IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1572/7/7/22 & 1582/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18th December 2025

Before:

The Honourable Mr Justice Leech
Mr John Alty
Dr Maria Maher

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Ad Tech Collective Action LLP

Class Representative

v

Alphabet Inc. and others

Defendants

A P P E A R AN C E S

Gerry Facenna KC, Niamh Cleary and Greg Adey (Instructed by Humphries Kerstetter LLP, Hausfeld & Co. LLP and Geradin Partners Limited) On behalf of Ad Tech Collective Action LLP

Meredith Pickford KC and Natasha Simonsen (Instructed by Herbert Smith Freehills Kramer LLP) On behalf of Alphabet Inc. and others.

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Thursday, 18 December 2025

(10.32 am)

MR FACENNA: Morning, sir.

THE CHAIR: Good morning, gentlemen.

MR FACENNA: In terms of the counsel cast list, it's the same as last time we all met. So I'm here for the Class Representative together with Ms Cleary and Mr Adey. My learned friend Mr Pickford appears with Ms Simonsen on behalf of Google.

You will have received the parties' agenda for today and I'll come to that in a moment. The only other initial housekeeping point I wanted to make was about confidentiality and open and closed sessions. You will probably have seen that you received skeleton arguments which were quite heavily redacted.

THE CHAIR: Yes.

MR FACENNA: That was on the basis that Google's proposals document remains fully within the confidentiality ring. We had previously asked for a de-designated version of that; there still hasn't been one. But we've reached the point in correspondence where I think we're agreed that there is actually very little that we need to refer to in open court and in argument that is actually confidential. So in practice, today's hearing probably can proceed in open, or at least largely. I think, certainly in my case, if I'm planning to refer to confidential material, I'll ask you to read it rather than read it in open court.

THE CHAIR: Mr Pickford, are you happy with that?

MR PICKFORD: Yes, we --

THE CHAIR: (Overspeaking) we should proceed in open court, that gives me a segue to give the usual statement that an official recording is being made and a transcript of this hearing will be produced but it is strictly prohibited for anyone else to make an

unauthorised recording, whether audio or visual, of the proceedings and just to remind people that a breach of that provision is a contempt of court.

So at the moment, Mr Pickford, you're happy for us to proceed in open court. I mean, if you want us to sit in closed session, please tell us and we'll see what can be done. But it'd be better, I think, if we try to refer to documents which are confidential just by reading them, if that's ...

MR PICKFORD: I entirely endorse that. I don't think it should be necessary, but I will make the application if --

THE CHAIR: I'm not certain --

MR PICKFORD: We've actually gone a very large way in terms of trying to be -- appreciating the need for open justice and the need for a pragmatic approach --

THE CHAIR: Yes, I'm never really sure what the consequence is of referring to a document, even if you don't specify what it's called or where it is and only refer to it by a bundle reference, to asking a judge to read it in open court, but I'm hoping nobody's going to ask to see copies of those documents anyway. And I just say that, for my purposes, I'm treating that any documents in the, you know, confidential material in bundle C that we're asked to read, we're going to continue to treat as confidential even if they are "referred to", if I can say that in inverted commas, in open court.

MR PICKFORD: Thank you, sir. So, the relevant provision, I think, is actually in Rule 102 of the Tribunal Rules. The Tribunal has the power to make that provision. In this case, I think that would actually be belt and braces because the documents are themselves in a confidentiality ring and the terms of that confidentiality ring effectively require that that happens in any event. So, no objection to the additional order; strictly speaking, I think it's already protected.

THE CHAIR: Thank you very much indeed. Thank you for clarifying.

MR FACENNA: Just finally on that, my Lord, sir, we recognise the explanatory note and the proposals is a lengthy and detailed document.

THE CHAIR: Yes, it is.

MR FACENNA: But in reality, as I think is now accepted in principle, much of the front end of that document is not really commercially sensitive. So although we can proceed pragmatically today, it remains our expectation that Google will provide a de-designated version of that document shortly.

MR PICKFORD: And we are working on providing that.

THE CHAIR: Thank you.

MR PICKFORD: I must say, it is not perhaps as straightforward an issue as it might first appear just in these proceedings because it involves a number of different jurisdictions with a number of different approaches to confidentiality and everything that we do here or in another proceeding has potential knock-on consequences. So it's actually a fiendishly complicated task, which is why it has taken some time. But we understand that it requires to be done and we are doing it.

MR FACENNA: So in terms of today's business, sir, so you have received a draft Order, which you will have noted, probably with some dismay, has a number of competing formulations in different colours on it. Just stepping back --

THE CHAIR: We did struggle to see anything that was agreed in the actual --

MR FACENNA: Well, I think green is ours; I think the black is what's agreed and there's a little bit at the beginning and some --

THE CHAIR: Some at the end, the expert evidence. You're going to tell us who you propose to call?

MR FACENNA: In fact, some of that, I think, probably can be synthesised, given where we've got to, particularly on some of the dates. But let me come on to that.

THE CHAIR: Sure. I was just pulling your leg, I'm afraid.

MR FACENNA: No, no. I mean, I think we all wish on the last day of term that you had received a more straightforward order. But in truth, I think it's fair to say that quite a bit of progress has been made. The list of issues is agreed. I hope we get full marks for that homework and it's broadly in line with the expectations that were discussed at the last CMC. There are --

THE CHAIR: It's quite a dense document. I mean, I do appreciate the agreement, but it is not a very user friendly document. No doubt we'll get more used to it as we get familiar with the issues.

MR FACENNA: Might be a B+ rather than an A ...

THE CHAIR: Not an A, no. A- --.

MR FACENNA: Yes. There are many disputes still in the correspondence. There's a lot of dispute still about what's going to happen in the Pre-existing Disclosure. We're not asking the Tribunal to resolve those today. Stepping back from the detail, there are really three issues.

THE CHAIR: So you're not asking -- because quite a lot of your base of your skeleton arguments is devoted to the Pre-existing Disclosure.

MR FACENNA: Yes, so there are --

THE CHAIR: Are you telling us we don't have to decide?

MR FACENNA: No, there are some aspects which we are inviting you to decide today, but we recognise there are a lot of ongoing disputes and queries about it which we've sensibly recognised could probably be dealt with in more detail between now and CMC 3 and some of them can likely be resolved.

In terms of today, there are three broad issues on which the Tribunal is asked to give directions. First of all, the directions which we say are required to give full effect to the disclosure arrangements which were put in place by the CMC 1 Order. There are two related aspects to that. The first concerns the operation of paragraphs 5 and 6 of the

previous Order which you'll recall required, first of all, disclosure of the specified three regulatory datasets referred to in Kornacki together with explanatory information. So that's what's been referred to as the Initial Disclosure. That disclosure has taken place; we've had the sets; we've had the explanatory information but there are a number of outstanding questions about it. Just to shortcut this, where we've ended up is that Google has agreed to provide answers to the outstanding questions about the explanatory information. I think there remains an issue between us as to whether the Tribunal should order the date by which that those --

THE CHAIR: Can I just be clear what the -- when you're talking about the outstanding questions, is that Dr Latham's questions in the --

MR FACENNA: Exactly.

THE CHAIR: Is it his 5 December letter?

MR FACENNA: No, it's in the 27 November letter. There's a memorandum. I was going to give you the bundle reference when I come to it. But the latest correspondence, I think from the 9 December letter, anyway the last few days, Google has said that it will provide answers to those questions. So it's just a question of whether you order, as we ask, that that should be done by 31 January.

THE CHAIR: So that's the 31 January in place of 27 February; is that right?

MR FACENNA: No, I don't think there's -- Google's not proposing any date for those answers.

THE CHAIR: Right.

MR FACENNA: It's simply said, "Well, you've raised the questions; we'll answer them in the normal way in due course" or something to that effect. So in terms of the draft Order, this would be paragraph 17.

THE CHAIR: Let's just have a look at that if we may. So you put in the 30 January, I think.

MR FACENNA: That's right, because I think we previously had the 31st, which turns out to be a Saturday.

THE CHAIR: That's a Saturday.

MR FACENNA: -- (inaudible) whether it's the 30th or the 31st. But you may recall that -- so, what essentially happened -- I mean, I can probably deal with this quite briefly rather than make the more detailed submissions, although I'm still at the stage of only giving you an outline of what has to be decided. In fact, shall I just finish the outline and then we can deal with that point quite quickly.

THE CHAIR: Yes. I'll try and keep quiet while you outline what's ...

MR FACENNA: Not at all, sir.

THE CHAIR: So the first thing is paragraphs 5 and 6, answers to the outstanding queries?

MR FACENNA: Yes. So that's the paragraph 5 disclosure under the previous Order. Paragraph 6 of the Tribunal's Order required the provision of Google's proposals and explanations in respect of that wider body of pre-existing regulatory disclosure. That's what's led to the 248-page document. There are some principles -- so there are a number of issues that come out of that, but essentially, there are some outstanding queries and questions, which are paragraph 10(b), we'd require Google to answer. Those include outstanding points from the 4 December CRA letter.

Then, we've identified some broad issues of --

THE CHAIR: Sorry, before you move on. So paragraph 6 was the -- so this is pre-existing disclosure?

MR FACENNA: Yes. So that's the wider body --

THE CHAIR: Wider body of material, yes.

MR FACENNA: The French Competition Authority and the EC and mostly the DoJ actually.

THE CHAIR: Yes.

MR FACENNA: So we've had the proposals; there's been a whole series of back and forth about that. Some of it, we accept, will probably have to wait for further exchanges.

THE CHAIR: Yes.

MR FACENNA: But there are three aspects, if you like, which we're asking you to decide today. One is that Google should provide a date for provision of responses to the outstanding queries. And when we come to that, although the draft Order refers to the three letters which are outstanding, we've produced a little list which identifies the exact questions. Actually, it's relatively short now, what's outstanding. That's the first point.

Then there are two issues of principle which are outstanding in relation to --

THE CHAIR: Sorry, Google's position on that is no date or are there rival dates?

MR FACENNA: I think that's still probably something to be dealt with in due course.

THE CHAIR: I see, okay. Thank you. And then there's the two outstanding issues; one is the sort of evidential material from the DoJ; is that right?

MR FACENNA: Yes. That's the so-called non-contemporaneous material. Now, that point goes wider than the DoJ because it also encompasses issues about the French authority and the EC, but we're not asking you to decide those today. I think we recognise they're slightly more complicated. We are asking you --

THE CHAIR: You're asking for the expert reports, depositions and other material in the DoJ proceedings?

MR FACENNA: Yes, and that's 11(c) in our draft Order so that needs to be decided in relation to the pre-existing disclosure.

Then the other point is this geographic exclusion for non-UK materials. We've had a series of concessions on that so the point has been substantially conceded. But, as

of last night, there still appears to be a significant amount of material which is being proposed to be withheld on geographic grounds, and so I will want to address you on that and decide that.

So those are the only issues which you're being asked to decide in relation to the paragraph 6 material.

THE CHAIR: Yes.

MR FACENNA: There's then the question of what is paragraph 12 in the previous Order, which is further disclosure, i.e. what do we do about the other material which is relevant to the issues in these proceedings, but which is not captured by the pre-existing regulatory disclosure? You'll recall that where we got to at CMC 1 was the Tribunal gave a strong indication that unless we could agree a way forward on this, you would be minded to order a disclosure report and EDQ. We are unfortunately still in the position where, from our perspective, we haven't made progress on it, and there's a bit of a stand-off as to how we do deal with that issue.

We're asking you, effectively, to make directions today, which put in place a structure to ensure that we can resolve that issue and make progress on it before the next CMC.

THE CHAIR: So that's the second issue?

MR FACENNA: That's the second issue, exactly. So, in relation to the first of the three broad issues, there's the pre-existing material and then there's the second issue, further disclosure.

The second broad area where you are being asked to give directions today relates to further directions to trial. Again, that's a slight rehash of arguments we had last time. Our position is that the Tribunal should now put in place a timetable towards trial. Google resists that.

THE CHAIR: We are now less than two years away from the trial. September 28, it starts, I think.

MR FACENNA: Yes.

THE CHAIR: And it's 12 weeks, I think.

MR FACENNA: It's a 12-week trial.

THE CHAIR: And it's going to be quite a difficult process to manage, both for us and for you isn't it?

MR FACENNA: Yes. The two years sounds like a long time away but, as you will know, that's going to disappear very quickly given the amount of work.

THE CHAIR: We need to build in slippage as well.

MR FACENNA: Yes, there might be a possibility of mediation. There might be other things that have to happen. So, I mean, again, in a nutshell, our position is the same as it was last time, which is: it's normal, once the pleadings are closed, that you set the timetable. We don't want to lose the trial date. It's useful for everyone to have a timetable. It doesn't mean that that's set in stone. Things might happen, but we do think it would be sensible to set that outline timetable today.

THE CHAIR: Just, has there been any engagement from Google in relation to the dates? Let's say, I mean, I know it's dangerous to engage if ultimately your position is we shouldn't make directions at all, but the dates are all your dates, are they, at the moment?

MR FACENNA: These are all our dates, I think, with the exception of what's in paragraph 34.

THE CHAIR: So if we did decide to give directions for trial today, perhaps the sensible thing is in fact to invite the parties to go away and try and agree them, rather than try and hammer out the timetable today. I mean, if we spend time arguing about a timetable which Google hasn't really commented on, that might be a waste of everyone's time.

MR FACENNA: Well, it might be that if the principle's decided then they may be no

issue about the dates, and particularly, as I say, those dates are not set in stone forever. They're giving us the roadmap between now and then. But yes, if you were to give an indication, having heard my learned friend, that that's what you're proposing to do, maybe we can have an opportunity to see if we can agree on the dates.

THE CHAIR: And if not, a short hearing to decide that. I suppose we would only have to decide on paper the first couple of dates, because we could then decide at CMC.

MR FACENNA: We could come back to it. So that's the second issue as to directions to trial.

The third broad issue is, Google's application to resurrect the strike-out application on limitation grounds. So that raises an issue of principle as to whether there is a proper basis for revisiting that case management decision now. We say --

THE CHAIR: You can't stop them issuing an application, and we can't stop them applying to have it heard. I mean, the indication that Mr Justice Marcus Smith gave was very clearly that it should be dealt with at trial. But if somebody applies to strike out part of a claim, we can't prevent them. I mean, the ultimate sanction is one of costs. If we have to convene a hearing which is then unsuccessful, we can't actually prevent them from having that application listed and heard, can we?

MR FACENNA: Well, they are asking today for directions for a one-day hearing at the same time as CMC 3. So they are in fact asking you today to revisit and decide the issue of substance as to whether it should be dealt with separately and that hearing be interposed into the timetable, or whether it should, as a matter of case management, be left to --

THE CHAIR: You, say that we should decide to do exactly what Mr Justice Marcus Smith decided: that it should be left for trial.

MR FACENNA: Yes, well our position, in a nutshell, is first of all, it's been raised at the very last minute and hasn't been properly explored in correspondence, so it

shouldn't be dealt with today at all, actually. Secondly, there isn't a proper basis to revisit that case management decision. And to the extent that you're going to reconsider that case management decision, then all of the reasons given in June last year remain valid.

So that's the outline. From our perspective, really the theme across all of these issues is case management efficiency and ensuring that the directions that you already made at CMC 1 can operate as they were intended to, i.e. to provide a shortcut, an efficient way through disclosure in this case, and then to put in place a structure to ensure that the more detailed issues on disclosure are crystallised and ready to be determined in May at CMC 3 when we come to that.

So, having given that outline, I was going to move on to the paragraph 5 issue, if you like. So that's the outstanding CRA questions. I think strictly, on the agenda, that's roman numeral III under number 1. But because it relates to the first tranche of disclosure, if you like, it makes more sense to deal with it now. And, actually, I think I've more or less given you the points.

THE CHAIR: How do you want to deal with items I, II, and III under paragraph 1? Obviously, from the agenda, we can see that you consider these to be the issues that are going to take up most of the time. Do you want to deal with each one and then ask us to make a decision, or do you want to deal with all three, and we'll hear from Mr Pickford on all three, and then we'll either retire and make a decision, or do you want us to hear an argument on everything and then either give a decision today or reserve? What are the parties' expectations?

MR FACENNA: Well, I don't have a clear view. I think I was rather anticipating, as you did last time, that you might tell me to speak on issue I, and then we'll hear my friend and then decide that.

THE CHAIR: Is issue I, for these purposes, the whole of paragraph 1 of the agenda,

or?

MR FACENNA: I think it is because, I mean, III is short, actually. And then it's really the disputed exclusions.

THE CHAIR: Yes.

MR FACENNA: On the paragraph 6 material.

THE CHAIR: So, just to remind us again, paragraph 1 is paragraph 5, isn't it. And it's the answers to the questions; is that right?

MR FACENNA: Yes. So on the agenda it's 1.III. But this relates to the paragraph, paragraph 5 of the old Order; it's the three datasets we've already got.

Pre-existing disclosure

Submissions by MR FACENNA

MR FACENNA: Now, it's dealt with in our skeleton argument at paragraphs 11 to 13. And we have set out there -- some of that material is still confidential, so I'm not going to go through those points. The basic point we were making in the skeleton was that the explanatory information which was provided, together with the datasets, was heavily redacted, without actually any clear explanation as to why. That created real problems for our external economists in seeking to navigate and understand the material. Because the explanatory information appeared to be incomplete, or exclude key descriptors of the contents of the data. And that's really to give you the context as to why CRA set out the detailed list of questions, which it did in the document on 27 November.

Now, if you haven't had a chance to look at those questions, they're in bundle C.1, tab 31, 414. That's the covering letter. So you'll see there that paragraphs 2 to 8 are probably worth you scanning an eye over. It's really context as to why we've experienced difficulty in navigating that material. So 2 to 6 essentially set out, well, these are the problems we've got with understanding the explanatory information,

CRA has now set out a detailed list of issues. Sorry, I realise this is a confidential letter, but I'm trying to be careful about what I say about it.

THE CHAIR: Absolutely.

MR FACENNA: I don't think the substance of what's said in the letter is actually confidential. Paragraph 7 of that letter makes the point that in CRA's questions, some of them overlap. So it might be that the exercise is not as extensive as it seems. And it raises, if you have a look at paragraph 7, you'll see that one of the difficulties, as you remember, there are three datasets, from different regulators. One of the difficulties is that even where the fields appear to be similar in the datasets, you can't see, or you can't safely assume, that they are exactly the same because they don't have a dictionary or codebook which allows them to understand necessarily what the fields are. And that's the point in paragraph 8, which I'm going to come back to. This is this point about codebooks.

THE CHAIR: This data codebook. Could you just describe what you mean by a codebook?

MR FACENNA: Yes. I can show you an example, actually. Effectively it's a document --

THE CHAIR: An electronic key, or something of that sort?

MR FACENNA: Exactly. It's a document which tells you what each of the fields means in the data set; the variables that might be in there; what exactly the measurements are: is it pounds, or is it a date, or is it a number, and so on. And it enables you properly to understand the data that you're looking at. And my instructions are, I think, as you actually see in paragraph 8 of this Hausfeld letter -- it might not be paragraph 8, but I think somewhere else in this letter -- there's a point in this letter, yes, actually, it's paragraph 2, which makes the point that the codebook for each dataset will provide "a clear economic definition/interpretation for each field and the expected ranges of

values or categories". And then they say:

"As you will be familiar with, it is standard practice for a party producing a dataset in a competition matter to provide such information (including through the creation of a new document) in view of the technical nature of the material."

Then that's why, at paragraph 8, you have the request, which I'm going to come back to you, that Google provides a codebook for each dataset, which it is going to produce.

So the annex to this letter then, which starts at 417, is the CRA memo from 27 November, and you'll see it's quite a detailed document. Section 1 is "Definitions". There's then a section for each of the datasets which have already been disclosed, so it starts at 419 with the DoJ; and then there's one for the French Authority, which is 6; and there's one for the CMA as well.

When we sent this letter, we asked for a response by 14 January. At the time of settling the skeleton and the draft Order, Google's position in correspondence was that it objected to this matter being on the agenda at all, because it simply said it would revert on the questions in due course, to the extent that they're reasonable and proportionate.

The latest letter from Google, on 16 December -- which you don't need to turn up, but which is in bundle E.1 at page 22 -- makes a series of complaints about the examples in paragraphs 11 to 13 of our skeleton argument, and seeks to address most of them on the basis that they are wrong or unjustified. But it does agree to provide written responses to CRA's questions in due course, and in the usual way.

So on this point -- I'll come back to codebooks in a moment, but on this point of answering the questions, it's only a question of timing, and our position is that it's appropriate to make the order in paragraph 17 of our draft directions. That will require them to answer the questions by the end of January, which is two weeks beyond the date we'd originally asked, and by that stage, it would be two months since they've

had the CRA memo.

On the question of codebooks then, we are -- effectively, the CRA questions bypass the need for codebooks in relation to those three initial datasets. The problem we've got is that we can't expect CRA to produce that sort of list of questions for every other one of the datasets that we're going to receive in due course. So that's why you have paragraph 18 of the draft order. I've just shown you that the class representative has asked, and indeed had asked as long ago as 1 September, that a codebook be provided for each dataset.

As I've said, my instructions are that these are standard internal documents. They're very likely, we understand, to be in existence already for internal use, especially within a data-driven business like Google's. So we're proceeding on the basis that these are not bespoke or novel documents. They are, essentially, a key to each data set, which Google already holds, and which it ought to be able to provide without great difficulty. The draft direction refers to the description of a codebook, which is in our letter of 1 September. If I can just show you that briefly, so you can see what exactly we're asking you to order. So that's bundle D.1.

THE CHAIR: D.1?

MR FACENNA: Yes. It's on page 203. This was on 1 September, before we'd had the initial disclosure. We already anticipated that there were things that we would need, and one of them was a codebook. So you'll see, at (B), we describe what exactly would be involved in this. That, again, that's a pretty standard, generally recognised description of what would normally be in a dataset codebook.

To show you an example of what that looks like, in relation to the initial datasets, Google relies on a confidential document which is in C.1, at page 76. So this is a this is a letter which starts at page 73, and it's a letter from Google's lawyers to the DoJ. The information I wanted to show you starts at page 78.

I gave you 76 because that describes what's in that appendix, so you'll see at 76. I won't read it out, because it's a confidential document, but the bold is the question that's being asked by the DoJ and then the letter describes the fact that the definitions of each field are in the annex, and then the annex is unredacted.

So that is the sort of thing that we would be expecting to receive by way of a codebook for each of the further datasets.

THE CHAIR: Can you just give us a little bit of help with the first category or the first description in your letter, which is the economic explanation? Because that's not so much a key, is it? You're asking for something slightly more than just simply the key to a field or an electronic document, if we go back to your letter in volume, I think it's E. It's the ...

MR FACENNA: Yes. So it's, at B(i):

"a clear economic definition/interpretation ..."

THE CHAIR: Yes.

MR FACENNA: So I think --

THE CHAIR: If we go back to D.1, at page 72 -- page 76, is it?

MR FACENNA: No, it was 203.

THE CHAIR: And then back to C.1 to page 78. Is there equivalent -- is there an example of something of that nature in this or maybe not?

MR FACENNA: Yes. Well, I'll need to check this, but my understanding is that the text which appears in "information", would be the sort of label that you would expect.

THE CHAIR: I see. So this is the kind of document that you're expecting?

MR FACENNA: Yes. So I have asked explicitly: is that what Google relies on in place of a codebook for the initial disclosures? My instructions are, yes, that's exactly what we would be looking for in relation to --

THE CHAIR: That's only in relation to ...?

MR FACENNA: It's in relation to any future datasets which are disclosed from the pre-existing disclosure. Again, because the CRA questions do away with the need to have it for the initial disclosure.

THE CHAIR: Yes.

MR FACENNA: So on this point, we invite the Tribunal to make the order in the form of paragraph 18. CRA will need to have some means of understanding and using the datasets reliably. We can't go through the same process.

THE CHAIR: Do we need to give the order a date, given that -- well, a date at the end of 18 will dovetail with whatever other orders we make.

MR FACENNA: Yes, I think we've confirmed that we're willing to receive the material on a rolling basis, subject to a longstop, which I think is 26 June in the draft order.

