Pickford can clarify. I thought that was being done by RBB. But in any event, the main point here is that in contrast to many of the other requests, we know that this is here. It's sitting there. And in fact, given that it's agreed, one would imagine steps could have been already set in motion. And as I say, our position is to just go for the low hanging fruit and where it's there, start making hay.

THE CHAIR: Yes. Okay. Well, we'll come back to it then. But the position is --

MS LOVE: Sir, A1, A3 and A4 are no longer pursued and so I think we move -- I'm sorry, one of the issues --

THE CHAIR: Yes.

MS LOVE: Yes, one of the issues --

THE CHAIR: A5 is?

MS LOVE: Yes. The break between the individual tables that there was in the Abuse JES has been somewhat lost and I think we therefore turn to page 126?

THE CHAIR: I think that's right, yes.

MS LOVE: Yes.

THE CHAIR: A5a.

MS LOVE: Sir, a couple of general introductory points because I think there's seven requests in this Table, if you count A5a and A5b together, that remain from Table 2.

THE CHAIR: Just let me remind myself. Just a minute. (Pause)

A5a, it's only the Post-Decision period we're concerned with because A5a, Pre-Decision and Decision period are agreed.

MS LOVE: Yes. And this concerns organic or paid links to CSSs and merchants, including for the 361 SO Response Aggregators that were referred to in the Decision. Sir, we've already canvassed the centrality of traffic data and click through rate data. The who is clicking on what, to what, and whose clicks are coming from where. This data is important for assessing whether, in the Post-Decision period, the observed market outcomes, of which traffic is one, are consistent with competition on the merits.

THE CHAIR: Yes, I understand that. I follow that.

Mr Pickford, Post-Decision period?

MR PICKFORD: Yes.

THE CHAIR: I know what Mr Noble says, that you just look at what's being done in terms of Google's conduct. But I think it is important to look at, if one's testing a remedy, the effect and this is looking at what happens to traffic. It's not about profitability or revenue, which is quite different. It does seem to me that it's not only relevant, but given the way the Claimants are putting their case, it's necessary.

MR PICKFORD: Sir. Well, we've already had the exchange in relation to testable hypotheses, and I don't need to say anything more about that. There are a spectrum of requests where, we say, we don't understand what this is going to, and I would accept that this is one which is at one end of the spectrum, and things like profitability are somewhat at the other end of the spectrum. So in the light of the submissions I've made and the indications the Tribunal has given, I'm not going to fight hard to resist

this one on the basis of what you've said, Sir.

THE CHAIR: Yes. Well, I think I will order that. So the post-Decision, as well as the pre-Decision and Decision periods. So that's A5a.

MS LOVE: A5b, we move on to page 130. I'm sorry, we've got a rather long column and A5b we're now looking at the pre-Decision and the Decision periods, click through rates to CSSs and merchants. And this is not agreed. Google's position is that the data isn't available and it would be disproportionate to search for alternative sources. Mr Hunt does maintain the request in relation to best available information and this is particularly important for the Pre-Decision and Decision periods because of the problems that we'll come to in relation to visibility data. It's important for his analysis, given the lack of visibility data, because click through rates do provide you with some kind of proxy for visibility, they're calculated on a ratio of clicks to impressions.

THE CHAIR: I can see that.

MS LOVE: And as we're going to go on to see, Google goes on in, I think it's A18 and A20, to say no to the visibility data that Mr Hunt is seeking for earlier periods. So we say, if you look at the matter in the round -- we're trying to be realistic. We have taken on board that there are data limitations, but we're just saying, please find us the best available.

THE CHAIR: Yes, you are asking for the Pre-Decision and Decision periods, and that's going back to sort of 2006. I'm trying to understand the reference in Google's response to September 2017. (Pause)

MS LOVE: Sorry, I assume, Sir, this is a product of the 400-day retention period. So someone's done some maths on that. I have to say about what the significance is of September 2017, you may be better off in Mr Pickford's hands than mine. Oh, sorry. I'm told that's the end of the Decision period of September 2017. At least it's the point

when the Remedy came into force. (Pause)

THE CHAIR: Yes, I understand, yes, I see. (Pause)

MS LOVE: Sir. Like many of these, as I've already said, we're now into the world of best available. (Pause)

THE CHAIR: Mr Pickford, no CTR data was given to the Commission for its investigation? Just seems a bit surprising. Is that the position? (Pause)

MR PICKFORD: The position -- I can address you on the specifics of what was given to the Commission in just a moment.

THE CHAIR: Yes.

MR PICKFORD: But the essential position on proper investigation in relation to this is that in the ordinary course, we don't process CTR data for organic and paid links. It could be reconstructed from data that we do have, but only for the last 400 days. So were it relevant, that is something that it would be possible to do, albeit, we say, it would still be disproportionate. But that isn't what is being asked for here. What is being asked for here is data up until the end of the Decision. That's the September 2017 issue. And for that period, which ended approximately eight years ago, we simply don't have today in Google the data that is being sought. And Mr Wisking explains that.

THE CHAIR: The question I was asking you, they didn't provide the Commission, which was obviously in the period before September 2017 with any CTR data?

MR PICKFORD: I need to check that.

THE CHAIR: Because that would be for that period, obviously. It wouldn't be for the last year and a half. (Pause)

MR PICKFORD: Sir, I think that is right. And the reason why I say that is because we disclosed the Commission file and anything that we provided on the Commission file,

they have and they're asking for this on the basis that they haven't got it and that they need it.

THE CHAIR: Yes.

MR PICKFORD: We can take it away and seek to get to the bottom of exactly what was sought or not but I'm afraid that's not a question that I can answer directly, at the moment. But what I can say is that Mr Wisking, in his evidence, has made it clear that enquiries have been made of Google in relation to this, and as of today, we haven't got that information. And insofar as it's information that the Commission received, well, then they've got it. So there's nothing further that needs to be done in relation to a disclosure order from the Tribunal.

What is being said in relation to best alternatives? What that means in reality is they want us to conduct searches, custodian based searches, through documents to see whether some of the data that they're asking for might somehow be lurking in documents. And we say that is wholly disproportionate. We don't know where we're supposed to start with that in terms of the custodians or the searches. And most likely, if there were anything that were linked in those documents, the link would now be dead because as the Tribunal, I think, will understand by now, the way that Google works is when it produces documents, there are lots and lots of links in them, and when it refers to something, it almost always links out of it. If it's done a direct search for the data and it says the data doesn't exist, it's exceedingly unlikely that a document, even if there were one and we don't know that there even exists such a document that links to it, would enable us to access it. So the idea that we're going to seek to try to put together data on the basis of that kind of search, we say is, is unreal.

Obviously it's very different if there are caches of data that we hold, that's what data disclosure should be focused on. It should not be focused on seeking to reconstruct

things through documents. So the bottom line is we can't do it.

THE CHAIR: Yes. (Pause)

Presumably some of your clients will have some data on links through from Google to them; the Google SERP. If they've retained those. But this is not about relevance. I understand why Mr Hunt would like to have this, but there is a real question of proportionality for what on earth one could be seeking for over this long period -- after a long period and then covering a long period.

MS LOVE: The recurring theme on many of the Table 2 requests, particularly in relation to the Pre-Decision period, and we hear what you are saying. We hear, in fact, what Mr Pickford has said, although we disagree about the impossibility of even beginning to think where one might search.

Click through rates are important. My understanding, and I will stand corrected by those behind me who know more, is that they are a central metric that is monitored, and it just seems to us implausible, in relation to all of this information, there would have been nobody emailing anyone, nobody sending things. And fine, if the links aren't available, then that's one thing. But this is a counsel of despair. They're not even going to try really. And particularly in circumstances where there's no visibility data, we're going to end up in a world where we can't do any quantitative analysis. We're basically just asking for them to have a go and to engage constructively about what the search terms and what custodians might be.

I think this will actually be a recurring theme. I anticipate that we may cover requests A7, A8 -- A9 is Product Universal, I probably shouldn't look ahead. The difficulty is really that Mr Pickford said they don't know where they'd start. Well, we don't know.

THE CHAIR: You can't be expected to know --

MS LOVE: They certainly have an information advantage to us, and it's their data

retention policies that are going to leave us disadvantaged.

MR PICKFORD: If I could just respond on one point, which I think there's some confusion on the heart of the -- by the Claimants here. They seem to accept that we don't have visibility data and they say, "Well, in a world where we haven't got visibility data, we need the click through data, click through rates instead".

THE CHAIR: Yes.

MR PICKFORD: The whole point is that you can only calculate click through rates if you've got the visibility data. You need the impressions. You need to know what impressions were provided, and then you look at the clicks based on those impressions, and that's how you then get click through rates. And that's the stumbling block here. We have clicks, and we are providing them, they have a lot of click data that we've agreed to and I think we've agreed to more click data even just in this hearing in the last hour.

What we can't do is reconstruct something that we don't have, and the key stumbling block here is the visibility aspect of that, as we explained in the Scott Schedule. So it doesn't help, in my submission, and it's confused to say, well, in a world where we can't have visibility data, fine, we'll have CTR instead. They go hand in hand, and that's the issue.

THE CHAIR: Yes. And how do SISTRIX calculate its visibility data? SISTRIX is an independent monitoring market research agency. One can purchase their data. Is that who they are?

MR PICKFORD: I cannot tell you the answer to that. I can seek instructions, but it's not something --

THE CHAIR: Well, your clients will obviously know, because they've got visibility tables for CSSs, and trying to work out and I wonder how they get it.

MR PICKFORD: So, it's my recollection, and I don't know whether this is why you've raised SISTRIX data, that SISTRIX data is referred to in the Commission Decision.

THE CHAIR: Yes, I'm aware of it.

MR PICKFORD: Yes, and I think that may provide part of the answer to the question that you asked me before about what we provided. I imagine that this, is to some degree of speculation, that if the Commission Decision is based on SISTRIX data, the reason for that is because it wasn't getting that data from Google, because it's not something that we ordinarily process in that way.

THE CHAIR: Yes. That's about visibility, rather than click through rates. But it does give visibility information.

MR PICKFORD: But as I said, Sir, the visibility information is central to then working out the click through rates, because essentially it's an equation. It's one over the other, I think.

THE CHAIR: Yes. And what Mr Hunt is interested in is visibility.

MR PICKFORD: Yes.

THE CHAIR: It's a proxy for visibility, that's what it seems to be. But I'm just wondering what the Claimants could get from SISTRIX, because certainly for part of the Decision period, quite a bit of it, SISTRIX seems to have significant data from around about June 2010, I think. Yes.

MS LOVE: So I'm directed that SISTRIX isn't available, in relation to the Pre-Decision --

THE CHAIR: No, it doesn't go Pre-Decision.

MS LOVE: -- period. But if there was a reasonable step that could be taken for proportionality, say, narrowing searches to the Pre-Decision period, we are open to this. As I've said, it's really a question of what we have, but we have heard the

discussion that has gone on, I understand Mr Pickford maybe taking instructions about certain matters, and I'm mindful of the time and I'm therefore suggesting --

THE CHAIR: I think we'll come back to this, because --

MS LOVE: Put a pin in it, as it were.

THE CHAIR: -- to see whether there isn't a means of getting some proportionate search, depending on what other things have to be looked at. So let's park that and go on to -- is it --

MS LOVE: Page 131 of Bundle 2. And this has narrowed now. So we're now looking for clicks and click through rates on menu links, directing users from the search to Google Comparison Shopping. And again --

THE CHAIR: Only Pre-Decision?

MS LOVE: I think that that is right. Yes, we're in the Pre-Decision period, yes. And again -- we're going to come across this issue several times -- Google is saying the data is not available, and it would be disproportionate to have a look for alternative searches. And Mr Hunt's point again is, "Well, this is important, and we'd like you to have a go at searching for disclosing the best available information". We've withdrawn the request for the post-Decision period due to limited data availability, and we're focusing now squarely on the gaps.

I was going to suggest in relation to this, as with A5b, it may be productive for consideration to be given over the lunch adjournment about what alternatives there might be, rather than rehearsing again, a debate that I think will probably be similar to that for A5b, if that's something Mr Pickford's --

THE CHAIR: Just by way of comment, I'm not asking you to respond, Mr Pickford. I think where we've got some relevant data, which seems important, if we can seek to find an efficient way of searching for what may be available, by way of reference to it,

because although the actual full data may not be available, there might have been some analysis. There might be comments in discussion in the relevant teams in Google Shopping Europe.

So, I would like to leave open the possibility of finding a proportionate way where a search can be done, and I'm sure that Google would be able to come up with relevant custodians where one might have a go, as it were. It may not be a complete search. So, just park that idea, and it applies to A5b and A7.

MS LOVE: I think, Sir, it may also apply to A8, which is again focusing on the Product OneBox era. And I'm sorry, again we have the UK and all EEA countries and we can rewrite that as Germany, yes. And this is about clicks and click through rates on direct users from the SERP to merchants or to Google's Comparison Shopping Service. And again, this is actually squarely within what Mr Hunt was discussing in his second letter.

THE CHAIR: OneBox.

MS LOVE: I beg your pardon, Sir?

THE CHAIR: This is clicks on the OneBox.

MS LOVE: That direct users from the search engine results page to merchants or to Google's Comparison Shopping Service.

THE CHAIR: You've got it --

MS LOVE: Yes.

THE CHAIR: -- for UK and Germany from January 2006 to January 2008. When does the Product OneBox era end? When Product Universal came in is that it?

MS LOVE: 2008, yes.

THE CHAIR: So for the period you've got it disaggregated by link type, but not by device type.

