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5 **IN THE COMPETITION**
6 **APPEAL**
7 **TRIBUNAL**
8

Case No: 1673/7/7/24, 1408/7/7/22, 1378/5/7/20

9
10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

13 Tuesday 24th February 2026

14
15 Before:
16 The Honourable Mr Stephen Morris
17 Tim Frazer
18 Bridget Lucas KC
19
20 (Sitting as a Tribunal in England and Wales)

21
22 BETWEEN:

23 **Professor Barry Rodger**

Class Representative

24 - And -

25 **Elizabeth Coll**

Class Representative

26 - And -

27 **Epic Games, Inc. & Others**

Claimants

28 - V -

29 **Alphabet Inc. & Others**

30 **Google LLC & Others**

Defendants

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33 **A P P E A R A N C E S**
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39
40 ROBERT O'DONOGHUE KC & ANNELIESE BLACKWOOD on behalf of Professor
41 Barry Rodger

42
43 KASSIE SMITH KC & JACK WILLIAMS on behalf of Google

44
45 ANTONIA FITZPATRICK on behalf of Ms Coll

46
47 DAVID SCANNELL KC & AISLINN KELLY-LYTH on behalf of Epic

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Tuesday, 24 February 2026

(10.00 am)

Application by MR SCANNELL

MS LUCAS: Good morning. You are both on your feet. This is not a promising start.

MR SCANNELL: I am assuming that, as the claimant, we will go first on the settlement of the September order.

MR WILLIAMS: I am surprised by that. There was an agreed agenda, madam, that you may recall for the postponed hearing earlier in the month, where Google was listed as going first. That, in my submission, makes good sense, because it tracks the issues in the order and deals with the matters in the order of the skeleton arguments. It was agreed between the parties and nothing has changed between now and earlier in the month as to why Epic should suddenly go first.

MS LUCAS: Remind me where I find the agenda. I don't think it is in the supplemental bundle 1, is it?

MR SCANNELL: No. My understanding is that it hasn't found its way into the bundles as yet.

The first item on the agenda are the disputes between Epic and Google on the draft order. So not the forecasting application that Google makes.

MS LUCAS: So the first application is to finalise the order?

MR SCANNELL: Yes.

MR WILLIAMS: And the order, of course, is in relation to both disclosure from Epic and to Epic, so it doesn't settle the point in dispute as to who goes first, because there

1 are issues from both sides if I can put it that way.

2 The G5 application, which is the financial forecast application, in a sense is a bit of
3 a misnomer that it is a separate issue, because it is the first item in paragraph 10 of
4 the draft order. We are settling that draft order. So this really doesn't go to who goes
5 first. But I am conscious of the time.

6 **MS LUCAS:** Yes. Well I was actually going to say, there are a number of issues that
7 have arisen in this case, one is that we are finalising the order 4-months after the
8 ruling.

9 **MR SCANNELL:** Yes.

10 **MS LUCAS:** That should not happen. The orders should be finalised in good time so
11 that everybody knows what they are doing, and that the Tribunal knows that matters
12 have been sorted and the timetable is on track. And I don't have to read back into it
13 after 4 months of walking away from it. Obviously, I have done it and we are all
14 prepared, but it all does need to be finalised in good order.

15 I think the appropriate thing to do would be for Mr Scannell to go first and for us to
16 work through the order.

17 I also understand that there is a dispute now about what issues you want me to resolve
18 on the order, or you say I can resolve on the order, which then feeds into which version
19 of the order I should be looking at.

20 **MR SCANNELL:** Yes. I will address you on that, Ms Lucas.

21 **MR WILLIAMS:** Just, in terms of the timing, madam, I am concerned there is no issue
22 arising out of this change in order from what was agreed and in the previous
23 correspondence so that Google isn't timed out of its applications from disclosure from
24 Epic. There is a risk on this approach. I just simply lay down that marker at this stage,
25 that I might have to pop up because I am concerned about the one-hour timeframe.

26 **MR SCANNELL:** We have already indicated, Ms Lucas, that it may be that more time

1 than an hour is required for this part of the hearing, as you will have described from
2 the skeleton arguments. There are lots of issues between the parties to sort out and
3 we don't want to impose any unrealistic expectations on anybody, not least the
4 Tribunal.

5 **MS LUCAS:** Unfortunately, we do only have an hour today, so everyone is going to
6 have to tailor their time to that. That doesn't mean you have to gallop through every
7 single issue, but you need to prioritise what we have to get through because we have
8 two other panel members who are waiting to come in and start part 2.

9 **MR SCANNELL:** Yes. My understanding is that we can spend a little bit more than
10 an hour, given what everybody else has said about how long they are likely to take for
11 the balance of the issues. We should be finished when the other members of the
12 Tribunal come in to consider their parts of today's agenda.

13 **MS LUCAS:** I am very conscious that we have spent five minutes talking about not
14 wasting time, but there is a letter, I think we have received from Google this morning,
15 suggesting that four and a half -- I think I added it up to four and a half hours is required
16 for the remainder of the issues involving the remainder of the panel, so if we can aim
17 for an hour.

18 **MR SCANNELL:** Let's see how we go.

19 **MS LUCAS:** Yes.

20 **MR SCANNELL:** Before I begin, it is necessary -- and I am conscious of time, but it
21 is necessary to make a contextual submission in relation to where we are on this draft
22 order. As you will have seen, I hope, from paragraphs 2 to 8 of our skeleton argument,
23 we are seriously concerned by Google's conduct in relation to the September ruling.
24 To say that Google has been uncooperative would be an understatement. It has been
25 positively evasive to date in relation to getting this order agreed. Under all of the heads
26 of your ruling that require search parameters to be agreed by the parties, for example,

1 Google has not engaged in a constructive way. Time and time again over the past
2 three months, my instructing solicitors have tried to get Google to engage with certain
3 parameters, and time and again, Google has rebuffed that in relation specifically to
4 search terms. Those have been proposed and repropoed by Epic, with concessions
5 along the way to facilitate agreement. When Google has asked for hit results to test
6 the adequacy of Epic's proposed search terms, they have been provided by Epic.
7 When Epic has asked Google to do the same thing, Google has either refused or has
8 given nonsensical useless answers such as hit results for the aggregate disclosure it's
9 purporting to give.

10 Now, I make two specific complaints about this.

11 The first is that Google's delay in providing compliant disclosure onto this ruling has
12 had a very real effect already on Epic's preparations for trial.

13 The second is that such disclosure as Google has given on a take-it-or-leave-it basis
14 to date is deficient and it does not engage properly with the ruling you made
15 in September. Now, as to Google's delay, 10 September, when Google began
16 releasing unilaterally framed disclosure in accordance with its own selected search
17 terms was only a week before the deadline for the expert evidence to be filed by Epic.

18 So, even if it had been compliant with the ruling -- and it wasn't -- it couldn't have been
19 considered by Epic's experts, and it wasn't. That is obviously a serious problem. You
20 may recall that at the June hearing, I repeatedly explained that it was imperative that
21 Google give the disclosure we were requesting so that it could be considered by Epic's
22 experts. Google has managed to get around that by delay, despite losing on almost
23 every single contested point at the June hearing.

24 As to the adequacy of the disclosure that Google has given to date, in the interests of
25 time, I am simply going to direct you to paragraph 8 of our skeleton argument where
26 we say that it is patently inadequate, it does not comply with the order. So, where we

1 are, madam, is that Google's conduct has the appearances of trying to outmanoeuvre
2 the September ruling. It hasn't given proper disclosure and it has strung Epic along
3 without actually engaging with the processes that are required to give compliant
4 disclosure now.

5 Now, in my submission, that cannot continue and it is for that reason that we are asking
6 that, if the Tribunal is amenable, we would ask that a line be drawn under this now and
7 you simply decide at this hearing the search parameters that Google should apply to
8 its disclosure under the ruling.

9 Epic has attempted to engage with Google on that and it has failed, so we have really
10 no option but to ask for it.

11 Now, those preliminary --

12 **MS LUCAS:** As I understand it, the objection to that is that the search
13 parameters -- some of them are in the Annexes -- were only provided shortly before
14 skeletons were due and that Google haven't had time to sort of test them.

15 **MR SCANNELL:** I am afraid we don't accept that at all. These search parameters
16 have been to-ing and fro-ing between the solicitors over the past number of months
17 and the Annexes to the draft order, which I will be referring to in a moment, they are
18 not unilateral Epic proposals for search terms. As we will see, a great deal of them
19 are in black text, so they have already been agreed. So they were unilaterally
20 proposed by Google as part of its unilateral disclosure and we said, "Okay, we will go
21 along with some of these but others we simply can't go along with because you are
22 not going to be generating the necessary disclosure to comply with Ms Lucas' order",
23 and so, some of the text is blue and some of it is green.

24 In fact, those Annexes reflect the position that the parties are in, the up-to-date position
25 that the parties are in, based on all of the correspondence between the parties to date.

26 So we don't accept that this has been sprung on Google at the last moment.

1 **MS LUCAS:** So you would say, would you, that the search parameters have been
2 ventilated in correspondence prior to this hearing?

3 **MR SCANNELL:** Yes, they have.

4 **MS LUCAS:** Okay. Thank you.

5 **MR SCANNELL:** So, in order to resolve the issues, we are going to have to look at
6 a draft order. The version I am going to speak to is the most up-to-date version of that
7 order. You may have it in loose copy, Ms Lucas. If not, it is in the third supplementary
8 bundle behind tab 9.

9 **MS LUCAS:** This is the one provided on 23 February?

10 **MR SCANNELL:** This was sent to the Tribunal on 20 February, the day of the skeleton
11 arguments, but late in the evening.

12 Sorry, the bundle was provided today, on the 23rd.

13 **MS LUCAS:** Maybe I only got it on the 23rd. Is this the one that contains your
14 additions?

15 **MR SCANNELL:** It contains all of the Annexes and not just some of the Annexes. It
16 is a 34-page document.

17 **MS LUCAS:** Yes. Yes, I have it. Thank you.

18 **MR SCANNELL:** I am grateful.

19 As you will see from this order, some of the text is black, some is green, some is blue.
20 Black is agreed, blue is the language that Epic commends and green is the language
21 that Google would prefer.

22 **MS LUCAS:** Yes.

23 **MR SCANNELL:** The first dispute arises under internal pages 3 to 4 of the draft order.
24 I am going to use internal page numbers unless you would prefer me to use --

25 **MS LUCAS:** No, that helps me, because I have printed it out separately before the
26 bundles came in.

1 **MR SCANNELL:** I am grateful. Under pages 3 to 4 of the order and paragraph 1.
2 Specifically, paragraphs 1(h), 1(k), 1(l) and 1(m).

3 **MS LUCAS:** Can I just ask, is there any dispute about the green text at the top of the
4 page in the recital?

5 **MR SCANNELL:** No.

6 **MS LUCAS:** Thank you.

7 **MR SCANNELL:** Now, the issue under paragraph 1 of the order relates to similar
8 incentive agreements. In the ruling, you concluded that Google has to provide
9 disclosure not only in respect of its revenue sharing agreements and its mobile
10 incentive agreements, but also in respect of similar incentive agreements. At
11 paragraph 121.1 of the ruling, you gave clear guidance as to what that meant.

12 Google does not want language like RSAs or similar incentive agreements to appear
13 in the order. Instead, it wants to replace that phrase with phrases such as RSA 3.0 or
14 an equivalent RSA 3.0; and RSA 4.0 or an equivalent RSA 4.0.

15 Now we give three reasons why that language should be rejected. The first is that the
16 language is not comprehensible as a matter of ordinary English syntax. We simply
17 don't understand what Google means by an RSA 3.0 or an equivalent RSA 3.0, if it
18 doesn't mean an RSA 3.0 or an equivalent incentive agreement.

19 The second is that the guidance you gave at paragraph 121(1) of the ruling as to what
20 is meant by a similar incentive agreement was clear. It is any agreement, whether it
21 is called an RSA or a MIA or anything else so long as it refers to or otherwise expands
22 an RSA or a MIA, or so long as it creates an incentive to hinder the installation of
23 alternative app distribution stores. That is the express wording in the ruling.

24 The third stems from the second. The whole reason for giving the guidance in the
25 order is to make the point that it doesn't matter what agreements are called, what
26 matters is their effect. Google's language qualifies that guidance and seems to confine

1 its disclosure to agreements that are actually labelled as RSAs and MIAs. We say
2 there is no warrant for that, so we commend the blue text in paragraph 1.

3 The next dispute comes under paragraph 2.

4 **MS LUCAS:** I had something to suggest on this in relation to the definitions section.
5 I wondered whether, to reflect paragraph 121(1), it was worth defining similar incentive
6 agreements separately and whether the parties had decided not to do that deliberately
7 or ...

8 **MR WILLIAMS:** Madam, I think this is all proceeding on a false premise that Google
9 does not want, in my learned friend's language, to disclose similar incentive
10 agreements. Can I ask you, please, to turn to paragraph 12 of this order where the
11 similar incentive agreements are defined, and then, subsequently, each and every
12 paragraph thereafter are ordered to be disclosed. Paragraph 1 is defining the
13 agreements themselves and that is necessary because of the way they are defined by
14 reference to Epic's pleadings. So my learned friend is proceeding on a false premise
15 and this collapses the sense of the order because similar incentive agreements are
16 ordered to be disclosed already. In my submission, it makes no sense, with respect,
17 to include similar agreements within the definition of the agreements themselves in
18 paragraph 1. I think this really is a case of ships passing in the night.

19 For the avoidance of doubt, Google is disclosing and has disclosed similar incentive
20 agreements pursuant to paragraphs 12, 13, 17 and 18A where the words "similar
21 incentive agreements" are included.

22 **MS LUCAS:** I had noticed that. That is one of the reasons I suggested that we might
23 want to shift a definition of "similar incentive agreement" into the definitions section,
24 and then your MIA is an MIA and your RSA is an RSA and your similar incentive
25 agreement is an agreement that has the effect of hindering the installation.

26 **MR WILLIAMS:** I can see, madam, where you are coming from on that. With respect,

1 | however, that would expand the scope of the ruling. Because you were very clear, in
2 | the September ruling, where the similar incentive agreements came in and where the
3 | obligation to disclose those flows in the orders, so at paragraphs 13, 17, 18A. If the
4 | definition of RSA, for example, includes a similar incentive agreement, we are
5 | expanding the scope of the obligation, in my submission, and that's not --

6 | **MS LUCAS:** All right, Mr Williams. You will have to walk me through that but, from
7 | your side's perspective, you would have no issue in --

8 | **MR WILLIAMS:** No.

9 | **MS LUCAS:** -- adding in an incentive agreement definition, which then gets swept up
10 | when you get to the relevant operative paragraph?

11 | **MR SCANNELL:** No, we wouldn't.

12 | The next dispute comes under paragraph 2 of the draft order on page 4 and under
13 | Annex 1 Part B on internal page 17.

14 | That paragraph relates to Google's request, G1, which was for further custodial
15 | disclosure related to Epic's strategy for the distribution of Epic Games Store on mobile.

16 | The disagreement relates to the date range. We say that the relevant date range has
17 | already been determined. It is 1 December 23023 to 30 November 2024. Google
18 | says the end date should be 31 May 2025, and you see that from page 17 of the draft
19 | order in the green text.

20 | **MS LUCAS:** Yes.

21 | **MR SCANNELL:** In adopting that position, Google, we say, is trying, via the draft
22 | order, to expand the ruling on G1 without having appealed against it. You disposed
23 | of request G1, madam, at paragraph 65 of the ruling. You accepted Epic's proposal
24 | to add further search terms to the disclosure it was already giving Google under
25 | requests 5 and 7 against the existing four custodians and you accepted its proposal
26 | to add Mr Sweeney and Mr Gass as custodians.

1 At paragraphs 67 to 68 of your ruling, you dismissed Google's attempt to extend the
2 date range for request G1 from November 2024 to March 2025. The only exception
3 was that the end date for the disclosure to be given by the two new Epic custodians
4 was May 2025. You expressly ruled that there should be no extension of the date
5 range for existing custodians. That is paragraph 68 of the ruling.

6 **MS LUCAS:** Yes, so, on that, my recollection is that it was submitted that it would be
7 difficult to go -- you are asking someone to go back and revisit and re-harvest, and
8 that might be more complicated. So that is why they were -- the existing custodians
9 were carved out, and then, for the new custodians, it would be easier to apply the
10 extended date range.

11 But I think in my ruling I also said that, if it was easy to do, then the date range should
12 be extended, and I think Google's position is that they don't see why it is quite so
13 difficult.

14 **MR SCANNELL:** It is difficult to do that, it is expensive, it is disproportionate. There
15 is absolutely no warrant for it at all and my instructions in relation to that are quite
16 clear, that it's one thing to extend a date range for one custodian, but to do it for all of
17 the custodians is a very onerous and expensive process which we are unwilling to
18 embark on without any sort of proper explanation as to why it should happen.

19 **MS LUCAS:** I think I was vaguely hoping that two additional custodians would yield
20 sufficient documentation relating to the later period, but it wouldn't be necessary for
21 the original custodians to have the same exercise done.

22 **MR SCANNELL:** Yes. In the interests of time, I am going to press on. I am terribly
23 sorry, I would like to spend more time unpacking that, but we do need to go on.

24 The next dispute arises under paragraphs 4 to 6, which is on page 5 of the order,
25 Ms Lucas, and under paragraph -- Annex 1 E, which is on page 22 of the document
26 you are looking at. They address the disclosure to be given under request G3. To

1 refresh your memory, Ms Lucas, request G3 related to Epic's distribution strategy on
2 mobile.

3 **MS LUCAS:** Yes.

4 **MR SCANNELL:** Specifically, request G1-sought documents relating to the strategy
5 generally and request G3-sought documents relating to Epic's engagement with third
6 parties in connection with that strategy.

7 The disagreement relates to the process by which the G3 disclosure is to be given,
8 along with custodians and search terms, which the parties were required to agree
9 under paragraph 66 of the ruling. I am cutting to the chase: Google wants a new
10 disclosure process to be launched under request G3, with search parameters that go
11 beyond those settled in respect of G1, and it wants to expand the group of custodians
12 for that request. All of that is set out on internal page 22 of the order at Annex 1, Part
13 E.

14 Our position is that Google's demand disregards the disclosure orders already made
15 in the proceedings, but we are willing to compromise in order to narrow the dispute. If
16 I can just explain where we are coming from in that respect. You correctly noted in
17 the ruling, Ms Lucas, that request G3 wasn't new. It was the same as request 6 at
18 the December 2024 CMC. That was paragraph 25 of your ruling. And request 6 was
19 refused in December 2024. The reason it was refused was that requests 5 and 7 were
20 highly likely to provide the information that Google sought and, if it didn't, Google could
21 come back and say in what respects the disclosure under requests 5 and 7 were
22 deficient by reference to the pleadings.

23 Google failed, at the June hearing, to establish any deficiency or insufficiency in the
24 existing disclosure Epic had given under requests 5 and 7, and for that reason you
25 refused request 3. But, because Mr Allison's written evidence had canvassed
26 reservations that third parties had expressed relating to Epic Games Store on mobile,

1 including Google's reactions, you deemed it expedient that there be limited disclosure
2 on that narrow issue. You expressly noted by reference to Mr Allison's evidence that
3 the disclosure ought not to be extensive and that the disclosure spanned a relatively
4 short timeframe. That is all in paragraph 66.

5 The search parameters applicable to request G1 are extensive, and those were the
6 search parameters Epic proposed to apply to the limited disclosure to be given now
7 under request G3. For the same reason as you identified in the December ruling, G1
8 generates the documents sought under G3 and, therefore, the search parameters for
9 G3 should be the same as those applied to G1. We are, nevertheless, willing to adopt
10 all of the search terms that Google would prefer for the limited G3 disclosure you have
11 allowed, all of them. We are also content to apply all of those terms across the entirety
12 of the date range that Google prefers.

13 What we are not prepared to do, however, is to add to the existing custodians for the
14 purposes of that limited field of disclosure, as Google is requesting. Mr Allison is the
15 witness whose evidence generated the Tribunal's ruling that there should be limited
16 disclosure in respect of third parties' perceptions of the dangers inherent in incurring
17 Google's wrath, so Mr Allison is plainly the appropriate disclosure custodian for that
18 purpose.

19 We say that extending the search to three additional custodians would be grossly
20 disproportionate. It would be disruptive and it would be expensive.

21 So, for those reasons, we object to the addition of the custodians whose names appear
22 in green on internal page 22 of the order. Otherwise, we agree.

23 **MS LUCAS:** Is there any particular reason why you couldn't include Mr Sweeney, for
24 example, as a custodian? Because he is covered by G1 and, if you say that the likely
25 population is going to be duplicative between G1 and G3, would it be sensible to run
26 the searches against Mr Sweeney as well?

1 **MR SCANNELL:** In principle, the answer to that question would be yes, because, of
2 course, the G3 search terms would be the same as G1, but what we are agreeing to --

3 **MS LUCAS:** The additional ones.

4 **MR SCANNELL:** -- is the new list of search terms that Google has commended for
5 G3, and so it is effectively a new search that would have to be run against the new
6 custodians and that is what we are not prepared to do.

7 **MS LUCAS:** You will forgive me if I don't have a reference for this, but I understood
8 Mr Sweeney had some role in relation to the strategy for the Epic Games Store, which
9 is one of the reasons that he is in G1. So I am not sure, someone will enlighten me,
10 but is his role such that it would be appropriate that he may have information relating
11 to the third party concerns?

12 **MR SCANNELL:** I don't want to speak out of turn in relation to this, and I am sure that
13 I would not be thanked for that, but my understanding is that Mr Sweeney was not
14 directly involved in the source of the processes that Mr Allison was involved in, in the
15 context of which he referred to reactions, most of which were given orally, if you recall.

16 **MS LUCAS:** Yes.

17 **MR SCANNELL:** That is my understanding. So, there is the point of principle, to
18 begin with, that if it is Mr Allison's evidence that is generating the indication that there
19 should be limited further disclosure to reveal, "Well, what exactly were these reactions
20 that you are talking about, Mr Allison?", Mr Allison is the appropriate custodian. But
21 there is also, I believe, the further point that Mr Sweeney is not the right person to be
22 talking about that anyway.

23 If I can move on, then, to pages 8 to 9 of the order. Paragraphs 14 to 16. These
24 paragraphs address the disclosure to be given by Google to Epic under requests E1
25 to E3 and E9 to E11. You see that from the top of internal page 8.

26 **MS LUCAS:** Yes.

1 **MR SCANNELL:** Again, to refresh our memory, requests E1 to E11 related to
2 incentive agreements of different kinds.

3 **MS LUCAS:** Yes.

4 **MR SCANNELL:** E1 to E3, incentive agreements with OEMs other than Samsung;
5 requests E9 to E11, Google's deals with carriers.

6 **MS LUCAS:** Yes.

7 **MR SCANNELL:** The issues here are, first, whether the words in blue at
8 paragraph 14A on page 9 should appear or not.

9 **MS LUCAS:** Yes.

10 **MR SCANNELL:** We say they should, Google disagrees.

11 Second, whether a line should now be drawn under the abortive process of trying to
12 agree search parameters with Google, on the basis that we have tried and failed to do
13 that, in which case the blue text in the main body of paragraph 14 should appear; or
14 whether we should continue with business as usual, which is what Google would like,
15 in which case the green text in paragraph 14 appears along with the green text in 15
16 and 16.

17 **MS LUCAS:** Yes. That is the text that was originally black, as I understand it?

18 **MR SCANNELL:** Yes. That's correct.

19 As to whether the blue language in paragraph 14A should appear, I can take that
20 shortly. That language comes verbatim from paragraph 121(2) of your ruling. It is at
21 internal pages 47 to 48 of your ruling, pages 209 to 210 of the supplementary bundle,
22 if one prefers to use that.

23 So we say there is no sensible reason for excluding them.

24 In correspondence, Google's only reason for objecting to the insertion of that language
25 is that the disclosure that Google has already given is sufficient. We say that is in part
26 untrue and in part irrelevant. It is untrue because we don't accept that the disclosure

1 given to date is sufficient pursuant to Google's unilaterally selected search
2 parameters, and it is irrelevant because what we are now discussing is the appropriate
3 order to be made following the ruling that you made in September. That is
4 a backward-facing exercise by reference to the ruling. It's not a forward-facing
5 exercise to be undertaken by reference to what Google decides to do. So, for those
6 reasons, we commend the wording in blue at paragraph 14A.

7 As to the main text in paragraph 14, the blue text envisages that Google will finally
8 give proper disclosure within 30 days in accordance with the search parameters set
9 out at internal page 27 of the order, Annex 2, Part D.

10 **MS LUCAS:** Yes.

11 **MR SCANNELL:** As you can see from page 27, and from pages 28 and 29 which
12 continue these boxes, some of the search parameters are in black. Now, they are the
13 parameters that Google unilaterally selected but Epic is willing to agree. Other
14 parameters are not in black, so they are the parameters that Epic has been banging
15 its head against the wall trying to get Google to agree, but without success.

16 **MS LUCAS:** Yes.

17 **MR SCANNELL:** As to where the blue text comes from and why it should be ordered,
18 that has been explained in correspondence with Google's solicitors over the past
19 number of weeks. That culminates in the letter that was sent by Epic's solicitors to
20 RPC on Friday and the annex to that letter.

21 Now, the letter should be in your bundles at volume 2 of supplementary bundle 1,
22 tab 81. The annex to the letter should be behind -- I am sorry.

23 **MS LUCAS:** That's fine, I can't find my electronic bundle. There's a relevant one on
24 the screen, but I have a hard copy, so, which reference is it?

25 **MR SCANNELL:** Tab 81 of volume 2 of supplementary bundle 1.

26 **MS LUCAS:** Yes, I have it.

1 **MR SCANNELL:** Behind the next tab, tab 82, which I am actually more interested in,
2 is an annex to that letter.

3 Now, you may feel that there is insufficient time at this hearing to go through all of the
4 search terms and custodians. That is, of course, understood. It may assist you if I can
5 just explain where the blue text on page 27 actually is explained and where it comes
6 from.

7 So, taking this in steps. The blue text at the top of page 27, the box at the top of
8 page 27 tracks on to the disclosure to be given by Google under paragraph 14A.

9 **MS LUCAS:** Yes.

10 **MR SCANNELL:** The reasons why the blue search parameters in that box should be
11 ordered are set out in the annex to the letter at tab 82, at page 1, row 1, column 5.

12 **MS LUCAS:** Yes.

13 **MR SCANNELL:** The second box, on page 27, backs on to paragraph 14B of the
14 order. The reasons why the blue text in that box should be ordered, and not the green,
15 are set out at row 2 of the annex, beginning at internal page 3 of that annex. Again,
16 in particular, at column 5.

17 The third box in this part of the order, which appears on page 28 and 29, backs on to
18 paragraph 14C of the order and the reasons why the blue text should be ordered are
19 set out in row 3 of the annex beginning on page 10.

20 Now, in the time available, all I can say is that I commend the blue search parameters.
21 As one sees when those rows of the annex are perused, they are narrowly tailored,
22 proportionate and necessary to ensure the full effect of the September ruling. That is
23 as far as I can take it.

24 **MR WILLIAMS:** Madam, in light of the time, we have 25 minutes. My learned friend
25 has picked his top 3 Epic requests, and he has dealt with two Google requests. So,
26 in light of the time, I propose, with your permission, to address the three Google

1 requests that -- the two, sorry, that my learned friend has addressed, G1 and G3, with
2 me selecting a third, which is G5, which is the one up front and centre of our skeleton
3 argument, you may recall, in relation to financial forecasts. And I will address the three
4 Epic requests that my learned friend has addressed, insofar as I am able. So the ones
5 that have been in dispute and have been addressed in his skeleton and in evidence
6 to date are in relation to paragraphs 1 and 14(a), and then the third, which he has
7 raised for the first time today, is the 14(b) and the annex which you have just been
8 looking at. But we have 22 minutes left and that is a fair division: three Google
9 requests and three Epic requests that can be dealt with this morning.

10 **MS LUCAS:** I think we will keep working through the order. I do hear what you say
11 and I am very conscious of the time, but we will keep working through the order.

12 **MR SCANNELL:** We are nearly at the end before we get to --

13 **MS LUCAS:** Nearly at the end? Marvellous.

14 **MR SCANNELL:** We are, before we get to the forecasting application, which of course
15 I will sit down for, it's not mine, and the other issue is the chats, so we are nearly at
16 the end.

17 The next issue arises under paragraphs 17 to 20 of the draft order. And Annex 2, Part
18 E. So that is internal pages 10 to 11 for 17 to 20, and internal page 30 for Annex 2,
19 Part E.

20 **MS LUCAS:** Yes.

21 **MR SCANNELL:** This part of the order relates to the disclosure to be given again by
22 Google to Epic under Epic requests E5 to E8.

23 **MS LUCAS:** They are Samsung requests, aren't they?

24 **MR SCANNELL:** Yes. I am grateful. The disagreement boils down to whether the
25 disclosure process Google is proposing for E5 to E8 is appropriate in circumstances
26 where Google has to disclose not only its current incentive agreements with Samsung,

1 but also in accordance with request E5, which was granted in full -- all of these were
2 granted in full -- at the order. Non-binding, preliminary documents, draft agreements,
3 letters of intent and heads of terms. And, in circumstances where it must also disclose
4 other internal and external communications covered by requests E6 and E7. And,
5 importantly, where it must disclose all of its data and analysis relating to contemplated
6 or concluded incentive agreements with Samsung.

7 **MS LUCAS:** Yes.

8 **MR SCANNELL:** Information like how much Google is actually paying, what it is
9 costing them to pay off the likes of Samsung.

10 The easiest way to see the problem with what Google is proposing is to look at their
11 search parameters. Those appear at internal page 30 of the order. So you can see
12 from the first box on this page, madam, that Google wants to limit its searches to
13 emails and attachments to the same.

14 **MS LUCAS:** Yes.

15 **MR SCANNELL:** That is a separate issue. That is the issue of whether Google chats
16 should be included, so I will take that separately. The more immediate problem arises
17 under the second box on this page. So, looking at the search parameters in green,
18 which are Google's suggested parameters, it is impossible to see how those
19 parameters could result in the disclosure of the requested information under E5 to E8.
20 They don't take account of the clear ruling that Google has to disclose incentive
21 agreements and draft agreements, even if they are not called revenue share
22 agreements and mobile incentive agreements, for example.

23 If one considers request E8, that requires Google to disclose data or analysis relating
24 to incentive agreements and how much it costs Google. These search terms clearly
25 won't result in the disclosure of that data and analysis. Only a repository-based search
26 would do that. We have repeatedly asked Google to explain why it's not proposing

1 a repository-based approach and we don't have a satisfactory answer.

2 **MS LUCAS:** Can you just explain to me what you mean when you say "repository
3 approach"?

4 **MR SCANNELL:** We feel that it is likely that all of the incentive agreements, or at
5 least categories of incentive agreements, certainly with Samsung, are to be found in
6 a single block repository somewhere on Google's system. That will include any
7 analyses that go into how much they are actually paying, what it is costing, whether or
8 not the game is worth the candle. Documents of that sort discussing how the
9 agreements actually work and what is proposed. A draft, and so on.

10 **MS LUCAS:** I mean, is that a fair assumption to make? Because it may be that, for
11 example, the general counsel at Google holds all these material agreements in the old
12 way of having a transaction Bible or whatever, and that the analysis of how much it's
13 costing is conducted by somebody else and exchanged between people in
14 a department that deal with this.

15 **MR SCANNELL:** Yes. I don't disagree with that point at all. Had we been told that
16 by Google, I wouldn't be making the submission that I am making now, but we don't
17 have a satisfactory answer to the question of why a repository-based approach isn't
18 being applied.

19 And if a repository-based approach is practically impossible, or won't disgorge the
20 relevant documents, then some other approach, but it is up to Google to let us know
21 how they are going to actually comply with E5 to E8. So that is the issue there.

22 **MS LUCAS:** Yes.

23 **MR SCANNELL:** The next and final discrete point under the paragraphs arises under
24 pages 12 to 13 of the draft order. Paragraphs 22 to 24 and 26 to 28. They deal with
25 Google's obligation to give disclosure in respect of UCB and Spotify respectively.

26 **MS LUCAS:** Again.

1 **MR SCANNELL:** Again, all of the UCB requests we made at the June hearing, as
2 modified in advance of that hearing, were granted. That is paragraph 135 of the ruling.
3 All of the Spotify requests at the ruling were also granted in full. That is paragraphs
4 148 to 149 of the ruling.

5 The dispute, again, is how the process should work to enable Google to actually give
6 the disclosure that it must make.

