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IN THE COMPETITION

Case No. : 1433/7/7/22

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 16th December 2025

Before:

Hodge Malek KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Liza Lovdahl Gormsen

Class Representative

v

Meta Platforms, Inc. and Others

Defendants

A P P E A R A N C E S

Sarah Ford KC, Sarah O’Keeffe and Daniel Cashman On behalf of Dr Liza Lovdahl Gormsen
(Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP)

Tony Singla KC, James White and Camilla Cockerill On behalf of Meta Platforms (Instructed by
Herbert Smith Freehills Kramer LLP)

Tuesday, 16 December 2025

(10.00 am)

(Proceedings delayed)

(10.14 am)

Housekeeping

THE CHAIRMAN: Some of you are joining us via livestream on our website, so I must start therefore with the customary warning.

An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court.

There will be a transcript of this hearing that is available on the website, and there will also be a written ruling explaining any rulings I have given at this hearing and previous hearings.

The view I take is that these proceedings are being brought on behalf of a large number of class members, and they have the right to understand what is going on in these proceedings. So ordinarily in many cases I just give oral rulings with nothing in writing afterwards, but a case like this, the size and complexity I think warrants the time I have been

1 spending since the last hearing trying to put together
2 a ruling that explains exactly how I envisage disclosure
3 should be carried out in a complex and large case like
4 this.

5 Everyone has their own experience of different
6 platforms and different ways of doing it, and at the end
7 of the day I have got to trust the Designated Solicitor
8 to take whichever course they see fit. I have looked at
9 the proposal for the technology, and I can see that
10 there are different ways of doing it. And the way
11 I look at it at the moment is of course the Designated
12 Solicitor has to take his own course of action. I have
13 found in some of these big exercises you start off and
14 then you start realising there are problems in what you
15 have got. If there are problems, just learn and adapt;
16 do not just treat it as a fixed line. Just adapt and
17 see how it goes.

18 But you should have a lot of leeway. If you use
19 your judgment and you get it wrong at the end of the
20 day, you are not going to be criticised, but just keep
21 reviewing it and see how it works.

22 I appreciate this is going to cost a fortune, and
23 that I want it to be done as efficiently as possible.
24 And I am not saying everything's a fault of the CR and
25 their requests, because obviously Meta will want to have

1 its own exercise looking for other categories of
2 documents which may assist its case.

3 So it is not going to simply be a question of
4 saying, well, you have spent X because the CR has asked
5 for these documents and the Tribunal's ruled it. I am
6 sure there will be a significant amount of searches
7 which will be done by Meta, for documents that they
8 think may assist their case over and above the specific
9 categories sought by the CR.

10 Looking at the Redfern Schedule, I am very pleased
11 with the progress that has been done, and clearly
12 everyone's got the right direction of travel, and it
13 probably will not take a huge amount of time to go
14 through these requests.

15 I have got the idea now, and I think you both have
16 got the idea, and I have a provisional view probably on
17 most of these categories. There is a few which I am not
18 sure about, and so I will tell you the ones where I need
19 the most help from both sides, because it is not simply
20 a case of everything the CR wants they are going to get.
21 There are going to be categories where you will find
22 some push-back from me, and I just need to be satisfied
23 you are right or you are wrong.

24 There may be an element that where you are looking
25 for categories of documents which may be the subject of

1 reports and internal documents of Meta, that I will not
2 at this first stage direct that there be disclosure of
3 the underlying data. But I will be willing to look at
4 it later and I will want, when we come through it, as we
5 did before, if there are documents of that type of
6 category where I say we defer the issue of underlying
7 data until we see what comes out of the current process,
8 I will want those to be prioritised first, so we do not
9 get to the end of the process and Ford stands up and
10 says we want this, and then Singla turns up and says no,
11 you cannot have it, it is too late.

12 So everyone should understand that where I am
13 deferring disclosure of certain categories of documents,
14 I do want those to be prioritised at the beginning.

15 So, Ms Ford, the floor is yours at the moment.

16 MS FORD: I am grateful, sir. The division of labour on our
17 side --

18 THE CHAIRMAN: Yes.

19 MS FORD: -- indicated you would like to hear from --

20 THE CHAIRMAN: I would love to, yes.

21 MS FORD: So Mr Cashman will be addressing Requests 68 and
22 69, which are the ones that are concerned with sensitive
23 data, and Ms O'Keefe will be addressing Requests 101 to
24 106, which are the ones that are concerned with privacy
25 and data protection.

1 THE CHAIRMAN: So you have given them the hardest two.

2 Mr Singla, have you sort of done the same exercise?

3 MR SINGLA: We have. So Mr White will address you on
4 certain Redfern requests, I think not necessarily the
5 same as junior counsel.

6 THE CHAIRMAN: It probably feels like for you and Ford that
7 it is like pulling teeth and it is a painful exercise.
8 So it is probably good for you and for the juniors to
9 let them have a go.

10 MR SINGLA: I will not comment on that.

11 THE CHAIRMAN: No.

12 Ms Ford.

13 REQUEST 55

14 Submissions by MS FORD

15 MS FORD: So the first request in the unagreed schedule
16 (inaudible).

17 THE CHAIRMAN: Sorry, are we starting at the beginning?

18 MS FORD: That was the proposal. There are 15 requests
19 which remain in the unagreed schedule.

20 THE CHAIRMAN: Yes.

21 MS FORD: However, considerable progress has been made even
22 over the last day or so. So I think 15, possibly some
23 of those even, have fallen away and some of the disputes
24 within those have fallen away.

25 The most up-to-date version of Request 28, which was

1 sent by the Class Representative in correspondence
2 yesterday is hopefully on Opus at E2/389 --

3 THE CHAIRMAN: Is this different from what I have here?

4 MS FORD: It is different from the updated table, because
5 the parties have been liaising on it in correspondence
6 even post --

7 THE CHAIRMAN: Yes, Mr Singla.

8 MR SINGLA: On 28, Herbert Smith have just written this
9 morning on 28, so I wonder if we could park that for
10 now.

11 THE CHAIRMAN: Yes, we will park it.

12 MR SINGLA: A lot of progress has been made, but it may be
13 more efficient to wait until they have had a chance to
14 see our latest letter.

15 THE CHAIRMAN: Yes, I think so. At the moment before you
16 were going to go into any detail I was probably in
17 favour of the CR on most of this, if not all of it.

18 But there were one or two sort of nuances on it. If
19 you were going to agree it anyway, that is fine.

20 MR SINGLA: I am not saying all of it will be agreed, but
21 certainly at least we can narrow the scope of the
22 debate. So it may just be more efficient to come back
23 to it.

24 MS FORD: Those behind me have, I think, had the opportunity
25 to --

1 MR SINGLA: Oh, I see.

2 MS FORD: I have not myself, but I understand that insofar
3 as some of it has been accepted, that --

4 THE CHAIRMAN: Well, Singla's said let us come back to it
5 later. I agree with that, so let us move on to the next
6 one.

7 MS FORD: The next one is Request 55. This is a request
8 which is concerned with the factors that affect the
9 value of --

10 THE CHAIRMAN: Is it helpful if I just tell you where I am
11 on each one and then we can fight it?

12 MR SINGLA: That is always a dangerous question. But
13 I think it may be sensible to hear the submissions,
14 because you obviously did not have the benefit of a
15 skeleton argument.

16 THE CHAIRMAN: No, I have had the benefit of the
17 Redfern Schedule --

18 MR SINGLA: You have, but there has been movement.

19 THE CHAIRMAN: Okay.

20 MR SINGLA: I think provisional views sometimes, certainly
21 on 55 and 56 --

22 THE CHAIRMAN: 55 would have helped you, but if you do not
23 want to hear it, let us see --

24 MR SINGLA: No, I have loads of correspondence which I am
25 not necessarily sure that you will have seen in relation

1 to 55(b) and 56. That is why it is important that
2 I just take the time to show you those letters before
3 you express any views. You may well have read the
4 letters, I do not know.

5 THE CHAIRMAN: No. Look, I am quite happy to do it
6 whichever way you are happy with. We have enough time
7 to finish this. There is no great rush. I hope that we
8 would have finished this schedule by lunchtime, because
9 we do have other things to deal with in the afternoon.

10 MR SINGLA: I am not intending to make very detailed
11 submissions, but because so much has moved in the last
12 few days --

13 THE CHAIRMAN: That is okay. I can see everyone has moved
14 a lot, and that ... yes, okay. 55.

15 MS FORD: So there are three areas of orange writing in 55.
16 One concerns the words "bidding behaviour, winning
17 probability and price paid by the advertisers" in
18 subparagraph (a).

19 THE CHAIRMAN: Yes.

20 MS FORD: There is then the reference to users data in
21 particular and not limited to in (b), and there is the
22 reference to underlying data in the HTTP, the chapeau
23 element of it.

24 In relation to the words "bidding behaviour, winning
25 probability and the price paid by advertisers", that is

1 a debate which was canvassed at CMC 3 and those words
2 appear as directed by the Tribunal in the relevant
3 underlying issue for disclosure at {D/11/34}, please.

4 THE CHAIRMAN: Well, it is already in the List of Issues for
5 Disclosure. I understand that point. But Singla makes
6 the point, and he is right, that when we did that we had
7 left open the question of reasonableness and
8 proportionality and that it was not going to prejudice
9 that argument.

10 So your first point is that when you are looking at
11 bidding behaviour, winning probability and price paid by
12 advertisers, you are saying, well, that reflects what is
13 in the List of Issues for Disclosure?

14 MS FORD: Not only that, but it was a matter that was
15 debated. It was opposed by Meta at the time and
16 the Tribunal ruled in favour of it coming in.

17 THE CHAIRMAN: Yes.

18 MS FORD: We can see that at {A/29/172}, please. Right at
19 the bottom of the page, the Tribunal will see that
20 Mr Singla is addressing --

21 THE CHAIRMAN: I need it to come up. Can I ... my screen is
22 not really sort of legible.

23 (Pause)

24 MS FORD: Perhaps I can read the section.

25 THE CHAIRMAN: You are reading the transcript of that

1 hearing.

2 MS FORD: I am just attempting to show the Tribunal that
3 this was an issue which was opposed and went in, in that
4 the Tribunal was satisfied it should be in there last
5 time round. So I was just showing the Tribunal --

6 THE CHAIRMAN: Do I have it in the hard copy or not, or is
7 it not in the hard copy?

8 MS FORD: If you have bundle A, tab 29 at page 172.

9 THE CHAIRMAN: Yes.

10 (Pause)

11 It is not that one.

12 (Pause)

13 MS FORD: Sir, we think that perhaps you may not have it in
14 hard copy. It may be quicker if I simply --

15 THE CHAIRMAN: Probably, but the chap is looking at the
16 thing at the moment. I do not think I have it in hard
17 copy.

18 (Pause)

19 Let us just carry on anyway.

20 MS FORD: So the submissions begin at the bottom of that
21 page. I was simply showing you where Mr Singla was
22 beginning to address this particular issue for
23 disclosure, 25.2. And then over the page at the top of
24 the following page, 173, Mr Singla posed a rhetorical
25 question, he said:

1 "... this is getting into what factors affect
2 bidding behaviour, winning probability, on the auctions.
3 Again, why is it relevant to this case what the bidding
4 behaviour is on the advertising auctions and what the
5 prospect of success ... is?"

6 There was then essentially submissions on that
7 particular point, and the Tribunal was satisfied, in the
8 light of the submissions, that this issue should be
9 allowed in, because it was relevant. And that is at
10 {A/29/175}. Line 7, your conclusion, sir, was:

11 "We will allow that in, because I think they have
12 justified it."

13 So we say in challenging precisely this wording
14 again, Meta is essentially trying to re-open something
15 that was determined against it at CMC 3.

16 Ms Scott Morton, in her report, has explained what
17 she seeks out of this request, and it is at {C7/5/14}.

18 THE CHAIRMAN: Well, I think I have got that, so let me see
19 if I can ...

20 (Pause)

21 Let us just see where everything is. Okay.

22 (Pause)

23 So you are looking at Scott Morton, yes?

24 MS FORD: Scott Morton 4, paragraph 53.

25 THE CHAIRMAN: Where is it in the bundle?

1 MS FORD: Bundle C7, tab 5, page 14.

2 (Pause)

3 THE CHAIRMAN: Okay, so that should be tab 13 of this
4 bundle. Let us have a look. Have you not got the same
5 version as me?

6 MS FORD: I had thought we did.

7 THE CHAIRMAN: Because, look, tab 13 of my bundle is the
8 fourth expert report. Okay?

9 MS FORD: I apologise that we seem to have different
10 numbering.

11 THE CHAIRMAN: Okay, so where are we looking at now?

12 MS FORD: Paragraph 53. She first of all refers back to the
13 previous requests --

14 THE CHAIRMAN: Yes, let me look at this.

15 (Pause)

16 Okay.

17 MS FORD: So the point she is making is --

18 THE CHAIRMAN: I have read it now. Look, I understand what
19 your position is on (a) and (b), and it is explained
20 there. And as you say, we had looked at a certain part
21 of this before. But what about the underlying data?

22 MS FORD: The underlying data is the point where there has
23 been a degree of movement. Meta has made a proposal in
24 its letter of yesterday. I can show the Tribunal that,
25 {E2/391/1}.

1 THE CHAIRMAN: Yes, let us look at that, if I can.

2 MS FORD: The relevant paragraphs are --

3 THE CHAIRMAN: I have got, you know, this technical issue we
4 are trying to sort out. Have you got a hard copy of
5 anything?

6 MS FORD: It may be that Meta have, as it is their letter.
7 Or alternatively, I can summarise.

8 MR SINGLA: I think we may do.

9 THE CHAIRMAN: Thanks very much.

10 (Pause)

11 Great, thanks very much for doing that. That is
12 really good. Okay, I have now got the screen working.
13 Okay, you want me to look at this?

14 MS FORD: This is a proposal which Meta have made which is
15 acceptable to us.

16 THE CHAIRMAN: So this is the underlying data, and that
17 is --

18 MS FORD: It is paragraphs 19 and 20.

19 THE CHAIRMAN: Herbert Smith letter, 15/12. I have not seen
20 this letter before, so I am going to have to read this.
21 So what paragraph?

22 MS FORD: Paragraphs 19 and 20 on this particular bit.

23 THE CHAIRMAN: Underlying data.

24 (Pause)

25 So it is paragraphs 19 and 20. So Herbert Smith

1 have been very constructive about this, and probably
2 they are offering more than I would have ordered were it
3 not for Mr Singla's earlier intervention.

4 So I think I was not a great fan of giving extensive
5 underlying data on this one, but it looks as though you
6 are willing to, and I think that is just being
7 constructive. Yes.

8 MS FORD: We are content with that proposal as well. And
9 what is said in paragraph 20 is obviously consistent
10 with the Tribunal's indication that insofar as there are
11 things that come up afterwards, there is a possibility
12 of --

13 THE CHAIRMAN: No, I agree. I think, you know, that it is
14 a very sensible way forward.

15 MS FORD: I have addressed the Tribunal on the bidding
16 behaviour wording. I have not yet addressed the limit
17 to off-Facebook Data which is also in dispute on this
18 request.

19 THE CHAIRMAN: Well, let us have a look.

20 MS FORD: This is the wording in subparagraph (b), and our
21 proposed wording is the wording in orange:

22 "We are seeking information about the commercial
23 benefits or economic value of users' data, in particular
24 but not limited to off-Facebook Data."

25 The dispute between us is that Meta would seek to

1 limit it to off-Facebook Data. That is a point that
2 Ms Scott Morton addressed at paragraph 55 of her report,
3 {C7/5/14}.

4 THE CHAIRMAN: I have read that, yes.

5 MS FORD: What she is explaining there is that when
6 estimating the value of off-Facebook Data, which is
7 obviously a matter of central importance in this
8 dispute, she envisages it would likely involve
9 disentangling the value that Facebook derives from
10 off-Facebook Data from the value it derives from other
11 sources.

12 THE CHAIRMAN: Yes, it is pretty obvious, yes.

13 MS FORD: In those circumstances we are concerned that
14 a limitation to off-Facebook Data rather than the
15 wording that we have proposed essentially only gives you
16 half the picture.

17 THE CHAIRMAN: It may do, yes, depending on how it is broken
18 down, and we do not know that at the moment.

19 MS FORD: Sir, yes, there is a risk to that effect and so we
20 are proposing in particular, but not limited to,
21 off-Facebook Data.

22 THE CHAIRMAN: Yes, and the underlying data point has been
23 dealt with.

24 MS FORD: Yes.

25 THE CHAIRMAN: Bidding behaviour you have dealt with, and

1 the whole question whether it should be limited to
2 off-Facebook Data you deal with at paragraph 55.

3 MS FORD: Yes.

4 THE CHAIRMAN: Yes. Okay.

5 MS FORD: Sir, for our part, those are the disputes on this
6 particular request.

7 THE CHAIRMAN: Mr Singla.

8 Submissions by MR SINGLA

9 MR SINGLA: Sir, the main issue here is proportionality, and
10 just as a general point before we get into all the other
11 requests as well, I think we have told the Class
12 Representative that the number of hits that are being
13 generated on two types of custodial disclosure alone, so
14 that is excluding all of the non-custodial disclosure,
15 all of the requests where we are still opposing, and
16 other custodial sources, we are now up to 2.4 million.

17 THE CHAIRMAN: I am not surprised, yes.

18 MR SINGLA: That is before de-duplication. But we are
19 talking about huge quantities of disclosure, and this --

20 THE CHAIRMAN: You are not necessarily, because you have got
21 the pool. What comes out of that pool is what is being
22 disclosed. And in the olden days, if you had told me
23 you have got 2.4 million hits I would be a bit worried
24 and think, you know, that is just going to be
25 disproportionate. But things have moved on since then,

1 and one would hope that the cost of this exercise will
2 be cheaper today than had it been done, let us say,
3 10 years ago.

4 10 years ago I would have looked at this and said:
5 actually, you know, this is just going to be --
6 you know, the amount of costs is just going to be
7 phenomenal. So I understand what you are saying, but
8 I do not envisage that when you say 2.4 million hits, it
9 is necessarily going to be some unbelievable cost that,
10 you know ... but I will make a point later on when we
11 come to it about the costs of this exercise, that I am
12 very conscious that, you know, it is an expensive
13 exercise. It is largely being directed pursuant to the
14 CR's case and how they put it. But it is not
15 exclusively that, for the reason I gave earlier.

16 But we will want to know how much this whole
17 exercise is costing at the end of this, because there is
18 this issue of ATE. What I do not want to happen is that
19 you win at trial and then you find that the ATE cover is
20 not enough. Okay? Because when you are in your
21 position, there is always a pressure on you to settle if
22 you feel that even if you win there is going to be some
23 massive amount of cost you will never be able to get
24 from the other side.

25 So we will want to revisit the whole issue of cost

1 and everything at the end of this exercise, and where
2 you are on this ATE cover. But I understand your point
3 about the number of hits is going to be big.

4 MR SINGLA: It is important context. So when we look at not
5 only this request but the other requests, we are already
6 looking at a very, very significant disclosure exercise.

7 THE CHAIRMAN: We are, yes.

8 MR SINGLA: So one has to always ask oneself, insofar as we
9 are disputing points, are these requests proportionate.
10 And here, in fact, we have agreed part of 55(a) and (b).
11 So actually the specific question is: are the bits which
12 the CR say they want over and above what they are
13 already getting under 55(a) and (b) --

14 THE CHAIRMAN: When we look at what is in issue, the first
15 bit and the underlying data for subparagraph (b), we say
16 let us look at Herbert Smith's letter of 15 December,
17 paragraphs 19 to 20 --

18 MR SINGLA: Can I take this in stages? There is a general
19 point I want to make about 55(a) and (b), and I want to
20 address you on 55(a) which does not involve underlying
21 data and --

22 THE CHAIRMAN: Good.

23 MR SINGLA: -- (inaudible) come to (b).

24 THE CHAIRMAN: Good. Yes, yes.

25 MR SINGLA: Let me make the general point which I have

1 already made is proportionality across the whole of the
2 disclosure exercise, specifically in relation to
3 a request like this I want to remind you of what you
4 ruled on in relation to 54. Because this Request, like
5 54, is about the advertising side of the market. So
6 there is a particular point that I would like to
7 emphasise about proportionality when it comes to the
8 side of the market which this claim does not even
9 concern.

10 So if I just remind you of your ruling at

11 {A/42/9} --

12 THE CHAIRMAN: You are saying 54, yes?

13 MR SINGLA: Yes, your ruling on 54. Could I just ask you
14 to ...

15 THE CHAIRMAN: Well, can I just read what --

16 MR SINGLA: Yes, I think it is page 9.

17 THE CHAIRMAN: I have written my own version.

18 (Pause)

19 Yes.

20 MR SINGLA: So what you were keen to emphasise is that there
21 is a risk of losing all sense of proportion in relation
22 to the advertising side of the market. And you cut back
23 what the CR was entitled to receive under Request 54.
24 And we say the same approach should apply equally to 55,
25 and it bears emphasis that this request concerns not

1 only the advertising market but the date range is going
2 all the way back to 2007.