MS LOVE: So the already disclosed link clicks data is aggregated. So it's unclear

whether other types of traffic to the Google Comparison Shopping website are included. So the clicks on the box itself are not isolated, and I'm not sure we have had anything on click through rates, because I imagine it's a similar story to that which we've had in relation to, A5b and A7. I don't think we had anything on merchants either. (Pause)

THE CHAIR: Doesn't cover traffic to third-party websites. (Pause)

Can you seek disaggregation by device type? Does that mean whether it's a smartphone or a laptop? Is that what is meant by that?

MS LOVE: Yes, so this will come up again in relation to A9 --

THE CHAIR: Why is that? Can you help me, why is that important?

MS LOVE: Well, the point is, and it's explained on page 137 of this. So, if we go forward to A9 and it's -- sorry, I don't know about you, I find the text size very difficult, but about --

THE CHAIR: Page 137.

MS LOVE: Yes, about the top paragraph, under "Claimants' position". And about halfway down, you see:

"Such a split is important given ..."

And as I understand it, the point is that if we're trying to assess -- bear in mind we're looking at Pre-Decision and Post-Decision -- we want to attempt to control things and ensure that the comparisons are reliable, bearing in mind that the ratio of things that were looked for on a PC or laptop to things that were looked for on a mobile, where obviously the display is different, will have changed significantly, during that period.

THE CHAIR: I see, yes.

MS LOVE: So, the account of the evolution of the means of search, as it were. (Pause)

THE CHAIR: I don't know what the question of the degree of disaggregation really comes to. Google says it is disaggregated by link type. Mr Hunt says it's not clear whether there are other types of traffic as well. (Pause)

You have to be done by search to --

MS LOVE: So, my understanding, in relation to the link type, is that the existing data doesn't split up the clicks that are in the box versus, for example, in the menu. So you recall, Sir, that things at the very top, and I think they're now tabs, or other routes to Google's Comparison Shopping Service.

So the request is really one for granularity, and again, Sir, we have taken on board what is said about what's available. But the question is why one would not at least make an effort to think constructively about what could be searched for.

THE CHAIR: So here you have got quite a bit of data, but not as complete or as granular as you wish?

MS LOVE: As would enable most robust and complete analysis as possible.

THE CHAIR: So it's a bit different from the two previous categories, where you just don't have it. Yes.

So we'll park those three. A9 -- and then we'll have our break -- A9 --

MS LOVE: Sorry, sorry. In deference to Mr Pickford, I think he had things to say on A8.

THE CHAIR: Yes, I was going to come back to those three, but if you want to say something about A8 --

MR PICKFORD: Just so these points don't get lost. Obviously A7 and A8 also engage the OneBox point, which we're going to have to come on to at some point. I'm not seeking to open it before the lunch adjournment, I'm just noting that there's an additional consideration here, not just the fact we haven't got the data.

MS LOVE: A9, Sir, as you said, is about the Product Universal. It is now limited, as you'll see from the red text at the bottom of 136, to countries where there was both a OneBox and a Universal. So again, it's UK and Germany only. Now here, Google has disclosed -- or will disclose, I'm not sure -- I think will disclose the data for UK and Germany, and they disaggregate by link type, although not by device type. And for click data, we're told that everything available has been disclosed. And again it's unreasonable, it's disproportionate, burdensome to search for alternative sources.

Now, this is a relatively narrow request. Again, we're focused on two countries, limited period. Again, we appreciate that what isn't there, isn't there, but our question is: can we have some constructive searching to see what is the best available information?

It is necessary for investigating the question of abuse in the Pre-Decision period, because of course, you'll remember, Sir, that the theories of harm that Mr Hunt wanted to explore -- his Questions Two and Three are forward looking -- so the question is whether there's conduct that took place in 2006 and 2007, that has effects and confers benefits and competitive advantages on Google in the later period, and that starts with the demotions in the earlier period, and it will enable a comparison of the Pre and the Post-Decision periods.

MR PICKFORD: Just to observe that this point is, in my submission, on all fours with A8. The debate here is that there is some data. We're providing them with what we have. In this context, we do have the CTR data, but we can only split it by link type. We can't do it by device type. And we say they should be content with that, because they're getting what we've got, and it's disproportionate for us to have to search for more than that, when we don't even know whether anything further than that exists. There's no evidence to suggest that we have what they're after.

THE CHAIR: Yes. And there's no particular reason, is there, Ms Love, why Google

would have much on device type split? It's rather different, isn't it, from the commercial reasons why they might have had the other form of data? Well, some of which they did have, but they no longer have with their 400-day policy -- the data retention. But why would they keep any data split by device type?

Further submissions by MS LOVE

MS LOVE: If I could -- if I may start by observing that it's -- I don't know what Google kept or didn't keep. The issue here is that we're not even going to sort of try to search custodians to look at it. One would imagine, Sir, that in thinking about what the SERP looks like and how to optimise things and how to make them appear on the mobile phone -- I think, I can't remember if the iPhone was 2007 or 2008 -- but when the smartphone comes up, there are obvious implications for how these things are designed, for what is done to see who's clicking on what and where and what should be done in these different formats.

If I may say so, Sir -- and I appreciate this is a sort of submission from the Bar -- it would seem somewhat surprising that Google is not looking at this, is not having meetings, having reports, having discussions, trying to gather data, even if not comprehensive. Again, we appreciate that it's not stored now in a systematic form, but what we're asking for is just to try to run some searches. I don't think I can take it much further, because I don't know what they do or don't have.

THE CHAIR: The thing is, you've got -- they did keep the data, and this was the form in which they disaggregated it. So that's the difference here. So the notion that they would somehow have it in a different form appears slightly surprising. So A9 is -- just so I'm clear -- it's from the introduction of the Product Universal to the introduction of the Shopping Unit. So this is for what can -- it's for UK and Germany.

MS LOVE: Yes.

THE CHAIR: And what's the period?

MS LOVE: Product Universal in both was January 2008. I think I'm right in saying Shopping Unit was 2013, but I'm going to look behind me. Yes. I'm sorry. The names all blur into one to an extent. The Shopping Unit is 2013. So you're basically looking at the countries that began with the OneBox, and then it evolves to Product Universal and it evolves to the Shopping Unit. We're wanting to understand what is happening before and after the Decision period. (Pause)

THE CHAIR: Having got the only alternative then, if that is not available, and it's important to get a sense of the device type, is just to use public sources on changes of use, on the extent to which people searched on smartphone as opposed to on laptops or desktops, and just apply that as the only proxy.

MS LOVE: I mean, I hesitate to speak for Mr Hunt. I'm not sure that will tell us about who is clicking on -- that will tell us, obviously, what people are searching on. I'm not sure it will necessarily tell us how they're clicking on and where the traffic is going and what the click rate is, the proportion of time --

THE CHAIR: But you're getting the click-through rate by link type, but you want to know, "Well, how is it split by device?" And if there's nothing in Google that can tell you that, either you just don't make the attempt at all, or you have to resort to a public source of being the extent to which people use different devices as the best proxy, and there's nothing else one can do. That can't be criticised if there's nothing else that's available.

Further submissions by MR PICKFORD

MR PICKFORD: Indeed, Sir. I mean, I know we parked some of these. If I can make

just two short further submissions on these points. The first is this: over 110,000 documents have been disclosed so far in these proceedings, including going to Google's strategy in relation to the boxes in question and in relation to algorithms, *et cetera*. The Claimants haven't pointed to a single document where they said, "Look, here's an example of what we're after, of what we mean. Here's an example of where it looks like there's this big data cache that you've got, and you could provide that". Now if they come forward and say, "Look, here's plenty of examples of that", then there might be greater merit, in my submission, in the idea that we're going to be able to find data through searching documents. But in the absence of that, we are deeply concerned about being asked to do, we say, the impossible: searching for a needle in a haystack, and we don't even know exists.

THE CHAIR: I may interrupt you, because we've got to break. I think there's a difference, seems to me, between A9, where there's nothing to suggest you did that. You're giving the data -- that you've got the data, you're giving the click data, and the way it was disaggregated by Google, to say that you would have done it some other way.

MR PICKFORD: Yes.

THE CHAIR: So I'm not so sympathetic to the request under A9. But when you go back to A5b, that's different, because there you have the data, but you only retain it going back 400 days. So it did exist. Indeed it existed when quite a number of these proceedings were started, and could have been retained. Therefore, because you had it at the time, there may well be discussion of it, comment on it, because, presumably, you gathered the data for some reason by the people working on Google Shopping. And there's more reason to think there's something to search for. So there does seem to me a difference in the case where the data did exist but has not been

retained, and the current position where you (audio distortion) there's no reason to think you ever had it.

MR PICKFORD: I'm instructed that what we keep for 400 days is source data and code, from which we can reconstruct. So when I was making the point before, about being able to reconstruct data for the last 400 days, that was not because we had the data in the form that is required by the Claimants for those days. It's that we do have sufficient underlying data and code that would enable us to reconstruct it. So that is material to this idea that we're going to be able to find it through document searches, because it's not that we've ever had the data or there's no evidence that we've ever had the data in this particular form. It's that we have 400 days' worth of data from which we could reconstruct it, and that's important in that context.

THE CHAIR: Thank you. Yes. I think, Ms Love, I've reserved A5b, A7, A8 and A9. I think that that does seem to me to be something, to do searches for something like that when it didn't exist seems disproportionate. So I won't grant A9. Then we go on to A11, and we'll have to do that at 2.10 pm.

MS LOVE: I'm so sorry, Sir. I'm asked to just check for A9, that there were aspects of it that were agreed. I assume that you were not --

THE CHAIR: Obviously the bits that are agreed are fine, and we're only dealing with the --

MS LOVE: Yes. I'm sorry (overspeaking) --

THE CHAIR: -- bit that -- I think that the -- well, A9, you say --

MS LOVE: It was the click-through rates. I think that we were going to get click-through rates for UK and Germany disaggregated by link type, and also for some other countries. I thought I had --

THE CHAIR: That's already disclosed -- is also disclosed.

MS LOVE: Oh, sorry. I'm looking at "Google agrees to produce", on page 136.

THE CHAIR: Yes.

MS LOVE: And over the page, we've got Google. Oh, no, I'm sorry. That's not agreed. I'm sorry. But yes, my point was that insofar as things (overspeaking) --

THE CHAIR: Disaggregated by link type --

MS LOVE: Yes.

THE CHAIR: -- for those two countries, which is the only two countries that actually want, is agreed. And it's not clear to me whether it has been disclosed, but if not, it will be.

MS LOVE: The only two countries where there is this issue of -- and I'm sorry, Sir, I'm mindful of the time. The only two countries where there is an issue of a OneBox and then a Universal and a Shopping Unit are the UK and Germany. Sir, I'm just being reminded that it's a little bit unclear.

THE CHAIR: Well, Mr Pickford, can you help. On page 136, it says, "Google agrees to produce CTR data ..."

MR PICKFORD: Yes.

THE CHAIR: On page 137, something suggesting you've already done it, but there's a slight inconsistency, the way I understand it. So maybe I've misunderstood it.

MR PICKFORD: I think the difference is between the click data and the CTR data, they have the click data --

THE CHAIR: I see. The click data --

MR PICKFORD: It's the CTR data we agree to produce.

THE CHAIR: Right. Yes. So that's agreed. Yes.

MS LOVE: I think we are making progress. We're about to finish -- we're close to finishing Table 1, and then we'll get on to the delights of the Penaltyserver after lunch.

THE CHAIR: Right. Okay.

(1.17 pm)

(The short adjournment)

(2.17 pm)

THE CHAIR: Yes, Ms Love. Can I just ask, have your clients or AlixPartners, have they looked at -- approached SISTRIX for data?

MS LOVE: I can take instructions on that. I'm getting a nod from Mr Hunt. Our clients have such data as are available from SISTRIX that are relevant.

THE CHAIR: Because from what one can see from the Decision -- and that's my only source -- they seem to have data certainly from the end of 2010 monitoring the position of sites' visibility, and I think Mr Hunt's interested in visibility of all sites on Google, on a very frequent basis and weekly or ... So, as far as visibility is concerned, that will be a basis for getting the information he needs, it seems to me.

MS LOVE: Sir, I understand that it is a sampling methodology, as opposed to a more comprehensive data set. We can come to the question of alternatives in relation to A18 to A20 when we get there. I was --

THE CHAIR: I was thinking of A5b.

MS LOVE: I think that was the earlier period, wasn't it? So --

THE CHAIR: Well, it covers the earlier period, but it extends to September 2017. If this is important, then it's helpful to know and, similarly, if one restricted the search to the period up to 2010, that makes it, of course, less disproportionate. The longer the period to be searched for, the greater the burden, the more the number of custodians changed and so on.

MS LOVE: So if what you're saying is that we should try to dovetail, so the second that SISTRIX takes over, even if it isn't perfect, and we go back from there --

THE CHAIR: That's what I was floating --

MS LOVE: I don't think we would --

THE CHAIR: -- as a possibility.

MS LOVE: I don't think we would disagree, Sir. Obviously, right now, we face a blank "no".

THE CHAIR: We haven't had a narrow request and Google might say no, but it's all a question of trying to find a means of getting data that helps your expert without wholly disproportionate burdens on the Defendants. If there is another way of reducing that request, that still achieves meaningful outcomes, then it's worth exploring. That's why, as I understand it, this is about a means of getting a proxy for visibility. If we have another source of visibility for CSSs and major merchants from 2000 and sometime from 2010 onwards, one could reduce it to the period from 2006 to 2010. That will be quite significantly different from going up to September 2017.