So that's the position on the CRA questions and on the codebooks. That then brings me to the other aspect of the paragraphs 5 and 6 issues, which are the exclusions from the pre-existing regulatory disclosure.

Now, as you'll recall, under paragraphs 6 to 9 of your order in August, Google was required to provide an explanation of the documents and datasets provided in connection with those other regulatory proceedings, if you have -- do you have the previous order there? If you need it in the bundle, it's in B.3, at page 77.

THE CHAIR: Yes.

MR FACENNA: So what paragraphs 6 to 9 of your order required was Google to provide an explanation of the documents and datasets that had been provided in those various proceedings and proposals for what should be reproduced into these proceedings, and then to engage in a Q&A process, with disputes to be resolved at the CMC.

So the purpose, I think, was to allow there to be an informed exchange and identification of what regulatory material had been provided in those proceedings and

what should be carried across into this case.

Now, Google's approach to compliance with those provisions is the 248-page explanatory note, which was served on 24 October. The bundle reference for that is C.1. It starts at page 129, which is tab 19.

As you have seen from the descriptions and the skeleton arguments, that document sets out in some detail what Google's prepared to disclose, but it also identifies some broad categories of material which Google proposes to exclude. We have addressed this in paragraphs 18 to 24 of our skeleton argument, and we've summarised some of the issues with that document.

The headline point is that it's a long document, has a lot of detail, but actually, its functional utility to try and achieve what paragraph 6 to 9 were hoping for is quite limited. There's been a lot of detailed correspondence that has gone back and forward on it, and that includes the detailed letter and the schedule from 5 December, which you referred to, from CRA.

The part of the problem with the document is that it's quite difficult to identify, from the proposals, the scope of what is actually in that pre-existing disclosure and the full scope of the proposed exclusions from it. I'll come on to further disclosure, but it certainly hasn't provided a basis to try and identify the gaps in that body of evidence.

Now, we have done our best to engage constructively on it and in detail, through a series of letters and technical queries. Many of those have been answered; some remain outstanding. I'm hoping that we have a list somewhere I can hand up as to what the questions are.

So in terms of the outstanding queries about that, which is dealt with in paragraph 10(b) of our draft order, as currently drafted, paragraph 10(b) I think asked Google to provide all additional information requested by the class representative in correspondence.

THE CHAIR: Sorry, where are you reading from? Paragraph 10(b) of your skeleton; is that right?

MR FACENNA: Sorry, it's 10(b) in the draft order.

THE CHAIR: Oh, sorry. Thank you very much.

MR FACENNA: Can I just hand up a short list, which, rather than have the draft -- rather than have the direction refer in general terms to that correspondence, we thought it would be sensible to try and pull together what the outstanding queries and questions actually are.

We've done this -- this has been shared with Google, but only as the hearing started. So before he says it, he will need an opportunity to have a look at this, and I think we are hoping, if you're with us on making the direction, rather than referring in general terms to correspondence, we can be a bit more specific about what the additional information that's outstanding is.

THE CHAIR: Just to be clear, this is what you say are the outstanding queries; is that right?

MR FACENNA: These are the outstanding queries --

THE CHAIR: Which they haven't agreed to answer?

MR FACENNA: Well, they haven't said they won't answer them. It's just that -- actually, to be fair, they have dealt with quite a lot of the queries which have been raised in the three or four letters they've been --

THE CHAIR: But these are the outstanding --

MR FACENNA: These are the things which are outstanding.

THE CHAIR: Yes. Thank you.

MR FACENNA: Just one other point on this. What we haven't included in this list are some queries that relate to the exclusions of the non-contemporaneous material -- which you can call it that -- in relation to the European commission and the

French Competition Authority.

That's not because we don't still have outstanding questions about that. It's because we've agreed that that's not a matter for the CMC. It will be for CMC 3. So they're not in this list, but that's because we've agreed we're going to continue to explore them and come back on that.

I've been passed a note that items 10 to 12 have been agreed on that on this list. Does that means that items 1 to 9 haven't been? Well, we'll see where we get to on the list, but I'm hoping --

THE CHAIR: So, in principle, you want us to make an order in relation to the outstanding queries, 10(b)?

MR FACENNA: Yes, and that would -- yes. So I think we're asking for those to be provided by 31 January.

THE CHAIR: Again, tell us how that fits into the original rubric which we ordered at the first CMC. So what we anticipated was a dialogue. We effectively made order -- gave them orders for the dialogue. So what do you say that they've not done that?

MR FACENNA: I suppose it would be a combination -- it's probably more paragraph 8 for the most part.

THE CHAIR: Right.

MR FACENNA: So that's ask and answer reasonable questions about it and the explanations are provided.

THE CHAIR: So you're asking us to address the areas of dispute. You're referring to us the areas of dispute effectively for determination at CMC 2, or at least one area of dispute?

MR FACENNA: Well, I think we want the answers to the questions to understand whether there continues to be a dispute on that.

THE CHAIR: I see. So it's more preliminary than that?

MR FACENNA: Yes, I think it's enabling us to understand what exactly is in this material and what is the scope of what you're proposing to exclude, are mostly what those questions go to.

THE CHAIR: Yes.

MR FACENNA: Now, separately from 10(b), for the purposes of this CMC, what we sought to try and do was identify out of the broad range of outstanding issues, issues of principle that could usefully be determined today to try and settle the scope of that pre-existing regulatory disclosure under paragraphs 6 to 9. Now, where we alighted was that there were some obvious candidates which had already crystallised and these were the three broad exclusions that Google was seeking to apply. So they were, and to some extent still are, a pre-2014 temporal cut off. So, the proposals say you're not getting anything from before January 2014. That's gone; that's essentially been conceded, sir, which is sensible. We don't need to deal with that.

The second broad exclusion is the point on UK geographic scope, which has been substantially conceded but I will need to make some submissions on where we've got to on that. And then the third point is the non-contemporaneous DoJ material, so the depositions and so on. So, our position is that those exclusions raise issues of principle and should be determined now so that the process can move forward.

And they're dealt with, the directions that we're seeking then in the draft are 11(a) and 11(c). You'll see that that has accepted Google's. So where we got to was that Google conceded the point on pre-2014 material subject to us agreeing to a month's extension to the longstop date. Our position at the time you got the skeletons and the draft orders was, well, we'll agree to the longstop date for the pre-2014 material and anything new, but you should stick to the 31 January date for the stuff that you'd already agreed to give us.

There was a further exchange last night where, if I'm not misrepresenting it, Google is essentially saying, "We still want to have the 27 February date as a longstop in the order, but we are working very hard to get you material". And it is, I think, with these, our expectation that we will be able to provide you with the 2.5 million documents that we'd already agreed to give to you by 31 January.

So we can get into this when it comes to finalising the order, but the essential point is that I think we're willing to accept the February date in the order, provided that is a concrete and real indication that we will be getting the vast bulk of that material by the end of January. What that might mean when we come to finalising the order is that what's currently in 10(a) would shift into something that looks like paragraph 11, because we would accept that the longstop date for provision would be in February, but we're going to get it on a rolling basis.

THE CHAIR: So you would move 10(a) to 11(a)?

MR FACENNA: I think that's effectively what we would do. So ...

THE CHAIR: On the basis that if there is to be any further extension of time, it will be very short and will depend on --

MR FACENNA: Well, I think more firm than that.

THE CHAIR: More firm than that?

MR FACENNA: I mean, the Tribunal was pretty clear with them at the last CMC that they would get a frosty reception if there hadn't been any progress made.

THE CHAIR: Yes.

MR FACENNA: Other than the three initial datasets, we've had no disclosure yet pursuant to the 24 October proposal. We think there ought to have been some by now and we expect to have that material on 31 January, but we are prepared ...

The explanation that's given doesn't make total sense to us. The idea seems to be that if you have two different dates in the order, that's somehow going to create more

work than having one date. I don't really see how that matters in practice if you're saying that actually you're going to give kind of the vast bulk of it in January anyway, but we don't want to stand on formalities. If Google's giving a concrete indication to us and the Tribunal that the 2.5 million documents will be provided at the end of January, I think we can live with having one longstop date at the end of February. But perhaps Mr Pickford can explain what the concern is about that.

THE CHAIR: But you're not asking us to make an unless order or anything of that nature?

MR FACENNA: No, no.

THE CHAIR: You're just making -- you want us to indicate that, as far as we're concerned, that's a firm date and that we'll --

MR FACENNA: Yes.

THE CHAIR: Yes.

MR FACENNA: Just before I deal with geographic scope and the DoJ materials, 11(b) deals with the temporal restriction that was previously imposed. So Google had initially proposed to exclude all documents predating January 2014. That was, frankly, plainly inappropriate, given that the alleged conduct in this case predates 2014 and there is a huge morass of pre-2014 documents which have featured prominently in the DoJ proceedings. Anyway, the point has been conceded subject to agreeing the date and that concession sensibly means that a substantial tranche of potentially relevant material will now be produced sooner rather than later. So that's provided for in 11(b) and we're happy for that to be subject to the longstop date in 27 February.

That then brings me on to the geographic scope question. There's been a bit of movement on that, actually, since last night. So if I can hand up a letter which has gone -- (Handed)

THE CHAIR: Yes.

MR FACENNA: So this is there was a letter late yesterday from Google with revised proposals on the geographic scope exclusion. Partly so that we have it in one place, we've responded to that this morning. I'll come on to this letter in a moment.

So, the context here is that Google's proposals exclude dozens of datasets from the DoJ material, and actually other EC material, which concern bids that were placed by advertisers on a country-level basis for markets outside the UK. Actually, I probably haven't paraphrased that very well. If you want to have a look at what the proposal actually was, it's at C.1, page 134, paragraphs 3.1.5 at the top of 134. Strictly speaking, this is still designated confidential so I'll just ask you to read that paragraph.

(Pause)

So the effect of that, which was actually the page reference I just gave you, if you then jump to the schedule at page 221 -- this is schedule 8, you'll see the datasets it concerns in bold type at the top of the page. In item 1, you can see a description of what's in the datasets in the third column, and then the proposal in the fourth column which reflects the justification which I've just shown you. So it would exclude EEA data for other countries which don't include the UK.

Now, the effect of that in the form in which we received it was that it would exclude large numbers of datasets which are directly relevant to the issues, in particular questions of dominance because market definition on whether the market is a UK or EEA-wide market is a live issue, and/or modelling to estimate damages and so on. And several of the proposed exclusions on geographic basis also relate to publishers, adoption and use of header bidding, which you might recall was relevant to the alleged abuses, including how that expanded over time and how Google's conduct affected that expansion.

I can show you, just to illustrate the point -- and although, and I'll get to it, there has been some narrowing, but I think the illustrations I'm going to give you include datasets

which, as of today, are still proposed to be withheld. If we go to the CRA explanation, which is the 5 December document, which is in the same bundle, C.1, and if I can ask you to go to page 443. So this is Dr Latham's letter, dated 4 December. It starts at 435. You might have seen that the purpose of this letter is to set out serious concerns about the proposed exclusions and then there's a table which starts at 440 which deals with each of the exclusions.

So for example, on 443, if you look at schedule 8 at the bottom, which is the schedule that I was just showing you a moment ago, you'll see Dr Latham's explanation for all of those schedule 8 items and why they're relevant. Do you see in the fourth column at the bottom of 443, the language beginning, "The datasets described"? If I can just ask you to read that box and it continues over the page. (Pause)

To give you another example again of something which remains an issue on this point, if you go to page 448 in the same bundle, this refers to schedule 8, item 9, which again, Google proposes not to produce as they're outside geographic scope. Again, I'll ask you to read Dr Latham's explanation of their relevance in the fourth column there. So it goes to the point I made a moment ago about adoption of header bidding. (Pause)

So this is where we were. Our skeleton argument when it was filed addresses, at paragraphs 29 to 34, why Google's approach is misconceived. There are basically three points. The first is that it presupposes the disputed issue about market definition; that's effectively now been conceded. The second point was that this is a claim which concerns global revenue streams and aggregate loss suffered by the class wherever the relevant impressions were sold. It's not merely about UK transactions. Then the third point we made in the skeleton was that these products, the ad tech products, are integrated and essentially globally uniform. So the datasets which cover non-UK markets are still directly relevant in the way that Dr Latham explains to the analysis of Google's conduct, to its effects and to questions of abuse and causation.

Now, there has been a step by step concession on some of those arguments. If I can show you the Herbert Smith letter, it's in the same bundle, C.1, at 474. And paragraphs -- so this is, I think, the 5 December letter. It's paragraphs 12 and 13. So Google -- although this is marked confidential, I think actually it's not confidential in substance -- has accepted that ...

THE CHAIR: They're accepting your pleaded cases.

MR FACENNA: They've accepted the market definition point and they've also accepted that the claim relates to global revenues. So they say that they won't exclude from the pre-existing disclosure material on either of those bases, but they will continue, at the bottom of 13, to exclude material which relates to publishers in non-UK markets (save to the extent that they determine that it's relevant to market definition and to questions of alleged dominance).

The latest correspondence, which came yesterday, is at E.2. The relevant page is 30. So they had previously said, "We're going to come up with a different proposal and we'll let you know what it is" so we got it last night. You'll see that what this letter says -- well, I'll let you read it; it's not confidential, this letter. It refers to some of the items which I've just shown you, so Schedule 8, which are EC materials and then Schedule 23 are DoJ materials. You'll see that, on some of the items, they are now proposing to provide all the datasets; on some of them, they say we're going to give you some additional ones: for example on Schedule 23, I think there are 33 in total and we would be getting 22 of them. Then they're not proposing to withhold any documents -- that's over the page -- on geographic grounds. So we're only talking about datasets.

I should make one point about this. This letter only addresses those items where they have reconsidered their position and are now going to give further disclosure. There are items which are not mentioned in here at all where they are maintaining their

position. That's the point.

If you now take up the letter which I just handed up. Actually, to be quite honest, I haven't yet had the chance to read this letter as it was being finalised as we started, so it might make sense if we just take a moment to scan this letter. (Pause)

So the table brings together those items from the pre-existing disclosure, where Google's position, at the time, well, as of this morning, remains that it will withhold them on geographic grounds.

The difficulty, as you see set out in our letter, is that it's actually still currently impossible to understand why some of the datasets are going to be withheld on geographic grounds when others are not. We still have no visibility of the datasets which are being withheld on geographic scope grounds. Google hasn't identified which ones they are. They could be very valuable datasets; we have no way of knowing what they are, based on Google's letter.

So our position, as of this morning, remains that this restriction, in principle, is inappropriate for the reasons which are set out in our skeleton argument. In particular, the ad tech products are part of a global ad tech infrastructure. The features of the products were not UK specific. Evidence, therefore about auction design, about the interoperation of the ad tech products that underpin the alleged abuses, are therefore directly relevant to any analysis of Google's conduct, its competitive effects and issues of abuse and causation. And we already have the Class Representative's confirmation and explanation, with detailed reasons, as to why these materials are relevant to the expert analysis and modelling.

So that's why, as a matter of principle, we are still seeking a direction from the Tribunal that there should not be exclusion on the basis of geographic scope, because the materials are necessarily relevant.

Just to deal with what Google has said about this, in correspondence, one of the

suggestions it made was that Dr Latham could request UK-equivalent datasets. There are significant practical concerns about that issue, partly because Google has itself previously indicated that it won't be possible to disaggregate the existing datasets to isolate data relevant to the UK. And secondly, it appears that, for many of them, there simply won't be UK-specific data. If I can show you on these issues, Mr Wisking's evidence produced for the last CMC. So that's bundle B.2 at page 453. This is Mr Wisking's description of the pre-existing datasets. And you'll see under the heading "EC Investigation", he says that he -- this is not confidential -- he understands from the economist:

" ... that a substantial number of the datasets produced to the EC either cover the EEA, but exclude the UK, and/or are global. These were provided ... on an aggregate basis, rather than per country, such that it would not generally be possible ... to isolate the data relevant to the geographic scope of the Proceedings ..."

And that at 72.3 he also understands:

" ... that it would not be possible for Google to return to the underlying data used to prepare those datasets ... due to Google's retention period and policies."

In any event, that would undermine the very purpose of relying on the pre-existing disclosure material. So it's not clear to us that that idea that Dr Latham can come back at a later stage and ask for UK-specific data is actually one that is feasible in practice. In its skeleton argument, Google also makes a number of further comments and criticisms about this geographic point. I can deal with them briefly. None of them really address the point of principle. The first is in my learned friend's skeleton argument at paragraphs 20 to 21. They suggest that we have contended that Google should have identified an equivalent UK data set for each non-UK data set, and they cite a Geradin Partners letter in support of that. That's a misinterpretation of what it said in that letter. It's quite clear that actually the concern that was being expressed

consistently with that evidence of Mr Wisking I've just shown you, is that equivalent UK-specific data simply may not exist.

Secondly, at paragraph 25 of Google's skeleton, there it's suggested that disclosure from publishers in non-UK markets will impose additional significant costs for limited, if any, benefit and where there is additional data which might be relevant, necessary and proportionate, this should be a targeted request made.

But, as I've shown you, Dr Latham has already explained why the non-UK specific datasets are relevant to his methodology for quantifying harm, in that 4 December memorandum. Further, as I've just mentioned, the assumption that it would be possible to locate and provide UK-specific data seems doubtful, given the evidence that we've received on that point.

The third point which Google makes in its skeleton relates to its revised proposals on geographic scope. We've now received that as of last night. And as I've shown you in correspondence, the explanations which have been provided remain unclear, and the distinctions are not fully explained. So where we end up on this point is that we say a ruling from the Tribunal on this issue is appropriate now to avoid further skirmishing and disputes about it later on. If we don't rule on it now, it's possible that the issue is still going to remain outstanding at CMC 3. Given the potentially broad nature of the issue, even with the more limited approach that Google is proposing to take, it does seem to us that it still has the potential to give rise to material delay in disclosing relevant pre-existing materials.

So our proposal on that is the one that you see at paragraph 11(a) of the draft Order. And again, we've accepted the February date for that, assuming you're with us, and order that material to be disclosed.

The other point then, is the DoJ non-contemporaneous documents. This is addressed in our skeleton argument, paragraphs 35 to 45, and it's, dealt with in 11(c) of the draft

Order, with which you've been provided. And you'll see that, for the purposes of today, we're seeking directions in relation to those four categories of material from the DoJ litigation, which are: expert reports; depositions material; responses to interrogatories; and responses to requests for admission.

Before turning to the relevance of each of those categories, can I just deal with one brief semantic point that Google raises in its skeleton argument, which is whether those materials fall within what was intended by paragraph 6 of the previous Order at all. So the previous Order referred to Google providing an explanation of the documents and datasets provided in connection with the relevant proceedings. It was not restricted to discovery in the US sense or the underlying materials which predated the relevant proceedings.

The Order says nothing about the documents needing to be pre-existing prior to the proceedings. In fact, it's a false distinction which Google seeks to make, because many of the datasets that were provided, and that Google accepts do fall within the scope of the Order, were prepared specifically for the proceedings in question. So they can't sensibly be said to be pre-existing or predating documents. Indeed, it is clear from the explanatory material that some of the datasets were produced actually in response to templates which were provided by the relevant regulator, in some of those proceedings. So, we say, semantically and conceptually, there's no reason why the body of documents and data provided in those other proceedings should not include the evidence that was generated for the proceedings. Indeed, that's exactly the sort of evidence and material which is going to provide the efficiency advantages that the Tribunal was seeking to achieve. That's the point on the scope of the Order.

As to the relevance of these specific categories, there are already redacted versions of many of those US documents available on the US docket. It's clear already from the redacted versions which are available that they do directly address questions of

auction design, bidding behaviour, market effects that correspond to the issues in these proceedings, and are now identified in the agreed list of issues.

Taking the categories of documents in turn, expert reports: we address this at paragraphs 38 to 41 of our skeleton argument. The DoJ litigation expert reports will contain economic and technical analyses of exactly the same ad tech products, the same conduct, and the datasets at the centre of this claim. They address core issues of market structure, of dominance of auction design and bidding behaviour, and so on, and the functioning of the ad tech stack. Most importantly, they will synthesise the vast amounts of source material that Google is already agreeing to disclose in bulk.

So it's obvious that having access to that expert evidence, which has already analysed and marshalled the underlying documents, will be of very real assistance in these proceedings, both for the Class Representative and for Google and for the Tribunal, and to orient within the material and make effective use of the pre-existing disclosure and the work that's already been done.

To give some concrete examples, Dr Latham addresses this in his memorandum. If we go back to volume C.1, page 439. Perhaps can I ask you -- if this is a confidential document -- can I ask you to read paragraphs 24 through to 29. That goes to the relevance of the expert reports, and I'll show you in a moment some other Orders where this Tribunal has ordered disclosure of exactly this kind of material in other proceedings.

THE CHAIR: I don't think you need to take us there; I remember perfectly.

MR FACENNA: You've seen that?

THE CHAIR: Yes.

MR FACENNA: The relevance of the second category and the depositions material, so those are sworn factual testimony during the US proceedings, which explain how the ad tech systems and datasets work. They are part of the factual evidence which

was provided in the DoJ proceedings. They will include first hand accounts of Google's ad tech systems by the engineers and the economists and the executives who were responsible for them, and they are very likely, actually, to contain the clearest explanation of the technical concepts and the data fields.

That depositions material is evidence which speaks to exactly the same core documents and datasets that Google is disclosing here. We say that producing those transcripts essentially provides you with a map and a way through the 2.5 million document universe, which self-evidently is going to reduce the work, and the time and the costs involved in reviewing that material. To be clear, we wouldn't be proposing to rely on that material for evidence --

THE CHAIR: No, no.

MR FACENNA: -- as evidence of truth in these proceedings. They're interpretative navigational tools to make the pre-existing disclosure arrangements usable and proportionate.

THE CHAIR: Well, no reason why they couldn't be admissible, in fact, as evidence.

MR FACENNA: They might be.

THE CHAIR: For the moment, you're relying on them as an aid to disclosure, because you say you shouldn't have to reinvent the wheel, because exactly --

MR FACENNA: Exactly.

THE CHAIR: -- you know, because spokes have been put on the wheel in earlier litigation, so it's going to help you identify key documents, key issues.

MR FACENNA: Yes. And in relation to this material, I mean there isn't really a difference. It is evidence. It's sworn evidence about exactly the same issues that the datasets go to.

THE CHAIR: I don't see why it shouldn't be admissible. I'll hear from Mr Pickford. But, I mean, it's only the actual findings that would be inadmissible as the findings of

an alternative Tribunal. I mean, the actual evidence that was put before them would be admissible, subject to questions about the constraints under which that evidence was given.

MR FACENNA: Yes.

THE CHAIR: But as a matter of principle, it would be admissible.

MR FACENNA: I take that point but, as you say, for now, this is really about making effective what you have already ordered and trying to shortcut the process.

THE CHAIR: Yes.

MR FACENNA: Really, the same points about responses to interrogatories. So interrogatories are, of course, written questions from one party to another.

THE CHAIR: And they play a different role in US proceedings.

MR FACENNA: They do. So they're not evidence in the same way. I mean, they're effectively, well, Google describes them as advocacy documents. They're not advocacy documents. I mean, the purpose is to determine the scope of the factual matters. They're not a vehicle for submissions. We recognise they're in a different category from the expert reports and depositions. But they will contain, for example, authoritative clarifications of Google's position on issues of system design and data generation, undisputed facts, and so on. So, again, they will materially assist in interpreting the datasets which are being redisclosed. The same really applies to the request for admission.

I mean, again, we'll clarify factual positions, narrow the issues, and if Google has admitted facts in the DoJ proceedings, it's going to be very important for the Tribunal and for the parties to know what those facts are, both for reasons of procedural efficiency, but because those admissions will obviously be highly relevant to the disputed issues, these proceedings, given the significant overlap. So that's the points on relevance of those materials.

Google's objections, just briefly: they say that the greatest weight should be given to the primary pre-existing material rather than what they describe as "secondary materials", but we don't accept their position on the probative value of the materials. I've just explained why this material actually has a clear and obvious probative value. Certainly, receiving a deposition or an expert witness statement that explains a particular aspect of Google's product is likely to provide far more valuable evidence than half a million documents or the raw data that sits underneath that explanation.