3 So with those sort of introductory points that apply
4 to both 55(a) and (b), if one looks at the delta between
5 the parties on 55(a), we say that what they are seeking
6 is just a level of granularity which is plainly
7 disproportionate, because we have already agreed that
8 they will get non-custodial disclosure considering what
9 factors, including the extent of use of off-Facebook
10 Data, affect the profitability. What they are looking
11 to do is to go one level or several levels beyond that
12 and to dig deeper into the specifics of bidding
13 behaviour, winning probability and the price paid by
14 advertisers.

15 We say there is no basis, or not a sufficient basis
16 for that level of granularity, because when one is
17 asking whether this disclosure is necessary for the fair
18 disposal of the case, we say that sort of detail in
19 terms of disclosure is not necessary, and all that the
20 CR relies on is what Ms Scott Morton says at
21 paragraph 53 which you have been taken to.

22 THE CHAIRMAN: Yes.

23 MR SINGLA: But in relation to that, we say, as the Tribunal
24 I think, sir, you yourself have said both in the Trucks
25 case and the Google Rodger case, it is not up to an

1 expert in terms of what disclosure they get. And the
2 question, the specific question --

3 THE CHAIRMAN: Am I controversial on that?

4 MR SINGLA: Well, it certainly does not seem to be
5 a proposition that the CR keeps in mind, because in my
6 respectful submission, it is a common sense provision
7 that experts will always ask for things, but --

8 THE CHAIRMAN: I agree, I have got my own views about that
9 I have expressed. I am just wondering if my views are
10 out of sync with other people's.

11 MR SINGLA: No, no, I am happy to tell you that is very much
12 an orthodox position.

13 But what, in my submission, paragraph 53 that you
14 were shown does not do, is explain why specifically does
15 she need the additional detailed disclosure beyond what
16 the CR will already be getting under the agreed part of
17 55(a), the agreed part of 55(b) and 54 and other
18 requests.

19 So that is the submission on 55(a). In relation to
20 55(b) there are two issues. The underlying data issue
21 has now been dealt with through the letter that you have
22 been taken to, so we have been constructive in respect
23 of the request to go for underlying data.

24 The other point on 55(b) is the reference to users'
25 data in particular but not limited to off-Facebook Data.

1 We say, again, this is going beyond the scope of the
2 case.

3 I mean, this case concerns the off-Facebook Data.
4 This is a request in connection with the advertising
5 side of the market, not even the user side of the
6 market. So we simply do not understand why this
7 broadening is said to be necessary and proportionate.

8 Again, it is not simply -- it is not good enough for
9 Ms Scott Morton to say "Well, I would be interested in
10 looking at X, Y and Z". We need to actually understand
11 why is this necessary for the fair disposal of this
12 case.

13 And we submit that what is really going on in 55(a)
14 and (b) is precisely the approach that you deprecated in
15 relation to 54, that we are boiling the ocean in respect
16 to the side of the market which this case is not
17 primarily concerned with.

18 My Lord, sir, that point on off-Facebook Data comes
19 up elsewhere later this morning. We do submit it is
20 important for you to keep in mind that this case is only
21 about off-Facebook Data. Broadening it out to all types
22 of data in my respectful submission would require quite
23 specific and compelling justification otherwise this
24 case is going to get out of control.

25 THE CHAIRMAN: Yes, okay.

1 DRAFT RULING on REQUEST 55 - sent for approval

2 THE CHAIRMAN: 56.

3 REQUEST 56

4 Submissions by MS FORD

5 MS FORD: Sir, yes, that has also been addressed in the
6 letter from yesterday.

7 THE CHAIRMAN: Let us have a look at the letter, yes.

8 MS FORD: So if you go on Opus to {E2/391/1}.

9 THE CHAIRMAN: I've got the letter now. Shall I just read
10 this first?

11 MS FORD: It is a pretty long letter. Perhaps I can show
12 you --

13 THE CHAIRMAN: I do not mind.

14 MS FORD: -- the paragraphs, starting at paragraph 7
15 {E2/391/2}.

16 THE CHAIRMAN: Yes.

17 MS FORD: What is being said there, they say they recognise
18 that Professor Scott Morton has identified Request 56 as
19 important.

20 THE CHAIRMAN: Yes. Can I just read this?

21 MS FORD: Sir, yes.

22 MR SINGLA: Sir, can I ask you to read the whole letter.

23 THE CHAIRMAN: It is much easier, is it not?

24 MR SINGLA: It is also just taking things out of context.

25 One has to read the whole letter. We have tried to set

1 effectively going to be required to do an exercise which
2 could be quite time-consuming and costly over a long
3 period of time.

4 But what we have got, in my view, at the moment, is
5 a very constructive approach, trying to come to a middle
6 way that could be acceptable to you and could be
7 acceptable to them and it may well be at the end of the
8 day acceptable to the Tribunal.

9 So I am inclined to park 56 on the basis of what has
10 been proposed by Herbert Smith unless you have got other
11 specific points that you want to raise.

12 But I know what you are looking for, okay, and it is
13 reasonable that -- what you are trying to do is
14 reasonable. I understand what you are trying to do.
15 They are trying to come up with something that is
16 practicable whereby it does not cost the earth, and you
17 can live with it and they can live with it and
18 the Tribunal will probably live with it as well. So my
19 inclination is we park it.

20 Are you happy with the timescale that has been
21 proposed? I do not really want to have this fight too
22 far down the line, because there may not be any time to
23 sort of resolve where we are. But at the moment my view
24 is the sooner we can get a crystallised position between
25 both of you, the sooner that I can give a ruling.

1 people at Meta will need to take time to work through
2 this Hive repository, which I can show you the evidence
3 about Hive --

4 THE CHAIRMAN: No, you do not need to. I am just trying to
5 think about when can it crystallise?

6 MR SINGLA: The timetable there was not set out as
7 a negotiating tool.

8 THE CHAIRMAN: We are not negotiating, we are trying to
9 figure out when it can be dealt with efficiently.

10 MR SINGLA: Exactly, but we do need this time. I think we
11 have said until 19 January, and the reason we have
12 arrived at ...

13 THE CHAIRMAN: Look, I think the problem you have got is
14 that I am happy with 19 January to get your proposal.

15 MR SINGLA: I am grateful.

16 THE CHAIRMAN: But I am not so happy that it does not come
17 back to me until 9 February. That is what I am not
18 happy with. The first bit is absolutely fine.

19 MR SINGLA: Yes. Well, those behind me are just suggesting
20 that we look again at the timetable. I think, I am
21 grateful, we will need until 19 January --

22 THE CHAIRMAN: No, no, I understand that bit, yes.

23 MR SINGLA: Because as you will have seen from the letter,
24 there is a lot of discussion that is going on with data
25 engineers and so on --

1 THE CHAIRMAN: But if we can get the papers earlier --

2 MR SINGLA: We have the vacation period as well --

3 THE CHAIRMAN: Let me have a look.

4 MR SINGLA: -- but we can look at the timetable beyond
5 19 January over the --

6 THE CHAIRMAN: Let me have a quick look and see where my
7 gaps are.

8 (Pause)

9 Look, if I can have the papers on 23 January, if
10 there is a dispute -- is that practical? You do not
11 need to agree it now, but if you can work together when
12 we have our next break and see if you can be in
13 the position that by 4 o'clock on 23 January, if there
14 is a dispute, I have got the papers in a file that I can
15 actually look at and come back with a ruling. Is that
16 all right? We will try and do that, okay.

17 MS FORD: Sir, just to outline where we are on this, we are
18 mindful that the Meta Entities have had this request
19 since 9 September. So it does seem somewhat
20 unsatisfactory to be told that they need until
21 19 January to come back with a counterproposal.

22 THE CHAIRMAN: Okay. It is a lot of requests that they have
23 had to deal with, that is the trouble. And you are
24 asking for quite a lot on this one, and I think you are
25 lucky to get what they have offered, I will be honest

1 with you, you know.

2 I was not enamoured by this request when I read it
3 yesterday, and I was not enamoured when I looked at it
4 a few weeks ago.

5 Look, what I would have done is, there is no point
6 me saying what I would have done, but the fact is we are
7 where we are. We have a constructive proposal. Then
8 the good thing is that by 23 January you will be able to
9 formulate, both of you, exactly where you disagree and
10 you can explain precisely why you need more, and they
11 can explain precisely where, by asking for more, it is
12 going to cost them X.

13 Because one of the things that I will want to look
14 at it is: what is the cost of X? So if there is a big
15 gap between you, I would like to have something concrete
16 from Meta saying, well, look, the difference in cost
17 between what we are willing to provide and what they are
18 seeking is going to be, in our estimation, whatever it
19 is going to be.

20 That can help us decide on proportionality grounds
21 where we go from there. Okay?

22 DRAFT RULING on REQUEST 56 - sent for approval

23 THE CHAIRMAN: Next one.

24 MS FORD: This point comes up when we talk about a long-stop
25 for disclosure.

1 THE CHAIRMAN: We will come back to that then. On precise
2 timings, that is something for this afternoon. There
3 are a lot of other points to deal with apart from this
4 schedule.

5 MS FORD: Yes, it was simply to make the point that one
6 would assume the starting point for time to conduct
7 disclosure will not be postponed until after the
8 Tribunal's ruling on this particular discrete point.
9 Progress can be made in the meantime. That was simply
10 the --

11 THE CHAIRMAN: No, of course. Insofar as any category is
12 being determined by the Tribunal or otherwise agreed by
13 the parties, once you have got the written ruling which
14 you will get tomorrow or Thursday or whatever, then
15 I expect that process to start.

16 But I do want the Designated Solicitor to have the
17 disclosure protocol in place, because unless we have
18 that at the very beginning, and then everyone knows what
19 they have got to do and what are the different roles and
20 how things should be recorded, you will end up having
21 a bit of a mess when you are dealing with a disclosure
22 exercise this way forward.

23 So I would have thought the first thing that they
24 have got to do, if they have not already done it, is to
25 get their disclosure protocol done. They can then start

1 the process.

2 We will hear from Mr Singla this afternoon as to
3 when he thinks the disclosure protocol is going to be
4 ready and we can go through that. But I do not want
5 them necessarily to go out and start the exercise until
6 we have got the framework done properly.

7 MR SINGLA: I will address you later on timing.

8 THE CHAIRMAN: We will come to it later, yes.

9 MR SINGLA: (Inaudible) search terms as well. You
10 understand that it is all well and good agreeing Redfern
11 requests, but until we have had agreement on the search
12 terms or they have been approved by the Tribunal ...

13 THE CHAIRMAN: Yes, yes.

14 MR SINGLA: So we will come back to that later.

15 THE CHAIRMAN: What I do not want to do is that you start
16 the disclosure exercise and this says something specific
17 and simple, before we have got everything in place.

18 MR SINGLA: We agree, obviously.

19 THE CHAIRMAN: Because my experience on these big disclosure
20 exercises is if you start too early it becomes a bit of
21 a mess, and people think we searched this already, we
22 are not going to do it again ... okay.

23 MS FORD: Search terms is something on which there has been
24 movement as well, so that should not be an obstacle.

25 THE CHAIRMAN: I hope so. We will look at search terms

1 later on.

2 REQUEST 60

3 Submissions by MS FORD

4 MS FORD: Request 60 is the next one. This is a request
5 that is opposed in its entirety by Meta. This is
6 a request which focuses solely on options for
7 controlling the collection of off-Facebook Data which
8 Meta considered introducing but did not introduce.

9 The Tribunal will recall we had a similar debate at
10 the last hearing in the context of Request 9 about the
11 relevance of alternatives and --

12 THE CHAIRMAN: Let me have a look at that. Request 9?

13 MS FORD: Request 9, and the Tribunal's direction on that is
14 at {A/42/2}.

15 THE CHAIRMAN: We have moved on since then. Let me just see
16 what I have written down. Request 9, yes?

17 MS FORD: Yes.

18 (Pause)

19 THE CHAIRMAN: What I have written down is the Tribunal
20 considers that the request is reasonable and
21 proportionate and it should not be burdensome for Meta
22 to respond to it:

23 "It can easily be seen why such material could be of
24 assistance because when you look at the actual terms
25 employed, it is sensible to look at what alternatives

1 would be considered and not followed up for one reason
2 or another."

3 We said therefore the Tribunal accept the CR's
4 formulation of Request 9. Yes.

5 MS FORD: Sir, yes. So this request is a very specific
6 targeted request in that it seeks to identify and focus
7 on those options for controlling the use of off-Facebook
8 Data which Meta considered introducing but did not
9 introduce.

10 THE CHAIRMAN: Yes.

11 MS FORD: The objection that was taken in Meta's 10 December
12 letter was to suggest that it was duplicative and that
13 they do not consider they should have to conduct
14 additional searches specifically targeted at tools which
15 were not introduced and which users never saw or used.
16 That is the phrase that was used in the correspondence.

17 We say it is not duplicative, in the sense that this
18 request is specifically focused on alternatives, whereas
19 other requests are not, be it that they may fall within
20 the scope of that request.

21 This request also addresses why they were
22 introduced, and insofar as there are alternatives which
23 users never saw and used, that very much begs the
24 question: why? Why did Meta consider those
25 possibilities and reject them? Was it, for example,

1 accept that the determination of Request 9 provides
2 an answer to Request 60; the requests are different.

3 Sir, you have seen Request 9. It --

4 THE CHAIRMAN: I have just looked at it, yes.

5 MR WHITE: Precisely. And Request 9 says nothing of mere
6 considerations of tools that were not ever introduced.
7 So Request 60 is wider than Request 9.

8 We do not say that Request 9 is irrelevant, but it
9 does not provide an answer. And I will come on to give
10 the reasons why Request 60 should be treated
11 differently.

12 Sir, in summary, Request 60 goes far beyond what is
13 ultimately going to be necessary for the parties and
14 the Tribunal to consider at trial. In terms of the
15 material that will be most relevant for the parties to
16 consider at trial, that will be covered under a number
17 of other requests which I will briefly turn up in
18 a moment, and that will cover material on the tools that
19 were in fact available and also some quite detailed
20 information on how those tools were designed and tested
21 and Meta's general considerations in relation to those
22 tools when it comes to design and testing, et cetera.

23 In any event, sir, and I will come on to refer to
24 some specific document hit numbers, it would be
25 disproportionate to allow Request 60 in over and above

1 everything else that the Class Representative will
2 already be getting.

3 Briefly to elaborate on those points, the first and
4 most important point perhaps is that the most relevant
5 material will concern the tools that were ultimately
6 introduced. It is those tools that stand to impact
7 an assessment of whether Meta's conduct in the market
8 during the period of the alleged dominance was abusive
9 vis-à-vis UK Users. And as part of that, it is those
10 extant tools that allow for an analysis of what degree
11 of understanding and control UK Users had in relation to
12 the reality and use of off-Facebook Data.

13 Meta is already going to be providing extensive
14 disclosure in relation to that.

15 If I could briefly turn you, sir, to the relevant
16 requests. They are in the Agreed Redfern at --

17 THE CHAIRMAN: You say there is extensive disclosure on the
18 tools introduced?

19 MR WHITE: Yes.

20 THE CHAIRMAN: Just give me the numbers, because I think
21 I am familiar.

22 MR WHITE: 58, which needs to be read together with 59 and,
23 importantly, under 59 we will be giving disclosure on
24 the tools, controls, features and resources referenced
25 in 58.

1 THE CHAIRMAN: Yes.

2 MR WHITE: If it is helpful to turn it up, I can give you
3 a reference.

4 THE CHAIRMAN: I have got the schedule here so let me have
5 a quick look.

6 (Pause)

7 MR WHITE: I think it is at page 20.

8 THE CHAIRMAN: Yes, I am looking at it now.

9 (Pause)

10 Yes, okay, so it is 58 and 59.

11 MR WHITE: And the disclosure under 59, as you have seen,
12 covers design introduction, et cetera. Then there is
13 66, page 22, importantly the words at the end:

14 "How and why those tools were introduced."

15 There is going to be material that provides relevant
16 background on these tools.

17 So through a combination of 58, 59 and 66. And
18 perhaps I emphasise this point, that it is the totality
19 of the information that the Class Representative can
20 perceive from those requests that is relevant in the
21 assessment of Request 60.

22 It is not that there is some individual request that
23 is wholly duplicative. It is that when one takes a step
24 back and looks at the totality of the material, we say
25 that the Class Representative will already be receiving

1 material that allows her to understand the specific
2 tools that were introduced, including as to UK Users'
3 understanding of the ability to limit and understand the
4 collection and receipt of data, design, testing and
5 effect of those tools, consideration of specific
6 legislation in respect of those tools, why those
7 particular tools were introduced, UK Users' engagement
8 and understanding with those tools. And all of that has
9 been agreed by Meta.

10 THE CHAIRMAN: Yes.

11 MR WHITE: So our position does not bluntly seek to limit
12 the material that the Class Representative will receive
13 to identify what tools exist. We will be providing
14 background materials, if I can put it in that way, that
15 allows the Class Representative and
16 Professor Scott Morton to gain a holistic understanding
17 of what these tools are and how they were designed,
18 tested, et cetera.

19 THE CHAIRMAN: Yes.

20 MR WHITE: On top of that, it would simply be, in my
21 submission, unnecessary and unreasonable and
22 disproportionate on top of that for Meta to give
23 disclosure in relation to tools that were never
24 introduced and that were merely considered at some point
25 over a 20-year period that is covered by this request.

1 Disclosure of that kind would be at the outermost
2 periphery of what is going to be relevant at the end of
3 the day and it places an unnecessary and inappropriate
4 burden on Meta.

5 Related to that, there is an important
6 proportionality point. And if I could turn to a letter
7 from HSF Kramer, sir, which was sent yesterday. This
8 sets out document hit counts for particular requests.

9 THE CHAIRMAN: It is not this one I have got already?

10 MR WHITE: It is not the 56 letter, if that is the letter
11 you are referring to.

12 THE CHAIRMAN: Is there another letter then?

13 MR WHITE: There is another letter.

14 THE CHAIRMAN: Do you have a copy?

15 MR WHITE: I will be able to get a copy (Pause). Yes,
16 I think I have one here.

17 THE CHAIRMAN: Brilliant, thanks very much.

18 MR WHITE: It is loose.

19 THE CHAIRMAN: That is okay.

20 MR WHITE: It is rather long. The reason for the length is
21 somewhat explained by a table being included at the end,
22 and it is the table that I want to turn you to, sir.

23 So if you go to page 34.

24 THE CHAIRMAN: Of this?

25 MR WHITE: Yes. So there is a table. You can see what that

1 THE CHAIRMAN: Yes.

2 MR WHITE: Yes, and it is important to emphasise in the same
3 way as last time that these estimates are email and work
4 chats only over custodial material. So it is not the
5 total universe even of custodial material; it only
6 covers the emails and work chats.

7 So we are already looking at hundreds of thousands
8 of documents based on the latest estimate on the
9 disclosure that Meta has already agreed to provide under
10 the requests I have shown you.

11 So in that way, sir, we are not at all trying to
12 shut the Class Representative out of trying to develop
13 a solid understanding of the relevant tools and how they
14 came into development. But we do say that in the
15 interests of proportionality and also considering the
16 peripheral relevance of Request 60 when it comes to the
17 issues that are actually going to need to be decided at
18 the end of the day, a line needs to be drawn. And in my
19 submission, that line plainly needs to be drawn at
20 Requests 58, 59 and 66 without an additional requirement
21 on Meta to chase down what is at best extraordinarily
22 tangential material on mere considerations of tools that
23 were never ultimately introduced.

24 For those reasons, we invite the Tribunal to rule
25 that Request 60 is excluded from the final list.

1 THE CHAIRMAN: Okay, thanks very much.

2 DRAFT RULING on REQUEST 60 - sent for approval

3 MS FORD: Sir, the next one is Request 62.

4 THE CHAIRMAN: Well, we will look at that after the break,

5 but how are we doing for time? So we have done a few

6 already. We should hopefully finish the rest by

7 lunchtime.

8 MS FORD: Sir, I think --

9 THE CHAIRMAN: We can always hope, can we not.

10 So we will be back at 25 to. Thank you.

11 (11.23 am)

12 (A short break)

13 (11.35 am)

14 THE CHAIRMAN: Okay. Hopefully not that much longer.

15 MS FORD: No, hopefully not.

16 THE CHAIRMAN: Yes, okay.

17 REQUEST 62

18 Submissions by MS FORD

19 MS FORD: Request 62, there are two rival formulations.

20 I just ask the Tribunal to remind yourself very briefly

21 of what ...

22 THE CHAIRMAN: Yes.

23 (Pause)

24 Yes.

25 MS FORD: The difference between us on the wording is the

1 request that the data we are seeking, annual data on
2 users' take-up rates of tools for controlling
3 off-Facebook Data, the request is that that data be
4 split by operating system, so into iOS, Android and
5 Windows, and then the revenue shares associated with
6 each operating system.

7 THE CHAIRMAN: Yes.

8 MS FORD: Now, the reason for that in a nutshell is because
9 one of the methodologies the Class Representative's
10 expert has proposed is what has been referred to as the
11 ATT natural experiment.

12 The ATT, Apple's tracking function, only impacted
13 those who used the iOS. And so it becomes necessary to
14 extrapolate the outcome of that for other operating
15 systems. That is a point that is explained in greater
16 detail by Ms Scott Morton in her report, {C7/5/19}.