MS LOVE: Sir, I see the force of that observation. I can take instructions. I'm reluctant to speak on my feet for fear of missing (inaudible). I'll take instructions.

THE CHAIR: No, well, I think it's something to raise with Mr Hunt. (Pause)

MS LOVE: 2006 to 2010 is good for us, Sir.

THE CHAIR: Yes, and then the access to SISTRIX would take over. They may not be directly comparable, and you don't know what you'll get, but it means that it's a more limited search on the part of Google.

Well, Mr Pickford, I do think visibility is important, and I appreciate you don't keep CTR data, but you don't know what such a search might come up with in terms of visibility and/or CTR data and its CTR or next best available data. If it's restricted to that period, it's more modest, still onerous. But this is a big claim and you're a large company and you have committed a serious infringement of competition law, so one can expect that

you're going to have to do significant disclosure searching.

MR PICKFORD: Sir, I hear you, but I'm not going to volunteer it but I can see that we may be ordered to do it. And I think I should make clear that obviously we will do, if we're ordered to do it, we'll do what we can that is proportionate, but it might not turn up anything, for the reasons that I've already submitted.

THE CHAIR: And I understand that.

MR PICKFORD: And what we don't want to get into is then -- I mean, obviously the Claimants would be permitted to say, "Oh, the reason why it didn't turn up anything is because you did something really stupid" but if what we've done is reasonably sensible and proportionate, given what we're being asked to do, which is in relation to a time period a long time ago and it doesn't yield anything, well then our position will be, "We tried. We told you. I'm afraid there is nothing".

THE CHAIR: Well, we don't know what might come out, if anything.

MR PICKFORD: We don't.

THE CHAIR: And nobody can tell that. But I think that is a reasonable period, in the circumstances. And of course, your obligation is not to produce such documents. Your obligation is to conduct a reasonable, proportionate search. You will know who the relevant custodians, who the sources, are. I mean, that's obviously not something the Claimants can tell you within Google.

MR PICKFORD: (Inaudible) Claimants and we will have to make an informed judgment about who might be sensible.

THE CHAIR: And I think it's for the UK and, I think, it's all Decision countries. It's not all EEA countries. It's just the countries that you're claiming for, I think, looking at column one.

MR PICKFORD: I thought this was just UK and Germany because that was -- but

I might have been mistaken and confusing it.

THE CHAIR: I think this is about the claims, isn't it?

MR PICKFORD: Sorry.

THE CHAIR: And Kelkoo is claiming from 2006 and Kelkoo covers pretty much all the Decision countries.

MS LOVE: Yes. Sir, I thought A5b was UK and all EEA. And obviously (overspeaking) --

THE CHAIR: That's why I'm saying all EEA. It's all Decision countries, it's not countries where there's no suggestion of abuse in countries that are not subject to the Decision.

MS LOVE: I think, Sir, we're content to (inaudible) the searches to Decision --

THE CHAIR: To Decision countries. Yes. I mean, what happened in Finland is irrelevant. So it's all Decision countries from 2006 to, I'll say, December 2010; January 2006 to December 2010. And that's A5b.

A7 is also Pre-Decision. So that goes up to different dates in different countries. It really goes with the -- I mean it can be combined, I think, with the other search because this is the ones going to the Google CSS and A5b is going to other CSSs and merchants, as I understand it. So I think, similarly --

MR PICKFORD: The only thing on A7 --

THE CHAIR: Yes.

MR PICKFORD: -- is that this does seem to engage, perhaps not as acutely as some, but the OneBox issue because what I think we're being -- I think part of the reason for this is the assumption that there's a OneBox claim. What we're being asked for under A7 is the clicks and CTRs on the menu links that directed users of the SERP to Google Comparison Shopping, which I think would have been a box.

THE CHAIR: Didn't Google's Comparison Shopping just come up on a generic search?

MR PICKFORD: No, it didn't.

THE CHAIR: Unless you actually put in the URL link for Google Comparison Shopping, you wouldn't get there from the general search.

MR PICKFORD: The way you'd end up there is, potentially, you might get directed there through a box.

Sorry, there was a header link as well that could come up.

THE CHAIR: Yes, that's not linked to the OneBox.

MR PICKFORD: That's not OneBox. That is true. I mean, it's slightly true. As I said, there are some where it's much more acutely, this is a OneBox claim.

THE CHAIR: I think we should -- no, Mr Pickford, I think it seems to me A7 is part of the picture. If we're going to the other CSSs, whether it goes through the OneBox or not, I think we better have A7 and it will -- In fact, I mean, some of it -- yes. (Pause)

Yes, I think A7 is -- (Pause)

Pre-Decision and Post-Decision.

Yes, we'll include A7 as well. We'll come back to A8; A9 that relates to the Product OneBox, I think. Well, A8 does and A9 we've dealt with. So A8 is now held over to return to and we've dealt with A9. So then we go on to A11.

Discussion re data

Submissions by MS LOVE

MS LOVE: Yes. So we are now in page 139 of the Scott Schedule. And these are the clicks and click-through rates on the Shopping Unit, including the Compliance Mechanism where it was introduced. So this is the period from the introduction of the

Compliance Mechanism, 28 September 2017 to date. And this is obviously required to assess the question of potential abuse in the Post-Decision period. A10, for your note, related to the Decision period, but that's not being pursued on proportionality grounds.

Now, we have Google's points about relevance and Mr Noble saying that this is all a design question so we don't need the data. And we have something about the data only being available after December 2023 for click through rates and the extraction being disproportionate. I think I've already addressed Mr Noble's conceptuals.

Mr Hunt maintains the request because it does seem to us that this is data that could be extracted or reconstructed, and doing it wouldn't be disproportionate. We want to understand how consumer behaviour has changed and changes in traffic to CSSs since the introduction of the Compliance Mechanism. We want to understand how user behaviour has changed, if at all, since the remedy came. And we want to understand -- it's necessary to see the clicks and the click-through rates that lead to Google's CSS and also to merchants. Get that picture.

Now, we understand from what is said about Wisking 7 in the Abuse JES -- and I think that is in Bundle 2, behind Tab 1, page 29 -- that clicks data on the Shopping -- sorry, I'll just give us all time to find that.

THE CHAIR: Are you looking for Mr Wisking's Seventh witness statement?

MS LOVE: I'm looking for the paraphrasing and summary of it that is in footnote 110 to the Abuse JES which is Bundle 2, Tab 1, page 29.

THE CHAIR: Yes.

MS LOVE: I apologise about the font size.

THE CHAIR: Click data on the Shopping Unit (following the introduction of the Remedy) until at least click data. Same is available for CTR data until December 2023.

MS LOVE: Our understanding is that this is data that can be extracted or reconstructed. Doing so wouldn't be disproportionate and would be obviously relevant. And the breakdown by link type would allow an analysis of the relative traffic volumes for CSS relative to the other links in the Shopping Unit. And in those circumstances, we really say that the objections come to nothing. (Pause)

THE CHAIR: Mr Pickford, what do you say about that?

Reply submissions by MR PICKFORD

MR PICKFORD: So, our position on this is that the Claimants are going to be getting data in relation to clicks and CTR, in relation to the Shopping Unit generally. We've gone through a number of those categories, and there are some that have been ordered and some that they were getting anyway.

What A11 is, is a very detailed set of disaggregation of data that we don't have. We don't have the granularity that is sought, over the period for which it is sought. And, whilst I understand that the Tribunal has been sympathetic to the general submission, well, there's something that I'd like to look into. I'm not going to tell you exactly what my hypothesis is yet, but I think this would be an interesting area to explore. That has to be balanced against how onerous it's going to be to try and comply. Obviously, if there's something that we can provide, that's one thing, but if there's information that we don't have, we say that's quite another.

So what we do have, in relation to the availability of data, if you see about halfway down, "Google's position", is the CTR. So they can have clicks -- subject to it, they can't have quite the breakdown that they want -- but we do have clicks data. But in relation to CTR, the data request is only available post-December 2023. (Pause)

Sorry. Yes, I was slightly -- it's only available -- sorry, the CTR for this data request is available until December 2023, over the entirety of the period. Right, sorry, I'm just

going to take one second. (Pause)

MS LOVE: Sir, we'll --

THE CHAIR: Just a moment.

MR PICKFORD: Yes, so in effect, the monitoring period and a little afterwards, we have the data that's broken down as sought. We don't have it for the period post-2023.

THE CHAIR: So you can give it up until December 2023.

MR PICKFORD: Yes, which obviously in terms of the analysis that is sought, which is to say, well, let's see what happened in 2017, that obviously goes a long way to addressing that; it's six years' worth of data.

THE CHAIR: Yes.

MR PICKFORD: What we are very reluctant to do is seek alternative sources for something when we can give quite a lot, we just can't give the full range in relation to that.

THE CHAIR: And because it says -- the footnote says it's available until December at least.

MR PICKFORD: Yes.

THE CHAIR: December, and on the Scott Schedule, it says only available post-December.

MR PICKFORD: That's an error.

THE CHAIR: Right.

MR PICKFORD: "Post" is an error.

THE CHAIR: So it should be "until".

MR PICKFORD: Yes, it should.

THE CHAIR: Yes.

MR PICKFORD: And there's just one other point to make on that. So, what we can't do for any of this is to disaggregate by device type, because it's not -- we've gone over it before, it's not what we do. We can give them quite a lot of disaggregation but we can't give them that disaggregation. And we say it's pointless for us to be asked to try and find something that they're not going to get.

THE CHAIR: Yes. Well, Ms Love, it looks like, in fact, until December 2023, you will get this, except for disaggregation by device type. But other aggregation you're going to get. So that's quite a substantial disclosure.

MS LOVE: The inconsistency from the "post" and "until" was one that Mr Hunt had picked up, I think December 2023 is fine.

Before I say anything definitive on device type, I ought, in deference to Mr Hunt, (inaudible). We'd like it. If it's not available, it's not available.

(2.40 pm)

THE CHAIR: It is not available. I can see why you would like it, but I think if it is not available, I am not going to -- and they did not analyse that way. There is no point in searching for it.

So I think on that basis it will be this data, until December 2023, disaggregated, so far as possible as sought, but not by device type. So, we delete by device type.

(2.41 pm)

THE CHAIR: Very good. Well, that's very helpful.

Discussion re Google CSS traffic

Submissions by MS LOVE

MS LOVE: We then move on to A13, page 140, which is the outgoing traffic from Google's Comparison Shopping Website to merchants. And I think I'm correct in saying that this is a Pre-Decision -- this is across the pre-Decision, Decision and Post-Decision period.

Now, Mr Hunt, again conscious of the data limitations, is requesting the best available data, and with Google, we have a familiar refrain of it's not relevant or necessary, and I think it's said to be unclear whether it is available. We're told in, I think about the second paragraph of the Google column:

"Notwithstanding Google's position on the irrelevance ... it has not been possible ... to confirm whether ... [it's] available ..."

And we say that it's going to help to corroborate and understand whether Google had a multi-period strategy to generate relationships with merchants and how the outgoing traffic evolved. And those are the Questions Two and Three from the Abuse JES that we've looked at, and it's going to assist in understanding whether competing comparison shopping services were being disadvantaged, and Google's relative advantage, by demotions.

THE CHAIR: This is traffic from the Google CSS, as I understand it.

MS LOVE: Yes, outwards to merchants.

THE CHAIR: Well, the first question is what's available, which those advising Google hadn't established at the time, the Scott Schedule -- what is the position, in terms of what's available?

Reply submissions by MR PICKFORD

MR PICKFORD: So, I apologise, Sir. We have chased; we still don't have an answer. The relevant team is in Israel. There have been difficulties in getting information from them. And that difficulty was particularly acute at the time of writing Wisking 8. And,

those behind me have continued to chase to say, "Okay, you couldn't tell us, now then can you please tell us?"

I'm afraid I don't have an answer as to what is available. I regret that. We produced a lot of information about what is available. Unfortunately, I don't --

THE CHAIR: No, I understand. Well, it's not very satisfactory, because things in Israel have quietened down significantly, and if they gave it priority, they could have provided it and given you instructions. It's not a difficult thing to know. It would be surprising if those responsible for the Google CSS, do not evaluate its performance in some way, and this would be a fairly obvious way of doing it, but there will be, I would have thought, almost certainly a company like Google, sophisticated as it is, particularly in analysing data, there will be a continuing evaluation of the performance of the Google CSS.

MR PICKFORD: Can I also address you on relevance, Sir?

THE CHAIR: Yes.

MR PICKFORD: There is a general point, which is we're not sure what the hypothesis is, but there's actually a more specific application of it here, which is in relation to the question of abuse. Abuse has been established for the period of the Decision. And it's not clear -- this request is for a data set of over 20 years, also encompassing the period of the Decision. It's not clear to us where this is actually going, in terms of analysis that Mr Hunt needs to carry out. Why does he need to know, we say, about Google's outgoing traffic to merchants in order to assist the Tribunal in the matters that we're actually going to be deciding?

So I do have a submission to make on that, and that's that point. I apologise that I'm not able to provide better information in relation to what we have.

THE CHAIR: Yes. That won't apply to the Pre-Decision period. Certainly if we start

in January 2006 --

MR PICKFORD: Yes, although in relation to the Pre-Decision period, the key question, unless there's a OneBox claim, is: what was happening to rival CSSs as a result of demotions? And it's not clear to us that this is going to help Mr Hunt answer that question either.

THE CHAIR: If I think he wants to look at how the performance of Google CSS compares to other CSSs --

MR PICKFORD: Yes.