Their argument, the related argument about manageability -- because they say that this will also lead to an increased volume of disclosure, which is unmanageable -- well, that's a bad point. One of the reasons why we're seeking these materials is precisely because they represent an efficient and cost-effective way of marshalling the more than two million documents that are going to be disclosed early next year.

So we would say, if questions of proportionality arise, then actually, disclosure of these materials favours proportionality, because it will reduce unnecessary duplication of work and save very substantial time and costs.

Google's second point concerns the need to review or remove or redact third-party confidentiality material. Now, we've made the point in our skeleton that there's currently no evidence before the Tribunal as to the scale of that task. Some of the material, as I've said, is already publicly available in redacted form. Some of the material appears to have been provided to the European Commission.

So based on what we can see, it seems likely to us that some form of redaction and confidentiality exercise has already been undertaken, but without evidence, it's difficult to know. But in any event, we would say any additional work that's required to do that exercise is likely to be far outweighed by the efficiency gains for the parties and the Tribunal in having structured comprehensible material in place of millions of unfiltered documents.

The third objection Google raises is that Dr Latham's approach is fundamentally inappropriate. That's Google's skeleton, paragraph 32. That's based on a partial summary of the explanations that Dr Latham gives. I've shown you his explanation in the 4 December letter, which makes it clear that what he's proposing to do is to use that expert material to help orient the available data and evidence.

There is actually nothing inappropriate at all, as a matter of principle, in an expert considering expert reports that have been produced in relation to the same issues in different proceedings. I will not take you to them, but exactly these kind of documents have been ordered to be disclosed by this Tribunal in other proceedings. I think the -- I don't know if the references are in our skeleton argument or not. I think they are.

Just to finish this point then, which I think brings me to the end of what I was going to say on it, Dr Latham is going to come to an independent view. The utility of disclosing the documents is obvious. The marginal burden of an additional confidentiality review is outweighed by the efficiency gain, which will be substantial. So on that basis, Google should not be permitted to exclude this category of documents in principle.

On the date, I think we've dealt with everything I wanted to say about that. Yes. I mean, effectively, we're willing to agree the February date for disclosure of this material, and that would involve some rejigging of 10(a), 10(b) and 11(a) to (c).

So going back to the draft Order, I think when it comes to 10(a) we'll be moving to what looks like 11. So the February date. 11(a) deals with geographic point; 11(b) is the pre-2014 point; and 11(c) is the DoJ material that I've just been making submissions on. Just so you have it, the reference to other proceedings where these Orders have been given is in our skeleton arguments, footnote 13.

THE CHAIR: Yes.

MR FACENNA: So those, I think, are my submissions I was proposing to make on

this first issue. Unless there's something else on that, I can --

THE CHAIR: I think you with -- the last point you had related to the question of a -- the EDQ and the -- does that fall under the --

MR FACENNA: So that's the next issue that's --

THE CHAIR: That's the next issue. Well, in which case, let's, yes -- looking back at my notes, that's paragraph 12. Yes. So we'll come to that after we've dealt with these issues.

MR FACENNA: Yes, sir.

THE CHAIR: So why don't we take a short break there, until 12.00, and then we'll hear from Mr Pickford.

(11.54 am)

(A short break)

(12.01 pm)

Submissions by MR PICKFORD

MR PICKFORD: Mr Chair, members of the Tribunal, I'm going to seek to go through the issues that Mr Facenna has addressed, broadly in the order in which he's addressed, and that isn't quite the order in the agenda, and so it's going to require a bit of rearrangement by me. It's possible that my learned junior may have to poke me at some point if I've missed something as a result of that reorganisation.

But before doing that, I'd just like to make one brief contextual comment, before getting drawn into the specific issues that we're debating, which is that an impression has been given by my learned friend to the extent that, sir, you even asked at one point whether, in fact, he was seeking an unless order, that we have, in some way, breached the previous Order the Tribunal made and/or been uncooperative or dilatory in the way that we have approached these disclosure issues. Any such suggestion is emphatically rejected by my client.

What we have done since the Tribunal's Order is produced an exceptionally detailed and comprehensive explanatory statement running to 248 pages, outlining the scope and the nature of the pre-existing disclosure. We originally made proposals to the Class Representative for the production of some 2.4 million documents from that and more than 300 datasets.

That work took Google, and its various external teams, in the various jurisdictions that are relevant, over three months, and we estimate that the cost of that exercise has been more than £1 million.

Now, the Class Representative chose not to engage with that document, which we provided on 24 October until two clear days before the deadline for the Tribunal -- for us to resolve what was an issue between us and what wasn't. So they engaged for the first time substantively on 18 November and the deadline was on 21 November. So there were two clear days between those dates.

Obviously, we are where we are now and we have continued to seek to engage with the Class Representative, notwithstanding what we say is their very late engagement with our statement. But that approach has not been helpful, and it has hindered to some extent the ability to make progress. That is going to impact some of the things that we say we can do and can't do and that we should in fact now wait for a further CMC. It's relevant to that.

Also, since that date of the first substantive engagement, there has been a flurry of further demands, a number of which have been backed away from. Obviously, parties always seek to reach agreement before a CMC, and I'm not criticising that of itself. When they back down, we're very glad. But the process, in our submission, has not been an orderly and constructive one on the Class Representative's side, and that has hindered, to some degree, what we can do in this hearing now.

So that's relevant context. It's not just a whinge. It's why I'm going to go on to

say -- some of the things that I'm saying, but I'll explain those in more detail.

So, if I could then go to the questions about, firstly, the request for information about datasets that the Class Representative has already received, and also the related codebooks issue.

THE CHAIR: This is para 17 or 18?

MR PICKFORD: I believe this is para 17 and 18 of the Order, yes.

You were taken by my learned friend, helpfully, to an example of the kind of information that is already available in terms of guides or a key to information that they have already received. So insofar as there is such a thing as an existing document, because what Mr Facenna was urging on the Tribunal is that there are existing documents, codebooks, as he described them, that can be provided.

In relation to the existing datasets, they also have everything in terms of what could be described as a codebook. That's also already been disclosed. There's nothing that we've been holding back in that respect.

Where his submission was, no doubt inadvertently a little -- well, it was incorrect. It was suggested by Mr Facenna that we would simply have codebooks and we can disclose them. Now, insofar as the documents exist, obviously, we can disclose them readily, easily, and would do so. I'm not instructed that there are any existing documents that go to explaining what the data is that's been received that we would be holding back.

The difficulty comes with the fact that what Mr Facenna -- in fact, what he actually really wants is not existing documents. He's not going to be satisfied with the answer, "Well, here is everything we've got", because there are some instances in which they want more information. And it's very clear that their economists understand what the scale of the task might be to provide that more information, because the date by which they ask for it is June next year.

So they don't generally bend over backwards to be particularly generous to us in their timetable, and the fact that they have anticipated that it's not until June, shows that, in fact, what they're asking for in that regard is potentially very, very large.

So it is important just to begin, therefore, by setting the scene in clarifying that there isn't some easy win here, that we just agree to provide the codebooks. What they're asking for is something that is going to need to be produced, and that is potentially going to be onerous.

But to come back to the first point about -- Mr Facenna's first point, which was before he got into codebooks. He said there are particular questions that CRA have already asked. We are indeed happy to respond to CRA. What we are not willing to do is to be held to an order where we are required substantively to respond to every single question that is asked of us, because we don't accept that every single question is capable of proportionately being responded to.

So what we are very keen to avoid is an order that compels us to do something that we don't think that we can proportionately do. We can respond, where reasonable and proportionate. We would be willing to aim to do it even within the timeframe that's been requested, which is 31 January.

But, given that these questions in fact have come through, we say, very late, and during preparation for all sorts of other aspects of the CMC, we don't think it's particularly fair that that becomes part of an order. And if it is going to have to become part of an order, it needs to be a more generous time frame, to make sure that we have some room for manoeuvre and scope so that we're not immediately under pressure in the new year.

THE CHAIR: Can I just ask this? Have you agreed to answer the questions raised in Dr Latham's confidential memorandum dated 27 November 2025? Or have you effectively said, "We will agree to do our best", you know? Is this a standard request

for further information where the recipient says "Yes, we'll give you an answer, but only to those questions to which you're entitled to an answer"?

MR PICKFORD: Yes. Yes, and I mean, I think it would go beyond entitled in a sense. We're not looking to be unconstructive: if we can help, and it's proportionate and reasonable for us to give an answer, we would seek to give an answer. But we do not accept that every question that we have been asked is one that it would be reasonable and proportionate to answer in the way that seems to be contemplated. So, that's the issue there. And in a letter that only came relatively shortly before this hearing, we say it wouldn't be fair on us to be subject to an order to address -- because Mr Facenna has not gone through each of those items and explained why it's a justifiable question and why we must reasonably be expected to answer it. So in those circumstances, it would be wrong for the Tribunal to order us to do so on that basis. We can only do the best that we can reasonably do. (Pause)

Sorry, in fact, I might be able to give an example. Let's just see whether I can give an example of a question which we say is inherently likely to be difficult, very difficult for us to answer. Yes. So, we're in the C bundle; if I could ask the Tribunal to go, please, to page 419. C.1/419. You'll see the first question at paragraph 1, which begins, "Please indicate how". I won't read out the rest because it's confidential, but if I could ask the Tribunal, please, to read paragraph 1, including (a) and (b). (Pause)

We say that is an example of a question that goes way beyond merely clarifying something about the documents that they've been given in a way that we could proportionately be expected to answer. And if there are going to be debates about whether we must provide an answer to that question, what would need to happen is that there would need to be a proper application, fully ventilated prior to a hearing, potentially a schedule of matters to be resolved by the Tribunal and we would go through and address each of those. But we can't, as I said, be expected to be subject

to an order where we are obliged to answer questions that we don't think we can proportionately address.

DR MAHER: Without getting into the details of everything, just with a quick look at this, it seems the questions that Dr Latham has asked seem to go directly towards market power. So I'm not sure why this request would not be relevant?

MR PICKFORD: I'm not saying it's not relevant to any issues. What I'm saying is that we have -- in terms of the overall approach that the Tribunal in my submission should adopt to dealing with disclosure-related questions and economic disclosure -- it's as follows. What we've done so far is provided -- we haven't yet got on to the topic of economic disclosure. Now, economic disclosure in the Tribunal, as I'm sure I don't need to remind the Tribunal, is dealt with as a discrete topic of its own. We have a Practice Direction, newly issued by the Tribunal, in relation to it. The Tribunal emphasises the exceptional importance of that being a targeted, proportionate approach. And the first part of that is, well, one hones in on what are the precise economic issues the experts actually need to cover. They are generally expected to discuss those between themselves; they are generally expected to have a discussion as to what documents and data they think they would need to cover those. We seek to reach agreement in relation to that and insofar as we can't reach agreement, we come back to the Tribunal and we have a hearing about it. We haven't gone through any of those steps yet.

THE CHAIR: This is perhaps going slightly off piste, but one issue that the Tribunal canvassed internally is why that couldn't run in parallel with the disclosure process, or at least get started at a fairly early stage so that some of the issues in relation to general disclosure might fall away, particularly if the experts are fully engaged in the same process. That's something that we just wanted to float.

MR PICKFORD: Yes. I'm not sure that we are standing in the way of that. We don't

have any proposals from the Class Representative in relation to the details of that economic disclosure and evidence process. But my point is, to respond, madam, to your question, to be very clear, I'm not saying these are irrelevant issues and they shouldn't ever be asking them. What I'm saying is, at this stage, the only thing that can reasonably be expected of us, given the point in time that we're at, is questions that directly arise out of the data. Basically, you've sent us a bunch of data; can you just clarify what it is you've given us or clarify -- you know, we don't understand it. We wouldn't turn around to that sort of question and say, "Aha, no, we're not going to engage with you".

THE CHAIR: You can see the purpose of this question, but you can also see that it is in fact directed at seeing how the data set works, isn't it? I mean, that's what paragraph 1 is trying to capture: how do we understand the material that you're giving us? It may be a long two questions and it may be that you say it's disproportionate to answer it at the moment. But the question for us is, what kind of order do we make now? Do we insist that you answer what you can by -- or we say we make an order that you provide answers to the questions, it being understood that you say, "Well, we can't answer that now or we don't think it's appropriate to give that answer now"; that comes later. Then with the idea that, at CMC 3, if there's a problem, hopefully we can narrow down all those issues so that if there is a problem at CMC 3, then we can have what in the old days used to be called a specific disclosure application or effectively an old-fashioned spat about whether you should be required to answer the request for further information.

MR PICKFORD: Well, that's what --

THE CHAIR: I mean, that's what this dispute is -- you know, it's taking place in a different context but that's what it's saying. The recipient of the request says, "Oh, well, you know, we're prepared to give you the answers, but don't make an order

against us because that will force us to do things which we're not required to do or we shouldn't have to do at this stage". I think my response to that is to say that we'll make an order that you give the answers by a certain date. If you say, you're not required to answer that or it's disproportionate to do so, and Mr Facenna doesn't accept the answer to that, then you come back at CMC 3. It seems to me that that's the sensible --

MR PICKFORD: Of course.

THE CHAIR: But we've got to start imposing some active case management, because the last four months have demonstrated that the bespoke procedure that we effectively adopted at the request of the parties is not working. Now, this can be done by a stick and carrot. You know, the big stick is to start imposing specific disclosure orders in the normal way the court does. We're very happy that the parties should design and produce their own disclosure process, but provided that there is -- you know, there's got to be some active deadlines imposed. That's, I think, the thing that we've come away with a very clear impression from the skeleton arguments.

Now, one knows when you start a disclosure application, both sides are saying, "Well, the reason we haven't done what we're supposed to is it's their fault. They're the ones". You're doing what parties always say, which is you're highlighting where there have been delays on the other side or unreasonable requests and where we're getting -- you're coming closer and closer together as the hearing arrives. But I think our very strong view is that we ought to be imposing active case management if we're going to get anywhere near a trial by September 2028. And if that means ordering some deadlines to be met, even though they can be extended, even though you can disagree between you about, you know, what you're actually required to do, fine, that begins to narrow the issues. There's then a deadline; you comply. If you don't comply or you can't comply, you apply to court and if the parties are sensible and the Tribunal

is reasonable, you get an extension of time. And we finally make progress in that way. But I think we are strongly of the view, just so that you know where we're coming from, that we're going to have to impose some deadlines and some active case management today.

MR PICKFORD: Sir, well, if I can make two responses to that. The first is you won't find me pushing back at all against the thrust of the need to work out what can be dealt with in correspondence, and if it can't be dealt with in correspondence, at CMC 3, there is a determination of it by the Tribunal. The only, in my submission, relatively minor part of that was whether we were going to be given a date to do it by, because we haven't actually been missing, in my submission, any dates --

THE CHAIR: The point is taken.

MR PICKFORD: -- or we were just going to be told to do it with the full understanding that if we hadn't reached a resolution that was satisfactory to my learned friend and his clients, we'd be facing an application in relation to it at the very next hearing. That's the only, in my submission, relatively minor point of difference. But I accept --

THE CHAIR: We take into account that for disclosure, the burden in this litigation is all on you at this stage, because that's always the way. We understand that and you're entitled to the benefit of the doubt in relation to quite a lot of things. But we do have to start sort of cracking the whip slightly.

MR PICKFORD: Yes. So --

MR ALTY: Can I --

MR PICKFORD: Sorry.

MR ALTY: I just wanted to make the point that I'm taking your statement about not missing deadlines, but nevertheless, deadlines in the previous CMC for the parties to agree stuff have been missed. So, from that point of view, the process is not working as well as it should.

MR PICKFORD: Well, sir, and I made my submission on why that was: because they didn't come back to us until two days before that deadline.

MR ALTY: There are various deadlines here. All I'm saying is: we need to think about how we avoid this happening next time.

MR PICKFORD: That's understood. Before I make my second responsive point, may I just take instructions quickly because I might just be able to short-circuit any further submissions from me on this. (Pause)

On this particular point, we've obviously heard what the Tribunal has to say. We would agree to provide a response with the provisos that we've all just heard by 13 February. That gives us a fortnight after the first major tranche of disclosure. In my experience of having multiple deadlines for things on the same day, it's generally better to stagger these things if we can, to avoid sort of ...

THE CHAIR: It's understood that what you're doing is, in the language that I'm used to, you're answering a request for further information in the normal way in that if you say, "Well, we're not prepared to answer it for these reasons" and if Mr Facenna objects and says, "No, you should have answered it", then that's an issue we'll resolve at CMC 3?

MR PICKFORD: Yes. That's right.

THE CHAIR: I don't think we can really impose very much more, Mr Facenna, in relation to that issue, because Mr Pickford is quite right: unless we go through each of the individual questions and say, "No, you've got to answer that one; no, you haven't got to answer that one because that one's" -- we see the relevance of one but it's not framed like "Please disclose X or Y"; it's framed -- I understand fully why that is because you're interrogating -- Dr Latham is interrogating a dataset. We all understand that. But it doesn't fall within the neat category of a disclosure request easily.

MR FACENNA: No, I mean, it wasn't our intention to ask them to answer questions which they can't answer. So I think I can be clear: what we don't want is that half of them were not answered because they say, "Well, you're not entitled to it at this stage".

THE CHAIR: Yes.

MR FACENNA: I think we would like to have answers or an explanation in each case as to why it's not possible or proportionate to answer the question.

THE CHAIR: It seems to me that the right thing to do is to impose an order, if Mr Pickford is not going to push back on that, but to qualify it in that way. So you answer what you think you can answer or think they're entitled to receive an answer to, and if there's any disagreement about you on that, we'll come back and we'll resolve it at CMC 3.

MR FACENNA: Sorry, just to come back on that. I think I anticipate there might be an issue about the question of entitlement. As we understand it, the objection is that some of these questions, it will not be possible, proportionately, to answer them. That's one thing: I think we'd like to avoid getting into a skirmish about what the entitlements are.

THE CHAIR: Yes. Well, we're going to make an order that they respond to the confidential memorandum, on the basis that if there's any dispute about the scope of the answers, then you can apply for a further order at CMC 3. Is that clearer?

MR FACENNA: That would be clearer, I think, provided they give us an explanation as to why they're not answering particular questions.

MR ALTY: Sorry, just on that point, I mean, and reading the document there, as Mr Justice Leech has said, clearly there is an underlying question about how you interpret data, and then there are some things that go beyond that. So one would hope that, in answering the question, Google was able to say something about how that would help people interpret the data, even if it's not going to answer all those

questions. I don't know if that is helpful, from your point of view.

MR FACENNA: It's certainly a helpful indication to me, yes. That, again, is what we understood the purpose of paragraph 5 and 6 to be, that we would get useful explanatory information about how the data had been pulled together, what it shows and what it is; and that's what CRA has attempted to do there, to ask the questions they need answers to, to make the data as usable as possible.

MR ALTY: Thank you.

MR PICKFORD: I do apologise, I was just taking an instruction, and I do hope that there isn't a question that's waiting for me.

THE CHAIR: No, there is no question that's waiting for you.

MR PICKFORD: I'm very grateful.

THE CHAIR: If it helps, I noticed that in paragraph 5 of the original Order, what we ordered was that the explanatory information provided to the CMA, the FCA and the DoJ, respectively, about those datasets, were produced and what they contained. So what Mr Facenna showed us, it falls within that category. We didn't actually order you to provide, if you like, new information, or new expert evidence, even in relation to, certainly the disclosure of specific pre-existing documents.

But if there is any argument about whether, in fact, you've complied with the Order today, it seems to me that you're entitled to say, well, we've given historic information.

MR PICKFORD: Thank you, that's helpful for what we're going to come on to. So, in terms of then ensuring that the process really is effective, what will probably be very helpful is for the Tribunal to set the number of days that the Class Representative is going to have to come back to tell us whether they're content with the answers that they're going to get on the 13 February. Because that, to some degree, was what we collectively didn't put into the last Order, and it's what's led to the problems.

MR FACENNA: Shall we wait and let Mr Facenna take instructions, and then he can

deal with that in reply.

MR PICKFORD: Thank you. So the other thing that I was going to respond to, I said I had two responses to the very helpful observations, sir, that you were making. The other one is me pushing back a little bit.

THE CHAIR: Yes, sure.

MR PICKFORD: Because what I believe, sir, you said, is that the disclosure -- that we had this bespoke process and it's not working. And I'd like to say I'd like to make a submission about that. In my submission --

THE CHAIR: You say it is working. It's just not enough time to let it go through to the end; is that right?

MR PICKFORD: I say that there is obviously an aspect which is not working, in the sense that we're having a dispute now about some matters that ideally we would have been able to resolve earlier. You've heard my submission as to why that's arisen. But, on the other hand, in my submission, for there to be disputes of this sort in litigation, is not indicative, actually, of a process not working. It's part of the process. I mean, inevitably there are differences of view between the parties because they have different interests.

Overall, I would say the fact that we have now identified -- the numbers have now gone up in the light of some concessions we've made -- over 2.8 million documents that the Class Representative is going to be getting: around 350 different datasets. They've had some of the core datasets already. They're getting more information. They're going to be getting 2.4 million of those documents in January. In my submission, that's not the disclosure process not working. In my submission, it is working, and we need, inevitably, to continue active case management to ensure that it continues to function and, to the extent that there are disagreements, they're resolved. I'm not pushing back against any of that case management.

THE CHAIR: I feel suitably corrected.

MR PICKFORD: So the next question then, on this topic, is the codebooks.

THE CHAIR: As I understand, this is only for future datasets, rather than existing.

MR PICKFORD: Yes. So, we do say that this hasn't been fully ventilated, and so it's difficult for us to respond fully on it. But what I am able to do, following the recent searches that those instructing me have made, is to say we are trying to establish for what proportion of datasets that we propose to produce, whether there is already a codebook or something equivalent.

What we know so far is the answer to that will be yes, there are some, but that is not true of all. That's where we've got to on that. So obviously, where there is an existing codebook, they will get it. There is then the question of the set of datasets for which there is no codebook. Whether it is appropriate for us to provide a codebook for those, is going to depend on a case-by-case assessment, in my submission. Because, again, what I am instructed is that some of the datasets are very simple and it is very clear what the data is in them, and there would be no point served by the formalistic exercise of creating a codebook for something that doesn't actually serve any incremental purpose.

To perhaps give the Class Representative some comfort, the three datasets that they've received so far are amongst the most complex of all the datasets in issue in these proceedings. So it's unsurprising that assistance has been sought. But we don't anticipate that that is going to be an issue for every dataset that arises. Then there is going to be the dataset where we may well have to provide some assistance. Obviously, if we believe that they're going to do that, so we'd need to do that, we will tell the class representative, accordingly. I'm happy to say that we will do that: that is, tell the Class Representative what we're planning to do in the same letter of 13 February.

Then, if there is a dispute between us about, well, they say: no, we actually are going to need a codebook for everything, and we've been looking at some of this data now and it really doesn't, you know, what you're proposing is inadequate. Then, obviously, we can ultimately be ordered to do more than we're proposing to do. But we don't particularly want to be before the Tribunal being told to do things that we could reasonably have agreed to, and so we will seek to agree if we can.

THE CHAIR: You said, 13 February. I think --

MR PICKFORD: 13th. Did I say the 13th?

THE CHAIR: I think it's the 27th. It's just I think Mr Facenna accepted that 10(a) -- we're working off the Order that would go back to 27 February. You're suggesting the 13th instead? So that they shouldn't be at the same time?

MR PICKFORD: Well, I --

THE CHAIR: I just want to be sure what deadline we're talking about.

DR MAHER: Let's get one thing that works, because you have 31 January.

THE CHAIR: Or the 30th.

DR MAHER: 13 February and 27 February.

MR PICKFORD: Yes. So, what I'm talking about for 13 February, is an explanation and an answer to the Class Representative about what it is we can provide by way of -- well, they've already seen, by this point --

THE CHAIR: This is 10(b). Sorry, it's my fault.

MR PICKFORD: Yes.

THE CHAIR: It's 10(b).