17 It is paragraphs 80 to 81, if I can ask the Tribunal
18 just to review what she explains in those.

19 (Pause)

20 THE CHAIRMAN: Yes, you can see where the parties part on
21 this, can you not?

22 (Pause)

23 You want me to look at that until the end of 81?

24 MS FORD: Yes. This is her explanation of why she needs
25 this particular breakdown. Her point is that in her

1 point in the sense that this is one of the key
2 methodologies that Ms Scott Morton has identified and
3 plans to pursue.

4 THE CHAIRMAN: Yes.

5 MS FORD: Those are my submissions on that point.

6 THE CHAIRMAN: Okay, are we hearing from anyone else on
7 this? Is it Mr White again?

8 Submissions by MR WHITE

9 MR WHITE: Yes.

10 Sir, my learned friend alluded at the outset that
11 before one gets to the additional data splits there are
12 some more minor points on the alternative framings on
13 this request. And I think I can skip through those
14 quite briefly.

15 THE CHAIRMAN: Yes.

16 MR WHITE: Just to explain what we have agreed to provide
17 and why, there is a slight difference in the wording of
18 the parties where we refer to data on the take-up/usage
19 rates of the relevant tools where the Class
20 Representative refers to opting in and opting out of
21 different tools.

22 The very short point there is that our wording seeks
23 to capture the potentially broad range of tools that
24 would fall within 58, not all of which will necessarily
25 have an opting in or opting out function. So in that

1 sense, our wording is actually potentially broader than
2 the Class Representative's if it is in dispute; we are
3 not sure why it is in dispute. I note that Ms Ford
4 referred to take-up and usage rates, so it might be that
5 they can adopt our wording.

6 THE CHAIRMAN: We had better hear from her on that.

7 MS FORD: It is helpful to hear that explanation. We had
8 not appreciated the nuance, but that wording is fine.
9 I think from our perspective it is the requirement of
10 a breakdown by operating system that is crucial.

11 MR WHITE: Yes, and I will come to that in a moment.

12 There is also a slightly different way in which the
13 parties cross-refer to 58. We just say that ours is
14 more straightforward. There is not a big point there.

15 There is one other difference in the parties'
16 wording. The Class Representative's wording refers to
17 data that concerns active users, whereas Meta proposes
18 that the data should be framed in reference to UK Users.

19 Our point here is in fact consistent, as we see it
20 at least, with the determination on Request 27, and that
21 is that the Class Representative should not be able to
22 be overly prescriptive as to the types of data that Meta
23 is to provide under these requests.

24 At this stage, before Meta has run the searches and
25 data extractions, it is not clear as to precisely what

1 forms or cuts of data will be held. And so the
2 appropriate order today on the parts of the wording to
3 which Meta agrees is for the data to be provided in
4 reference to UK Users rather than active users.

5 Again, to be clear, to the extent the extractions
6 show data on an active user basis, then we are not going
7 to withhold that. We can provide it, but the point is
8 that we should not be prescribed by the wording of the
9 request by data on an active user basis. The wording
10 should be UK Users, as we propose.

11 That then takes me to the more substantive point in
12 dispute, which is the additional disclosure that the
13 Class Representative seeks on the take-up and usage
14 rates of the relevant tools split by operating system,
15 and also, as we see it, the somewhat ambiguous reference
16 to revenue shares associated with different operating
17 systems.

18 As my learned friend explained, the reason that the
19 Class Representative and Professor Scott Morton want
20 that additional data is for Professor Scott Morton to
21 use it in the context of her ATT methodology.

22 Our position is that it is simply disproportionate
23 for Meta to be ordered to provide a split of data on
24 take-up and usage rates on an operating system basis,
25 and also specific revenue data on operating system

1 basis. And the ultimate question for the Tribunal as
2 part of its proportionality assessment is whether the
3 material additional burden placed on Meta in providing
4 data split in that way, on top of the data that Meta has
5 already agreed to provide under Request 62, and all of
6 the other disclosure that Meta will provide that we say
7 is relevant to this methodology, and I will take you
8 very briefly to some of those other requests, and all of
9 the other heavy work that that entails is really
10 reasonable and proportionate when Professor Scott Morton
11 does not state in her fourth report that this additional
12 data is essential and an unavoidable (inaudible) to her
13 ATT methodology, and she does not explain in her fourth
14 report why the balance of the disclosure that Meta has
15 agreed to provide will be inadequate.

16 In making good that point I will very briefly refer
17 to the requests that Meta has agreed in the Agreed
18 Redfern. So the Tribunal can see the sorts of
19 information that will already be provided that goes to
20 ATT and revenues.

21 The first -- and, again, it is similar to the point
22 I made earlier, that it is not necessarily that any of
23 the individual requests to which I will refer are
24 precisely the same as the data splits sought under 62,
25 it is that the totality of the material we say will be

1 adequate.

2 So the first Request is 61 in the Agreed Redfern.

3 I have it at page 21.

4 THE CHAIRMAN: Yes.

5 MR WHITE: I will not take time reading it out, but it
6 essentially includes custodial documents in relation to,
7 among other things, commercial and economic value of
8 data impacted by ATT.

9 THE CHAIRMAN: Yes.

10 MR WHITE: Then there is also 107 at 32, again concerns
11 custodial documents in relation to Meta's assessment of
12 the financial impact of ATT and its impact on the
13 collection of the relevant data, off-Facebook Data.

14 So we rather think that the material that we have
15 already agreed to provide in that regard is going to be
16 very helpful to Professor Scott Morton in implementing
17 her ATT methodology. It covers material that directly
18 impacts that methodology, including the financial impact
19 of ATT. As I said, Professor Scott Morton has not
20 explained why the material under those requests is going
21 to be simply inadequate.

22 We have also agreed to provide substantial revenue
23 data under other requests. Again, I will very briefly
24 refer to those. They are in the Agreed Redfern as well.
25 That is Request 113. I am providing these by way of

1 example; they are not the totality of the revenue data.
2 That is on page 34.

3 Perhaps I will ask the Tribunal just to glance
4 through it, "already giving data on internal analysis
5 and estimates concerning revenues on the user and
6 advertising side".

7 THE CHAIRMAN: Yes.

8 MR WHITE: Then 116, there are references to changes in
9 revenues, specifically in relation to UK Users.

10 119 is the last one I will refer to, revenue
11 information including in respect of OFBD, off-Facebook
12 Data, specifically.

13 The point here is that there is already going to be
14 substantial material on both ATT and revenues, and we
15 say that that will provide Professor Scott Morton with
16 ample material to assess the sorts of things that she is
17 going to need to consider as part of her ATT
18 methodology. And she has not explained why the totality
19 of that material is inadequate for the purpose of her
20 ATT methodology.

21 For those reasons we say that the additional burden
22 that Meta would come under in being required to give the
23 specific granular prescriptive data splits that are
24 sought under Request 62 is disproportionate.
25 Professor Scott Morton has not said that it is

1 completely necessary or unavoidable and that the other
2 requests will not be adequate.

3 We invite the Tribunal to adopt our wording.

4 THE CHAIRMAN: Thank you.

5 Ms Ford, on the issue of the alternative formulation
6 which uses the word "UK Users' take-up rates", what is
7 your position on that?

8 Reply submissions by MS FORD

9 MS FORD: Sir, this is the first time this point has been
10 canvassed, so it has somewhat taken us by surprise.

11 I wonder if I can briefly take instructions on the
12 point?

13 THE CHAIRMAN: Yes, because the rest is clear to me, just
14 that UK Users point.

15 (Pause)

16 MS FORD: Sir, our understanding is that the submission that
17 was made was essentially explaining that UK Users would
18 be wider than active users.

19 THE CHAIRMAN: That is what is being said. That is why I
20 wondered whether there is still an issue on that.

21 MS FORD: In those circumstances, given that it is not
22 excluding anything, as we understand it, that is fine.

23 DRAFT RULING on REQUEST 62 - sent for approval

24 THE CHAIRMAN: Next one is 68.

25

1 disclosure. I accept they are not conclusive --

2 THE CHAIRMAN: Yes, because what we need to look at on this

3 one is not just the issues for disclosure but the

4 pleadings. I'd like to look at the pleading.

5 MR CASHMAN: And then the pleaded case.

6 THE CHAIRMAN: Because I think this is one of those ones

7 where if it is pleaded properly then that may lead to

8 one course of action. If it is not pleaded then

9 obviously it will go a different way. So let us -- List

10 of Issues for Disclosure, which one are you relying?

11 MR CASHMAN: I am grateful, sir. So starting with the

12 issues for disclosure, we need the definition of

13 sensitive data first. That was one of the four

14 overarching issues that was in dispute at CMC 3 and

15 resolved by the Tribunal. And the Defendant's

16 submissions in their skeleton argument for that CMC was

17 what we need is a definition of sensitive data that can

18 then be taken forward in Meta's internal searches and

19 investigations for the purposes of disclosure. The

20 reference to that -- we do not need to turn it up -- is

21 {F8/2/25}.

22 THE CHAIRMAN: Is this specifically covered in the written

23 ruling? I cannot remember now.

24 MR CASHMAN: So perhaps we could turn up {A/31/27}.

25 THE CHAIRMAN: Okay. What is this we are looking at?

1 MR CASHMAN: So this is the Tribunal's written ruling. Just
2 to put it in context, the Tribunal here was narrowing
3 the definition of sensitive data from that which the
4 Class Representative had sought.

5 What we see at paragraph 60 is part of the reason
6 for the Tribunal not being minded to include part of
7 what the Class Representative was seeking was that it
8 would be difficult to apply and would be generally
9 vague.

10 THE CHAIRMAN: I remember we went through all of this.

11 MR CASHMAN: So it was made a central issue for
12 determination by the Defendants and the Tribunal has
13 specifically formulated something narrower with a view
14 to it being able to be applied.

15 THE CHAIRMAN: It follows paragraph 60, does it?

16 MR CASHMAN: So 60 is the reasoning to which I just referred
17 you, sir. And then we see the definition at
18 paragraph 62 at the bottom of the page and over to the
19 next page.

20 THE CHAIRMAN: Right, let me have a look at it.

21 MR CASHMAN: It might be easier if we look at it as
22 replicated in the List of Issues for Disclosure.

23 THE CHAIRMAN: Not really, I am happy to look at it.

24 (Pause)

25 MR CASHMAN: So the limbs, sir, the first, data falling

1 within the categories of sensitive personal data under
2 section 2 of the 1998 Act and then Article 9 of the
3 GDPR. So this is the list with which we are very
4 familiar: racial, political, religious, sexual
5 orientation and so forth.

6 THE CHAIRMAN: Yes.

7 MR CASHMAN: Limb 2, personal data relating to criminal
8 convictions and offences. So this is Article 10 of the
9 GDPR.

10 THE CHAIRMAN: Yes.

11 MR CASHMAN: Then limb 3 is those situations where you
12 cannot separate out non-sensitive and sensitive data.

13 THE CHAIRMAN: Yes.

14 MR CASHMAN: So that definition then gets imported into the
15 List of Issues for Disclosure. And if we could turn up,
16 please, {D/11/22}. So this is the list of issues,
17 issue 15, and the purpose of these two requests is to
18 reflect issues 15(2) to 15(4), and we see there it is
19 the same four points reflected. So, does it contain
20 sensitive data? Can you infer sensitive data? Can you
21 separate out sensitive data? Then at the bottom, 15(4),
22 consent to sensitive data.

23 THE CHAIRMAN: Yes.

24 MR CASHMAN: So that is how it sits in the issues for
25 disclosure.

1 Sir, you asked to see the pleading. We say the
2 relevance of sensitive data is extensively pleaded and
3 it is very obviously intertwined with and relevant to
4 the core questions of the value of off-Facebook Data to
5 Meta, and the cost to users of giving up their
6 off-Facebook Data.

7 Can I show you, sir, six references?

8 THE CHAIRMAN: Yes, I would like to look at that.

9 MR CASHMAN: We start with the summary, {B/11/12}.

10 THE CHAIRMAN: Let me see if I can find it first. Where is
11 it, you say?

12 MR CASHMAN: If we start at the summary --

13 THE CHAIRMAN: Where in the hard copy bundle?

14 MR CASHMAN: It should be your tab 3, sir. For the benefit
15 of the screen, it is {B/11/12}, summary paragraph 28.

16 THE CHAIRMAN: No. Look, List of Issues for Disclosure,
17 final list. It is tab 19, which is {D/11}. Does that
18 ring a bell?

19 MR CASHMAN: That is the List of Issues for Disclosure, sir.
20 I was proposing to put that away now and look at the
21 pleaded case.

22 THE CHAIRMAN: You want me to look at the pleaded case,
23 okay. So on the pleaded case you want me to look at the
24 Re-Amended Claim Form?

25 MR CASHMAN: Yes, please.

1 THE CHAIRMAN: Okay, and that is tab 3; yes?

2 (Pause)

3 Yes, paragraph?

4 MR CASHMAN: Paragraph 28 of the summary, 12 pages in. This
5 part of the summary -- do you have that, sir?

6 THE CHAIRMAN: I am looking for it now. Page 28, yes?

7 MR CASHMAN: This is addressing the quantum methodology that
8 is going to be applied. I am looking three lines up
9 from the bottom:

10 "The methodology also takes into account the value
11 of off-Facebook Data to users: the more valuable such
12 data to users (for example, by reason of its
13 sensitivity), the greater the value transfer to users
14 would be likely to be in the counterfactual."

15 THE CHAIRMAN: Okay, I have got that, yes.

16 MR CASHMAN: So that is the summary.

17 Now if we could turn to the body of the Re-Amended
18 Claim Form, three pages further on, paragraph 7.

19 THE CHAIRMAN: Yes. We have looked at this a few times now.

20 MR CASHMAN: Exactly, sir, and this is the paragraph which
21 first pleads the contention of abuse of a dominant
22 position, and it pleads that the extraction of data
23 including highly sensitive personal data, a factual
24 allegation.

25 Paragraph 39 on page 25 {B/11/25}, this makes the

1 point that the personal data is extremely valuable and
2 may be deeply sensitive in nature, with
3 a cross-reference to 88 to 91 which we will come on to
4 in a moment.

5 THE CHAIRMAN: Yes.

6 MR CASHMAN: Paragraph 49(a), this is at {B/11/29}, this is
7 the factual context that Facebook's initial emphasis on
8 privacy encouraged users at that stage to share more and
9 more sensitive data.

10 THE CHAIRMAN: Exactly. You thought you were safe, were you
11 not, that is the point you are making?

12 MR CASHMAN: That is the point.

13 Page 51, now we look at a section from pages 51 to
14 54 which is set out at paragraphs 91, 92 and 94. But
15 broadly, and it starts by reference to the findings in
16 the Bundeskartellamt decision, but the point being made
17 is that the off-Facebook Data can include sensitive user
18 data and, for example, data about a user's browsing
19 history from which extremely sensitive information about
20 users can then be inferred.

21 If I could just ask you to turn the page, sir,
22 skimming that section, through to paragraph 94, which is
23 page {B/11/54}.

24 THE CHAIRMAN: Yes.

25 MR CASHMAN: I will just allow the screen to catch up. The

1 point being made in paragraph 94 is making that express
2 link to value between sensitivity and value.

3 In response, sir, we had Meta's pleaded Defence, and
4 Meta objected to the relevance of sensitivity. We
5 respond to that in our Reply. So I think it is worth
6 seeing how we answer that case. This is {B/13/37}.

7 THE CHAIRMAN: What is the paragraph of the Defence you want
8 me to look at?

9 MR CASHMAN: The paragraph of the Amended Reply is 28.

10 THE CHAIRMAN: I want to look at the Defence first,
11 because --

12 MR CASHMAN: It's {B/12/31-32}. The paragraph of the
13 Defence is 58(b)(ii).

14 THE CHAIRMAN: Let me look at this.

15 MR CASHMAN: So the point made in the Defence there as to
16 the Class Representative's:

17 "... reference to the 'personal data' being
18 potentially 'deeply sensitive in nature, the CR does not
19 explain what is meant by 'sensitive' or indeed 'deeply
20 sensitive', or in respect of which particular data such
21 allegations are intended to apply. In the premises it
22 is not possible to plead a response."

23 The relevance is not explained. So that is the
24 position they take.

25 THE CHAIRMAN: Yes, I have got that now, yes.

1 MR CASHMAN: If we can see how the Class Representative
2 replies to that, this is {B/13/37}. Amended Reply,
3 paragraph 28(a)(ii):

4 "As to paragraph 58(b)(ii) [that is what we have
5 just looked at] the [Class Representative] avers that
6 the potential sensitivity of Off-Facebook Data is
7 relevant to the fairness of the bargain struck by Meta
8 insofar as: (1) sensitive Off-Facebook Data is likely to
9 be of greater value to users and/or users are likely to
10 incur higher costs in giving permission for such data to
11 be collected or used; (2) Meta's lack of
12 transparency ..."

13 THE CHAIRMAN: I have read that.

14 MR CASHMAN: I am grateful.

15 In summary, sir, it is an important pleaded issue on
16 the Class Representative's case. And of course
17 the Tribunal is not making a determination today about
18 that matter; the issues for disclosure have been
19 specifically formulated to facilitate searches being
20 carried out by reference to this issue. So we do submit
21 there is no reason why it should be excluded from the
22 Redfern Schedule.

23 THE CHAIRMAN: Okay.

24 MR CASHMAN: I should note, sir, at 9.30 this morning we
25 received a letter from Meta which set out two

1 alternative formulations of these requests insofar as
2 they are ordered in our favour. I can address those
3 briefly now or in reply.

4 MR SINGLA: Just to be clear, we completely oppose these
5 requests coming in. So can I address you on that first?

6 Submissions by MR SINGLA

7 THE CHAIRMAN: Let us just hear what Mr Singla wants to say
8 on this.

9 MR SINGLA: The letter says: on any view the way these
10 requests are framed is too broad, but our primary
11 position has always been these are completely
12 misconceived requests. So can I just address you in
13 relation to that?

14 THE CHAIRMAN: Yes, of course you can.

15 MR SINGLA: Sir, so you have heard and in fact you have said
16 earlier this morning we have actually been very flexible
17 and willing to engage on quite a few of these requests
18 where --

19 THE CHAIRMAN: Look --

20 MR SINGLA: -- we could otherwise have brought disputes
21 before the Tribunal.

22 THE CHAIRMAN: I agree. As I have said, there has been at
23 least two requests where I would have been inclined to
24 have rejected them that you have constructively said
25 that you'll provide. So there is no criticism about you

1 opposing anything. I think that --

2 MR SINGLA: No, but I just highlight that because where we
3 are opposing requests is because, I mean, we have taken
4 a long time to consider all of these matters and these
5 are, with respect, completely misconceived, because the
6 pleaded case -- it is no good, with respect to my
7 learned friend, taking you to bits of the pleadings
8 saying, look, we have pleaded a word sensitive there and
9 we have pleaded a word sensitive there. The nature of
10 the alleged abuse concerns off-Facebook Data. That is
11 the crux of the case.

12 What they have pleaded, I do not want to take you
13 back, but for example you were shown paragraphs 7 and 39
14 and 43. What they have pleaded is that off-Facebook
15 Data includes sensitive data. In fact, it might just be
16 worth looking at the way it is expressed.

17 THE CHAIRMAN: Let us have a look.

18 MR SINGLA: So this case, as the Tribunal said in its CPO
19 judgment, does not concern sensitive data; it concerns
20 off-Facebook Data.

21 If you look back at paragraph 7, 7 is quite
22 important because 7 is where they in fact provide their
23 definition of off-Facebook Data. Do you have 7?

24 THE CHAIRMAN: Yes.

25 MR SINGLA: So you see what is said is:

1 "... including highly sensitive personal data."

2 THE CHAIRMAN: Exactly. So they are saying within it they
3 have highly sensitive personal data which they say has
4 probably got higher value to the consumer than what is
5 non-sensitive. But you say, as I understand it, it is
6 a bit of a fuzzy definition, yes.

7 MR SINGLA: The critical point. Let us just take a step
8 back. The critical point --

9 THE CHAIRMAN: You say you do not need it at all. I
10 understand that.

11 MR SINGLA: But why do I say that? Because there are so
12 many other requests where we are giving disclosure in
13 relation to off-Facebook Data, including in relation to
14 value.

15 Now, the way they have pleaded their case is that
16 off-Facebook Data includes sensitive data. So the
17 question for the Tribunal is: why should there be
18 a distinct disclosure request in relation to sensitive
19 data?

20 The way they have expressed it, this is all a subset
21 of off-Facebook Data. What they are now asking you to
22 do, in circumstances where they are going to receive
23 disclosure across the board on off-Facebook Data, we
24 have spent many hours now going through the rest of the
25 Redfern, but where sensitive data comes in, insofar as

1 it comes in at all on their case, is it comes in
2 through -- it is said that off-Facebook Data included
3 some sensitive data. But we respectfully submit that it
4 is misconceived to seek disclosure in relation to what
5 is described as a subset of off-Facebook Data.

6 That is the difficulty for my learned friend. It is
7 completely wrong, in my submission, to take you to the
8 pleading and say, well, look, we have pleaded sensitive
9 data, because what you actually have to do is actually
10 apply some analysis to this.

11 Yes, sensitive data appears in a handful of
12 paragraphs in the pleading, but it is always as a subset
13 of what is described as off-Facebook Data.