THE CHAIR: -- to see whether if one is improving and the others are all declining, that might indicate some discrimination. It may be because yours is so much better. But, if they were all increasing at the same rate, it might suggest that there's no discrimination.

So I can see why that's relevant. Similarly, in the Post-Decision period, it might be relevant.

Let me ask Ms Love about the Decision period itself. I can see it may be relevant to quantum, but why is it relevant to abuse or the Counterfactual in the Decision period? If I look at the justification, quoting from Mr Hunt's letter in your column on page 140, the first bullet point is regarding the Pre-Decision period, and the second bullet point seems to be, so far as it relates to the Decision period, talking about abuse, which you don't have to prove.

MS LOVE: Sir, Mr Hunt does want to be able to look at how things have changed over time, because as you've seen, the question in, for instance, in relation to Kelkoo's Pre-Decision claim, is that there has been a multi-period strategy. And obviously, if one puts down the guillotine in 2008 and lifts it up again in 2017, then you've got a big break in the middle of the time series. If what you're asking is, can we narrow? So

it's a certain period from the Decision when the Abuse was found to have begun, and it can be narrowed for a certain period before the Remedy came into force, because we're looking across the piece there, I can take instructions on it. But, Sir, as you've said, it does seem surprising to think that those who were in charge of looking at Google Comparison Shopping wouldn't have had an eye on this sort of thing, and once one is doing the searches, I do ask, is a proportionate thing --

THE CHAIR: I think it's not said that they weren't, it's said that they can't get instructions, which is disappointing. We've had the explanation, but can you just get instructions of whether the period can be curtailed? (Pause)

MR PICKFORD: Whilst that's happening, can I suggest that if the Tribunal is minded otherwise to make an order here, that we be directed to provide what data we hold, insofar as we hold it in response to the request, over the time period that the Tribunal directs.

THE CHAIR: The best information you can provide.

MS LOVE: Sir, I'm told that, while obviously, the complete time series is preferable, the early period 2006 to 2010, would give one a sort of snapshot of the transition, and then if one took a similar two years before, then it would be 2015 -- I'm sorry, I'm forgetting how to count -- onwards, and obviously we'd prefer not to have the five year gap, and this is subject to what Mr Pickford finds out about what is available. But in principle, we can see how it could work in that way.

THE CHAIR: Yes, well, I think that's reasonable.

(2.51 pm)

THE CHAIR: I think it does come into the decision period, but I can see you want to look at how the strategy evolved. So I think, 2006 to December 2010, and I will say,

1 July 2015 to date, Google to provide the best information it can, as regards the traffic specified in A13.

(2.52 pm)

THE CHAIR: And then go to A15.

Discussion regarding penalty data

Submissions by MS LOVE

MS LOVE: Yes. We now move on. A15 and A16 are what Table 3 of the JES was on, and we now move on to the world of penalty data, which is, of course, the other aspect of what users are seeing, and traffic, which is what they're not seeing, because it's not showing up where it would otherwise have done in the SERP. Among the penalty data requests, A15 and A16 are what remain in dispute. They concern Penaltyserver data, which is demotions of other CSSs' websites or domains.

A15 is about penalty data for the Claimants' websites. So I say "the Claimants", but as we'll come on to it, it's actually a very small number of individual websites. A16 is penalty data for other CSSs, and we've gone with the 361 SO Response Aggregators.

Now, Sir, I'm sure you will recall from the November CMC that the Penaltyserver tool can be used by Google engineers to test whether certain algorithms or manual penalties have been applied to a site. Google has these Penaltyserver files, and they are records of the sites that have been affected by algorithms and manual penalties, although they're not completely comprehensive.

Mr Hunt asked for all algorithmic penalties and we have now narrowed to Algorithm A, Panda, Coati, and any successors for the Post-Decision period on the grounds of proportionality and all manual penalties, and the strength -- which is the penalty score -- the time periods of application, and the reason why each was applied. He did

ask for the penalties applied to each domain, and he has now narrowed that by excluding those Kelkoo domains that represent a very small fraction of the traffic.

So I believe that there are two Kelkoo domains with known gaps, and their names are shaded, which suggest to me I probably can't read them aloud. I'm just searching through here to locate where I will find them in the Scott Schedule. Sorry, they're not in the Scott Schedule, I'm told, but they will be in the Abuse JES. And it's for the period between November 2006 and December 2007. Yes. Sorry that -- it's in the JES, internal page 34. Let me just find the bundle. So that will be Bundle 2, Tab 1, page 34.

THE CHAIR: Forgive me. Is it page 34?

MS LOVE: Yes.

THE CHAIR: Abuse JES.

MS LOVE: Yes.

THE CHAIR: I think they're in the right-hand column.

MS LOVE: Yes, they are. They are the two --

THE CHAIR: One is French and one is British.

MS LOVE: I'm going to be circumspect, but they are the two in blue. Yes. You identified them, Sir.

THE CHAIR: So I'm just ... (Pause)

So for the period November 2006 to December 2007 for these two Kelkoo domains. So that is what you're now seeking.

MS LOVE: Yes. I'm sorry, I don't know if it applies to these two, but I think there is also an issue about whitelisting, protection signals, hot domains and device type issue. But I don't think that that applies to the A15 requests. That's more for A16. But I'm going to look behind. I'm sorry, that also applies to A15, I'm told.

THE CHAIR: We come back to the usable format point in a minute, but the -- well, I'm

not clear. Is that now it or is there anything on any of the Foundem, Ciao and Connexity domains. Is that resolved?

MS LOVE: Not for A15. I think A16 is a more comprehensive --

THE CHAIR: So, in A15, for Kelkoo it's just those two, but in the Pre-Decision period ...

MS LOVE: I think it's just those two, but I'm going to, given the cumbersome nature of the Schedule, I'm going to --

THE CHAIR: I think there's -- but then there's the question of the Decision and the Post-Decision period. (Pause)

MS LOVE: I'm sorry, Sir. I've misspoken. The two blue ones are for the Pre-Decision period, and all of the current domains are for the Decision and Post-Decision I apologise, Sir, for my failure to navigate.

THE CHAIR: This is a blue one, so ... But if the two blue ones are the two Kelkoo ones in the Pre-Decision period, are there also the other three Claimants in the Pre-Decision period or not?

MS LOVE: No, Sir, it's just those two for the Pre-Decision period.

THE CHAIR: It's just those two. And then, for the Decision and Post-Decision period, it's all four. Is that right?

MS LOVE: It's the Claimants' domains listed in the Annex. (Pause)

THE CHAIR: Why is the Decision period relevant? As opposed to the Post-Decision?

MS LOVE: Sir, Mr Hunt wants to understand what the impact is of the demotions on the visibility of, and the traffic to the rival comparison shopping services, both on their own and in conjunction with the different forms of the exclusionary promotion and display of Google's own CSS in the Shopping boxes, as well as understanding why demotions would apply to particular CSSs or domains, and why some sites may have been exempted, whether by whitelisting or some other hot domains thing. Again, it is

a question of having the full picture across the time series. Of course, Mr Noble's approach is that one doesn't even need to look at it --

THE CHAIR: Well, we know that, but I'm not concerned with that. I'm trying to understand Mr Hunt's approach --

MS LOVE: We want to.

THE CHAIR: -- and whether it -- and the Decision period ...

MS LOVE: The Decision period is there as a comparison, and that is explained on page -- I'm sorry that we end up with these very long columns. That is explained on page 145, in the second paragraph, in the very, very long "Claimants' position" column, in which it said that, basically, what we want is the pre, during, post -- the time series -- but what we need the Decision period for is to compare what is happening before and after the abuse that's been found by the Commission begins. We want to understand, and that will help to understand whether the Compliance Mechanism, along with any potential penalties still being applied, how close that looks to competition on the merits. But on the post-Decision period, if Mr Hunt and Mr Noble can agree factually that Google is continuing to apply penalties reflecting inherent characteristics, and he doesn't want it to the Post-Decision period.

THE CHAIR: No, I don't think they are saying that ... (Pause)

Given that this has to be extracted from the Penaltyserver data -- if it were to start in 2016, that will give sufficient comparison because, as I understand what's being said, having just reread it, Mr Hunt wants to see whether or to what extent things changed in the Remedy period. So that will give him about 18 months pre-Remedy. It is said for all Kelkoo, Ciao, Connexity and Foundem domains. Well, there are a lot of them. I don't think I've got readily the Annex to this. I think it's the Annex -- an Annex -- to the Joint Expert Statement, when it refers to the list --

MR PICKFORD: Page 56 of Bundle 2, if you have that.

THE CHAIR: Bundle 2, page 56.

MR PICKFORD: At least my paging. Perhaps it's slightly out of date, but ...

THE CHAIR: Yes, 56.

MS LOVE: So it's a couple of columns which are all in blue at the end.

THE CHAIR: Yes, I see, "Mr Hunt's Annex". But Foundem wasn't trading Post-Decision, was it? I don't think. It stopped trading by then (inaudible)? Isn't that right?

MS LOVE: Yes, yes. The search "self narrows" in that regard.

THE CHAIR: Will that be a top ten Kelkoo domains and a top -- I don't know - with the Connexity domains demands, presumably, some are much more significant than others.

MS LOVE: I'm going to take it -- we're now well beyond the shadows of my expertise. I'm going to turn around, if I may.

MR PICKFORD: Sir, I appreciate that, obviously, what the Tribunal is seeking to do is to work out what might be a different and more proportionate version of what's being sought. However, I -- and I quite understand why the Tribunal is doing that -- I have some submissions to make about this, and whether it's proportionate at all. I'm obviously in your hands, if you'd like me to make them, but I have quite a bit to say. That's what I'm ...

THE CHAIR: Yes.

MS LOVE: So as regards the narrowing, I'm instructed that the issue is obviously that there are a range of countries in place, so it's not that -- so, for instance, in relation to Kelkoo -- and I'm sorry, I'm conscious this is all in neon blue -- it's not that we're duplicating a lot of domains for each Member State, it's that you'll see from the

suffixes --

THE CHAIR: There are about 11 under the one name, and then there are some others, so that one might be picking in each country, but -- well, I'll leave you with that thought and listen to Mr Pickford about whether there should be any disclosure under A15, which is what you want to address me on.

Reply submissions by MR PICKFORD

MR PICKFORD: Thank you, Sir. Yes. So, this is a topic that we have obviously canvased before, in particular at the last hearing. Could we please go to Mr Wisking's Eighth statement? Because it's important to contextualise what's being sought here. So that's in the first bundle. It's at Tab 17, and I am going to page 150.

THE CHAIR: Yes. Paragraph 58.

MR PICKFORD: Exactly. So, if I could ask, Sir, you to read paragraph 58. So, firstly, what we've already done on this very topic -- and it's very extensive.

THE CHAIR: I have read this and, I may be wrong, but I seem to recall there was nothing for the Post-Decision period. Was there?

MR PICKFORD: That is right, because their initial focus was on the Pre-Decision period. We're now coming back.

THE CHAIR: We're now really only focused on the Post-Decision period.

MR PICKFORD: Well, sorry, I --

THE CHAIR: I've said that I don't think it's appropriate for the Decision period, other than perhaps for a year or two, to get a comparison. So we're starting in 2016 now.

MR PICKFORD: So, the request is not only for the Post-Decision period, (overspeaking) --

THE CHAIR: You're right, but I said a few moments ago that I don't see why they need it for the Decision period, other than for a little bit to have a comparison to see what

changed.

MR PICKFORD: Understood, thank you.

Well, in relation then to the Post-Decision period, it is important, we say, to bear in mind, in terms of what the Tribunal ultimately orders, that what is required when responding to these requests is very substantial input in essence, from one particular engineer, because this is not an area of expertise across a large part of Google. There used to be one person, and I think they've now left Google and they've been replaced by someone else, who is effectively the engineer who is able to engage in the kinds of work that's required to query the relevant data. They don't, obviously, generally do this for their day job; they have other things to do. So it's important to contextualise this request by reference to that. This isn't something that Google can just send one of many engineers off to do, and that's one of the reasons why we have tended to be very keen on trying to keep the nature of the requests as focused and as proportionate as possible. So that that's the first point.

Secondly, in terms of what is being sought, in my submission, is very, very extensive, including for the Post-Decision period. So, for the Post-Decision period, if one reads it, at the bottom of the -- I think it's the second page of A15 (page 142-143):

"... any successor algorithms to Algorithm A, Panda and Coati, which were applied to web pages that were ranked in Google's generic search results due to certain characteristics of those web pages, and which were prone to demoting CSSs due to their inherent characteristics in a similar way to Algorithm A, Panda and Coati algorithms and/or have a similar effect as these algorithms on the visibility of CSSs in organic search rankings (for the period from the start of application of such algorithms until the latest date of application)."

Then:

"The information should include ..."

"The strength ... of the penalty ..."

"The exact time [that it applied] ..."

"Underlying reasoning or criteria for each algorithmic and manual penalty (i.e. why the penalty was applied to the domain and/or what characteristics) ..."

"Data on when and for how long each domain/ subdomain was whitelisted for each penalty [et cetera] ..."

It goes on. It's incredibly detailed and the resources that would be involved in seeking to provide this kind of information and not to say also the judgement in deciding whether something actually corresponds to what's being sought here, we say is very onerous. And we do really have to have a clear reason for interrogating all of this information. I appreciate that in general terms, Sir, you're not particularly persuaded by the submission that we don't know what the hypothesis is here, but I am going to repeat it for this. We don't really know where this is ultimately going in terms of the kinds of level of detail that's being sought here.