7 We want Google to give this long overdue disclosure within 30 days of the order in
8 accordance with the search parameters which are set out in Annex 2, Parts F and G,
9 which are internal pages 31 and 33. Google would prefer to continue with business
10 as usual and that accounts for the swathes of blue and green text at pages 12 to 13
11 of the order.

12 **MS LUCAS:** Yes. So that is the process of seeking to agree terms, et cetera?

13 **MR SCANNELL:** Yes, which we say --

14 **MS LUCAS:** We are beyond that, you say?

15 **MR SCANNELL:** Yes. Additionally, in the case of UCB disclosure, not in the case of
16 Spotify, there is a disagreement as to the search parameters. As to the search
17 parameters for Google's UCB disclosure, if I could just ask you to turn, please, again
18 to internal page 31.

19 **MS LUCAS:** Yes. Is part of this dispute, if you have to have UK or EEA in there, then
20 that is going to narrow the hits, is that right? I will let you explain it, and then -- yes,
21 I will let you explain it.

22 **MR SCANNELL:** I am told that it is part of it. That is what one doesn't want to hear,
23 but I am sure that is absolutely right.

24 At page 31, we can see the points of agreement in black and the points of
25 disagreement in green. Now, the answer to why the blue text should appear again
26 requires me to give you the references to the annex to the letter, and so I will give you

1 those for your note. So the blue text in the first box on page 31 is the disclosure that
2 Google must give under paragraph 13A of the -- sorry, under request 13A at the June
3 hearing.

4 **MS LUCAS:** Yes.

5 **MR SCANNELL:** That is internal page 17 of the annex.

6 **MS LUCAS:** Yes.

7 **MR SCANNELL:** Row 6. Again, column 5. Would you like the supplementary bundle
8 reference? It is page 1376.

9 **MS LUCAS:** I have it. I have actually read this document. I have read the annex to
10 the letter.

11 **MR SCANNELL:** That is marvellous. I am grateful.

12 As to the blue text in the second box on page 31, it relates to the take-up of UCB and
13 DOB -- sorry, Developer Only Billing -- in the territories in which they are available
14 under what was request 13B at the June hearing. The explanation is to be found at
15 internal page 20 of the annex, row 6A, column 5.

16 **MS LUCAS:** Yes.

17 **MR SCANNELL:** I am grateful for the indication that those short accounts have been
18 read. They are, in my submission, persuasive.

19 That just leaves internal communications and chats.

20 **MS LUCAS:** Yes.

21 **MR SCANNELL:** And application.

22 The disagreement there is pervasive throughout the order and it arises from the fact
23 that Google has simply refused to disclose internal communications via Google Chat.
24 We do say that that is an astonishing position for Google and its legal advisers to have
25 adopted, and we are concerned by it. We are equally concerned by the admission
26 that Google has not disclosed any of these chats to date in the proceedings. As to

1 | what a Google Chat is, madam, it is a communications instant messaging tool that
2 | allows users to send each other text messages. I have taken that definition, I haven't
3 | made it up. I have taken that definition from a ruling that was given specifically on
4 | Google's deliberate concealment of Google Chats in the US version of these
5 | proceedings.

6 | **MS LUCAS:** Yes, I read your skeleton on that. Are there any particular paragraphs
7 | in that ruling you want me to look at? If you just give me the references I can take
8 | them away.

9 | **MR SCANNELL:** Yes. I would like to give you the page numbers from the bundle,
10 | the authorities bundle. I hope that is agreeable.

11 | **MS LUCAS:** Yes.

12 | **MR SCANNELL:** The paragraphs I would like you, please, to read are: lines 13 to 15
13 | of paragraph 1 at page 768, line 9; page 770 at paragraph 9 in full.

14 | **MS LUCAS:** At paragraph 9?

15 | **MR SCANNELL:** Yes. Page 773 at paragraph 24, in particular the first three lines;
16 | page 774, paragraph 27; paragraph 32 on the same page, 774; paragraph 33 over the
17 | page; and the culmination of the court's consideration of all of those points at
18 | page 782, beginning at line 8.

19 | **MS LUCAS:** Yes. The difference between you is there is this American ruling which
20 | says that it was an important form of business communication, and an Australian ruling
21 | which says they didn't -- the court there didn't detect any meaningful business
22 | communications via Chat.

23 | **MR SCANNELL:** The starting point in relation to all of this is that we made -- ten
24 | different requests that we made for disclosure engaged internal communications
25 | expressly in the requests that were made. They included an express reference in the
26 | consolidated Redfern Schedule that we used for the hearing that that must include

1 Google Chat. And the broader point that Google Chat is an internal communication,
2 and you have ruled in respect of all ten of the requests that the internal
3 communications must be disclosed. There is, therefore, no reason whatsoever to hive
4 them off in the way that Google suggests.

5 What I was going to say in relation to that ruling is that the fact that these findings have
6 been made in the United States heightens our concern as to why these Google Chats
7 have not been disclosed and why Google is trying to hive them off from the internal
8 communications it must disclose.

9 In light of the findings that the court made and particularly given that your ruling
10 requires internal communications worldwide, we are concerned as to why Google is
11 not disclosing these.

12 Finally on this point, none of the reasons that we see have been put forward by
13 Mr Cran are remotely close to tenable as a reason for hiving off these chats.

14 First, he says that we should have specifically asked for chats and we should explain
15 why we want them. Well, we did ask for the chats. That is the short point. And, in
16 any event, it is not incumbent on us to say why a chat isn't an internal communication;
17 it is incumbent on Google to explain why, notwithstanding that they are, they should
18 be separated out and sequestered.

19 Finally, it is no answer to any of this to say that Google hasn't disclosed these chats
20 to date. Leaving aside the disregard for its disclosure obligations that that argument
21 reveals, the short point is that multiple wrongs don't make a right. If Google's failure
22 to disclose these chats to this point merely increases the imperative that it do so now.

23 **MS LUCAS:** I have read the annex.

24 **MR SCANNELL:** Of course.

25 **MS LUCAS:** Yes. Before you start, I wonder if we could get a message through to
26 the other panel members who are waiting with bated breath for phase 2 that it will be

1 not before 11.30 am.

2

3 **Submissions by MR WILLIAMS**

4 **MR WILLIAMS:** Madam, in light of your indication, I will take the draft order in order.

5 That will include dealing with paragraph 10 at the appropriate point in relation to G5,

6 which my learned friend has not addressed you on. I am happy to take the draft order

7 that you have been looking at for convenience.

8 **MS LUCAS:** Thank you.

9 **MR WILLIAMS:** In relation to paragraph 1, that is the definition of the agreements,

10 RSAs and so forth, we are content with your suggestion, madam, essentially, as

11 I understand it, to move the definition in paragraph 12 up to a recital. That deals in full

12 with paragraph 1.

13 The next issue is in relation to request G1, that is -- the operative part is at paragraph 2

14 of the order but, as you will see there, that links out to Annex 1, Part B.

15 **MS LUCAS:** Yes.

16 **MR WILLIAMS:** That's on internal page 17. You will see there that the only

17 disagreement is to the date range for the searches.

18 In short, Google seeks consistency between the dates for the two new custodians,

19 Mr Sweeney and Mr Gass, which are agreed, and the dates for the four existing

20 custodians, the end date for which is not agreed. Google, in particular, seeks

21 a consistent end date of 31 May 2025 for all the custodians. There is no good reason,

22 in my submission, for Epic's curtailment of the period for only some of the custodians

23 ending on 30 November 2024. They should all end on 31 May 2025.

24 **MS LUCAS:** Apart from the fact I said they could.

25 **MR WILLIAMS:** Madam, if we can turn to the ruling in September, I think it is

26 important to track through exactly what was said. My learned friend had skated over

1 quite a lot of material in the short time available this morning.

2 **MS LUCAS:** I did say, if it was straightforward for them to do it, they should do it.

3 **MR WILLIAMS:** Absolutely. I will take you to that passage, but also some other
4 passages. It is in the first volume at tab 10, madam, and in particular starting at
5 page 183. It is at the bottom of the page, paragraph 48 of the September ruling. That
6 is page 183. That sets out the date range. Paragraph 49 then records Google's
7 submission that it is a fast-developing market. Paragraph 50 is important.
8 Mr Scannell there accepted there may be a need for categories of disclosure to be
9 updated nearer to trial, and then paragraph 50 states that Epic maintains the line has
10 to be drawn somewhere.

11 Now, with that in mind, if we skip forward to page 188 -- this is the paragraph that you
12 have in mind, madam; it is paragraph 68 in particular. If I could ask you to read that
13 in full, please.

14 **MS LUCAS:** I need to read the previous paragraph, don't I, about the --

15 **MR WILLIAMS:** Yes. This is the one where you end at the top of page 189 with:
16 "If it is a relatively straightforward process to extend the time, Epic should do so."

17 **MS LUCAS:** Yes.

18 **MR WILLIAMS:** Now, Epic has put forward no evidence whatsoever that it is not
19 relatively straightforward to do so or that it would be an extensive and costly process.
20 Indeed, in its skeleton, it has not put forward any reasoning and my learned friend
21 today acted on instructions only. There is no explanation as to why it's not
22 straightforward.

23 The only evidence that is before you, madam, demonstrates, in my submission, that it
24 is straightforward and I make three short points to make that good. The first is that the
25 difference between the parties is only five months. We are not talking about
26 an extensive extension.

1 Second, the ease of the extension is demonstrated by two factors. The first is that
2 Epic has already proposed to provide disclosure over the same time period in the case
3 of one custodian, that is Mr Allison, in response to another request. So this can be
4 done.

5 The second factor which demonstrates the ease is that in respect of this request, so
6 G1, Epic has already agreed to extend the searches by one month to November 2024,
7 so, again, Epic is already going to be undertaking additional searches and will be
8 conducting that extended process in any event.

9 The third point I wish to emphasise is that the date range into 2025 is important
10 because of known factual developments since November 2024.

11 To make that point good, I would like to show you just one short paragraph in the
12 Redfern Schedule or I can give you the reference, if you would like to take this away,
13 madam.

14 **MS LUCAS:** Is this the original Redfern Schedule?

15 **MR WILLIAMS:** This is the one at tab 12 of this first bundle and it is page 246. The
16 reason I am taking you there is because I am skirting around confidentiality issues,
17 which makes this hearing particularly difficult. It is at page 246.

18 It is the bottom right-hand corner, the second bullet point, if I can ask you to read that.
19 It begins with "the need for the date range to be updated...".

20 **MS LUCAS:** Yes.

21 **MR WILLIAMS:** The second factual development since February 2024 is Mr Allison
22 has subsequently provided a supplemental statement dated 10 June 2025. Large
23 portions of that are confidential, so I won't go through the detail, but he does record
24 relevant discussions with team members who were involved in discussions with other
25 OEMs and carriers.

26 **MS LUCAS:** Yes, I recall what --

1 **MR WILLIAMS:** That's why we're very keen not to end in 2024. Once, in my
2 submission, it has been demonstrated to be highly relevant and there are factual
3 developments and it is being extended for other custodians, there is no good reason,
4 in my submission, to curtail it to earlier periods in relation to other custodians in
5 circumstances where updated searches are already being conducted.

6 That deals at a canter with request G1.

7 The next one that my learned friend addressed was in relation to request G3. The
8 operative part is paragraphs 4 and 6, but, as you already know, that refers out to
9 Annex 1 Part E, and that is where the dispute is set out. On Epic's order, that is at
10 SB3, tab 9, page 91. That is internal page 22 of the Epic's order. So you will have
11 seen the search terms are agreed. There were two disputes on this page. Having
12 heard your indications earlier, madam, we are prepared to accept the date range. I will
13 only press now the custodians, in light of the time. But, of course, Google will reserve
14 its position on that if the disclosure is not sufficient in due course.

15 **MS LUCAS:** So, you accept 1 August 2024?

16 **MR WILLIAMS:** Yes. That is the date of launch of the Epic Games Store.

17 Epic proposes only a single custodian and there are two headline points I want to
18 make and develop in due course on that.

19 First, Mr Allison himself says that he was not involved in all the discussions with third
20 parties. So, the inclusion of just Mr Allison in that list in black text on the bottom of
21 page 22 is not sufficient, and I will make that point good.

22 Second, Epic's own evidence demonstrates that other custodians are highly relevant
23 as they were involved in Epic's relationships with third parties.

24 In light of the time, I will deal with Mr Somol and Mr Stolfus, and the quickest way of
25 dealing with that is to turn to the fourth witness statement of Ms Rogers, which is
26 highlighted in confidential passages. That is in bundle 2, at least in my hard copy, at

1 tab 71.

2 **MS LUCAS:** Yes.

3 **MR WILLIAMS:** In particular, at page 1094.

4 **MS LUCAS:** Yes.

5 **MR WILLIAMS:** Now, given confidentiality, could I please ask you to read paragraphs
6 10 and 11 to yourself?

7 **MS LUCAS:** Yes.

8 **MR WILLIAMS:** As you do so, can I ask you to note who respectively is relevant for
9 developers, OEMs and carriers.

10 **(Pause).**

11 **MS LUCAS:** Yes, I have read that.

12 **MR WILLIAMS:** I also note that Mr Stolfus has given a witness statement in these
13 proceedings, which is why we also seek this.

14 In relation to Mr Sweeney, again, it is confidential. In light of the time, I will just refer
15 you to paragraph 27A of our skeleton argument.

16 **MS LUCAS:** Yes.

17 **MR WILLIAMS:** There was a confidential extract concerning his role.

18 Now, Epic's response, as you heard this morning, essentially boils down to one key
19 point. That point is that documents responsive to request G1 -- so G1 and not
20 G3 -- are sufficient. That is because, I quote "Epic is providing disclosure in response
21 to request G1". That is justified and, again, I quote:

22 "On the basis of the inclusion of third party titles on EGS [Epic Games Store] clearly
23 forms part of Epic's strategy for the distribution of EGS on mobiles."

24 Now, with respect, that materially conflates two entirely separate requests with
25 different material scopes. And there are two short points to make on that.

26 The first is that request G1 is about internal strategy documents, whereas G3 concerns

1 reservations and concerns about the quality of EGS from third parties.

2 The second justification that I have just read out, that Google will get information about
3 the inclusion of developers' apps on EGS, is not sufficient for the purposes of G3.
4 Now, which developers' apps are available on EGS is not the same as the distribution
5 of EGS, Epic Games Store.

6 Furthermore, request G3 also captures the views of OEMs and carriers about EGS,
7 not those just of developers. That is important because it would be immediately
8 obvious that OEMs, carriers and developers have different perspectives and different
9 interests and, therefore, may raise different concerns.

10 I will take this very briefly, but if you have page 22 of the order still open, part E, and
11 glance down the search terms --

12 **MS LUCAS:** Yes.

13 **MR WILLIAMS:** -- you will see that they include developers, OEMs and carriers. That
14 is why G3 is potentially different. They are all relevant.
15 That deals with G3.

16 We are now turning away from requests from Google to requests from Epic.

17 **MS LUCAS:** Has Google conducted a review of the G1 disclosure to see how much
18 it does yield in relation to request G3?

19 **MR WILLIAMS:** Yes, it has, and these requests have not been made blindly on the
20 assumption that we have sufficient material already. They are different requests in
21 relation to different search terms. The EGS, as a comparator to the Google Play Store
22 is, as you will appreciate, a central issue in this case and the quality concerns and
23 contemporaneous quality concerns are vital to the comparison between EGS and the
24 Google Play Store.

25 We have sought, those behind me will be really keen to emphasise, to limit these
26 requests for what matters.

1 I said that I was going to turn to paragraph 14, but please forgive me, the next
2 paragraph in dispute, taking the order in turn, is paragraph 10. That is on internal
3 page 6, page 75 of the bundle.

4 My learned friend hasn't addressed you on this this morning. I am going to assume
5 that he is not conceding the point and, therefore, address on that basis, based on his
6 skeleton argument.

7 So this request concerns G5, and this is the one that was put up front and centre of
8 Google's skeleton argument, and the context will be familiar to the Tribunal. That is
9 for a reason.

10 Request G5 concerns financial forecasts in relation to the profitability of the
11 Epic Games Store which fell due pursuant to paragraph 22 of the September ruling.

12 The contested wording you will see at the bottom of page 6. Google's text is in green:
13 Google seeks "all forecasts presented at an executive level which are intended to
14 reflect EGS's reasonably anticipated performance and whether or not it is reasonably
15 likely to be profitable by 2026 to 2028.

16 That wording may sound eerily familiar to you, madam, because that tracks the
17 language in the ruling almost exactly.

18 By contrast, in the blue text, you will see that Epic seeks to limit this in two ways. Now,
19 this is highlighted "Confidential" for reasons I can't entirely fathom. I don't think the
20 date ranges are, so the first limitation in relation to both A and B is that they have
21 limited the date of documents produced between 1 October 2024 to 30 June 2025.

22 The second type of limitation, in relation to subparagraph (a) you will see a particular
23 group or team and in (b) you will see two other and different teams that that has been
24 limited to.

25 **MS LUCAS:** Yes.

26 **MR WILLIAMS:** Apologies for having to be slightly delphic, but I hope, madam, you

1 are following me on that.

2 **MS LUCAS:** I do.

3 **MR WILLIAMS:** That's the scope of the debate. So turning to the ruling, the relevant
4 passage starts at volume 1, tab 10, page 171. It's paragraph 18, if you have beaten
5 me there, madam.

6 **MS LUCAS:** Yes.

7 **MR WILLIAMS:** The key bit is the last four lines. Madam, it was accepted that Epic
8 has put its own future profitability in issue. It's relevant to the comparator case, and
9 so on.

10 Now, this is particularly important, given that, in Epic's claim against Apple in the US,
11 Epic's 12 per cent commission rate was found to be "below cost", and the store is
12 "expected to operate at a loss for many years at this rate". Again, I quote that the
13 judge there found that could be viewed "merely as a litigation tactic". Now, Google
14 seeks disclosure to make that point good on the basis of primary evidence. As I have
15 said, the claimants rely on EGS as a comparator by which to judge whether Google's
16 service fee is excessive and unfair.

17 Paragraph 19 in the ruling, if you are still there, at the bottom of page 9, you have
18 confirmed that Epic has pleaded its own expectations, and then, summarising
19 paragraph 20 over the page on 172, you noted that Mr Allison provided evidence on
20 this topic. That's something that Google is entitled to test.

21 Now, paragraph 22 at the bottom of that page internal page 10, is the key one. If
22 I could ask you to reread that for yourself.

23 **MS LUCAS:** I have done that.

24 **MR WILLIAMS:** In which case, the key issue that I would like to emphasise is the first
25 sentence:

26 "What should be disclosed are the forecasts presented at executive level."

1 The last two lines on the bottom of that page:

2 "What should be disclosed are forecasts meaningfully presented at senior executive
3 level."

4 And then the last sentence at the end of the paragraph on the next page.

5 **MS LUCAS:** Yes.

6 **MR WILLIAMS:** "Reflect the understanding at the executive level of the likely
7 parameters of Epic's future performance, ie between 2026 and 2028."

8 Now, in my submission, it's not sufficient for Epic to have disclosed a mere three
9 documents in response to that paragraph and to have promised only the inputs for
10 a fourth document.

11 First, in respect of the date range, there is no reason for it to be confined to the period
12 where documents were produced between only October 2024 and May 2025. That
13 fails to capture forecasts which relate to the time period of profitability that we are
14 interested in, namely, 2026 to 2028. For example and for illustrative purposes only,
15 given confidentiality, any hypothetical five-year forecast would have to have been
16 prepared in 2021 to capture 2026. In my submission, these should be.

17 **MS LUCAS:** Is that right? Because, every time you prepare a five-year forecast, 2026
18 will just move nearer the front end of that forecast and it will go on to 2031 presumably,
19 so 2026 will still be on it.

20 **MR WILLIAMS:** Well, it is important, in my submission, that they be provided
21 regardless of when they are produced. In particular, given that we have only had four
22 documents and we have identified missing ones from 2023 and 2024, and Epic said
23 we don't have, and given the need to track the various forecasts to check there has
24 been no cherry picking or to track the changing expectations and predictions over time
25 in what is a quickly-moving market, we would also like to then track the forecasts with
26 the actual costs because that will help put the forecasts in context and enable us to

1 understand and see their accuracy generally. So it is important, in my submission, to
2 see the moving picture across time.

3 **MS LUCAS:** I mean, if you are looking at this from the perspective of looking at relief
4 at the end of the day and whether or not the comparator is appropriate for that, then
5 do we need to go back to these old forecasts?

6 **MR WILLIAMS:** We do, madam. The comparison with EGS has been adopted by all
7 three claimant parties, not just Epic. That's my first point. This is in the proceedings
8 generally, and therefore it is important to understand, during the relevant periods in
9 question, whether Epic Games Store was profitable or not.

10 **MS LUCAS:** So during the period for which damages is claimed, is that what you
11 mean?

12 **MR WILLIAMS:** I am also told that I keep on saying "ESG". It is EGS.

13 **MS LUCAS:** I know.

14 **MR WILLIAMS:** I do apologise, there are so many acronyms in this case. So, yes, it
15 is important, in my submission, to see how they have been placed over time and also
16 to ensure the comparison across a different temporal period.

17 We only have three documents to date and we have only been promised inputs for
18 one, whereas we can already see from the documents we have been disclosed that it
19 refers to some other documents that have not been disclosed. We don't want it to be
20 said against us at trial, when we are comparing against costs and profitability, "Oh,
21 you only have three documents from a limited snapshot".

22 So that is relevant to the date range.

23 In relation to the teams, it's not clear at all to us why Epic is justified limiting the teams
24 set out in subparagraphs (a) and (b) of its proposal rather than tracking the ruling's
25 wording of an executive level. Now, that is both inappropriate, as it seems to us, to
26 limit the scope of the obligation; and, secondly, it seems internally inconsistent, given

1 the teams in subparagraphs (a) and (b) in Epic's proposal in the blue text are different.
2 Now, none of this has been properly explained to us. Google has now withdrawn its
3 previous request for a witness statement setting out the information about Epic's
4 teams, but that makes it all the more important, in my submission, to get the terms of
5 the order set and sufficient in the first place.

6 Now, in response to all of this, at least in Epic's skeleton it made three points which,
7 in my submission, are misplaced. The first I haven't heard this morning repeated, but
8 it claimed that Google, at the last moment, changed its position. That, with respect, is
9 simply wrong. The wording in paragraph 10 of the draft order that we have been
10 looking at was included in a separate draft order for the January CMC, which was filed
11 and served with the 10th witness statement of Mr Cran, dated 16 January 2026. It
12 was removed from there following the Tribunal's direction that issues were being hived
13 off, but it has always been Google's position and Epic has always been aware of the
14 exact wording we are seeking.

15 Secondly, Epic claimed this was an attempt by Google to expand findings made by
16 the ruling which had not been appealed. I have already shown you, madam, how the
17 wording proposed matches the exact terms of the ruling and how Epic has not
18 complied with that wording. We are not seeking to appeal the ruling, we are seeking
19 to implement and enforce the ruling. It is a simple point.

20 Thirdly, in the skeleton argument Epic claimed that certain documents that we had
21 identified as missing are not, in fact, missing. But that does not address the core
22 issues of why we only have three, potentially four, documents. Neither does it address
23 the ones which are not said to be included in the disclosure but are instead being
24 excluded on the basis they fall outside of Epic's narrow search parameters, ie its date
25 range.

26 Finally, it doesn't reflect the fact that missing documents that we have been able to

1 identify because they are mentioned elsewhere are simply illustrations of Epic's failure
2 to comply with the order. They are not comprehensive of the disclosure we seek.

3 If I could ask you to please turn up one confidential passage, which I am grateful for
4 being reminded of. It is at the first volume, tab 25. It is at page 537. I don't think I can
5 even summarise it, given confidentiality and the extent of the highlighting here, but it
6 is paragraph 6(a). This is a letter from Epic's solicitors stating -- a slide deck which
7 has been prepared and presented by a particular date in question, which shows that
8 there are relevant documents outside the date range that Epic is now proposing.

9 That deals with request G5, madam, which is paragraph 10 of the order. I commend
10 Google's green wording.

11 The next topic is paragraph 14.

12 Now, I am going to address you, firstly, on the topics which are in dispute, have been
13 addressed in my learned friend's skeleton and our skeleton and have been addressed
14 in evidence first. I will flag at the end where I am not dealing with a particular point.

15 So I propose, with your permission, to deal with paragraph 14(b) -- paragraph 14(a),
16 sorry, first.

17 **MS LUCAS:** Yes.

18 **MR WILLIAMS:** Then I will deal with Google Chats and then I will come back to
19 explain why all of the annexes my learned friend later went through is not appropriate
20 to deal with today.

21 **MS LUCAS:** Okay.

22 **MR WILLIAMS:** Taking those points in turn in paragraph 14(a). Paragraph 14
23 concerns requests E2 and E10 regarding internal Google communications concerning
24 RSAs and MIA extensions or variations, and Epic, as you will see, proposes to add
25 a new category of disclosure in subparagraph (a) in addition to those already set out
26 in (b) and (c). It's worth looking at precisely what Epic is seeking and comparing it to

1 two things: firstly, what is being provided to Epic already under the agreed terms of
2 the order; and, secondly, in terms of what the ruling actually says.

3 Now, in terms of what Epic is seeking in subparagraph (a), that is at page 9 internal,
4 page 78 of the bundle, it is seeking internal communications concerning the reasons
5 and strategy for extensions.

6 **MS LUCAS:** Yes.

7 **MR WILLIAMS:** As you will see from four lines down, it says "from OEMs or carriers",
8 so all OEMs and carriers. Then also "in relation to the introduction or negotiation with
9 OEMs or carriers". I will come back to why that is important, but it is necessary to flag
10 at the outset this is all OEMs, all carriers, and all internal communications.

11 **MS LUCAS:** Yes.

12 **MR WILLIAMS:** Now compare that with subparagraph (b). This is what Epic is
13 already getting. I will leave aside the Google Chats point. Epic is already receiving
14 internal Google communications regarding the agreements, limited to the sample of
15 OEMs and carriers listed in the annex. It is actually quite a large sample. If we could
16 turn to Annex 2 at Part A, that is on internal page 23, bundle-page 92. In the third
17 volume.

18 **MS LUCAS:** Yes.

19 **MR WILLIAMS:** Now, you will see there, eight major OEMs and four major carriers.

20 **MS LUCAS:** Yes.

21 **MR WILLIAMS:** So my first point is Epic is already getting a fair chunk.

22 **MS LUCAS:** Can we go to the ruling -- I am sure you were going to go there -- so
23 I can explain what the ruling was doing? That is at page 121 -- sorry paragraph 121
24 supplementary bundle 1, page 209.

25 **MR WILLIAMS:** Yes, I was going to begin, if we could, at paragraph 119. It is my
26 next point. If we could take it through in order, with your permission, madam.

1 **MS LUCAS:** Yes.

2 **MR WILLIAMS:** That is page 208, I think. Yes, paragraph 119. I invite you just to
3 read that in addition.

4 **MS LUCAS:** Yes.

5 **MR WILLIAMS:** Now, I emphasise that, in particular -- the last three lines at the
6 bottom of page 208 -- it is limited to specific OEMs only. And it is, therefore, why, in
7 paragraph 14(b), the agreed black text, we married that across.

8 (Videolink crashed)

9 **MR WILLIAMS:** ... not relating to each and every counterparty.

10 **MS LUCAS:** Yes.

11 **MR WILLIAMS:** Now, again, comparing that to what paragraph 14(a) now says, as
12 sought by Epic, "all OEMs, all carriers and all far-reaching internal communications".
13 I will address Google Chats separately, but I have an additional point here on that that
14 it goes beyond the text of the ruling, which is, as, at least, we had read this paragraph,
15 in addition to paragraph 119, emphasised limiting this to key documents at a relatively
16 senior level and a general strategic level.

17 **MS LUCAS:** Okay, let me -- when I reread this, I had hoped I had made it relatively
18 clear in paragraph 121, but it looks like I haven't. So the 121, subparagraph (1) was
19 meant to be disclosure of all RSAs MIAs and all similar incentive agreements. Not
20 confined to the UK, so worldwide. Subparagraph (2) was strategy documents, why
21 are we having to change these agreements, without focusing on individual OEMs or
22 carriers? It's, why are we having to do this? That is internal discussions at a relatively
23 senior level within Google discussing why it is needed.

24 **MR WILLIAMS:** So far, I think we followed identically.

25 **MS LUCAS:** Then (3) was supposed to be more specific. So you can have all the
26 internal communications relating to a limited number of OEMs and carriers, so you can

1 | drill into the detail.

2 | **MR WILLIAMS:** Exactly. That is our agreed subparagraph (b).

3 | **MS LUCAS:** Then (4) is, you can have the external communications relating to how
4 | that is then communicated to the carriers and OEMs. And then (5) is Samsung and
5 | that is separate.

6 | So -- I am seeing nodding on both sides, so I am slightly struggling to see why we are
7 | in dispute on --

8 | **MR WILLIAMS:** Madam, perhaps it is easier to deal with it in the exact text, but if we
9 | focus on paragraphs 14(a) and (b) of the draft order, which perhaps I took too quickly.
10 | Subparagraph (b) is agreed, save for the separate issue on Google Chats. We are
11 | providing there, internal communications regarding the RSAs and MIA variations, and
12 | the new ones, limited to the sample OEMs and carriers listed in the annex that I have
13 | shown you.

14 | **MS LUCAS:** That is subparagraph (3).

15 | **MR WILLIAMS:** Exactly. And we had intended for that also to capture subparagraph
16 | (b) because if you look at the terms of 14(a), which Epic is seeking, they are not
17 | seeking any limitation with OEMs and carriers and they are not seeking any material
18 | limitation on the internal Google communications. This is absolutely everything in
19 | relation to strategy and so forth, whereas (b) has no limitation. It is all internal
20 | communications. So (a) goes, in my submission, much wider than the terms of the
21 | ruling.

22 | **MS LUCAS:** Why do you say that? I am sorry, I know we are short on time, but I think
23 | they are trying to mirror subparagraph (2) of the order of the reasons -- the more
24 | general level reasons for the strategy for why you have to change your agreements.
25 | Am I missing something?

26 | **MR WILLIAMS:** There is no such limitation in 14(a) as drafted. It simply says "internal

1 Google communications regarding the reasons for and strategy relating to ..."

2 **MS LUCAS:** Which I think is listed -- that wording is lifted from subparagraph (2), as
3 I read it.

4 **MR WILLIAMS:** That goes beyond your "For the avoidance of doubt", in my
5 submission, at the top of page 48:

6 "For the avoidance of doubt, this is intended to capture documents of a general nature
7 considered at a relatively senior level within Google ..."

8 **MS LUCAS:** Right, I have the point.

9 **MR WILLIAMS:** "... and does not require Google to conduct an exercise related to
10 each and every counterparty."

11 So, in my submission, there are two failings within paragraph 14(a), as drafted by Epic.
12 Firstly, it's in relation to each and every counterparty -- so it's all OEMs and all
13 carriers -- and, secondly, there is no limitation in respect of capturing only documents
14 of a general nature at a relatively senior level.

15 **MS LUCAS:** Yes. I understand the point.

16 **MR WILLIAMS:** So those are my submissions on the substance of 14(a).

17 Just to make the point good, in case my learned friend raises the point on whether
18 there has already been sufficient disclosure, because you will recall the beginning of
19 that paragraph is if there hasn't been. Now, it is Google's position that it has already
20 provided sufficient disclosure so that the pre-condition of the terms that we have been
21 debating is not actually met in the first place.

22 Now, we identified an illustrative example in our skeleton argument. That was at
23 paragraph 41(b), but my learned friend's skeleton seeks to criticise on the basis that it
24 is only one example. That is his key point.

25 With respect, it's not a good point. In light of the time and my need to deal with
26 Google Chats, which is a particularly important issue, I will just give you a reference,

1 but it was the loose-leaf letter that RPC sent last night and should have been on your
2 desk this morning.

3 **MS LUCAS:** Yes, I have it.

4 **MR WILLIAMS:** That is at paragraph 20 on the bottom of page 4, and it links out to
5 an annex which identifies a further 38 documents on this issue.

6 **MS LUCAS:** Yes.

7 **MR WILLIAMS:** So we have, in our submission, provided proportionate disclosure on
8 this topic already. And it is worth bearing in mind that disclosure is not yet closed.
9 I was going to take a point about the proportionality needing to be assessed in the
10 view of the pleaded issues. I will just give you a reference to the Redfern Schedule.
11 Volume 1, tab 12, page 277. It is the second column, the first bullet point. Our
12 submission, in a nutshell, if I can crystallise it, is that the internal communications have
13 a limited direct relevance to the pleaded issues, which is about the effect of the terms
14 in question. So this whole request should be viewed in that context, which, in my
15 submission, shouldn't be lost sight of.