14 So in circumstances where they are getting very
15 broad disclosure in relation to off-Facebook Data, why
16 should there be two additional Redfern requests in
17 relation to the subset?

18 So it is absolutely not on the critical path, as we
19 have said, in relation to the nature of the alleged
20 abuse. And the Tribunal, as I say, recognised that in
21 the CPO judgment, saying the data providing the basis
22 for the claim is not characterised by its personal
23 sensitivity but by the fact that it is off-Facebook
24 Data.

25 THE CHAIRMAN: So that is the CPO judgment.

1 MR SINGLA: Yes.

2 THE CHAIRMAN: Can I just look at that? It is in the
3 authorities bundle.

4 MR SINGLA: Is it?

5 THE CHAIRMAN: I do not know. Hopefully it is in the
6 authorities bundle.

7 MR SINGLA: I just want to break this down, because insofar
8 as one is talking about what is the alleged abuse --

9 THE CHAIRMAN: One second. I want to look at this --

10 MR SINGLA: The judgment. I do not know where --

11 THE CHAIRMAN: It should be tab 3. What paragraph are you
12 looking at?

13 MR SINGLA: It is paragraph 17, but I am afraid I do not
14 actually have --

15 THE CHAIRMAN: Do not worry about it, let me have a look
16 at it.

17 (Pause)

18 I have got it. I am just looking at it now.

19 MR SINGLA: So ...

20 (Pause)

21 THE CHAIRMAN: Yes.

22 MR SINGLA: So just taking this in stages, what is the
23 alleged abuse? That concerns off-Facebook Data.
24 Actually, it is neither here nor there whether any part
25 of off-Facebook Data is what is described as sensitive,

1 because it is all about off-Facebook Data. It is their
2 point that within off-Facebook Data is sensitive data.
3 But that does not make any difference at all to the
4 abuse allegation.

5 The only point that is really made is, well, it
6 comes in at the value stage.

7 THE CHAIRMAN: That is what Marcus Smith seemed to indicate,
8 that arguably it comes in --

9 MR SINGLA: Let me just address you on that.

10 In relation to that, it is actually quite revealing
11 that Professor Scott Morton, who has provided
12 the Tribunal with hundreds of pages, there are only
13 three cursory references to sensitive data in her first
14 report. In the 30 pages that she has produced for this
15 hearing, not a single reference to sensitive data. And
16 if I just show you for example {C1/6.1}, so there is
17 a document between the experts that was produced with
18 relevant categories of evidence. I am just bringing it
19 up to --

20 THE CHAIRMAN: In Scott Morton's first report --

21 MR SINGLA: Yes. I can show you --

22 THE CHAIRMAN: -- it has some mentions of it.

23 MR SINGLA: Let me just show you. Do you have a hard copy?

24 THE CHAIRMAN: There was some reference.

25 MR SINGLA: No, but it is not enough to justify disclosure.

1 Let me show you paragraph 81.

2 THE CHAIRMAN: Just tell me where it is going to be in the
3 bundle. It is tab 6 in my one.

4 MR SINGLA: So if I could ask you to look at paragraph 81.

5 THE CHAIRMAN: 81?

6 MR SINGLA: Yes. So this is her first report, which was in
7 support of the certification.

8 THE CHAIRMAN: Okay.

9 MR SINGLA: You will see why we say this is not a sufficient
10 hook for disclosure.

11 So 81 -- it is actually not a mention really at all,
12 but do you see a reference to sensitive?

13 THE CHAIRMAN: It is an oblique reference, really.

14 MR SINGLA: It is not really a reference at all, that is the
15 point I am making. So that is 81.

16 Then when you get to the bargaining model, so this
17 is in relation to loss, I think it is paragraph 349.

18 THE CHAIRMAN: Yes.

19 MR SINGLA: (b), and you will see in the fourth line:
20 "... which will be costly to them if they consider
21 this data sensitive."

22 THE CHAIRMAN: Where are we looking at? 349(b), is it not?

23 MR SINGLA: Yes:
24 "If agreement is reached Facebook can engage in
25 off-Facebook tracking and gather additional data which

1 it can use to monetise users more effectively. Users
2 give up data on their activity (which will be costly to
3 them if they consider this data sensitive and value
4 their privacy)."

5 So that is it. Okay?

6 So let us just take this in stages. At the time
7 this case was pleaded and Professor Scott Morton
8 provided her report, that is the totality of the
9 references to sensitive data. And I believe she has
10 a list of materials at the end of this report which she
11 wants by way of disclosure, and I think there is nothing
12 about sensitive data because I think she recognises that
13 this case is about off-Facebook Data.

14 THE CHAIRMAN: Then are you saying in Scott Morton 4 it does
15 not cover it?

16 MR SINGLA: That is right.

17 Just take it in stages. That is Scott Morton 1.
18 Then we have the joint expert note which I just brought
19 up on the screen, which is {C1/6.1}, that I believe was
20 prepared for the July CMC. Not a single mention of
21 sensitive data.

22 THE CHAIRMAN: Okay.

23 MR SINGLA: Then Scott Morton 4 for the November hearing
24 does not mention sensitive data.

25 Now, the question in those circumstances is: how can

1 it credibly be said that Requests 68 and 69 are
2 necessary for the fair disposal of the case?

3 THE CHAIRMAN: But you are saying that the data insofar as
4 it is sensitive data they would be getting it anyway.
5 What you are objecting to is the requirement that you
6 effectively split it out; is that right?

7 MR SINGLA: Exactly. It is a complete red herring in terms
8 of the substance of the case. But for disclosure
9 purposes -- I am not going to take time, but there are
10 tens of requests in relation to off-Facebook Data,
11 including specifically in relation to the value of
12 off-Facebook Data.

13 So the onus is on the Class Representative to say
14 all of those other requests are not sufficient, (a)
15 because sensitive data is such an important issue, which
16 I submit they cannot, but (b) they have to say they are
17 not going to get the material that they want from the
18 other requests. And the way they have pleaded it, this
19 is all a subset, as I say, of off-Facebook Data and it
20 is completely inappropriate, in my submission, to add to
21 this 120 list of Redfern requests to start adding in
22 more requests which go a level below or should be
23 covered by other requests, and that is why it is
24 problematic.

25 Then the letter that we sent this morning, so we do

1 say you should still strike this through. And it is not
2 a case, if I may say so, you said earlier in relation to
3 a different request that we should not have to do
4 a kitchen sink exercise and not much cost and so on,
5 should be spent. In my submission, actually you should
6 be cutting this off at the pass.

7 THE CHAIRMAN: You are saying they should not get this at
8 all, because in reality you say it is duplicative in any
9 event because they will get the off-Facebook Data. And
10 if this is just a subset of the Off-Facebook Data, and
11 you say it is going to be too much work for you to have
12 to separate this out as an individual topic.

13 MR SINGLA: If it is right as a matter of analysis, which
14 I submit it is, that this is pleaded as a subset, then
15 it falls away as a separate disclosure request.

16 It is actually quite simple. And the fact that
17 their own expert has had three opportunities to try and
18 justify this and has not taken them, we submit is
19 actually something the Tribunal should accept. And it
20 is not a case, as I say, of, well, have it in and do not
21 do very much work. We say no, it should be out.

22 THE CHAIRMAN: Okay, sit down for now and let us see what
23 you have got to say.

24 Reply submissions by MR CASHMAN

25 MR CASHMAN: Sir, the suggestion that it is duplicative or

1 already going to be captured in the data that we will
2 receive is not the way the objection has been framed to
3 date and it is plainly wrong.

4 These are the only two requests in the whole Redfern
5 Schedule by reference to sensitive data and they are not
6 focused on policies, tools; they are questions as to
7 what was actually happening as a matter of fact. That
8 is why matters such as "were you in fact able to infer
9 sensitive data" and "did you infer sensitive data" and
10 "if you did infer sensitive data, did you have consent
11 for it" are so important. They do not get brought in
12 anywhere else.

13 Now, I do not accept the characterisation of our
14 pleading by my learned friend. I have shown you, sir,
15 the Reply, which sets out very clearly why it is
16 relevant to the question of abuse and the question of
17 quantum.

18 As to the point that was made in the Tribunal's
19 second certification judgment -- in fact, perhaps we
20 could just look at that one more time. It is at
21 {A/15/11}.

22 THE CHAIRMAN: Yes, are you talking about 17.1 or another
23 paragraph?

24 MR CASHMAN: Yes, exactly.

25 THE CHAIRMAN: I have seen the caveat at the end of that

1 paragraph.

2 MR CASHMAN: The Tribunal was making a point there, looking
3 at a particular paragraph, 7, saying I am not sure how
4 sensitive data is clear in relation to that paragraph,
5 but floats perhaps it goes to value and the question of
6 loss. And indeed, by this judgment the Tribunal
7 acknowledged the claim had been pleaded in terms of
8 highly sensitive personal data and recognised that
9 sensitivity might go to questions of value and loss.
10 And that is exactly what we have gone on and pleaded,
11 have put in the summary -- which of course post-dated
12 this judgment -- and on the basis of which this claim
13 was certified.

14 So it is an issue for disclosure that has been
15 recognised and already determined, it has been framed in
16 a way to make it tractable for disclosure, and it is
17 fundamentally not an issue that falls under any other
18 request.

19 MR SINGLA: Can I just make one point. It is actually just
20 completely wrong --

21 THE CHAIRMAN: No, no, let him finish. Sorry.

22 MR CASHMAN: Sir, I think that is everything that I want to
23 say, subject to any need I might need to have for
24 a rejoinder.

25 MR SINGLA: I just want to correct one thing. We said in

1 THE CHAIRMAN: Yes.

2 MS FORD: Then Request 72 and 73, which are concerned with
3 user side market definition.

4 THE CHAIRMAN: Sorry, which are the other ones?

5 MS FORD: 72 and 73, which are concerned with user side
6 market definition.

7 THE CHAIRMAN: Yes, but the ones I am interested in are the
8 ones which deal with advertiser side.

9 MS FORD: Request 95 is one that has been identified as
10 supposedly duplicative, and that is concerned with
11 advertiser side market definition.

12 THE CHAIRMAN: Yes.

13 MS FORD: Professor Scott Morton has explained why in her
14 view none of those are relevantly duplicative of what is
15 being sought under this request. It is {C7/5/20},
16 please.

17 She starts --

18 THE CHAIRMAN: I will have to get it open first.

19 MS FORD: Sorry.

20 (Pause)

21 THE CHAIRMAN: So which tab is it in my thing? I had it
22 open a minute ago.

23 MS FORD: I am afraid I only know the Opus reference. I had
24 not appreciated that you, sir, were working on different
25 bundles.

1 THE CHAIRMAN: I have marked up my copy of the ... what is
2 the Opus reference again?

3 MS FORD: The Opus reference is {C7/5/20}. Tab 13, I am
4 told.

5 THE CHAIRMAN: That is absolutely fine. For a hearing like
6 this where there are not that many documents I tend just
7 to work from the thing, because this is quite fiddly and
8 I might have to make notes on the documents. So
9 although I am quite happy to work from electronic, for
10 a hearing like this which is particularly fiddly,
11 I would rather have my notes.

12 Okay, so Scott Morton, yes, fourth paragraph?

13 MS FORD: She starts at paragraph 84. At 86 she expresses
14 her understanding that Meta opposes the request on the
15 basis they say it overlaps.

16 THE CHAIRMAN: That is the duplication. That is the main
17 point they are running.

18 MS FORD: That is certainly our understanding, yes.

19 If you go over to the next page, she deals in turn
20 with the various supposed overlaps. So 87 is referring
21 to Request 50.

22 THE CHAIRMAN: Yes.

23 MS FORD: Concerning efficiencies. The point she makes
24 there is efficiencies is not synonymous with ability to
25 compete.

1 She says efficiencies may be one channel through
2 which Meta and et cetera of off-Facebook Data impacts
3 Meta's ability to compete, but there may be other
4 channels, for example through increased market power.
5 So no duplication there.

6 At 88, she deals with Request 72(b).

7 THE CHAIRMAN: I have read that. I have got that, yes.

8 MS FORD: 89 is to do with 73(c), and she explains
9 off-Facebook Data is not solely relevant to barriers to
10 entry and expansion.

11 Then 90 is the one that deals with barriers to entry
12 and expansion on the advertiser side, and she says the
13 same reasons: does not consider that that is duplicative
14 of Request 82.

15 In general terms we have absolutely heard what
16 the Tribunal has said about trying to avoid
17 de-duplication -- sorry, trying to avoid duplication and
18 trying to engage in de-duplication, and we have sought
19 to de-duplicate as much as possible.

20 THE CHAIRMAN: That is good, yes.

21 MS FORD: We say this is not a relevant example where there
22 is scope for further de-duplication. Of course if
23 documents happen in fact in practice to be responsive to
24 more than one search, in our submission that is not
25 a basis to decline to provide --

1 THE CHAIRMAN: The problem is if it is 100% duplicative, and
2 I thought the last two were, I have got no problem in
3 accepting that submission. If it is not 100%
4 duplicative, then you have got the two stools problem
5 and that you may not get it at all. And sometimes it is
6 useful to have a specific request even though it could
7 be said there is an element of duplication with other
8 requests.

9 MS FORD: Sir, yes, and we say that is the position in
10 relation to --

11 THE CHAIRMAN: Certainly when I went through this, my notes
12 made a distinction between this one and the last two
13 where I did feel that there was no real need for that to
14 be disclosed as a separate class.

15 At the end of the day we will have to see what comes
16 out of the exercise on the last two, and on this one
17 I will give a ruling in a minute. Okay.

18 Mr White again.

19 Submissions by MR WHITE

20 MR WHITE: Sir, yes. On Request 82 --

21 THE CHAIRMAN: I see Mr Singla always gives you the really
22 difficult ones. Singla is very impressive on this,
23 because he has identified the ones on which he is on
24 strong ground and so he argues those, and he has given
25 you some of the really difficult ones on this case.

1 MR SINGLA: I just picked up that I am very impressive,
2 I think, sir.

3 THE CHAIRMAN: You are very impressive, there is no doubt
4 about that, Mr Singla. You are a very effective
5 advocate, but I do not want to be misled by the quality
6 of your advocacy. At the end of the day I have to
7 figure out what the true position is.

8 Sometimes when I sit in this Tribunal I listen to
9 both of you and I think you are both right when I hear
10 you, but you both cannot be right so I have to come to
11 a view.

12 But Mr White you have the short straw. Let us hear.

13 MR WHITE: But I am not quite sure that is how this one came
14 to me, just to be fair to Mr Singla.

15 THE CHAIRMAN: Yes.

16 MR WHITE: Yes, we dispute this request in its entirety, and
17 it is because the totality of the material under various
18 other requests --

19 THE CHAIRMAN: Yes, that is a key issue, is it not?

20 MR WHITE: That is a key point. And the emphasis is on the
21 combination of the other requests. And just to
22 emphasise that on these sorts of requests we really have
23 sought to limit the requests that are brought before
24 the Tribunal to those where we really do think that the
25 totality of the material under the other requests which

1 we have already agreed really will provide ample
2 coverage and be directly on point with the sort of
3 analysis in this case on ability to compete.

4 There is perhaps one other introductory point on
5 Request 82 that, as we see it, does not sit happily as
6 a disclosure request at all. It is more an issue that
7 the experts are going to have to consider on the ability
8 to compete and the impact of data in that mix.

9 We are already providing substantial disclosure in
10 relation to that. I will not turn up specific
11 disclosure requests that Ms Ford has already taken you
12 to, but I will turn up just one or two that were not
13 gone through in the level of detail that I say --

14 THE CHAIRMAN: Okay, which ones are they?

15 MR WHITE: You have heard on Request 50, which I will not
16 turn up, documents on efficiencies in relation to
17 providing the user and advertiser side of Facebook in
18 relation to the receipt, collection, et cetera,
19 Off-Facebook Data.

20 So that is clearly directly relevant to the sort of
21 analysis in 82, and we are already providing that from
22 2005 to date, so 20 years. Then there is Request 72
23 which is on page 24.

24 THE CHAIRMAN: Yes.

25 MR WHITE: That is a long list of factors that go to Meta's

1 ability to compete on the user side of the market.

2 THE CHAIRMAN: Yes.

3 MR WHITE: Again, I will not read out each and every one of
4 them, but impressionistically the Tribunal can see that
5 there are a lot of factors to which we have agreed in
6 this request. There are a lot of materials for the
7 experts to consider on both sides.

8 Just to call out one or two points. At (c) one has
9 Meta's views, assessments of competitor platforms, their
10 evolution, competitive constraints. (e), one has
11 consideration and analysis by Meta of the features and
12 functionalities offered by competitors, and some of
13 those things will be informed of course by their
14 practices in relation to data.

15 But then at (h), importantly there is an express
16 reference to Meta's consideration or analysis of the
17 data on users that its competitors have been able to
18 collect and receive. Over and above 50 we have specific
19 references here to the data that competitors receive and
20 use and how that stands to impact user side markets
21 definition and competition analysis thereon.

22 There is then Request 73 immediately afterwards.
23 That is yet another long list of factors that go to
24 competition on the user side. Again, I will not call
25 out all of the detail, but there is consideration of

1 barriers to entry, competitive constraints, analysis
2 thereof.

3 Then at (h), Meta's assessment of whether the user
4 data received and used by its competitors is comparable
5 in quantity and quality to that received by Meta.

6 So, again, that is going to be directly relevant,
7 and clearly so in relation to the sort of analysis under
8 82 over and above all of the other disclosure that will
9 be given under that list.

10 THE CHAIRMAN: Yes.

11 MR WHITE: One then has on for the advertiser side, which
12 those two requests obviously concern user side, 95,
13 which Ms Ford referred to.

14 That is on page 29 in case it is helpful. It is
15 another long list. Again, consideration of competitive
16 constraints, barriers to entry, et cetera. And at (f),
17 material on Meta's assessment of the services offered by
18 competitors on the advertising side, including the
19 extent to which competitors offered complementary or
20 substitutable services which, in my submission, is
21 liable to capture the sort of material that one would
22 want to analyse when running an analysis on the ability
23 to compete in relation to data.

24 There are also other requests --

25 THE CHAIRMAN: And 50, is that on the user side as well?

1 MR WHITE: 50 concerns both sides of the market, so --

2 THE CHAIRMAN: Let me have a look.

3 MR WHITE: Yes, so that's on page 17.

4 THE CHAIRMAN: User and advertiser side.

5 MR WHITE: Yes, specifically in relation to off-Facebook
6 Data, as is the case in 82.

7 THE CHAIRMAN: Yes, yes got that.

8 MR WHITE: There really is quite a lot of material under
9 these other requests that is directly on point for the
10 additional material that they are seeking under 82.

11 So we say the totality of that disclosure will
12 provide both parties' experts with a substantial amount
13 to work with when they are producing their analyses on
14 the ability to compete.

15 Sir, as I said, there are also other requests which
16 I will not turn up that go to ability to compete. There
17 is 75, there is 96, which is also on the advertiser
18 side.

19 There is also a proportionality consideration which
20 is important for the Tribunal to take into account.
21 This is the letter that I referred to earlier with these
22 indicative hit counts, and I hope I can again refer to
23 it quite briefly.

24 THE CHAIRMAN: Yes, I have got it here. Let me get that,
25 yes.

1 MR WHITE: So page 28, back into this --

2 THE CHAIRMAN: Of the schedule, yes?

3 MR WHITE: Yes. What I hope you will see, sir, on page 28

4 is Request 50.

5 THE CHAIRMAN: Yes, okay, so --

6 MR WHITE: So Request 50, 83,000 document hits. Again, that

7 is email/work chat only, so not the total universe.

8 Then on page 45 you should see Request 73, 72,000

9 document hits.

10 THE CHAIRMAN: Yes.

11 MR WHITE: Email/work chat only. Then 54, page 54, one can

12 see Request 95, 60,000 document hits.

13 THE CHAIRMAN: Let me -- oh, I can see it now.

14 MR WHITE: Page 54, I think it is at the bottom, 95.

15 THE CHAIRMAN: What number are we looking at?

16 MR WHITE: Request 95 is what I am trying to pull up.

17 THE CHAIRMAN: Have I not got 60,000 on that?

18 MR WHITE: Yes, 60,000. Apologies if I misspoke. It is

19 60,000 document hits.

20 THE CHAIRMAN: Yes, okay.

21 MR WHITE: Yes. So the point is that on the requests that

22 Meta have already agreed that you have seen are directly

23 on point in my submission, large volumes of material

24 will already be provided. So it is important to us

25 whether it is really necessary, reasonable and

1 agreed is going to be insufficient or inadequate.

2 She simply says that on a semantic analysis of
3 individual parts of individual requests, and you will
4 see that in respect of some of the requests that she
5 calls out in her report she only refers to part of them,
6 certain of the sub-requests within 73, for example.

7 So that does not provide an answer to the
8 submissions that I have made, that it is the totality of
9 the material that is going to be provided under these
10 other requests that needs to be taken into consideration
11 by the Tribunal when assessing whether it really is
12 necessary, reasonable and proportionate to add yet
13 another disclosure request into the mix, where there is
14 already a lot of disclosure that is going to be provided
15 on precisely this issue.

16 For those reasons, sir, subject to any questions, we
17 invite the Tribunal to leave Request 82 out of the
18 final list.