THE CHAIR: Well, they don't know what the algorithm is because there's no Commission finding obviously, on Post-Decision. So it may still be (inaudible) if that's still being used, but if it's been replaced by something else, then it will be that something else. So they can't specify the algorithm, but if demotions are taking place or penalties are being applied, there will be an algorithm and it may have a certain name. So that's all I think that the first part is saying, and when you read that out --

MR PICKFORD: It includes the following information.

THE CHAIR: Then one goes to the -- but I imagine that that is exactly why you took me to what Mr Wisking says in paragraph 58. I mean, Penaltyserver data will presumably show the period for which the penalty applied and it will have so that -- in

fact, it says the exact time period and so on, you would expect that's what it's going to show is the time period, some coding of what the penalty is and certainly if it's a manual penalty, it will show the reason.

So it doesn't strike me, although it involves a series of bullet points, as actually rather surprising or excessively granular information. You'd think it's fairly basic information on the penalty. Well, I don't know what we'd see but it might be helpful if we did, in looking at, you know, what the data being produced referred to by Mr Wisking at say paragraph 58(b), but one expects those files will have, for that period and for those domain names, some of this information.

I'm happy to say in so far as that can be reasonably ascertained, the following information, but the fact that it's going to take an engineer and there's only one engineer and a certain amount of time to do that, I think it's a price Google has to pay when faced with the allegations that are being levelled against it.

What I have sought to do, that's the point at which you stood up, is to try and (a) curtail the period, which I've done, going back only to 2016 and not the full Decision. And also because if they have to go, as Mr Wisking indicates, that one has to go and interrogate the files, pull the specific data requested, run the process and verify the output, I imagine that if one does it for less files, less domain names, the work is reduced.

MR PICKFORD: Yes.

THE CHAIR: And that's why I'm looking to see whether we can forget about Foundem because it doesn't apply; Ciao, it's basically one per country. I'm just trying to remember, come back to Ciao in a minute. But whether we can reduce the number of Kelkoo and Connexity domains, so that the amount of work is curtailed. So I'm doing that in response to what you said about the need to call on one particular engineer,

but to -- I think given the allegation is that there continues to be abuse and that's an allegation that's not struck out, I think this sort of disclosure has to be given.

MR PICKFORD: That's understood, Sir. I think the key point that I was seeking to make in relation to the nature of the information that's now sought is that it seems, at least to me, to go beyond what was previously provided when we provided Penaltyserver data. Now, as you say, Sir, some of that may just drop out automatically. Insofar as it's not within the Penaltyserver data that we have been able to seek previously to provide, I would say that it's not proportionate to expect us to seek to try to explain it. For instance -- sorry, I'm just being given some instructions on something.

So I'm very glad a point I thought I could make is very much the point that's being made behind me as well, which is the Penaltyserver data that they were given is files that effectively shows outcomes in relation to domains. What it's not going to do is have qualitative reasoning behind why that happened on a particular occasion.

THE CHAIR: But when you say "outcomes" it will give presumably the dates.

MR PICKFORD: Yes.

THE CHAIR: It will give some sort of indication of what the penalty is.

MR PICKFORD: Yes.

THE CHAIR: So really what you're talking about then is the underlying reasoning.

MR PICKFORD: Exactly. The third bullet point is not going to be something that falls out of the Penaltyserver data that we can interrogate in terms of the precise reasoning.

THE CHAIR: Yes.

MR PICKFORD: Obviously one can make inferences, because one knows, in general terms, the way in which an algorithm might work. But in terms of what's being sought there, that is not something that we're going to be able to provide.

THE CHAIR: Yes.

MR PICKFORD: And --

THE CHAIR: That's something that should be ascertainable from looking at the algorithm itself or interpreting it.

MR PICKFORD: Yes. Well, in terms of the information that we are able to -- that we're going to provide on that.

THE CHAIR: Yes. Yes. Well, I think that's -- but for manual penalties, it may be there is some reasoning, is there, for criterion?

MR PICKFORD: Yes. It's been pointed out to me that there are no manual penalties that are being sought in relation to this particular request.

THE CHAIR: Well, I thought there are looking at the -- I may be looking at the wrong place -- yes. I think it may be that it's been curtailed and it was originally.

MR PICKFORD: Sir, as you know, we obviously have your judgment on the meaning of the Decision and we know that manual penalties are in there, but we also know that it's not really the heart of what's going on in this case. It was not the heart of the Commission's concern. And at all times, we do have to take a step back and say, acting proportionately, what's really going to help advance the Claimants' case. And in my submission, we can reasonably stop at the algorithms about which they complain, rather than adding interesting things that aren't there in relation to manual penalties.

THE CHAIR: I think you're right that manual penalties are not there now and that it's not significant but whitelisting is relevant and that will be produced in the same source, is it?

MR PICKFORD: Can I just take instructions?

THE CHAIR: Yes. (Pause)

MR PICKFORD: I'm instructed that the whitelisting only applies to Algorithm A but it is not something that is going to come out of the Penaltyserver data. What one would see is that insofar as there was an algorithm that was demoting a domain that would then stop but what you wouldn't know is necessarily whether that was because it had been whitelisted. A separate process would be needed to interrogate the issue of whitelisting.

THE CHAIR: Yes.

MR PICKFORD: And again, I come back to saying every additional thing we're asked to do will be additional resources. Do we really need to have further resources invested in whitelisting, which itself has never been part of any abuse allegation, because of course, Google's CSS doesn't appear in generic search results at all? So it's not like there's going to be a claim, "Well, you're whitelisting yourself and not others". Whitelisting seems to be, I would suggest, somewhat like manual penalties, an icing on the cake, but --

THE CHAIR: No, I mean it would be, in a sense, if you rely on --

MR PICKFORD: Yes.

THE CHAIR: -- whitelisting, you'll have to produce evidence --

MR PICKFORD: Quite.

THE CHAIR: -- and otherwise it mitigates the conduct. Yes.

Yes. Well, Ms Love, you will have gathered that I'm sympathetic to some disclosure on this, notwithstanding the amount of work it causes Google but because I think it's for Post-Decision, we'd start in 2016 so that Mr Hunt can see if there are any changes. But I'm concerned about the number of domains for -- can you just help me on, and I just can't remember this. What are the countries for which Ciao is claiming?

MS LOVE: Sir, I'm also being told that we're thinking about a variety of things,

including the role of whitelisting, and also that I need to take instructions on some issues around -- I mean, this is all intimately bound up with the question of usable format and aggregation, because we've got a list of stuff that's been provided, but thousands of files that we have to compile and have to have the benefit of the witness statement of Mr Kwok and the correspondence is deeply unsatisfactory. So this is part of a wider picture. I don't know when the transcript --

THE CHAIR: It's a separate thing we'll come on to.

MS LOVE: Yes. I don't know when there will be a transcriber break but let me just --

THE CHAIR: I'm just trying to remember in the Ciao Proceedings, which is, I think, Whitewater. I think I've had the answer to that given to me. So I think those all apply. Yes. So I think the Ciao ones probably all apply.

Well, it's time to take a short break. Perhaps while I'm doing that, you can take instructions on Kelkoo and Connexity. I'd like to reduce the number. Because this is not, bear in mind, this isn't a quantum trial, so one's just trying to get a sense of what's happening. And if one has ten of them, either it'll show that penalties are being applied or not, and if it's not to any of the ten, it would be surprising if it was to some of the others and we don't need a complete picture. So if you could select some domains from the Kelkoo and Connexity list and take instructions.

The second point then arises is the format in which this disclosure is given because another part of A15 is to say that it should be in a usable format, I think. Is it A15? I think it's under A15. I think it was. No. I can't now see it in the Scott Schedule. It's in the JES statement.

MS LOVE: I think it's towards the bottom of page 144.

THE CHAIR: Oh yes. It's there in the same form. Yes. "Not in an easily accessible and consistent format". And Mr Noble says that it is possible, he says, to process the

files to obtain a usable format, in accordance with the template and he refers to various documents.

I can't reach, it seems to me, a sensible view on that, given the difference between them. But it does seem to me, and again, can you take instructions while I rise, that if Mr Noble thinks that this can be done using these documents to which he refers, in order to process the files, that Mr Hunt and Mr Noble should meet -- they're both highly professional individuals -- and discuss together how it can be done. Either they'll find a reasonable way of doing it, or if not, it may be necessary to go back to Google. But if Mr Noble says it can be done that way, they're both going to be working off this data, I think, even if Mr Noble thinks it's not necessary for the post-Remedy period but once Mr Hunt analyses it, no doubt Mr Noble will want to do so as well. So they need to get them in a form they can both work with, and that should be done through co-operation. You can't really make an order that this shall be in an accessible format because that's wholly unclear.

Further submissions by MS LOVE

MS LOVE: Sir, on that, we entirely agree with what you just said that it needs to be aggregated so it can -- no one is saying it cannot be done. I think the question is really in whose hands the resources and the knowledge and the wherewithal best to do it lie. And perhaps if I can show you -- and I'm sorry, I'm conscious that some of this is LEO so there's a limit to what I can say -- but can I ask you to turn in Bundle 6 to page 125. I don't know what tab it is.

THE CHAIR: 125?

MS LOVE: Yes, and you'll see something that looks rather like the sort of fabric on District Line tube trains, if I can put it in that way. It's a very jazzy, multicoloured moquette. This is one of the two -- well, it's actually a printout of an Excel file and we'll

have a whole separate exciting debate tomorrow on native versions. I'm afraid it's printed out in a rather difficult to interpret way. But this is one of the two documents, the two spreadsheets, to which Mr Hunt is referring in Row 15 of the JES. I've got another one which is printed out in a less helpful format. I think my solicitors have also sent you an Excel file, but I --

THE CHAIR: When you say Row 15?

MS LOVE: Row 15 of the Abuse JES.

THE CHAIR: Yes.

MS LOVE: Which is in --

THE CHAIR: I've got Issue 15.

MS LOVE: Yes.

THE CHAIR: But I haven't got a reference.

MS LOVE: You'll see a reference to two documents there. So Row 15 is on page -- I think it's on page 18 but I'm going to --

THE CHAIR: The JES, it's page 34.

MS LOVE: Page 34, I apologise.

THE CHAIR: But I'm not --

MS LOVE: Yes. And under relevant disclosure, there are two documents that are there referred to. Now, this is, as I understand it, one of them and this is an example of the sort of aggregation that Google has previously done for the Commission. They have effectively pulled together the data, as I understand it, and I really am now beyond the shadows of my expertise, time goes down and there's a different domain across and so --

THE CHAIR: You can't read the headings, because they're too small.

MS LOVE: I'm sure it's --

THE CHAIR: And you're saying that that's all right, because that gives a -- is that correct?

MS LOVE: It draws it together in an aggregated and more usable form. Now, there are limitations of these files, and in particular one of the others, there's a description of some of the data gaps in the text on page 34 of the JES immediately below it. But it is very clear that, unlike these raw text files, of which there are thousands, this is something that the experts can work with, and from our perspective, the question is, if Google has done it before, does it make more sense for Google to do it again? Or does it make more sense for the economists coming to this afresh to liaise, or indeed for the Claimants to bear the cost of doing it themselves? Because obviously this is the format, and the way in which it is done in the Penaltyserver data is a matter of Google's choice.

Google is familiar with the data. Google has clearly already managed to do this sort of exercise for the Commission, and if I may respectfully say so, Mr Wisking's list of explanations and correspondence and the witness statements from Mr Kwok, rather reinforces our point, that if one is asking who best to undertake a form of aggregation, it's Google. And the Claimants obviously asked for this information so that they could better understand the penalties that applied to them specifically.

But the experts aren't going to be just looking at the impact of the penalties on the specific Claimants for Trial One, they're going to be looking at whether Google's abuse extended into the Pre-Decision and the Post-Decision periods. They're going to have to look at the effect on the CSS market as a whole.

And that's why we need to see across the piece, and it's why it becomes all the more important that we think about the most cost-effective way of doing this that leverages the expertise already available.

So on that, I cannot emphasise enough the signals from Mr Hunt behind me that the format is critical, and we do say that that lies in Google's hands. I'm happy to go away and take instructions on domains, but on that I can deal now.

THE CHAIR: Yes, if you do that, and Mr Pickford can take instructions on format. And as I understand, what's being said is that's how the information -- well, some of it -- was presented in the past for the Commission, and whether that can be done similarly now, and that's the question.

MR PICKFORD: That's a question. I mean, there is a submission that I would make prior to that, but I'm happy to make it when we come back.

THE CHAIR: Yes, well, I think we need to take a break. So back about 3.50.

(3.38 pm)

(A short break)

(3.52 pm)

THE CHAIR: Yes, Ms Love.

MS LOVE: Mr Pickford and I both had homework. His was to go away and think about the moquette stripes, and mine was to think about domains.

In relation to the domains for A15, we have taken such instructions as we can take, and I can confirm that for Kelkoo and for Ciao, we will narrow to six domains for each. I can't right now say on my feet which those six will be, but we can write and inform Google.

The picture for Connexity is slightly more complex, for two reasons: the first is that, of course, Connexity, certainly we'll come back to Pre-Decision, but it has evolved from three separate businesses; and the second, more immediately pragmatic one, is that there isn't a client in the room from whom instructions can be taken, but the signal that you've sent, about the need to narrow, is understood. Instructions are being taken as

quickly as they can be, and we intend to revert tomorrow morning, if possible, with a list.

THE CHAIR: Yes, I understand. That's no problem. Thank you.

Mr Pickford, format.