16 **MS LUCAS:** That is, whatever Google thought they were intending to achieve, that,
17 in one sense, you say, should be set to one side; it is whether they achieved it?

18 **MR WILLIAMS:** Yes. That's right.

19 That takes us to Google Chats, which is an issue, I accept, has been debated in
20 skeleton arguments and in evidence. So that is one that is suitable for determination
21 today, so I will deal with that now.

22 So Epic seeks, as we have heard, internal communications on the instant messaging
23 platform of Google Chats. This is reflected across the draft order from paragraphs 14,
24 18 and Annex 2 Part B. I don't invite you to take them up, but it is a point that is
25 pervasive. It concerns at least six requests -- so requests E6, regarding any extension
26 or variation of the agreements; E13 and E14, the extension of the UCB pilot; E15,

1 concerning the costs incurred by Google when in-app billing is used -- hard to see why
2 Chats is a proportionate response or necessary for that -- E19, concerning the
3 performance of the 2022 Spotify addendum; and E20/22, concerning any negotiations
4 for the extension or variation of that amendment.

5 **MS LUCAS:** Yes.

6 **MR WILLIAMS:** You will have my points that I've just made in relation to the other
7 requests about the proportionality needing to be assessed against the potential issues
8 as pleaded, which is the effects of the terms, the effects of the UCB pilot and the terms
9 of those agreements.

10 Now, in my submission, it is manifestly not reasonable, necessary or proportionate to
11 envisage disclosure of chats in relation to what we count up to be 16 Google
12 custodians over a three-year period. The principles, the Tribunal will be well familiar
13 with about the need to limit disclosure to what is proportionate and necessary, and not
14 to disclose every potentially relevant document, it's just not possible.

15 Now, in that context, I make three short points. The first is that Epic has paid no
16 attention to, and not addressed whatsoever, the proportionality or the workability of
17 the proposal. Now I say that given the terms of the requests in question. I have listed
18 them out:

19 what else Epic is receiving for each of the requests, I have set out; the number of
20 custodians in question; the lengthy time periods of the requests; the suitability of
21 search terms when applied to instant messages; the nature and the cost of the
22 exercise processing, reviewing and disclosing such documents; and, importantly, the
23 short timeframe for providing the disclosure which is sought within 30 days. Now that
24 is important, given the time for expert evidence and just where we are up to in these
25 proceedings and I do say that that all needs to be taken into account in terms of the
26 proportionality of this exercise. So that is my first point.

1 The second point is that Google Chats have not formed part of any Google UK-specific
2 supplemental disclosure in any of the three proceedings to date. That is crucial
3 because my learned friend is simply wrong to say that no Google Chats have been
4 disclosed in these proceedings because the US disclosure has been ported across.
5 So all Google Chats forming part of that are already in disclosure. It's just the fact that
6 the disclosure now sought is supposed to be the last round of supplemental disclosure
7 in respect of confined topics topping up the UK disclosure in relation to specific
8 requests and Epic has provided no good reason why a different approach should be
9 adopted for this particular tranche of the UK supplemental disclosure when Epic itself
10 has never sought before instant messages up until this final round. I am afraid it
11 appears to be nothing other than "a weapon used in a war of attrition", just to quote
12 the Tribunal's guide.

13 So that is my second point.

14 The third point, and my final point, is an involved one but very important, given your
15 indication about the difference between the US and the Australian judgments.

16 Given the extensive disclosure already provided and already ordered, including
17 emails, and the fact that I have said the terms and then the effects of the agreements
18 and programmes are what ultimately matters for the pleaded issues, it is important to
19 bear in mind what the Federal Court of Australia, in a judgment of August this year,
20 has stated. The relevant findings are at the authorities bundle, tab 15, page 887. They
21 have been quoted in our skeleton, so I won't take you to them now, but I do invite you
22 to read that page. It is a very short page. There is a judgment of Mr Justice Beech,
23 following a full trial concerning eerily similar, if not identical, allegations made by Epic
24 against Google.

25 I emphasise the findings made there that chats are not core business documents, that
26 Epic has not demonstrated -- I add "after a full trial" -- that chats were commonly used.

1 And, thirdly, the finding that Google makes decisions in an elaborate documented
2 fashion.

3 Now, in such circumstances, there is no reason or evidence from Epic why these chats
4 now are reasonable, necessary or proportionate.

5 The first point it relies on in its skeleton is the US ruling of Mr Justice Donato. That
6 ruling was dated March 2023, so two years ago. It was a pre-trial ruling in respect of
7 a discovery motion in the context of a submission that Google had not adequately
8 preserved communications. That was determined, of course, under US law which
9 notoriously takes a far broader and more extensive approach to disclosure -- in
10 essence, what is discoverable -- than under common law systems and the specific
11 issue-based disclosure in this Tribunal. As you will see from the Australian judgment,
12 by contrast with the US decision, that was a substantive judgment after a full trial, and
13 two years later than the US interlocutory decision in August 2025, directly addressing
14 the full set of disclosure in context that had been provided at trial.

15 **MS LUCAS:** Can I just clarify one point? Were chats provided to the Australian court?

16 **MR WILLIAMS:** Yes. They ported the US discovery as well and we have ported the
17 Australian disclosure into the UK disclosure. It is the same body of chats because it
18 was the US discovery which was ported across to Australia.

19 **MS LUCAS:** Right.

20 **MR WILLIAMS:** The only final point I will make very briefly is Epic effectively says this
21 should have been addressed at the last hearing. This is an important topic. It was one
22 that was not addressed orally at the hearing, which was unsurprising, given the vast
23 amounts of material that we had to get through, but, in any event, the submission is
24 beside the point. We are all here trying our best to determine the contours of the order
25 arising out of that hearing, and it is appropriate for this to be determined now. It wasn't
26 definitively settled in the ruling or addressed in the ruling. The ruling instead directed

1 the parties to seek to agree search parameters and, "seek to agree language that is
2 not overinclusive". So it is entirely appropriate for my client to raise this issue now in
3 light of having seen the draft order since the hearing.

4 You will recall, in June and July, madam, perhaps, we didn't have a draft order in
5 place, so one couldn't have seen the knock-on effects and disproportionality of this at
6 that time.

7 Those are my submissions on the topics that are in dispute. I can address you,
8 madam, on why we can't, and shouldn't, fairly address the other topics now, if that
9 would assist?

10 **MS LUCAS:** Are you going to make any submissions on the detailed points in relation
11 to those annexes?

12 **MR WILLIAMS:** No. And that's not because they are conceded; far from it. I need to
13 emphasise that they have not been addressed in my learned friend's skeleton, they
14 have not been addressed in any evidence by either party, we have heard new points
15 today for the first time, and we received these on Friday at 1.00 pm for the first time.
16 It is simply inaccurate for my learned friend to have said that this has been canvassed
17 in correspondence. Those behind me are very keen that I make the point that many
18 of these points have not been addressed even in correspondence, let alone
19 crystallised by the annex you have seen. The annex sets out, in the far right-hand
20 side column, for the very first time, many of these search strings, custodians and date
21 ranges. So this isn't a case of utilising this annex as if it were a Redfern process; this
22 has not been addressed. In my submission, it would be unfair for the Tribunal, at this
23 stage, to order the disclosure without knowing at all what the proportionality,
24 relevance, workability of these matters are. They are extensive. They go over about
25 seven-odd pages of annexes and there is a lot of detail buried in them. We have taken
26 over an hour and a half to deal with only a few parts of the --

1 **MS LUCAS:** I am going to be in trouble.

2 **MR WILLIAMS:** -- (overspeaking) that were in debate.

3 Exactly. What I will say, though, in the spirit of cooperation, to make this clear, there
4 are parts, which are fully agreed, set out in the new annexes, entirely in black, and we
5 are content to agree those. They were set out in the correspondence of last night. So
6 it is on the record.

7 We can accept, subject to an important caveat, part of Part F in respect of E14 and
8 E15; Part G in full regarding E18, E19 and E20; and the rest of Part G regarding E22
9 and E23. So, we have accepted seven search requests and they should be a part of
10 the order. That will need a corresponding update to the operative part. We accept
11 there doesn't need to be a process to agree in relation to those seven. They can be
12 ordered at this stage and I am sure we can work together very quickly, within a day,
13 to update the draft order to reflect that agreement, because, otherwise, the main body
14 will refer to processes and the annexes will refer to agreed terms.

15 The one caveat is that, if and to the extent the chats, Google Chats, contrary to my
16 submissions, are ordered, that will require revisiting because of the search strings,
17 which are very extensive, and the date ranges and so forth, and we would need to
18 take that away and consider that.

19 But, in relation to those outstanding in dispute that my learned friend took you to -- so
20 I think that is Parts D, E and part of F -- the appropriate and most efficient course is
21 for us to respond to their annex, we can agree a process and set timelines for that
22 process, if necessary, and hopefully not have to return at all or for those points to be
23 dealt with on the papers.

24 I say that regrettably, but I think that is the only fair way that we can deal with this.

25 **MS LUCAS:** Thank you.

26 Mr Scannell?

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Submissions in reply by MR SCANNELL

MR SCANNELL: Just on that last point. That provides a very clear insight into what Epic has had to deal with since the September ruling. That submission that the annex was served on Google and Google hasn't been able to address it, the only reason there is an annex there at all is that Google sent an annex to Epic and asked it to engage with that and to fill it in. Epic has done that, Google hasn't. We simply have to draw a line at some point under the draft order. Submissions that we can agree an orderly process might work in many cases, but it's not working in this case. We enthusiastically endorse the concern that was expressed by you, Ms Lucas, at the very beginning of today's hearing, that months have passed now since the September ruling was handed down and we simply must have an order. Our experts have not been able to consider any of the disclosure we won at the June hearing and to date, and it is imperative that they do so at the reply stage.

I am not going to reply on all of the points, I hope it is understood why that is. I appreciate that the Tribunal is in difficulty and that is as much our fault as anyone's. So I am just going to make one or two points and I will respond to the forecasts.

MS LUCAS: Yes.

MR SCANNELL: On proportionality in relation to chats, therein also lies a problem, which we have sought to underscore in multiple respects under the draft order. The question of whether or not it is proportionate to disclose Google Chats is water under the bridge. That is an argument which could have been made by Google at the June hearing, but it was no part of their resistance to any of the points and requests that were made at the June hearing to say, "Well, if we lose on the kitchen sink arguments that we have put against you on your disclosure requests, nevertheless we say that there is a subcategory that has to be sequestered and not disclosed to you, because

1 | it would be disproportionate to do that". It was simply no part of their argument then,
2 | and it should not be available to them now, to say, "Well, even though we have got
3 | a ruling now saying that we have to disclose these things, it would be disproportionate
4 | for us to do that". That is a paradigm example of rearguing an order without appealing
5 | it.

6 | We don't accept, either, that that proportionality assertion has any persuasiveness to
7 | it at all. Google clearly has the resources to provide those documents and, in light of
8 | what the US court has said about its evasion, it's deliberate evasion at the highest
9 | levels in respect of Google Chats, it is unacceptable simply to assert proportionality
10 | and then to say, "It would be very difficult for us, Google, to provide our internal
11 | communications in that way".

12 | We don't deny the Australia judgment. We know, and we accept, what the
13 | Australian judgment has said, but the mere fact that there is another judgment which
14 | reveals a different part of the story is concerning enough.

15 | In relation to paragraph 14(a), there was a lengthy discussion in relation to 14(a).
16 | Again, it's rather frustrating for Epic to hear those points being made. Norton Rose
17 | Fulbright, solicitors for Epic, expressly suggested to RPC Google's solicitors last year
18 | that they were happy to limit the number of OEMs, in respect of whom -- and carriers,
19 | in respect of whom disclosure would be given, so long as Google disclosed its overall
20 | strategy documents. Now, Google hasn't disclosed its overall strategy documents
21 | and, fundamentally, they are the documents that Epic is keen to see.

22 | Not only that, of course, but the disclosure which Google has given under
23 | paragraphs 121(3) and (4) of the order of the ruling, excuse me, is deficient for the
24 | reasons that are set out in the annex which you have read.

25 | The request, incidentally, under 14(a) is still narrow. Yes, it is broader than a sample,
26 | but it is still a narrow request which is tailored to the requirements of the order.

1 Now, I do want to say a few words about the forecasting disclosure. Now, just to
2 reorient ourselves, we are dealing, in the context of forecasting, with internal pages 6
3 to 7 of the order and internal page 16 of the order, where there is also some blue text.
4 So that is also relevant to this.

5 It is also important to reorient ourselves in relation to the requests that were made by
6 Google at the June hearing. So, Google's application at the June hearing wasn't, as
7 an outsider might think, listening to my learned friend's submissions, just a request for
8 forecasting, it was a wide-ranging request for financial forecasts for Epic Games Store
9 and related material, all of which is set out at paragraph 10 of your ruling. It was
10 an application of extraordinary breadth that comprised six subcategories of
11 documents. The basis of that request was an unfounded allegation that Google had
12 withheld relevant disclosure and had failed to comply with the Tribunal's 10 January
13 order, which was rejected. Nor did you accept in the ruling, contrary to what Mr Cran
14 asserts in his 11th witness statement for today's hearing, that a document that had
15 inadvertently been disclosed by Epic to Google contradicted anything in Epic's
16 pleadings or factual evidence. That document wasn't even reviewed by the Tribunal
17 at the June hearing.

18 What you did accept at the June hearing, madam, was that, more recently than Epic's
19 Re-Amended Reply, on 5 March 2025, to be precise, one of Epic's witnesses,
20 Mr Allison, had said in evidence that he shared the expectation in Epic's Re-Amended
21 Reply as to future profitability, and you said that it was fair that Google should test that
22 proposition. For that purpose, what mattered were high-level forecasts within the Epic
23 business. I am not going to take you back to 21 and 22 of your ruling, I know that you
24 have those well in mind.

25 Those remarks did, of course, reflect what you had said orally at the hearing, and it's
26 helpful to recall those too. Without turning it up in the bundles, what you explained

1 very helpfully at the ruling was, "I am thinking of something that is actually meaningful
2 and that people refer to as being the forecast or the plan". Obviously, that will also
3 need to include the assumptions on which it is based. I do consider this is relevant to
4 the pleaded case, regarding Epic's expected profitability and the issue of whether it is
5 an appropriate comparator. I don't think that providing disclosure forecasts more
6 generally would necessarily be of assistance. I think there is a real risk that it would
7 become disproportionate and I am not satisfied that forecasting, which isn't at the more
8 formal end of things, would be relevant. To that, you added, "I am not envisaging there
9 necessarily will be a huge number of these forecasts, they have to be something that
10 is meaningful to the organisation". And, of course, that is readily comprehensible.
11 Now, as to what has been disclosed, the complaint that we face is, "Oh, you have only
12 disclosed four documents and that's not good enough", but without actually getting
13 into the detail of what exactly these documents are. So, what has been disclosed,
14 which is explained in Ms Thomas' third witness statement is a [Redacted for
15 Confidentiality], the most recent one that has been produced within the Epic business
16 after the 2024 document that was inadvertently disclosed. I do need to be a bit careful
17 about what I say because of confidentiality.
18 That document, as you have already pointed out, madam, [Redacted for
19 Confidentiality]. For the avoidance of doubt, that has been explained to Google by
20 Epic's solicitors already.
21 [Redacted for Confidentiality]. That is really fundamentally why we don't accept at all
22 that it is proportionate or relevant to include additional [Redacted for Confidentiality].
23 Those historical forecasts aren't going to explain Epic's current expectation of
24 profitability, which is what needs to be tested to compare it to what Mr Allison has said
25 in his evidence.
26 In any event, we have given the most significant previous forecast, [Redacted for

1 Confidentiality]. There are also [Redacted for Confidentiality] within that and I am just
2 going to make one point about that. We do accept that a [Redacted for Confidentiality].
3 But complaining about that is akin to complaining that leopards are spotty. That's just
4 what they are. It's not that they have been contrived in any way to cut them short at
5 a particular date, we have simply disclosed the [Redacted for Confidentiality].

6 **MS LUCAS:** What do you say about the relevance of historic forecasts? Because
7 Google say that they are relevant.

8 **MR SCANNELL:** We don't accept that they are relevant. We don't accept that it is
9 proportionate to disclose them. Fundamentally, what has been ordered is disclosure
10 which enables a testing of Mr Allison's evidence. That is an assertion as to whether
11 Epic's current view that it will be profitable within the window that he gives in his
12 evidence is a tenable or sustainable view or not. Going through historical forecasting
13 doesn't assist with that analysis. And, of course, one could give every conceivable
14 document that has ever been produced, but one must again reorient oneself to the
15 findings that were made at -- in the ruling and in June, that what the Tribunal -- what
16 you had in mind was a short -- not a short period of time necessarily, but a restricted
17 pool of disclosure to deal with a very specific point in Mr Allison's evidence. That is
18 the only point on request 5 that Google actually succeeded on at that hearing. It lost
19 on all of those other points.

20 Now, as to the complaints, finally, that are made in relation to the points -- and I will
21 return to the answer I have given a moment ago. So far as we can tell, they boil down
22 to saying that, first, the disclosure doesn't comply with the ruling; second, that the date
23 ranges are not to Google's satisfaction; and the third is that it expected more. Google
24 expected more to be disclosed. We don't accept at all that the disclosure that we have
25 given doesn't comply with the ruling, it clearly does, and with the indications that I have
26 drawn your attention to again that you gave orally at the June hearing.

1 As to the date range, as I have explained, the most recent forecast has been disclosed,
2 so has the earlier [Redacted for Confidentiality] and beyond have been disclosed.

3 I just add that it is no part of the ruling that Google should be able to interrogate
4 historical forecasts of profitability to understand how assumptions might have evolved
5 based on evolving markets or any other extrinsic factors. No doubt because that would
6 have been disproportionate.

7 The third complaint, the complaint that it expected more, that Google expected more,
8 that is not, in my submission, a valid basis for impugning disclosure. It is even less
9 coherent in this instance because the volume of disclosure given is in line with the
10 Tribunal's express expectation that there will not necessarily be a high number of
11 these forecasts that are meaningful to the organisation.

12 The specific complaints are also simply wrong in point of fact. Those specific
13 complaints are that Epic should have disclosed four further documents. It should have
14 disclosed a January 2025 forecast, a document called an [Redacted for
15 Confidentiality], either at [Redacted for Confidentiality] and a document called
16 [Redacted for Confidentiality].

17 Now as to each of those the 2025 forecast was at all material times a draft so it wasn't
18 actually disclosable under the clear terms of the ruling. Despite that, Epic has
19 disclosed all of the figures used as input into that draft.

20 As to the LRP model, the LRP [Redacted for Confidentiality]-- I have been reminded
21 that I wasn't allowed to say what LRP stands for. Not all of these claims to
22 confidentiality are readily understandable.

23 **MS LUCAS:** Yes.

24 **MR SCANNELL:** In any event, [Redacted for Confidentiality] It is entirely irrelevant
25 anyway to the issues but so far as the LRP component of the descriptor is concerned,
26 all of the forecasts have in fact been disclosed.

1 As to the [Redacted for Confidentiality], they have been superseded, as I have
2 suggested, by the [Redacted for Confidentiality], which has been disclosed, but in any
3 event, [Redacted for Confidentiality].

4 Just one final point and that is this reference to the leadership team which appears in
5 the order. That expression of concern that the Tribunal has heard today in relation to
6 leadership team is, with respect, misplaced. Epic is not seeking to narrow the pool of
7 individuals that constitute senior executives within the meaning of the ruling. Epic has
8 sought to accommodate the fact that significant [Redacted for Confidentiality] might
9 be considered by people who are in the leadership team but might not be at the upper
10 echelons, the absolute pinnacle of the business, and that is what has been disclosed.
11 It is an attempt to be accommodating rather than narrowing, which has resulted in the
12 inclusion of leadership team language. So, I am afraid we don't accept that that
13 concern is well founded.

14 So, for all of those reasons, we resist the forecasting application. It really is an attempt
15 to crack into the ruling all over again, and there is no warrant for that.

16 **MS LUCAS:** Thank you. I think, strictly speaking, Mr Williams, you get a short right
17 of reply, but if you don't want to take it ...?

18 **MR WILLIAMS:** No, that's absolutely fine.

19 **MS LUCAS:** Thank you. It won't come as a surprise, given that we have overrun by
20 an hour, that I probably won't -- well, I definitely won't be giving a ruling on this right
21 now. We have other matters to move on to.

22 If you could get me the draft order, agreed so far as it is now agreed, that will be very
23 helpful. And I will let you have my decision as soon as possible. It may be the decision
24 as to what the terms of the order are before the reasons, so that you know exactly
25 where you are going.

26 Thank you very much. I will rise now.

1 (12.00 pm)

2 (A short break)

3 (12.29 pm)

4

5 **Housekeeping**

6 **THE CHAIRMAN:** Good afternoon, everybody. A delay has been caused by our
7 giving thought to how we continue for the rest of the day and the time estimate,
8 et cetera. What we propose to do is, in respect of this aspect, which is the witness
9 statement disclosure application, we propose to hear that for two hours. We propose
10 to sit for an hour now until 1.30, and have half an hour for lunch and start again at
11 2.00 pm. Then, at 3 o'clock, we will resume with the rest of the matters, although
12 whether we will cover all the other matters, we doubt.

13 In relation to the witness disclosure issues, there are 11 items and we would like to
14 hear each of you in turn on each item, which, by my calculation, gives you about
15 five minutes for each one. Obviously, some may be more complicated than others,
16 but we must stick to that time limit. We have got your Redfern Schedule, we have
17 your skeletons. We hope that with the headline points you make on each item, that
18 will further assist us.

19 What we then propose to do in relation to that is we are not going to give our decision
20 today. We will give our decision as soon as we can on each item. That decision will
21 be in relatively brief form with brief reasons and, at the moment, what we propose
22 doing is actually putting in an additional column into the Redfern Schedule with our
23 decision on each with brief reasons, so that, for example, it saves us setting out each
24 parties' submissions.

25 We may have a brief covering sort of reasoned order as well. But, anyway, that is the
26 way we propose proceeding. Obviously, if you have any concerns or comments on

1 that, we will hear them. I think that is probably all we want to say by way of
2 introduction.

3 The only other point I would make is that it might assist us if, when dealing with each
4 item, you give your -- you make your submissions on how much material each item
5 involves. Now, I am sure that the party applying will say it is very limited and the party
6 resisting will say it is enormously voluminous. If you could try and put those things to
7 one side and give us a realistic view, that might assist.

8 **MS SMITH:** Thank you, sir. That's very helpful and we think that is a very sensible
9 way of proceeding.

10 Can I just check, however, that Ms Lucas -- we only found out last night that Ms Lucas
11 was going to be sitting on this item, whether she has access to the bundles that were
12 previously produced for the 30 January hearing JCM C5. Because she was not given
13 access -- wasn't given those bundles, obviously, not having been at that hearing.
14 I may be referring to one or two documents in those bundles from the previous hearing.

15 **MS LUCAS:** Yes.

16 **MS SMITH:** Thank you very much.

17 If we could kick off, then, with the first application by Google for disclosure from Epic,
18 and if I can ask you to have open the latest Redfern Schedule, which is in
19 supplementary bundle 2, tab 3, starting on 11.1.

20

21 **Disclosure applications by MS SMITH**

22 **MS SMITH:** The first outstanding request arises under category 2. Category 2, just
23 by way of introduction, relates to documents and data relating to Epic Games Store,
24 EGS. Epic's pleaded case is that distribution via Google Play is the "only practical
25 means by which alternative app stores [such as EGS] can secure distribution on
26 Android devices and thus distribute their apps", but that due to -- and, moreover, that

1 due to Google's anti-competitive conduct, Epic Games Store on Android may not
2 ultimately succeed.

3 Epic's most recent round of witness evidence raised various relevant points on EGS.
4 In his third witness statement, Mr Allison provides evidence on installations of EGS on
5 Android and the commercial success or otherwise of EGS on mobile. Mr Stout gives
6 evidence on Epic's investments in marketing EGS. So, in order to test Epic's pleaded
7 case and its most recent witness evidence at trial, Google needs the outstanding
8 disclosure sought under category 2.

9 The first is request 4, which is found at pages 1 to 2 of the Redfern Schedule.
10 Evidence is given by Mr Allison, as I said, as to the number of users and the number
11 of installs of Epic Games Store on mobile. That is not via Google Play Store, but
12 otherwise --

13 **THE CHAIRMAN:** Sorry, can you just say that again? Sorry.

14 **MS SMITH:** Mr Allison -- I will take to you it. Mr Allison gives evidence on the number
15 of users and installations, installs, of EGS on mobile other than via Google Play Store,
16 because, of course, for most of the relevant period, EGS was not on Google Play
17 Store. He gives the evidence which you will see is in the confidential text in column 2.

18 **THE CHAIRMAN:** Yes.

19 **MS SMITH:** SB2/11.1 and SB2/11.2.

20 Epic has already provided a document which is identified in column 1, 41069, setting
21 out the total number of installs of EGS on Android. We request that this be updated
22 to the latest available date, given the evidence given by Mr Allison as to the most
23 recent numbers of installs, and we also ask that the document, the data, be a
24 database, be expanded so as to identify the source of those installs, whether, for
25 example, by way of pre-installation or sideloading, in order to test Epic's most recent
26 round of evidence in its pleaded case as to whether Google Play is the only practical

1 means of distribution or whether and, if so, how and to what extent, the
2 Epic Games Store is being distributed or installed on Android devices other than by
3 via Google Play Store by pre-installation or sideloading et cetera.

4 **THE CHAIRMAN:** Can I ask a very simple question, which will reveal the lowness on
5 the learning curve that I am on this case, I am afraid. In box -- in the first column, at 4,
6 the phrase "EGS on Android" is used, and the phrase "EGS on mobile globally" is
7 used, and broken down by operating system mobile platform. Is "EGS on Android"
8 and "EGS on mobile globally" two different concepts? When you are talking about
9 "operating systems", what other operating systems are you talking about?

10 **MS SMITH:** It is -- the total installs of EGS on Android are Android mobile phones,
11 mobiles operating that particular operating system, the Android operating system, but
12 the total number of installs on EGS on mobile globally is not limited to Android.

13 **THE CHAIRMAN:** Right. So that is --

14 **MS SMITH:** Operating system mobiles. As you say there, it is broken -- other
15 operating systems.

16 **THE CHAIRMAN:** What would those other operating systems be?

17 **MS SMITH:** For example, iOS.

18 **THE CHAIRMAN:** That's what I thought. That is much wider than the current state of
19 the disclosure.

20 **MS SMITH:** Yes.

21 **THE CHAIRMAN:** Okay.

22 **MS SMITH:** Epic has offered, you will see in the third column, updated data on global
23 Epic Games Store monthly active users, that is MAUs, and says that should be
24 enough. But usage data is not the same as install data. Epic's witness, Mr Allison,
25 has given evidence to the effect that developers consider the number of installs to be
26 a relevant metric when considering whether to release their apps on EGS or mobile.

1 That is his third witness statement, paragraph 25.

2 It is also important to have data on different sources of installation and different -- for
3 example, different -- the operating systems on which it is being operated to see how
4 EGS is actually being distributed and how commercially successful that is, in order to
5 properly test Epic's case that no commercially practicable alternative -- there is no
6 commercially practicable alternative to Google Play for the distribution of
7 Epic Games Store.

8 So those are my submissions on --

9 **MR FRAZER:** Can I just ask a question? In relation to the question of the practicability
10 of installing EGS on Android other than through the Google Play Store, why do you
11 need this global information in relation to other platforms and other countries?

12 **MS SMITH:** The question is the commercial success or otherwise of EGS and the
13 sort of questions that will arise are, are there other reasons why EGS has not been in
14 our submission a commercial success? Epic's answer is, "Well, it's because we
15 cannot get access to Google Play Store, we cannot be distributed on Google Play
16 Store". We will need to find out whether that is the reason why it has not been
17 a commercial success or whether there are other reasons why it hasn't been
18 a commercial success. So the data as to how it is distributed, how EGS is installed,
19 to the extent to which it is installed across the -- globally, and how it is installed,
20 including by reference to operating system, are there reasons why is it a success on
21 a different operating system or is it a success on Android, we need to be able to look
22 at that in order to assess the evidence as to the number of installs and the commercial
23 viability of how EGS is distributed.

24 **MR FRAZER:** The problem is there are some other variables, aren't there? Because
25 there may well be restrictions on other operating systems, such as iOS, which prevent
26 EGS being installed on that, which is nothing to do with practicability on an Android

1 platform.

2 **MS SMITH:** There may be, but that's the next stage, if I can put it like this, of analysis.

3 One needs to find out the respective number of installs on the different types of OS, in
4 order then to look at why there might be a difference, why there might be a difference
5 as regards the operating system, why there might be a difference as regards the
6 different means of installation, pre-installation onto devices before they are sold or
7 sideloading once the devices have been sold.

8 On our market definition and our case, distribution via the different operating systems,
9 iOS and Android, are within the same market definition.

10 **MR FRAZER:** I see.

11 **THE CHAIRMAN:** Yes, Mr Scannell?

12 **MR SCANNELL:** I will be as brief as I can. We resist this request. We say it is
13 unnecessary and we say that it is disproportionate. The mere fact that Mr Allison
14 mentions in his evidence Epic's estimate of the number of installs of Epic Games Store
15 as at the end of August 2025 does not justify the request, nor does the fact that Epic
16 has pleaded that it may not ultimately succeed as a competitor to Google Play Store.
17 Both Mr Allison's remark and the plea Epic makes about the success of
18 Epic Games Store raise the same very simple question: how successful is
19 Epic Games Store? But that question has already been the subject of a disclosure
20 order by the Tribunal, specifically in paragraph 8(b) of the disclosure order the Tribunal
21 made in October 2024, which is in the E bundle at tab 4, page 22.

22 The Tribunal ordered Epic to disclose data showing the number of users of the
23 Epic Games Store on Android in the period from launch on 16 August 2024 and
24 31 December 2024.

25 So, the metric of success focused upon by the Tribunal to date has always been the
26 number of users.

1 **THE CHAIRMAN:** Users on ...?

2 **MR SCANNELL:** Of Epic Games Store.

3 **THE CHAIRMAN:** On Android?

4 **MR SCANNELL:** Yes, on Android. Not the number of times Epic Games Store has
5 been installed. There is a perfectly logical reason for that. Monthly active user data
6 is a superior metric for determining the success or failure of Epic Games Store than
7 installation information.

8 If one relies on installations, as Google now wants to do, one leaves out of account
9 entirely the fact that some people, having installed Epic Games Store will never use it.
10 Others will use it, but infrequently, and yet others will use it when they were not the
11 ones who installed it. Monthly active users provides a far better indication of success,
12 because persons actively using the Epic Games Store are the people who are actually
13 engaging with the store and potentially spending money in it.

14 Now, the dataset --

15 **THE CHAIRMAN:** Sorry, this is -- what was disclosed pursuant to paragraph 8(b) was
16 users rather than installs?

17 **MR SCANNELL:** What paragraph 8(b) asked for was the total number of users. Now,
18 what was disclosed is what Google now wants to update.

19 **THE CHAIRMAN:** So, sorry, but you did disclose installs then, did you?

20 **MR SCANNELL:** Yes, and I am going to explain why. When that order was made,
21 the monthly active user data was not available. The only information that was available
22 at that time was install data.

23 **THE CHAIRMAN:** Okay.

24 **MR SCANNELL:** The MAU data, as we call it, wasn't available at that time. The MAU
25 data is now available and Epic has already offered, as one can see from this, to
26 disclose that. That's obviously sensible. I would finally --

1 **THE CHAIRMAN:** Can I just also -- is the reliance by Google on Mr Allison's
2 statement really the reliance on the second bit there, where -- in column 2, in the
3 orange, where he refers to "installs", whereas, in the previous one, he refers to
4 "users"? Do you see what I am saying?

5 **MR SCANNELL:** Yes, I do.

6 **THE CHAIRMAN:** Am I right in thinking that Google are effectively relying on his
7 reference to "installs" there as the link to get --

8 **MR SCANNELL:** That is where they are coming from. Where I am coming from is
9 that this huge disclosure request -- and, really, when one reads the request, one sees
10 immediately just how vast this request for disclosure is, that is not justified by the fact
11 that Mr Allison has made that remark in his witness statement. That's where I am
12 coming from. And I am adding to that that the MAU data is a better dataset.