19 THE CHAIRMAN: Okay.

20 DRAFT RULING on REQUEST 82 - sent for approval

21 REQUEST 101

22 Submissions by MS O'KEEFFE

23 MS O'KEEFFE: For the benefit of the transcript, Ms O'Keeffe
24 for the Class Representative.

25 THE CHAIRMAN: Ms O'Keeffe, you always have a very loud

1 voice. You do not need to worry, you can be heard
2 without the microphone.

3 MS O'KEEFFE: I am going to address you on hopefully the
4 final group of requests which relate to privacy and data
5 protection.

6 Meta's position has been throughout that data
7 protection and privacy are only tangentially relevant to
8 the Class Representative's pleaded case, and therefore
9 that Meta should either give no disclosure for some of
10 these requests on which I am about to address
11 the Tribunal, or that it should give disclosure of only
12 limited scope.

13 Now, so far in the context of certain requests
14 relating to data protection and privacy legislation,
15 the Tribunal has already determined that these are
16 relevant to the Class Representative's claim. And
17 unless the Tribunal would find it of assistance, I do
18 not propose to cover that ground again.

19 But I will recall the submissions of my learned
20 leader Ms Ford during the previous hearing first
21 explaining the relevance of GDPR to the Class
22 Representative' claim, which for the Tribunal's note is
23 at page 64 --

24 THE CHAIRMAN: Have I not covered this already, have not I,
25 on some of this?

1 MS O'KEEFFE: I am grateful.

2 THE CHAIRMAN: Which request is it under?

3 MS O'KEEFFE: So the first request is Request 101, sir.

4 THE CHAIRMAN: No, the previous request where I dealt with
5 that.

6 MS O'KEEFFE: I am afraid I do not have that to hand.

7 THE CHAIRMAN: Okay.

8 MS O'KEEFFE: But it was at {A/39/17-18}.

9 THE CHAIRMAN: Can you, Ms Ford, help? Can you pick out
10 which request number that falls under? Because
11 I remember dealing with this. Let me have a look.

12 MS FORD: I believe it was the initial clump of requests at
13 the beginning of the Redfern, 3 to 6.

14 THE CHAIRMAN: Let me look.

15 (Pause)

16 Which requests should I be looking at then? We have
17 got -- I'm still trying to find it in the draft ruling.

18 MS FORD: Requests 4 to 6 were the ones where they were
19 resisted, amongst other things, on the basis of
20 a suggestion that the regulatory proceedings that we
21 were seeking disclosure of were essentially peripheral.

22 THE CHAIRMAN: Yes, I remember that, yes.

23 MS FORD: And I addressed the Tribunal in some detail on
24 reasons why the privacy legislation underpinning those
25 regulatory proceedings was clearly relevant, and

1 the Tribunal gave a ruling and it was satisfied that it
2 was.

3 THE CHAIRMAN: Yes.

4 MS FORD: The ruling on the legislation then feeds into the
5 consideration of these subsequent requests in the sense
6 that the Tribunal has already determined that these
7 legislative materials, essentially these legislative
8 provisions, are of relevance to the Class
9 Representative's claim.

10 THE CHAIRMAN: Okay, yes, I have got it. Thanks very much.

11 MS O'KEEFFE: I am grateful.

12 So, sir, that first submission that I wanted to
13 record was in respect of the GDPR. But the executive
14 set of submissions was in respect of the Digital Markets
15 Act and DMA where essentially it is the same story in
16 relation to the same requests. The reference to the
17 transcript for that one, for the Tribunal's note, is at
18 {A/39/19-22}.

19 But in both cases the reasoning essentially boils
20 down to two key points. First of all, that Meta's
21 treatment of users' data and privacy can be a vital clue
22 to establishing abuse, and these pieces of legislation
23 provide useful sets of standards against which Meta's
24 treatment of data and of privacy can be compared.

25 Secondly, that Meta criticises the Class

1 Representative's counterfactual as being misaligned with
2 Meta's responses in the factual to legislation like the
3 GDPR and DMA, and in particular Meta's introduction of
4 less personalised advertising models like subscription
5 for no ads which they point out did not involve payments
6 to users.

7 Now, the main pleading references to that which
8 Ms Ford showed the Tribunal at a previous hearing are
9 paragraphs 102 of the Claim Form at {B/11/70}, and
10 paragraphs 175(c) (iii) and 263(b) (iv) of the Defence,
11 which are at --

12 THE CHAIRMAN: You are too quick. So 102?

13 MS O'KEEFFE: Yes, 102 of the Claim Form, sir.

14 THE CHAIRMAN: Yes. 175(c) (iii).

15 MS O'KEEFFE: Yes, sir. And then 263(b) (iv) as well of the
16 Defence.

17 THE CHAIRMAN: Yes.

18 MS O'KEEFFE: I do not propose to turn those up at this
19 stage unless the Tribunal would find it of assistance.

20 THE CHAIRMAN: I might do.

21 MS O'KEEFFE: Very well. In that case could we please start
22 at 102 of the Claim Form. This is where we plead that,
23 at (ii) there:

24 "The PCR understands that the proposal [ie to bring
25 in payment of a monthly subscription fee to avoid

1 personalised advertising] is intended to resolve
2 concerns about user consent pursuant to the GDPR."

3 Then if we could turn up 175(c)(iii), which is at
4 {B/12/110}. Here, we see --

5 THE CHAIRMAN: I am just trying to find --

6 MS O'KEEFFE: Sorry, sir.

7 THE CHAIRMAN: Should be B/11, but yes, on my one. So 110.

8 MS O'KEEFFE: Page 110, sir, paragraph (i) just at the top
9 there.

10 THE CHAIRMAN: Okay. Are we still looking at the Claim
11 Form?

12 MS O'KEEFFE: The Defence, sir.

13 THE CHAIRMAN: We are looking at the Defence, okay, you are
14 right. So Claim Form, we have got Defence. And that is
15 page 110, yes?

16 MS O'KEEFFE: Yes, sir.

17 So the key point here, sir, is that Meta denies at
18 the top there that subscription for no ads was intended
19 to resolve user concerns about user consent pursuant to
20 GDPR. They suggest in particular that SNA was
21 introduced for a variety of reasons, one of which
22 included the DMA. But we are not told what those other
23 reasons are, and that is a point that will come up again
24 in respect of some of the later requests. I just flag
25 it at this stage.

1 Then if we could also turn up paragraph 263(b) (iv),
2 which is on page 150 of the Defence {B/12/150}.

3 THE CHAIRMAN: Yes.

4 MS O'KEEFFE: I think that should be just over the page on
5 the screen, please. Thank you.

6 Here we have the pleading that -- well, Meta's
7 pleading that the Class Representative's counterfactual
8 is misconceived because they say Meta has never
9 negotiated or bargained with its users, and they give
10 the example of SNA again.

11 THE CHAIRMAN: It is a pretty important part of their case,
12 really.

13 MS O'KEEFFE: Yes, sir, it is.

14 Now, at the previous hearing Meta took issue with
15 this second point about the counterfactual on the basis
16 that Meta were not pleading positively that the SNA is
17 what would have happened in the counterfactual. And the
18 reference for that is page 79, lines 9 to 10 of the
19 first day of the last hearing, {A/9/21}.

20 Our position is that makes no difference. It is
21 plain that subscription for no ads is relevant both to
22 the assessment of the counterfactual and, as we said,
23 for establishing abuse. That is why in addition to
24 their pleadings, Meta also make this a central part of
25 their challenge to Professor Scott Morton's methodology

1 at the certification stage.

2 There are various references to that in the reply
3 column to Request 105. I could also either show
4 the Tribunal the extent of reliance on SNA at the
5 certification stage, or just provide the references as
6 the Tribunal prefers.

7 THE CHAIRMAN: Okay. So this argument applies to
8 requests -- let us just get the number. So it is 102.

9 MS O'KEEFFE: 101 through to 106, sir.

10 THE CHAIRMAN: Let me just go back. So 101 to 106, yes?

11 MS O'KEEFFE: Yes, sir.

12 THE CHAIRMAN: Then it is a new -- that is the end of that.

13 So we really need to resolve this overriding issue.

14 MR SINGLA: (Inaudible) characterise our position as
15 depending on the overriding issue.

16 THE CHAIRMAN: The thing is, what we could do is we could
17 look at this overriding issue, come to a view on it,
18 then you have your lunch break and then you can see to
19 what extent that resolves some of the issues between
20 you, and then we can focus on the specific wording.

21 MR SINGLA: I do not think it will work like that.

22 THE CHAIRMAN: Okay.

23 MR SINGLA: We have obviously heard what you said about some
24 of these pleading issues before. So our position on 101
25 through to 106, yes, we do say this is all tangential,

1 et cetera, but we actually have points about duplication
2 and so on.

3 THE CHAIRMAN: So what we could do, we could deal with 101,
4 for example, and within that deal with the sort of
5 tangential point, and then we have our break. Then that
6 issue is parked, at least resolved, for when we come
7 back in the afternoon to finish the rest.

8 You know, I do need time to go through various other
9 things apart from this Redfern Schedule, so we do need
10 to finish this Redfern Schedule pretty soon after lunch,
11 because we have got a lot of stuff to go through.

12 MR SINGLA: I know. None of what my learned friend has just
13 been saying actually arises under 101 and 102. That is
14 the simple point about whether it should be UK and
15 off-Facebook Data. So I think they are trying to
16 re-argue points that we have already taken on board what
17 you have said.

18 MS O'KEEFFE: Sir, if I could just explain how it is
19 relevant, which is that the basis upon which
20 the Tribunal has already ordered certain requests in
21 respect of, as I say, privacy and data protection
22 legislation has included pieces of legislation that are
23 EU wide. And the fact that those were EU pieces of
24 legislation has not meant that they are not relevant to
25 the claim. Instead, we say, reading that through, it

1 should follow that these requests that concern Meta's
2 approach to privacy and data protection beyond just the
3 legislation should also be defined by the same
4 parameters and should involve disclosure on an EU level.

5 That essentially is the first point about the UK
6 Users versus EU issue that my learned friend has just
7 identified in relation to the first Request, 101.

8 So if I could make those submissions further, sir.

9 THE CHAIRMAN: Okay. Let us just try and be really simple.
10 Let us just argue 101, because whatever we rule on 101
11 will be fairly helpful for 102, for obvious reasons.

12 So the question is: there is a dispute between you
13 and the other side as to whether or not we should look
14 at data protection in the EU, simple as that.

15 MS O'KEEFFE: Yes, sir.

16 THE CHAIRMAN: What is your simple point on that?

17 MS O'KEEFFE: Sir, you have my first simple point on that,
18 which is that it would track the boundaries of the
19 legislation that we say is relevant to data protection
20 and privacy. It would give us only a partial picture to
21 have that legislation at the EU level but not the
22 general approach at the EU level towards privacy and
23 data protection.

24 The second short point is that it reflects the terms
25 of the IFD from the previous hearing. So if we could

1 please turn up {D/11/40}, we see there IFD 30(1), which
2 is the IFD on which this request is based. It asks:

3 "What is Meta's approach to user privacy and data
4 protection in the UK/EU in relation to off-Facebook Data
5 ..."

6 And it may also be worth reading, sir, IFD 30(2)
7 which relates to the next Request, 102.

8 THE CHAIRMAN: Yes.

9 MS O'KEEFFE: Sir, as mentioned, this same issue does arise
10 in the context of Request 102 as well. I am in
11 the Tribunal's hands as to whether it would make more
12 sense to --

13 THE CHAIRMAN: Let us just deal with 102.

14 MS O'KEEFFE: I am grateful.

15 So the next Request, 102 --

16 THE CHAIRMAN: Sorry, let us just finish 101, because we
17 will not be able to finish 102 by ...

18 MS O'KEEFFE: Sir, those are our submissions.

19 Submissions by MR SINGLA

20 MR SINGLA: They are actually connected.

21 THE CHAIRMAN: They are connected, but let us look at 101.

22 MR SINGLA: There is a very short point on 101, if you are
23 just looking at that. So the dispute is whether it
24 should be UK or extend to the EU, as to which we say
25 this case concerns UK Users and we do not actually

1 accept that this case concerns privacy legislation and
2 so on. But I am not looking to re-argue that. But one
3 does have to start this with a degree of common sense.
4 I mean, it is not actually a case about privacy and data
5 legislation and it is certainly not a case about the EU,
6 and moreover the reason I said that we have some
7 duplication type points in this part of the schedule,
8 you will recall that under Requests 4 and 5 you have
9 already ordered disclosure in relation to a DMA
10 investigation under Article 5.2 of the DMA.

11 I could just perhaps show you -- I think you were
12 looking in the Agreed Redfern, the now ordered Redfern.
13 If you go back to Requests 4 and 5, which we did argue
14 about on the last occasion, but what you ordered, it is
15 page 2, I think, of the latest Agreed Redfern. Do you
16 see Redfern Schedule 4, F, the European Commissions
17 case, DMA, and related legal proceedings.

18 Then in relation to 5, you will see how broad that
19 really is, because it is all submissions, responses,
20 underlying documents and so on.

21 So that having been ordered and this being a case
22 about UK competition law in connection with UK Users, we
23 say it is completely appropriate for 101 to be limited
24 to UK, otherwise this is roving into an EU privacy case
25 which is just not pleaded at all. That is just not what

1 the case is about.

2 THE CHAIRMAN: Okay.

3 DRAFT RULING on REQUEST 101 - sent for approval

4 THE CHAIRMAN: We will then look at the others after lunch,
5 and then we have got a number of topics that we will
6 want to deal with and hopefully we should be able to
7 finish today. But we will have to speed up a bit, and
8 I do not really want to spend more than absolutely
9 necessary on the remaining requests.

10 So if the parties can think about those requests
11 over the lunch break and see what can be agreed and what
12 might not be agreed in the light of that ruling, that
13 would be great. But we do have other issues which we
14 need to work out this afternoon.

15 If the parties can consider what they want as part
16 of their shopping list for rulings this afternoon,
17 perhaps they can agree a list so we finish this
18 Redfern Schedule, and then Ms Ford can tell us what she
19 considers, and Mr Singla, anything that Mr Singla wants
20 to be included should be included.

21 So you give me a list of the things that you both
22 feel need to be covered and we can map out the timing
23 for the rest of the day. So hopefully we will finish
24 this by 2.30 and then we will go and look at what issues
25 both of you want to be dealt with and we will just deal

1 with them one by one. And once we have dealt with your
2 issues, we can then deal with my issues.

3 Thank you very much.

4 (1.02 pm)

5 (The short adjournment)

6 (2.00 pm)

7 (Proceedings delayed)

8 (2.06 pm)

9 REQUEST 102

10 Submissions by MS O'KEEFFE

11 THE CHAIRMAN: Yes, Ms O'Keefe.

12 MS O'KEEFFE: Sir, if we could turn then to Request 102,
13 please.

14 THE CHAIRMAN: Have you not been able to agree any common
15 ground with your opposite number?

16 MS O'KEEFFE: Sir, we have not discussed it, but for our
17 part we consider that it follows through to Request 102.
18 And essentially there are two disputes under Request
19 102.

20 The first relates to the UK Users point, which we
21 say follows through from your previous ruling, sir, on
22 Request 101. And the second is this point about data
23 including but not limited to off-Facebook Data, which we
24 say, sir, follows through from the Tribunal's ruling on
25 Request 55 earlier today.

1 Should Meta be seeking to distinguish this request
2 from those previous rulings, then we would ask for a
3 rejoinder, sir. But other than that, in the interests
4 of timing we propose only to deal with it at that level
5 of detail for now.

6 THE CHAIRMAN: Okay.

7 Submissions by MR SINGLA

8 MR SINGLA: We do accept that the UK/EU point does follow
9 through, but I do not accept that 102 should go wider
10 than OFBD. So one has to look at these requests in
11 turn. It is not really good enough to say you have
12 already dealt with this, because I do not think you have
13 dealt with this particular point, because 102 is couched
14 in terms of the approach to privacy and data protection
15 and you will see they are going beyond off-Facebook
16 Data, and that is the point we just do not accept.

17 Because as I keep saying, this case is about
18 off-Facebook Data, and even if you take the view, which
19 we do not accept, that privacy and data protection is
20 relevant, why should it go beyond the data that is the
21 subject of the claim? We have given some assurance in
22 the sense that we have said that we will not withhold
23 documents if they go beyond off-Facebook Data. If there
24 is some material which is relevant to off-Facebook Data
25 but goes beyond, they will get that material.

1 So we really do say this is an example of a fishing
2 expedition and it does not, in my submission, follow
3 from what you said on 55, because you have to read the
4 preamble to understand what the request is about. So
5 you have to take a fresh view on that.

6 Reply submissions by MS O'KEEFFE

7 MS O'KEEFFE: Sir, in that case if I may just address
8 the Tribunal about this point on off-Facebook Data.

9 The Tribunal is by now very familiar with
10 Professor Scott Morton's methodology for calculating the
11 value of off-Facebook Data, which has essentially two
12 inputs: one being the value to Meta in terms of what it
13 would have been prepared to pay essentially; and then on
14 the other hand being what price users would have been
15 prepared to accept.

16 That is particularly important for this Request 102
17 which, as we saw when we were looking at IFD 30(2) just
18 before lunch, this request concerns Meta's assessments
19 of the importance of privacy to users, the costs and
20 burdens to users of sharing data, and also the price
21 they would need to be paid to share their data, not only
22 off-Facebook Data but also on-Facebook Data.

23 Now, the Tribunal will also recall that IFD 30(2)
24 did include this wording that we are proposing on the
25 Class Representative's formulation, and then in terms of

1 this essentially being the same issue, we submit, as
2 what came up under Request 55(b), the Tribunal will
3 recall Professor Scott Morton's evidence that she needs
4 not only the disclosure in respect of the commercial
5 value to Meta of off-Facebook Data, but also the
6 disclosure of that value of on-Facebook Data in order to
7 be able to infer or to cross-check the figures that she
8 is seeking to calculate.

9 In particular, she explained in the passage that we
10 saw earlier that she does not anticipate that Meta's
11 internal estimates will have been produced on the basis
12 of what she needs to define as off-Facebook Data for the
13 purposes of the Class Representative's claim. And we
14 say that is a perfectly sensible assumption,
15 particularly in light of some of the emphasis that Meta
16 has placed so far on alternative concepts like
17 Third Party Activity Data, et cetera.

18 Their internal assessments are unlikely to have been
19 calculated on the basis of off-Facebook Data as defined
20 by the Class Representative.

21 Just to give a couple of examples from the pleadings
22 and from the reports, so first of all,

23 Professor Scott Morton's first report --

24 THE CHAIRMAN: Yes.

25 MS O'KEEFFE: I am grateful.

1 DRAFT RULING on REQUEST 102 - sent for approval

2 THE CHAIRMAN: We now go to 103.

3 REQUESTS 103 and 104

4 Submissions by MS O'KEEFFE

5 MS O'KEEFFE: Yes, sir, and we would suggest that 103 and

6 104 be dealt with together, because 104 essentially

7 deals with changes to 103.

8 THE CHAIRMAN: Yes, okay.

9 MS O'KEEFFE: So this Request 103 concerns material

10 representations issued by Meta to UK Users and to UK

11 regulators relating to privacy, data protection and

12 off-Facebook Data, and this is a request that Meta

13 resists in its entirety.

14 Now, the first point to note is that the Class
15 Representative has confined this request to a very

16 narrow scope. So it concerns only material

17 representations, only to UK Users and regulators, and

18 only concerning off-Facebook Data.

19 Now, as to representations to users, we have good
20 reason to suspect that this material exists and can be

21 readily retrieved. So if we could turn up {D/12/45},

22 please, this is the table of custodial disclosure that

23 was provided in the Klein proceedings.

24 So the final row on this page, sir, concerns data
25 collection and use policies and practice. Picking up

1 the final sentence that goes over the page, we see:

2 "This category also includes documents regarding
3 Meta's public statements about its data collection and
4 use practices."

5 Then if we could turn just to page 31 of this
6 document as well, please {D/12/31}. There at 4.32.1 in
7 subparagraph (B), we are told that there is a repository
8 called CMS which centrally stores Meta's content for
9 external facing webpages.

10 Now, just to head off the point about duplication,
11 Meta has suggested in correspondence that this request
12 is duplicative insofar as it relates to representations
13 to UK Users, and that is at {E2/381/5}. So at
14 paragraph 15b --

15 THE CHAIRMAN: What is the date of this letter?

16 MS O'KEEFFE: I believe it is from 10 December, sir, and
17 I think there was further correspondence this morning,
18 but I did not spot any further --

19 THE CHAIRMAN: Okay, and what paragraph?

20 MS O'KEEFFE: Paragraph 15b, sir.

21 THE CHAIRMAN: Yes, so it is just basically saying they are
22 duplicative.

23 MS O'KEEFFE: Yes, sir. But all of the requests that they
24 identify relate only to communications about specific
25 terms or tools and they do not capture all material

1 table, this only concerns communications about the
2 Business Tools Terms.

3 Then Request 58, which is at {D/22/20} of the agreed
4 table, only refers to the specific options and tools and
5 so on that have been identified in the previous
6 requests.

7 So, sir, that is why we say in terms of users it is
8 non-duplicative.

9 Turning to representations to UK regulators, if we
10 could please turn to the transcript of the third CMC,
11 which is at {A/29/176}, and this was the CMC about
12 issues for disclosure.