Further reply submissions by MR PICKFORD

MR PICKFORD: Format, yes. So, we are happy to provide the format and the data that we have already provided, that in terms of -- provide data in the same format as we have already provided. My instructions are that Mr Noble considers that, either he or Mr Hunt, or both of them together, could then process that into a number of different forms, but that the raw data as it comes out of Google, in the form that it has previously come out of Google, is certainly something that can be used properly, and in my submission, that is sufficient to fulfil Google's obligation in relation to providing inspection of the data.

We very, very strongly resist producing pretty coloured graphs that Mr Hunt might like, because my -- again, this is on instruction, but you were shown it -- that graph was in response to a request from the Commission, and it took many, many months to produce, because it's analysis; it's not just taking the data and putting it into a form that can be used. It's something that goes beyond that, and it's also -- it's just not something, that we say, it's incumbent on Google to do. Mr Hunt can perform whatever analysis he wants to, once he's got the data, and that's what we should be enabling him to do, that is give him the data that he can do that with.

THE CHAIR: And if he can reasonably do it with, what is sensible is that the two experts should have the data in a format that they both together consider they can then analyse showing the same position. Because it's just factual data, isn't it? It's about what penalties applied over what period and in what strength. That's what it's

about, and it should be produced in a way that they can both properly work with, and the disclosure obligation is not just to hand over documents, it's also to provide information in a way that can sensibly be used.

It may be if you say, "that is particularly complicated". I mean, it might be complicated because it involves, of course, a huge number of domains. But, what it seems to show, so far as I can understand it, is across the top, what are the domains, and down the side, the length of period. And then you've got three degrees of penalty, or perhaps the green is not a penalty, then two degrees of penalty. And that's all you've got there. So it doesn't seem very sophisticated.

MR PICKFORD: Well, I think the fact --

THE CHAIR: That's what it is: it's three colours and it's domains and time.

MR PICKFORD: I think the fact that it's presented in a way that is usable does not mean that a lot of work didn't go into working out -- into what underpins that. Certainly my instructions are that an extension had to be sought from the Commission in order to provide that information, because it was not an easy thing to do. And we strongly resist Google being required to do that.

What we can assist with is, if Mr Hunt thinks he is unable to do something in his consultancy, but Mr Noble thinks that he can in his, Mr Noble can potentially do something. But Sir, as you say, it's probably better that the experts simply liaise together and come up with something that they're both happy with.

THE CHAIR: Yes.

(3.57 pm)

THE CHAIR: One wants -- to do that in the course of a hearing is not ideal, in fact, not practicable, is that the experts are able to extract from the data provided a picture that

is relatively clear of what the factual situation was, that they can both then consider the implications of. But the basic facts, which is all that this is, can be understood by both of them in the same way. And that is something, if Mr Noble says this can readily be done, I am happy to direct that once the disclosure is given, they should meet, without prejudice basis, to see if they can produce an agreed format of the whitelisting periods and penalties, and insofar as they cannot understand the data, cannot agree what the data -- then I think that Google should answer reasonable questions to help them interpret it.

And if Mr Hunt has questions of what this actually means, and in terms of getting the information that is being sought, namely the time period and strength of penalty, and to what it was applied, then you will answer that question.

(3.59 pm)

MR PICKFORD: That's all understood. That was just one word, Sir, that you mentioned, I just wanted to clarify. You mentioned just now "whitelisting". In the discussion that we had earlier, I had said whitelisting is really something that's for us, not for them.

THE CHAIR: One can exclude whitelisting.

MR PICKFORD: Yes.

THE CHAIR: In terms of clarification of penalties, I didn't mean to say “whitelisting”, and that you will therefore provide that for the -- we'll get six domain names for each of Ciao and Kelkoo to be supplied by those Claimants. Connexity, we'll revisit tomorrow. And then for the period 2016 to date.

MR PICKFORD: Yes.

THE CHAIR: And once that's applied, the two experts to meet, to seek to agree what that states in terms of period and strength of penalty and insofar as it's unclear, Google

to answer any questions.

MR PICKFORD: That's understood.

THE CHAIR: I hope that will enable Mr Hunt. Mr Hunt may want to say something to you, Ms Love, I think.

MS LOVE: Yes, Sir. A couple of things.

Firstly, just to be clear, we're not saying that Mr Hunt will only work with stripes of a certain colour or something. It's about the numbers behind them. It's about taking all these text files and turning them into something that you can stick in a spreadsheet, and I think that the indication that you've given is very clear, and obviously it doesn't make sense for two different spreadsheet exercises to be going on in parallel.

There is also a separate question, because Mr Hunt, as we've discussed, has been given data in respect of the Pre-Decision period, say for the two domains that we've discussed, that the ones that have been blued out are LEO Confidential.

But as I understand it, that data is in the form of the many thousands of text files, and if the exercise is being done of thinking about the format to extract it and turn it into something that one can actually see numbers, we do say that in order to compare Pre-Decision and Decision, because we're looking across the piece, we do say that the exercise of doing the same, to make it usable for the Post-Decision, 2016 onwards, also needs to be done with the pre-existing material we've got for the Pre-Decision period, plus the two new domains that have been included there.

THE CHAIR: That's the server data that Mr Wisking sets out at page 158 of bundle 1.

MS LOVE: I believe so. But basically for everything we've got the many, many text files, if there's going to be a format and there's going to be a template, it seems silly to do anything other than get it all in that template.

THE CHAIR: Well, there's no reason why the experts can't meet to do that now,

because they've got those files and starting that exercise will make it easier to then continue to extend it, once the further files come.

MS LOVE: We hear what you say --

THE CHAIR: Then you get at least a format in which they can go. (Pause)

MS LOVE: I then turn to the whitelisting --

THE CHAIR: I would have thought that they should do that, because it will mean that if they can address questions of Google, that process should get going before perhaps people are on summer holidays and things.

MS LOVE: I'm sorry --

THE CHAIR: Yes.

MR PICKFORD: We see the logic in that.

MS LOVE: Also, we want to start the meeting soon, and we'd like it within the next fortnight, mainly because of exactly the reasons you say. Otherwise time is lost.

THE CHAIR: Well, I can't (overspeaking) --

MS LOVE: (Inaudible).

THE CHAIR: -- within two weeks, because I don't know about Mr Noble's schedule, but I'll say, as soon as practicable they should meet to seek to put this data into a format that they can both understand and analyse. And we then have it in a common format that they're both satisfied with, which is what we're ... Yes. So that's A15.

MS LOVE: Yes, we don't --

THE CHAIR: Then we've got A16.

MS LOVE: In relation to A15, I think I also need to address whitelisting.

THE CHAIR: Yes.

MS LOVE: In particular, the fact that because whitelisting -- is applied to Algorithm A, the question of what happens for Panda and Coati -- I think for this that I need to turn

to -- well, I have it here already. Wisking 8, paragraph 60. What he says there about the -- I don't want to call them the "whitelisting successors", but the protection signals and the hot domains. And what Mr Wisking says -- and you'll see at the bottom of page 152 -- is that they:

"... are not analogous ... but rather are additional signals that are built into an algorithm to temper the effects of the demotion for sites with particular attributes."

It's not site specific, it's attributes specific. Now, Google doesn't actually say what attributes a website needs to have the hot domains or the protection signals applied, but obviously these were developed by Google. So these were a choice on its part, whether or not their application was automated through an algorithm. So saying, "Well, we didn't choose whether to disapply or temper the effects of Panda or Coati for a specific domain", slightly misses the point, which is that the very decision to build in the additional signals is itself a choice, and the effect of the choice is to affect the application of Panda or Coati, the algorithms.

If there are signals that are applied and that have the effect of either demoting a CSS's domain or not demoting it, when it would otherwise have been, they are still going to affect traffic flow to that domain. They're still going to affect traffic flow to the domains of rival CSSs, and they're still going to help Mr Hunt to understand the link between the demotions and the traffic flows.

We therefore say that the question why CSS domains met the criteria for the hot domains or the protection signals to be applied is still relevant. So, I'm afraid that we don't -- we sort of stub our toe at the idea that if you say we whitelist, then okay, we'll look at it but if you build a signal into it, then it's no longer a choice, it's automated, so we don't have to. So we do say that we need to include the hot domains and the protection signals for the period when whitelisting finished.

THE CHAIR: Is your understanding that, after Algorithm A, there's no more whitelisting that's stated explicitly, but from the introduction of Panda and Coati, instead -- or a different approach -- Google introduced these algorithmic signals to temper demotion and, therefore, is it the case that penalty files will show the position of the website as tempered by this further algorithm?

MS LOVE: First of all, I understand that -- I mean, Algorithm A is still going, I believe. It's just that we now have the family that is going as well, so I don't know whether there's still whitelisting going on for that. But the short answer is: it's a little bit difficult to work out what Mr Wisking is saying, but insofar as he is saying that there are additional signals that mean that things that would otherwise have been demoted or demoted differently or demoted less or not demoted, or insofar as there's basically newly built in stuff for Panda and Coati and whatever the successor may be, that that doesn't make it any less relevant. I think, probably, in terms of what the position is, I need to defer to Mr Pickford.

THE CHAIR: I just wonder if it's captured by the information you're being given because, if it's algorithmically driven, will the penalty files take account of it already? That's a question for Mr Pickford, not for you. Can I be clear? Algorithm A, it's not superseded; it's still going. Is that right, Mr Pickford?

MR PICKFORD: I'm turning around to those that know better than me to make sure that I'm not ... (Pause)

MS LOVE: I'm told it's been confirmed to solicitors in correspondence, but, again, Mr Pickford and I defer to the expertise behind us. (Pause)

MR PICKFORD: So, Sir, as of the most recent information of which we are aware, which is of the last few months, a version is still in force.

THE CHAIR: Yes. Right. And so that is subject to whitelisting?

MR PICKFORD: Yes.

THE CHAIR: Yes. Then these other "temporary" -- Mr Wisking's term --

MR PICKFORD: Yes.

THE CHAIR: The demotions which are algorithmically driven --

MR PICKFORD: Yes.

THE CHAIR: -- will the penalty files that you're going to disclose, will that show the penalty after taking account of effect of these tempering algorithms?

MR PICKFORD: That is certainly the implication of Mr Wisking's evidence. I'm going to turn around in just a moment, but what Mr Wisking says is that these are additional signals that are built into an algorithm, to temper the effects of the demotion. So, to that extent, what Mr Hunt wants to know about is the demotion. He doesn't need to know about the micro mechanisms within that, that ultimately led to that position. Because what they're saying is, "We were affected by this demotion. It wasn't fair. And look, we did badly as a result of it." That's what he's going to be getting. He doesn't need to go into this level of further detail that's one step down, to do the analysis that he claims that he wants to do.

THE CHAIR: Well, I hear what you say, but it's implicit, that it would not be satisfactory if Google provides these files showing demotion and then says subsequently, "Oh, yes, but, actually, it didn't apply, because it was tempered by the domain algorithm and therefore that was not actually the position." Do you see the point?

MR PICKFORD: I understand. That's why I wanted to firstly say what I take from that and now check there isn't anything that contradicts that.

THE CHAIR: Perhaps you can confirm with Mr Hunt. (Pause)

MR PICKFORD: So, I'm happy to say that no one behind me has said that what I told the Tribunal is wrong. However, we are happy to confirm -- as this is a point that the

Tribunal has highlighted is important -- we're happy to confirm that in writing, having taken instructions from the technical people that ultimately know in Google. But, certainly, our understanding is, as I described to the Tribunal, that this information is not necessary once one has the information about the application of the algorithm itself, because that's what ultimately determines whether there is a penalty or not.

MS LOVE: Sir, I think we have been trying, in such information as we have, to understand whether it's enough to see the net effect -- if it's in the penalty files -- or if one needs to see what would have happened in principle, and then the saving mechanism and understand the net effect of it. I think it may be sensible if we await Mr Pickford's client's clarification, rather than my taking instructions in a position where the actual information is unclear.

THE CHAIR: Yes, I mean, it seems to me it's important to (inaudible) seize what actually was the treatment of the domains -- selected domains -- which you're going to identify. If it's through a process of one algorithm or two algorithms, it doesn't seem to me that necessarily makes much difference, if those algorithms are consistently applied. It's what's being done to the sites on Google's search page that matters.

MS LOVE: I see that, Sir. We are a little bit -- whatever confusion there is on that side of the room, we can see what you mean, but there is a question about whether it is a complete picture that will emerge from a sort of net of all of them, across all of the algorithms and all of the periods. And so we will take it away.

THE CHAIR: It is a complete picture, right? Which algorithm does what does not seem to me relevant to looking at whether there is still discrimination, because what you're interested in is what is the treatment of your clients' sites.

MS LOVE: What we're interested in is what Google is doing and whether it is abusive looking across the market (overspeaking) --

THE CHAIR: Yes, but it's abuse in terms of the effect.

MS LOVE: I see that.

THE CHAIR: Whether it's done with one algorithm or two, if the outcome is discriminatory, it's no less discriminatory if it's done with two algorithms. But if it's not discriminatory, it doesn't become discriminatory, because it's done with two algorithms. So that seems to me fundamental.

MS LOVE: We hear what you're saying, and we will take it (inaudible) when we know what we're going to get.

THE CHAIR: You need to reflect on that. Right. We're going to go to A16.

Discussion regarding Request A16 of A3 Bundle

Submissions by MS LOVE

MS LOVE: Yes. Now, this is where we move from the Claimants and their domains to the question of what is happening in the market, and we have requested and -- let me just click forward to get to it.

THE CHAIR: You want the three ...