13 Just in relation to that final point about the MAU data being the better dataset, my
14 understanding is that the MAU data actually derives from installation -- sorry,
15 installation estimates derived from MAU data.

16 The only way that an estimate of installations can be generated is by examining the
17 number of times Epic Games Store was installed and then opened on Android devices
18 per month. This has been explained by NRF, my instructing solicitors, to RPC last
19 year.

20 **THE CHAIRMAN:** Right.

21 **MR SCANNELL:** Those are our reasons for resisting.

22 **MS LUCAS:** Can I ask you one question, Mr Scannell? You say it is an enormous
23 disclosure exercise. If it is a constantly updating dataset, is it a big disclosure exercise
24 or is it simply a matter of downloading it on a particular date and providing it?

25 **MR SCANNELL:** The problem is the wording of this request, Ms Lucas. It is the
26 dataset not updated, but the dataset expanded to do all of these other things.

1 **MS LUCAS:** Does it do that anyway?

2 **MR SCANNELL:** It does not do that. It only provides for installations on Android,
3 that's the key, within a tight date range.

4 **THE CHAIRMAN:** So, the expansion is beyond Android and also broken down into
5 pre-installation, app store installation, and sideloading?

6 **MR SCANNELL:** Globally, by source of installation, by operating system, by platform,
7 by country.

8 **THE CHAIRMAN:** Okay.

9 **MS LUCAS:** It doesn't do that?

10 **MR SCANNELL:** It doesn't do that but that is what is being applied for.

11 **MS SMITH:** By way of reply, I might be able to assist that -- well, first point.
12 Mr Scannell referred to usage data. The point we are making in regards request 4 is
13 that Epic have already disclosed install data, this database to which reference is made
14 in the first column of request 4, the document number 41069. We are asking for that,
15 one, to be updated and, two, to be expanded. It might assist the Tribunal that we
16 would be happy for just the first of those to be ordered, that the database be updated.

17 **THE CHAIRMAN:** Yes. Carry on.

18 **MS SMITH:** Yes, so one updated to expanded you will see in column 1.
19 The second point, install data is different from user data. I referred to Mr -- Epic's
20 witness statement, Mr Allison and the evidence he has given in his most recent
21 witness statement, at paragraph 25. If I could just take you to that. It is in the
22 JCM C5 bundle.

23 **THE CHAIRMAN:** In where?

24 **MS SMITH:** C. The previous --

25 **THE CHAIRMAN:** Sorry, bundle ...?

26 **MS SMITH:** The previous hearing, 30 January hearing, bundle C, tab 8, page 195.

1 Paragraphs 25. Page 195, paragraph 25.

2 **THE CHAIRMAN:** Yes.

3 **MS SMITH:** What Mr Allison gives evidence on, what developers are interested in
4 when deciding whether or not to distribute their apps on EGS, that is why we seek
5 install data. That is what is relevant to the question of --

6 **THE CHAIRMAN:** The figure that you give in the second line?

7 **MS SMITH:** No, the last two lines. What he says developers are most interested in
8 when deciding whether or not to use EGS, that is why we are asking for install data,
9 because it is installs, number of installs, that are relevant to the success or otherwise
10 of distribution.

11 **THE CHAIRMAN:** Paragraph 25 refers to both active users and installs, doesn't it?

12 **MS SMITH:** It does. We need both.

13 **THE CHAIRMAN:** You're relying --

14 **MS SMITH:** Yes, for the purposes of request 4, I am relying on the reference to
15 installs. It's not enough to say --

16 **THE CHAIRMAN:** So that's in addition to what you've -- 26 and 25 now; yes?

17 **MS SMITH:** 25 is what I am relying on, sir.

18 **THE CHAIRMAN:** Footnote 2 to your schedule refers to 26.

19 **MS SMITH:** I'm sorry, that's a typo.

20 **THE CHAIRMAN:** No, 26 is correct, but you are also now relying on 25?

21 **MS SMITH:** I am, yes. Footnote 2 refers to the -- yes, that's right.
22 Request 8 --

23 **THE CHAIRMAN:** Okay.

24 **MS SMITH:** -- is in the Redfern Schedule at SB2, page 11.2 --

25 **THE CHAIRMAN:** Yes, I have it, thank you.

26 **MS SMITH:** -- over to 11.3.

1 **THE CHAIRMAN:** It is "revenue generated by EGS on mobile".

2 **MS SMITH:** Yes. To keep this brief, we ask for up-to-date data evidencing the
3 revenue generated by EGS on mobile. That is relevant to the pleaded case, as I have
4 already outlined, and in his third witness statement, Mr Allison, as you will see in the
5 second column, discusses Epic's revenue share model in his latest witness statement.
6 And Google needs this data in order to be able to test that evidence and it is relevant
7 to Epic's pleaded case on Epic Games Store on mobile not being able to succeed,
8 whether it is because it is the only practical -- the only practical means of distribution
9 is via Google Play.

10 Epic's response to our request 8 is that the headline rates it charges by way of
11 commission on Epic Games Store are publicly known and it has already provided
12 witness evidence on its revenue share model, but Google needs the underlying data.
13 It is relevant to Epic's pleaded case and the data is only sought for a very limited period
14 of time from August 2024 until the present day. And we say that request is reasonable
15 and proportionate.

16 **THE CHAIRMAN:** Okay.

17 **MS SMITH:** Epic says that it has provided sufficient disclosure on this issue and has
18 pointed to two documents in that regard. This is footnote 7.

19 **THE CHAIRMAN:** Just let me find where the reference to that is in the -- okay, Epic
20 has tried numerous documents with forecasts on PC including -- okay.

21 **MS SMITH:** That is footnote 7, the two documents.

22 **THE CHAIRMAN:** Yes.

23 **MS SMITH:** I would like to refer you, if I can, in response to that, to my instructing
24 solicitor's letter of 18 February because our response contains confidential material so
25 I can't read it out. If I could take you to the letter itself, which is in supplementary
26 bundle 2, tab 55. The page, for those on the electronic version, 436.

1 **THE CHAIRMAN:** Page number?

2 **MS SMITH:** 436.

3 **THE CHAIRMAN:** 436?

4 **MS SMITH:** The document starts on 435.

5 **THE CHAIRMAN:** Yes, I have it.

6 **MS SMITH:** But I would like to take you to 436. Paragraph 6 of that letter, you will

7 see is under the heading "Request 8". We make the point, at the end of that

8 introductory paragraph:

9 "The only two documents to which Epic refers, of which Google seems to be its best

10 examples, are plainly inadequate."

11 Then, if I can ask you to read (a) and (b) to yourselves because they contain

12 confidential information.

13 **(Pause).**

14 **THE CHAIRMAN:** Okay.

15 **MS SMITH:** That explains why those two documents are inadequate and why we are

16 making the request at request 8.

17 **THE CHAIRMAN:** Okay. Can you just give me a moment while I -- B2/436; yes?

18 **MS SMITH:** Yes.

19 **THE CHAIRMAN:** Thank you. Yes, Mr Scannell?

20 **MR SCANNELL:** Request 8 is said to arise from paragraphs 10 and 11 of Mr Allison's

21 third witness statement served last year. Google says that it wants to test that

22 evidence. The reason we resist this request is that we don't think that that purported

23 justification makes sense and we resist it on that basis.

24 Could I ask you, please, my Lord Chairman, to turn up bundle C1, tab 8, page 192.

25 **THE CHAIRMAN:** Yes I have it. Paragraphs 10 and 11.

26 **MR SCANNELL:** 10 and 11, yes. You will read that faster than I can out loud.

1 **THE CHAIRMAN:** I can if it's large enough.

2 **(Pause).**

3 All about the revenue share.

4 **MR SCANNELL:** Yes. So, I am going to simplify, but Mr Allison there is saying "We
5 only charge 12 per cent commission. That compares with Google's 30 per cent
6 commission. Moreover, if the user of our apps doesn't use our billing system, we
7 charge zero commission and, moreover, we only start charging after the first
8 \$1 million". That's what he is saying there.

9 Google then comes along and says, "Well, Epic Games Store is still not a suitable
10 comparator for us because Epic Games Store, with that 88/12 split, isn't profitable".
11 So what we say is the fallacy in request 8 is that, of course, we accept that Google
12 might want to say that Epic Games Store isn't a suitable comparator, but it doesn't
13 need this disclosure in order to make that point. It doesn't need to test it against Epic's
14 latest revenue across all countries, all platforms and all forms of revenue. It's common
15 ground that Epic Games Store hasn't been profitable historically. It's common ground
16 that it's not profitable today, so it makes no difference how Google goes about making
17 the comparator point by reference to 2024 data or 2025 data, or indeed by reference
18 to no data at all, and simply the fact that it is common ground that Epic Games Store
19 isn't presently profitable. The only net question is does any of that change because
20 Epic has expressed the expectation that it will be profitable at some time in the future?
21 But as Ms Lucas, of course, well knows, that has already been addressed in disclosure
22 and the conclusion that has been reached is that all that matters there are forecasts,
23 not historical financial data, and so it has already been ruled that the forecasts
24 generated within Epic at a senior level should be disclosed. We have already had that
25 debate.

26 So we say there is no basis for a freestanding disclosure request under request 8. It's

1 just a fishing expedition which is imposing a further disproportionate burden on Epic.
2 Just in relation to that, you will hear me saying, in relation to all of these requests, that
3 they are disproportionate. It has to be borne in mind that we have already agreed 11
4 or 10 of them.

5 **THE CHAIRMAN:** Already agreed -- sorry?

6 **MR SCANNELL:** Eleven or so of the requests. That accounts for all of the green
7 lines. The ones that we haven't agreed are the ones that we simply cannot agree
8 because they are so unjustified and disproportionate.

9 **THE CHAIRMAN:** Can I just understand, in relation to item 8, which is revenue
10 generated by EGS on mobile from August 2024 until present, have you already
11 disclosed that information pre August 2024? Presumably, you have, have you?

12 **MR SCANNELL:** We have disclosed vast volumes of financial data, as Ms Lucas is
13 aware. But the important point in relation to that date is Epic Games Store hadn't been
14 launched before that August 2024 date.

15 **THE CHAIRMAN:** Okay. So, in fact, it hasn't been disclosed?

16 **MR SCANNELL:** Not specifically.

17 **THE CHAIRMAN:** Not revenue generated by EGS --

18 **MR SCANNELL:** By (overspeaking) --

19 **THE CHAIRMAN:** -- has not been disclosed full stop?

20 **MR SCANNELL:** No, it couldn't have been.

21 **THE CHAIRMAN:** No, I understand. This is, again, my low on the learning curve
22 point. All right, thank you.

23 Yes?

24 **MS SMITH:** One brief point in response. My learned friend relies upon disclosure
25 already given in response to G5, the disclosure request that Ms Lucas is very familiar
26 with. Of course, that only relates to future forecasts of profitability. Past revenues are

1 relevant to the question of past profitability and the development over time of EGS as
2 a viable commercial comparator to the Google Play Store.

3 In any event, I make the point that Epic, in our submission -- I am not going to repeat
4 the points made by Mr Williams this morning -- continues to resist what we say is
5 providing proper disclosure under G5, but Ms Lucas has already had our submissions
6 on that point.

7 Moving, then, on to request 10.

8 **THE CHAIRMAN:** Yes.

9 **MS SMITH:** Request 10 relates to marketing spend on EGS. Again, relevant to the
10 pleaded case on whether or not EGS is a commercially viable practical alternative to
11 Google Play Store. It's marketing spend and cost per install, two separate elements
12 of this request.

13 Mr Stout, in his most recent witness statement for Epic, gives evidence on marketing
14 spend on EGS as well as on cost per install, and that is set out in the second column
15 at the top of page 4.

16 **THE CHAIRMAN:** Yes.

17 **MS SMITH:** He gives that evidence as regards a single particular point in time,
18 December 2024.

19 **THE CHAIRMAN:** Yes.

20 **MS SMITH:** We need to be able to test that evidence.

21 **THE CHAIRMAN:** Yes.

22 **MS SMITH:** First, as regards whether it is, in fact, correct, the figures he gives, which
23 he has given without disclosing any underlying data or documents, but also to test
24 whether those figures which he gives for one particular point in time have changed or
25 whether those figures are, for example, cherry picked for that particular point in time.
26 We need to be able to see costs of marketing changing over time.

1 Epic, in response to our request, says it has given some disclosure already as regards
2 marketing spend, and it has given further disclosure regarding Epic's strategy for the
3 distribution of EGS on mobile. But that is not to the point. Mr Stout, as you will see,
4 has given specific evidence on particular figures of marketing spend.

5 **THE CHAIRMAN:** Can I ask you -- sorry to interrupt you, could you give me the
6 bundle reference for Mr Stout's one statement so that I can just mark it? I am sure
7 Mr Williams can do it. I don't want to distract you.

8 **MS SMITH:** It will be bundle C for the previous hearing. It is at tab 12.

9 **THE CHAIRMAN:** Can you give me the page number?

10 **MS SMITH:** Starting on page 235 through to 245.

11 **THE CHAIRMAN:** Just give me a moment.

12 Yes, thank you very much. That's very helpful.

13 **MS SMITH:** So Mr Stout says that Epic spent a total of -- or spent [Redacted for
14 Confidentiality] on marketing EGS on mobile between August 2024
15 and December 2024, and gives specific figures, which are confidential, for costs per
16 install for December 2024.

17 Google asks for material evidencing and underlying the basis for those figures, and,
18 as I have already said, how they might have changed over time.

19 As for marketing spend, on EGS on Android, one would assume such data should be
20 readily available, because Epic has calculated it for the purposes of calculating the
21 figure for the purpose of Mr Stout's witness statement.

22 **THE CHAIRMAN:** Can I just ask this question? The request is for marketing spend
23 and cost per install, your criticism is that they cherry picked a particular period of time.
24 Can you be more precise about what period of time your request relates to? You may
25 want to come back on that.

26 **MS SMITH:** Yes. Yes, if I can in reply, I will come back on that.

1 As I said, it's not just a question about whether they have changed in time, but also
2 whether the figures themselves -- the basis for the figure themselves -- first, the basis
3 for the figures themselves; second, whether they have changed over time.

4 As I have said, the marketing spend the data should be readily available because it
5 must have been obtained by Epic in order to enable Mr Stout to give the figure that he
6 gives in his witness statement. As to cost per install figures for EGS, Epic says in its
7 Redfern Schedule response that it cannot produce cost per install figures because
8 [Redacted for Confidentiality]. It was explained in correspondence, and again in Epic's
9 skeleton argument, that the cost per install figure was, and I quote, "[Redacted for
10 Confidentiality]".

11 **THE CHAIRMAN:** Sorry, can I just find that? Is that in the --

12 **MS SMITH:** It is in the skeleton and it is also in correspondence. To be fair, it is in
13 Epic's skeleton argument, paragraph --

14 **THE CHAIRMAN:** Yes, I have it. It's page 4.

15 **MS SMITH:** Yes. So there is this [Redacted for Confidentiality] and enables the --

16 **THE CHAIRMAN:** You are able to see the cost per install for a particular time period?

17 **MS SMITH:** Yes. If there is this [Redacted for Confidentiality], so as to provide details
18 of Epic's assessment of its cost per install for EGS and Fortnite overtime, as we
19 request.

20 I am instructed that we will -- we can restrict the date range for this disclosure
21 to August 2024, which is the starting point for the period Mr Stout refers to in his
22 evidence, to October 2025, which is the end of October 2025, which is the date upon
23 which he gave his witness statement.

24 **THE CHAIRMAN:** Right. Okay, thank you. Mr Scannell?

25 **MR SCANNELL:** There are two disclosure requests in request 10, strictly speaking.
26 So the first is that marketing spend or investment in respect of EGS on mobile in the

1 UK, the EU, and the US, broken down by platform and broken down by country. The
2 second is disclosure of the cost per install for both Epic Games Store and Fortnite.
3 We resist both: the first on the basis that it ignores existing disclosure; the second on
4 the basis of practical possibilities.

5 As to the first of them, Epic has already provided disclosure under what were Google's
6 requests 5 and 7 at the December 2024 CMC, and the January 2025 disclosure order
7 relating to Epic's distribution strategy for Epic Games Store on mobile. We have also
8 agreed, at the June and July hearings last year, to disclose additionally agendas,
9 minutes, slide decks, presentations, other records of meetings relevant to Epic's
10 strategy for release of Epic Games Store on mobile devices and documents
11 evidencing Epic's strategy for the release of EGS on mobile and communications
12 relating to the preparations of the same. That was Google's request G1 at the June
13 and July hearings last year.

14 Now, marketing is obviously a component of Epic's strategy for the release of
15 Epic Games Store on mobile devices. So it is highly likely that any documents relevant
16 to marketing spend either already have been disclosed to Google or will, in due course,
17 be disclosed. So, at the very least, Google should digest the material it receives and
18 make targeted, narrow, timely applications to fill perceived gaps. That was precisely
19 what Ms Lucas envisaged in the September ruling.

20 As for breaking down the information by platform and country, that is obviously
21 unwarranted. It is pretty obvious, I would suggest, that no further illumination is going
22 to come from knowing that particular amounts of money were spent in particular
23 countries at particular points in time. The stated need for the information at that level
24 of granularity is just contrived, in my submission.

25 Now, as to the second limb, the cost per installation, there is a practical difficulty that
26 arises in that regard. The Tribunal might think, as, I confess, did I, that the cost per

1 installation is simply a question of taking the total marketing spend and dividing it by
2 the number of installs, but I am afraid it's not that simple. I am instructed that
3 [Redacted for Confidentiality]. What all of that means is that, while an Epic employee
4 like Mr Stout can ask [Redacted for Confidentiality] to estimate a figure for the cost per
5 install and [Redacted for Confidentiality] will produce a figure, that figure can't be
6 interrogated in the sense of understanding precisely how it was derived without
7 disclosing a whole universe of documents underlying the figure that is produced. It
8 would be, I am told, a herculean task to provide that disclosure which would be
9 disproportionate.

10 **THE CHAIRMAN:** Just so that I understand it, very basically, again, in column 2 in
11 this request there is a reference to an overall spend, marketing spend, and the cost
12 per install, what that cost means is the marketing spend per install, does it?

13 **MR SCANNELL:** That's my understanding.

14 **THE CHAIRMAN:** Just I got confused by -- I didn't pick up as clearly that the cost per
15 install is the marketing cost per install.

16 **MR SCANNELL:** Yes.

17 **THE CHAIRMAN:** Okay. All right.

18 **MR SCANNELL:** I can't take that any further.

19 **THE CHAIRMAN:** Okay, thank you.

20 **MS SMITH:** Two short points in reply. As to marketing spend overall, Epic's counsel
21 relied upon the disclosure that they are already giving as regards Epic's strategy for
22 release of Epic Games Store on mobile, which Ms Lucas will recall forms the subject
23 of request G1 that was considered this morning. Ms Lucas will also recall that
24 Google -- that Epic seeks to resist disclosure of such strategy documents postdating
25 30 November 2024.

26 We ask for disclosure of data regarding marketing spend -- documents and data

1 regarding marketing spend, as I have indicated, up to the date on which Mr Stout gave
2 his witness statement, which is October 2025.

3 **THE CHAIRMAN:** Okay.

4 **MS SMITH:** The second point is cost per install.

5 **MS LUCAS:** I think I should probably clarify, and you will correct me if I have this
6 wrong, but I think the basis for the resistance is that in my ruling of September, we
7 were dealing with how easy it is to update disclosure and Epic submitted that it's
8 actually quite difficult to update disclosure, and so, to ask them to revisit disclosure
9 already given to November 2024 is -- to the date that you want, which is, I think, May,
10 is more difficult. And the new custodians that have been specified are giving
11 disclosure to 31 May. So, it's not that you have no disclosure coming relating to that
12 later period.

13 **MS SMITH:** Yes, that takes me back to the point I am not going to repeat from my
14 initial submission, which is strategy -- what we are asking for is documents and
15 disclosure regarding the marketing spend figures that Mr Stout gives in his witness
16 evidence in order to enable us to interrogate those figures on marketing spend. It's
17 not good enough to say we already have disclosure on strategy documents, but the
18 date range is also an issue.

19 **MS LUCAS:** If you get documents to 31 May 2025, will they not cover marketing
20 spend up to that point in time?

21 **MS SMITH:** Well, it is limited to custodians we don't know, and I don't think -- I will be
22 corrected, if I am wrong -- that Mr Stout is one of those custodians. No, he is not. He
23 is not one of those custodians.

24 **THE CHAIRMAN:** You were going to make a point about costs per install, I think.

25 **MS SMITH:** I was. Much has been made about how difficult it is to run or the data
26 goes into the -- how difficult it would be to produce the data that goes into [Redacted

1 for Confidentiality]. In light of that, we -- but it is clear that figures can be produced
2 and the specific figures were produced for December 2024 which appear in Mr Stout's
3 witness evidence. I won't read out what those figures are.

4 We would be satisfied if equivalent figures were produced [Redacted for
5 Confidentiality] equivalent monthly figures for the period August 2024
6 to October 2025.

7 **THE CHAIRMAN:** The August 2024 to October 2025 monthly figures. So, at the
8 moment, we have one figure.

9 **MS SMITH:** We have one monthly figure, which is December. I think it would be
10 a further 11 monthly figures. So that we can consider, rather than just --

11 **THE CHAIRMAN:** Just to the end of October which is 13 months, 14 months; is that
12 right? And you have one, so you want 13 further figures; is that right?

13 **MS SMITH:** Yes.

14 **THE CHAIRMAN:** All right.

15 **MS SMITH:** Moving, then, on to the requests made under category 3.

16 **THE CHAIRMAN:** Yes. Request 14.

17 **MS SMITH:** Just by way of introduction, there are two outstanding requests under
18 category 3, requests 14 and 15, Google has withdrawn request 16. These requests
19 both relate -- 14 and 15 both relate to documents and data relating to Epic Direct
20 Payments, EDP. Epic Direct Payment is Epic's in-app payment solution which is
21 integrated with the Epic Games Store. Epic charges 12 per cent commission when
22 users make payments in apps distributed by EGS using EDP. Epic's pleaded case is
23 that Google's service fees are excessive and unfair in comparison to the fees that it
24 charges, the 12 per cent commission. And Google needs to be able to test whether
25 this 12 per cent rate charged by Epic for Epic Direct Payment is a valid comparator for
26 Google's service fee rates. Against that background, we make the request, first, at

1 request 14, for Epic Direct Payment global transaction data broken down by platform
2 and country covering the period from August 2024 until the present. The basis for that
3 request is that Mr Schmitt, Epic's witness, in his most recent witness evidence gives
4 evidence which is set out in column 1 of the Redfern Schedule on page 11.5, as on
5 the volumes of transactions processed by Epic Direct Payments -- by Epic Direct
6 Payment per month in August 2025, both globally and in Great Britain.

7 So, we ask for disclosure of transaction data for a period from August 2024 until the
8 present, to enable us --

9 **THE CHAIRMAN:** By "transaction data", are you saying volumes of transactions?

10 **MS SMITH:** I'm sorry, volume data.

11 **THE CHAIRMAN:** It doesn't say that, but that's what you mean?

12 **MS SMITH:** Yes.

13 **THE CHAIRMAN:** Yes.

14 **MS SMITH:** And we ask for it, the data, for the volumes of transactions processed for
15 the period of August 2024 to the latest available date so that we can test the figures
16 given by Mr Schmitt. Again, he is giving figures as of 31 August 2025 in a witness
17 statement that was produced at the end of October 2025. We need to be able to get
18 data to enable us to test his evidence on those figures. Particularly, and this is very
19 important, you will see there is just a number given in Mr Schmitt's evidence. There
20 were numbers given in previous evidence from an Epic witness Mr Seavers, his first
21 witness statement dated 1 March 2023, and he gave figures for the Epic Direct
22 Payment transaction data for an earlier period. We now know from Mr Schmitt's
23 statement that those previous figures were incorrect.

24 **THE CHAIRMAN:** Right.

25 **MS SMITH:** Given the concern, given this admitted lack -- these admitted problems
26 with the figures that were previously given, it is, in our submission, reasonable and

1 necessary for Google to be able to test the figures now given by Mr Schmitt, again
2 without underlying disclosure. We need to be able to test his evidence by reference
3 to the underlying data and we have limited our requests to a short period of time
4 from August 2024 until the present day, so we say, therefore, this request is
5 reasonable and proportionate.

6 Epic has not to date, as I understand it, disclosed any Epic Direct Payment global
7 transaction data at all, even though evidence has been given by their witnesses on the
8 number of transactions. We say such data should be readily available to it, given that
9 the figures are produced in evidence, the bare figures are produced in evidence. No
10 explanation or particulars have been given by Epic as to why disclosure of such data
11 and documents for the limited period we request from August 2024 until the present
12 date would be difficult or disproportionate.

13 **THE CHAIRMAN:** Mr Schmitt's evidence gives a per month figure which presumably
14 is an average? I don't know. Are you asking for monthly figures for each of those
15 months?

16 **MS SMITH:** No, we are asking for the data and documents that give rise to the figures
17 produced by Mr Schmitt.

18 **MS LUCAS:** When you say you need to test Mr Schmitt's evidence, he has only given
19 evidence about one month, so I probably need a better understanding of how this is
20 relevant to the pleaded -- I mean, I understand the general point about whether the 12
21 per cent commission is a realistic comparator from Epic, but why do you need all this
22 other data about --

23 **MS SMITH:** If I could take you back to the particular paragraph in Mr Schmitt's
24 evidence, it is in the previous hearing bundle C, tab 11, page 228. Paragraph 24.

25 **THE CHAIRMAN:** I had it and I have lost it again. Give me the page number again.

26 **MS SMITH:** Bundle C, page 228.

1 **THE CHAIRMAN:** The trouble is I can't get it on the screen.

2 **MS SMITH:** Here, Mr Schmitt is giving evidence -- at the beginning of this section of
3 his witness statement, he is giving evidence on the features offered by Epic Direct
4 Payment and you will see the heading to this section, B1, talks about the improved
5 coverage of Epic Direct Payment. So, he is here giving evidence about, in effect, why
6 Epic Direct Payment is a good comparator to the payment services and the
7 Google Play Services that are offered by Google. One of the points he makes in that
8 regard is at paragraph 24, where he says:

9 "As the breadth of Epic Direct Payments offering has increased, so has its use both
10 globally and within the UK."

11 Then he gives the figures, and --

12 **THE CHAIRMAN:** They are average, on average, in 12 months.

13 **MS SMITH:** Yes. As of 31 August, those figures have changed and it is making the
14 point that, as our offering has increased, the usage of our offering has -- EDP has
15 increased. And so the figures, the coverage, the success of Epic Direct Payment, as
16 illustrated by the number of transactions per month, is relevant to our pleaded case on
17 whether this is a commercially viable alternative to Google Play Store. The EDP
18 aspect of Epic Games Store.

19 Where our concern arises is that previous evidence on this, figures produced without
20 underlying data, are wrong, were wrong. Mr Schmitt now gives different figures and
21 we need to be able to test those figures by reference to the underlying data.

22 **THE CHAIRMAN:** Anything else on this one?

23 **MS SMITH:** Could I have a moment, sorry? There is a suggestion that we might limit
24 it, but I am not sure I entirely understand.

25 **(Pause).**

26 I am instructed that Google would be satisfied with -- these figures are given, as you

1 will see, by Mr Schmitt for the point as of 31 August 2025. In order to support his
2 evidence that, as the breadth of Epic Direct Payments offering has increased, so has
3 its use. If, instead of the underlying data and documents, Epic were able to give us
4 the figures for each month from August 2024 to October 2025 to see how the figures
5 have changed over that period so that we can assess his evidence as to --

6 **THE CHAIRMAN:** Why is that a limit? I thought that was what you were asking for.

7 **MS SMITH:** Rather than the underlying data and documents that go into producing
8 those figures.

9 **THE CHAIRMAN:** Oh, right. Global transaction data, you want the figure?

10 **MS SMITH:** Figures, yes.

11 **THE CHAIRMAN:** The figure for each month?

12 **MS SMITH:** Yes.

13 **THE CHAIRMAN:** I am slightly baffled by the paragraph in the witness statement
14 anyway:

15 "As breadth of offer has increased, so has its use post-Covid in the UK."

16 On average, in the 12 months prior to Seavers, he gives a figure which is obviously
17 lower than the as of August, but then they correct that figure to a figure that is higher.

18 **MS SMITH:** Yes.

19 **MS LUCAS:** Yes, the figure in the last sentence is higher.

20 **THE CHAIRMAN:** It looks as though it is a reduction, on that basis. Anyway.

21 All right, but you want the figure for each month rather than the underlying data?

22 I think we are going to have to stop, when we have finished this one, for lunch.

23 Obviously, Mr Scannell -- we will hear what Mr Scannell has to say. This is request 14
24 and we will review where we are in terms of timing. Carry on.

25 **MR SCANNELL:** This is one of those requests which requires the Tribunal to step
26 back and ask, what exactly is Google asking for and is it really necessary to put Epic

1 to the trouble and expense of giving that disclosure in light of the reasons given?
2 Mr Schmitt has deposed that, at the end of August, a certain number of transactions
3 were being processed every month by Epic's payment system and a certain proportion
4 of those occurred monthly in the UK. Now, Google wants to test that evidence, but,
5 for that purpose, it is seeking global transaction figures which are broken down by
6 platform and by country. We simply ask, why? There is no suggestion that
7 Mr Schmitt's evidence is wrong, that it is either deliberately wrong or inadvertently
8 untrue. Google hints that the request of disclosure is relevant to the assessment of
9 whether Google's commissions are excessive and unfair by comparison to
10 Epic Games Store, but that's not actually an explanation of why this disclosure is
11 needed. Google might want to rely on the monthly transaction figure Mr Schmitt gives
12 to show that Epic's payment system isn't operating on the same scale as Google's is
13 operating in, or it may seek to rely on the UK monthly figure, but Google already has
14 those particular figures. Breaking it down further than that into platforms and countries
15 won't take that analysis any further. It really must be noted, and this is really the main
16 point, that there is already a mountain of evidence before the Tribunal addressing how
17 Epic's commission actually works. Importantly, no expert in this case has hinted that
18 a by-platform or by-country breakdown of the number of transactions processed
19 through Epic Direct Payment would be of any assistance in assessing whether
20 Epic Games Store is a suitable comparator. Google hasn't suggested that any of its
21 experts have asked for this information either.

22 The final point I want to make here is, again, a proportionality point that providing the
23 breakdown that Google is asking for by its 14th request would be immensely onerous.
24 [Redacted for Confidentiality]. So we say that this request just looks like Google
25 seeing a figure in a witness statement and saying, "Well, how can we use that number
26 in that witness statement to impose a further disclosure burden?". It's not

1 proportionate, it's not necessary and that's why we resist it.

2 **THE CHAIRMAN:** Can I just double check, I think it is probably for Ms Smith. In the
3 light of what you limited it to, you want a figure for each month, you still want that
4 broken down by reference to platform and country, do you?

5 **MS SMITH:** As I understand it, it would simply be a reproduction of the figures
6 produced in paragraph 20 -- which one is it -- 24 of Mr Schmitt's witness statement for
7 the months that we have requested.

8 **THE CHAIRMAN:** So not broken down?

9 **MS SMITH:** Just those figures that he has provided in his witness statement.

10 **THE CHAIRMAN:** One figure per month for transactions globally, and one figure per
11 month for transactions for Great Britain.

12 **MR SCANNELL:** This is becoming like encountering the Black Knight in a forest. I will
13 need to take instructions on that.

14 **THE CHAIRMAN:** All right, if you would, over the lunch break.
15 Let me just make a note of that.

16 **(Pause)**

17 Okay, we are going to rise now for lunch. We will start again at 2 o'clock. We would
18 like to finish by 3 o'clock. If we don't get through it all, we will have to see where we
19 go with it. I don't think we are quite halfway through, but maybe we are.

20 All right, thank you all very much. Thank you.

21 **(1.35 pm)**

22 **(The short adjournment)**

23 (2.00 pm)

24 (Proceedings delayed)

25 **(2.05 pm)**

26 **THE CHAIRMAN:** Yes?

1 **MS SMITH:** Members of the Tribunal, request 15. This is on pages 5 to 6 of the
2 Redfern Schedule, SB2/11.5.

3 **THE CHAIRMAN:** Yes. Just give me a moment.

4 **MS SMITH:** I will try and get through the remainder of the requests as quickly as I can.

5 **THE CHAIRMAN:** Yes.

6 **MS SMITH:** Epic's pleaded case is that, without the restrictions imposed by Google,
7 users and developers would use alternative payment processing services that would
8 be cheaper and of better quality than Google's billing system. And Mr Schmitt, in his
9 most recent witness evidence, gave evidence that Epic -- and this is reproduced in the
10 second column on page 11.5. His evidence was that Epic regularly reviews the
11 features on Epic Direct Payment to ensure that they are working properly.