13 THE CHAIRMAN: Yes.

14 MS O'KEEFFE: So we can see a discussion there from line 14
15 that is related to IFD 30(3), which is the IFD that
16 underlies this request.

17 At line 18, Meta submit that they, as in we, the

18 CR --

19 THE CHAIRMAN: Is that the one that became 30(2), or is that
20 the same as at 30(3)?

21 MS O'KEEFFE: It should be 30(3), sir.

22 THE CHAIRMAN: Okay, so yes.

23 MS O'KEEFFE: So from line 14, where it says:

24 "There is another point on 30(3)."

25 Then picking up at line 18:

1 "... they want representations to regulators, and we
2 object to that, because it is quite hard to
3 understand --"

4 Then at line 25 at the end of that:

5 "... insofar as any issue does exist [then if we
6 could go over the page, please] is about whether Meta
7 was transparent vis-à-vis users in relation to
8 privacy-type points."

9 You, sir, then point out at line 3 {A/29/177} that
10 what Meta have said to regulators could be highly
11 relevant, and when asked relevant to what, you explain
12 from line 6:

13 "... to the issues in the action, because that
14 really could cut across the pleadings."

15 We respectfully agree with that.

16 We are also mindful of the Tribunal's ruling in
17 respect of Request 6 at the last hearing, which
18 Request 6, to remind the Tribunal -- or I could pull it
19 up if it would be helpful to look at. It is at
20 {D/17/10} as it was then formulated.

21 That sought submissions, reports, studies, analysis
22 and underlying documents disclosed by Meta to the ICO,
23 the Irish Data Protection Commission and the European
24 Data Protection Board, and any correspondence with those
25 regulators relating to off-Facebook Data.

1 If we could turn, then, to {A/41/7}, which is
2 paragraph 22 of the Draft Rulings from the last CMC,
3 the Tribunal declined to order disclosure in respect of
4 Request 6, essentially on proportionality grounds, that
5 not all of those regulators had been referred to in the
6 pleadings and that the communications and submissions
7 sought were unlikely to have anything more that is of
8 significant assistance over and above what was being
9 provided in the six specific investigations that had
10 been identified in Requests 4 and 5.

11 Now, as explained, this Request 103 is first of all
12 restricted to material representations, but also only to
13 UK regulators relating to privacy and data protection.
14 While one of the investigations covered by Request 4 is
15 a CMA investigation, that was a competition
16 investigation and none of the other investigations
17 covered by Request 4 involved UK privacy regulators or
18 UK regulators at all.

19 So Request 103 we say is therefore likely to capture
20 material that does go over and above the disclosure
21 under Requests 4 and 5.

22 We say this point has even more force in light of
23 Meta's submissions on Request 6 at the time. So if we
24 could please turn to {A/39/34}.

25 THE CHAIRMAN: On 103, are you able to be more specific as

1 to which regulators and which investigation you are
2 talking about?

3 MS O'KEEFFE: If I could just take instructions on that,
4 sir.

5 THE CHAIRMAN: Yes.

6 (Pause)

7 MS O'KEEFFE: Sir, is that one we could take away to come up
8 with a closed list, that we would consider including,
9 for example, the ICO and the CMA insofar as they also
10 have the DMU within their umbrella? Those are the first
11 two that spring to mind.

12 THE CHAIRMAN: If I am going to order this, I want it to
13 have a list of which investigations, which regulators in
14 respect of what that you are talking about, because at
15 the end of the day the team is going to go out and find
16 something. If it is too woolly and too broad you may
17 end up getting less rather than more. The more guidance
18 you can give to the team that is going to do the
19 exercise, the better.

20 At the moment I am inclined to order 103, but I do
21 want you to be specific about which regulators and which
22 investigations and in respect of what. And if you
23 cannot be more specific, you are not going to get it.
24 So you have to be specific.

25 MS O'KEEFFE: Well, sir, perhaps if we could start with

1 So if your team is going to do the exercise
2 properly, they need to know what they are looking for.

3 MR SINGLA: That is right. I mean, that must be right. We
4 do actually submit that in light of where you got to on
5 Request 6, we submit this should be struck through
6 altogether, because we say this is just an attempt to
7 re-argue and get via the back door the same material.

8 So we had a long debate about the other
9 investigations, and where you ended up ruling -- I can
10 just show you the Redfern if that is helpful, but
11 I think --

12 THE CHAIRMAN: Yes.

13 MR SINGLA: If you have the Agreed Redfern, you will see how
14 much they are getting under 3 to 6.

15 THE CHAIRMAN: I saw that, yes. I am conscious of the --

16 MR SINGLA: Including a DMA investigation.

17 Then what you said on 6 was in light of all of
18 the -- we just saw the ruling on the screen -- material
19 they are getting on 3 to 5, 6 is not going to be of any
20 material assistance over and above that.

21 We respectfully agree with those comments and we do
22 not follow really why the analysis should be any
23 different here. So our primary position is actually
24 this should be struck through.

25 I will come to UK Users in a moment. But on the

1 representations to regulators it is tantamount to
2 re-running Request 6. And if Request 6 is out, there is
3 actually no logical reason why this should be in. If it
4 is in, it must be confined to those two regulators. But
5 in my submission, even allowing it in on that basis was
6 essentially widening where you -- because you looked at
7 3 to 6 in the round last time. That was the whole piece
8 on other investigations and other proceedings. And you
9 looked at it essentially -- you heard submissions, I
10 think, in the round and certainly on the ruling you
11 reached a view in light of all of the material.

12 This is now representations to regulators in another
13 guise.

14 THE CHAIRMAN: Well ...

15 MR SINGLA: One has to remember -- again, sir, I am
16 conscious you want to sort of get through.

17 THE CHAIRMAN: We only have five minutes left.

18 MR SINGLA: I understand, but can I just show you, for
19 example, look at Requests 17, 26, 44. I mean, these
20 requests, we do not accept privacy is at all central to
21 this case, but be that as it may, just look at the
22 voluminous disclosure which will now be provided under
23 17, 26, the impact of GDPR, 44, DMA, 52 and GDPR, 59,
24 DPA -- sorry, DMA and GDPR, 64, 67, 101 --

25 THE CHAIRMAN: You rely on 4 and 5 as well, do you not?

1 MR SINGLA: Yes.

2 THE CHAIRMAN: I am just doing the list. 4, 5, 17, 26 --

3 MR SINGLA: No, no, so they are two different submissions.

4 The first submission is this is an attempt to
5 re-argue 6, which you knocked out because you ruled
6 against us on 4 and 5. And then the second point, which
7 is a separate point, is this is not material about
8 representations to regulators, but insofar as they are
9 fishing around for privacy material, look at what they
10 are going to get under 17, 26, 44, 59, 64, 67 and now
11 101 and 102.

12 They are just not addressing the right question,
13 which is: is this going to be additive to that which
14 they are already going to get? And in my submission by
15 the time one gets to 100 in the Redfern Schedule that
16 really ought to be the question the Tribunal is asking
17 itself.

18 That is the regulator part of it.

19 Then on the representations to users, we say again
20 this is actually misconceived, because the starting
21 point is this is not a claim based on misrepresentation.
22 The alleged abuses, you might be forgiven for not being
23 reminded what the abuses actually are. It is an unfair
24 trading term and an unfair price.

25 So this is not a case about a misrepresentation to

1 users. In fact, the Tribunal said in its first
2 certification judgment that sort of case could not be
3 run.

4 So it is not a misrepresentation case. And in any
5 event they are already going to receive voluminous
6 disclosure under Requests 7, 10 and 21. So 7 is about
7 the Terms of Service, 10 is about external announcements
8 or communications issued by Meta to users on the Terms
9 of Service, and 21 is external announcements issued by
10 Meta to users on the BTTs, and 58 is external
11 announcements.

12 My learned friend's point here was, well, we do not
13 accept they are duplicative because they are confined to
14 the terms. Well, I am afraid to say that is because the
15 case is an unfair trading term case. It is hardly
16 surprising that the disclosure fits the case. So again,
17 they are just fishing around for disclosure that is just
18 not tethered to the allegation.

19 So that is what we say about UK Users. That should
20 be struck through; it is just not material to the case.

21 THE CHAIRMAN: Okay.

22 Yes.

23 Reply submissions by MS O'KEEFFE

24 MS O'KEEFFE: Sir, just quickly on the representations to
25 users, the Tribunal already has my submissions about the

1 THE CHAIRMAN: Okay, thank you.

2 Mr Singla?

3 DRAFT RULING on REQUEST 104 - sent for approval

4 THE CHAIRMAN: Next one.

5 REQUEST 105

6 MS O'KEEFFE: I am grateful, sir. Request 105 concerns

7 matters --

8 THE CHAIRMAN: I see that you have amended that in the light

9 of what we had said before. And so 105, let us see what

10 Mr Singla says about 105.

11 Mr Singla?

12 Submissions by MR SINGLA

13 MR SINGLA: I think (inaudible) that it is duplicative.

14 I need to take you back to request -- if we have a look

15 at Request 28.

16 THE CHAIRMAN: Let us have a look at this, so we are on 105.

17 MR SINGLA: Part of 28 is agreed, so I think I can make the

18 submission.

19 THE CHAIRMAN: Let me go back. So 28 is one of the ones

20 that we have dealt with.

21 MR SINGLA: We parked 28.

22 THE CHAIRMAN: And we were going to come back to?

23 MR SINGLA: We are, unfortunately. But this aspect of 28 --

24 THE CHAIRMAN: Before I forget, where are we on 28?

25 MR SINGLA: We are going to come back to it. There are a

1 couple of points I think outstanding.

2 THE CHAIRMAN: This afternoon, you mean?

3 MR SINGLA: Ideally, yes. I mean, these are very, very
4 short points now.

5 THE CHAIRMAN: Okay.

6 Ms Ford.

7 Submissions by MS FORD

8 MS FORD: So I can simply tell you it is the point about
9 whether it should be confined to the Meta Entities
10 testing and the point about whether it should be insofar
11 as they relate to off-Facebook Data in respect of three
12 of the sub-requests only, which we say is not
13 appropriate.

14 Those are the two points that remain in issue.

15 THE CHAIRMAN: That will not take too much time.

16 Reply submissions by MR SINGLA

17 MR SINGLA: No. I imagine we only need five or ten minutes
18 now to wrap everything up. The bit of 28 that I wanted
19 to show you is agreed.

20 THE CHAIRMAN: Okay, let us have a look at that.

21 28, which one are you --

22 MR SINGLA: I am focusing -- it is 28(g).

23 THE CHAIRMAN: What, strategies to --

24 MR SINGLA: Exactly.

25 THE CHAIRMAN: Okay.

1 MR SINGLA: Meta will already be conducting searches in
2 relation to their strategies.

3 Then if you also could look at 44 and 67, if you
4 have not looked at those recently.

5 THE CHAIRMAN: Yes. So I go back.

6 MR SINGLA: You have to go back to the agreed schedule, 44
7 and 67. Instead of taking up too much time, the best
8 example of duplication is in fact 28(g). So maybe it is
9 just easier if you look at 28(g) and you have that side
10 by side with 105.

11 THE CHAIRMAN: Let me get that. Let me get back to that.

12 MR SINGLA: Yes.

13 (Pause)

14 THE CHAIRMAN: Okay.

15 MR SINGLA: So just looking at 105, (a), commercial,
16 strategic and/or other business assessment or strategy
17 in relation to GDPR and 5(2). We say that is obviously
18 duplicative of 28(g). We say something similar in
19 relation to (b). Then (c) again refers to strategies.

20 So we actually say this whole thing should be struck
21 through on the basis it is duplicative. But if you are
22 against me on that, on any view, (a) and (c) are
23 duplicative.

24 THE CHAIRMAN: Where do I find (c) in -- I am just looking
25 at it. That is also (g), is it?

1 MR SINGLA: Yes, that is the submission. Because can you
2 see: the strategy Meta considered and/or adopted and
3 what steps it took to respond to or mitigate the impact
4 of the same?

5 THE CHAIRMAN: Yes, I can see that.

6 MR SINGLA: Yes. So that is the point. We actually say all
7 of this should go, because (a) and (c) are entirely
8 overlapping with 28(g), and that that should be really
9 the long and the short of it.

10 On any view, if you are minded to include anything
11 here, it should be (b), and that should be limited to
12 the GDPR and Article 5.2. So it needs to be narrowed.
13 And we have provided some narrowed wording which I can
14 show you in a moment if you are against me on the main
15 point.

16 I mean, again, these are back end requests of the
17 Redfern Schedule which duplicate what has gone before.

18 THE CHAIRMAN: Yes, Ms O'Keefe.

19 Submissions by MS O'KEEFFE

20 MS O'KEEFFE: Sir, the short point on why this isn't
21 duplicative is that the unique thing about this request
22 is its focus on the commercial assessment of these
23 pieces of legislation, and especially the actual and
24 predicted effect, including financial effect of these
25 pieces of legislation. And that is why originally in

1 its original formulation it specified a search of the
2 accounting and finance repositories. In light of the
3 Tribunal's indications we have sort of given Meta free
4 rein to decide where to look for this information, but
5 the key point that this request gets at is this idea of
6 actual and predicted effect. And that is not covered by
7 the other requests that relate to either general
8 strategy, as in 28(q) which, now (g), my learned friend
9 has shown you, nor does Request 44 cover it, because
10 that is limited only to steps taken in compliance with
11 the legislation before designing specific tools
12 identified at Request 43.

13 And similarly, Request 67 only concerns
14 consideration of privacy and data protection and not
15 consideration of commercial impact or effects. That is
16 why we say this is non-duplicative, sir.

17 I could also show the Tribunal
18 Professor Scott Morton's evidence as to why this is
19 particularly important, but I am in the Tribunal's hands
20 as to whether that is a worthwhile use of time.

21 DRAFT RULING on REQUEST 105 - sent for approval

22 THE CHAIRMAN: We have now got 106, which you say is
23 relevant to the counterfactual.

24 REQUEST 106

25 MS O'KEEFFE: Yes, sir, we do.

1 point, that it could go either way.

2 As you know, I have got a completely open mind as to
3 who is right on these issues because it really does need
4 to be worked out.

5 MR SINGLA: The problem is, I do not actually accept this is
6 going to be relevant for disclosure purposes. Can
7 I just say two things.

8 The first is --

9 THE CHAIRMAN: It could be relevant if their case does not
10 work.

11 MR SINGLA: No, no, that is what I mean. Can I just show
12 you Request 120.

13 THE CHAIRMAN: Yes, let us have a look.

14 MR SINGLA: Because we do say this is duplicative.

15 THE CHAIRMAN: When you say Request 120, that is --

16 MR SINGLA: Sorry, it is in the agreed part of the schedule.

17 So custodial documents in relation to whether Meta
18 ever made or considered making a value transfer to UK
19 Users. Do you see that?

20 THE CHAIRMAN: Yes, yes.

21 MR SINGLA: So to the extent SNA comes in at all, as you
22 have heard, it comes in on the counterfactual.

23 What is pleaded by way of counterfactual by the CR
24 is that Meta in the counterfactual would have made
25 a value transfer to UK Users. They seem to think the

1 fact of SNA helps them in that regard. We do not accept
2 that. But the counterfactual issue in this case is:
3 would Meta have made a value transfer to users?

4 THE CHAIRMAN: Exactly, and you say you would not have done.

5 MR SINGLA: Yes. For disclosure purposes what we say is 120
6 gives everything they need in respect of that issue,
7 because it is in relation to whether Meta ever made or
8 considered making a value transfer to UK Users.

9 THE CHAIRMAN: Look, you can see this goes to the heart of
10 your defence, because if at the end of the day you look
11 at your documents and it shows you have never considered
12 making a value transfer because that is never going to
13 happen, then that assists your case, whichever way you
14 look at it.

15 MR SINGLA: The point I am making today --

16 THE CHAIRMAN: You say there is an element of duplication,
17 it is going to come out of 120 and you do not need 105
18 because you are going to get it on 120.

19 MR SINGLA: 106.

20 THE CHAIRMAN: Sorry, 106.

21 MR SINGLA: (Inaudible) important issue. It is actually
22 very important to understand that 120 captures all of
23 the counterfactual material. And I do not accept, if
24 you have taken a view, or if the CR seeks to make much
25 of SNA, that is neither here nor there for all the

1 purposes of today. The question for today is: does 120
2 sufficiently capture the counterfactual material?

3 THE CHAIRMAN: Yes, okay.

4 MR SINGLA: The other problem -- so we say actually that is
5 the short answer. SNA at most is relevant to the
6 counterfactual. 120 is so broad that it covers all the
7 counterfactual issues in this case.

8 The other problem is the focus needs to be on UK
9 Users, because again the counterfactual question in this
10 case, by reference to the pleadings, is: would there
11 have been a value transfer to UK Users? That is why we
12 say that if you are against me on the principle then
13 this needs to be limited; it is just hopelessly broad.

14 We say it should be limited to custodial documents
15 in relation to Meta's rationale for introducing SNA in
16 the UK, which it did in September of this year. I can
17 show you the wording if that is helpful.

18 THE CHAIRMAN: Yes.

19 MR SINGLA: Actually, in my submission one does not even get
20 to that second point because it is really very difficult
21 to understand why they are not satisfied with the
22 breadth of 120 when their own pleaded case is: you would
23 have made a value transfer to UK Users and 120 covers
24 whether Meta ever made or considered making a value
25 transfer. It is actually in my submission not

1 progressing things at all just to keep banging the drum
2 about the relevance of SNA. That is not the question.
3 The question is: why does 120 not give them everything
4 they need?

5 THE CHAIRMAN: Let us ask them.

6 Ms O'Keeffe, you understand where we are?

7 MS O'KEEFFE: Yes, sir.

8 THE CHAIRMAN: I think we are all agreed that this is a --
9 not necessarily agreed. I consider that this is
10 a relevant request and that you should have the
11 information covered by this request. There is a point
12 about: is this purely duplicative of Request 120? If
13 you look at Request 120, it is confined to UK Users, as
14 you know, and you are trying to get EU as well.

15 MS O'KEEFFE: Yes.

16 THE CHAIRMAN: So if you could simply address me on why you
17 should have EU and why this is not duplicative of 120.

18 Submissions by MS O'KEEFFE

19 MS O'KEEFFE: Yes, sir.

20 So first of all, there is a difference between the
21 concept of value transfer and the reasoning and
22 consideration of whether to introduce one versus the
23 disclosure we are seeking here, which concerns the
24 rationale for bringing in subscription for no ads which
25 I accept, as Mr Singla has submitted, has now also been

1 rolled out in the UK, but also less personalised ads
2 which, to our understanding, has not been rolled out,
3 and also the default ads option which is not addressed
4 in any of the other requests that have been drawn to our
5 attention.

6 Now, the difference in terms of UK versus EU users,
7 the Tribunal will recall earlier today paragraph 175
8 something (iii) of Meta's Defence where they pleaded
9 that their reasoning for bringing in SNA as a concept
10 generally was not, as we, the Class Representative, had
11 asserted in our Claim Form, in response to consent
12 concerns under the GDPR, but instead was for a variety
13 of reasons, including developments in European
14 legislation, including the DMA.

15 So in that context, getting only the rationale for
16 why they extended that policy to the UK is not going to
17 tell us anything at all, sir, about the merits that they
18 weighed up when deciding whether to adopt a subscription
19 for no ads model, and therefore is not going to tell us
20 anything about what they would have been doing in
21 a non-abusive counterfactual if the unfair trading
22 condition had not been imposed.

23 So for that reason we just do not consider that
24 limiting it to the UK is going to be informative for
25 this purpose.

1 THE CHAIRMAN: Thanks very much.

2 DRAFT RULING on REQUEST 106 - sent for approval

3 THE CHAIRMAN: So we have now almost finished the schedule.

4 We have got one item or two items on 28 to deal with.

5 Ms Ford, can you just take us through that?

6 REQUEST 28

7 Submissions by MS FORD

8 MS FORD: Sir, yes.

9 The first one concerns the words "the Meta Entities"
10 in 28.

11 We have accepted Meta's proposed formulation which
12 referred to custodial documents containing testing
13 analyses and studies. Meta propose to insert "the Meta
14 Entities' testing, analyses and studies". Our concern
15 about that is that we understand what it is trying to do
16 is to exclude from the scope of this request studies
17 conducted by third parties. So not directly conducted
18 by Meta, but studies that Meta commissioned from
19 third parties. That seems to us to be fundamentally
20 problematic. There might well be studies that Meta have
21 commissioned from third parties. If they are responsive
22 to this request, we say they should provide them.

23 THE CHAIRMAN: Of course they should. You are right on
24 that, because I do not want to get a sense of anyone
25 just playing games on this. If they have got

1 third parties who have done this type of analysis for
2 them, I do not want that to be excluded under 28,
3 because it is just as valuable for the experts to see
4 how these issues have been considered in the past and
5 take them into account in formulating their own reports.

6 So let us hear what Mr Singla says about that first.

7 Submissions by MR SINGLA

8 MR SINGLA: The point is we are not opposed to disclosing
9 anything from a third party. But our point is we are
10 not going to conduct additional searches for such
11 third party material, because we say that would be
12 disproportionate. That is the distinction. It is quite
13 an important distinction. You will understand that
14 having to go off to do additional search for third party
15 testing is --

16 THE CHAIRMAN: Let us say you have got a third party testing
17 and they have given you a report. You should disclose
18 that just as much as if you did it in-house.