MR PICKFORD: In relation to the datasets that they're going to get by 31 January, they will know, at that point, what the accompanying codebooks are or aren't. I accept that in relation to the longstop date of 27 February, they won't know by then what datasets they have or haven't got. But I'm committing, in any event, to a fortnight

ahead of that us having done the analysis to say that we've looked through here; we've looked through the data; this is where there's a codebook, you've either got it or you're getting it; this is where there isn't one, we really don't think you need one; this is where we think there's a problem, and this is how we --

MR FACENNA: It's my fault, Mr Pickford. We're talking about paragraphs 17 and 18. It's my fault, not yours. It's my fault. So what you're proposing is 13 February for 17, and in that letter to explain what codebooks you are providing, as a matter of historic codebooks, if I can call them that.

MR PICKFORD: Yes.

THE CHAIR: And to explain which other datasets you're going to provide codebooks for.

MR PICKFORD: Yes.

THE CHAIR: And you'll do that at the same time, 13 February?

MR PICKFORD: Indeed, where they may need to be produced, exactly.

THE CHAIR: And you'll say: we are or we're not going to produce them.

MR PICKFORD: Yes.

THE CHAIR: And on that basis, you ask us not to make any order in relation to paragraph 18. Is that right?

MR PICKFORD: That is correct, yes. Because we say that's premature, until they have seen what we're saying about it, because they may agree. They may say: "fair enough, it would be a formalistic waste of time for you to produce codebooks for these, and so we're not going to ask that of you, but we disagree with you about this dataset; we think that it's still very unclear; we don't accept what you've told us about on clarification, so we still want --"

THE CHAIR: Well, we'll leave Mr Facenna to ponder that, and he can deal in reply whether he still wants us to make the order in 18 nevertheless, given the offer that

you've just made. So that's the first category of disclosure, if I can call it that, I think.

MR PICKFORD: That's correct.

THE CHAIR: So that's paragraph 17. And then?

MR PICKFORD: And, again as, as before. We'll want a date for response from the Class Representative in relation to that, so all of that is well ventilated.

THE CHAIR: So, what you invite us to direct is that a further paragraph should appear in which the Class Representative responds to your, whether they accept the answers in relation to 17?

MR PICKFORD: Yes. And I would suggest that's well ahead of the next CMC, so that, as is often the case, and has been the case prior to this CMC, there is reasonable time for the parties to coalesce, where they can.

THE CHAIR: Yes. Well, again Mr Facenna can say whether he's happy to agree to that when he deals with it, in reply.

MR PICKFORD: Exactly. He's going to come back on that.

THE CHAIR: So then, the next point I think he dealt with was 10(b), which is the outstanding queries which are in the -- is that what you wanted to move on to next? Is that right? That's just my note: the outstanding queries, before he moved on to --

MR PICKFORD: Yes.

THE CHAIR: So he had three categories, I think.

MR PICKFORD: So, I'm struggling slightly because we got this new note that was handed up. I haven't actually read this yet; I haven't had a chance.

THE CHAIR: Okay, well, should we -- what would you like me to do then? Should we park that and come back to it or ...?

MR PICKFORD: It might be sensible to -- I mean, I'm obviously going to go over into the afternoon in any event. It might be sensible for me to come back on that. Because I think to some extent I had understood that some of that potentially overlapped with

what we were covering. But insofar as --

THE CHAIR: Well, I think that was my confusion as well.

MR PICKFORD: Insofar as it's discrete --

THE CHAIR: Yes.

MR PICKFORD: -- I will come back with discrete submissions on it. But I'm afraid I'm slightly confused now, given how incredibly late that has come as to quite what is being asked separately.

THE CHAIR: What is being asked is -- he's lifted out of the 18 November, 24 November, and 5 December letters the outstanding queries and collected them together in this list, on the basis that you -- I think it's requests 1 to 9 which are still contentious, if I'm correct.

MR FACENNA: Yes. So there is no overlap, because what we've been talking about until now are the list of questions in relation to the three existing datasets. The issues -- this is in relation to what's proposed to come, so we can understand the explanatory memorandum.

MR PICKFORD: Okay. If I may, I think it would be more efficient --

THE CHAIR: We'll come back on that. We'll deal with that after lunch.

MR PICKFORD: -- for me to do that after the short adjournment.

So the next point is the date for the disclosure of the documents identified in the explanatory statement.

THE CHAIR: Yes.

MR PICKFORD: We seem to be -- I think, in substance, there is no longer any dispute between us, because I think, and Mr Facenna will correct me if I'm wrong, that the Class Representative is content with our position that there would be a longstop in the Order of 27 February for provision of all of those documents, but that we accept and intend to provide the 2.4 million that were originally part of the DoJ proposal by the

end of January. I think he's content with that. So in substance, there is no point of contention.

I'm going to say a couple of sentences, and I anticipate -- the Tribunal may want to stop me fairly quickly. There were some suggestions, I think from Mr Facenna, that it was us again delaying, and that really we should have provided all of this by 31 January. There is a very clear reason why we, again, are in the difficulty that we are. In particular, it relates to the format of some of the documents that were going to be provided, because in summary, we wrote in September to tell them that they were going to be getting their disclosure in TIFF format. This may sound like it's a relatively small issue. It's in fact an issue that was subject to an application and a determination by the Tribunal in another set of proceedings involving Google -- it's the *Shopping* proceedings -- and we won that application against us.

But we know that Hausfeld, for the claimants, don't like TIFF and they did not indicate whether they were willing to accept TIFF. Indeed, they wrote to us at one point asking us to answer various questions about the TIFF format, which seemed to be gearing up to then making an application to say, as they had done in another hearing, "no, we don't want these in TIFF format".

Eventually, just before this hearing or, you know, within a week or so, they decided that they weren't going to pursue that anymore, and they finally confirmed that they were content for them to be produced in the TIFF format. That's 5 December, when that finally came.

The difficulty for us was, in relation to at least portions of the documents, it was pointless for us to get them into the format in order to be able to disclose them -- we are talking about millions of documents here -- until we could be confident that we were doing it in a format that they weren't going to turn around and say, "Oh, no, that's all wasted. We're objecting to that".

So, with respect to Mr Facenna, he gave an impression that it was us dilly dallying here, and that is really not fair. In our submission, we have done the best that we can. But I don't think I really need to take you through the detail of all the correspondence, because ultimately it doesn't matter, given the substantive agreement.

So next issue is the pre-2014 documents and I'm glad to say I need to say very little about this, because there is agreement that we will give documents pre-2014. The only thing I'm afraid I do have to again respond to is: it was suggested that our initial position was ridiculous. Their claim is from 2014 and so it was not absurd for us to say, "You can have documents from 2014". We've now relaxed that, we understand that the context is helpful, and we no longer resist. But it wasn't a mad suggestion that they have documents from the first date at which they actually have brought a claim for damages.

The next point is geographic scope. Now, you heard some quite full submissions from Mr Facenna about this issue. Ultimately, there really is, I think, very little between the parties, and I'd like to reiterate and make clear what the very narrow nature of the scope is.

So in relation to documents, not datasets, but documents, there is no holdback on grounds of geography at all. We are not going to impose any such restriction. The only restriction is in relation to datasets.

DR MAHER: May I just ask you to clarify. Do you mean, when you say documents, that would also include expert reports in the other proceedings?

MR PICKFORD: No. I'm arguing separately about expert reports, because I strongly contest --

THE CHAIR: We're just dealing with the geographical exclusion?

MR PICKFORD: Yes. So insofar as a document is otherwise agreed to be disclosed and inspection provided of it, we're not saying, "In relation to any document, no, you

can't have that, because it concerns something outside the UK". That's simply not an exclusion we're intending to impose.

In relation to datasets, the only exclusion that we propose is this: that where a dataset exclusively concerns non-UK publishers, then that will be excluded, unless it is relevant in some way to the market definition or dominance issue, because we've also conceded that they can have any document no matter its geography. That goes to the question of how widely or narrowly we should draw the market. So it's just that very narrow exception.

THE CHAIR: Can you just --

MR PICKFORD: Yes.

THE CHAIR: -- formulate it again, please?

MR PICKFORD: Yes. So we will only exclude datasets which relate exclusively to publishers outside the UK. Then as a further exclusion from the exclusion, unless they're otherwise relevant to the issues of market definition and dominance, in which case they will be provided in any event. (Pause)

THE CHAIR: That's a relatively sophisticated exercise for somebody to undertake, isn't it? Which is to look at those individual datasets and say, "Well, does this relate to what is a complex legal issue?"

MR PICKFORD: Well, my understanding is that that is a workable exercise. Because what we -- and that is part of the reason why we have narrowed our exception to the degree that we have. Because originally, we were seeking to exclude, effectively, material relating to non-UK publishers.

It became apparent to us, when we were working out how that was going to operate in practice, that that was going to lead to difficult question marks about what datasets fell within or without that rule.

So we say -- and the reason for formulating it in this way is that that approach that

I have advocated is sufficiently well defined that we can do that exercise properly. Because what we're really seeking to do is to identify only -- for example, suppose there is a dataset which is just something to do with French publishers, and it's a dataset only. We say: "why, in general terms, should we be providing that in this litigation, where the class is UK publishers?" Because there has to be, in our submission, sensible geographic lines drawn when you are dealing with an international client that has worldwide data and some of the data that is being requested may simply not be of any assistance in the proceedings.

Now, what Mr Facenna says is, "Aha, I've got a letter from Dr Latham, and Dr Latham, when he's conducting his economic analysis, he thinks it might be helpful to have these non-UK datasets, even though they've got nothing to do with the class".

My answer to that is this: I am not saying that the claimants cannot come before this Tribunal and make out the case that there are certain datasets, potentially datasets that are exclusively about non-UK publishers, that they might want to say, "Well, this one in particular will be really useful, and here's why. The reason why we really like this one is because there isn't a UK equivalent. Here's the exact analysis that I'd like to do and this is why I want that dataset".

That's something they can legitimately come to us to say and we can form a view on that, in conjunction with our economists, as part of the process that I was describing before, which is what the parties need to go through in order to arrive at a sensible and proportionate set of additional disclosure for economic purposes.

What we object to is this being done ad hoc now, as a form of sort of early quasi economic disclosure, when it hasn't been warmed up in the right way at all. We haven't engaged with our economists in relation to this. We haven't had the time and the opportunity to do that, and they might have some sensible things to tell us about it. They may say, "Oh, don't be silly. I totally see where Dr Latham is coming from on

this. You should just give him the data". Or they might say, "No, from our point of view, from an economic point of view, this just seems to be an economic fishing expedition. We don't understand why he really wants that".

But we just haven't gone through that yet, so we're not prepared to engage with it in on the basis of, "Dr Latham says this", because we have our economists to say --

THE CHAIR: I mean, it looks, on the face of it, at least from the letter dated 18 December, which I suspect you haven't had much chance to read either that -- I mean, it is quite a number of datasets that seem to fall within your exclusion. So they say: all five datasets in Schedule 8, item 3; all three datasets in Schedule 8, item 5 --

MR PICKFORD: Yes, and --

THE CHAIR: -- and 13 datasets included in Schedule 23, item 11. So there's quite a lot of material you're proposing to -- well, it looks like -- you know, at face value -- I mean, we haven't looked at any of these datasets and we don't know what else you're disclosing, so it may be that it's giving us a misleading impression. But it does look as if you've carved out quite a wide category of documents, just at first sight.

MR PICKFORD: That may or may not be true. I can't answer that question, I'm afraid, and my submission is I am embarrassed in not being able to respond properly to this aspect of the application --

THE CHAIR: So what do you propose --

MR PICKFORD: Because it hasn't been fairly ventilated.--

THE CHAIR: So what are you inviting us to do then? To refuse to make an order in the -- I think it's 11(a), isn't it, is the ...

MR PICKFORD: I'm saying that you can make an order in the form that, for the time being, the only exclusion that is permitted on geographic --

THE CHAIR: So we would add your proviso to 11(a); is that right?

MR PICKFORD: Yes. And if you want -- or if Mr Facenna wants -- that can be without prejudice to the further engagement that we will have in relation to economic disclosure. But we're not going to do that on an ad hoc basis.

THE CHAIR: Well, again, he can respond on your exclusion. Can you just tell us this, which is: how far does your -- I'm not sure that we've seen the exclusion, if I can call it that, you know, just as a label.

MR PICKFORD: So when you say you haven't seen the exclusion, I think --

THE CHAIR: Quite formulated in the way you did it on your feet to us a moment or two ago. So it may be that it is in the skeleton argument and in the correspondence, but does that involve any move from the position in, the, I think, previous letter from Herbert Smith, if I can just get it for my note?

MR PICKFORD: There is.

THE CHAIR: I think 17 December was, I think the -- oh, no, that related to the non-contemporaneous documents. The geographical exclusion -- well, I think you probably need to go away and look at the letter dated 18 December.

MR PICKFORD: Their letter?

THE CHAIR: Yes.

MR PICKFORD: I can ...

THE CHAIR: All I'm asking you is, what you've said, is that a summary of what's effectively set out in your skeleton argument?

MR PICKFORD: It's certainly a summary as to what --

THE CHAIR: He put in rather -- you said, "We accept X and we accept Y", but I'm not sure you carved it out, gave us the exclusion in quite those terms.

MR PICKFORD: So, what it is a summary of is the two most recent letters from those instructing me on this issue. And those are ones that I think you have been taken to.

THE CHAIR: The most recent was the 17 December; is that right?

MR PICKFORD: I think that's right. There are two. One is the one at C, and there's E.2, tab 8, 30 to 31. I think that's the most recent. (Pause)

Yes, that's the 17th --

THE CHAIR: That's the 17 December, which I think we looked at in the context of the --

MR PICKFORD: Yes, exactly.

THE CHAIR: And so non-contemporaneous, again using a label.

MR PICKFORD: Exactly. But if you turn over the page on that to 2.6, what that says is in terms:

"Google is no longer proposing to withhold any documents from Pre-existing Disclosure on the basis of geographic scope."

So that deals with the documents point. That's the shift from the skeleton, because we don't expressly address that in the skeleton.

THE CHAIR: And the datasets is 2.1 to 2.4, yes?

MR PICKFORD: Yes, and indeed that was already in fact, in my submission, set up in our letter at C.1, page 474. Let me get the right date.

THE CHAIR: I mean, it's not really a forensic point; I'm just trying to establish whether you're effectively summarising the position that's been adopted in correspondence. I think what you're saying is yes, you have?

MR PICKFORD: Yes. And it's paragraph 13 of the other letter, which is, as I said, at C.1, page 474.

THE CHAIR: I think we have looked at that.

MR PICKFORD: I'm not going to read that out because technically it's in --

THE CHAIR: No, no, it's a confidential document.

MR PICKFORD: But I mean, what's there isn't, I don't think it's in dispute, confidential. And I say that those two letters do actually cover the submissions that I've made.

(Pause)

So, the next topic I think then is the secondary or non-contemporaneous documents as they've been called.

THE CHAIR: Yes.

MR PICKFORD: And it's 1.00, so you definitely don't want to hear me on that now, I think.

THE CHAIR: We'll meet again at 2.00.

(12.58 pm)

(The short adjournment)

(1.58 pm)

THE CHAIR: Yes, Mr Pickford.

MR PICKFORD: Thank you, sir. I was about to embark on the secondary or non-contemporaneous documents category that is requested. The first point to make in relation to it is that we dispute that we have breached the Order by not providing in the explanatory statement a full explanation of the scope of the non-contemporaneous materials created during the DoJ, CMA and FCA and EC proceedings. Our position is that these are not pre-existing disclosure: that is, documents and data which have already been disclosed in those proceedings. These are secondary materials that were filed during those proceedings, but they were not disclosed in those proceedings. So, if they were disclosed in these proceedings, that would be the first time that they had been disclosed and reproduced. Now, that is not in itself an argument about whether or not they should be produced; that is simply to substantiate the point that we complied with the Order that was expressly in relation to pre-existing disclosure.

Now, Mr Facenna makes the point: "Ah, but that can't be right; I've got you because I've got your data, because you've created some datasets". And I say that our approach to the data is entirely consistent with our approach to the pre-existing

documents generally. The data that we provided in those proceedings existed, and it was put into a form, potentially, in those proceedings which didn't exist. But it was also -- if those datasets are now reproduced again in these proceedings, that is reproduction of something which has been disclosed once.

And it is common indeed, in my submission, in this Tribunal no one ever takes a point about disclosure saying, "Well, you can't have disclosure of that data because that data doesn't actually yet exist in the form that you want it". Everyone accepts that when one talks about data, and you're providing a dataset, that that is a form of data-based disclosure.

So, we complied with the Order, both in relation to the documents and the data, and we are now having an argument, therefore, about something that my learned friend is quite entitled to ask for, but not on the basis that we breached the Order.

So he's categorised his application into a number of different parts. His begins with expert reports so I'll begin with expert reports. I have four points to make in response to the application for expert reports. As the Tribunal will have apprehended from our skeleton argument, we resist all of these categories of disclosure in this hearing. That is not to say that we are not amenable to focused applications for certain documents in due course, but we resist the generalised application that's being made before the Tribunal now. That's our general stance.

In relation to the expert reports, as I said, I've got four points. The first is that the Class Representative relies in the main upon Dr Latham's letter, which we were provided with on 5 December, saying that these documents will assist his economic analysis. Now, insofar then that this is in fact a form of application for economic-based disclosure, i.e. these are documents or data that would further the economic analysis, that was too late and not part of a sufficiently well-structured process for engaging with economic disclosure. Dr Latham's quite entitled to say, "Here's why I think these

would be useful for my economics analysis" and we are quite entitled to say, as I said, in relation to another of our categories before the short adjournment, "Well, we've discussed it with our expert and he says you do need this or you don't need that". So, in my submission, the first point is, insofar as it's justified on that basis by reference to what Dr Latham says he needs for his economic analysis, it's premature and it should be part of an economic disclosure process.

The second point I have to make is that Dr Latham's letter, we say, was in any event misguided insofar as it purported to support generalised disclosure of all expert reports in the proceedings that the Class Representative seeks. You saw that, I think, in the passages that Mr Facenna took you to, he said it would assist him in these proceedings because "the economic analysis and factual accounts contained within them will overlap very significantly with the issues I've been asked to consider" and he says that would avoid him having to reinvent the wheel. That's the gist of his justification for asking for all of these documents.

We say that that does not, properly analysed, justify the wholesale disclosure of all of the expert evidence in the other proceedings. As context, these are reports that have been produced by experts who won't be appearing in front of this Tribunal. They are applying different law; they are in relation to different allegations; and the experts are subject to different duties. On that point, sir, if I could pass comment on something that I understood the Tribunal to say before the short adjournment about the admissibility --

THE CHAIR: Well, they're not inadmissible just because they're expert reports.

MR PICKFORD: Well, and I'm not sure we accept that they are admissible, actually, for this reason: the general position in English proceedings is that, by virtue of the Civil Evidence Act 1972, section 3(2), what is admissible is opinion evidence given by an expert subject to rules of the court. Now, in English proceedings, those rules of the

court include CPR 35 and the requirements that experts in this court must adhere to in order to produce admissible expert reports.

THE CHAIR: I don't think we should be debating the admissibility of expert evidence, but there are lots of cases in which expert reports in other proceedings have been admitted -- in fact, in subsequent proceedings. In fact, I've just done one. So they are generally admissible. All I'm simply saying is that admissibility is not an objection in itself; that's all I'm saying. There may perfectly well be other reasons, but if the broad basis for the objection is admissibility, then that won't do by itself.

MR PICKFORD: I think my position, just so we're clear and we're not ships passing in the night, is I'm not saying that merely because something is inadmissible -- let's assume it were not admissible -- that doesn't mean that it could not be disclosed. That is not my submission. My submission is that, when one is considering the utility of these documents that we're currently considering, the expert reports in these proceedings, I don't accept and I have not conceded -- you may be against me -- that they would be admissible.

THE CHAIR: But all of these arguments are very difficult to judge. You know, all the arguments in relation to admissibility, relevance, proportionality in relation to these documents are all almost impossible to evaluate without seeing the documents themselves. Now, you've got them; I haven't. That's the difference, and neither does Mr Facenna. So he's saying what I would have assumed would be almost self-evident: that they're going to give somebody a head start in deciding what to do.

Now, it may be that your real objection is that they will be prejudicial to your case. Now, that I fully understand and that would be a reason why they might have to be excluded. But in disclosure terms, plainly it seems to me that the starting point is that they're going to be useful in working out what the relevant documents are and what the specific datasets are. Now, you may say that the evidence was wrong in those

proceedings, that now you want to contest it a second time, and it prejudices your chances in this jurisdiction and with different rules of evidence, different law, your case is going to be much better and that the court should try and put out of its mind the prejudicial nature of some of these documents. I understand all of that, but those all seem to me to be arguments much, much further down the line. And until we've actually seen some of these documents, it's impossible for us to engage -- it's impossible for me to evaluate the submission that you've just made. It's misguided insofar as it sought, you know, disclosure of all expert reports. I don't actually know how many experts in what disciplines were actually used in these proceedings. So how does that submission help the Tribunal today?

MR PICKFORD: Because what is being sought is -- they say we want everything. We want all the expert evidence.

THE CHAIR: Well, he doesn't presumably have very much of a clear idea of what was used in these proceedings. He's got publicly available information. I don't know, because I've not gone on the internet and spent hours trying to work out what's publicly available in relation to the proceedings in front of the DoJ, but he presumably is in a worse position than you are. So, how are we going to resolve this issue if, at the end of the day, we as a Tribunal have a view that these are likely to be very helpful to somebody trying to unpack all of this information that you're going to be handing over? In fact, the experts' reports are likely to be at least a route map to the relevance of some of these documents.

Now, if what you're concerned about is prejudice, I fully understand that, and the Tribunal can be trusted to take that into account. We're not --

MR PICKFORD: So, I have two directions to go in response to that very helpful indication from where the Tribunal is coming from. The first is, I would like to make some submissions.

THE CHAIR: Well, do make them, but how do we evaluate? I'm just asking you, how do we evaluate that second submission? Dr Latham's letter, he thinks they're going to be useful to him. And you say he's misguided insofar as it sought disclosure of all experts' reports, he doesn't justify all of the experts' reports. So different disciplines, different laws, different duties. Sure. But, you know, until one's seen what these people have actually said, it's very difficult to assess whether that, you know, meets the argument that they're not going to be of any use.

MR PICKFORD: Well.

THE CHAIR: Because this is -- these arguments are all being put on the basis of utility. That's what you started your submissions with.

MR PICKFORD: Yes.

THE CHAIR: This is all about the utility of these documents.

MR PICKFORD: Yes.

THE CHAIR: And how do we assess the utility of these documents?

MR PICKFORD: Well, to some degree, I'm going to invite the Tribunal to, in relation to some points -- and this is not the particular one we've been discussing -- but in some, by using common sense. Because I'm going to say, insofar as Mr Facenna says: "this is going to help us parse the disclosure". My submission, in response to that is: come on, you're getting nearly three million documents. The idea that the experts have done the job of parsing the disclosure for you, in a way that's going to obviate you needing to get stuck into that and find your own ways of doing it, presumably using lots of associates and artificial intelligence, that's the realistic way they're going to parse the documents, not through consulting the expert reports.

The only way I can substantiate that is to say, as we say, is a matter of common sense, and you might accept that or reject it, but that's --

THE CHAIR: You say common sense, these documents are not going to be useful?

MR PICKFORD: That's for that purpose, for that purpose. And I say that they may be useful on a more targeted basis for other purposes, which is the point I'm seeking to develop now.

THE CHAIR: Well, why don't we then look at that. So, let's say that they get all these documents and they identify some reasons why they think the expert evidence would be useful. So they've got the datasets. They can establish that they were used by some experts in front of the DoJ. They say, "look, these are datasets that the DoJ's experts used -- or Google's experts in the DoJ proceedings used; now can we see the expert's reports?" Effectively, you say you're giving them the datasets that were used by the experts in these proceedings.

MR PICKFORD: Yes. So --

THE CHAIR: So, they're going to go away. You say they've got to analyse these datasets, and then if there is some value in looking at the experts' reports, they can come back and ask?

MR PICKFORD: Well, I believe, sir, that I have an answer, which may be acceptable to the Tribunal in relation to an alternative way of proceeding.

THE CHAIR: Okay, all right.

MR PICKFORD: But I would like to turn around and check before --

THE CHAIR: Well, give me the alternative way of proceeding.