MS LOVE: We have requested it for the 361 SO Response Aggregators. Sir, we have heard what you said about narrowing domains, and while we remain sceptical about how much effort it is to do these extractions -- and engineers writing code for Google doesn't seem like the moon on a stick, or even the moon on a USB stick -- we have attempted to focus, and I am instructed that what we propose to narrow A16 is, instead of the 361 SO Response Aggregators, we propose, other than the Claimants, 20 other CSSs, and the domains for those 20 other CSSs. I'm obviously not in a position to tell you or tell Mr Pickford who they are now, but again, we will go away and we will get instructions and we'll get help.

THE CHAIR: Why do you need help? What is the relevance of this? If this was just a Connexity claim, I can see that that would not be enough. But now that you're looking at the Post-Decision period -- the Remedy -- now that you've got three active Claimants with a large number of sites, and you're seeing what's happening to them, why do you need to know what's happening to others, who are subject to the same algorithms and the same treatment?

MS LOVE: Sir, it isn't that large a number of sites --

THE CHAIR: What's the relevance of looking at everybody else or a sample of everybody else? Why? I am just trying to understand where it fits into the analysis. I have no objection to Mr Hunt sitting next to you for the purpose of this exercise. We just want to get through this efficiently, rather than you constantly having to turn your back. If he wants to come forward and he can brief you. But ...

MS LOVE: The point is, Sir, that this isn't about -- the question whether Google's abuse, its abuse of its dominant position across the market, extended into the Pre-Decision and the Post-Decision period, isn't just about the individual Claimants and the impact on us. I mean, one sees, for example, that when it comes to a quantum thing, I look at Kelkoo and Ciao and at that point it becomes impact on individuals. One has to know what is happening with Google's conduct and its effect on the CSS market as a whole.

And I would also add, Sir, that it's important to bear in mind that between, well, at least 2008 and 2017, competition has been disrupted, squished altogether, by this abuse. And so the effect is that the market shares that we are looking at now, it's not just about the number of domains, but the traffic, the market shares, all of it is a very different picture to what it would have been had there never been abusive conduct. And so it is necessary to make sure that we're getting a decent snapshot across the

piece as a whole to look at the market.

For instance, just because one particular domain may be, I don't know, hot-listed, whitelisted, whatever listed it is, it doesn't necessarily follow you'll get a sort of false negative if you say, well, that tells you something about whether looking across the market as a whole, there's been an Abuse. We have sought to narrow it so that we're confident we're getting a decent snapshot.

THE CHAIR: Yes, let's just pause there. If there is discrimination by demotions of your sites or some of them, one can assume because they're all algorithmically applied, it will apply to others. How many and to what extent, it doesn't matter. It's not a singling out of only Connexity just because we've only got three Claimants for this period in the Tribunal. Not everybody necessarily wants to bring a claim. So one would assume that, you know, the effect is more widespread. But you don't need to establish that. If it's having that effect on your clients then you've made out your case of abuse, haven't you? What's the need to show that it's also affecting other people?

MS LOVE: Sir, it's not just about the (inaudible), it's about the market as a whole. If I could ask you to turn back to, I think it's paragraph 1.14 of the Abuse JES. And I'm sorry, I'm going to have to dig out the page number.

THE CHAIR: No, don't worry, I've got the hard copy so it's not a problem.

MS LOVE: It is --

THE CHAIR: 1.14.

MS LOVE: 1.14. It is page 7.

THE CHAIR: "As part of the assessment ..."

MS LOVE: One of the ways in which you will have a sense of what's happened, and whether anything approaching competition on the merits has been restored, is by comparing outcomes across CSSs. So Mr Hunt, for instance, contemplates there may

be affected CSSs within one company. He also contemplates that you'll be able to look over time for particular affected CSSs and he also contemplates, over the page, affected CSSs versus unaffected CSSs within the same jurisdiction. Because individual things bumping around by itself doesn't give you a complete insight into how they are doing relative to all the others and to what extent, overall, this appears to be a market on which competition on the merits can be restored.

THE CHAIR: But you're going to -- I mean, even a sample of the Response Aggregators, some may be affected as well. You don't know they'll be unaffected. It's just they're not the Claimants. Your real comparator, isn't it Google's CSS? I mean, obviously the one who bids for -- is it still called the OneBox or equivalent and is selected may be doing rather better, but I just don't understand, at the moment, how that fits into establishing abuse. Because the abuse is demotions, unjustified demotions and/or self-preferencing of the Google CSS. That is, I think, how you allege it. (Pause)

MS LOVE: Mr Hunt tells me that it's not just about whether there have been demotions, it's about the impact of those demotions, for instance, across traffic and a whole range of other metrics. And in order to be able to understand what the impact of the demotions is, it's necessary to have comparators. So, I mean, Google says that they think the demotions are fine and they would have continued them in the Counterfactual and indeed they have continued them.

THE CHAIR: I think they say they're objectively justified and it therefore doesn't distort competition between your sites and the Google comparative shopping site. But the degree of impact on the market is really going to the question of quantum. I don't see why that's relevant for Abuse. It's competition on the merits, you say, there isn't as affecting your clients. It may affect others as well, but it's the way your clients are

treated that you're concerned with. It's not something we need to devote a lot of time to, do we? Because it's not suggested by anyone that these algorithms are specifically selected for Kelkoo. They're applied across the board, are they not? I thought all sites are subject to the algorithms.

MS LOVE: (Audio error) point of it but also, I mean, it's not just that we were demoted, we were demoted and the question is, what did that do to visibility -- to what extent we were demoted -- and what did it do to traffic? And one sees the demotions, the Penaltyserver data, one sees the impact on us and what I don't know is were there CSSs with less severe demotions, CSSs with more severe demotions, other CSSs, what the pattern looks like across all of those different parameters.

The difficulty isn't -- the Penaltyserver data will tell us whether, in principle, there have been demotions applied to particular domains for the Claimants. So we'll be able to see does the stripe go yellow, does the stripe go orange or something. And let's say all the stripes go orange and then what, what's the next step? How does that tie into what has happened to us and what would have happened under competition on the merits? And in order to see that, we have to see what effect it's having and in order to know what it's done to our traffic, we need to know what's happened to other people's traffic, including other CSSs' traffic, including those who may not have been demoted or may have been demoted in different times or different severity. And indeed, how it compares to others who had the same demotions as us.

It really is about the need to have comparators to see a richer picture, and we're trying very hard to focus to ensure that the picture is not excessively onerous for Google to produce. (Pause)

THE CHAIR: The abuse being alleged is all by reference to the way Google treats its own comparison site, isn't it? That is the essence of the Abuse. That's what the

Commission found. And that's what you say the Remedy doesn't correct sufficiently.

MS LOVE: Well, the Commission found -- I use the word “self-preferencing”, the combination of the demotions and the promotions.

THE CHAIR: But self-preferencing meaning Google preferring its own site. That's the self-preferencing.

MS LOVE: Sorry, but it doesn't follow from that, if I may say so, Sir, that just looking at us and looking at a handful of Claimants when one has to establish appreciable effects on competition relative to the 500-pound gorilla that Google Shopping has become, it doesn't follow that that will necessarily be an informative and full comparison about what's happened to the market after that.

THE CHAIR: You don't need to show the full effect on the market. I don't think it can possibly be said if it's adversely affecting Kelkoo, Ciao and Connexity, the post-Remedy Compliance Mechanism and they are being significantly handicapped, that is not appreciable and Google can hardly say, "Oh, but everybody else is fine". If they want to say that, they'll have to provide disclosure about a lot of other people. So I don't think it really goes to appreciable effect and you are all significant players.

MS LOVE: Sir, can we focus on the Pre-Decision (several inaudible words) and there is a question of whether this happened in stages. There's a question of whether it happened in a multi-period way, and it is a murkier and more complicated picture. And we know that the demotions began. We know that the promotion limb that the Commission found to be abusive began in certain countries in January 2008, and we need to understand what is happening before then. Who is being demoted? To what extent? What is happening to their traffic and how that compares to --

THE CHAIR: This is not about the Pre-Decision period, is it?

MS LOVE: Sorry? A16 --

THE CHAIR: We're not looking at the previous period in A16.

MS LOVE: Sorry, I thought we were and --

THE CHAIR: Because it's, you say, the equivalent to A15 for the other response aggregators and A15 excludes the Pre-Decision period, I thought.

MS LOVE: A15 was Pre-Decision, but there were only actually two domains that needed to be plugged because we didn't have the files. And part of A15 is wanting all of the files to be turned from the reams of text.

THE CHAIR: Yes, I see. (Pause)

MS LOVE: I'm sorry, I understood A16 to be across all of the periods. I'm going to just --

THE CHAIR: Yes, I mean, you're probably right, because certainly I see Google has understood it that way. And it says it -- (Pause)

MS LOVE: I mean, the other thing that I am -- (Pause)

THE CHAIR: (Several inaudible words) that's a bit of Pre-Decision period. (Pause) And I still struggle to understand why you need to see the effect on the total market. I can understand that it would be nice to see the effect on the total market but simply to establish that the abuse started earlier, you look at the effect on yourself, your sites, and that the Remedy wasn't fully effective, you see what continued to be the position of your sites after the remedy came into force.

MS LOVE: Sir, I'm not sure how much further -- these are standalone claims and we need to show an effect on competition. I'm also reminded that in fact, in the JES, internal page, sorry, it's page 40 of Bundle 2 in the red numbers, in relation to the Pre-Decision period the status is said to be agreement in principle in the relevance of the type of revised scope of data requested, as set out in Mr Hunt's rationale column. But there's partial disagreement in practice as Mr Noble thinks that a sample of

361 SO Aggregators could be sufficient. So we're clearly not alone in seeing the world this way, subject to Mr Pickford's proportionality and people having to write code and people having to aggregate.

THE CHAIR: Well, he says if the Tribunal thought that data beyond the two Claimants was necessary to test whether there's a market-wide effect, and that analysing the two Claimants would be insufficient then my view is that if there is an effect on the two Claimants, that is then Foundem and Kelkoo, then that is an effect on competition and it will not be open to Google to say, "Oh, but they were insignificant and nobody else was affected" unless having resisted this disclosure and --

MS LOVE: Sir, I don't think I can take it much further. I've explained why we need it. Obviously, if your indication about showing an effect on us were to be echoed in what's discussed in June 2026, then that would be fine. But Mr Hunt has asked for it (several inaudible words).

(4.40 pm)

THE CHAIR: Well, Mr Pickford, as you see I am conscious of the burden of producing these files. I have ordered that you do it for the claimant's domains, subject to narrowing down the number. I am not sympathetic in doing it for a lot of others as comparators, but that's on the assumption that the way that for the pre-decision period Foundem and Kelkoo were subject to demotions was no different in principle from others of the same kind. And I have made it clear that if Google will seek to argue, "No, this was just what we did to those two, because we think they were particularly terrible" or whatever, then you need to disclose what you did to others, and if you want to resist that one's got to accept that these are fairly typical.

(4.41 pm)

MR PICKFORD: That's understood. My position is that there is not a good case made out for this disclosure, and it's disproportionate. And I've heard what the Tribunal has said.

THE CHAIR: Yes. But as I say, the implication of what I might -- denying the disclosure is that, one has to treat the -- it's not then open to Google to say, this was confined to these two CSS operators, and nobody else was being affected in that way, because if you're going to say that, you've then got to produce the material.

MR PICKFORD: Understood. That isn't what we pleaded.

THE CHAIR: Yes. Very well.

MS LOVE: I might, with the time, I --

THE CHAIR: I will sit till 5.10, but I think at that point we do have to stop.

MS LOVE: I'm very grateful, Sir.

I then bring happy news in relation to A18 and A19 which were visibility -- which are visibility -- which is that we have heard, Sir, the views that you expressed in relation to SISTRIX.

THE CHAIR: Yes.

MS LOVE: And in the light of that indication, we will not be pursuing A18 and A19.

THE CHAIR: Yes, that's helpful. Then we've got A20.

MS LOVE: Yes, on page 154 of Bundle 2. Let me see where I am --

THE CHAIR: Yes.

MS LOVE: -- in my notes on this.

Discussion re visibility data

Submissions by MS LOVE

MS LOVE: Yes, and this is the visibility data on the SERP for the top five merchant platforms in each country. And Mr Hunt's reasons for requesting this information -- I've already rehearsed the visibility importance, but it's really summarised in the JES around pages 43 to 45 of tab 1 -- but just by way of summary, it contextualises the traffic data, and you can't just use traffic as a proxy for visibility. And you have to understand the links in the chain. Demotions affect visibility and therefore traffic, because the users are less likely to click on a lower ranked result.

And so traffic data alone isn't comprehensive. And to test the impact of demotions on website visibility is relevant to abuse in relation to the Pre-Decision period and the Post-Decision period, and it will allow an analysis of the impact to be done that's similar to that which was done by the Commission.

In the Pre-Decision period, it's really important to understand what happened to visibility and traffic and other market outcomes, both for the Claimants' websites, and for those of other CSSs, and that includes those who were affected or not affected by demotion.

In the Post-Decision period, the question is whether Google has continued to engage in self-preferencing. Visibility is a relevant factor for that, and merchant data is an important aspect of it, because the question is where the traffic is being diverted to, insofar as it is being diverted. And if I can just go to A20 in particular, I think that we're no longer pursuing that, in relation to the -- have a look at this for A20. We're not -- sorry, I'm just looking at this.

It's the equivalent data to that which we requested in A18. But we have dropped the -- I'm trying to make sense -- we've dropped the Post-Decision period in relation to A20, which is the merchant data, and we think that's less important than other periods, not least because Google is clear that it's discriminatory demotions have been

continuing, and I think that I would make similar observations for this to those which I made in relation to Table 2, which is that Mr Hunt is aware that there are limitations, and so he's not saying produce stuff that doesn't exist, he's not asking for the impossible, and he's just asking, really, for the best data that is available. And the reason why he is doing that is because of the importance of visibility data, and it's only reinforced if we don't yet know whether there's going to be any click-through rate material, and there are always going to be important elements of the picture that are.