19 MR SINGLA: Well, sir, you make that point as if it is
20 obvious. It had not occurred to the CR until yesterday
21 afternoon, and this process has been going on for
22 months. So perhaps that is a forensic point, but one
23 has to also really ask oneself: if it is coming up the
24 day before the last hearing on this, is it central to
25 their case?

1 MS FORD: Sir, yes, and there are only three where we say it
2 is not appropriate. The first is subparagraph (f),
3 which is value transfers to UK Users in connection with
4 the connection and/or receipt and/or processing and/or
5 use of data. And the second is (h), prices or other
6 compensation that UK Users would need to be paid to
7 share their data.

8 The reason we consider it is not an appropriate
9 qualifier in relation to those two, and I will come back
10 to the third one --

11 THE CHAIRMAN: Let me just mark it down. There is (h).

12 MS FORD: There is (f) and (h) is the first two.

13 THE CHAIRMAN: There should be three, should there not?

14 MS FORD: There are, but the third one is a different point
15 really as to why we do not quite follow why it applies.
16 (l) is the third one in the second group of ... The
17 impact upon UK Users' behaviour of advertising on the
18 users' side of Facebook, including personalised
19 advertising.

20 So (f) and (h), essentially the same point arises,
21 and it is what is dealt with in Ms Scott Morton's
22 report, paragraph 33. So it is your tab 13, Opus
23 {C7/5/10}.

24 Submissions by MR SINGLA

25 THE CHAIRMAN: Can we just see what Mr Singla says about

1 this?

2 MR SINGLA: Just a general point, which is the disclosure
3 has to be kept confined. You have heard me say this
4 a number of times, not successfully, I do not think.

5 THE CHAIRMAN: A lot of success, do not under --

6 MR SINGLA: On this particular point about off-Facebook
7 Data.

8 THE CHAIRMAN: (inaudible)

9 MR SINGLA: But the submission really here is that all of
10 this needs to be confined. If one looks at what the
11 request is about, custodial documents, about the
12 testing, documents for research about the testing
13 analysis and studies, and why should this be going
14 beyond the data which is the subject of the claim?

15 You may say that the CR has taken care to go through
16 and work out which ones should be limited. Another way
17 of looking at it is to say it was far too broad to begin
18 with and they are realistically accepting that.

19 We say having accepted that the rest of it should be
20 confined to off-Facebook Data, there is actually no
21 logical distinction, and (f) and (h) and (l), like the
22 others, should be confined to off-Facebook Data.

23 In fact, it does not make any sense, because the
24 preamble is the same for each of these subcategories.
25 So if the preamble is the same, then actually it should

1 follow that the subparagraphs should also be
2 co-extensive.

3 SECOND DRAFT RULING on REQUEST 28 - sent for approval

4 THE CHAIRMAN: Anything else on the Redfern Schedule? No,
5 we have done that, okay.

6 Let us look at what is on the agenda that has been
7 agreed between you and Mr Singla, and I will write them
8 down as we go along. Okay.

9 DISCLOSURE

10 MS FORD: For the Class Representative's part, we have
11 identified two issues. The first is the question of
12 a long-stop date for disclosure and the second is the
13 question of rolling disclosure.

14 THE CHAIRMAN: Long-stop date, okay. Rolling disclosure,
15 yes.

16 MS FORD: Meta have not so far identified to us any further
17 matters that they wish to put on the agenda.

18 THE CHAIRMAN: Is that right?

19 MR SINGLA: That is right, and we also --

20 THE CHAIRMAN: We will come to my ones after that, then.

21 That is fine.

22 MR SINGLA: We do not actually accept that there needs to be
23 a ruling on rolling disclosure, but obviously we can
24 debate that in due course.

25 THE CHAIRMAN: I do want to leave today where everyone knows

1 where they stand and what the dates are. That is what
2 we are going to do.

3 But I know there is going to be an element that you
4 probably want a bit more fat to take into account
5 things, because you may not have complete visibility and
6 may need a bit more time to reflect on what has been
7 ordered and what has not been ordered. I understand
8 that.

9 MR SINGLA: There is that, but also I think you made some
10 comments -- I do not want to get into the submission now
11 unless you want me to. But you had some comments last
12 time about rolling disclosure and that you would not
13 give any dates and timings for rolling disclosure, and
14 in fact --

15 THE CHAIRMAN: No, no, what I was going to say was that you
16 have got a long-stop date and that you will be giving
17 disclosure on a rolling basis, and that there are
18 certain categories which I have identified as we go
19 along that you should be prioritising to have sooner
20 rather than later because those, whatever happens on
21 those requests may impact on whether or not further data
22 needs to be sought or argued at least between the
23 parties.

24 What I am not going to do is to say precise dates
25 when you are going to have to start doing it. I thought

1 we have already discussed this. But, I mean, I do not
2 know if we are going backwards, but I thought we had
3 discussed that I was not going to give you fixed dates,
4 because at the end of the day there has to be some trust
5 in you and your team as to what you are going to do, and
6 you are going to be sensible. And of course what you
7 are going to do is as and when you have finished a
8 particular task you are going to say, well, here's
9 a list, or whatever. Then they can have something to
10 work on and that no time is going to be lost.

11 MR SINGLA: Yes. So on rolling disclosure we also thought
12 that this had essentially been dealt with last time,
13 because you said what you said and there has already
14 been correspondence and an offer has been made and the
15 parties are talking about that.

16 So that is very much an ongoing --

17 THE CHAIRMAN: Let me just look at my notes on this.

18 I thought I had dealt with this.

19 MR SINGLA: There is one point that you just mentioned which
20 I need to just address --

21 THE CHAIRMAN: Can I just look at my notes, please, on this.

22 (Pause)

23 On rolling disclosure, I thought I had dealt with
24 rolling disclosure already. I do not know if you want
25 to say anything more about that, but I think probably

1 I need to say something specific about rolling
2 disclosure now, unless you have anything further you
3 would like to say.

4 The long-stop date is obviously important, so we
5 will come to that in a minute. On the issue of rolling
6 disclosure is there anything else you would like to say?

7 MS FORD: We are not inviting the Tribunal to set down
8 particular dates. What we have done, however, in
9 correspondence, is set out categories where we consider
10 that rolling disclosure would be appropriate, which we
11 consider are consistent with the indications
12 the Tribunal has given previously.

13 We have set that out in correspondence and we
14 propose to canvass that with the Tribunal today,
15 essentially in order to get a direction for rolling
16 disclosure consistent with your previous indications and
17 to inform the parties' discussions as to what the
18 subject matter of that should be.

19 It is not intended to be exhaustive in the sense
20 that we have invited Meta to indicate where they or
21 their Designated Solicitor considers further rolling
22 disclosure might be appropriate, but it does indicate,
23 for example, explanatory statements and matters of that
24 nature, pre-existing regulatory documents that are
25 already held, those sorts of categories where we

1 consider that rolling disclosure is essentially
2 appropriate.

3 THE CHAIRMAN: Look, the Tribunal agrees, and Singla agrees,
4 we should have rolling disclosure. So we have agreed
5 that. We have also agreed or directed in relation to
6 certain categories of documents that I have identified
7 as we have gone along, they should be prioritised, they
8 should be done first.

9 Over and above that, you are saying that you have
10 got other categories where you say that Meta should
11 prioritise those. Yes. But the problem with that is
12 that the Designated Solicitor has got this job to do,
13 and things like what is practicable and what should be
14 prioritised is really a judgement call.

15 So he may say, for example, let us look at the board
16 papers, or whatever. That is a really easy one, I can
17 give that to X. X can do that, and X will finish that
18 job whenever it is going to be. So you can see using
19 common sense. So certain ones which requires a manual
20 review, for example, and it is a relatively confined
21 topic, and someone can get on and do that. But --

22 MS FORD: That is an example we have given.

23 THE CHAIRMAN: Yes, no, but I think we can trust that the
24 Designated Solicitor will be able to -- one of the
25 things he has to do is identify what is practicable and

1 what is not, look at the size of the team and are there
2 tasks which could be designated to individual people,
3 and that I am reluctant at this stage to give directions
4 over and above ones I have already given as to what they
5 should prioritise. We have got to trust them to
6 a certain extent.

7 I know in the nature of litigation people do not
8 trust the other side or whatever, but life is too short.
9 You can be pretty confident that the people that we are
10 dealing with, they are not going to put their neck on
11 the line for any individual client. They are just going
12 to do their job properly. I have seen no sign at all
13 they are not going to do their job properly.

14 MS FORD: It may be that we can leave it that we have
15 indicated in correspondence the requests that we
16 consider to be particularly potentially amenable to
17 rolling disclosure and the Designated Solicitor can take
18 those into account in forming his judgment.

19 THE CHAIRMAN: Okay. On the question of --

20 MR SINGLA: Sorry, can I just say something? Are you about
21 to give a ruling --

22 THE CHAIRMAN: I am, yes.

23 MR SINGLA: Can I just quickly say something?

24 THE CHAIRMAN: Of course you can, yes, yes. You know how
25 much time we have. We have the rest of -- we have time,

1 do not worry.

2 MR SINGLA: It is a very short point because I think what
3 you are about to do is helpful to our side, but perhaps
4 put down a marker. I think we said that (a) I had
5 agreed there should be rolling disclosure. And just to
6 be completely accurate, an offer has been made. But
7 what has also been said is that those behind me are
8 considering the feasibility of other tranches. I do not
9 want it to be said that on my feet I have somehow gone
10 beyond the correspondence.

11 I mean, the correspondence speaks for itself.
12 Herbert Smith have sent, I think, three letters saying
13 they are considering other categories in addition to the
14 one that has been offered.

15 The other point is you said that you have directed
16 that certain things should be prioritised, and of course
17 we all have heard that. But those behind me again will
18 need time to consider the feasibility of prioritising,
19 as you have described it, those particular categories of
20 disclosure. I understand why you have said what you
21 said, but you will understand also there are issues with
22 providing disclosure ahead of time.

23 THE CHAIRMAN: I do, yes.

24 MR SINGLA: So I am not, as it were, pushing back on
25 anything at the moment. I am just saying we will need

1 to look at everything in the round after today to
2 consider whether it is feasible to prioritise what you
3 have said should be prioritised, and if it can be
4 produced in advance of the long-stop date by what point
5 in time.

6 THE CHAIRMAN: Insofar as there are specific categories
7 which I have said should be prioritised, I do not expect
8 those to be disclosed at the end of the process. I have
9 made it clear. It is a question of allocating
10 resources, and what I am asking your team to do is to
11 allocate resources maybe disproportionately in relation
12 to certain categories of documents, but I do want that
13 to be done.

14 MR SINGLA: Understood, but the Designated Solicitor will
15 have to work out exactly when and how --

16 THE CHAIRMAN: I know, and there is going to be give and
17 take because he will have to say, look, I have got my
18 team of X, I am going to have to put whoever or whatever
19 resources into that, but that may mean there is less
20 resources for other things; and that might take more
21 time. I understand that.

22 MR SINGLA: What I do not want is, because you mentioned the
23 word "prioritise", I do not want a letter from
24 Quinn Emanuel tomorrow saying we want this disclosure in
25 January. And that is the sort of behaviour we are

1 seeing, so it needs to be prioritised but within the
2 context of a process which the Designated Solicitor
3 should have some discretion and judgement to run.

4 THE CHAIRMAN: Okay.

5 Disclosure in this case will be on a rolling basis.
6 There will be a long-stop date by which all the
7 disclosure should be provided, but in the course of this
8 ruling the Tribunal has indicated that there are certain
9 categories of documents which should be prioritised
10 upfront so that if there is any follow-on disclosure in
11 relation to those categories, that can be done in
12 reasonable time.

13 The Tribunal understands that there has been
14 correspondence between the parties as to what priority
15 should be given on rolling disclosure to other
16 categories of documents. The Tribunal is not inclined
17 at this stage to direct the Designated Solicitor to
18 prioritise any other specific tasks. It is a question
19 for the Designated Solicitor to take a view, looking at
20 the resources that he has, what can be done discretely
21 in advance of everything else at a relatively early
22 stage and what is important. But what the Tribunal is
23 not going to do is micromanage this disclosure exercise.

24 What the Tribunal does not want, though, is the vast
25 bulk of the disclosure to be given on the last day,

1 because that is clearly undesirable. Where these
2 exercises work best is that you give disclosure on
3 an ongoing basis. As and when a particular task has
4 been finished, disclosure is given of that, and then the
5 CR will have something to work on, so no time is going
6 to be wasted.

7 The Tribunal does want to give a long-stop date for
8 disclosure, at which point there will be a disclosure
9 statement signed both by the Designated Solicitor and by
10 a representative of Meta.

11 So I would like to hear submissions now on the
12 long-stop date.

13 MS FORD: As the Tribunal is aware, we previously
14 suggested --

15 THE CHAIRMAN: So what is the trial date?

16 MS FORD: The trial date is Michaelmas 2027.

17 THE CHAIRMAN: Do we have dates for expert evidence and
18 witness statements and stuff like that?

19 MS FORD: We do not yet.

20 THE CHAIRMAN: So no dates for witness statements and expert
21 reports. Yes.

22 MS FORD: We previously proposed an April 2026 long-stop
23 date.

24 For their part, the Defendants previously pointed to
25 the disclosure exercise they conducted in Klein and the

1 fact it took 10 months. In those circumstances we have
2 sought to act co-operatively and we have proposed
3 an alternative long-stop date of 16 October 2026, so
4 that is ten months from the date of today's CMC.

5 THE CHAIRMAN: Yes.

6 MS FORD: We have made three specific points in
7 correspondence in respect of that proposal. The first
8 I can skip over quickly because it was that disclosure
9 until the long-stop date would be given on a rolling
10 basis. The second was that that period would start from
11 today's hearing rather than from some other unspecified
12 future date.

13 THE CHAIRMAN: What we will have at the end of today is
14 a long-stop date. It is not referable to any trigger,
15 we are just going to have a date, okay, because there
16 are going to be things which we are going to discuss in
17 a minute but the Designated Solicitor has to do before
18 a button is pressed on actually doing the exercise. But
19 you say the long-stop date is 16 October 2026.

20 Let us hear what Mr Singla says is the long-stop
21 date and then we will come back and debate it.

22 Mr Singla.

23 MR SINGLA: We have gone about this in a slightly different
24 way.

25 We have said consistently that we need ten months to

1 do disclosure --

2 THE CHAIRMAN: Yes.

3 MR SINGLA: -- put a witness statement in at the last
4 hearing. In fact, the scope of the disclosure has
5 widened, but we are still saying ten months. Happily,
6 the CR now agrees that disclosure should take
7 ten months.

8 Where there is a disagreement is actually in
9 relation to the start date, because we do not accept
10 that the relevant start date for that ten months should
11 be today or any time until the search terms have been
12 locked down. You will understand that one cannot
13 actually meaningfully conduct the disclosure exercise
14 until the search terms -- and there is obviously lots of
15 work that is going on in relation to --

16 THE CHAIRMAN: Where are we on search terms?

17 MR SINGLA: That is why I say --

18 THE CHAIRMAN: Let us look at that first.

19 MR SINGLA: Exactly. That is what I wanted to start with
20 because that is really the key debate: when should time
21 start running from?

22 I was going to take you back to this --

23 THE CHAIRMAN: Is it the long letter?

24 MR SINGLA: Yes, I will not take you back through all of it,
25 but just cut to the chase, because we suggested

1 a process for the resolution of the search terms and you
2 will appreciate this discussion about search terms has
3 been going on for weeks if not months. So to try and
4 bring this all together, if you go to page 9 --

5 THE CHAIRMAN: Of the schedule or the letter?

6 MR SINGLA: -- of the letter. Yes. That is probably
7 enough. If you start at 9.

8 So you will see what we were proposing as the way
9 forward. Essentially you do not need to spend too long
10 looking at that, but you will see from the deadlines in
11 the right-hand column this was all building up to
12 a final resolution, by the Tribunal if necessary, of
13 search terms in February.

14 Now, during the course of this morning I think you
15 explained that you had availability and could look at
16 this matter in the week of 23 January.

17 THE CHAIRMAN: Yes. So what I said is anything that anyone
18 wants me to rule on, I want the submissions in a bundle
19 on 23 January.

20 MR SINGLA: Exactly. So with that in mind we have looked
21 again at this timetable, because obviously going into
22 February would not work. So what we would now propose
23 is as follows, and I am going to take this a bit slowly
24 because you need to understand the various stages.

25 So what we would respectfully propose is that if the

1 Redfern following this hearing can be provided to us by
2 Friday lunchtime --

3 THE CHAIRMAN: The final schedule?

4 MR SINGLA: Redfern Schedule, that is this Friday.

5 THE CHAIRMAN: But when you say the Redfern Schedule, you
6 mean the final schedule, the order of the categories
7 without all the stuff at the end and the different
8 columns. It is just going to be as per the first half
9 of the bundle that you have given me yesterday, whenever
10 it was.

11 MR SINGLA: The final Redfern, so the list of requests as
12 agreed or ordered.

13 We need that by this Friday lunchtime, which we hope
14 is not going to be difficult. But what we also need in
15 order for this search terms process to be brought to
16 a conclusion in that week of 23 January, we would
17 respectfully suggest that if the other side could also
18 provide their material comments on search terms -- they
19 have agreed some search terms, but there are some
20 outstanding search terms and there will be some further
21 points arising out of today. And we sent them our
22 latest proposals yesterday, so we would invite them to
23 provide any major points by this Friday lunchtime along
24 with the revised Redfern, or final Redfern.

25 We would then respond on 16 January, which is

1 pulling that date forward, because we had previously
2 said 20 January in our letter. And the reason we need
3 time is because we need to go away and actually test and
4 implement all these search terms to arrive at hit counts
5 and work out whether their search terms are feasible and
6 are reasonable and proportionate and so on.

7 If the other side then responded to the 16 January
8 letter on 19 January, we could then bring any issues
9 before the Tribunal in that week that you identified.

10 But two important points that I would stress. One
11 is the long-stop date cannot start, or the ten months,
12 I should say, cannot start until you have given a ruling
13 so we know exactly what we have to do. That is point 1.

14 Point 2 is we do not want any re-opening of search
15 terms in due course. So if there is a problem with the
16 search terms, we need to know about them now because we
17 are going to go off and do a very, very substantial
18 exercise of collating and searching and so on, and so it
19 needs to be --

20 THE CHAIRMAN: The thing is that you -- my experience on
21 search terms is that the parties agree search terms and
22 it is always ideal to try and get that sorted out first.
23 But sometimes when you go through the process, you tend
24 to find some search terms come up with too many hits and
25 you find that the sort of positive rate is extremely low

1 and other times it is pretty high, in which case you
2 have clearly got the right thing. But then you then
3 have to think, well, I have done this, worked on these
4 search terms, I have got almost zero hits, there must be
5 a problem there, I am going to have to try some other
6 search terms.

7 So I do not belong to that school that you fix
8 search terms on day one and that is the end of it,
9 because what happens in practice is that whoever is
10 guiding this whole process has to be on the frontline
11 and say: I realise actually this is not working, I need
12 to adapt the search terms.

13 I probably have more experience than most people
14 here on disclosure and massive disclosure exercises, not
15 just in civil proceedings, and my experience is that
16 search terms is something that is not fixed. If you are
17 going to do it properly, if you really want a piece of
18 information that is important, you quite often find it
19 is not on the search terms that you think and you have
20 to keep adjusting it until you find what you are looking
21 for.

22 MR SINGLA: One of the extraordinary things about this case
23 is those behind me have spent months and months already
24 working on it.

25 THE CHAIRMAN: I am sure, and they have been modelling it

1 and trying to see what works and what produces hits --

2 MR SINGLA: Exactly, exactly, so we are very confident with
3 the search terms. Obviously if there is a material
4 change of circumstances, then that is a different
5 matter. I was not really addressing that. I was simply
6 saying that what we do not want is reservation of rights
7 or complaints about search terms, because we would
8 actually like to get this right --

9 THE CHAIRMAN: What we will have shortly after 23 January is
10 the search terms to be adopted.

11 MR SINGLA: Yes.

12 THE CHAIRMAN: Okay, and that is always subject to the
13 caveat that you have to see what happens in practice,
14 what comes out of that process. You say you are pretty
15 confident what is going to come out because of all the
16 research that you have done, in which case you are not
17 going to have a problem that I have seen in other cases.
18 If it does not turn out like that and in fact you are
19 finding major gaps, you have to really think: why have
20 I got this major gap with stuff that I expect we should
21 have but we do not have?

22 MR SINGLA: No. That is something obviously that my side
23 will continue to --

24 THE CHAIRMAN: Of course.

25 MR SINGLA: What I am saying is that what we cannot have is

1 the situation where any complaints about the search
2 terms that we are proposing now are being stored up,
3 because we then will run into problems later because the
4 exercise --

5 THE CHAIRMAN: No, no, you are perfectly entitled to make
6 that point --

7 MR SINGLA: That is the point.

8 THE CHAIRMAN: -- and make that marker down.

9 MR SINGLA: Then the other really crucial point on the
10 long-stop is I really do need to emphasise that it is
11 the ten months, we said in evidence we needed
12 ten months, we still say now we need ten months. In
13 fact, the exercise is bigger, but it cannot start until
14 that process has reached a conclusion.