MR PICKFORD: Yes, well, that's what I'd like to check. My answer -- because -- it's not what's being canvassed on the other side, and you have rejected the first round of my submission --

THE CHAIR: All I'm saying is, I find it very difficult to know how to -- if we're going to have to go away and evaluate that, how do we know, without looking at these documents, or seeing how they were used, or even looking at the way they were deployed in those proceedings, whether we can work out whether they're useful to

these proceedings.

MR PICKFORD: Yes. Sir, I'm recognising that that's a perfectly valid question, sir, that you've asked me, and I understand why you've asked it to me. I do have a potential response I could give, but I would like to check before I give it --

THE CHAIR: Well, do you want to give it? Oh, I see, okay. All right. Sorry. Well, you turn around then.

MR PICKFORD: Thank you.

THE CHAIR: I don't want to force you into making any offer that you want to think about. That's not what my point is. I'm just resisting this, the idea that we can actually, you know. Experts' reports are often disclosed. I mean, in my experience, and it may be different in this jurisdiction, but experts' reports are often used as a way -- often as a way of getting through. You know, to shortcut to determination of issues. I mean, we'll decide it, we'll decide the issue, if you want. But, at the moment, I'm struggling to see how we will decide it. We're going to go out and, you know, and then we're going to scratch our heads and say, well, how do we decide?

MR PICKFORD: Whilst those behind me are taking instructions, could I ask the Tribunal to turn to the Practice Direction on expert evidence? Because I think this may assist us to some degree, in dealing with this issue. So that's in the Authorities Bundle, tab 28, at page 604. If I could ask the Tribunal, please, to read paragraphs 12 through to 14 on "Case Management". This is in the context of case management of economic experts and requests for disclosure. Paragraphs 12 through to 14. And that's in the Authorities Bundle, page 604.

THE CHAIR: Sorry, which paragraphs, again?

MR PICKFORD: Paragraphs 12 through to 14 and under the subheading, "Case Management", particularly 14. (Pause)

THE CHAIR: Yes.

MR PICKFORD: So, the submission that I make is that, at the moment, we have a request for everything. In my submission, it is not going to be consistent with the Tribunal's expressed approach in the Practice Direction, without going through some additional steps, to just grant everything. Because the Tribunal makes it very clear in its Practice Direction that experts are expected to keep their requests narrow and targeted.

But, equally, I hear, sir, what you say, which is how as a practical matter, you as a Tribunal, how are you supposed to evaluate that? And so the proposal that I make, which I do have instructions to offer, is that we do, in relation to the categories of documents that are now in dispute, the very same process that we did in relation to the creation of the explanatory statement for the pre-existing disclosure.

So what we set out is the nature of those further categories of documents, whichever ones that this Tribunal considers are prima facie the ones that it might be interested in. So, at the moment, we're dealing with expert reports. And we will produce a document that says, well, there are X number of expert reports, here are the issues broadly that they focused on, this was the context, et cetera. And then we can have a focused and targeted debate. Initially, we can obviously have an exchange on whether some of those we are willing to provide. And they may say, well, actually, it sounds like X, Y, and Z are pretty good, and they say: bang, bang, bang, one point.

THE CHAIR: The Class Representative is not going to want expert evidence on, I don't know, the law of Florida or something, are they? They're going to want technical expert evidence in relation to the issues in this. Yes. And, you know, markets, the heads of market abuse is what they're going to be after, isn't it?

MR PICKFORD: Yes. I mean --

THE CHAIR: Market definition and, you know, market power.

MR PICKFORD: I would imagine so. Mr Facenna, obviously, can tell you whether

you're right or wrong in that regard, from his perspective. But that is a way of providing a concrete way through that makes this tractable, but also means that the Tribunal will be adhering to its own guidance and the Practice Direction.

THE CHAIR: So that I can be clear what you're suggesting is, if we go to the draft Order, paragraph 11(c) is the paragraph which is dealing with what we've called non-contemporaneous material from the DoJ litigation. We would strike that through, and what we would do is put in sort of a series of directions for, well, I suppose an exchange of letters dealing with the content of these experts' reports, what they go to; with Mr Facenna responding to that. And then you making a final decision, and then you disclosing what you agree, and if there's any disagreement about that, we rule on it. Is that the idea?

MR PICKFORD: Yes. I would just like to add some other points in relation to it. Because I wanted to get across the broad answer as I just responded to the question that the Tribunal put to me.

THE CHAIR: So, we postpone having to decide what the utility of the individual reports are until there's been a bit more information across the line.

MR PICKFORD: Yes. But what I would wish to say is -- that this is without any concession on our part about, for example, the admissibility issue, and that is not to say, obviously what I think I would readily accept, and I don't need to reserve my position on -- it is conceivable that there might be a report that Mr Latham could read that at least gave him a sufficient insight into what went on in some aspects of the US proceedings, that it furthered his knowledge. That wouldn't mean using that report in these proceedings. And I don't think, in my submission, it's not realistic that it's really going to help them with disclosure. But it might be that there are some reports that would help them, that would help the experts grapple with the issues more generally. So I'm conceding that, as a general principle; what I'm not conceding is all of the

reasons why they say it might be desirable to see these reports.

THE CHAIR: It's a pragmatic process that you are putting forward?

MR PICKFORD: Yes. Additionally, it is important to -- so that Mr Facenna appreciates what he's ultimately potentially going to get -- it is said one of the reasons why they want these reports to be provided through disclosure, so they say, oh, well, we've got some bits of the stuff, but it's the public form, and so there are things that are redacted, and we want to see behind the redactions. He is not necessarily ever going to see behind the redactions because, in fact, the examples that he's given are, in fact, of third-party redactions that we are not at liberty to reveal.

That's, you know, a US court that he's going to have to take that up with. But Google doesn't have the right to lift those kinds of redactions. So it may be, just to manage expectations, that it's not going to fully fulfil all of the hopes and dreams that Mr Latham has in relation to it. But we say that that is a sensible and pragmatic way forward that makes the dispute tractable, and may indeed lead to, who knows, maybe there won't even be a dispute. I'm not putting money on that. But, it gives a way forward.

THE CHAIR: Okay.

MR PICKFORD: Next category is depositions, exhibits, transcripts, written responses from the DoJ proceedings. The starting point to make about that is that material is extremely voluminous. The depositions alone, from the DoJ proceedings, spanned 550 hours. So that is, I think by my reckoning, at least twice as many hours as we have programmed for our entire trial. And so, there is a proportionality question, again, about the provision of all of that material.

I am going to double check that I wasn't misleading in my question to those behind me, but I would say insofar as the Tribunal thinks there is any merit in having these documents at all, and my submission is that these are a much lower order of likely helpfulness than the expert reports, in any event, the way through would be a similar

one to the one that I propose. But my primary submission is we have not seen a convincing case from the Class Representative that this really is a proportionate exercise at all, to be getting into the depositions, et cetera, of witnesses in entirely different proceedings. We have some very complicated big proceedings of our own here. We're going to have a lot of factual evidence. We're going to have a lot of expert material, ultimately. We have 17 different grounds of abuse, once they're analysed properly.

THE CHAIR: Even that, the number is contentious, isn't it?

MR PICKFORD: Yes. Well, they group them into three, and I deconstruct them. But in any event, there is an enormous amount that we have to grapple with in our own proceedings, and in my submission, it's a little bit greedy to be seeking to bring in swathes of secondary material from other proceedings just to, you know -- basically, as a massive fishing expedition, to see whether there's anything that can be drawn out of those that might be of some relevance, in addition to the 2.8 million documents we already have, the 350 datasets we already have, and, potentially, some expert reports that we might not already have.

In my submission, one should draw the line, and you should draw a line pre getting into this kind of material. But my fallback would be to ask about whether we would volunteer the same procedure as a fallback.

Then the same submission for --

THE CHAIR: They're interrogatories.

MR PICKFORD: Yes. I mean, we're just going kind of each point a tier down.

THE CHAIR: Yes. Interrogatories do serve a different function in US proceedings than these proceedings. They are probably more significant, but as you say, they're the third order, really.

MR PICKFORD: Yes.

THE CHAIR: And if you haven't got what you might -- you haven't hit gold in the experts' reports or in the depositions, you're unlikely to find anything extra in the interrogatories.

MR PICKFORD: Yes. I do understand the desire both of the Class Representative and of the Tribunal to get on with things. On the other hand, it always has to be balanced against doing things in a proportionate way and not creating the environment for just an unimaginably large and expensive set of proceedings. We all know, that at some point, there's going to be people complaining about how expensive these proceedings are. And whoever the loser is, I imagine will be making that submission.

THE CHAIR: And making it probably to us.

MR PICKFORD: Yes, the Tribunal may make that complaint even. In my submission, it is important to keep that in the back of our mind when we are going through these other documents that might or might not be of some sort of help to the claimant.

THE CHAIR: We do have that in mind. We have both the cost and the unequal burden at this stage of the proceedings. It's a dynamic, not only in the Competition Appeal Tribunal, but in other forms of litigation as well. And it is quite difficult to hold that balance and you're quite right to remind us of it.

MR PICKFORD: So that's, I think, all I have to say on that general topic.

THE CHAIR: Yes.

MR PICKFORD: The next point to address is the outstanding --

THE CHAIR: Can we just can you just remind us of the - that's- 10(b) is it?

MR PICKFORD: That's found in "questions". Yes, that's --

THE CHAIR: I think that's 10(b). Just so we know which bit of the order.

MR PICKFORD: Yes, I think that is 10(b). I believe it is.

THE CHAIR: That's the list of -- that's the distillation, if I can call it that, of the --

MR PICKFORD: Well, it is the alleged distillation.

THE CHAIR: Proposed distillation.

MR PICKFORD: Yes. It's probably helpful to take this in two parts. I'm going to come back to 1 and 2 in a moment, and start at 3 onwards. So 3 and following, we say can fairly -- well, actually for the most part, sorry -- 4 and following, as best as we have been able to assess during the lunch adjournment, reflect questions that have previously been asked in correspondence. We have already said, in relation to 10, 11 and 12, that we'll be providing answers.

3 is a different attempt to come back on something where we've already responded, and it appears from the new question 3 that they didn't like our original answer, because it's a new formulation. So we don't accept that that question is in precisely the same terms.

THE CHAIR: That's 3, is it?

MR PICKFORD: It is, that's question 3.

THE CHAIR: So 4 onwards --

MR PICKFORD: But --

THE CHAIR: Just so I can be absolutely clear for my note: 4 onwards, you accept have been asked and pretty much in that form?

MR PICKFORD: We think so, and obviously, we've done this exercise --

THE CHAIR: Yes.

MR PICKFORD: -- in extremely quick time --

THE CHAIR: Sure.

MR PICKFORD: -- and it wouldn't be fair to sort of bind us to anything very strictly as a result, in relation to that concession. But I'm trying to be helpful, and as far as I understand it, that is broadly the case. I haven't myself gone through the forensic exercise of checking.

3, I'm instructed, bears some resemblance to a previous question, but is different. In

relation to all of them, we are content to provide answers by the same date as we're providing all the other answers, 13 February, and indeed, on a rolling basis, as and when we become able to do so. So given --

THE CHAIR: So you say all of the questions?

MR PICKFORD: All of 3 onwards. I'm going to come back to 1 and 2, because they are special.

THE CHAIR: You say you're prepared to answer 3, even though you think it's a -- it involves a change to what you were asked before?

MR PICKFORD: Yes. Because we're not -- I mean, it's fine. They could have sent us a letter today with a new 3 and, you know, we might as well wrap it up and deal with it. We're not being pedantic about responding in that way.

THE CHAIR: 1 and 2, you --

MR PICKFORD: 1 and 2 are different, and the reason for that is this: we were asked in a letter of 24 November to produce what is requested in 1 and 2. We responded on 9 December and said, "No, that's premature at the moment. We're not going to do that. We're not saying we're not going to do it at all, but it's currently premature". There the matter lay until this morning. So nowhere in Mr Facenna's skeleton argument did he say, "Well, actually, we're going to make an application against you, that you comply with 1 and 2". Because we'd already dealt with their correspondence, we'd said, "No, we're not going to do that yet. We'll come back to you about it." They didn't respond to us and say, "No, not good enough". They just didn't respond. What is --

THE CHAIR: Sorry, when did you write back?

MR PICKFORD: Just we did that on 9 December. I can, if helpful --

THE CHAIR: No, no. We're prepared to take your word for it.

MR PICKFORD: So, yes. So question originally asked on 24 November; we

responded on 9 December, saying "premature". One of the reasons why -- I was explaining one of the reasons why it's premature, it's because the EC process is ongoing and there are a number of difficulties with giving remedies documents from a remedies process that is still happening, not least of which we'd have to keep doing it again and again.

I'm not saying that's the only problem, but that is an example of just one particular difficulty with what's being requested in relation to the EC materials.

THE CHAIR: "As far as the remainder are concerned ... by no later ..." You would substitute the date at the top of the page. It would be -- you said 13 February, I think; is that right?

MR PICKFORD: Yes. So as far as the rest of it is concerned, I'd -- just let me just read that, but I think so.

THE CHAIR: 13 February is when you're proposing to give that sort of --

MR PICKFORD: Yes.

THE CHAIR: Para 17 and para 18 is where --

MR PICKFORD: What I'd actually say is this: this list is a selection of questions that are asked in those other documents and so we infer, and perhaps Mr Facenna can confirm, that insofar as it's not in this list, it's no longer being pursued.

Because what is obviously particularly unsatisfactory and perhaps would reveal this document was not quite as neutral as might at first have been suggested is that, in fact, they still want the answers to everything; it's just -- it's a means of getting us to do some things that would otherwise be difficult.

So, yes, I think we would say: by no later than 13 February, we'll provide all the additional information requested -- or well, we will answer those questions. I think what I'd say is that we will answer all of those requests --

THE CHAIR: 3 to 12.

MR PICKFORD: -- between 3 and 12. Again, subject to the usual proviso that we will do what we think is proper and in good faith, and if they've got a problem with that, then they'll obviously have to come back and we'll be -- Sir, you've said to me before, our feet will be held to the fire if you think that we have behaved improperly, or you will agree with us if, you know, you think we've done the right thing.

THE CHAIR: 1 and 2, you're not going -- you're saying we shouldn't make an order now, but you're not going to -- are you going to -- is the position that you adopt this: that you're going to provide an answer to those requests? Or as things stand, as far as you're concerned, you've answered those requests already?

MR PICKFORD: Yes. We provide an answer, which was, "No, we think it's premature". If they want to renew something and tee it up properly and set out everything to do with why they say they should have it, and we have a proper justification so we have a proper opportunity to respond -- and that's a serious undertaking, what's being requested in 1 and 2 --

THE CHAIR: Yes.

MR PICKFORD: We probably want evidence on it. Then, you know, we can do that. But I'm not --

THE CHAIR: We got the point.

MR PICKFORD: -- willing to entertain an ad hoc application that was sprung on me this morning. I think that that's it until we get on to the other items on the agenda. Can I just check --

THE CHAIR: Yes.

MR PICKFORD: -- that no one wants me to say anything else now. (Pause)

No.

THE CHAIR: Thank you.

MR PICKFORD: I'm grateful.

THE CHAIR: Thank you very much indeed, Mr Pickford.

Reply submissions by MR FACENNA

MR FACENNA: Just focusing then on the draft directions on where we are. So on paragraph 17, which is the response to the CRA questions, I think that's fine. We can agree the 13 February date, and I think it's understood from the exchanges that they will answer all the questions, including to provide an explanation where it's not proportionate or possible -- sorry, they'll respond to each of the questions, and the response might be, "It's not possible or proportionate to answer it".

THE CHAIR: You'll get an answer, and if you don't like the answer, you come back.

MR FACENNA: Yes. And I think the request that there should be a date for us to respond to that, I think around a month would be fine from our perspective.

THE CHAIR: So you're willing for a direction to go into that?

MR FACENNA: We're willing for a direction. That would be sometime in the middle of March, which is still some way out from CMC 3.

THE CHAIR: So that is ...?

MR FACENNA: That's 17.

THE CHAIR: 17. Yes. So 17 we've dealt with.

MR FACENNA: 17 we've dealt with. Paragraph 18, then, is the codebooks. So I think again we can agree the proposal, which is that on the same date of 13 February, they will tell us effectively if there is a codebook already available, or if there isn't one and why there isn't one, i.e. "because you don't need it or it just doesn't exist".

THE CHAIR: Or why they're not prepared to give it --

MR FACENNA: Or why they're not prepared to produce one. I think our only -- the only rider I'd put on the exchanges before are that, obviously, if the answer is that there is a codebook already available, we then expect that to be provided with the relevant dataset by the longstop date of 27 February.

THE CHAIR: Mr Pickford is not suggesting otherwise.
MR FACENNA: I think that was implied, yes.
THE CHAIR: I think he may even have said that expressly, but --
MR PICKFORD: Yes, we don't object to that.
MR FACENNA: We assume that if there will be cases where there's no codebook because you don't need it, it's just --
THE CHAIR: Because you can read the top of the column and it tells you precisely what it does.
MR FACENNA: If there are other cases where there's no codebook for some more complicated reason, then again, I think we take it as read that Google will be willing to provide a prompt response to reasonable and proportionate enquiries, necessary to enable us to understand (inaudible).
THE CHAIR: I wouldn't make any assumptions. What you do is you go back and say, "We want a codebook, please". And if Mr Pickford's client says, "No, we're not giving you one", then you raise that at CMC 3.
MR FACENNA: Yes, absolutely.
THE CHAIR: For whatever reason he gives you. And I think that is an improvement for you because you were asking for a longstop date -- I know you were asking for a rolling basis, but that still gives you an opportunity at CMC 3 to say, "Well, you know, they've made a mockery of this process; please impose that date". I'm hoping that's not going to happen, but it gives you an opportunity to come back to ask for something very similar to what you're asking now.
MR FACENNA: Yes. That brings me then to the geographical --
THE CHAIR: Would you just excuse me a moment? (Pause)
My colleague's just asking me about the drafting. Can we leave it to the parties to try and agree a form for paragraph 18? I mean, it will be a form of words, won't it, that's

very similar to paragraph 17, not quite the same, I think.

MR FACENNA: Yes.

THE CHAIR: And then followed by a new paragraph 19 which will deal with your response. I hesitate to do the drafting in relation to something like a data dictionary on the hoof.

MR FACENNA: I think we anticipated you would send us away and we'd come back with some agreed wording.

So then the geographical exclusion --

THE CHAIR: Can you just remind us -- can I just actually look at my -- you dealt with 10(b) next, but do you want to leave that until the end? That's the point that Mr --

MR FACENNA: Well, no, we can actually deal with that now. Yes, so the proposal on that is that by the same date, 13 February, they will provide a response to everything in the list that we handed up this morning.

THE CHAIR: Apart from 1 and 2?

MR FACENNA: Apart from 1 and 2. I think if that's the case, we accept that. We don't necessarily accept the criticisms that were made about timing and so on, but --

THE CHAIR: It means you've got to ask again in relation to 1 or 2 to get an order.

MR FACENNA: Exactly, we can ask again in relation to 1 and 2, so we're content with that.

THE CHAIR: Then just to confirm, while we're still on it, 10(a) goes to 11(a), I think -- or no, because the 27th is now agreed, but it's the 27th.

MR FACENNA: Yes, so 10(a) would go into 11.

THE CHAIR: So we can put a tick next to 10(a) and 10(b).

MR FACENNA: Yes. 10(c) we're going to come on to.

THE CHAIR: And then 11(a) is the qualification that Mr Pickford gave us. 11(a) is the geographical point.

MR FACENNA: Yes, so that's the next point. I mean, the problem is, as you've seen from the correspondence last night and then this morning, we still actually just don't understand what they're proposing to do or the basis on which to propose to exclude this material. If you have to hand the letter that went this morning, it makes it clear, for instance, that --

THE CHAIR: That's the 18th?

MR FACENNA: That's the 18 December letter --

THE CHAIR: From you, to Herbert Smith --

MR FACENNA: -- with the table attached.

THE CHAIR: -- with the table attached.

MR FACENNA: So, just to demonstrate the arbitrary nature of what seems to be proposed, in paragraph 4 of that letter, you'll see -- and I'll be cautious because technically, some of it is confidential --

THE CHAIR: Well, I mean, I take your point, and it was the point that I was trying to put probably rather ineffectually to Mr Pickford. I mean, his formulation does have a principled basis, it seems to me; you can understand at least what it means, which is where -- and I hope he'll correct me if I'm wrong -- a dataset relates exclusively to non-UK publishers, they don't have to disclose it, unless it goes to something like market definition or market dominance.

MR FACENNA: Yes. The problem with that, I mean, first of all, market definition and dominance are a bit of a red herring. To go back to the initial points we made, this is a global market with global products. The fact that a dataset might relate to, in this case, the United States, does not mean that it's not relevant, not just to -- it's not just a question to market definition and dominance; actually, the issues are abuse and causation and quantum in particular. So when you're dealing with global products where this is a case which concerns Google's conduct and the effects of that conduct,

then data that relates to the United States and to other EEA countries is directly relevant to those issues. So as a matter of principle, we don't accept the position that this should be the secondary set of exchanges and any more detailed and more targeted exchange about those other datasets. The fact is that the Tribunal has decided to go down this bespoke disclosure process. The idea was to shortcut something more detailed by handing over what already exists. These are the datasets which were provided to these other regulators; the US material was provided in its entirety to the European Commission. It is relevant for the reasons which Dr Latham sets out and for the reasons I've just given.

MR PICKFORD: Sorry, I didn't want to interrupt, but there might be some misunderstanding here. I just want to be clear. We're not seeking to exclude all non-UK data; only that which pertains only to non-UK publishers. So if it's data about US purchases of UK publishers, then that's fine, that's in. If it's something to do with the US more generally, which is not to do with specifically US publishers, that's in. The thing that we're excluding is data that is purely, exclusively concerned with non-UK publishers. So, I apprehended because it was being put in a broader way by Mr Facenna that there might be some -- I might not have been clear in the way that I put my submissions.

MR FACENNA: I'm grateful for that, although there's no misunderstanding on our part. I mean, we understand that they have conceded that if it relates to any extent to revenues, if you like, of UK publishers, that will be included. But our objection is wider than that. If you have a dataset which concerns, for example, if you look at the table --

THE CHAIR: I'm just looking at it now.

MR FACENNA: Yes, so if you look at, for example, Schedule 8, item 7, I don't want to describe what it relates to, but you can see, for example -- now, that's proposed to be withheld on geographic grounds. Presumably some of it relates to non-UK markets.

And you'll see what Dr Latham says about its relevance to Google's conduct. So that's not market definition or dominance, but to questions of liability.

Similarly, if you look over the page at Schedule 23, which are the DoJ proceedings, item 11, there's a whole high-level description and part of the problem here is there are supposedly 35 datasets within this. We haven't been given any information about which 11 it's providing and what are in the 13 which are being withheld. But if you look at the high-level description, it's US and North American data. They say, "Well, on that basis you're not having any of it as this doesn't relate to UK publishers". But for the reasons given by Dr Latham, that material is directly relevant to questions of conduct and causation, abuse and so on.

So, again, without going into the detail of what's said in column 4, there's no principled basis on which to say that: "this is a UK case relating to UK publishers; therefore, material that relates to non-UK markets is not relevant". It is relevant because this is a case which concerns Google's conduct in relation to products which are the same all over the world. I mean, that's the basic point.

So, that's the point on the geographic exclusion. There's also the proportionality element of it. We have decided to go down a path of disclosing the material that's already there. There's no point now trying to build in further hurdles where we're going to have further disputes about particular parts of that. We are also concerned about the basis on which these judgments about relevance are going to be made.

The same is true to some extent on the expert reports, the DoJ material. First of all, on the Practice Direction, that's not relevant. Again, this is a bespoke process that the Tribunal has decided to go down for these proceedings. So we're not in the realm of specific disclosure requests for the purposes of economic expert evidence.

They appeal to common sense that it's not going to assist us to have this material: well, I mean, we would say the opposite is true. It's obviously going to assist the

Tribunal's case management in terms of the efficiency rationale underlying the CMC 1 Order and having access to evidence which is already analysed and marshalled. The raw documents will obviously be of real assistance.