12 Given Epic's pleaded case on quality, Google needs to be able to test that evidence.
13 So we ask for documents restricted to -- or documents and correspondence restricted
14 to those regarding the internal reviews that Mr Schmitt says Epic carries out of the
15 features and performance of Epic Direct Payment.

16 **THE CHAIRMAN:** Yes.

17 **MS SMITH:** Epic says it has already disclosed some such documents but, of the four
18 documents referred to by Epic, you will see in the third -- the fourth, apologies, the
19 far-right column. Four of those -- there are four documents referred to by Epic in
20 saying that disclosure is not necessary because it has already disclosed some relevant
21 documents, but the latest of those documents dates from April 2022. So, Google has
22 reduced the temporal scope of its request to 1 April 2022 to 31 October 2025. That's
23 on page 11.6, updated position in the far-right column.

24 This is a reasonable, necessary and proportionate request. Epic says the other
25 reason why Epic says we should not get this disclosure, apart from the fact it has
26 already disclosed four documents which I have addressed, Epic also says that this

1 issue, the quality of Epic Direct Payment, has been addressed by Google's payment
2 systems expert, Mr Burg, so disclosure is unnecessary. In my submission, the fact
3 that an expert addresses this issue does not render disclosure on it unnecessary. On
4 the contrary, it supports our application for disclosure. Experts should base the
5 opinions contained in their reports insofar as possible on the basis of
6 contemporaneous documents produced by the parties in the proceedings.

7 That is particularly the case where, as here, one of Epic's factual witnesses,
8 Mr Schmitt, has given evidence to the effect that Epic carries out these regular
9 reviews.

10 That evidence will need to be tested at trial, so we ask for documents relating to these
11 internal reviews from 1 April 2022 to 31 October 2025. We say such request is
12 necessary, reasonable and proportionate.

13 **MR SCANNELL:** This request is certainly not proportionate. Just a moment's thought
14 in respect of this category and it can be seen that complying with it would impose
15 a very considerable further onus on Epic. It covers each and every document,
16 including correspondence, relating to every internal review Epic has carried out over
17 a period of almost 4 years. To describe that as "focused and limited", which are the
18 words which appear in the Redfern Schedule and beside Google's entries, is absurd,
19 in my submission. It's nothing of the sort.

20 Why does Google want this disclosure? Well, the reason it gives is that Mr Schmitt
21 mentions that Epic reviews its direct payment system regularly to make sure that it
22 works. Now, of course, we understand that Google will want to compare its payment
23 system with Epic's, but it's absurd to suggest that that disclosure, this disclosure, or
24 any part of it is necessary to enable that comparison to be made.

25 The features of Epic's payment system are readily ascertainable by Google's expert
26 witnesses. Google's experts only have to use Epic's system to see those features.

1 It's hopeless to suggest that the only way they can know how those features -- or what
2 those features are is to obtain internal disclosure relating to how all of the features are
3 kept under review. And the Tribunal need not take my word for that, incidentally,
4 because Google's experts have already undertaken that very exercise. On behalf of
5 the claimant companies, Mr Burelli compares the Epic payment system to Google's,
6 and he concludes that Epic's payment system is, in his words, "an orthodox merchant
7 of record service akin to that provided by Google Play Store" --

8 **THE CHAIRMAN:** Who? That's Mr --

9 **MR SCANNELL:** That's Mr Burelli.

10 **THE CHAIRMAN:** Burelli, okay.

11 **MR SCANNELL:** Then Mr Burg, who is Google's expert in the same field, takes that
12 up on behalf of Google and he conducts a comparative analysis. Now, those words
13 "a comparative analysis", are Mr Burg's words, they are not my words, and he
14 disagrees with two of Mr Burelli's conclusion. So, he is perfectly able to compare
15 Google's system with Epic's without any of this disclosure.

16 **THE CHAIRMAN:** I am just thinking aloud. There will be factual evidence as to what
17 the features of the two systems are, number one. That is presumably already
18 there -- will be there, actually what each system does, doesn't do and its features. And
19 there will be the opinions of the experts as to whether they are comparators or not,
20 good comparators or not.

21 **MR SCANNELL:** Yes.

22 **THE CHAIRMAN:** Why -- I mean, I am really asking this of Ms Smith, but I am just
23 throwing it out. Why is internal opinion about whether our system is as good as theirs
24 or not relevant? I don't know, I mean, it may be.

25 **MR SCANNELL:** Even that, my Lord Chairman, would probably go too far. It would
26 be unnecessary. What we are actually talking about is whether or not Epic should

1 have to disclose all of its internal reviews of how its system is working just because
2 one of its witnesses has said we keep our system under review. It is an absolutely
3 preposterous fishing expedition for further disclosure. It is not going to change any
4 analysis at trial.

5 **THE CHAIRMAN:** Okay. It's ultimately a question for the Tribunal as to whether they
6 are comparable or not, presumably, or the relevance of the comparison.

7 **MR SCANNELL:** Yes, that's correct.

8 **THE CHAIRMAN:** Okay. All right. Yes, Ms Smith, I don't know if you want to reply
9 briefly on 15?

10 **MS SMITH:** Yes, one very brief point on that. This disclosure does not only go to the
11 question of whether Epic Direct Payment and Google Play's billing systems are
12 comparators. As I said, Epic's pleaded case is that, without the restrictions imposed
13 by Google, users and developers would use alternative payment processing systems
14 that would be cheaper and of better quality than Google's billing system in the
15 counterfactual. The reviews that are carried out by Epic as to the continuing quality of
16 the features and performance of its payment system are relevant, we say, to that
17 pleaded case.

18 We are willing, in light of the points made against us on proportionality, to restrict the
19 request for the limited period of date ranges, the limited date range, as I have already
20 mentioned, but to restrict it to documents and not to include correspondence. Simply
21 documents regarding Epic's internal reviews.

22 Sorry, I am sorry, I am misspeaking. Just the reviews themselves. Not
23 correspondence relating to the reviews, but just simply -- not documents and
24 correspondence relating to the reviews, but Epic's actual reviews. The reviews
25 themselves.

26 **THE CHAIRMAN:** So, when he says regular reviews, the features --

1 **MS SMITH:** Yes, it was just (overspeaking).

2 **THE CHAIRMAN:** -- (overspeaking) those reviews? Okay.

3 **MS SMITH:** Can I then move on?

4 **MR SCANNELL:** My Lord, just before we begin the next of these requests. I do feel

5 that I have to intervene to make one point, which is that it is slightly absurd that we

6 have been trying to engage with Google for months in relation to their disclosure

7 requests. We have bent over backwards to agree 11 of them, and now, when the

8 requests are being made, and only now, are concessions being made on successive

9 requests. That could have been done months ago.

10 **THE CHAIRMAN:** I have the point. It's not unusual for the courtroom to --

11 **MS SMITH:** Focus minds.

12 **THE CHAIRMAN:** It is the nature of the game.

13 **MS SMITH:** It is. I would also make the point, if Mr Scannell finds it necessary to

14 make those sorts of points, that not only have Epic agreed to certain requests, Google

15 have also dropped a number of requests originally made during the course of

16 correspondence with the other side.

17 Moving on, then, to request 17, which is on page 11.6.

18 **THE CHAIRMAN:** Yes.

19 **MS SMITH:** Category 4 is various other research reports and other relevant

20 documents. The first of those under request 17, you will see request 19 has now been

21 dropped by Google, so -- sorry, in light of Epic agreeing to provide an assessment.

22 **THE CHAIRMAN:** Sorry, which has been dropped?

23 **MS SMITH:** 19 has been dropped, so we have 17 and 18.

24 Request 17. This request is relevant to Epic's pleaded case that streaming services

25 are not -- or playing games, for example, over streaming services are not substitutes

26 for native apps. Mr Sweeney, in his most recent witness statement, makes a number

1 of assertions in his witness statement about why that is the case. You will see some
2 of those assertions are set out in the second column on the bottom of page 11.6.
3 Those are simply bare assertions as to why, in his opinion, streaming services are not
4 substitutes for native apps. And we need to be able to test those assertions made in
5 his evidence. So, we make a targeted request for specific documents, not documents
6 generally, but internal or external research or reports comparing the performance of
7 game streaming services and native game apps produced in a very limited period of
8 time, 12 August 2024 until 30 November 2025. We have, in response --

9 **THE CHAIRMAN:** One minute, one minute. Sorry. I thought you just said
10 "12 August". I have, in your third column --

11 **MS SMITH:** Yes, I was about to say, in fact, since that initial proposal on the updated
12 position on the 29 January 2026 is that we have significantly narrowed the temporal
13 scope of that request to one year. 1 November 2024 to 31 October 2023 [as spoken].

14 **THE CHAIRMAN:** Sorry, that is the current position?

15 **MS SMITH:** That is the current position, yes.

16 **THE CHAIRMAN:** Thank you.

17 **MS SMITH:** So, we say that the request is relevant because of the -- relevant to the
18 pleaded case. It is necessary in order to test the bare assertions that Mr Sweeney
19 makes in his third witness statement, and it is proportionate, it is for specific
20 documents, just research reports comparing the performance for one year.

21 Epic's case in refusing this disclosure is that it has -- it is unnecessary because Epic
22 has already provided disclosure of usage data on certain streaming platforms,
23 Amazon Luna, and GeForce NOW. But that does not go to the general assertions
24 made in Mr Sweeney's evidence about the comparative performance of streaming
25 services and native apps.

26 **THE CHAIRMAN:** Okay.

1 **MS SMITH:** The second point that Epic makes is that, because Google holds relevant
2 material of its own and, therefore, does not require disclosure because Google has its
3 own cloud streaming platform, Stadia. Stadia ceased operation in January 2023, that
4 is nearly 2 years before the start of the date range in respect of which disclosure is
5 sought, and almost 3 years before the evidence which is being given by Mr Sweeney
6 that Google seeks to test by reference to the disclosure sought. So, we say neither of
7 those responses are adequate in response to our request -- our very targeted, limited
8 request for disclosure under request 17.

9 **THE CHAIRMAN:** Thank you.

10 **MR SCANNELL:** Members of the Tribunal, if one just considers for a moment the
11 evidence that is pointed to by Google in connection with this request, they point to the
12 fact that Mr Sweeney makes a number of what they call "bare assertions", including
13 that the significant issues of latency, lack of bandwidth and the cost of service are
14 highly unlikely to change and, although availability of internet bandwidth generally
15 increases over time, smartphone hardware performance tends to increase at a faster
16 rate, et cetera. What Mr Sweeney is doing there is expressing his view in relation to
17 the comparison between streaming services and other ways of distributing apps.

18 If one thinks about that, why does Google need disclosure from Epic in relation to what
19 the comparison between those two actually are? If they had their own points, they can
20 just cross-examine up hill and down dale in relation to what they say the correct answer
21 to the comparison question actually is. It is fair to say, contrary to my learned friend's
22 submission a moment ago, that Google obviously knows a great deal more about the
23 comparative performance of game streaming services and native game apps than
24 Epic does. Epic doesn't produce web apps. Google, in contrast, did have its own
25 cloud streaming service, Stadia, as my learned friend has pointed out. So, it is
26 obviously better placed than Epic to provide the sort of documents it professes to need

1 under this disclosure request.

2 The second point is that, although Epic did launch one of its apps, Fortnite, on Nvidia's
3 GeForce NOW and Amazon's Luna streaming platform, the Tribunal has already
4 considered the disclosure to which that gives rise. That was considered by Ms Lucas.
5 And Epic has also agreed to provide updated data covering daily, weekly and monthly
6 active users of Fortnite on Amazon Luna.

7 The final point is that there is already ample evidence before the Tribunal relating to
8 the performance of cloud gaming. We have given the references to Google's and
9 Epic's evidence in that connection at paragraph 58 -- sorry, 5F --

10 **THE CHAIRMAN:** Paragraph?

11 **MR SCANNELL:** Paragraph 5F.

12 **THE CHAIRMAN:** Of your skeleton?

13 **MR SCANNELL:** Of our skeleton, footnotes 13, 14, and 15.

14 So Google already has all of the relevant documents pertaining to Epic's experience
15 of game streaming. There is absolutely no justification, in my submission, for more
16 general disclosure covering general research into the comparative performance of
17 streaming services and native apps.

18 **THE CHAIRMAN:** Thank you very much.

19 **MS SMITH:** Very briefly, in way of reply, an Epic witness, Mr Sweeney, has given
20 evidence on the comparative performance of streaming services and native apps.
21 Epic is a producer of native apps -- Fortnite and its other games -- but also web apps
22 for Fortnite and its other games, distributed by, for example, the streaming services of
23 GeForce NOW and Amazon Luna. Epic's counsel says, well, you can cross-examine
24 Mr Sweeney up hill and down dale on his evidence, but in order to carry out effective
25 cross-examination which is of any use to the Tribunal, we need disclosure of
26 documents that support or go to the issues upon which he is giving evidence and upon

1 | which we wish to cross-examine him.

2 | **THE CHAIRMAN:** I think the point Mr Scannell was making was that you would have
3 | documents upon which to cross-examine him. I think. Amongst other points.

4 | **MS SMITH:** Insofar as he makes that point --

5 | **THE CHAIRMAN:** You want internal documents which might contradict what he says?

6 | **MS SMITH:** Well, exactly. If he is giving this evidence, then it is perfectly reasonable
7 | for us to seek to properly test that.

8 | **THE CHAIRMAN:** Okay, thank you.

9 | **MS SMITH:** Request 18, page 11.6 of the second supplemental bundle. 11.7,
10 | apologies, of the second supplemental bundle.

11 | This goes to Roblox. This goes to evidence given by Mr Stout in his latest witness
12 | statement. He gives evidence to the effect that Roblox is a key competitor to Fortnite.
13 | He also gives evidence, although it's not set out in the Redfern Schedule to the effect
14 | that Epic considers, assesses, the operation success of competitors to its products.
15 | Sorry, that is in the Redfern Schedule. It is at the very bottom of the very end of the
16 | fourth column, the far-right column on page 11.8.

17 | **THE CHAIRMAN:** Just point out in the fourth column what you are referring to there.

18 | **MS SMITH:** Page 11.8, the right-hand side, Mr Stout's evidence is that Epic assesses
19 | the operations and success of competitors to its products such as Roblox.

20 | **THE CHAIRMAN:** Yes, okay.

21 | **MS SMITH:** I thought I had a paragraph on that, but I will come back to it.

22 | **THE CHAIRMAN:** That's a different passage of his evidence.

23 | **MS SMITH:** Yes, I am sorry, I thought I had a paragraph number in my notes, but I will
24 | come back to that.

25 | **THE CHAIRMAN:** It's different from paragraph 19 which is what is relied on in the first
26 | column?

1 **MS SMITH:** Yes.

2 **THE CHAIRMAN:** Okay.

3 **MS SMITH:** It is background to, and a response to, objections to this disclosure which
4 supports the point that Epic is likely to have documents in which it assesses its key
5 competitors, including the key competitor identified in paragraph 19 of Mr Stout's
6 witness statement as Roblox.

7 **THE CHAIRMAN:** Okay.

8 **MS SMITH:** Now, Epic refuses to give disclosure on two points. Well, it refuses to
9 give disclosure on the basis that Roblox is not an app store and it's not a competitor
10 of Epic Games Store.

11 Now, Mr Frazer, at least, will probably be aware that Roblox is an online gaming
12 platform that allows third parties to create content to sell within the games on that
13 platform, like an equivalent to in-app purchases. And Roblox charges developers
14 a commission on content that is sold within games on the platform.

15 Google's position is that Roblox may be an appropriate comparator to the Google Play
16 Store for the purposes, for example, of, among other things, Epic's excessive and
17 unfair pricing claim. The Tribunal may in due course find it useful to compare the
18 commission charged by Roblox to developers for the selling of in-game content with
19 the commissions charged by Google selling of in-app purchases.

20 In fact, and importantly, Roblox was assessed as a comparator to Epic Games Store
21 in the Apple v Kent proceedings, where the Tribunal explicitly said that it would be
22 useful to have further evidence about Roblox.

23 If I can, in this regard, refer you to the Redfern Schedule, page 11.6, the fourth column
24 on the far right-hand page of the page, 11.6. You will see first an excerpt from the
25 Roblox Corporation annual report which explains what it does, and then, about halfway
26 down the page, an extract from the judgment in the Kent v Apple judgment,

1 paragraph 853. Yes it is 11.7. Page 11.7, halfway down the page, the extract from
2 paragraph 853 of the court's judgment in Kent v Apple.

3 We ask for disclosure of documents evidencing or recording Epic's assessment of
4 Roblox as a competitor to Epic's product. As Mr Stout gives evidence to the effect that
5 Epic assesses the operation and success of competitors to its product, we say,
6 therefore, it must hold such material as regards Roblox and our request.

7 **THE CHAIRMAN:** It says expressly it is one of Fortnite's key competitors.

8 **MS SMITH:** Indeed, but the evidence -- the material that it has -- the material that
9 Mr Stout says that it holds on its competitors -- so the first step is Epic has identified
10 Roblox as one of its key competitors. Yes, it is a key competitor to Fortnite. It then
11 says, "We carry out an assessment, a general assessment, of the operation and
12 success of our competitors", and we say while Roblox is relevant, possibly not as
13 a comparator to Fortnite, but on our case it would be relevant as a comparator to the
14 Epic Games Store, we would therefore like to see what documents you hold assessing
15 the operation and success of Roblox, which will go, for example, to, one would
16 assume, the prices charged by Roblox.

17 **THE CHAIRMAN:** Yes, okay.

18 **MS LUCAS:** Does Google hold information relating to Roblox?

19 **MS SMITH:** I can't answer that question. It may be that there are documents in which
20 Roblox is mentioned, but it is part of the system, the ecosystem, in which Google
21 operates.

22 **MS LUCAS:** Has Google identified Roblox as an appropriate comparator up to this
23 point?

24 **MS SMITH:** I think I will double check, but I am pretty sure it is mentioned in
25 Mr Noble's expert report, and, of course, we are, at the moment, producing our reply
26 expert evidence, including expert economic evidence. And since Mr Noble's second

1 report, the Tribunal has handed down judgment in Kent v Apple, and obviously
2 highlighted the relevance, potential relevance, of Roblox as a competitor, so we need
3 to be able to assess that for the purposes of our forthcoming economic evidence that
4 Mr Noble is currently producing, or Oxera are currently producing, for production
5 in April.

6 It is -- I am instructed that, to try and simplify it, Mr Noble does refer to Roblox in the
7 context of cross-platform functionality, I am sorry. But it is irrelevant to the
8 commissions charged for in-app purchases.

9 **THE CHAIRMAN:** Okay.

10 **MS SMITH:** Effectively, if someone is going to be playing a game on Roblox or on an
11 app downloaded from Epic Games Store, if they make in-app purchases, how much
12 are they paying for those in-app purchases on the games they are playing. If the price
13 goes up on one, on Epic Games Store, purely hypothetically, will they go and play it
14 instead on Roblox, for example?

15 **THE CHAIRMAN:** You haven't made a positive case about Roblox at the moment.

16 **MS SMITH:** I am not sure it is in our pleaded case.

17 **THE CHAIRMAN:** Yes. Because it looks as though Apple made a positive case about
18 Roblox.

19 **MS SMITH:** It is certainly something that has been addressed in our expert economic
20 evidence and no doubt will be addressed in our upcoming expert economic evidence
21 in April. Obviously, documents assessing -- documents recording Epic's assessment
22 of one of its competitors, Roblox, will be important for the purposes of that economic
23 evidence.

24 **MS LUCAS:** I would be interested to know whether Google has given disclosure in
25 the way of documents relating to Roblox itself.

26 **MS SMITH:** No -- there will be documents referring to Roblox, I think, almost

1 inevitably, in Google's disclosure. I do not --

2 **THE CHAIRMAN:** There's no documents evidenced in your report?

3 **MS SMITH:** -- off the top of my head, think that in the UK there have been any specific
4 requests for disclosure which name Roblox or say "We want your assessment of
5 Roblox". But in the 4-point-however-many-million documents that have been
6 disclosed, both in the US, Australia and here, there will no doubt be documents
7 produced by Google which refer to Roblox.

8 **THE CHAIRMAN:** But you haven't specifically given disclosure of documents
9 evidencing or recording Google's assessments of Roblox as a competitor? You won't
10 have done, presumably?

11 **MS SMITH:** Yes. We have -- well, no such application has been made, and we are
12 making --

13 **THE CHAIRMAN:** If we granted your application, you'd be perfectly willing to give
14 such disclosure?

15 **MS SMITH:** Well, I am not sure that follows, sir.

16 **THE CHAIRMAN:** It doesn't follow like day follows night and night follows day?

17 **MS SMITH:** Given that these are requests that are made in response -- we have made
18 these requests on the back of the latest witness evidence given by Epic and what is
19 said in that witness evidence. And we make this application on the basis of what is
20 said in paragraph 19 --

21 **THE CHAIRMAN:** Yes. No, I see.

22 **MS SMITH:** -- and elsewhere in Mr Stout's witness evidence, which, in our
23 submission, makes it clear that Epic will have documents recording their assessment
24 of the operations and success of their competitors, including Roblox.

25 **THE CHAIRMAN:** Right, okay. Yes, Mr Scannell?

26 **MR SCANNELL:** Mr Stout says in his witness statement that the importance of having

1 a presence on mobile can be seen from Roblox. He describes it as one of
2 Fortnite's -- not Epic's, Fortnite's -- key competitors and he refers to one document,
3 a publicly available document, Roblox's 2024 annual report, which says 80 per cent of
4 its users are mobile users.

5 This request is Google leaping on that observation to assert that Google is then entitled
6 to disclosure of every single document in Epic's possession, either recording or even
7 evidencing Epic's assessment of Roblox as a competitor, and it claims that it needs
8 that to defend itself against the excessive pricing case.

9 **THE CHAIRMAN:** Is there any assertion made by Mr Stout, or elsewhere by you, that
10 Roblox is a relevant competitor for the purposes of -- sorry, I am losing my -- of EGS?

11 **MR SCANNELL:** No. That would be a nonsensical proposition because Roblox is
12 not a competitor of Epic Games Store. It is a competitor of one of Epic's apps, which
13 is a game --

14 **THE CHAIRMAN:** Although, as Ms Smith just described it, Roblox does appear to
15 have some form of platform element -- I am not sure -- app-store-type function as
16 opposed to just being an app.

17 **MR SCANNELL:** Yes. That's not quite right. In fact, there are things that can be
18 bought within the games on Roblox.

19 **THE CHAIRMAN:** That's the point, yes, okay.

20 **MR SCANNELL:** But it's not an app store. It doesn't have any apps to sell. That is
21 my understanding of it.

22 **THE CHAIRMAN:** Do you make any point about commission rates charged by
23 Roblox?

24 **MR SCANNELL:** It wouldn't make a great deal of sense, I would suggest, to start
25 comparing app stores with the prices that are charged for things within a game. It's
26 just comparing apples and pears and it's not going to assist anybody at trial.

1 As to the Kent v Apple point, with respect, we consider that that actually doesn't lead
2 anywhere. No expert in these proceedings has, at least to date -- I hear what my
3 learned friend says, but no expert in the proceedings to date has made the suggestion
4 that Roblox is a comparator, either for Epic Games Store or for Google Play Store. It
5 doesn't charge a commission on app downloads, as I understand it, as Google does,
6 because it has no apps to download. Its model, as far as we are aware, is completely
7 different to the Google Play Store and, for that matter, the Epic Games Store.

8 This request is just a red herring.

9 **THE CHAIRMAN:** All right. Okay. Thank you.

10 **MS SMITH:** This is not a question of apples and pears and the point is really simply
11 this. Users can choose whether to play games on -- and make purchases while they
12 are playing those games on Roblox. They can choose to play games and make
13 purchases while they are playing those games on apps downloaded via
14 Epic Games Store. The prices charged to users on -- for games they play on Roblox
15 will arguably impose a competitive constraint on the prices that Epic or the developers
16 can charge for the in-app purchases on EGS, which are, of course, informed by the
17 commissions they have to pay Epic when they -- for each of those in-app purchases.

18 This is a point about cross-platform functionality.

19 The success of Roblox and the -- and Epic's assessment of that is relevant to these
20 issues. Mr Stout's evidence, which is in previous hearing bundle C, page 239, for your
21 note, is that -- this is paragraph 19 -- "the importance of mobile is also demonstrated
22 by the success of one of Fortnite's key competitors and Roblox is a popular virtual
23 universe in which users can create games and share experiences with friends". So
24 Mr Stout is giving evidence on the success of Roblox. We know -- we are asking for
25 Epic's assessment of the success of Roblox, because, obviously, that goes to the
26 constraints that Roblox places -- to put it crudely, places on the Epic Games Store.

1 So those are issues that we say are relevant and we ask for the documents that must
2 underlie the statements made in Mr Stout's evidence.

3 **THE CHAIRMAN:** Thank you.

4 **MS SMITH:** If we can then move on. We then move, actually, to Epic's requests of
5 Google, so perhaps --

6 **THE CHAIRMAN:** I think Mr Scannell leads on those. There are four of those, I think?

7 **Disclosure applications by MR SCANNELL**

8 **MR SCANNELL:** Four remaining. One of them has been -- is not being pursued
9 today.

10 The first request is on page 6 of the Redfern, and it relates to Google Play Services.

11 As to what they are, broadly speaking, they are a group of protocols and software that
12 is needed to develop apps and to run them on Android. They are normally described
13 as features, functionalities and app programming interfaces, or APIs, and they are also
14 described sometimes as middleware.

15 Epic's pleaded case is that Google Play Services provide core functionality and that,
16 without them, many apps would simply crash on the Android operating system. That's
17 why I say that they are needed.

18 The fact that Play Services are needed is important, because the only way that they
19 can be obtained by OEMs is for OEMs to enter into a MADA agreement -- Mobile App
20 Distribution Agreement -- with Google. That is the GMS bundle requirement. Once
21 they are party to a MADA agreement with Google, then the Google Pre-Install
22 Requirement kicks in.

23 Google's pleaded response to that -- I don't have time to take you to it, but I will give
24 you the references to this -- is that OEMs and developers can obtain services that are
25 similar to those provided by Google Play Services from third parties, but it makes no
26 admission as to whether apps would crash without Google Play Services or as to the

1 importance of any functions that are lacking without Google Play Services.

2 The references there are paragraph 70 of its defence --

3 **THE CHAIRMAN:** 17?

4 **MR SCANNELL:** 70. Against that background, Mr Gennai, in his fourth witness
5 statement on behalf of Google, which was filed at the end of last year, attests that
6 there are alternatives for all of the functionality offered by Google Play Services. That
7 suggests that none of the functionalities of Google Play Services are needed by OEMs
8 at all, which is obviously relevant to the pleaded case concerning the importance of
9 Google Play Services for OEMs. As to what we are seeking by our first request, for
10 Mr Gennai to have made the assertion that he does, there have to be some reports or
11 similar documents that Google prepared comparing the functionalities of Google Play
12 Services and those provided by third parties. That's what we are seeking, so that we
13 can test Mr Gennai's evidence. The date range is narrowly
14 circumscribed, January 2024 to December 2025.

15 Now, in response to that request, Google says that it is made too late. It says
16 Mr Gennai gave the same evidence in an earlier witness statement. That is actually
17 not correct. What Mr Gennai said in his earlier evidence was that everything in
18 Google Play Services was, in his word, replaceable. What he did not say was that the
19 replacements would provide exactly the same functionality as Google Play Services
20 itself. That is obviously a much stronger assertion and a far more consequential one
21 in terms of the claims that Epic makes. It's functionality that matters.

22 The only other argument that Google has come up with for resisting this is that some
23 documents have been disclosed to Epic that discuss third party middleware. We don't
24 deny that, we don't deny that some documents that discuss third party middleware
25 have been disclosed to date. But that is plainly insufficient to test Mr Gennai's
26 statement that all the functionality of Google Play Services can be replicated. Those

1 were our reasons for request 1.

2 **THE CHAIRMAN:** Okay, thank you.

3 **MS SMITH:** Can I make the initial introductory point that the Tribunal may recall that,
4 at the last hearing, the 30 January hearing, Epic previously confirmed in its witness
5 statement that it would not be prioritising or pursuing its requests 1 and 4 at that
6 hearing because they were not "of most potential relevance to the ongoing expert
7 evidence process". That is paragraph 31(b) of Epic's skeleton for the 30 January
8 hearing. For your note, it is Bundle A, tab 1, pages 12 to 13.

9 However, despite the statements made at that previous hearing, Epic has now
10 resurrected these requests 1 and 4, even though, in our submission, Epic's willingness
11 not to pursue them previously makes it clear that these are not, in fact, necessary
12 requests for disclosure.

13 But I will address those requests briefly.

14 Request number 1 is for disclosure regarding Google Play Services functionalities and
15 specifically whether there are alternatives for the functionalities offered by Google Play
16 Services, whether functionalities are also offered by third parties.

17 Now, the functionalities offered by Google Play Services and similar functionalities
18 offered by third parties are functionalities offered to developers and obtained by
19 developers. Epic is a developer. So, the question of whether the functionalities
20 offered by Google Play Services, whether there are alternatives for those
21 functionalities offered by third parties, is an issue which is squarely within the
22 knowledge of Epic. They do not require -- they are the ones who are choosing
23 between the functionalities offered by the Google Play Services and other third parties
24 out there on the market. They do not need disclosure on this issue from Epic -- from
25 Google.

26 Moreover --

1 **THE CHAIRMAN:** That is your point 5 in the third column?

2 **MS SMITH:** Yes. And that is an extremely important point as to whether this is
3 a necessary request or whether, as we submit, it is simply a tit-for-tat request which
4 was made many months after the witness statements were served. Just to make the
5 point, these requests were not made by Google until 14 January when the witness
6 evidence that apparently they proceed upon had been served on 31 October and
7 28 November.

8 They were made some time after we made our requests for disclosure and, in our
9 submission, it was simply tit for tat, it's not necessary disclosure.

10 Furthermore, and this is the important point I make at point 1, it is made in point 1 of
11 our column on the Redfern Schedule, this is a request for updated disclosure and it
12 relates to a paragraph in the Epic 5ACF -- the fifth amended claim form -- which is
13 an amendment that was allowed following sworn witness evidence from Epic that
14 disclosure was not required as regards this amendment. That is paragraphs 93 and
15 95 of the first witness statements for Mark Tricker.

16 So, this pleading amendment, upon which Epic now relies in order to seek disclosure,
17 was allowed on the basis that no such disclosure was required.

18 **THE CHAIRMAN:** Sorry to trouble you again, just for my note, could you give me the
19 bundle reference for that witness statement?

20 **MS SMITH:** I will in a moment, if I may.

21 **THE CHAIRMAN:** In a moment, that's fine.

22 **MS SMITH:** My junior will dig it out of the bundle.

23 We also make the point that, ultimately, the request derives from statements that were
24 made in previous witness evidence, Gennai 3.

25 **THE CHAIRMAN:** Yes, okay.

26 **MS SMITH:** And there has been an unexplained delay in making the

1 requests -- again, which supports our position that the disclosure is not necessary.
2 And we finally make the point that Epic already has disclosure from Google on this
3 issue, point 4, and the most important point that, as a developer, Epic itself, point 5, is
4 likely to hold its own material on this issue. Therefore, we say this disclosure request
5 is not necessary or reasonable. It is also disproportionate, given the vague and
6 wide-ranging nature of the request, internal reports and other similar
7 documents -- similar documents are extremely vague -- discussing or considering the
8 extent to which third parties could provide equivalent services to Google Play Services'
9 functionalities over the course of two years. It is wholly disproportionate.

10 I will get you the reference to the pleadings in a moment. The Mr Tricker witness
11 evidence, sorry.

12 **MR SCANNELL:** I want to deal with two points.

13 **THE CHAIRMAN:** One moment.

14 **MR SCANNELL:** Sorry. I am just concerned about time.

15 **MS SMITH:** Yes, I am sorry. It is Supplementary Bundle 1, which was produced for
16 Ms Lucas's -- volume 2, tab 67.

17 **THE CHAIRMAN:** Page? It's all right, I will find the paragraph number.
18 Supplementary Bundle 1, tab 2 -- no, volume 2.

19 **MS SMITH:** Volume 2, tab 67. Page 1010.

20 **THE CHAIRMAN:** Okay. Yes.

21 Mr Scannell, you wanted to respond on this one, I think?

22 **MR SCANNELL:** Very quickly. I am going to make two points. The first point was
23 the rather remarkable submission that Epic is a developer so it can just get all of these
24 documents itself. That misunderstands the nature of this request.