15 THE CHAIRMAN: Okay.

16 All right, then, let us see what Ms Ford says.

17 MS FORD: Sir, just to pick up immediately that the response
18 to that submission is that what we cannot have is
19 complaints stored up; equally what we cannot have, in my
20 submission, is the Class Representative being shut out
21 from taking legitimate points insofar as it appears that
22 the search has not been done properly. That, in my
23 submission, cannot be right. We have set out --

24 THE CHAIRMAN: Let us look at it this way. The way I look
25 at it is that they do their task. If, for example, the

1 task does not have the result that one would expect it
2 has, of course you can come back and say "I think you
3 need to revisit the search terms", and you will have
4 a dialogue. It does not mean it is a criticism of Meta
5 or the Designated Solicitors that in fact additional
6 search terms are needed, nor is it a question of saying
7 to you you are shut out. Because if, for example, you
8 look at the disclosure and there is a whole mass of
9 a big hole and there is something missing, you are going
10 to want to explore why there is that hole.

11 I think you have to leave it up to (a) the
12 Designated Solicitor and, if I am involved in this,
13 leave it up to me to try and help the parties get to
14 what they are looking for.

15 MS FORD: Sir, yes, that is actually consistent with the
16 position we have set out in correspondence. If I can
17 show the Tribunal {E2/393}, please.

18 THE CHAIRMAN: Do I need to look at correspondence?

19 MS FORD: It may cut through some of the proposals that are
20 being made, in this sense: we have indicated that we are
21 prepared to allow Meta to proceed now to apply its
22 proposed search terms, taking into account the points
23 that the Class Representative has made, rather than
24 engage in a process of further debate about them.

25 The reason we have taken that position is that we

1 are concerned one should not end up with the entire
2 process being bumped off for two months while we try and
3 essentially further engage on the search terms. Rather,
4 we say Meta should be starting now to conduct the
5 disclosure process.

6 THE CHAIRMAN: Yes, but the problem with that is normally my
7 practice is to try and figure out what the search terms
8 are at the beginning, because otherwise you end up doing
9 the job twice. This is why I am asking, if not
10 directing, a protocol so everyone knows from the
11 beginning what they have got to do.

12 I am not with you on this in the sense that I do
13 want the parties, and if not -- if you are not able
14 to -- the Tribunal, to come to a landing on what the
15 search terms are at the beginning. That is not
16 tramlines, it is not going to be the end of it, if in
17 fact it does appear that there is more appropriate
18 search terms as a result of experience.

19 But I would have thought that the way we are doing
20 it now, we have one person whose job it is to oversee
21 this process, it is going to be quite efficient
22 hopefully and these things will be worked out, and
23 I really do not think Meta is out to try and not give
24 disclosure. I think they are going to try their best.

25 Look, if I have a feel that they are playing games

1 or anything, then you will know about it and they will
2 know about it. But I see no sign at all of
3 an unwillingness to do this job properly. I have seen
4 actually the opposite, and indeed today Singla's team
5 have been so reasonable that they have agreed to give
6 disclosure of things that probably I would not have
7 ordered, at least not at first instance.

8 So I know what you are worried about. Hopefully it
9 does not arise, but if it does arise we will deal with
10 it.

11 MS FORD: Sir, absolutely, I do not think we are necessarily
12 speaking across each other in that respect. Certainly
13 the point the Tribunal has made about the search terms
14 process being iterative is one that we have made as well
15 in our correspondence --

16 THE CHAIRMAN: It has got to be, yes.

17 MS FORD: Sorry, paragraph 6(a) in this letter, please
18 {E2/393/2}.

19 THE CHAIRMAN: Which letter are we talking about?

20 MS FORD: This is our response to the search terms letter.

21 So Meta has provided the recent --

22 THE CHAIRMAN: I have got the search terms letter. I have
23 got that in front of me, yes. I have got that.

24 MS FORD: We sought to respond to it obviously within a
25 relatively limited timeframe.

1 THE CHAIRMAN: You have only -- yes, very limited.

2 MS FORD: The point we have made is that the Class
3 Representative has tested certain of the Defendant's
4 proposed search terms against Meta's contemporaneous
5 documents disclosed in the FTC v Meta Platforms
6 proceedings, and what it appears to us is to show is
7 that the proposed search terms are liable to miss
8 documents relevant to the requests; and, sir, we have
9 given, for example, at 6(a) a document that was relevant
10 to Request 33 in the Redfern Schedule that would not be
11 responsive to the proposed search terms.

12 So I draw attention to this merely to express our
13 strong agreement with the indication the Tribunal has
14 given that this necessarily must be an iterative process
15 and that one cannot essentially fix the search terms in
16 aspic and say that there is no scope to revisit them.

17 What we have sought to do in this letter at
18 paragraph 8 --

19 THE CHAIRMAN: What I am concerned about is that you have
20 got this long letter on search terms, and that you will
21 want to have considered that and come back with your
22 proposals saying "I want this and this, you have missed
23 out this", and then they need time to come back. But
24 Singla is saying he wants you to give your substantive
25 response on search terms by Friday. That seems too

1 short to me. But I am still inclined that what we will
2 need is Meta's response to your response by 16 January.
3 The question is: when are we going to get your response
4 on what you say are other search terms that should be
5 added to the mix?

6 MS FORD: Sir, that timing question is the one that we have
7 sought to cut through by the approach that we have taken
8 in paragraph 8 where we have essentially said we have no
9 choice but to leave it to the Defendants and the
10 Designated Solicitor to consider the appropriate search
11 terms including in light of the further issues raised
12 above, and to inform the Class Representative once they
13 have been settled; and the reason we have resorted to
14 putting it in that way is so that this process can get
15 started, and it will not then end up dragging out for
16 a long time and essentially the practical starting point
17 of this disclosure ends up getting put off and put off
18 by a debate over search terms, and that is really what
19 we have tried to cut through.

20 THE CHAIRMAN: I have seen this in another case and they did
21 that and it was a bit of a disaster, because the
22 disclosure was done and there were other search terms
23 that should clearly have been adopted, they were not
24 adopted, then a huge amount of money had already been
25 spent on the list of search terms that had been set at

1 the beginning of the process, and what the Defendant did
2 in that case was to say: well, look, we agree your list
3 of search terms but we reserve the right to come back
4 with more, but then they had completed the exercise,
5 spent an absolute fortune and they got a letter saying
6 "What about all these other search terms?" and then it
7 became a bit of a costly mess.

8 So I am not keen to -- I am not attracted by that
9 proposal. What I think everyone needs is a list of
10 search terms that has been settled between the
11 parties -- and if not between the parties by
12 the Tribunal -- but with all the caveats that I have
13 given already that Singla seems to agree to anyway. But
14 you will need to come up with what you say are the
15 search terms if you think that they should be adopted.

16 MS FORD: Sir, those behind me have heard what you said and
17 proposed a timetable by way of engagement on that.

18 THE CHAIRMAN: Yes.

19 MS FORD: What was being suggested -- until a further
20 note ... (Pause). The proposal is that the Class
21 Representative will endeavour to respond to what has
22 been proposed in Meta's correspondence by 9 January. We
23 would then look for the Defendants to respond by
24 16 January, and the parties provide submissions to
25 the Tribunal to determine issue by 23 January.

1 THE CHAIRMAN: Mr Singla.

2 MR SINGLA: I can take instructions, and I do not know if we
3 are having a break, but that is not going to work
4 because of the amount that we need to do on our side to
5 --

6 THE CHAIRMAN: We will have our break now.

7 MR SINGLA: Yes.

8 THE CHAIRMAN: Try and agree this. You understand what
9 I want.

10 MR SINGLA: Yes, we want that too.

11 THE CHAIRMAN: 23 January, there is a dispute about search
12 terms, I want to know what the dispute is, submissions
13 from both sides, I can work from it. How you get there
14 is down to you two, but I am saying that if they are
15 saying at this stage that there are specific search
16 terms that should be included, you need to know what
17 they are, and you need to have some time to respond to
18 it. But I think there is going to have to be a sense of
19 urgency on this. You have already done a lot of work on
20 search terms, so I do not think your response time is
21 going to be huge.

22 MR SINGLA: The trouble is every time they suggest more
23 search terms, we then need to go away and explore --

24 THE CHAIRMAN: I know.

25 MR SINGLA: -- with people in the business. So it is

1 would be 9 January for our response, 16 January for the
2 Defendant's Reply, and then the joint subs in time for
3 the Tribunal's indication.

4 There is just one additional detail to mention,
5 which is there are a tranche of search terms in respect
6 of which we have not yet received a proposal from Meta,
7 those are essentially the ones that were new and so have
8 not been addressed at all. So what we would propose in
9 respect of those is that we would receive Meta's first
10 proposal for those on 2 January, and that would enable
11 us then to address those in the 9 January response and
12 to fit in with the timetable to get submissions to
13 the Tribunal by the date that is indicated.

14 THE CHAIRMAN: Yes, okay.

15 Mr Singla.

16 MR SINGLA: Sir, just working backwards --

17 THE CHAIRMAN: You have to work backwards, I understand
18 that.

19 MR SINGLA: Whenever the date is when you come to make a
20 decision, you will need before you some material
21 which --

22 THE CHAIRMAN: Do you want me to see if I have another slot
23 then?

24 MR SINGLA: That would actually expedite things. Basically
25 if they cannot come back to us before Christmas --

1 THE CHAIRMAN: Let me just see what other slots we have got.

2 (Pause)

3 My next slot, it may not be great, is 9 February.

4 MR SINGLA: Well, I am sure that would help, because on the
5 dates --

6 THE CHAIRMAN: I might as well do it all on 9 February, I do
7 not want to do one thing on the 23rd and one thing on
8 the 9th. So there is any sort of outstanding issues in
9 one go, if you see what I mean.

10 MR SINGLA: May I just take instructions?

11 THE CHAIRMAN: Yes.

12 (Pause)

13 MR SINGLA: So I am grateful for the time and I am obviously
14 grateful for the additional slot, on the basis that that
15 is workable, but we do still need, as it were, the
16 lion's share of the time, because we have to go away and
17 actually with third parties run all these proposed
18 search terms, put them all together, that requires
19 engagement with the third party providers. Every time
20 you make a tweak to the search terms you then have to
21 re-run them.

22 So just in terms of the balance of the time between
23 now and 9 February, it is really quite important to
24 understand that the work, the real work is going on on
25 our side.

1 for them. We would then have two weeks to do all of the
2 searches and do all the work we need to do in order for
3 you to have meaningful material on proportionality. So
4 that takes us to 16 January, then 23 January for
5 a response, and then everything can be put before you
6 for 9 February.

7 Then insofar as there are other search terms that we
8 need to deal with, we can deal with those alongside that
9 timetable. But that is the best we can do.

10 THE CHAIRMAN: Right.

11 MS FORD: Sir, you have our submissions that we are not in
12 a position to respond to the volume of material before
13 9 January. It is worth emphasising the timetable --

14 THE CHAIRMAN: I am not going to change that date. So look,
15 you are going to have until 9 January to respond to
16 this. Okay? Then we have got the additional search
17 terms in relation to the further material that has been
18 ordered today, and that probably can be 2 January,
19 because I do not think it is a huge amount of work.
20 Maybe 3 January. Whatever the -- let us have a look at
21 what day it is, because I do not want to order on
22 a Saturday or a Sunday.

23 Yes, I would be inclined to say that for their
24 further disclosure it should be 3 January.

25 MS FORD: Insofar as they have not been addressed in the

1 letter we received?

2 THE CHAIRMAN: Exactly. So you come back on 9th, so they
3 should -- they will have to do their reviews and
4 everything, they can come back on I would have thought
5 23 January for their reviews, and then when it comes to
6 submissions as long as the submissions are all filed by
7 the 10 o'clock on 9 February, it is fine.

8 MS FORD: We are content with that.

9 THE CHAIRMAN: Yes.

10 MR SINGLA: Can I just take instructions?

11 THE CHAIRMAN: You can, yes, that is fine.

12 (Pause)

13 MR SINGLA: I think we are not very far apart. I am sorry
14 for taking time. If Quinn Emanuel have until 9 January,
15 then that is okay as long as we can deal with everything
16 on the 23rd, so what we do not want to do is --

17 THE CHAIRMAN: I have said that, yes.

18 MR SINGLA: Okay. Then we can also build in a reply from
19 Quinn Emanuel on the 30th to try and crystallise the
20 issues before you.

21 THE CHAIRMAN: Okay.

22 MR SINGLA: So it is 9th, 23rd, 30th.

23 THE CHAIRMAN: Okay.

24 As I have said in earlier rulings, if either party
25 wants to have a hearing on it, you just write in and say

1 "We do not think it is appropriate to do it on paper, we
2 want to have a hearing", in which case you will have the
3 hearing on the -- whatever the date is, 9 February. But
4 if both of you think that actually we can just do it on
5 paper, then we do it on paper. But I do want Friday,
6 that can be the date -- Monday, I think, that can be the
7 date, but I do not want to spend more than a day on
8 this.

9 I have other things to deal with, you know. I know
10 you often thought Malek's got nothing else to do apart
11 from what you have got, but I do have other things, and
12 every day is quite valuable trying to fit in everything
13 else.

14 So 9th would be either written submissions at 10
15 or -- on my desk at 10 or a hearing at 10.30. Either
16 party has the right to ask for a hearing.

17 MR SINGLA: I am very grateful.

18 Now on the question of long-stop date.

19 THE CHAIRMAN: We will come to that in a minute.

20 MR SINGLA: Okay.

21 DRAFT RULING on DISCLOSURE - sent for approval

22 Further matters

23 THE CHAIRMAN: As regards the long-stop date, the long-stop
24 date is going to be 16 October 2026, subject to whatever
25 happens on 9 February. So the long-stop date of

1 16 October 2026 is there for now, but of course there is
2 going to be liberty to apply to vary that long-stop date
3 when we get to 9 February 2026. So everyone knows what
4 ideally we are looking for, but it must be the case that
5 Meta have the right to say "No, actually we just cannot
6 do it by then because of the search term issue".

7 MR SINGLA: Just to be clear, our position on why the start
8 of the ten months needs to be --

9 THE CHAIRMAN: Yes, I understand what you are saying, but,
10 you know, that is what I have ordered.

11 As regards other topics, if we can go through those.

12 I explained that I would like a disclosure protocol,
13 and ideally that disclosure protocol should be done
14 prior to the commencement of the whole exercise, and so
15 one would hope the Designated Solicitor will be working
16 on a disclosure protocol from now on, so by the time you
17 get to 9 February the disclosure protocol is in place.

18 The next point is in relation to costs. What
19 the Tribunal would like to have is that when Meta files
20 its final disclosure statement, it files a disclosure
21 costs report. The disclosure cost report will analyse
22 the costs of this whole exercise, and I want to be able
23 to ascertain from that what have been the costs, in
24 particular on three levels.

25 The first is going to be the costs of the List of

1 Issues for Disclosure and getting that sorted out, so
2 considering the draft and having the process that we had
3 at the, I think it is CMC 2 or CMC 3.

4 Then the costs of the exercise that has been
5 conducted to get to the finalised list of categories of
6 documents, which is what we have done today.

7 Then the costs of the actual disclosure exercise, so
8 if that can all be provided.

9 I do not need a huge amount of detail, but I do want
10 to be able to read that, understand what has been done
11 by way of disclosure, what difficulties have been
12 encountered, what the costs are in a broad way.

13 No doubt Herbert Smith will be requiring anyone
14 working on this case to log their time separately in
15 relation to the disclosure exercise. So if they are
16 working on pleadings, they are working on pleadings, do
17 not put that on this. Make sure the costs records are
18 clear so we have a more or less accurate position.

19 Once we have done that, then it may be that we are
20 going to have to have a short hearing to discuss the
21 whole process, any lessons learnt, what the costs are,
22 and the adequacy of the ATE insurance.

23 So I do not want, if Meta wins this case, for it to
24 be a sort of Pyrrhic victory. If they are going to win,
25 they should have their costs covered. I am not saying

1 at this stage that one should just simply say: well, the
2 CR has asked for all this disclosure and the whole
3 disclosure exercise, the costs are down to them.
4 Because it does not work like that. Meta would
5 of course have done its own disclosure exercise for its
6 own purposes to try and find documents which will assist
7 its case.

8 So there will be a certain element of this
9 disclosure which is not purely responsive to the order
10 that has been made on disclosure, because one would
11 expect a proper exercise on behalf of Meta would be
12 looking for other categories of documents over and above
13 what has been ordered or sought by the CR.

14 We have already dealt with the pleadings issues
15 about seeking clarification, so I do not need to say
16 anything about that.

17 As regards proposed use of methodology, I will go
18 through that in the written ruling, but I have already
19 said what I am going to say, which is that there are
20 different ways of doing this, there are various
21 platforms and providers and stuff like that. I am not
22 going to favour any particular provider or system.
23 I just have to look at: is the one that is being
24 proposed by Meta a reasonable one to adopt in all the
25 circumstances? Having read Mr Burton's statement, he

1 has obviously given a great deal of thought to this, and
2 the Tribunal at this stage considers that it is the
3 right way forward, in the sense it is workable and it is
4 within the discretion of the Designated Solicitor.

5 But certainly when you look at the exercise, you may
6 find that there are difficulties and inadequacies or
7 whatever, but that is part of the process of these
8 things, and then you learn.

9 I have had cases where you have a particular system
10 and it is not working well at all, and they just carry
11 on using it, and the problems just get bigger and bigger
12 as you go along. As long as you keep your eye on it, if
13 there are problems -- and there probably will be
14 problems -- you identify them and deal with them as you
15 go along.

16 So that is, I think, probably everything that I need
17 to cover.

18 I have to wait until I get the transcript back from
19 Opus before finalising the written ruling, but hopefully
20 I will get that back tomorrow.

21 Then that leaves us until, let us say, some time on
22 Thursday, you will get the draft ruling. If I can get
23 everyone's comments with any proposed changes by, let us
24 say, 11 o'clock on Monday, then there is a chance that
25 you will get -- the ruling will be issued this side of

1 the New Year. I would rather get it out now so everyone
2 knows what they have got to go and look for.

3 This is an unusual case because of its size and
4 complexity, and I am very grateful for all the help that
5 everyone has given. I appreciate that Ford and Singla
6 have not had a great time, because it is fairly tedious
7 and complicated to do this. Both of you have done your
8 job and gone into the detail and tried to distill it and
9 put it in a simple enough form that I can follow and
10 understand it. Hopefully I have got that, the balance
11 right, but let us see what happens in practice when the
12 exercise goes forward.

13 I am fairly optimistic that on this case we are not
14 going to have any major problems on disclosure, because
15 a great deal of thought has been put in on both sides as
16 to what is actually needed at the end of the day.

17 I presume, Mr Singla, you will not be seeking any
18 disclosure from the CR, at least at this stage, because
19 what is there to give you?

20 MR SINGLA: Not at this stage.

21 THE CHAIRMAN: Yes. But it does mean that the whole burden
22 of disclosure is on your side and I appreciate,
23 you know, what that means.

24 As regards the Designated Solicitor, Mr Singla, is
25 it envisaged that this is his side of the case and he is

1 just going to deal with this, or is he going to be
2 dealing with, let us say, the case more broadly between
3 now and the end of this process? Do you know where you
4 are on that?

5 MR SINGLA: I know a Designated Solicitor has been
6 appointed --

7 THE CHAIRMAN: I have seen that.

8 MR SINGLA: -- and I know that the precise mechanics are
9 still being considered, so it is something that is still
10 under consideration.

11 THE CHAIRMAN: My experience on the really big exercises
12 like this, if your job is the disclosure officer, you
13 are the one with the responsibility, you know what has
14 to be done, and then you end up having quite a degree of
15 independence in the whole process because you are not
16 part of the team fighting on the rest of the case, and
17 sometimes that is what is really needed: someone looks
18 at it in a relatively dispassionate way, knowing that
19 his duty is to the Tribunal rather than to his client
20 when it comes to disclosure, and I think also that I can
21 presume that all the relevant notices, you know, the
22 preservation notices have all gone out, and so there is
23 no real risk of documents being destroyed as we go
24 along, because obviously firms have document destruction
25 policies which apply unless there has been a stop that

1 has been put on it.

2 MR SINGLA: Yes.

3 THE CHAIRMAN: Yes.

4 MR SINGLA: We are months down the line --

5 THE CHAIRMAN: All that has been done, so I am presuming all
6 that sort of stuff has been done already.

7 MR SINGLA: Yes.

8 THE CHAIRMAN: Yes, that is perfect. Okay. Anything else?

9 Okay, thanks very much. I know that the juniors
10 have done a lot of work, so have the solicitors, the
11 solicitors have probably done more work than anyone
12 else, and the silks seem to get the credit for it
13 because they are the ones arguing, but I appreciate that
14 the solicitors on both sides have done a lot of work and
15 they have a lot more work to do unfortunately before we
16 get to the stage where you can press the button and say
17 we can start the process of disclosure.

18 So I will rise now. Thank you very much.

19 (4.20 pm)

20 (The hearing adjourned)

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