THE CHAIR: I mean, you don't need to press that point because I think we're in your favour on that point. The question is whether we should do the two-stage approach put forward by Mr Pickford, which has an attraction to it, given the wide-ranging nature. It seems to me that Mr Pickford's points all have a lot more traction if you're looking at the two-stage process rather than, you know, I obviously reacted badly to his proposal we should exclude the material entirely, but his points do have a lot more force when they're directed at the two-stage approach that he puts forward.

MR FACENNA: Only if the two-stage process doesn't introduce yet further work and further delay and further costs, and we say that it will. First of all, I showed you this morning Dr Latham's report where he refers to the redacted versions. There has already been a review of the witnesses and the experts, and we already have an explanation as to why they're likely to be relevant. I take the point that we're not going to get completely unredacted versions, but we're going to get something much closer to what will be useful.

So in terms of proportionality, the material already exists in compiled form. My learned friend's proposal seems to be: "let's go down the route which we already know has failed: we'll end up with another -- it may not be 250 pages, it may not be £1 million -- another new document which describes, in a tendentious way, the expert material". That's likely to lead to further debate about relevance, targeted requests, consideration of each request. It's just simply far more time consuming and expensive than simply handing them over. Simply handing them over is consistent with the approach which underlies the architecture from the CMC 1 Order. Hand them over in that form.

It's also, by the way -- I said I wouldn't show you this, but it is exactly the order which

this Tribunal has made in a number of other proceedings. If I can just show you very quickly.

THE CHAIR: Yes.

MR FACENNA: In the Authorities Bundle at page 536 is the order dated 8 March 2023 in the *Kent v Apple* case. You'll see at paragraph 5.3 on page 536, the Tribunal in that case ordered disclosure of:

"... all witness statements, affidavits, interrogatories, depositions and expert reports filed and/or served in the US Proceedings and the Australian *Epic* Proceedings."

You see a similar order if you jump forward to 541 in the bundle, which is the order in the *Qualcomm* case. You'll see there at 1(c) on that page, Qualcomm was ordered to disclose:

"Copies of non-publicly available depositions and expert reports from the US Class Action Proceedings save insofar as already disclosed in these proceedings."

So that was both depositions and expert reports.

And 277 in the same bundle is a judgment of the Tribunal in *Coll v Google*, paragraph 26. You'll see in *Coll* that:

"The [Class Representative] accepted Google's proposal to produce disclosure by reference to the documents produced for the US Proceedings [and this was done] to avoid argument. At the Third CMC, the [Class Representative], in addition, sought disclosure of the expert reports in the US Proceedings [and] submits that one of the reasons [for doing so are essentially the same reasons we're giving here.] Initially, it was only Google's expert reports that were provided, although redacted versions of the plaintiff expert reports in the US Proceedings have also now been disclosed."

So in other proceedings, Google's given exactly the material that we're asking for here. So there's a well-established precedent for it in this Tribunal. It's going to be more work to introduce another stage, and it's actually contrary to what we were trying to

achieve with the CMC 1 Order. I think that's all the points on --

THE CHAIR: Can I just make sure that I -- what we'll do is we just rise for five minutes and come back and give you our decision on the outstanding points before we move on, I think. So, can I just be absolutely clear where we've got to, which is that I think the only two outstanding points are the geographical exclusion, the point on 11(a), which is the categories of material excluded from disclosure, and then 11(c), is that right? The date itself I think is not contentious, but 11(a), the issue between the parties is whether there should be a rider in the form put forward by Mr Pickford, and 11(c) is whether there should be disclosure at all. And if so, it should either be in the form that you put forward in paragraph (c) or whether it should be a staged approach put forward by Mr Pickford.

And those are the only two issues before us?

MR FACENNA: No one's telling me otherwise.

THE CHAIR: Well, we'll just rise for two or three minutes, just to confer, and then we'll come back --

(2.55 pm)

(A short break)

(2.59 pm)

MR FACENNA: Just while we're waiting for that, in terms of timing. So we still need to deal with that.

THE CHAIR: There's still quite a lot to go.

MR FACENNA: There is, although I think, I mean, we've got further disclosure, in paragraph 12 to deal with. There's obviously a bit to do on that. Trial timetable, I anticipate, given the indications, maybe I can be quite short on that, and Mr Pickford can do the running.

THE CHAIR: Yes.

MR FACENNA: And then we need to deal with the limitation points.

(3.00 pm)

Ruling

THE CHAIR: This is the decision of the Tribunal in relation to the disclosure issues which arise out of the various applications made by the parties, which are reflected in the composite draft Order which was put before the Tribunal this morning.

I am pleased to say that the parties, either before the hearing or during the course of argument, have been able to narrow the issues so that we are only required to deal with two outstanding issues, and that the remainder of the Order will be, effectively, agreed so far as disclosure is concerned.

Two outstanding issues relate to paragraphs 11(a) and 11(c) of the proposed Order put forward by Mr Facenna on behalf of the class representative. 11(a) reads:

"By no later than 4pm on [27 February 2026] the Defendants shall reproduce to the Class Representative from the Pre-existing Disclosure:

"(a) the categories of material excluded from their proposals for reproduction dated 24 October 2025 on the basis that such material pertains to non-UK jurisdictions and markets."

The proposed Order relates to the objection taken by Google to disclosing documents and datasets on a geographical basis. In the course of argument, or shortly before the hearing, Google conceded that no geographical exception should be made for documents, but nevertheless continue to maintain that there should be an exclusion for certain datasets.

In the course of his submissions, Mr Pickford, on behalf of Google, formulated an exception which would have gone into paragraph 11(a). That was, in broad terms, probably not reflecting his own drafting, that there should not be disclosed datasets which related exclusively to non-UK publishers unless those datasets were relevant to

the market definition or market dominance.

Mr Facenna, on behalf of the class representative, argued that the disclosure of those documents should be made for a number of reasons.

Having considered the arguments, we agree with Mr Facenna, and we will make an order in the terms of paragraph 11(a) without any exception.

I can briefly state our reasons. Firstly, that Google has effectively conceded the principle of disclosure in relation to the geographical exception.

Secondly, and perhaps most importantly, we have a concern that the exclusion is simply going to lead to more argument and more costs. It seems to us to be too sophisticated to be operated very easily. It contains effectively three issues which the reviewer would have to decide: firstly, whether disclosures should be made; secondly, whether a dataset related exclusively to non-UK publishers; and then, thirdly, whether it fell within the exception to the exception.

Thirdly, given that the material already exists, it seems to us that there is no proportionality objection.

Fourthly, in relation to the alternative proposal put forward by Mr Pickford, namely, that there should be a two-stage approach, we note with some diffidence that the two-stage approach which was reflected in our first Order, has not worked perfectly but where we do not apportion any blame to either of the parties. It seems to us that the sensible course is simply to make the order in the form requested.

I add that there was an argument in relation to the construction of the Order, and whether in fact Google ought to have engaged in the two-stage process under paragraph 6 of the original Order. We make no observation in relation to that, but it certainly fell within the principle of our Order that the disclosure of these documents should have been considered. For that reason also, we consider that it is appropriate to order disclosure.

Likewise, in relation to category (c), we consider that it is appropriate to order disclosure. The category is set out in the Order as follows:

"[T]he following non-contemporaneous material from the DOJ litigation (as defined in paragraph 6(e) of the 15 August Order): (i) expert reports; (ii) depositions given by Google employees and associated material, including exhibits, transcripts and written responses; (iii) responses to interrogatories; and (iv) responses to requests for admission."

Mr Facenna relied on the fact that it has been the practice in a number of cases for the Tribunal to make orders of that kind, and we agree that an order should be made in the present case.

Mr Pickford appealed to a number of features to resist disclosure. Firstly, he appealed to common sense on the basis that this material was unlikely to be useful on disclosure. Secondly, he appealed to the volume of disclosure which Google had already made or agreed to make in the present proceedings, and the burden which that has imposed on Google.

It is difficult, as I observed in argument with Mr Pickford, for us to assess the common sense utility of the individual documents but it seems to us that if one applies a common sense test, then they will obviously be useful, both to Dr Latham and to the parties themselves, in exploring the issues and identifying key relevant documents, to have access, particularly to the expert evidence, but also to the depositions and factual evidence of the witnesses given in the course of those proceedings.

Again, Mr Pickford advanced a proposal for a two-stage process in relation to the disclosure, modelled by reference to the new Practice Direction on expert evidence. Again, although there is some attraction in adopting a two-stage approach so that full disclosure is not required at this stage, it seemed to us on consideration that that is likely to cause greater expense and greater argument in the long run, as practical

experience has demonstrated in relation to some of the forms of order that we made in the original Order at CMC 1.

So, for those reasons, therefore, we make an order. We will also make an order for disclosure of the material in paragraph 11(c) by 27 February 2026.

(3.08 pm)

Further disclosure

Submissions by MR FACENNA

MR FACENNA: I am grateful, sir.

That takes me then to the question of further disclosure, which is giving effect to what was hoped to be achieved under paragraph 12 of the previous Order. It's addressed in our skeleton argument at paragraphs 48 onwards, and in my learned friend's skeleton at 38 onwards.

It is common ground, in correspondence, that further disclosure is going to be required. The issue now is how the parties can go about identifying what that further disclosure should be. Now, we had discussion at the last CMC about a gap analysis. Without turning up the transcript, you'll recall the Tribunal made it clear that the idea was that we should have been able to achieve that gap analysis by the time of the CMC, and it was incumbent on Google to identify what it had and tell the Class Representative, when giving the remainder of the pre-existing disclosure.

Don't turn it up in the interest of time, but the transcript from CMC 1 is at B.3, page 543 to 544, where the relevant exchanges take place. Now, the solution that was proposed under paragraph 12 of the Order obviously hasn't worked. Google's position has been that the Class Representative should work through the pre-existing disclosure to identify what further disclosure is required, with that further disclosure to be sought at CMC 3. And that's what you see in Google's fairly minimal set of proposed directions in the draft Order. Now, that's -- paragraphs 5 to 7 is what Google's proposing.

We say that's not what was contemplated by the Tribunal when it gave directions on this issue at CMC 1. You said, in particular, that Google was to co-operate and tell us what else, what other material there might be. It's also a completely unrealistic proposal. Even if it were possible for the Class Representative to digest all of the material between the date that's now 27 February and CMC 3, it's impossible to identify what's missing from the disclosure and relevant to the issues in this case, without at least some sense of what the wider universe of documents and datasets is. There's a sort of conceptual difference between us. Google's stance seems to be: finding the gaps means going through the pre-existing disclosure and trying to identify any issues in the list of issues that aren't addressed by that pre-existing disclosure, whereas we say the correct way of looking at this, which we think reflects the exchanges at CMC 1, is that when trying to assess the disclosure exercise that's necessary to ensure that the Tribunal and the parties have the evidence relevant to these proceedings, in circumstances where all of that evidence is currently in Google's hands, identifying the gaps means having some awareness of those repositories of evidence that are relevant to these proceedings, but which have not been captured by the pre-existing disclosure.

You will have seen in our skeleton argument, based on the information currently available, it is apparent that there are material gaps in the pre-existing disclosure, and we have set them out, paragraph 53 of our skeleton argument. Paragraph 53 is the proposed solution. Paragraph 54 sets out the thinking and what we identify as known gaps. Now, there were some late exchanges on this. So when you're looking at what we say in the skeleton, it's probably necessary also to have a look at what Google says in response, which is in E.1, at page 21.

But the points are really this. We already know where there are some significant gaps in the body of pre-existing disclosure. So first of all, there's a temporal scope gap.

Now, the date which is in that paragraph in our skeleton has been designated confidential, so I won't refer to it. But what is not designated is that, as a result of the temporal scope of the pre-existing disclosure exercises, there is a significant period, of the relevant period in these claims, which will not be covered by the pre-existing disclosure. So you see that, if you have our skeleton argument, it's the dates in paragraph 54.

THE CHAIR: Yes, we've got that.

MR FACENNA: So first of all, there's temporal scope. That, as we understand it, the position is not very clear, based on Google's most recent explanation at 8.1, on page 20 of that letter. It seems to be that that time limit applies to all custodial searches in the DoJ proceedings. It may not apply to some non-custodial searches, although that's not actually what Google's letter says in terms. They say that the pre-existing disclosure will include some documents created after that date. But again, it's pretty vague. So it does seem to be the case that we know for a fact that the pre-existing disclosure will not cover the period from that date onwards.

In terms of custodians, which is the second point, Google's position is that we should identify missing custodians, rather than Google undertaking the analysis. That's unrealistic. It's unhelpful. Google already knows whether there are potential custodians who have not been caught by the pre-existing disclosure, so it has presumably issued litigation hold notices to relevant custodians for these proceedings, but it has declined to identify those custodians, which would at least allow the Class Representative to undertake the cross-check against the custodians who are set out in the proposal.

So we know who the custodians were, whose documents were searched in the regulatory proceedings, but what we don't know is who are the other people within Google or otherwise, who Google itself has designated to hold relevant material or are

likely to hold relevant material to these proceedings. We have already identified that there are likely to be some.

Then categories 3 and 4 in our skeleton argument relate to non-custodial sources for both documents and datasets. Our understanding had been that only a small proportion of non-custodial sources, share drives, and so on, had been searched in the pre-existing disclosure. Google's responded at paragraph 8.3.1 of that letter, and --

THE CHAIR: This is --

MR FACENNA: Yes, this letter is confidential, so I won't refer to what the explanation is, but they say that our understanding is not correct.

DR MAHER: Sorry, can you (audio distortion)? 8.1 is on temporal scope.

MR FACENNA: I am sorry, Dr Maher. It's 8.3.1, over the page. (Pause)

So there's an explanation which uses the word "addressed" in relation to some searches, but I think the problem for us is still doesn't really give us a sense of what the non-custodial sources are, who had access to them, and whether they have, in fact, been captured by the pre-existing disclosure. So there's still a degree of uncertainty -- I mean, we know there are gaps. We roughly know what those gaps might be in broad terms, but there's still quite a lot of vagueness about quite where the gaps are, where the bright lines are.

Now, at the July CMC, the expectation of both Google and the Tribunal was that a disclosure report, an EDQ, would be required to address the gaps in the preexisting disclosure, and it remains our position that that is the right tool; it is an orthodox, well-established tool. You heard what I had to say about it six months ago. It's referred to directly in the Tribunal's Rules, and it is what would ordinarily be expected to identify the relevant evidence.

You will have seen, in our skeleton, our suggestion was that there should be

a disclosure report, an EDQ, to address those known gaps, so not a sort of entire universe.

Now, in the run up to the hearing, we've seen what Google has said about this and so we've been further considering whether there are other means of eliciting the information to achieve what paragraph 12 was seeking to achieve. We set out a proposal which is in E.1, at page 28. This is a letter that we sent yesterday. If you jump to paragraph 8 of the letter, which is on page 30, the last page of the bundle, you'll see that by way of an alternative of the formality of a full DR and EDQ, we've proposed that Google would respond to three questions.

All of those questions are -- you see they're related custodians, and non-custodial repositories, and to the temporal scope. They're all within Google's knowledge. If Google engages fully with those questions, they would certainly allow progress to be made on the further disclosure, perhaps without the need at this stage for a full DR and EDQ.

Just dealing with the questions briefly, the first one on custodians:

"Whether the custodians who were not included in the Pre-Existing Disclosure exercise hold material relevant to the List of Issues; and, if so, Google's proposals for disclosure ..."

That should be straightforward to answer. It knows both the custodians who were searched in the pre-existing disclosure, as well as those to whom litigation hold notices have been issued for those proceedings.

Secondly:

"Whether non-custodial repositories hold material relevant to the List of Issues; and, if so, Google's proposals [in relation to those]."

Again, that's a straightforward question. Based on the latest letter, it seems to know which non-custodial repositories were searched in the DoJ proceedings, and it should

be able to identify whether there are significant non-custodial repositories that did not make it onto that list.

Again, the third question, on the date, is one that Google ought to be able to answer readily, because it knows what disclosure was given or has been given in various proceedings since that date.

Now, Google has not confirmed it's willing to provide answers to those questions and we need to wait to hear what Mr Pickford says about it. If they're not prepared to go down this route, then our position is that there has to be some process to make progress on the further disclosure and to try and bring that to a head before a CMC 3.

It seems to us that the normal way of doing that would be a disclosure report, an EDQ. They are well-established tools. Without them, we're currently in a position where we can't assess which categories of documents exist and are available, or whether Google's proposals for further disclosure are likely to be adequate. If we have those documents, that will then enable us to take a targeted and more efficient approach, because we'll have a sense of -- by then, not only will we have a better sense of what's in the pre-existing disclosure, but we'll know what else is available and what's likely to be relevant.

I won't deal in detail with Google's objections -- Mr Pickford can say what he wants to say about it -- but the main objection seems to be that, having decided to go down a route of relying on the pre-existing disclosure, we're asking now for a ground up exercise, a disclosure exercise.

The reality is: this is exactly what we discussed and that which everyone contemplated at CMC 1. The idea that that imposes some enormous burden is one which I think we approach with a degree of scepticism, given the extent to which these issues are being litigated in a number of different jurisdictions.

Thirdly, the idea that it is more proportionate to work through the pre-existing

disclosure first, that really would be a ground up process, one which is just simply not practical, and which would be arduous.

So in short, we've set out an alternative which is not a full DR/EDQ. Failing that, we think you should use those tools or some comparable process which will enable us to make the progress which the Tribunal envisaged under paragraph 12 of the original Order.

THE CHAIR: Yes, Mr Pickford.

Submissions by MR PICKFORD

MR PICKFORD: Thank you, sir.

We do resist this part of the application. We certainly resist the full-scale disclosure report and EDQ, I am not quite sure, and I've asked for instructions behind me, to what extent 8(a) to (c) in the letter that you just showed from yesterday really differs from that. Our understanding when we read it initially is it was just an EDQ and DR in different clothing.

Mr Facenna has sought to make the case that it really is substantively different, and it's possible that I may need to take some instructions on whether, in the light of Mr Facenna's submissions, it really is substantively different. But I'm going to start by dealing with the case that was made against us in the Order, which is they want an EDQ and a disclosure report.

THE CHAIR: Yes.

MR PICKFORD: So the essential difference, in my submission, between the parties comes down to this. I find it helpful to think in these terms and, Tribunal, stop me if my approach is unhelpful, and I'll try and find a different way of describing it.

But the way I approach it is that there is a set we can think of in kind of very basic mathematical logic terms of the full universe, of all the documents that would be covered if we engaged in a full ground up DR and EDQ process. That's big set A.

We did, under the process -- and we argued at the last CMC about whether we should go straight for A, and what the Tribunal decided, following argument about that, was it agreed with Google that, actually, there was a more proportionate approach that was available to us here, because of all the work that had been done in relation to the DoJ, CMA, and FCA, and EC proceedings.

So what we have produced the explanatory statement for and are about to make very substantial disclosure in relation to is a different, smaller set, B. Now, B overlaps with A in this sense. It's not entirely within A, because there are, of course, some bits of B which we say aren't strictly relevant to these proceedings. We've tried to carve those out, and those have been, indeed, some of the things that we've been arguing about in this very hearing. For instance, the geographic scope.

But in any event, the idea behind the smaller set B is it's a close approximation as we can get to something within the sphere of A. Then the question is: what do we do next? What Mr Facenna says is, "Well, don't worry. We're just asking you to work out what's outside your B and in our A. That's what we want. We just want to know what's outside. What are you making such a big fuss about? Please, can you do that?"

What we say is, the problem with that approach is if you really want to know everything that you would have known, we're going to have to do the full EDQ process, because that's the only way you can know A minus B; it's to know what is in your A.

The problem with that is that it basically means that we've wasted three months and over £1 million doing the first exercise. Because if we were always going to basically just have to expand to the full set of documents, we might as well have just done an EDQ and DR process, that is the inevitable result. We should have just done that in the first place and saved ourselves a lot of time and money.

There are good reasons why we didn't do that. It's because what we have done, in my submission, is actually a pragmatic and proportionate approach, and that the

second step that we can now take is to, rather than ask ourselves the question, "What might we be missing that we would have got had we adopted an entirely different approach?", is to ask ourselves the question, "Now we've got all these documents, these three million documents, and we've got these issues that we want to cover, where realistically are we allowed to get the biggest bang for our buck in terms of focusing our attention?"

Because if it turns out that we have 500,000 documents about a particular issue in terms of introducing products, and it's very, you know, we've got strategy documents about it and we've got, seemingly, everything that one might expect to get, is it really going to be a worthwhile exercise, assuming that there might be something else out there? I mean, there might, but the question is: what's proportionate?

We say that instead of trying to cover the whole universe and make and match between the two sets, what we should be doing is just focusing in on those areas where there actually seem to be gaps -- obvious problem gaps -- and searching for those issues in a proportionate way.

Now, Mr Facenna has given an example of what he said is a gap. He says, "Well, there's a gap. Everything from 2023 onwards is a gap". My response to that is that that is a very broad brush and insufficiently nuanced approach to working out what the gap might be. It might well be that there are certain types of documents that it would be helpful for us to search for in that period, going onwards.

But the difficulty is that what we shouldn't be doing is necessarily searching for everything in that universe without first asking ourselves, "What do we actually need to know?" Because if one goes back -- and generally, this requires going back to the pleadings and actually looking at what issues are left uncovered.

The pleas against us are in relation to practices that effectively end in 2019. The last thing that they talk about is some changes that we made in 2019, in relation to the

universal first-price auction. They say, "Those changes that you made in September 2019, they're not sufficient to deal with that problem and so the abuse is continuing".

But what they don't particularise is lots of things that we did after that date that they say are further problems. So it may be that we don't have to have a large-scale, full analysis of every single document that might go to anything in the case from 2019 onwards. It might be that we can focus in on things that go to the question of damages, for example. So --

THE CHAIR: How do we establish where the gaps are and what they are?

MR PICKFORD: We establish where the gaps are by making a comparison between the lists of issues and what we've got. And to use what the therapists might sometimes say we need to do, to some degree, there is a need to live with some uncertainty. But we are not taking the purist line that what we have to do is work out everything that they possibly could have got had we adopted a different approach and make sure that they get that. We're saying, no, that is too large scale an exercise to do again, given the route that we sensibly chose. What we should do instead is look for areas where you genuinely can say, "Look, we simply don't know anything about this particular topic; we've only got three pieces of disclosure on it. Surely there must be something more out there. Please can you go away and tell us how you think you're going to provide more documents on that, suggest some custodians to us, et cetera".

It has never been suggested, and Mr Facenna is unfair when he says we've asked them to identify our custodians. We have never said that they should do that. What we've asked them to do is to engage in a process with us where we identify where there appear to be topics and a dearth of documents that help the parties understand what went on in relation to those topics.

That's essentially the philosophical difference between us. We accept that leads to

potentially slightly different sets of documents. We say the reality is, given that there is a substantial overlap --

THE CHAIR: I just wanted to have Rule 60 in front of me. I mean, all we're asking is really that you -- I mean, a lot of what you say may be absolutely right, but what's really being said is, well, now it's time to comply with the rules. I just wanted to have the rule in front of me.

MR PICKFORD: The rule --

THE CHAIR: Rule 60, I think, is it?

MR PICKFORD: Sixty.

THE CHAIR: Rule six zero, yes. Which is in the Authorities Bundle, page 66. I just wanted to look at what the scope of our discretion is. If you look at top of page 67: "The Tribunal may at any point give directions as to how disclosure is to be given, and in particular:"

Then it gives the menu of choices. And then "Claim to withhold inspection or disclosure of a document" is 64.

So the way this is normally works is that you make an order for disclosure and then it's for you to assert a claim to withhold disclosure or inspection.

MR PICKFORD: Yes.

THE CHAIR: And what the rules actually contemplate is, I think: "Subject to paragraph (3) and unless the Tribunal otherwise thinks fit, at the first case management conference, the Tribunal shall decide whether and when the disclosure report ... should be filed."

The observations that I made in the first CMC were really directed at Rule 60(2), which is to say, well, we're not deciding one way or the other at the CMC whether to order an EDQ and a disclosure report. But certainly the rule itself contemplates that unless we decide to do otherwise, we should make an order for an EDQ or disclosure report.

I'm not saying we shouldn't depart from that, but all I'm really pointing out to you is that's what you would normally expect. And in fact, EDQs and DRs were designed really to meet huge cases. Now, I fully appreciate this is a bigger case even than most very big cases and we're prepared to make allowances. But we made that allowance last time and in effect, what I'm saying to you in a roundabout kind of way is rules is rules, you know. And it's now really for you to persuade us that we shouldn't force you to comply with them, if you like.