THE CHAIR: You said, very helpfully, that you're not pursuing A18, because of SISTRIX, although A18 was for the Pre-Decision period; there's no SISTRIX.

MS LOVE: I'm sorry, Sir. So I have an update, apparently A20, we're also going to cut our cloth, in the interest of time, and live without.

THE CHAIR: So yes, it goes very much the same, I think.

MS LOVE: We are less convinced about the adequacy of the SISTRIX coverage. But as I say, we're cutting our cloth and we're moving onwards, right.

THE CHAIR: A21.

MS LOVE: We come to financial data. Now --

THE CHAIR: Well, can I say this about financial data: one can have quite an argument about relevance. But looking at what can readily -- has been disclosed and can be made available, you've had the reports, I think four-monthly reports, for the Remedy period, which include, as I understand it, financial data. (Pause)

There are the, I think -- you say that you've had Shopping revenue data for the 13 countries, to September 2017 -- 13 Decision countries to December 2016 and January 2017 to September 2017, you've only had it for six of those countries. So, subject hearing from Mr Pickford, if it's available, I would be minded to say you should have it then also for the other seven. So you get it for the 13 to September 2017.

MS LOVE: So I don't think in broad strokes that we disagree with the list of what we have had. It is important to qualify, I'm going to come back to this revenue and profitability, that what we have had, is for Google -- I think that the Shopping Unit period from 2017 onwards -- is that January to September 2016, Google Shopping Europe. (Pause)

The Remedy period concerned Google Shopping Europe, which is a new entity, because as I'm going to discuss, the structure of it all has changed. So previously, there was Google, which made money from operating the boxes, and there was Google appearing in the boxes, and there was a sort of whole different kind of ecosystem, to borrow a phrase. And Google Shopping Europe, as I understand it, is essentially a new accounting construct to hive off the revenues that are associated with appearing in the box, having the standalone website and acting as an intermediary, insofar as it gets placed in the box and clicked on. But that's a different thing to what Google makes from operating the box.

So, I'm not denying for a second that if there is stuff that is readily available, then it should be provided, but I just need to make clear the limitations on what has been offered, in the post-revenue period. (Pause)

THE CHAIR: There are these Weekly Reports submitted to the Commission, from October 2017 till June 2022, for covering the Decision countries, those and others, which contain a lot of information, including revenue information and prices. And those are therefore readily available. You've not had them disclosed to you so far. They were raised previously, but it was, as it were, adjourned at the [request]. And I mind to order that those be provided to you, which is what you say on page 157 of the Scott Schedule, and that will give you significant revenue information.

MS LOVE: Sorry, just so I'm keeping track in my notes, what you've indicated so far,

for January to September 2017, for all the countries in which the Shopping Unit was active, because so far we've only had six out of 13, and you've indicated the Weekly Reports for 2017 to 2022, which is, as you --

THE CHAIR: October 2017 to June 2022. Thereafter, the Shopping P&Ls have been produced on a six monthly basis. (Pause)

Without getting into an extensive argument on relevance, that will give quite a lot of financial information on the performance of Google Shopping in the post-Decision period. And beyond that, I don't see why you need additional information. I'm not sure, not entirely persuaded, that even that information is necessarily relevant, but it's because it's readily available. Therefore, there's no burden on Google to disclose it, and I'm, as I say, minded to order it. But beyond that, I'm not clear why you need any further revenue information.

MS LOVE: So, my understanding -- and I will be corrected -- is that the Shopping P&Ls and the Shopping revenue data that was produced to the Commission from 2013 to 2016, I mean, set aside for now the question of the level of detail or of time period. Again, I come back to the point there about Google Shopping Europe, and not the Shopping boxes, or rather the Shopping Unit, from 2013.

I think it may be helpful to start by just tracking back across time, before the abuse, whether it began in 2008 or earlier, there was a market in which CSSs competed to attract merchants. They competed for traffic, more traffic is more merchants, which means you improve your offering, you get more traffic, and there's a whole mode of competition in the market.

Then comes the Decision period, and possibly the Abuse before then, during which that competition is disrupted/squashed altogether, and what we now have, in the form of the Compliance Mechanism, is a different market, a very different market. There is

effectively no free traffic, but more importantly, a lot of what was in the previous market, getting information from building scale, building relationships with merchants, that is out now all just in Google Search, that is going through Google Search, and the CSSs have been turned into intermediaries, you have to place product offers for merchants in the boxes, and who gets in the boxes is determined by Google on the basis of auctions.

And the one CSS that has been immunised from all of these changes is Google, and so it is really important to track what has happened to Google in terms of what it makes from Google Shopping -- in the sense that you've discussed it in the Preliminary Issues Judgment -- from operating the box as well as having the standalone website, and as well as placing things that lead to clicks to merchants. It's what Google gets from arranging the service it does and operating the box. And we have some or most of that information for the Decision period, and data for Google Shopping Europe, which is harvesting out the standalone website, isn't really the same. It's partial, but what we need to be able to do, what Mr Hunt needs to be able to do, so I'm using "we" in a loose term, is to follow the thread and complete what is essentially the time series for the revenues from operating the box - that is Google Search, that is not Google Shopping Europe.

Without that data, a really key before and after, which is not just how much Google makes from the Google Shopping Europe standalone website, but qua operator of the box is lost.

And, Sir, we endorse what you said about at least what can be readily provided ought to be. But we also say that it appears to us that a lot of this data can be provided, for example, from the Click Repository in particular, as well as these Weekly Reports. I assume a lot of it will derive from accounting records. That's revenue; we'll come to

profitability separately, but we say at least as far as the revenue is concerned, we really can't see why this is a particularly laborious or time-consuming effort, and it really is important to make sure that we're not sort of building in and baking in limitations that arise out of changes Google has chosen to make in the Compliance Mechanism. (Pause)

THE CHAIR: The box -- what you refer to as revenue from the box is the Shopping Unit. That's right, isn't it?

MS LOVE: So, as well as the two categories you've identified, which is the data from January to September and the Weekly Reports, what we're also asking for, and we are narrowing Request A21, is for revenue and volume data for the Shopping Unit from September 2017 onwards, to allow that full proper before and after analysis of the Compliance Mechanism, and the revenue and the volume data for Google Comparison Shopping and the Shopping Unit from January 2011, which we understand to be available through the Click Repository, which will give the Shopping Unit revenues which haven't been disclosed so far. (Pause)

THE CHAIR: The Shopping P&Ls; are they not, as opposed to the weekly, are they not showing revenue from the Shopping Unit?

MR PICKFORD: Sir, we are, hesitating to --

THE CHAIR: My understanding, it says --

MR PICKFORD: If you go to the fourth Bundle, page 923. (Pause)

THE CHAIR: Yes.

Reply submissions by MR PICKFORD

MR PICKFORD: This is information that the Claimants have been provided with, and it is revenue from product ads displayed in the Shopping Unit.

Now, as I understand it, what Ms Love would also like is to understand the revenues

that Google has made from CSSs placing ads in the Shopping Unit, and in the information, Sir, that you've indicated that you would be minded to order us to provide, that information would enable her to complete the picture that she wants to complete. I'm proposing to do something slightly unorthodox, given that it's 5.00, and make an open offer, which is we do take issue with the proportionality -- sorry, with the relevance, of pretty much all of these items. However, I've heard, Sir, what you've said about data that you have highlighted is relatively easily available. And in order to get through what we have to get through, we'd be willing to provide that, obviously without prejudice to the fact we say ultimately it's not going to go anywhere. But if Ms Love wants to take each point and fight for it beyond that, we're going to have to fight for each one, because I'm going to say it's not relevant.

So effectively, she can have what, Sir, you've suggested to assist her and her clients, and she may wish to take instructions on this, but if they want to go further than that and put us to considerable efforts in terms of providing further information, then I am going to resist each of those items.

The additional information that she would get, Sir, from what you've suggested, is if we go to page 878 in the same bundle, this is another exhibit to Ms Lawrance's Eleventh witness statement.

THE CHAIR: Yes.

MR PICKFORD: That's an example of the Weekly Reports. And it shows by CSS the revenues received by Google from that CSS. And my understanding is if you took that and you combined it with the other information that they already have, that would satisfy, the essence of what is being sought under A21.

THE CHAIR: And if I understand what Ms Lawrance says, distinct from the -- what were the Weekly Reports, which were for the monitoring, the Shopping P&Ls will show

the revenue through the Shopping Unit.

MR PICKFORD: Yes.

THE CHAIR: So it's not just Google's CSS, it's the Shopping Unit which people are bidding for.

MR PICKFORD: I think it's the combination of these two data sources.

THE CHAIR: Not restricted to just the Google CSS.

MS LOVE: Sir, I'm just --

THE CHAIR: Mr Pickford. (Pause)

MR PICKFORD: Yes, so that's right. From the Weekly Reports, you don't even need to combine it in the way that I suggested to get all of the information on the revenues that Google receives.

THE CHAIR: I mean some of it's commercially confidential. (Inaudible).

But in Ms Lawrance's Eleventh witness statement, paragraphs 20 to 32, she explains, in some detail, what is the form of accounting and reporting that Google did during the monitoring period and has done since, and that is essentially the data that or documents that I'm saying, you should disclose --

MR PICKFORD: Yes.

THE CHAIR: -- and I fully understand your reservation about relevance. I'm not holding they are relevant, and it seems to me, Ms Love, that will give you not just the revenue of the newly created Google Shopping entity, but the revenue Google earns from CSSs going into the Shopping Unit, new regime.

That's going to give you quite a lot of financial information on Google's performance.

MS LOVE: So, if we're talking about the Weekly Reports and we're talking about the Shopping P&Ls from October 2022 to date, and the point that you began with, which is the data, the remaining seven of the 13 countries for January to September 2017,

I will look behind me for confirmation, but I think we have a deal.

THE CHAIR: Yes, and that's, the remaining seven countries for those few months; that's not a problem.

MR PICKFORD: Yes. As I said, that is part of the offer.

THE CHAIR: I think that's perhaps a cheerful moment at which to stop. We'd better resume at 10.00 am tomorrow, I think. Do we still have a lot to get through? Because I, as I said at the outset of this morning, was concerned about time, because experience tells one these things can slow down all of a sudden on one item.

MS LOVE: We have the Counterfactual JES, although that is only --

THE CHAIR: That's just C1 to C3.

MS LOVE: C1, C2, C3.

THE CHAIR: Yes.

MS LOVE: And that I think raises perhaps some crisper issues.

THE CHAIR: Yes, it does. It's what comes after that that concerns me.

MS LOVE: And we then have the SS and R requests from Kelkoo. Also, we do have some points of principle around such exciting topics as privilege and native versions versus (inaudible).

THE CHAIR: Yes, (inaudible) there's the DMA. And --

MS LOVE: And then we've got DMA.

THE CHAIR: -- headline points. I don't think those are going to they're important, but they're not the kind of things that slow one down. It's when one looks at, you know, the particular documents referred to in this email or in ... that's where things get stuck in my experience, because one has to understand it, appreciate its significance, and hear both sides on it and so on. That's where -- and there seem quite a number of those.

MS LOVE: They do, Sir, but if I may say so, you gave very helpful indication towards the start, which is that insofar as the document is referred to in another document that has come out of disclosure, and the Claimants have done exactly what one would hope and expect -- which is a sort of gaps analysis -- and you said, "Well, that's linked", then one would hope that there are constructive, proportionate searches that are going to be carried out. I trust that that message has filtered back on the other side. So I remain cautiously optimistic, Sir.

MR PICKFORD: Sir, sorry, it hasn't in this sense. We've done that exercise --

THE CHAIR: Yes.

MR PICKFORD: -- and they've got those documents. What this is now seeking is when there isn't such a document, and that's where the points of argument are.

THE CHAIR: Well, that's why we -- well, we will do what we can tomorrow. Well, let's start at 9.30 am, if that's possible for you all; is it? Does that inconvenience anyone greatly? Well, let's sit at 9.30 am, and then we'll press on with that and see where we get.

MR PICKFORD: Thank you, Sir.

MS LOVE: Thank you, Sir.

MR PICKFORD: On the issue of the OneBox -- that I perhaps over-confidently said that we would definitely get through -- would it be best to leave that to the end, and if we get to it, we get to it, but if we don't, obviously, it will be ...?

THE CHAIR: It will have to be (inaudible).

MR PICKFORD: Yes.

THE CHAIR: And I think, at the moment, that's only affected, I think -- is it A7 and A8?

MS LOVE: It's A0, A8, A13 and A20 ... Oh, sorry, A0 is gone.

MR PICKFORD: And also E1 and E8.

THE CHAIR: Yes, those we haven't got to. But of the A ones, it's just A7 and A8, isn't it?

MR PICKFORD: And A0, which I think we --

MS LOVE: Well, that's gone.

MR PICKFORD: That's gone. Sorry. Sorry.

THE CHAIR: I thought I (inaudible) A0.

MR PICKFORD: Sorry. Yes. Sir, no, you have. Sorry.

THE CHAIR: Yes.

MR PICKFORD: End of a long day. Yes.

THE CHAIR: Take your winnings, Mr Pickford.

9.30 am tomorrow.

(5.11 pm)

(Hearing adjourned until Friday, 18 July 2025 at 9.30 am)

Key to punctuation used in transcript