25 To be blunt about it, we simply are disinclined to accept what Mr Gennai says, that all
26 of the functionalities of Google Play Services can be replicated from third parties. We

1 strongly suspect, on that basis, that there are unlikely to be any documents which
2 actually say that.

3 Mr Gennai, in his evidence, says otherwise and we are entitled to test the proposition
4 that he puts forward, and if, as we suspect, there is a nil return under this disclosure
5 request, then that, too, tells a story and will be used to test Mr Gennai's evidence.

6 **THE CHAIRMAN:** There might be a nil return because there might be nothing which
7 says that they offer all of the functionality --

8 **MR SCANNELL:** That is precisely the point.

9 **THE CHAIRMAN:** -- but it doesn't mean there is a nil return to your request, because
10 your request is for the extent to which. So, what you think you might turn up is
11 documents which consider the extent to which the parties could provide equivalent
12 services and you are hoping, or expecting, that there will be a comparison but that it
13 won't cover all the functionality.

14 **MR SCANNELL:** Yes. That's one permutation. We are entitled to get --

15 **THE CHAIRMAN:** It is not that there will be a nil return to the request.

16 **MR SCANNELL:** Yes.

17 **THE CHAIRMAN:** All right.

18 **MR SCANNELL:** But we are entitled to get that from Google. It's not enough for us
19 to just depend on our own documents suggesting that what Mr Gennai says is utter
20 nonsense. We are entitled to hear it from Google, because that actually changes the
21 way that Mr Gennai's evidence is tested.

22 As to the early indications saying that it wasn't expected that amendments would result
23 in future disclosure applications, all I can say in relation to that is that there was no
24 expectation at that time that Mr Gennai would develop his evidence beyond his third
25 witness statement to make this altogether stronger statement about Google Play
26 Services not being necessary.

1 **THE CHAIRMAN:** Okay. That's the point where you said that you don't envisage
2 further disclosure. At that point, Mr Gennai hadn't -- you didn't have Gennai 4.

3 **MR SCANNELL:** We didn't have Gennai 4. What we had instead was Gennai 3.

4 **THE CHAIRMAN:** And you said Gennai 4 was a stronger statement than Gennai 3?

5 **MR SCANNELL:** It is a stronger statement which is more consequential.

6 **THE CHAIRMAN:** That deals with number 1, does it?

7 **MR SCANNELL:** That deals with number 1.

8 **THE CHAIRMAN:** So we have 3 and 4 and 5 to do?

9 **MR SCANNELL:** Yes. So the third disclosure request, which you can see from the
10 bottom of internal page 6, we seek disclosure in relation to Google's so-called Android
11 Developer Verification Scheme. As we understand it, under this scheme, Google will
12 subject every developer who wants to distribute an app on Android to a verification
13 process. A developer will need to register with Google and, under the verification
14 process, we understand that the developer will need to provide information and
15 documentation to Google that confirms their identity as an individual or corporate
16 developer. Once the developer is registered with Google, it will get a developer ID
17 and, thereafter, any app that that developer produces and wants to distribute via any
18 distribution channel on Android must, likewise, be registered using the developer's ID.
19 The details that I have just described come from Google's evidence served at the end
20 of last year, in particular Mr Cunningham's fourth witness statement. In that witness
21 statement, he repeatedly underscores that Google's developer verification scheme will
22 apply to all apps distributed from all sources on Android, so even a directly-loaded app
23 or an app distributed via an app store other than the Google Play Store would have to
24 be verified.

25 The relevance of the disclosure requests we are making on the back of that is manifest.
26 It is a fundamental part of our case that Google restricts developers' abilities to

1 distribute their apps otherwise than via the Play Store. It does that in a number of
2 ways. Google has pleaded back to that and said, "These restrictions that we impose,
3 they are objectively justified, including on security grounds. We can't allow, for
4 example, direct download of apps because we can't verify that they are safe and we
5 need to project scare screens and warnings at users when they try to download apps
6 directly because we can't be sure that they are safe". We plead back to that in our
7 reply.

8 Now, it is obviously important that Epic be able to test Google's objective justification
9 defence at trial. That will be a very important part of the proceedings. And if, as now
10 appears to be the case, Google is about to roll out a scheme whereby each and every
11 app on Android will be subject to some form of verification and registration, even if it
12 is not distributed via the Play Store, Epic will want to explore whether Google's
13 objective justification defence is capable of being sustained.

14 Now, as to what we are seeking by way of disclosure under request 3, that can be
15 seen from the second column on page 6 of the Redfern Schedule.

16 **THE CHAIRMAN:** You keep referring to page 6 -- am I -- page 10.

17 **MR SCANNELL:** It is actually page 6 on mine. It should be page 16 of supplementary
18 bundle 2.

19 **THE CHAIRMAN:** No, you have different version. SB2/11.10 I have.

20 **MR SCANNELL:** I don't think this --

21 **THE CHAIRMAN:** I am looking at request 3.

22 **MR SCANNELL:** Request 3.

23 **THE CHAIRMAN:** So which column are you looking at?

24 **MR SCANNELL:** I am looking at the "Request" column, so the one that sets out the
25 request.

26 **THE CHAIRMAN:** Just give me the number. Second column or first column? Just

1 call them 1, 2, 3 and 4.

2 **MR SCANNELL:** I am going to go with the second column.

3 **MS LUCAS:** The court strategy papers and other similar --

4 **MR SCANNELL:** Yes.

5 **THE CHAIRMAN:** Oh, I see. I call that the first column, sorry.

6 **MR SCANNELL:** I'm sorry.

7 **THE CHAIRMAN:** No, that's me. You are quite right, Mr Scannell, yes. Your second
8 column.

9 **MR SCANNELL:** So that's what we are requesting in.

10 In the interests of time, I am just going to state -- submit to you that it is a narrow,
11 proportionate request. It derives directly from Mr Cunningham's evidence and it
12 should be granted.

13 Now, in response to this, all that has been put forward by Google is that this verification
14 scheme hasn't yet been launched. That is not good enough. Google's witnesses have
15 averred that the scheme will be launched this year. Google confirms in the Redfern
16 Schedule that the scheme will be live by the time we come to trial. No doubt, if we
17 waited until it was actually launched to seek this disclosure, we would be met with the
18 counter-argument that it is all too late. It is obviously necessary to get the disclosure
19 now, not least so that our security expert can consider it. So those are the reasons
20 for request 3.

21 **THE CHAIRMAN:** Okay, thank you.

22 I should say that we have internally factored in that we would be prepared to run on
23 until 3.15 on this aspect. I would hope that that should be sufficient time. I don't really
24 want to go much beyond that.

25 **MS SMITH:** Sir, request 3 is for the reports, strategy papers and other similar
26 documents, extremely extensive, produced internally at Google concerning the

1 introduction of this Android developer verification scheme regarding, one, the purpose
2 of the scheme; two, the effect of the scheme.

3 First, this request relates to a developer verification scheme which has not yet been
4 implemented. It won't be implemented until late this year and then only in four
5 countries, none of which is the UK.

6 **THE CHAIRMAN:** Right.

7 **MS SMITH:** It is a premature request, it is also unnecessary. Epic asks for documents
8 on, one, the purpose; and, two, the effect of the scheme. As for purpose, we make it
9 clear in -- I would say in the third column, but possibly the fourth column, number 2,
10 the request for documents concerning the purpose of the scheme is not relevant, but
11 it is also unnecessary because, point 3, Google has publicly announced the purpose
12 of the scheme and there are publicly available documents as to the purpose of the
13 scheme, which was set out in the correspondence. I can give you the references to
14 that, but it is publicly the purpose of the scheme, their extensive press releases and
15 publicly available documents that go to the purpose.

16 As to the effect of the scheme, we don't know what the effect is until it comes into force
17 and it has not yet come into force. It won't do until late 2026 and then not in the UK,
18 which is the relevant jurisdiction for these proceedings. So, the request is premature.
19 Quite apart from the fact that the request is extremely wide-ranging, again asking for
20 all similar documents produced internally at Google regarding this scheme and
21 regarding its purpose and effect. It is extremely wide-ranging, vague and, we say,
22 disproportionate.

23 **THE CHAIRMAN:** Okay.

24 **MR SCANNELL:** Two points. First, no suggestion in that response to this request
25 that Google doesn't actually have these documents which explain the verification
26 scheme it is just about to launch. That's remarkable. It almost certainly does have

1 lots of documents which go to this, and it is going to be very important, come trial, on
2 the objective justification defence.

3 The second point, as to purpose, not only the effect of this scheme is relevant. Its
4 purpose is too. I cannot say what the purpose of the scheme actually is. Public
5 pronouncements as to what its purpose is will not go far enough. It may be, for
6 example, and I only put this forward as a possibility, that the true purpose of Google's
7 new verification scheme is that it fears, on the basis of the decisions that have gone
8 against it in other jurisdictions, that the methods it has traditionally used to restrict the
9 distribution of Android apps otherwise than via the Play Store and to impose high
10 commissions are unlikely to be upheld. But it considers that security can become the
11 successor to those methods as a means of achieving the same restrictions.

12 If that's true, the Tribunal is entitled to know that, especially when it comes to
13 considering the appropriate relief to grant, to prevent that conduct by Google.

14 **THE CHAIRMAN:** Okay, thank you.

15 Yes, request 4.

16 **MR SCANNELL:** Requests 4 and 5.

17 The fourth request is on page 11.10.

18 **THE CHAIRMAN:** Yes.

19 **MR SCANNELL:** One of the major points that Google relies on to advance its
20 objective justification argument is security. We have seen that. One specific aspect
21 of that argument is that the pre-installation of the Google Play Store on Android
22 devices is necessary to ensure that Google Play Protect works properly. As to what
23 Google Play Protect is, Google says in its defence that it protects users and their
24 devices. I understand, on that basis, that it's some sort of anti-virus software.

25 That takes me to Mr Cunningham again. He is Google's UK director of product
26 management and, in his fifth witness statement, served at the end of last year, he

1 attests that Google Play Protect catches more malware than third party anti-virus
2 software. Request 4 is, therefore, a narrow and focused request for the reports that
3 provide that comparative analysis. It's really as simply as that.

4 As originally drafted, it also sought materials going to the effectiveness of Google Play
5 Protect. That's no longer pursued.

6 **THE CHAIRMAN:** Okay, hold on a minute. Right, can we just see where have you
7 narrowed it down?

8 **MR SCANNELL:** That is in row 4 in numbered point 2.

9 **THE CHAIRMAN:** Right. Let me just have a look. "Accordingly, willing to limit" -- yes,
10 got it.

11 **MR SCANNELL:** So, the request is only for the comparative analysis that
12 Mr Cunningham implicitly --

13 **THE CHAIRMAN:** "Comparing the efficacy" -- okay, it is the second part of it, isn't it,
14 "substantially catches more malware"?

15 **MR SCANNELL:** That's it.

16 **THE CHAIRMAN:** Thank you.

17 **MS SMITH:** The first point we make is that this request is not justified by the pleaded
18 issues in the case. The pleading upon which Epic relies in order to purportedly justify
19 this request is Google's argument that the pre-installation of the Google Play Store is
20 necessary for the proper operation of Google Play Protect. This -- however, Google
21 Epic requests evidence as regards the effectiveness of Google Play Protect in
22 catching malware. That's not relevant to the pleaded case.

23 In any event, however, Epic has already provided substantial disclosure -- Google, my
24 apologies, has already provided substantial disclosure and there is ample publicly
25 available material about the effectiveness of Google Play Protect. In that regard,
26 I think the most efficient and speedy way of making good that point is to take you to

1 Mr Cran's 11th witness statement, which is in the core bundle for the previous hearing.
2 Tab 29, core bundle.

3 **THE CHAIRMAN:** Tab 11 did you say?

4 **MS SMITH:** Cran 11, yes. Core bundle, tab 29, page 446, paragraph 89.

5 **THE CHAIRMAN:** Can I just physically get that?

6 **MS SMITH:** Yes. It is core bundle, tab 29, page 446. So CB/446.

7 **THE CHAIRMAN:** Just give me a minute.

8 **MS SMITH:** Tab 29. If you flick through that statement to paragraph 89 on page 446,
9 if I could just ask you to look at what he sets out in the subparagraphs 89.1 to 89.3 -- it's
10 probably most efficient if I just let you read that to yourself -- where he gives evidence
11 on, or gives details of, the ample material available to Epic in disclosure and publicly
12 available materials in relation to this issue. It is the request category 4.

13 **THE CHAIRMAN:** Is that the same as it sets out in the column or not?

14 **MS SMITH:** Yes. Yes, it is, effectively. Yes.

15 **THE CHAIRMAN:** It is?

16 **MS SMITH:** Yes. It says slightly more.

17 **THE CHAIRMAN:** Okay so if, I am scribbling "paragraph 89" --

18 **MS SMITH:** It gives you the cross-references in the evidence itself. In the witness
19 statement, it gives you the cross-references.

20 **THE CHAIRMAN:** Yes, okay. Although -- all right.

21 **MS SMITH:** We say this request is not necessary, given the ample material already
22 available in existing disclosure and publicly. Certainly, it is not proportionate in light of
23 either the pleaded issues or what is already available in disclosure. It is vague and
24 wide-ranging; it refers to reports and similar documents produced internally or by
25 a third party. Generally otherwise substantiating Mr Cunningham's claim that GPP
26 catches more malware than third party anti-virus software. It is for a period of 2 years.

1 It is vague, disproportionate and, in any event, unnecessary.

2 **THE CHAIRMAN:** All right. Thank you.

3 **MR SCANNELL:** Just one short point of reply. My learned friend says that Google
4 has disclosed substantial volumes of disclosure relating to Google Play Protect. I am
5 not quite sure where that --

6 **MS SMITH:** I didn't use the word "volumes", I used explicitly the word that's in
7 Mr Cran's witness evidence, that there is ample material available. I didn't talk about
8 existing volumes of disclosure.

9 **MR SCANNELL:** I apologise. Ample material relating to Google Play Protect. None
10 of the disclosure that has been provided on Google Play Protect to date deals with the
11 evidence that is put in by Mr Cunningham. Mr Cunningham says that Google Play
12 Protect catches more malware than third party anti-virus software. Nobody else says
13 that. Mr Cran, a solicitor who works for RPC and not for Google, has put in a witness
14 statement referring to public documents but that, with respect, goes nowhere. We are
15 entitled to disclosure of the documents that Mr Cunningham is relying on to make the
16 assertion that Google Play Protect catches more malware and is, therefore, more
17 effective than third party anti-virus software. That is likely to be an important question
18 at trial when it comes to ascertaining whether or not Google security is all it is cracked
19 up to be.

20 **THE CHAIRMAN:** Okay. Can I just -- just give me a moment, please.

21 **MR SCANNELL:** A further point in relation to all of the documents that are referred to
22 by Mr Cran is that all of those documents date from 2024 and backwards from that,
23 there is nothing going forward from 2024.

24 The final point --

25 **THE CHAIRMAN:** Sorry, let me just ...

26 Yes.

1 **MR SCANNELL:** That's why there is this narrow date range for request 4,
2 1 January 2024 to 31 December 2025.

3 **THE CHAIRMAN:** Is there anything in this point about reports of similar documents
4 produced internally by a third party? What is a similar document to a report?

5 **MR SCANNELL:** What we have found.

6 **THE CHAIRMAN:** Internal assessment.

7 **MR SCANNELL:** Unless we say there were similar documents, what we will be faced
8 with by Google is, "I don't have to disclose this document because it's not called
9 a report".

10 **THE CHAIRMAN:** All right. Okay. Is that finished, request 4?

11 **MR SCANNELL:** Yes.

12 **THE CHAIRMAN:** Request 5 --

13 **MR SCANNELL:** So the fifth and final --

14 **THE CHAIRMAN:** -- is UCB?

15 **MR SCANNELL:** -- is UCB. So this is very important. Nevertheless, the point is
16 a short one.

17 Epic's understanding of how Google's User Choice Billing Scheme works, or at least
18 how it has worked in the UK and in the other jurisdictions where Google has to date
19 deployed it, is that, when a developer signs up to User Choice Billing, so has its own
20 payment system alongside Google's, that developer could not offer what is called
21 differentiated pricing. By that, I mean that the developer couldn't seek to encourage
22 users to use its billing system instead of Google's billing system by saying something
23 along the lines of if you opt for Google's in-app billing system, when you check out,
24 the product you are buying is going to cost you £5, but if you use my billing system,
25 when you check out, the price is going to be only £4. That is what I mean by
26 differentiated pricing based on which of the billing systems is used.

1 So, again, our understanding to date is that developers --

2 **THE CHAIRMAN:** Just so I understand, your understanding is the price remains the
3 same, you just use one of the two billing systems? But the price in reality, is this for
4 an in-app purchase or --

5 **MR SCANNELL:** This is an in-app purchase, anything that's bought with the in-app
6 billing system.

7 **THE CHAIRMAN:** Okay.

8 **MR SCANNELL:** Our understanding is that it is not possible for a developer to have
9 different prices depending on which of the billing systems is used.

10 **THE CHAIRMAN:** Got you. The price for the product differentiated between the two
11 billing systems.

12 **MR SCANNELL:** Yes. I am sure you can see, my Lord Chairman, that if it were the
13 case that differentiated pricing could be offered, a developer might seek to compete,
14 using different prices, saying, "Don't use Google's system, use mine, because, if you
15 use mine, the product will be cheaper".

16 Now, we formed the view that developers should not offer differentiated pricing for
17 multiple reasons. In particular, none of the publicly available documents setting out
18 Google's rules for UCB suggest that differentiated pricing is permissible. To the
19 contrary, they strongly imply that it is not. So, for example, there is a user experience
20 guideline that Google has published for UCB and that sets out a sample purchase
21 flow. That shows that the developer has to display the price - singular - of what is
22 being bought before users are presented with a choice between the Google billing
23 system and the developer's billing system.

24 **THE CHAIRMAN:** Okay.

25 **MR SCANNELL:** The choice of billing system is the very last screen and, at that point,
26 you can't offer multi prices. We are not alone in reading Google's UCB rules that way,

1 | incidentally. In the Australian proceedings between Epic and Google, in which this
2 | issue was considered, the conclusion was that differentiated pricing is not permitted in
3 | any country in which Google offers UCB, except in South Korea. That takes me to the
4 | fifth witness statement of Mr Feng, who is Google's Vice President in product
5 | management. He served that statement on 28 November and, in that witness
6 | statement, he says that developers are able to offer differentiated pricing.

7 | **THE CHAIRMAN:** Yes, I see that he --

8 | **MR SCANNELL:** When Epic asked Google to clarify on what basis Mr Feng had said
9 | that, Google asserted through its London solicitors that it has always been clear that
10 | UCB would allow differentiated pricing. They said, when Google offered UCB to the
11 | CMA in 2025, in an effort to fend off the CMA's regulatory intervention, Google was
12 | prepared to offer differentiated pricing. It said that, when it settled a class action in the
13 | United States challenging similar conduct, it was again willing to offer differentiated
14 | pricing.

15 | We say that the fact that Google has been willing to offer regulators differentiated
16 | pricing as part of plea-bargain-type arrangements to fend off their investigations into
17 | Google's conduct is obviously not determinative. If anything, indeed, they suggest that
18 | the default position is that Google will not tolerate differentiated pricing. We need to
19 | get to the bottom of it and so we have said to Google, "If you say that the true position
20 | is set out in documents, internal or external, that differentiated pricing is permissible,
21 | show us the documents".

22 | As to the documents that we are seeking, that can be seen on the Redfern Schedule
23 | at page 11.11, and they are the documents that explain or describe Google's UCB
24 | rules relating to differentiated pricing as well as communications relating to the
25 | decision to allow developers to offer differentiated pricing. The timeframe is short, it
26 | is only nine months, 1 March 2025 to the end of 2025. We say that that is sensible.

1 No reason is given by my learned friend for resisting it, other than to say that it is
2 disproportionate. That is clearly wrong. It is tightly tailored to Mr Feng's evidence and
3 we commend it.

4 **THE CHAIRMAN:** Okay, yes.

5 **MS SMITH:** This request 5 is, to put it mildly, puzzling. First, the UCB rules which are
6 publicly available and which have been provided to Epic in any event, do not contain
7 any prohibition on a developer's ability to differentiate the price that is payable when
8 a user chooses an alternative payment billing system.

9 Second, and most importantly, and why I say this request is, to put it mildly, puzzling,
10 Epic has accepted, for the purpose of these proceedings, that developers using UCB
11 are entitled to offer differentiated prices when a user chooses their alternative billing
12 system. To make that point good, I do need to take to you Mr Cran's 11th witness
13 statement in the core bundle. Back to tab 29.

14 **THE CHAIRMAN:** Page?

15 **MS SMITH:** Page 448 first. Page 448. At the top of page 448, paragraph 92.1:

16 "Epic has already been provided with the rules applicable to UCB which are, in any
17 event ..."

18 As I have said, they don't contain this prohibition and there is the link to the rules in
19 the footnote. Then point 2:

20 "Epic now accepts that developers have the ability to differentiate."

21 That's paragraphs 31 and 32 above, which is on page 424. If you flick back to
22 page 424, paragraph 31, by its letter dated 10 December, Epic or Epic's solicitors,
23 Norton Rose Fulbright:

24 "... confirmed that it would proceed on the understanding that a developer enrolled in
25 the UCB pilot in the UK is able to, in effect [the quotation there] offer differentiated
26 pricing."

1 So there, as the point is made in paragraph 32, there is no genuine dispute that
2 developers can offer differentiated pricing under the UCB and that that has been the
3 case since the UCB pilot was extended to apply to UK users on 29 March 2025. You
4 might want to write next to paragraph 31, the reference for that letter from which the
5 quotation is taken is in bundle F.

6 **THE CHAIRMAN:** F?

7 **MS SMITH:** F for Freddy, page 1195, paragraph 13.

8 **THE CHAIRMAN:** All right.

9 **MS SMITH:** So this disclosure is wholly unnecessary. There has been no --

10 **THE CHAIRMAN:** You say it's not in issue between the parties that differential pricing
11 is permitted under UCB?

12 **MS SMITH:** Yes, exactly. And there has been no change in the rules that could justify
13 this ... dealt with on the correspondence between solicitors, their past confusion as to
14 this issue is not a basis for a disclosure request.

15 In any event, again, the request is far too vague, broad and disproportionate.

16 **THE CHAIRMAN:** Mr Scannell, anything in reply?

17 **MR SCANNELL:** Two points. Firstly, the absence of an express prohibition in public
18 documents saying developers cannot offer differentiated pricing is no answer to this.
19 If a document makes it abundantly clear that differentiated pricing cannot be offered,
20 then that is enough. That is what we have seen in all of the documents that we have
21 looked at to date.

22 Second, as to the point that my learned friend showed you in Mr Cran's witness
23 statement, the very particular reason for the statement that "We will proceed on the
24 basis that differentiated pricing can be offered" was a qualified statement. We said,
25 "You keep refusing to answer the question of whether or not differentiated pricing can
26 or cannot be offered. We are right up against the deadline for our expert evidence.

1 Pending your confirmation one way or the other, we are going to proceed on the basis
2 that they can". That is now being thrown back at me as some sort of capitulation --

3 **MS SMITH:** I am afraid these are submissions --

4 **THE CHAIRMAN:** Ms Smith, please let me hear Mr Scannell first.

5 **MR SCANNELL:** I have made --

6 **MS SMITH:** I would ask you to look at the letter, sir.

7 **MR SCANNELL:** I have made --

8 **MS SMITH:** This is wholly inappropriate and untrue.

9 **THE CHAIRMAN:** No, I think that will conclude this part of the proceedings.

10 We are going to rise for a moment to reconstitute ourselves.

11 **MS SMITH:** I think we probably need a transcriber break as well.

12 **THE CHAIRMAN:** Yes. Let's start again at 3.30 pm. At which point, we will tell
13 everybody how we intend to proceed with the remaining items on the -- those on the
14 agenda and those that are not necessarily on the agenda. We will rise until 3.30 pm.
15 Thank you very much.

16 **(3.22 pm)**

17 **(A short break)**

18 **(3.30 pm)**

19 **THE CHAIRMAN:** Thank you very much. Welcome to the third iteration of today's
20 Tribunal. We have a different cast of people here as well.

21 There are remaining issues 4, 5, 6 and 7, as I have identified them. I just want to tell
22 you what we propose doing.

23 I propose dealing with the CPO variation application issue, such as it is, first. That is
24 issue 5. I then propose saying something about issue 7, the transaction data
25 application, to which the answer is that we don't propose dealing with that today
26 because Google haven't had an opportunity to respond. Then we will turn to issue 4,

1 which is the Evans issue, and then issue 6, which I think is a relatively short issue,
2 which is the order from last time and I think, most significantly, the question about the
3 extension of time for Google's expert evidence.

4 So that is the order in which I propose to deal with them. Yes, Mr O'Donoghue?

5 **MR O'DONOGHUE:** At the risk of jumping the gun, I was going to kick off on --

6 **THE CHAIRMAN:** No -- well, let me tell you where we are on that, given the CPO
7 variation issue.

8 The position is as follows, that the Tribunal, if and insofar as that application is made
9 and pursued and comes to a hearing, the Tribunal will not be in a position to deal with
10 it until the first week of June. Therefore, we are telling you that, number one. Number
11 two, I think the position we propose taking on that is that the application hasn't yet
12 formally been made and that, when it is made, which I believe will be later this week,
13 then the parties can liaise on a timetable working towards that date in June. Does
14 that --

15 **MS SMITH:** Sir, that is an extremely helpful indication -- well, helpful in some ways,
16 in that it sets out clearly what the position is. Not so helpful on the timing. But, of
17 course, we are in the Tribunal's hands as to when you can feasibly deal with this. So
18 we are happy with that. The application will be issued on Friday and we will seek
19 thereafter to set a timetable with the other side, leading to a hearing in the first week
20 of June.

21 **THE CHAIRMAN:** I will have to double check that, but I think the Monday is 1 or
22 2 June; is that right?

23 **MS SMITH:** Possibly. It might be prudent to request that the Tribunal set aside two
24 days.

25 **THE CHAIRMAN:** Yes, two days. Monday, 1 June. It won't be the 1st, it will probably
26 be somewhere in that week. I will have to obviously go back to my people, as they

1 say, to bag those dates. At the moment, I will see what I can do. I would probably
2 think of wanting it probably on the Thursday and Friday of that week. I will just make
3 a note to do that.

4 **MS SMITH:** Yes, it would be extremely helpful if we could bagsy time, as it were, in
5 that week. Now --

6 **THE CHAIRMAN:** Yes. Mr O'Donoghue, yes?

7 **MR O'DONOGHUE:** The Tribunal's helpful suggestion chimes with what we said in
8 our skeleton argument. So we are in agreement that the first week of June is perfectly
9 acceptable.

10 **THE CHAIRMAN:** Okay, so that deals with that.

11 Then, in relation to the transaction data application, we think that that should be dealt
12 with at some other time. When, I don't know. But we would want -- Google would like
13 to respond. We note that, strictly, today's hearing was really for mopping up from last
14 time, and this is a distinct application, although, of course, it was flagged last time.
15 I am open to your suggestions as to how that is dealt with, and perhaps -- I don't know
16 whether -- obviously, we will want a timetable for you to respond to it. I don't know,
17 and I am thinking aloud, whether we would need a hearing for that to be resolved or
18 not. We might not. I understand the essential point is, should it be done now and on
19 multiple occasions, or should it be done -- should it be done later on? You would
20 presumably want the opportunity to respond. Yes, go ahead.

21 **MS FITZPATRICK:** That's right. However it is dealt with, we would like the opportunity
22 to reply. We are content for it to be dealt with on the papers, we consider it
23 a straightforward application. Just to be clear what we are asking for is one tranche
24 of data which would take us up to 30 January 2026. We do actually explain, in
25 paragraph 24 of our application, for your note -- I won't take you to it, given the
26 time -- that we would not be seeking a further tranche at the PTR and, of course,

1 unless we win at trial, we would not be seeking any further data before judgment. It is
2 simply this one request for transaction data up to the end of the relevant period, which
3 is now 30 January 2026. There did appear to be some confusion in the letter Google
4 sent this morning, so I am clarifying that now in case it simplifies the way that the
5 Tribunal feels fit to deal with this.

6 **THE CHAIRMAN:** Fine. No doubt, in your response, you would address the point of
7 why it is necessary now as opposed to at the end of trial?

8 **MS FITZPATRICK:** Yes, that's exactly right. One point I did note in Google's skeleton
9 is that it is seeking from Ms Coll notification of anyone who opts out of the new class
10 so that its experts can update their quantum estimate, so one of the reasons that we
11 say we would like the data going into trial is because, if Google is going to have
12 an updated estimate of our claim on the basis of data it holds, we think that we should
13 have the same thing. Just to foreshadow that point for you, sir.

14 **THE CHAIRMAN:** All right. Ms Smith, can this -- well, respond.

15 **MS SMITH:** We agree that it is impossible for the Tribunal to seek to deal with this
16 new application, which is a substantive application today. One marker I need to put
17 down, without descending into the detail of the substance of the application, is that the
18 primary reason given by Ms Coll as to why she needs the transaction data now is so
19 that her experts can update their quantum estimate before trial. That is paragraphs
20 28 and 29 of the Coll skeleton. But Ms Coll's experts do not have permission to serve
21 further expert evidence on quantum, for example, and they don't currently -- they only
22 have limited permission at the moment, within a very tight timetable, to serve reply
23 evidence on pass-on only. If the Tribunal is to consider this substantive application,
24 one of the issues it will also have to consider are the consequences that might arise
25 from the order. Ms Coll hasn't yet applied for permission for any further expert
26 evidence and, of course, if she does, what provision will have to be put in place for

1 any evidence in reply from Google and what ramifications this will all have for the
2 timetable.

3 **THE CHAIRMAN:** Can I just ask, apropos your point that has just been made about
4 you wanting to be notified of the opt-in/opt-out, are you suggesting that you would then
5 be updating your expert evidence on the basis of that?

6 **MS SMITH:** It is simply about the additions to the class -- it is simply about the class
7 size.

8 **THE CHAIRMAN:** Not about the quantum?

9 **MS SMITH:** It's not about a reassessment of the quantum.

10 **THE CHAIRMAN:** Okay. But you wouldn't be requiring any further expert evidence
11 as a result of that?

12 **MS SMITH:** No.

13 **THE CHAIRMAN:** No. All right.

14 **MS FITZPATRICK:** I can -- I realise this is slightly out of order, but on the expert
15 evidence, this is not a new report. We could simply insert --

16 **THE CHAIRMAN:** All right, you can deal with that in your submissions.

17 **MS FITZPATRICK:** Yes, okay.

18 **THE CHAIRMAN:** What I am suggesting is that there will be a -- I would hope there
19 is going to be a response from Google. I don't know whether it is going to be dealt
20 with by witness statement or a submission, or both. Witness statement?

21 **MS SMITH:** Yes. We would like the opportunity to put in witness evidence. Sorry, for
22 some reason, this is not on. Wrong microphone. We would like the opportunity to put
23 in witness evidence.

24 **THE CHAIRMAN:** And a submission as well?

25 **MS SMITH:** Yes.

26 **THE CHAIRMAN:** Right. And then you can reply via submission?

1 **MS FITZPATRICK:** Yes.

2 **THE CHAIRMAN:** I would have thought that could be dealt with within a week or two
3 weeks, I would have thought. I don't know.
4 Maybe we don't need to fix the timetable now.

5 **MS SMITH:** Yes. We don't need to set a timetable now, but of course, all our
6 resources are focused at the moment at getting in the CPO variation order for Friday.
7 So it might be --

8 **THE CHAIRMAN:** Yes, I understand, okay.

9 **MS SMITH:** We will try to --

10 **THE CHAIRMAN:** All right. Well, see if you can agree. If you can't agree a timetable,
11 come back to me. I don't want to suggest that you won't be able to agree it.

12 **MS SMITH:** Thank you.

13 **THE CHAIRMAN:** All right that deals with what I call issue 7. So, I think we now need
14 to turn to issue 4, which is the Evans issue. My understanding of the current position
15 is that, at the moment, all parties, apart from Coll, agree that the pure Evans issue,
16 which is the extent to which other decisions/judgments are admissible, can properly
17 be left to be dealt with at trial and Coll, by contrast, wishes for it to be dealt with sooner.
18 That's right, isn't it?