MR PICKFORD: I'm very happy to meet that. Whether I succeed or not is another question, but I --

MR ALTY: May I just ask a question?

MR PICKFORD: Yes.

MR ALTY: What you were saying already, you were talking about, you know, the large complete set and then B the subset.

MR PICKFORD: Yes.

MR ALTY: And you were saying that if you're now asked, or Google's asked, to carry out the EDQ and so forth, that's really the same as though we'd done that in the first place.

MR PICKFORD: Yes.

MR ALTY: But surely that can't be quite true because we are limiting the time span; we're limiting -- I mean, the way that the questions are set out, you're limited in terms of what you're asked to look at, custodians that aren't already covered in the pre-existing disclosure. So it can't be exactly the same.

MR PICKFORD: With respect, sir, I've got a couple of questions to answer and I'll --

THE CHAIR: Choose whichever order you like.

MR PICKFORD: I'm going to deal with them in reverse order. So in relation to that question, with respect, I disagree.

MR ALTY: Fine, yes, go on.

THE CHAIR: And you say it's the same -- effectively, you're now being asked to do effectively the same exercise which you would have had to do if we'd made the order first time around.

MR PICKFORD: Yes. Because, in relation to the particular points you put to me, it's not merely another time period. That was their third point. But they've also got -- they want to say, who are the other custodians and where are the other repositories of documents. And you say, well, surely that's easier because you've already worked out what some of them are, so you just need to know what the other ones are. But the question is, how do we determine what the other ones are? The other ones are -- by reference to -- the only answer we can give to that is the normal approach, which is "Okay, what is everything else"? Because we only know what we currently know. What we currently know is here's what we produced for the DoJ. And it's said, "Ah, but just tell us what everything else might be". Well, we can only tell you what everything else might be by looking at the totality of the set and then saying, "Okay, well, we've now worked out that everything that we might have looked at is X, Y, and Z and what we've actually given you is X and Y so therefore the alternative is Z". But we can't determine Z until we've looked at X, Y and Z.

THE CHAIR: But I think, if one looks at the draft Order and what you're proposing instead, we might ultimately just get to that eventually because what you're doing is putting the burden on them to say, "Well, come on, you tell us where the gaps are".

MR PICKFORD: Yes, we'd have to look.

THE CHAIR: So you're making Mr Facenna do the work and then you'll respond to that and ultimately, we may be back here arguing the same point. He'll be saying, "Well, you've been obstructive", you won't -- but ultimately you're going to have to carry out these searches, aren't you? Unless we say, "No, the disclosure rests with the

material that you disclosed to the DoJ". There's no way you're going to avoid carrying out further searches, is there?

MR PICKFORD: Some further searches. The question is, do we carry out further searches that fill in the entirety of the universe between set B and set A? That is what they are asking for because they say, "We want to know everything that we would have otherwise got".

THE CHAIR: Well, because the parties of --

MR PICKFORD: They want a list of all the other custodians that you might have, you might have considered. So how do we come up with those custodians? Do we have to go back to the basics?

THE CHAIR: Well, when you have the list of issues, both parties have the list of issues, you have the existing documents. And in the same way as Mr Facenna's clients are going to be analysing the existing documents and looking at the list of issues, you're going to be able to probably take an informed view about the answers to his three questions in the letter: custodians, repositories and time periods.

MR PICKFORD: Well, sir, I wanted to take some instructions on how different that really was from the perspective of those behind me in the light of what Mr Facenna said. But I haven't yet responded to your question, which --

THE CHAIR: Which is rules is rules.

MR PICKFORD: Which is rules is rules. And again, in the same way as I, with utmost respect, don't agree with the point --

THE CHAIR: You don't agree with that either?

MR PICKFORD: I'm afraid I don't agree with your point either, sir. And the reason is that the Tribunal's rules do not create a presumption in favour of an EDQ approach; they require the Tribunal to consider whether, and impliedly if so, when, to order an EDQ. It does not say, "You shall order an EDQ unless you can be persuaded by the

defendant that you shouldn't". That's not how the rules are written. The rules, in my submission, are neutral as to whether an EDQ is an appropriate approach or not. Now, it is not the case that in all -- as I'm sure, sir, you know from other places that you sit -- High Court litigation, even in big scale cases, that parties necessarily go through an EDQ and DR process. They may adopt a different model from the various models that are available for disclosure.

THE CHAIR: You'd normally expect an EDQ and some form of disclosure report. You might -- but I mean, what you have there is a different process because you agree a DR and then you disagree on model for disclosure -- but you would normally expect, in advance of the first CMC, somebody to produce … But I mean, I take your point that we're talking about a different scale of litigation in most cases; I follow that.

MR PICKFORD: Yes. And in my submission, it is important to stand back. I mean, because it's easy to get sucked into a sort of logical purist chain of, "Well, how do we make sure that we get out all of the documents that might be relevant to this particular subject?" And in my submission, when we already have the best part of 3 million -- 3 million documents that are being disclosed and 350 enormous datasets that are being disclosed, it is sensible to pause for a moment and say, "Do we really need to actually carry out that exhaustive process, or can we admit to the fact that you might not have everything?"

THE CHAIR: Can I just stop you, really, to say this. I think we are receptive to your submissions. I think what worries us collectively is what's going to happen long term if we end -- because we started down this route and you, if I may say so, persuaded us very persuasively that we should not order an EDQ last time round. But I don't think we at that time had focused on what the end game would be. So let's say we just can't get there; we kick the can down the road and you exchange more letters about and spend a lot of money arguing about what gaps exist, the gap analysis, what custodians

there might be if you went and had a look for them. How are we ultimately going to resolve this issue if the parties simply cannot agree about what searches Google should carry out by the 5 May? Because we'll then be four months further on. I mean, if you could convince us that there is going to be a solution which doesn't involve us ultimately ordering you to, you know, to prepare an EDQ and a DR, but that's ultimately -- you know, if we don't do it now, we may end up doing it in May, in which case you're going to also want quite a long time to carry out that process.

MR PICKFORD: Yes. Well, taking it in steps, the first --

THE CHAIR: So, we're now looking forward. Whereas the first CMC, we were just all kicking off where everybody is thinking about what we should do immediately, and we were willing to give you, you know, quite a lot of latitude. But now we're thinking about, well, we're at the second CMC already and we haven't even agreed about the basic standards of disclosure. That's the way I look at it.

MR PICKFORD: Yes.

THE CHAIR: I mean, there are very good reasons for that and I'm not saying you are at fault. But, you know, we are where we are and we have got to decide how we bring the disclosure process to an end, ultimately, and get on with what is the main event, if you like.

MR PICKFORD: Yes. So I'd like to make two points in response to that. But you asked me a very practical question about how do we resolve this?

THE CHAIR: How do we resolve it?

MR PICKFORD: As a contextual response to answering that --

THE CHAIR: Yes, certainly.

MR PICKFORD: -- I would like to come back to the question of whether this process is working poorly or well. Now, we've already had some exchange on that and it was suggested by the Tribunal that it's not working. And I would strongly reiterate, in my

submission, this process is working. I have never, ever done any sizable case where there haven't been a large number of arguments about disclosure, whatever model one adopts. In fact, all we've had -- you know, we're going to have a day's hearing roughly about disclosure and, as a result of that, three million documents are going to be available --

THE CHAIR: It's because the parties are so reasonable.

MR PICKFORD: -- to be reviewed. Well, it's because we've taken a sensible and pragmatic approach.

THE CHAIR: I'm not disagreeing with you --

MR PICKFORD: And the reason why I make that submission -- sorry, sir -- is because that does colour, in my submission, the degree of concern that the Tribunal needs to have about shaping the rest of the process. I can well see that if this case was going off the rails already --

THE CHAIR: No, no, I accept that. But my point is slightly different one, which is that we're now at the second CMC and we're now trying to work out whether, if we effectively allow the process to continue in the way you've suggested and there isn't agreement, you know, after what will be getting on for nine months, how do we find another way of, if you like, case managing the process so that ultimately the disclosure is given which is fair and proportionate for both parties?

MR PICKFORD: Yes, so sir --

THE CHAIR: And if you can offer us a fallback position, then we would be receptive to that.

MR PICKFORD: My answer focuses heavily on the proportionate bit of what, sir, you've just said. And it this: that firstly, we have the dialogue between the parties where they exchange their positions on what they say they need, and it might well be that Mr Facenna's clients come back saying, "Well, we need a lot", and we come back

saying, "Well, maybe we can accept that you need something in these areas, but come on, you've already got 100,000 documents on this issue. You've got all the strategy reports, you've got all the other things; do you really need anything else?" And then, no doubt, out of that there will be some disagreement.

What will probably happen thereafter, in the world that we're envisaging, is that there would be, as there are in many cases, perhaps a slightly painful one or two days where we have a Scott Schedule of the areas where it's said, "Well, there's still needs to be further disclosure". The Tribunal will then assess those and will assess the proportionality of what we're being asked to do by reference to how important it thinks those questions are in the litigation and how much is really missing from what's already been disclosed.

That's exactly the sort of exercise, for instance, that I've been going through in proceedings before Mr Justice Roth in *Shopping*. We've had a number of disclosure hearings where, you know, as painful as it might be, we all have to sit down with a schedule and the judge goes through, goes through and says, "Well, I think you could do that, couldn't you? You really could." And then says, "But I think that's probably a little bit excessive". And that issues-based approach enables us to, in my submission, adopt a proportionate further response.

To give a further example in relation to the EDQs and DRs, we might well find that there is a particular sub-issue where they say, "We've only got a few documents and there's only like two custodians that we seem to have gotten them from. It seems to us implausible that there isn't something better that you can do there. Can you go away and do a mini DR and EDQ" -- you know, supposing that were the only issue in the case, what would your mini DR and EDQ look like for that, at least something akin to it. And we might ultimately be ordered to do that, but not, as I said, across the universe of everything in the case that we could have done from the very beginning.

We'd be doing it on a focused and targeted basis which, in my submission, is very much consistent with the -- has always been consistent with the policy of the Tribunal, but the particularly re-emphasised philosophy in, for example, the Practice Direction that we looked at this morning.

Could I just check from those behind me if there's anything else to say on this topic.

(Pause)

THE CHAIR: Sorry, we were just using that opportunity to discuss it and put the point with each other. Yes.

MR PICKFORD: Thank you, sorry, sir. I've just taken instructions; I said I'd come back on the letter.

THE CHAIR: The letter, yes.

MR PICKFORD: The difficulty that's been explained to me, I think, is very much consonant with the point that I've just been making to the Tribunal, which is whether what it is by reference to in every case, whether it's (a), (b) or (c), is the list of issues. So we're being expected to conduct this exercise of supplementary analysis across all of the list of issues in the entire case. And given the topics in terms of custodians, non-custodial repositories, et cetera, in my submission, that is ultimately going to lead to precisely the same problem as I've been trying to identify in relation to EDQs and DRs: that we're being asked to do it for the universe of documents that might exist in the case. Whereas what would be appropriate here is to do this kind of exercise that they have identified, but in relation to a subset of issues where they can reasonably say, "We just don't seem to know very much about this because you haven't disclosed many documents about this topic". And actually, to be honest with modern artificial intelligence, I'd be very surprised if the claimants aren't able to engage in that process in a fairly sophisticated way. They don't have to -- you know, Mr Facenna is fortunately not going to have to read 3 million documents in order to come back and argue that

point.

So that's what we have to say about this. It doesn't really shift the dial, unfortunately. So, unless I can be of further assistance, thank you.

Reply submissions by MR FACENNA

MR FACENNA: There is a broad discretion in the Rules but it is a well-established tool which has already been used by the Tribunal and other proceedings and is directly envisaged in the rules.

As to the repeated reference to there being 3 million documents, actually, there's publicly available evidence from the US proceedings about Google touting the 6 million documents provided in discovery there and it turned out that 1.2 million of them weren't relevant. So you can't assume that, just because it's a big number, that's somehow going to provide all the material that we need.

We want to make progress; we want to bring this to a head. We can't do that in a way that's proposed. Just to give one example, even if we can analyse, with AI or not, the material that's provided to us in January and February, we won't know which custodians gave which document from that material. We can't do this exercise by waiting for a dump of 2.5 million documents and then hope to be in a sensible position for the Tribunal to rule on discrete and crystallised disputes at CMC 3, which will be almost a year on from when you made the Order at CMC 1.

Mr Pickford complains about what they're being asked to do: to sit with the list of issues and go through their universe of documents, but that's exactly what they're asking for us to do. And we're being asked to do it in circumstances where we have no visibility at all of what material there is which sits outside the pre-existing disclosure.

The answer is to do the two things in parallel. Google says, well, how do we know what else is relevant? Well, come on, you ask your employees. The custodians are the people who are still at Google. Some of them will have been issued with litigation

hold notices already. Google can go and talk to those people; they can ask the questions. What other material is there which is relevant to these issues?

The point about AI obviously applies to Google itself. It's not a case that Mr Pickford is going to have to wander around Google's offices looking for these materials; there are obviously tools which they can use and this is exactly what the Rules envisage.

In footnote 16 of our skeleton argument, paragraph 55.2, we've made the point that these DRs and EDQs are routinely ordered including where there has been preexisting disclosure. There's a number of references in the footnote, but can I just show you one example that might be helpful: the *Alex Neill v Sony* case. It's in the Authorities Bundle, at page 550, where the Order starts. So that's the Tribunal's Order there on amended disclosure and timetable to trial. If one looks at the appendix which starts at 552, what you see was ordered there was, first of all, in box 1, there should be Redfern disclosure, so you'll see the defendants were required to provide an update on which of the requests in the Redfern Schedule they were proposing to respond to. Then a month after that, over the page at 2, there was then to be search-based disclosure, so reasonable and proportionate searches for the relevant categories of documents. Then after that, at 3, ten days later, they were to file a disclosure report and EDQ. So again, you had stages there: search-based disclosure, responses to directed enquiries and, at the same time, preparing a fuller disclosure report, an EDQ.

That is our best proposal for how we are going to make the progress that we now need to make in relation to the further disclosure in these proceedings. We are going to start analysing the documents; we will be in a better position come early next year to see where some of the gaps are but at the same time, we also need to have visibility over what other material is available and relevant. And this seems to be the only sensible way to do it.

(3.57 pm)

Ruling

THE CHAIR: The Tribunal's decision is that we are going to order Google to provide a DR and an EDQ and I will briefly state the reasons now.

Rule 60(2) of the Competition Appeal Tribunal Rules provides as follows:

"Subject to paragraph 3 and unless the Tribunal otherwise thinks fit:

"(a) at the first case management conference, the Tribunal shall decide whether and when the disclosure report and a completed Electronic Documents Questionnaire should be filed; and.

"(b) at a subsequent case management conference, the Tribunal shall decide, having regard to the governing principles and the need to limit disclosure to that which is necessary to deal with the case justly, what orders to make in relation to disclosure."

Then 60(3) provides that:

"The Tribunal may at any point give directions as to how disclosure is to be given, and in particular: [and a number of options are provided]."

It is clear from the structure of the rules that the first question, normally, that the Tribunal must decide is whether to order a disclosure report and EDQ and if so, when. We decided not to make such an order at CMC 1 but to postpone that decision until CMC 2 and, as Mr Facenna pointed out, the transcript clearly records that.

So the question now is whether we should make such an order, which we would normally expect to make in a case of this kind where the parties are well-resourced and fully familiar now with the individual issues.

True it is that 60(2) is subject to 60(3) and that the Tribunal can give contrary directions as to how disclosure is to be given and to choose a different rubric rather than to order a completed EDQ and DR to be filed. But that was the purpose of postponing this issue until CMC 2: to give the parties an opportunity to at least go some way down the road to giving disclosure to demonstrate to the Tribunal that the different and bespoke

procedure that was adopted could be continued through to completion.

I fully accept, as Mr Pickford submitted, that the mere fact that the parties are here arguing about disclosure does not mean that the process is not working. But the question for the Tribunal is whether we should now make the order in accordance with Rule 60(2)(a) or whether we should order a different procedure under Rule 60(3). The difficulty we have is that the alternatives being put forward by Google do not seem to us to achieve what ultimately must be achieved before the parties can move on to trial, which is that full disclosure of the relevant documents is given to enable the CR to put forward its case.

Even taking into account the huge number of documents which have already been disclosed or which are shortly to be disclosed and the importance of proportionality in a case of this kind, it still seems to us that it is fair and proportionate to require Google to carry out the exercise which the Rules contemplate at 60(2). Therefore, we order that it shall provide a DR and a completed EDQ. We will hear from the parties on the question of timing, should that be necessary.

(4.02 pm)

MR PICKFORD: On the question of timing, the kind of examples that Mr Facenna took you to were not -- the Order, I think it was being suggested we would have six weeks. In our submission, that is absolutely absurd, with respect. Even in simpler cases, ordinarily the Tribunal typically grants two and a half months, three months, this is the kind of time period for doing this. And this is not a simple case.

THE CHAIR: But what I had in mind was within a period of weeks, working back from CMC 3, so that we can see where you've got to. So what it needs to be is sufficiently before CMC 3, so that, you know, parties can take stock, deal with any outstanding issues in correspondence, and at least, you know, develop a position which is put before the Tribunal. So end of April, I don't know?

MR PICKFORD: Can I just take instructions?

THE CHAIR: Yes.

MR PICKFORD: We're content with the end of April.

THE CHAIR: Thank you. Does that give you sufficient time? The CMC is likely to be, I think, in the week of 18 to 22 May. I mean, I get that solely from the parties' skeleton arguments.

MR FACENNA: I think, well, the end of April will leave almost no time for us to consider it and have exchanges on it, is the problem. Because I think that CMC 3 is going to be in the middle of May.

THE CHAIR: Yes.

MR FACENNA: Is currently what's envisaged.

THE CHAIR: I'm not anticipating that we're going to have big arguments, we're going to you're going to be making specific disclosure applications, because it is a big task. But you will at least, you know, we'll be able to see that it's been done.

MR FACENNA: Well, it'll be done. But I think our hope was that it would be done, and then in parallel with what we were doing, we would be in a position to come to you at CMC 3 and say: "now we can resolve these issues on further disclosure". So on that basis, we were going to suggest the end of March, which would then allow time to have the exchanges.

THE CHAIR: Easter is 2 April, isn't it?

MR FACENNA: It's 2 April.

THE CHAIR: So that's a week, you can add a week for, you know, people are going to need, all of you are going to need some time off, I imagine, over Easter. So it's going to be a week or two, even then, before.

MR FACENNA: Yes.

THE CHAIR: I think people will be working again on dealing with these issues.

MR FACENNA: If we get it on 30 April, it's difficult to see that we'll be able to do much with it in terms of --

THE CHAIR: Well, I don't anticipate you'll be able to do much with it, even if we order it on 30 March, with Easter in between and the run-up to the -- I mean, are you going to be able to -- it depends what you get I suppose, doesn't it?

MR FACENNA: It depends on the scale of it. I mean, the sooner the better. We will do our best.

THE CHAIR: I think, having made what is quite a clear decision in your favour on the issue, I mean, we're inclined to be charitable in relation to timing, because it is a big job. So I think we'll say 30 April.

Further directions to trial

Submissions by MR FACENNA

MR FACENNA: On that basis then, that deals with that, I think, which just leaves a timetable to trial and Mr Pickford's limitation points. Having heard the indication, I will not say anything about timetable to trial; I can rest on what's in my skeleton argument. You can see what we say about that.

In terms of dates, I think what we've agreed informally is that if you're minded to order that there should be a timetable in the manner that we've proposed, you give us a period of time to figure out what the date should be. We're particularly keen to maintain what's in our current structure, which allows a couple of gaps where there could be a mediation. We haven't asked for an order for that.

THE CHAIR: Just show us, can you, or remind us what you propose.

MR FACENNA: Yes. We've got, if we take up the composite or draft Order here. So we would have the filing and service of factual evidence on 4 December next year. So, on our proposal, disclosure would effectively be done by June. Then we would have a period between June and December where that would allow a gap, for

instance, leaving aside the summer, for there to be mediation at that point. So paragraphs 26 and 27 propose December, the end of next year, for factual evidence; reply statements by 5 March 2027; written observations in relation to the CMA's intervention to happen next. So you've got the dates there, April 2027 and May. Then the expert reports would come between October 2027 and March 2028, and that would include the expert meetings. Then, again, there's another gap in our proposal between March 2028 and the PTR, which would be in June. So you would have April and May at that point where there might be scope to have a discussion as well, depending on where we've got to.

THE CHAIR: So you want to keep the same structure, is that the point that you made?

MR FACENNA: Yes. The structure including those gaps. Those are our proposals for dates. I take the point that Google hasn't yet engaged on the dates.

THE CHAIR: No. We hear what you say about that. What you haven't included is the, sort of, what's contemplated, at least, by the new Practice Direction, which is the sort of expert engagement, separate expert disclosure engagement thing.

MR FACENNA: Yes.

THE CHAIR: I think we were quite keen to see it begun as soon as possible. So I mean, rather than, you know, take up what is left of the time at 4.10 on that, if you could bear in mind when you're considering directions that possibility, because we'd certainly like to see that, you know, we'd like the parties to engage, and at least have thought about it, if not agreed directions by the time of the next -- irrespective of whether we order directions to trial by the time of CMC 3.

MR FACENNA: Understood. So subject to your decision after hearing my learned friend, I would propose that we will take that exhortation on board and we'll go in and design what it will look like. It's Christmas next week, obviously, we'll come back to you at some point with the draft, and if we haven't agreed the dates, then we can ask

you to decide them at that point.

THE CHAIR: Yes, certainly.

Submissions by MR PICKFORD

MR PICKFORD: Thank you, sir. Given the indication from the Tribunal this morning, I'm not going to press that we don't set those dates. We will engage in the process, and we'll get back to you.

THE CHAIR: Thank you.

Limitation: Google's application for directions

Submissions by MR PICKFORD

MR PICKFORD: That leaves my application to move our strike out application in the future. We wish to strike out parts of the Class Representative's claim which are time barred.

THE CHAIR: For that particular part, could you just give me an example of the kind of paragraph that you're referring to.

MR PICKFORD: Yes. So the claim is for losses arising from 1 January 2014. We say that all claims for losses -- sorry, did I say before; I meant to say, it's from 1 January 2014, and we say that any claims for losses arising before 1 October 2015 are out of time, because that is subject to the two-year limitation period in Rule 31 of the CAT Rules that were then applicable. So they cannot claim for that roughly first two years of their claim.

We also say, anticipating a point that they then seek to raise in relation to this, that there is no requirement deriving from EU law, in particular the EU, or European, principle of effectiveness, as it applied prior to Brexit completion day. That displaces the national limitation rule so as to incorporate a cessation requirement. That point is well canvassed in correspondence, I'm surprised that Mr Facenna says that this is somehow sprung on them.

THE CHAIR: Can I cut through this? The only real objection that I see to your -- is really what Mr Justice Marcus Smith said last time.

MR PICKFORD: Yes.

THE CHAIR: That's really the point I would like you to deal with.

MR PICKFORD: Well, I'm happy to go straight to that. In that case, could we pick up the bundle, please, at B.3, tab 5, page 43.

THE CHAIR: We're not, certainly this afternoon, and we weren't intending to anyway, to really engage with the -- decide, you know, whether the law has changed or not. It seems to me that if we could get into all of that -- the real issue, seems to us, is whether, effectively, a decision has been made not to hear this strike out.

MR PICKFORD: Yes. So if I could take the Tribunal then to bundle B.3. This is the refusal of permission to appeal, by Mr Justice Marcus Smith. I'm on page 43 of that document. It's at tab 5.

What he said, at paragraph 13 of the judgment, of the ruling on permission, is as follows:

"The Judgment was not dispositive of the limitation questions which are the subject of the Strike-Out Application, which will be considered as part of the Tribunal's overall case management duties. As the Judgment notes, the Tribunal considered that the certification hearing was not the time for hearing the Strike-Out Application, and all parties acceded to this. The Tribunal made no determination beyond this, but to express the view that (given the nature of the issue) strike-out ought to be considered at the main trial. That, however, is a matter that can be re-considered if the hearing the Strike-Out Application earlier will be more case efficient. The Tribunal appropriately exercised its discretion as to case management on the question of scheduling, which (if there is a change in circumstance, can and should be reconsidered) and there is no real prospect of Google persuading the Court of Appeal

to overturn this aspect of the Judgment."

So all that the learned judge decided is that he wasn't going to determine the application at the certification hearing. He made a comment that, in his view, the right time was trial. But he did not rule out the possibility that the right time might in fact be earlier, if someone could persuade him then that, in fact it, should be earlier.

THE CHAIR: So let me get this straight. The main trial -- it is split. The main trial is just on the -- or are we considering damages at the main trial?

MR PICKFORD: I think we've currently got a 12-week listing.

THE CHAIR: Which is for everything?

MR PICKFORD: For everything, yes. And, in my --

THE CHAIR: I mean, so if you're taking a limitation defence, it's effectively a trial issue, isn't it then? You know, we would have to you know, you'd either have to persuade us to strike out that part of the claim on Day 1, or we would actually have to hear evidence in relation to all of that, in relation what you say is the limitation bar claim.

MR PICKFORD: In my submission, with respect to the learned judge before, whilst he may well have been right, that it wasn't the right time to hear it at the certification hearing, it is far more convenient and efficient --

THE CHAIR: I mean, it is unusual to say the right time to hear a strike out application is at trial. The point of the strike out application would have been largely defeated.

MR PICKFORD: Exactly. And by that point, there are many advantages if -- in my submission, following recent Court of Appeal authority, our strike out isn't answerable. Obviously, Mr Facenna, he says, "No, I can still answer it", but we are very confident that they have no good answer on limitation.

Their answer on limitation requires this Tribunal to say, "Well, the Tribunal's Rules might say X, but we're going to have to read in some alternative requirements in EU

law, because national law wasn't compliant with EU law, even when there is now very clear authority to the contrary from both the Court of Appeal and indeed from the Supreme Court in an earlier case". So he has a very, very tall hill, in my submission, to overcome in relation to this.

Now, obviously, we need to have a hearing about it. But when there is a strong strike out point that could be taken, it makes no sense to -- we are bringing our application strike out application to then adjourn the application all the way until trial. We will lose nearly all the benefits of the application.

For example, it might be we don't need disclosure on certain issues, because they're simply outside what they can sensibly claim, in which case that's dealt with two years' worth of unnecessary disclosure. It may be that we don't have to have an argument about all sorts of aspects of damages that might relate to that part of the claim.

THE CHAIR: I mean, he did decide, didn't he, in the certification judgment, that it wasn't suitable as a preliminary issue, at B.3/115.

MR PICKFORD: As a preliminary issue.

THE CHAIR: Yes.

MR PICKFORD: But he didn't say, "You can't renew your strike out application". And indeed, what he seemed to be contemplating was that there might be some uncertainty about the law.

At the time, one of the core issues that was engaged was on appeal to the Court of Appeal in the *Umbrella Interchange* proceedings. Although I'm inferring to some degree what was in the judge's mind here, certainly at the hearing, it was mentioned, "Well, this issue is on appeal. Do I really want to be deciding this now, et cetera?" And you can well understand that, at that point in time, perhaps there was some nervousness about deciding an issue which was about to then be considered in the Court of Appeal. It now has been, and in effect, we won and they lost on the relevant

issues.

So that's why we say now is an appropriate time to hear that application and there's really no justifiable reason to deny us what is -- respectfully, sir, you rightly said at the beginning -- is the norm, that if you bring a strike out application, your strike out application is determined, and you might win it or you might lose it, but that is the normal approach.

THE CHAIR: The concern, I think, is that it's going to interfere with what is a heavy piece of litigation between now and trial. I mean, the directions you're asking us to make are --

MR PICKFORD: They are in B.1. They are at, I think, 19 and 20, and it's been pointed out to me there's actually a typographical error in that --

THE CHAIR: You.

MR PICKFORD: So 2025 and 2026 -- so 2026 for the relevant days.

THE CHAIR: You want a day for the ...?

MR PICKFORD: We'd like a day, yes.

THE CHAIR: And we do have two days available. We have one day for the CMC 3, don't we? One day in reserve. So we could actually hear the strike out application then if --

MR PICKFORD: That's what we will ask for, but obviously, we if the Tribunal would prefer to hear it at another time, we're open to that. We'd just like it to be heard, because, in our view, we've got a very strong basis for knocking out two years of the claim, and we should be entitled to do that. There's all sorts of good policy reasons why if you've got a good limitation argument, you should be able to bring it.

Indeed, it is the norm, in my submission, in cases in the Tribunal that such applications are permitted. It was a very unusual decision to say that it should be adjourned until the trial, and indeed --

THE CHAIR: Well, as I observed to Mr Facenna, we can't stop you issuing a strike out application or indeed asking the Tribunal to list it. Then we would have to say, "Well, we're not prepared to hear it until the trial ".

MR PICKFORD: Yes. That, we say, it would be unhelpful, with respect --

THE CHAIR: But we would just have to simply say, well, we're refusing to hear your application until the -- I mean, that was my immediate reaction to seeing your application, "Well, we can't stop you", but, you know, I suppose we can be unhelpful and be as difficult as possible about hearing it. But we can't really stop you making a strike out application.

MR PICKFORD: No. In my submission, it would be quite an unusual response to say --

THE CHAIR: Especially with two years to go to a trial.

MR PICKFORD: Yes.

THE CHAIR: My concern, I think, is that it will -- I mean, there's a point about the appeal, I suppose: would an appeal -- and if we decided in May, what happens about disclosure, for instance.

DR MAHER: I actually have a question on that. If I recall correctly from the certification hearing and Dr Latham's report, some of the behaviours that were alleged go to pre-2014 to much earlier. So the issue of striking out anything from pre-2014, if there is a limitation on legal grounds, that would go more towards the issue of then quantum -- alleged quantum, so to speak. So is that something therefore that the Tribunal really needs to deal with before trial?

MR PICKFORD: Yes. One of the reasons for that is -- because Mr Facenna would like it to be built into the timetable -- that there should be some form of alternative dispute resolution. We are ordinarily, as of right, entitled to strike out aspects of the claim that's been brought against us.

One aspect which we say is unarguable is the claim in respect of the period prior to 1 October 2015. We are prejudiced in the potential ability to get outcomes that we might want in that ADR, if we haven't managed to strip out parts of the claim, which we say are obviously not arguable.

So it is normal and justifiable that a defendant should be able to bring such applications and have them determined, because it may well shape many aspects, including in relation to quantum, but knowing where you stand earlier is a benefit to us.

DR MAHER: Right. I see that. I guess the question I have, then, relates to how that interacts with disclosure requirements for information that would be available prior to 2014?

MR PICKFORD: In relation to disclosure, I accept that the situation is more complex, because I made the concession earlier on that there may be contextual material that's required. But how far one goes in nailing down and pursuing contextual material may be very different to how far one goes, if there is, in fact, a valid damages claim for the same period.

Indeed, I, in this very courtroom, had had that debate again in, for instance, in *Google Shopping*, where the judge, in my submission rightly, differentiates between, "Well, okay, you can have disclosure on issue X", but what is proportionate to context is going to differ from the disclosure that you might get if you actually had a claim in relation to those issues in what I'm talking about, something called the OneBox, for what it's worth.

So it's more complex in relation to disclosure, but it's still relevant in relation to disclosure.

THE CHAIR: Well, shall we hear from Mr Facenna?

Submissions by MR FACENNA

MR FACENNA: In terms of what -- the first document my learned friend took you to

was the Tribunal's refusal of permission to appeal, which is at page 43 of the Authorities Bundle. So the point that was made there was that the point could be -- the case management decision could be revisited, if it became more efficient to deal with it in a different way. In other words, if there was a change of circumstances.

Just by way of reminder, this point was also pursued by Google in the Court of Appeal, or attempted to be pursued in the Court of Appeal. So in the Authorities Bundle, again, if I ask you to go to page 56.

THE CHAIR: 56, yes.

MR FACENNA: Oh, sorry. It's the wrong bundle. It's in bundle B.3. There's a document in this case, and it's 56 in bundle B.3. This is Court of Appeal's refusal of permission, and they dealt with it -- it's actually at page 57, paragraph 11:

"[A]s to proposed ground III, it is incorrect to say that the CAT has effectively dismissed Google[']s strike out application. The CAT exercised its case management power directing that the limitation issue be heard at trial. It set out [in its judgment] a number of considerations justifying that conclusion. All of these factors are proper and relevant. It did not arguably err."

So if we just go back to what those reasons were, which are 115 in the same bundle. There are --

THE CHAIR: It deals with it as if it's a preliminary issue in paragraph 45. Was there a separate argument about --

MR FACENNA: Technically, what had happened was that they indicated they were going to make a strike out application, but then didn't move it at the certification stage. So the application, I think technically had been identified and set out, but they didn't move the application. But they said there was an issue to be decided then about when it should be dealt with.

THE CHAIR: I see.

MR FACENNA: So the reasons which are given, which my learned friend hasn't really fully addressed, are at 1 to 4. You'll see, first of all, the first reason was that while the limitation issues turn substantially on questions of law, not fact, that is not exclusively the case, and the Tribunal was going to have to consider questions as to when the claimants had, or can be deemed to have had knowledge of the alleged abuses.

Now, that is because the principle of effectiveness point that the Class Representatives relies on here is both the so-called "cessation" point, i.e. has the conduct ceased, but also the knowledge point, so at what point do they have the knowledge necessary to bring a claim?

Now, my learned friend says the law has changed or settled on this. It has not changed; it's been settled. But the Court of Appeal in *Interchange* expressly is only dealing with the cessation argument. It does not deal with the knowledge point at all. So there has been no change in circumstances there.

Again, in order to deal with this limitation point, it remains true that there will have to be -- you get into some quite detailed, difficult, evidential and factual questions about knowledge. So the point that's made in subparagraph 1.

THE CHAIR: Is the test the same as under section 14A, for not having knowledge of the claim? I mean, I won't hold you to this, but in broad terms.

MR FACENNA: In broad terms, yes. I'll give you the reference in the pleadings. It's paragraph 147(1) of the Reply in this case, which is at B.1, page 345. The test is both the cessation point and because the class members and the Class Representative or other potential Class Representatives lacked knowledge in --

THE CHAIR: Just give me the reference again.

MR FACENNA: It's at B.1/345.

THE CHAIR: So it's in the Reply?

MR FACENNA: It's in the Reply, because the limitation point was raised in the

Defence.

THE CHAIR: Yes.

MR FACENNA: So it's whether the Class Representatives or potential Class Representatives or the class members lack the knowledge indispensable to be able to commence the claims. And just to make good the --

THE CHAIR: And you also run a section 32 point as well, don't you?

MR FACENNA: Yes. Well, and this is -- yes, we do. So there are two aspects to it.

THE CHAIR: What I was asking you is slightly different; it was what "knowledge indispensable to be able to commence the claims" means in this context. So you've got to have the knowledge of the facts which give rise to the claim. But you also don't have to have knowledge of the law, do you?

MR FACENNA: It's been a while since I've looked at this, sorry.

THE CHAIR: You have the advantage over me because I've never really looked at it at all.

MR FACENNA: Let me come back to that if I need to.

THE CHAIR: It's more out of interest.

MR FACENNA: But the point remains a good one. Actually, where might be a useful place to look to make good my point that the law hasn't been settled on this is if we go to the Court of Appeal in *Interchange*. That's the judgment that my learned friend relies on. It's in the Authorities Bundle at tab 6, page 172. Sorry, actually this is not the Court of Appeal; it's the first instance decision, but it makes clear what the Court of Appeal was actually considering.

So, this is the Tribunal's decision and you'll see at paragraph 8 the Tribunal identified four questions arising out of the relevant EU case law. Question 2:

"Is it the case that such limitation periods cannot begin to run before the claimant knows, or can reasonably be expected to know, the information necessary to bring the

claim?"

And then at paragraph 9, you'll see the Tribunal, halfway through that paragraph:

"The submissions on Question 2 were … directed to assisting us to understand the general thrust of [*Volvo*], rather than articulating a distinct expansion of the law of limitation regarding knowledge ... We did not understand any party to be contending that [*Volvo*] had expanded the EU law of limitation."

And just jumping to the conclusion:

"Nothing in this Judgment should be taken as suggesting what the answer to Question 2 might or might not be."

And then at paragraph 31 in the same judgment, which is at page 195, the Tribunal said that it considered it "entirely inappropriate to address the extent of the Knowledge Requirement in this Judgment", and that should be dealt with in the context of actual facts regarding information, which is the subject of a separate hearing.

Again, at 32(4), in the same judgment, the Tribunal referred to the CJEU judgment in *Cogeco* and identified that as regarding an articulation or further articulation of the knowledge requirement before immediately saying, "We say no more about it".

So it's plain that the first instance decision did not involve any consideration of the knowledge requirement which is an issue in this case and which formed part of the Tribunal's reasoning in its last case management decision. For obvious reasons, since the first instance decision did not consider it, the Court of Appeal decision doesn't consider it.

As a separate matter, the Court of Appeal in Interchange also does not consider the cessation requirement under Rule 31 of the Tribunal's rules; they're solely concerned with the Limitation Act at that point.

So going back to the Tribunal's reasons in June last year, actually, the law hasn't settled; we will face the same problem that this is complicated and is going to involve

questions of fact. So there's been no material change on that.

The other reasons which the Tribunal gave, if we go back to those, the second one was this issue of the risk of appeal. That still arises. And this question of limitation is sufficiently significant that there is a risk of a satellite appeal and that will then have knock-on effects on the overall timetable and potentially jeopardise the aim of dealing with matters expeditiously.

But also important are points 3 and 4 in the Tribunal's decision. That's bundle B.3. The third point was that, since the limitation issues affect only the time period of repeated abuses, rather than having the potential to strike out any of the abuses, the Tribunal did not consider that deciding them in advance would narrow the issues for the main trial, so actually will not have much of an impact on the overall evidence and so on for the trial. And as a fourth point, there won't be any real advantage in terms of the economic modelling and the work that would have to be done, since the model will have to be sufficiently flexible to deal with multiple outcomes, including whether some abuses are established or not and time period is just one such variable.

So, those are the reasons given then. They were upheld as reasonable by the Court of Appeal. The law hasn't changed to determine the knowledge requirement in particular; it only arguably affects the cessation aspect of the argument. Really, all that's happening is that Google wants to have another go at persuading the Tribunal that you should set aside the day to hear these arguments in circumstances where the same balance of convenience arguments that the Tribunal has already decided, meaning that you should leave it to trial, still apply.

THE CHAIR: Was there actually an issued application for a strike out?

MR PICKFORD: Yes, I believe that there was one in the CPO response that was issued, but ultimately it was not moved.

THE CHAIR: Right. So do you say that we're actually bound by the decision of

the -- well, what do you say? It's a *Henderson v Henderson* abuse for him to actually apply to strike out?

MR FACENNA: I did think about saying that. I mean, the way I put it is that the application has been made, a case management decision has been made about it. In order for you to revisit that, and for it not to be abusive, there would need to be some material change in the circumstances or, as the Tribunal had indicated in its refusal of permission, it would need to be obvious that it was now going to be more efficient to deal with it in this way.

THE CHAIR: The reason I say this is, all things being equal, you know, if there's a part of a claim that's bad, it ought to be struck out. I mean, it's in the interest of all parties that that should happen. Now, that's my view, for what it's worth, about strike out applications. And, you know, there is an opportunity for us to hear it in May. The question in my mind is are we bound not to? Are we bound by -- effectively -- the decision on the certification hearing?

MR FACENNA: It's one of the problems with us dealing with this today because although there's been a certain amount of correspondence with the threat of doing it, actually it was only on the day before the skeletons were filed that Google indicated that it was going to be seeking directions. Now, we've dealt with it in a few paragraphs in our skeleton argument. But on this point, for instance, you will know, sir, there is case law on revisiting case management decisions: *Tibbles*, I think.

THE CHAIR: Well, that's what troubles me about -- I mean, my colleagues may disagree, but my initial view is that, you know, if he wants to apply to strike out part of your claim and there is an opportunity to deal with that well in advance of trial, then we really ought to deal with that unless there is a compelling reason not to.

The reasons given by Mr Justice Marcus Smith don't seem necessarily to me to be compelling unless I go away and look at the case law to satisfy myself that there's no

real prospect of that succeeding. It seems to me that, this being the very last issue in what is quite a heavy day, we ought not necessarily to -- if you're submitting to the Tribunal that we're effectively bound not to hear the application, then I think ...

MR FACENNA: Yes. My submission is: a decision's been made. Unless my learned friend can show you that there is a material change in circumstances, then there's no proper basis to revisit that decision. There is case law on that and I make my other point which is, because of the way it's been done, relatively last minute, we're actually not in a position to explore all of those issues.

THE CHAIR: When do you need to issue, Mr Pickford, your -- in terms of the directions, when were you ... We have the day in reserve in May, don't we?

MR PICKFORD: Yes, we were proposing to issue and file by 27 March. I mean, I'm sure we could do it earlier.

MR FACENNA: I'm sorry to interrupt. Just before we go down that route, there actually is another point of substance that I need to raise which --

THE CHAIR: All I was suggesting is that if the direction that he's seeking is that he files his application for strike out, there's an opportunity. You've got to go away and come up with a timetable to trial anyway. But if you want to, rather than decide this now as a case management decision, put in further submissions on this point when you actually put in the trial timetable, then we could deal with it then. We could deal with it on paper having heard the submissions of the parties rather than give you a decision today.

MR FACENNA: In light of the time, I think that might be sensible.

THE CHAIR: Or do you want a clear decision out of this today?

MR PICKFORD: Can I take instructions? Because I do reject the idea that this has been sprung on them. They've had all the time that they needed to meet this and we say that we should be entitled to do it, but I'm just going to ask if I may. (Pause)

THE CHAIR: Sorry, Mr Pickford.

MR PICKFORD: Sir, so the difficulty is that if the Tribunal ultimately feels that there is something that it needs to grapple with that it hasn't had a fair opportunity to grapple with, then obviously, I'm in the Tribunal's hands that it may want to consider the matter further.

THE CHAIR: I'm looking at the time.

MR PICKFORD: And I'm conscious of the time.

The abuse of process point is new. I showed you the relevant part of the refusal hearing, which is how Mr Justice Marcus Smith dealt with the strike out. He also considered it himself as, "Well, should I hear this as a preliminary issue?" And he said, "No, I shouldn't; here are the reasons for that".

In my submission, those submissions are, to be honest, somewhat tangential to the question we're dealing with today because we're not advancing it as a preliminary issue. We're saying --

THE CHAIR: You're saying you want to --

MR PICKFORD: -- we actually want to bring forward our strike out application, and we're going to reissue it. And there is nothing in the decision of Mr Justice Marcus Smith, as he made abundantly clear in the passage that I took you to, that makes that an abuse. He said that it could be reconsidered; indeed, he said it should be reconsidered if there's a change in circumstances. There have been two decisions since that bear on this issue and, we say, settle it. And --

THE CHAIR: Well, let's say we go down this route, which is that I'm satisfied that we can't reopen that decision without a change of circumstances, then I'm going to have to look at all the relevant law to see if you're right about it. Rather than have you take us through it, what I was going to suggest is that you've got to go away and come up with a new draft Order anyway, and also timetable for trial. So what if we give you

until, I don't know, whatever date you want in early January to put in any further submissions on this point and then we will decide whether to permit you to make the strike out application on paper in a written judgment in good time for you to be able to meet the directions you propose and for us to hear it in May if we can.

MR PICKFORD: Thank you, sir.

THE CHAIR: So it seems to me -- originally I approached it simply on the basis that it was really a case management decision, but looking at it now, if we do have to be satisfied that there is a change of circumstances, then I think we do have to consider the relevant law that you've canvassed. I don't think anybody's going to thank us if we now ask to embark on that for another hour or so or come back tomorrow to do that. So is that acceptable to both parties? If we give you -- I don't know what date you want until, we ought to be able to deliver a decision pretty quickly once ... How early in January could you -- just on this single point really, anything more you want to say on the strike out point?

MR PICKFORD: For the strike out submissions?

THE CHAIR: Yes, and also if you can to give us the draft Order and any directions to trial so that we can deal with those at the same time.

MR PICKFORD: So, I have another fairly heavy hearing in early to mid January. I'm going to ask for the third week in January, simply because I'd quite like not to be doing it at the same time.

THE CHAIR: Because I'm sitting on circuit in the North for the second half of February and early March, I would hope to give you a decision before, because I suspect I shall be doing the heavy lifting in relation to this point because I'm not sure my colleagues really want to get involved in *Henderson v Henderson* abuse.

MR PICKFORD: (Overspeaking).

THE CHAIR: So, if you didn't get a decision until sometime in March, would that

prevent you from preparing for a strike out application?

MR PICKFORD: No, because we were proposing to file the application on 27 March. And to be honest, it doesn't require an enormous amount of work because it would be effectively amending something we've already done once.

THE CHAIR: Given if we were to give you until the third week in January, could you file anything -- file an agreed minute of the Order subject to this outstanding point and also the directions that you've either agreed or want us to make in relation to the trial directions which we want to make?

MR PICKFORD: Yes, we can do that for you.

THE CHAIR: So third week in January will be?

MR FACENNA: Well, I was just going to say, we shouldn't allow these limitation issues to slow down the Order and everything else. I think we'd like that Order to be settled sooner.

THE CHAIR: What date? Pitch your alternative date at us, then.

MR FACENNA: Well, I think we would probably -- can I just take instructions for a moment? (Pause)

As far as we understand it, the only order we need to settle in relation to this is a date to go in the Order with everything else for them to put in their application and for that to be decided.

THE CHAIR: And they're asking for some consequential directions as well, but they all start to run from 27 March.

MR FACENNA: Unless I've misunderstood, our position is that we ought to be able to settle between us and provide the Tribunal by, say, the second week in January, so the week beginning probably the ninth or something. So by, let's say, Friday 9 January, we ought to be able to provide to you an Order dealing with everything else and any differences between us on the directions to trial. Then they can still have until

the third week of January to make their application for additional directions on the limitation point.

THE CHAIR: I'll say the third week of January in relation to your submissions on the strike out application. But do we need to make an order in relation to agreeing the form of Order and submitting the draft directions? You know, as soon as possible is really what we want. Unless you want to --

MR FACENNA: That's fine.

THE CHAIR: So I think we will give the parties permission to file further submissions in relation to just the strike out issue. Well, that's issue 4 on the agenda for today's CMC. Third week in January is --

MR FACENNA: Beginning the 19th.

THE CHAIR: So beginning or end of -- why don't we say Wednesday 21st. Should give me enough time to consider and make a decision and circulate it to my colleagues before I go.

MR FACENNA: And so Google would presumably make its submissions on the 21st and we would --

THE CHAIR: Do you want time to reply or do you want --

MR FACENNA: I was anticipating that they would not be simultaneous.

THE CHAIR: Simultaneous, because it's really your point, I want to know whether you want to take the point about *Henderson v Henderson* abuse and I want to know what the change of circumstance is; I want you to identify the change of circumstances clearly for me in each case.

MR FACENNA: Without wanting to slow it down unnecessarily, it might be that if we see what they put in and do something sequential, we can at least make that more targeted, but we can probably prepare to do that within a few days. I mean, I'm not going to ask you for two weeks.

THE CHAIR: I rather anticipated that you would be the person making the running in relation to it.

MR PICKFORD: It's a bit difficult. For the first time today, we've heard the words abuse of process.

THE CHAIR: Well, I did encourage --

MR PICKFORD: But my question is, he's expecting me to put in submissions first about the abuse of process point that he might or might not pursue against me.

THE CHAIR: Well, I think to cut through this, we're going to order -- if you want to say anything, if anybody wants to say anything, they should say it by 21 January. Is that clear?

MR FACENNA: Yes. I don't think we have anything else. Thank you very much to the Tribunal. I wish you all a Merry Christmas.

THE CHAIR: Thank you to both of you. I wish you and your teams a Merry Christmas and we'll meet again sometime in May. Thank you very much.

(4.50 pm)

(The hearing concluded)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?