19 **MS FITZPATRICK:** I think that is broadly right, sir. As I understand it, it is common
20 ground among the claimants that Google should specify and justify its Evans
21 objections and, as you say, the question for the Tribunal is when those objections
22 should be ruled upon. Should it be done -- should the Tribunal grasp the nettle now
23 and resolve the issue as soon as possible and, indeed, we say, well in advance of the
24 PTR, or should it be left for trial?

25 We have a twofold proposal in this regard, which you will have seen in our skeleton
26 argument. First, the Tribunal should direct Google to particularise the objections it

1 wishes to raise on the basis of Evans, and give short reasons explaining those
2 objections. Second, that a hearing to rule on the objections should be fixed before or
3 after Easter, depending on the Tribunal's availability. That way, we say, the parties
4 can prepare for what will be an extremely complex trial on a firm footing, taking
5 account of a prior ruling from the Tribunal with respect to how it will apply the Supreme
6 Court's judgment in Evans. In my submission, that would be the appropriate process
7 and it would be the fair way of proceeding.

8 The alternative before the Tribunal is Google's proposal that it can raise Evans points
9 ad hoc over the course of the trial itself. You have read our skeleton --

10 **THE CHAIRMAN:** I am not sure they say that, do they? I am not sure anybody says
11 that it should be done ad hoc.

12 **MS FITZPATRICK:** Their proposal certainly leaves that possibility open, in as much
13 as they haven't, for example, said that we should have a couple of days at the
14 beginning of trial to work out the Tribunal's principled approach. This is part and parcel
15 of an approach on Google's part which is opaque even as to the basis of the objections
16 that they are raising. And, of course, to the parts of our expert reports that they say
17 are admissible on the grounds of Evans, we simply don't know which parts Google
18 object to and the basis on which it does so.

19 So, we say that Google's proposal is a recipe for, first, the material disruption of the
20 trial, if the Tribunal has, for example, to rule incrementally on a drip feed of Evans
21 issues as and when they occur to Google, for example, in the course of
22 cross-examination.

23 Secondly, we say it is a recipe for procedural unfairness because it requires the parties
24 to take the risk that paragraphs of their pleadings or expert reports will be declared
25 inadmissible in the midst of trial.

26 What's striking here is that Google's skeleton just does not grapple with these points

1 on disruption and fairness, which is the point that I was making just now. It doesn't
2 actually have a proposal as to how this could be dealt with in an orderly way at trial.
3 If the Tribunal has Google's skeleton in front of it -- although it may not need to turn to
4 it.

5 **THE CHAIRMAN:** I do have. I have a feeling I have left it in -- I may have left it in the
6 other room. Just give me a moment. I would rather have my copy. Do you mind?
7 I think it is a dark blue lever-arch file. Thank you.

8 **(Pause).**

9 Thank you very much.

10 Yes, Google's skeleton. Paragraph?

11 **MS FITZPATRICK:** Paragraph 39, please.

12 **THE CHAIRMAN:** 30?

13 **MS FITZPATRICK:** 39.

14 **THE CHAIRMAN:** I don't have a 39, do I?

15 **MS FITZPATRICK:** Do you not? I have it in supplementary bundle 2.

16 **THE CHAIRMAN:** Sorry, this is Google's skeleton for today.

17 **MS FITZPATRICK:** Oh, it's Google's skeleton number 2, I am sorry.

18 **THE CHAIRMAN:** I have Google's skeleton number 2 for today. Mine is 15-pages
19 long. Is there a revised skeleton? I have a skeleton dated 20 February 2026. It runs
20 just over to 15 pages. And it runs to paragraph 34, 5, 6, 7 (a) and (b).

21 **MR WILLIAMS:** I understand there was a paragraph numbering issue with the initial
22 skeleton which then got updated. So, it restarted at paragraph 5.

23 **THE CHAIRMAN:** Right, but the text hasn't changed.

24 **MR WILLIAMS:** The text hasn't changed. So, it should be in section 4, the Evans
25 issue.

26 **MS FITZPATRICK:** I can work from the version in front of you sir. So --

1 **THE CHAIRMAN:** Can you just give me the paragraph you are referring to, what the
2 first few words of it are?

3 **MS FITZPATRICK:** "It is also the case that the claimant ..."

4 **THE CHAIRMAN:** Got it. It is 31 in my version.

5 **MS FITZPATRICK:** The final sentence of that paragraph says that "it would be time-
6 consuming and difficult, at this stage, to redact the [unspecified] material" in expert
7 reports, which it says is inadmissible. But, if that is the case, then that is a reason to
8 grapple with the task now rather than disrupt the trial with potentially time-consuming
9 and difficult satellite points.

10 Then, at the next paragraph, which in the version in front of you will be paragraph 32,
11 in the final sentence Google purports to give notice of what its position will be at trial.

12 But it simply says:

13 "As indicated above, Google will be submitting that the Tribunal is prohibited",
14 et cetera.

15 But the problem, of course, is that this does not clarify the specific nature or the specific
16 basis of Google's objections on admissibility. So, if I can explain that point a little
17 further, it is common ground, I think, that Evans excludes the Tribunal from relying on
18 a third-party evaluation of facts in circumstances where it is called upon to determine
19 the same issue as the third-party decision-maker. The Tribunal must base its findings
20 on its own evaluation of the evidence. That is common ground, I think.

21 **THE CHAIRMAN:** It may or may not be. I mean, in a sense, we have the whole issue
22 of what Evans actually decides and how far it decides what.

23 **MS FITZPATRICK:** Exactly. So that brings me precisely to my next point, sir, which
24 is, whatever Google is asserting it goes beyond, that statement of principle that I have
25 just articulated, is not exactly clear. It has not been specified by Google. For example,
26 it's not clear whether Google is asserting furthermore that even experts cannot cite or

1 rely upon third-party evaluations of facts. That's just an example. But if Google is
2 asserting that, if that is Google's position and if it will raise that objection against
3 Ms Coll at trial, then we need to know now. This is exactly the kind of point that should
4 be crystallised and ruled upon in advance of the PTR so that the parties know where
5 they stand in preparation for trial.

6 Professor Rodger, in his skeleton, raises the prospect of a potential appeal of any
7 ruling made by the Tribunal. Of course, it's possible that no party will seek permission.

8 **THE CHAIRMAN:** No party will ...?

9 **MS FITZPATRICK:** Seek permission to appeal. It's possible. It's possible that, if any
10 party does, permission could be refused and, alternatively, it's possible that if
11 an appeal is allowed, it could be expedited and heard in parallel with preparations for
12 trial.

13 The possibility of a future appeal is not a reason to decide against directing that
14 fundamental issues regarding admissibility be crystallised now.

15 The final point I would like to highlight is one immediate and concrete result of Google's
16 broad and opaque approach to Evans, which is Ms Coll's specific disclosure
17 application. That is in our skeleton and you will have seen that the application relates
18 to documents which underlie certain pleas that Google has objected to on Evans'
19 grounds.

20 We are not making the application now, so I don't propose to go through the detail.

21 **THE CHAIRMAN:** I was about to say.

22 **MS FITZPATRICK:** No, not at all, you will be relieved to hear.

23 **THE CHAIRMAN:** I am not sure I understand your position in your skeleton on that.
24 You seem to be suggesting that if disclosure is given, at paragraph -- let me find your
25 skeleton. Paragraph 19, was it? Yes. Paragraph 18, "Disclosure of this
26 document" -- presumably all the documents, because there are 21 of them -- "will

1 remove any Evans issue". I am not quite sure I understand that.

2 **MS FITZPATRICK:** What is meant there is that the documents that we are seeking,
3 the 21, relate to --

4 **THE CHAIRMAN:** We have looked at it. Those are documents which, if you go to the
5 Commission decision, when there is a statement or finding by the Commission, there
6 is then a footnote upon which that finding is based and the footnote then refers to
7 evidence either provided by Google or by a third party to the Commission. And you
8 want disclosure of that material.

9 **MS FITZPATRICK:** Yes. I think what is meant there is that disclosure of that material
10 protects our position in the event that the Tribunal should, at trial, per Google's
11 suggestion, rule that the relevant footnote in our pleadings is inadmissible, if that
12 makes sense. So, if Google wants to maintain objections to parts of our pleadings
13 which report relevant facts set out in prior decisions, if it wants to maintain that
14 objection, then we should be able to protect our position. We say the objection is
15 flawed. We should be able to protect our position by seeking disclosure of the
16 underlying document. Google, we say, can't have it both ways.

17 **THE CHAIRMAN:** All right. But what, then, is the position if we are against you in
18 relation to when this issue should be determined? If we turn around and we say this
19 issue should be left until trial, what is your position going to be on disclosure? You
20 haven't made the application, maybe you are not going to answer, but
21 presumably -- well, I suppose I will leave it with you depending on our decision, since
22 we don't have the disclosure application in front of us.

23 **MS FITZPATRICK:** Yes, in those circumstances, where the Tribunal rules that the
24 Evans issue is left to trial, we would, of course, maintain the application because the
25 need to protect our position would remain. Because Google would be maintaining its
26 objections to the relevant parts of our pleadings.

1 **THE CHAIRMAN:** Okay. Fine. Thank you very much. I don't know which order.
2 Mr O'Donoghue seemed to rise first on it.

3 **MR O'DONOGHUE:** Very briefly, we would say --

4 **THE CHAIRMAN:** Sorry, before you go on, can I just be clear in my own mind about
5 what the position is more generally. There were a series of amendments that people
6 sought to make last time around where this issue arose and everybody, I think I am
7 right in understanding, has not made those amendments.

8 Secondly, as I understand it, there are lots of -- there are references in all the
9 pleadings to one or more previous decisions, including the CMA decision and others
10 and the references in the expert reports to those. I am not clear in my own mind,
11 because I haven't gone through the pleading, exactly what is the extent of the
12 decisions that are referred to. And I understand that one party, possibly Coll, has
13 agreed to take those existing pleadings out and has reamended effectively or put
14 forward a new draft post 30 January which doesn't include any of it. Is that right?

15 **MS SMITH:** Most, but not -- Coll has taken out most but not all.

16 **THE CHAIRMAN:** But reserving its right to reintroduce them.

17 But the other claimants, the other two have not done that and they have extant
18 pleadings with extant references. That's my understanding of the current position.

19 Okay, fine. Yes, Mr O'Donoghue? Yes?

20 **MR O'DONOGHUE:** Three quick points.

21 First of all, we think it is important that a terminus is reached on what exactly Google
22 objects to in admissibility terms before trial opens, and briefly the reasons. I will just
23 give you an example. There has been some sabre rattling in relation to Fletcher, to
24 our expert. That went in post-Evans Supreme Court. From our perspective, it is
25 Evans-compliant and, if Google contends otherwise, in fairness to Professor Rodger,
26 and indeed to Dr Fletcher, we need to know sooner rather than later whether any part

1 of that is objected to. That is a basic question of fairness. This sort of permanent
2 limbo will not do.

3 Second is on fairness to the experts. There is a joint expert process which will
4 commence relatively shortly. In my submission, it is only fair to the experts in that
5 process that they understand, before that process begins in earnest, whether there
6 are parts of their report to which admissibility objections are taken. Now, that is for
7 pragmatic reasons quite apart from fairness. It may be that the expert says in that
8 process, "You have misunderstood the reliance I have placed on these prior decisions
9 in my report", it may be that the expert says, "That doesn't matter because I have
10 a disclosure document which I also rely on". In my submission, it is fair and efficient
11 within that process that the experts know how they are fixed when it comes to
12 admissibility objections.

13 And finally, sir, from everyone's perspective, particularly the Tribunal, we need to know
14 from our openings what is in play and what is not in play. Because, of course, the
15 pragmatic answer to Evans is we circumnavigate the issues. As this Tribunal did in
16 Kent, if there are disclosure or other contemporaneous documents which make good
17 a forensic point, then we can, to that extent, sidestep Evans. In my submission, it is
18 in everyone's interests, including the Tribunal, that there is clarity on that, certainly by
19 the time of opening of trial. We would suggest it is not onerous, we get a table of the
20 admissibility objections, brief reasons. We all then know where we stand by the time
21 the trial starts and we don't get this jack-in-the-box or musical chairs of freewheeling
22 objections being taken every argument in trial.

23 **THE CHAIRMAN:** Yes. So, I understand your position, there are two limbs to this.
24 One is the precise identification of what is objected to and why.

25 **MR O'DONOGHUE:** Yes.

26 **THE CHAIRMAN:** I think the "and why" is important, not least so that I can understand

1 it.

2 **MR O'DONOGHUE:** Indeed.

3 **THE CHAIRMAN:** And the second is when that objection is determined. As
4 I understand it, your position is that you take the view that that can be determined at
5 trial.

6 **MR O'DONOGHUE:** Yes.

7 **THE CHAIRMAN:** And there is an issue, and I think it is a fair point made by Coll, that
8 there is an issue as to whether or not, for example, there would be any benefit in
9 determining that at the outset or hearing the argument at the outset of the trial. I don't
10 know. But you are still basically saying no determination until trial.

11 **MR O'DONOGHUE:** Indeed, but I do want to be able to say in my written opening:
12 "Here is the list of objections taken against Professor Rodger. They are misplaced for
13 the following reasons ..."

14 It is in everyone's interest that those (overspeaking).

15 **THE CHAIRMAN:** I have the point. Yes, Mr Scannell?

16 **MR SCANNELL:** We don't disagree with the points made by Mr O'Donoghue. Where
17 we come from is that we agree in particular that it is incumbent on Google to identify
18 paragraphs of the pleadings and the expert evidence to which it objects on Evans
19 grounds, and why, as you correctly added. Now, to date, Google has identified in
20 correspondence paragraphs of the pleadings which it considers to be inadmissible but
21 without explaining why and it has not done anything at all in respect of expert evidence.

22 What I would say in relation to the choice to be made by the Tribunal, which is a difficult
23 choice as to whether to resolve this now or leave it to drift into the trial itself, is that the
24 Tribunal may very well consider that it's content to leave all of the Evans matters to
25 trial, and there are certain advantages that one can immediately see with that
26 approach. Just to take one, even if we were to have an Evans fight now, one could

1 still not guard against the possibility that somebody would refer at trial to a previous
2 decision, and that an objection would be taken to that by Google. That could happen
3 in any one of a number of contexts at trial.

4 **THE CHAIRMAN:** I am not sure -- if we hear it now, we rule that -- with Google, it is
5 inadmissible.

6 **MR SCANNELL:** If, for example, we have a fight relating to particular paragraphs of
7 the pleadings or particular paragraphs of expert reports, there is still a possibility that,
8 come trial, something will be said by somebody relating to a previous decision and
9 Google will jump up and say, "Oh, that's a problem".

10 **THE CHAIRMAN:** Oh, I see. You mean, despite our ruling, there might be a nuance
11 of a reference which somebody might say that's not caught by the ruling?

12 **MR SCANNELL:** Yes.

13 **THE CHAIRMAN:** All right. I was more troubled by the idea that, we having ruled,
14 I would just say, "Sorry, you can say what you want" --

15 **MR SCANNELL:** Absolutely.

16 **THE CHAIRMAN:** That's a different point, but you are saying there might be a more
17 nuanced argument as to whether or not this falls within the --

18 **MR SCANNELL:** Yes. I don't think that is something even within contemplation now
19 that might crop up in trial. So, there is no perfect answer to this: do I decide it now or
20 do I leave it until trial?

21 The Tribunal may well consider that the best approach to all of this is to leave it until
22 trial, but I agree with my learned friend's suggestion that the ideal situation then would
23 be that at least we are in the position of being able to open our case confident that we
24 can have the trial without being sabotaged.

25 **THE CHAIRMAN:** Also, you know what is objected to and what's not, and to the extent
26 that you wish still to rely upon the material that is objected to, you can make your case

1 at that stage as to why it's not caught by Evans.

2 **MR SCANNELL:** Yes. The final point I would make is that, if the notion were to
3 commend itself to the Tribunal that they would prefer to resolve this sooner rather than
4 later and not have this Sword of Damocles hanging over its head, even on Day 1 of
5 the trial, our position is that we do agree with Coll, with Ms Coll, that that hearing, were
6 it to happen, should happen sooner rather than later and that the PTR is really too late
7 for that. If there is to be a hearing, it should be sooner rather than later.

8 We are entitled, ultimately -- and this is the final line here, we are entitled to have a trial
9 of the matters in dispute, and the Tribunal, for that matter, is entitled to adjudicate upon
10 it without the risk of the judgment being sabotaged by an argument which could have
11 been brought much sooner. That is a view that the Tribunal might --

12 **THE CHAIRMAN:** The point I am slightly struggling with, which is a point really for
13 Coll, I am really struggling, and I think we put it in our letter, as to, in practical terms,
14 what effect a ruling will have on trial preparations -- or the absence of a ruling now or
15 before trial would have on trial preparation or the trial itself. Either this material is or
16 isn't admissible and people aren't -- you know, it's not going to -- the expert evidence
17 isn't going to change. I am assuming they rely on it by reference to cross-reference to
18 earlier decisions, and I am struggling to see, in terms of trial
19 preparation -- I understand why people want to know and I understand why, in terms
20 of the argument you put forward, it will make a difference, ultimately, to the opening
21 and the closing, as to the extent to which this material can be relied upon. In terms of
22 trial preparation and evidence, I am struggling to see what difference it would make.

23 **MR SCANNELL:** Yes. That, too, I would respectfully suggest is a sophisticated view
24 to take in relation to all of this because, as you suggest, there is -- it will always be
25 possible on an appeal, for example, for one party or another to say, "Well, irrespective
26 of what was said at an earlier hearing, this evidence was inadmissible. It shouldn't

1 have been considered. It just wasn't right". So, there is no perfect solution --

2 **THE CHAIRMAN:** Okay.

3 **MR SCANNELL:** -- in relation to this.

4 **THE CHAIRMAN:** Thank you. Ms Smith?

5 **MS SMITH:** Thank you, sir. The Tribunal doesn't need me to tell it that the Supreme
6 Court's judgment in Evans in late December last year was a major development in the
7 applicable case law. Following the Supreme Court's decision that the rule in
8 Hollington v Hewthorn applies in this Tribunal, it is now the case that, as a matter of
9 law, findings by other decision-makers are inadmissible before this Tribunal as
10 evidence of the facts found. This Tribunal is bound by that Supreme Court ruling and,
11 therefore, such findings are inadmissible before this Tribunal for that purpose,
12 regardless of whether or not applications have been made for one party -- by one party
13 or another to strike out material which refers to or relies upon such findings.

14 In that context, in our submission, it is incumbent on the parties to try to work together
15 to assist the Tribunal in deciding how and when to deal with this issue in a constructive
16 and efficient way, which, importantly, will not disrupt progress to trial.

17 **THE CHAIRMAN:** Yes.

18 **MS SMITH:** It shouldn't be an opportunity for adversarial point scoring or bouncing
19 Google into making applications which may be either premature, ultimately pointless,
20 or especially wasteful of costs. With respect, in our submission, that is what Coll is
21 seeking to do by its submission that Google should be directed now, today, to provide
22 a list of all objections that it seeks to raise on the basis of the Evans judgment, not just
23 as regards pleadings and expert reports but, and I am quoting here, paragraph 15(a)
24 of Coll's skeleton, which is at SB2, supplementary bundle 2, page 31.4. Coll is seeking
25 a direction.

26 **THE CHAIRMAN:** Sorry, just let me find the Coll skeleton. Paragraph number?

1 **MS SMITH:** 15(a). Coll is seeking a direction today.

2 **THE CHAIRMAN:** Well, "should not be limited to the pleadings or expert reports",
3 although --

4 **MS SMITH:** But all other objections that Google wishes it -- Google wishes to raise
5 and that that list should be prepared by next Tuesday, 3 March, with a hearing to be
6 held before or after Easter.

7 **THE CHAIRMAN:** Right.

8 **MS SMITH:** And that proposal, presumably, on Coll's case, is that "That's your bite at
9 the cherry, Google, that's it", but we say that proposal is unreasonable and overall it
10 will not assist the Tribunal. I will explain why.

11 As we have indicated in our skeleton, upon reflection -- and this is a very difficult issue
12 to deal with, given where we are in these proceedings and the volume of material that
13 we have in these proceedings. But upon reflection, Google's position is that the best
14 time for the Tribunal to address the Evans issues is at trial or possibly at the PTR. It
15 is the only way to deal with this issue justly and at proportionate cost in line with the
16 governing principles set out in rule 4 of the Tribunal rules. And I will explain why I say
17 that's the case. First, as regards pleadings and then as regards expert reports.
18 Because the situation is a little different.

19 **THE CHAIRMAN:** I need to be clear on what you are saying.

20 **MS SMITH:** Yes.

21 **THE CHAIRMAN:** There are two issues, it seems to me, one is what is objected to
22 and why?

23 **MS SMITH:** Yes.

24 **THE CHAIRMAN:** The second is, when is it being determined? My understanding is
25 your submission is that it is to be determined, probably reluctantly, you said, at trial.
26 When I say, "at trial", it may be at the beginning of the trial, it may be during the trial,

1 but that is to be determined. That is your position, and I think it is aligned with Epic
2 and Professor Rodger --

3 **MS SMITH:** Yes.

4 **THE CHAIRMAN:** -- more or less. And that Coll wants it determined earlier.

5 I am more interested at the moment in what you are saying about the objections and
6 the identification of the objections and when that should take place.

7 **MS SMITH:** Sir, I will explain that, if I may.

8 **THE CHAIRMAN:** Yes, of course.

9 **MS SMITH:** I am not descending into the -- what the Evans issues are as a matter of
10 substance, but simply as a matter of when these issues should be dealt with. As you
11 said in line with your letter, I think it said the parties should make submissions as to
12 when it would be most appropriate --

13 **THE CHAIRMAN:** At that point, I was talking about when it should be dealt with,
14 meaning determined. I am really interested at the moment, because
15 I think -- certainly, we haven't heard -- I want to know. You don't want to provide
16 details of the objections by next Tuesday. The question is, when will you provide
17 details of the objections and what will you provide? Because, at the moment, I -- at
18 the moment, and you are ahead of me, I am not as clear as you are on the clarity of
19 what Evans does and doesn't decide precisely. So, my instinct is I would like to know
20 not only what is objected to as inadmissible and whether that is dealt with by way of
21 a strike out application, it doesn't matter because Coll has taken the material out.
22 What is objected to and, really, why it is objected to.

23 **MS SMITH:** Well, sir, my submission as to what is to be objected to, identification of
24 what is to be objected to, is slightly different as regards the pleadings and the expert
25 reports. In summary, I will make the point, we have already identified, as regards the
26 pleadings, what we object to and I will show you that. As regards the expert reports,

1 we say it is impossible and, in fact -- well, not impossible, but it is wholly unreasonable
2 and not just -- or dealing with issues at proportionate cost to seek to identify what is
3 inadmissible at this stage and probably not until well after the joint expert statement
4 has been produced. I will explain why that is the case shortly.

5 So, if I may deal with each of those two --

6 **THE CHAIRMAN:** Yes.

7 **MS SMITH:** -- matters separately, because they are quite different.

8 First, the pleadings. Since the last hearing, we have been seeking to narrow the issues
9 with the other parties and, as you already indicated, sir, at the last hearing, the
10 position -- well, we are now at this stage with the pleadings. At the last hearing,
11 Ms Coll withdrew her proposed amendments to her claim form, to which we had
12 objected on Evans grounds. Since then, perhaps as a result of comments made by
13 the Tribunal at that last hearing, Epic and Professor Rodger have also withdrawn their
14 proposed amendments.

15 **THE CHAIRMAN:** It is largely related to the CMA.

16 **MS SMITH:** That's right, to which we had objected on Evans grounds. However, and
17 this is a big however, all three claimants have nevertheless reserved their positions
18 and, in particular, their right to rely upon the material to which they had referred in
19 those proposed amendments at trial.

20 So that is where we are with the amendments.

21 As regards the pre-existing pleadings, in correspondence before the hearing last time
22 around, at a relatively early stage, Google gave initial indications to each of the
23 claimants of the passages in their claim forms to which it objected on Evans grounds.

24 In response to that correspondence, Coll agreed to remove a large number but not all
25 of those categories from her claim form. Rodger and Epic have not removed any. As
26 a result of the correspondence between the parties, Google has reduced the number

1 of paragraphs to which it objects and there are now -- the outstanding paragraphs to
2 which it objects in the existing pleadings of Coll, Rodger and Epic are set out in
3 footnote 16 of our skeleton argument, which is on page -- probably on page 11 of the
4 printout that you have got.

5 **THE CHAIRMAN:** Yes.

6 **MS SMITH:** So those are the only paragraphs remaining to which we object.

7 **THE CHAIRMAN:** Okay.

8 **MS SMITH:** Those have been identified in correspondence with the other side in
9 letters to Geradin Partners, Professor Rodger's solicitors, of 12 February and Epic's
10 solicitors of 12 February and in a letter to Ms. `Coll's solicitors of 16 February. I can
11 give you the cross-references to those letters. I think they appear in paragraph --

12 **THE CHAIRMAN:** Do I need any more than footnote 16?

13 **MS SMITH:** Well, footnote 16 is there. The point I am trying to make is this is not new
14 to the claimants. Footnote 16 is not the first time these have been identified. They
15 were identified in correspondence back on 12 and 16 February, after last time -- the
16 hearing last time around, in an attempt to narrow the issues. We have said, having
17 gone back and really focused on this, these are the paragraphs that we think are
18 inadmissible on Evans grounds. We invited the claimants to delete those paragraphs.
19 They refused to do so. We said, "Okay, we are" --

20 **THE CHAIRMAN:** Okay, just give me a moment, please. I am just looking at this
21 footnote.

22 Right. What I am now a bit confused about -- can we just go to that footnote, please.

23 **MS SMITH:** 29.12.

24 **THE CHAIRMAN:** No, footnote 16.

25 **MS SMITH:** Yes, sorry, page 29.12 in the bundle.

26 **THE CHAIRMAN:** You identified aspects in respect of each of Rodger and Epic,

1 I understand.

2 **MS SMITH:** Yes.

3 **THE CHAIRMAN:** You have told me that Coll has withdrawn -- can I just understand,
4 those Coll references --

5 **MS SMITH:** Are the ones that are outstanding after the ones that they have withdrawn.
6 These are the ones --

7 **THE CHAIRMAN:** So, these are fourth ones that they have not withdrawn.

8 **MS SMITH:** Yes. These are the final position as regards --

9 **THE CHAIRMAN:** You want more withdrawn than they have withdrawn. But what
10 they have withdrawn, they have reserved the right to reintroduce anyway.

11 **MS SMITH:** Yes. We have invited each of the claimants to withdraw those -- in the
12 correspondence, we invited each of the claimants to withdraw those paragraphs from
13 their pleadings, to delete those paragraphs from their pleadings. They have not done
14 so -- refused to do so. Our response has been: well, in order to try to keep this show
15 on the road, we are not going to object to you lodging your latest versions of the claim
16 forms with the Tribunal including those paragraphs, but we have reserved our position
17 as regards those passages and we have reserved our position to argue at trial that the
18 Tribunal is prohibited from relying upon the pleadings in those paragraphs because
19 they are -- effectively would entail the Tribunal relying on the judgments of other
20 decision-makers contrary to the Supreme Court's judgment in Evans.

21 So that is the current position on the pleadings. The pleadings are in front of the
22 Tribunal.

23 **THE CHAIRMAN:** Except that it doesn't address the things that have been withdrawn.
24 It doesn't address -- it doesn't help us identify -- it deals with what is objected to,
25 plainly, what the dispute between Professor Rodger and you, and Epic and you is, but
26 it doesn't fully address the dispute with Coll, because I don't know, certainly having

1 | looked at what Coll has withdrawn and what Coll would wish to reintroduce.

2 | **MS SMITH:** Yes.

3 | **THE CHAIRMAN:** Do you see what I mean?

4 | **MS SMITH:** I take the point, sir.

5 | **THE CHAIRMAN:** I wonder whether the stuff that Coll has withdrawn is all reference
6 | to one particular decision or it is a whole range of decisions.

7 | **MS SMITH:** I think it is a range of decisions.

8 | **THE CHAIRMAN:** I think that would need to be clarified, but go on.

9 | **MS SMITH:** I see the point. Whether it becomes a real issue by the time we get to
10 | trial, I cannot say one way or the other.

11 | **THE CHAIRMAN:** It may be that if we are going down the route of requiring
12 | clarification of what is in issue, or further clarification of what is in issue on this ground,
13 | it may be that I am going to -- we are going to require you to do more -- we may or
14 | may not -- but at the same time, if we did, we would be requiring Coll to identify what
15 | it would seek to introduce and --

16 | **MS FITZPATRICK:** I am sorry, sir, I am on my feet. I can address that now. Where
17 | we have made amendments, we are not reserving our position on reintroducing them.

18 | **THE CHAIRMAN:** Oh, you have deleted them and you are not going to go --

19 | **MS FITZPATRICK:** We are not going to seek to put those back in.

20 | **THE CHAIRMAN:** Right, okay.

21 | **MS SMITH:** I think that had been my understanding.

22 | **THE CHAIRMAN:** My misunderstanding.

23 | **MS SMITH:** (Overspeaking) seek to put in those amendments but they are potentially
24 | seeking to rely upon the material that was referred to in those amendments at trial.

25 | **THE CHAIRMAN:** Sorry, no, no, no, you are confusing the issue.

26 | **MS SMITH:** I am confusing the issue, sorry.

1 **THE CHAIRMAN:** It is probably me. Park, for the moment, the question of the
2 amendments people sought to introduce, which will also have to be dealt with because
3 they are not in at the moment. I am talking, Ms Smith, about the things that Coll has
4 taken out of its existing pre-January pleading. It has now been clarified that they are
5 not going to seek to reintroduce those.

6 **MS SMITH:** That is a very helpful clarification.

7 **THE CHAIRMAN:** Fine. So everybody's position is as follows: what is in their pleading
8 is what they rely on now and you object to, plus each of them -- and I think each of
9 them will want to introduce by amendment the stuff that has been not sought to be
10 amended now, which I think is to do with the CMA decision. Is that right?

11 Anyway, this is all a very good advert for this all being clarified, if I may say so.

12 Carry on, Ms Smith.

13 **MS SMITH:** Well, sir, the touchstone, of course, and I don't need to remind you of it
14 is, that, of course, this is -- the Tribunal is to deal with this issue justly and at
15 proportionate cost and we say the position on the current -- the pleading -- the position
16 on the pleadings is currently we have made --

17 **THE CHAIRMAN:** (Overspeaking).

18 **MS SMITH:** -- know what we are objecting to, amendments have been withdrawn.
19 No purpose would be served and there would be no benefit to the Tribunal, in our
20 submission, in requiring Google to make an application to strike out the passages
21 which we have identified. That would be a waste of time and money, potentially disrupt
22 the timetable to trial, in particular given the risk of appeal.

23 In any event, if, contrary to my submissions, the Tribunal were nevertheless tempted
24 to order that it should address the application of the Evans issues to the parties'
25 pleadings -- and I am just here dealing with pleadings, not expert reports, but
26 pleadings before trial -- that cannot properly be done by next Tuesday. The claimants

1 haven't even filed their amended replies yet. Those amended replies are to be filed
2 on 27 March for Epic and Rodger and on 1 April for Coll. So, the pleadings haven't
3 even closed yet.

4 **THE CHAIRMAN:** Okay.

5 **MS SMITH:** In any event, we say the most sensible and proportionate way of dealing
6 with this is -- in my submission, the claimants know what we object to, we have taken
7 a proactive and sensible approach, in my submission, to saying, "Well, we don't object
8 to you lodging your claim forms, including those passages, but we reserve our position
9 as regards those passages". As I have said before, whether that becomes a huge
10 issue at trial, we will see as to whether what is exactly pleaded.

11 But the position is different --

12 **THE CHAIRMAN:** So, that is pleadings.

13 **MS SMITH:** Moving then to expert reports. Our position is that it would be wholly
14 inappropriate and wasteful to require, and possibly even impossible to require, Google
15 to make an application now. I say that for the following reasons. The expert reports
16 which have been lodged with the Tribunal so far, as you know, run to many thousands
17 of pages. I set out the details of just the latest round of expert reports, the volume of
18 the latest round of expert reports which were filed in December of last year, in
19 paragraph 10 of my skeleton, which is in supplementary bundle 2, page 29.5, it just
20 gives you an idea of the volume of material that you are --

21 **THE CHAIRMAN:** Sorry, I am struggling -- just wait a moment, please.

22 **MS SMITH:** Paragraph 10. Okay, it is --

23 **THE CHAIRMAN:** It's not paragraph 10.

24 **MS SMITH:** Sorry, it is --

25 **THE CHAIRMAN:** It would be useful if somebody had the same version that I have in
26 front of them.

1 **MS SMITH:** Yes, I am sorry. The version that is in the supplemental bundles is
2 different, I think.

3 **THE CHAIRMAN:** Yes, I don't generally use skeletons from bundles because, when
4 they come in, I print them off immediately and I use them rather than using them in the
5 bundle. So, what are you referring me to?

6 **MS SMITH:** It is the first paragraph 10. It is on page 3 of the document that you are
7 looking at.

8 **THE CHAIRMAN:** Okay, yes.

9 **MS SMITH:** As Google explained --

10 **THE CHAIRMAN:** I have seen it, there are lots of pages.

11 **MS SMITH:** There are lots. That is just the latest round of expert reports which were
12 filed in December of last year. Before that, there were two rounds of expert reports
13 exchanged between Ms Coll and Google of similar volume. Google is currently due
14 to file its expert reports in reply to the latest round of Epic, Coll and Rodger reports
15 in April. Epic and Rodger then have permission to file responsive reports and Coll has
16 limited permission to file a report responding to the pass-on expert evidence on
17 13 May. The parties' experts are to meet and to produce their joint expert statement
18 by 30 June. The important point, sir, in my submission, it is only then that the Tribunal
19 will actually know what remains in dispute between the experts. It is only then --

20 **THE CHAIRMAN:** Okay.

21 **MS SMITH:** -- that, as counsel for Professor Rodger says in their skeleton, the
22 Tribunal -- it is only then that the Tribunal will have a clear view of the material, the
23 expert material, upon which the parties actually wish to rely in order to establish their
24 respective cases at trial.

25 **THE CHAIRMAN:** Okay.

26 **MS SMITH:** It may be that following that process --

1 **THE CHAIRMAN:** Can I just cut it short a little bit? You are saying that -- what is the
2 date for the joint report?

3 **MS SMITH:** 30 June.

4 **THE CHAIRMAN:** Okay. You are effectively saying that your objections -- the trouble
5 is that, well, your objections to the admissibility of reliance by experts on these
6 decisions should be made following that process.

7 **MS SMITH:** Sir, yes. The next step.

8 **THE CHAIRMAN:** Not before the end of that process.

9 **MS SMITH:** Absolutely. And the next step in the timetable after the production of the
10 JES on 30 June is the pre-trial review a month later.

11 **THE CHAIRMAN:** Okay, can I just understand this? There will be a joint report and
12 I can't -- I don't know the process and I think this was discussed. It doesn't prevent
13 the earlier reports being in evidence, the joint report, and I am just thinking whether or
14 not that will make life easier by -- I am not saying it won't, I am just thinking aloud about
15 whether it would make it easier for that not to be dealt with because -- not to be dealt
16 with until that time. I don't know, it might do. I am just thinking aloud.

17 **MS SMITH:** Sir, the point, I think, is the realistic point and I think --

18 **THE CHAIRMAN:** Yes, sorry, go on.

19 **MS SMITH:** I think you brought it up, with -- I can't remember if it was with
20 Mr O'Donoghue or Mr Scannell. Parties are free to refer to admissible material in front
21 of you at trial and put the material that is inadmissible to witnesses, but you can't take
22 it into account in your judgment. What we say is that certainly it will not be until the
23 joint expert statement is produced on 30 June that the Tribunal will know what is
24 actually in dispute between the experts. As Professor Rodger said in her skeleton
25 argument, and I am quoting their skeleton argument, it is only then the Tribunal will
26 have a clear view of the material upon which the parties actually wish to rely. It may

1 be -- again, I am taking this from Rodger's skeleton argument. It may be that little or
2 no reliance is ultimately placed by the parties on material that is said to be inadmissible
3 when we get to trial, or it may be that the Tribunal will feel able to determine the issues
4 before it without relying on the judgments of other decision-makers. Therefore, we
5 say it would be most appropriate to determine the Evans issue, insofar as it remains
6 live at trial, and it would be premature, pointless, disruptive of the timetable to trial and
7 potentially incur wholly unnecessary cost to bounce Google into making an application
8 now.

9 How we manage this at trial will depend on whether and to what extent the Evans
10 issues still remain an issue after the production of the joint expert statement. We don't
11 know now, but one way of dealing with this would be for the issue to be addressed at
12 the PTR. Another way of dealing with this would be, for example -- and these are just
13 hypotheticals at the moment because I say we don't know, and we cannot know, at
14 this stage, how best to deal with the issue of the expert evidence, but it may be, at
15 trial, Google's legal team or others in the legal team keep a record or schedule of
16 material that is put to the Tribunal to which it thinks gives rise to Evans issues, to share
17 that schedule with the other parties and to make submissions on the inadmissibility of
18 that material in its closing submissions.

19 This is simply a hypothetical suggestion at the moment because we are -- we say it is
20 far too early to deal with those sorts of case management or trial management issues
21 at this stage. These are exactly the sorts of issues that we need to deal with at the
22 PTR, in my submission.

23 But that is a suggestion of how this could perhaps be dealt with once the issues have
24 crystallised.

25 **THE CHAIRMAN:** You are saying, in relation to experts, leave until the PTR?

26 **MS SMITH:** Yes.

1 **THE CHAIRMAN:** Thank you. All right.

2 **MS SMITH:** I just want to highlight what Rodger's counsel said in submissions orally
3 appear to be slightly at odds with what was said in their skeleton and I would ask you
4 to look at paragraphs 5 and 6 of their skeleton argument.

5 The points are made in paragraph 5 -- this is under the heading, if you have that -- that
6 I have made, about, "It would be most appropriate to determine the Evans Issue at
7 trial for the following reasons ..."

8 **THE CHAIRMAN:** Yes.

9 **MS SMITH:** I make the points that we have made and they say in paragraph 6:

10 "There are no practical issues with this approach in the Rodger proceedings."

11 The approach of leaving this to trial. They say:

12 Professor Fletcher's evidence will in substance be unaffected by the Tribunal's
13 determination of the Evans Issue."

14 Then they make the suggestion:

15 Insofar and "To the extent that a party wishes to rely on material whose admissibility
16 is contested on the basis of Evans, the Tribunal can hear submissions on that evidence
17 from the parties de bene esse at trial but will be entitled to dismiss that evidence, and
18 accompanying submissions, in its ruling if the Tribunal finds the material to be
19 inadmissible."

20 Again, that's a suggestion that perhaps, at the PTR, could be fed into our proposal
21 of -- again, a hypothetical at this stage, but that we put together a schedule of material
22 that -- to which potential objection can be made -- that is put in front of the Tribunal
23 and that it is dealt with in that way. These are the sort of issues, I say, that are most
24 properly and most helpfully, usefully and most cost-effectively dealt with at the PTR.

25 **THE CHAIRMAN:** Okay. Just give me a moment.

26 Okay. Thank you very much.

1 I don't know, I suspect that Coll have a right to respond technically. I don't know who
2 has a right to respond. I am not going to shut anybody up.

3 **MR O'DONOGHUE:** Two brief points, if I may.

4 **THE CHAIRMAN:** Yes. I should say what I am proposing to do is actually to rise for
5 a few moments after we have concluded this part of the argument to give consideration
6 to where we are at.

7 Yes?

8 **MR O'DONOGHUE:** With great respect to Ms Smith, this is the tail wagging the dog.
9 The submission I made about clarity upfront is not primarily driven by the expert
10 process. We need to know what admissibility objections are taken so that we can, at
11 this stage, or at an early stage, then ascertain to what extent, the disclosure
12 documents, we can circumnavigate these issues.

13 **THE CHAIRMAN:** To what extent -- oh, disclosure documents, okay.

14 **MR O'DONOGHUE:** That is in our interests, it is actually in Google's interests and it
15 is in the Tribunal's interests. The idea that we sit on our hands for many, many months
16 in relation to a hare they set running a few months ago has nothing to commend it.
17 That is my starting point. It is not about the experts, it is actually about something
18 much more fundamental, which is, do we even need to contend with this at trial? The
19 sooner they got off the fence on that, the better, frankly.

20 **THE CHAIRMAN:** Your point is you need to know because you might want to seek
21 disclosure of underlying material which would be admissible, is that what you are
22 saying?

23 **MS SMITH:** I am not sure how --

24 **THE CHAIRMAN:** Sorry, can you just wait a moment?

25 **MS SMITH:** (Overspeaking) skeleton, because this appears to be a new point that is
26 being made that I don't quite understand.

1 **THE CHAIRMAN:** You can make your point in a moment, sorry. I am just trying to
2 understand Mr O'Donoghue's point.

3 **MR O'DONOGHUE:** No, we are saying if an admissibility point is taken, for example,
4 Fletcher 2.

5 **THE CHAIRMAN:** Okay, this is admissibility in relation to the expert not just the
6 pleading?

7 **MR O'DONOGHUE:** Both. We may want to implement plan B and say we don't need
8 to have that debate because there is a disclosure document that makes good the
9 same point and we can circumnavigate --

10 **THE CHAIRMAN:** When you say "a disclosure document", one already in disclosure?

11 **MR O'DONOGHUE:** Well, starting there. I mean, there is a possibility, and no more
12 than that, because, of course, Google have it both ways. They say this is inadmissible.
13 That may, I put it no higher, come at the expense of them having to give further
14 disclosure at some point.

15 **THE CHAIRMAN:** Which is along the lines of what Coll has raised.

16 **MR O'DONOGHUE:** Indeed. But that is a long way down the track. My simple
17 submission today and, frankly, this is all overblown, Google has already, in the context
18 of the pleading, given a shopping list -- I am afraid it is no more than a shopping
19 list -- of the passages to which it objects. By a parity of reasoning, they should do
20 exactly the same thing on the expert side. This is completely overblown. Frankly, on
21 the pleadings --

22 **THE CHAIRMAN:** Sorry, they should do the same for the experts you say?

23 **MR O'DONOGHUE:** Yes. So, on the pleadings, if we can quickly look at supplemental
24 bundle 2, tab 23, 326 in relation to Rodger.

25 **THE CHAIRMAN:** Sorry, tab ...?

26 **MR O'DONOGHUE:** Supplemental 2, tab 23, page 326.

1 **THE CHAIRMAN:** Tab 23?

2 **MR O'DONOGHUE:** Yes.

3 **THE CHAIRMAN:** I am just trying to find the right bundle. Could I make a request?

4 It is a very boring one --

5 **MS SMITH:** No, this is not the current list of paragraphs.

6 **THE CHAIRMAN:** The list is in the footnote in the skeleton.

7 **MS SMITH:** And the letter, the current letter, insofar as it relates to Professor Rodger,

8 is at supplementary bundle 2, page 379 to page 380. It is paragraph 3 of that letter.

9 **THE CHAIRMAN:** Okay. Those are the paragraph numbers at paragraph 3, which

10 you have cited in the footnote?

11 **MR O'DONOGHUE:** Yes. So, sir, we have a laundry list. As you indicated, sir, more

12 than once, Evans is not without complications. All we are suggesting, and it is

13 a modest suggestion, there would be a second column, side-by-side with the passage,

14 giving the basic reason, in one sentence or two sentences, why an objection is taken.

15 Likewise for experts. It is in everyone's interests that this is front loaded and not kicked

16 down the road. In fact, the suggestion we deal with this at the PTR --

17 **THE CHAIRMAN:** Okay. Let's separate, for the moment, pleadings and experts.

18 Pleadings, I am not sure -- well, there is an issue of whether they should give reasons.

19 That's an issue and we will think about that. On expert reports, I think the argument

20 is, there are thousands of pages of expert reports and we don't want to have to scour

21 every paragraph of every page and a thousand references of sentences which are

22 objected to. I think that seems to be the thrust of what is being said. To which one is,

23 well, you can do it; or two is, you can at least identify those decisions, without having

24 to -- if the Google Android decision is referred to in 4,000 paragraphs in the expert

25 reports, rather than enumerate the 4,000 paragraphs, you just say "the Google Android

26 decision", "any reference to the Google Android decision". I don't know whether that

1 is permissible, but that seems to me to be the issue on the expert front.

2 **MR O'DONOGHUE:** Yes.

3 **THE CHAIRMAN:** There is a separate issue which Ms Smith raised, which is that, no,
4 you don't need to do that at all now, because let's wait until you get the joint expert
5 report and we will see what is relied on and not. My concern about that is those expert
6 reports will still be in evidence, and it may come out in cross-examination or in the
7 hot-tub or whatever.

8 **MR O'DONOGHUE:** That is an exercise in (inaudible). This isn't a poor grandmother;
9 this is one of the richest companies in existence. If you want to have a fight, you have
10 to be prepared to throw a punch. They set this hare running and they should be
11 prepared to meet the terms.

12 **THE CHAIRMAN:** Mr Scannell, anything to add? I was hoping not, but you obviously
13 do. It is always nice to hear from you Mr Scannell, as I am sure you know.

14 **MR SCANNELL:** I am very grateful.

15 We agree with what has just been said in relation to the desirability of reasons, so that
16 we can see where Google is coming from. At the moment, all we have is paragraph
17 numbers, and there is a sense that the claimants now have to argue against their
18 position by justifying why they have pleadings. We are entitled to know why Google
19 objects to at least paragraphs of the pleadings, and to date we do not have that. At
20 least then we would have some better understanding and insight into where Google is
21 coming from on Evans.

22 **THE CHAIRMAN:** Anything to add?

23 **MS FITZPATRICK:** Only one very quick suggestion, just jumping off from your
24 suggestion of perhaps saying, "all references to the Google Android decision, they are
25 out". Another thing that Google could do --

26 **THE CHAIRMAN:** Could you keep your voice up a little bit?

1 **MS FITZPATRICK:** Another thing that Google could do, that wouldn't require it to
2 scour every page, is to give categories or examples of citations or instances of reliance
3 that it considers to be objectionable, and then it could justify that on the basis of its
4 understanding of Evans. That could be something that Google could do without going
5 through absolutely every page.

6 **THE CHAIRMAN:** Before Ms Smith replies again, I want to raise one other issue
7 about this, which is what do we do about the amendments that were not made, which
8 at least two of you, or maybe three of you, have reserved your position on? This was
9 the amendments that were sought to be introduced in January, which you didn't make
10 but which you have reserved your position on. I imagine that deals mainly with the
11 CMA decision and how that would be dealt with. It may be that there is something that
12 has to be incumbent on the claimants to identify, I don't know. But anyway, that is
13 something that I think has to come into the mix.

14 Fine. Ms Smith, did you want to say anything else on this topic?

15 **MS SMITH:** Only that, as regards the pleadings, we have identified the paragraphs
16 that we object to in the existing pleadings. As I understand the position on the
17 amendments, the claimants are not going to seek to reintroduce those amendments.
18 As regards the expert --

19 **THE CHAIRMAN:** No, I don't think you are right. I am sorry.

20 **MS SMITH:** Well, certainly Ms Coll is not going to seek to reintroduce --

21 **THE CHAIRMAN:** No, I don't think -- I may have misunderstood. There are two
22 categories of things not currently in the pleadings. There are things which Ms Coll has
23 withdrawn from its existing pre-30 January pleading, which are not going to be
24 reintroduced. Made clear today. There are, however, all the amendments that were
25 initially sought on 30 January, which have started this whole debate off, which relate
26 to the CMA's decision in the name of the case I can't remember.

1 **MS SMITH:** And other decisions as well. The amendments also --

2 **THE CHAIRMAN:** Okay. It was agreed, following that hearing, that they weren't going
3 to be introduced. But my understanding is that those parties -- I am not sure if it
4 includes Coll, but certainly Epic and Rodger -- did so on the basis that they were
5 reserving their right to rely on those later on. Am I --

6 **MS SMITH:** Well, there is a difference between, sir, seeking to reintroduce the specific
7 amendment, pleading amendments, and seeking to rely upon the substance of the
8 decisions to which reference is made in those amendments. I had understood that
9 they were reserving their position to seek to rely upon the substance of the decisions
10 to which references are made in the amendments, not seeking to reintroduce
11 pleadings.

12 **THE CHAIRMAN:** No, no, I understand that. But that is a formality.

13 **MS SMITH:** But it is -- they can do that at the hearing even without the amendments.
14 And so -- at the trial. So my point is it won't be until trial, production of skeleton
15 arguments et cetera, and production of expert reports, that we will know the extent to
16 which the parties seek to rely, not on pleading amendments which are now, to be frank,
17 will have receded into the background, but the actual substance of what is contained
18 in decisions. That we don't know until we get to trial.

19 **THE CHAIRMAN:** That's what I am grappling with. What I am grappling with --

20 **MS SMITH:** Actually, we are getting distracted by pleading amendments, because,
21 honestly, by the time we get to trial, we are not going to be looking at what the exact
22 terms of pleading amendments are that were proposed back in January. We are going
23 to be looking at the arguments that are now being made, on the basis of the evidence
24 as it stands by the day of the beginning of trial, that the parties are seeking -- the
25 claimants are seeking to make by reference to prior regulatory judgments, and whether
26 or not the arguments they are seeking to make and how they are inviting the Tribunal

1 to deal with those judgments, whether that is inadmissible or not. That will happen
2 regardless of pleading amendments, my Lord. Regardless of what is in the pleadings.

3 **THE CHAIRMAN:** Yes. I am probably trying to assist you in that regard by how we
4 deal with that issue. Forget the fact whether it is in a pleading or not in a pleading, it
5 doesn't really matter. In the opening submissions or whatever, the claimants are going
6 to rely on this decision and that decision, and you are going to say they can't. Whether
7 it is in a pleading or expert report, I am not sure, at the end of the day, whether it
8 matters much. But what we have at the moment is we have the things they want to
9 rely on in the pleadings, they just happen to be in the pleadings and the expert reports.
10 They can be identified, and you have very fairly identified passages in the pleadings
11 you object to on that basis.

12 However, because of the reservation by those claimants of their ability to rely upon
13 other decisions substantively at the trial, what I am saying is how do we -- on the
14 assumption that the Tribunal would be assisted by having identified in advance, well
15 in advance of trial, those aspects of previous decisions and judgments which are
16 objected to, how can we deal with, how can we address, that issue in relation to the
17 things that weren't introduced by way of pleading amendment? That's what I am
18 seeking to address.

19 What I may be suggesting is that the claimants will need -- at the same time as you
20 have to do whatever you have to do, they have to identify what further decisions they
21 will wish to rely on at trial, so that you will then be able to respond and say we object
22 to the CMA's decision being relied on for the following reasons, so that that can be
23 brought into the mix. That is what -- I think that's what I am trying to address.

24 I don't think you agree.

25 **MS SMITH:** I see where you are coming from. I unfortunately don't think it is as simple
26 as saying you can refer to the CMA's decision or you cannot refer to the CMA's

1 decision. Of course you can refer to the CMA's decision insofar as it refers to
2 a particular -- to give the most, I hope, the least controversial example -- you can refer
3 to a previous regulatory decision that cites a particular email, in order to say, look,
4 there is a particular email that says X, Y, Z. What you can't do is refer, again to the
5 other extreme, to a previous regulatory decision that says, I, the regulator, the CMA,
6 have assessed all the evidence before me and find that you are dominant. So that is
7 at the other extreme.

8 So, you can't just say: you cannot refer to the CMA's decision. That is the point.

9 **THE CHAIRMAN:** Okay, I was being more general. I may be -- what I am trying to
10 assess is how we deal with that issue and the extent to which the claimants should be
11 required, even if they don't formally plead it, to identify what additional
12 decision -- aspect of what decision for what proposition they are going to rely on, so
13 you know what you can object to.

14 **MS SMITH:** Sir, I hear what you say.

15 **THE CHAIRMAN:** It is as if the pleading amendment had been allowed, and it hasn't
16 been. It's not in a pleading, but what we were debating on 30 January, it was as if that
17 had been introduced and then you would be in the same position as we are in relation
18 to the things that are extant. Does that make sense?

19 **MS SMITH:** It makes sense, yes.

20 **THE CHAIRMAN:** I hope the claimants understand the point I am making. I am sure
21 they do.

22 **MS SMITH:** As regards the expert reports, of course, at the moment, we don't have
23 all the expert reports. There is still a large number of -- a large amount of expert
24 evidence to be produced. As I said --

25 **THE CHAIRMAN:** The last date for that is 13 May, isn't it?

26 **MS SMITH:** Yes. And then the parties then will meet -- the parties' experts then will

1 meet subsequently, between 13 May and 30 June, in order to narrow the issues and
2 produce the JES. So, certainly as it currently stands, Coll's application that we identify
3 everything by next Tuesday, is just unrealistic.

4 **THE CHAIRMAN:** All right. I think we are going to rise for a few moments, just to
5 consider where we are on that. Thank you very much.

6 **(4.45 pm)**

7 **(A short break)**

8 **(4.56 pm)**

9
10 **Ruling**

11 **THE CHAIRMAN:** Thank you very much. We are going to make our decision now in
12 relation to this issue, which is the issue of when and how objections to the admissibility
13 in this case of decisions or judgments made by other bodies should be determined.
14 First of all, as to when the objection itself should be determined. We are not going to
15 determine those objections until the trial at the earliest. When I say at "the earliest",
16 I mean we will obviously hear the argument but it is obviously possible that it will get
17 determined in the final judgment.

18 The second issue, which is as to the clarification or particularisation of the objections
19 themselves, what we propose is as follows. There be a first stage, where the claimants
20 will be required -- and we are going to say within two weeks -- to identify what, if any,
21 further regulatory decisions or judgments they will be seeking to rely upon and in
22 respect of what propositions. That covers what is probably, largely, the CMA's recent
23 pronouncements, but it is intended to cover those amendments which were initially
24 sought to be introduced but have not been.

25 The next stage will be within a further two weeks, so four weeks from now. It will be
26 for Google to identify, in respect of the pleadings, all those passages which it objects

1 to in the pleadings, which it has done, to some extent -- well, done now by identifying
2 the paragraph numbers, as well as responding to the documents that the claimants
3 are going to put in, identifying further regulatory decisions. But, in addition, Google
4 will be required to give their reasons for the objection to each particular paragraph,
5 based on the Supreme Court's judgment in Evans. In other words, why, with short
6 reasons.

7 That deals with pleadings and the other additional bits.

8 As far as expert reports are concerned, we will require Google to identify the
9 admissibility of those decisions/judgments, or parts of decisions or judgments, which
10 are referred to or relied upon in expert reports, which they object to and in respect of
11 what particular proposition. For example, the finding in Google Android on market
12 definition and why it is objected to. We are going to require that to be done by the end
13 of May, which will be after -- well, you can certainly get on with it now. The final expert
14 reports, at the moment, are going to be 13 May, but we would want that exercise to be
15 done by the end of May.

16 That does not involve a line-by-line going through of every expert report, but -- I mean,
17 obviously it will involve you having to do that to see what is being relied upon, but it
18 will be a statement of principle rather than a paragraph-by-paragraph schedule of
19 objections.

20 So that is where we are going on that. I hope that is sufficiently clear. It may be that
21 it has to be -- any lack of clarity might come out in the wash in terms of a draft of
22 an order.

23 That, I think, leaves only -- I can't remember the item number but effectively the -- it is
24 issue 6, isn't it?

25

26 **Application for an extension of time by MS SMITH**

1 **MS SMITH:** Yes.

2 **THE CHAIRMAN:** As I see it, the main issue is the question of whether or not there
3 should be an extension of time for Google's expert in reply.

4 **MS SMITH:** Yes.

5 **THE CHAIRMAN:** Before do you that, can I just understand. The current position is
6 that that is due by 1 April, yes?

7 **MS SMITH:** Yes.

8 **THE CHAIRMAN:** Can you --

9 **MS SMITH:** It might be help if you have the timetable order in front of you, so you can
10 see all the dates.

11 **THE CHAIRMAN:** Yes.

12 **MS SMITH:** It is in supplementary bundle 2, tab 5. This is the timetable order.

13 **THE CHAIRMAN:** Is this the 4 August order or the 8 August?

14 **MS SMITH:** It includes the amendment to the 4 August order, so it will show you what
15 that is.

16 **THE CHAIRMAN:** Okay. Sorry, Ms Smith, my mistake. Can you give me the
17 reference again to look at it?

18 **MS SMITH:** It is supplementary bundle 2, tab 5.

19 **THE CHAIRMAN:** Yes. Just give me a moment.

20 **MS SMITH:** For those working from page numbers, it is 25.1.

21 **THE CHAIRMAN:** Sorry, I am just a bit ...

22 Oh, I have the wrong bundle. I was going to make an observation earlier, which I didn't
23 finish making, but I would like to make it now. My eyesight is a bit dickie. Could I ask
24 that those who prepare these bundles -- and can I thank you all very much, because
25 they are all prepared superbly -- is that, if you could, on the spine of each
26 bundle -- never mind about all this -- just have a big number on it.

1 **MS SMITH:** Yes. I do it like that.

2 **THE CHAIRMAN:** Exactly. I don't need all this stuff, I think I know the title of the
3 actions by now. But it would really help me.
4 Tab 5?

5 **MS SMITH:** Tab 5, sir. It will show you how the various dates work. It is the timetable
6 order arising out of the various amendments that the Tribunal gave permission for at
7 the last hearing, on 30 January. And the dates. And what it includes are the
8 dates -- just to show you how the dates work -- and then, at paragraph 16 on
9 page 25.5 --

10 **THE CHAIRMAN:** No, I understand what you are asking for.

11 **MS SMITH:** Yes, it is a proposed amendment from 1 April to 10 April.

12 **THE CHAIRMAN:** Yes. I understand that. What I was trying to understand, because
13 I can't keep it in my head, after your evidence in reply to Epic and Rodger, expert
14 evidence, what is then left in terms of further evidence stages?

15 **MS SMITH:** There is our -- at the moment, under the 4 August order, our expert
16 evidence in reply on 1 April; the Epic and Rodger reply evidence to that, because this
17 is the first opportunity they have had to put in reply evidence, on 13 May.

18 **THE CHAIRMAN:** That's a reply to this?

19 **MS SMITH:** Yes. This is the reply to our evidence served on 1 April.

20 **THE CHAIRMAN:** Okay.

21 **MS SMITH:** And also Coll-- has been given permission to put in a limited expert report
22 on pass-on.

23 **THE CHAIRMAN:** On the same date?

24 **MS SMITH:** On the same date. 13 May.

25 **THE CHAIRMAN:** Right. And then what happens after that? The joint expert report
26 is the next stage?

1 **MS SMITH:** 30 June is the next stage.

2 **THE CHAIRMAN:** Which is 30 June?

3 **MS SMITH:** Yes. So, what we are asking for, for the reasons that I have set out in
4 my skeleton, the amended pleadings and also the late service of the claimant's expert
5 evidence. Rodger was granted a six-day extension for service of Professor Fletcher's
6 expert report; and Epic received a two-day extension for the economic report, so for
7 Ms McCall and Mr Hunt. We asked for an extension in -- and I think you might recall
8 that, back in the December hearing, the position of the Tribunal was that, well, if you
9 need an extension subsequently, see how it goes and, if you need it, come back to
10 the Tribunal to ask for that extension. That is what we are doing. We are asking for
11 an extension to 10 April, because, with the Easter bank holiday, Good Friday and
12 Easter Monday, that is five working days.

13 **THE CHAIRMAN:** I understand that. Are you saying that this extension is
14 consequential on the pleading amendment?

15 **MS SMITH:** Yes, and also --

16 **THE CHAIRMAN:** Which is what this order is doing, but also upon because of late
17 earlier expert evidence?

18 **MS SMITH:** It's both, yes, sir. The pleading amendments don't close until 1 April.
19 You will see that from paragraph 13 of this timetable.

20 **THE CHAIRMAN:** Well, one of them doesn't. And that is Coll.

21 **MS SMITH:** The other one only closes three days earlier.

22 **THE CHAIRMAN:** So, to be fair, 27 March is a better date for you, isn't it, because
23 this is expert evidence in response to the Epic and Rodger proceedings. The extent
24 to which the reply pleading is going to have any impact, I don't know, upon the expert
25 evidence --

26 **MS SMITH:** It is the reply pleading but, perhaps more importantly, the six-day

1 extension that was granted --

2 **THE CHAIRMAN:** Okay. In relation to the expert evidence?

3 **MS SMITH:** Yes.

4 **THE CHAIRMAN:** Can you -- I think a moment ago, Ms Smith, you said to me
5 something about you can come back and ask for an extension. Just remind me about
6 that?

7 **MS SMITH:** I think this was the -- yes, in December, when the extensions were
8 granted for the service of Professor Fletcher's report for Rodger, and Ms McCall and
9 Mr Hunt's reports for Epic, the Tribunal said if -- I think, and I will have to find
10 a reference to this -- but, as I recall, the Tribunal said if, Google, you need
11 an extension, come back and tell us.

12 **THE CHAIRMAN:** Is that at the December CMC? I have lost track of everything.

13 **MS SMITH:** I think we are going to have to find you a reference for that.

14 **MS BLACKWOOD:** If I can assist. It is supplementary bundle 2, volume 3. The first
15 tab.

16 **THE CHAIRMAN:** This is supplementary bundle 3?

17 **MS BLACKWOOD:** No, supplementary bundle 2, volume 3.

18 **MS SMITH:** I think ours ended up being called supplementary bundle 3. Which tab
19 are you looking at?

20 **MS BLACKWOOD:** Tab 1, which is the letter.

21 **MS SMITH:** The letter of the Tribunal of 15 --

22 **THE CHAIRMAN:** Yes, I have it. Just point to me where -- can I just read that?

23 **MS SMITH:** It is the first paragraph under the heading "The Application".

24 **THE CHAIRMAN:** Yes, I am just reading it. Thank you for that.

25 **(Pause).**

26 Right, so that was me granting an extension for Rodger's expert report.

1 **MS SMITH:** And saying that any commensurate extensions to the timetable, including
2 in relation to Epic's evidence, you should come back. And we do need, in light of --

3 **THE CHAIRMAN:** All right. The real issue here, it seems to me, trying to cut it short,
4 is the extent to which this is going to have an adverse impact on the overall timetable,
5 if it is. I think that is the concern.

6 **MS SMITH:** Yes. At the moment, the only possible impact it could have is on the
7 deadline for the claimant's reply expert reports, which are currently set for 13 May.
8 We say that no extension should be made to that deadline at the moment, for two
9 reasons.

10 First, as regards the pleadings, the amended pleadings -- well, Epic, Rodger and Coll
11 all sought those amendments on the basis that they would have no subsequent impact
12 on the timetable for trial. As regards the delayed submission of the expert reports, we
13 would invite the Tribunal to take the same approach now as it did back in December;
14 hold the parties for now to the 13 May deadline and, if a short extension really is
15 necessary subsequently, to address that closer to the time.

16 **THE CHAIRMAN:** Okay.

17 **MS SMITH:** So, to take the same approach.

18 **THE CHAIRMAN:** The pleading timetable is set --

19 **MS SMITH:** Yes.

20 **THE CHAIRMAN:** -- and agreed. So the only issue is potentially whether or not there
21 should be a commensurate extension of the 13 May deadlines for the claimant's
22 further expert evidence, and the extent to which that might have a knock-on effect,
23 effectively, on the joint expert report which, presumably -- more than presumably -- we
24 are extremely keen to stick to the current date?

25 **MS SMITH:** Yes.

26 **THE CHAIRMAN:** But you say, in relation to that, grant us the extension because

1 they had an extension before, you need it. If any of the other claimants -- if the
2 claimants require any further extension to the final round, 13 May round, deal with that
3 nearer the time, and very much hope that they don't. What happens if we grant that
4 extension, is that going to make it impossible for the joint expert report to be dealt with
5 by 30 June?

6 **MS SMITH:** Yes. I should make the point simply that -- another final point, before I sit
7 down -- as regards the need for our five-day, working day, extension. You will have
8 seen -- I took you to paragraph 10 of our skeleton -- the sheer volume of the reports
9 that were submitted for Rodger, Epic and Coll. Despite, sadly, the page estimates that
10 you imposed back in August, the annexes run to thousands of pages. Our experts
11 have to address all of those expert reports from a number of different experts from the
12 three different parties.

13 **THE CHAIRMAN:** Just remind me, they were served in December?

14 **MS SMITH:** Yes.

15 **THE CHAIRMAN:** Okay.

16 **MS SMITH:** They were served on --

17 **THE CHAIRMAN:** 23rd?

18 **MS SMITH:** Well, 17 December for McCall and Hunt, and 23rd for Fletcher. Although,
19 I think initially Professor Fletcher's report was served on the 17th and then there was
20 a slight amendment on 23rd and it was re-served on the 23rd. So very shortly before
21 Christmas, yes.

22 **THE CHAIRMAN:** I will hear from the claimants. I don't know if they are all going to
23 make different points, but who wants to go first?

24

25 **Submissions by MS FITZPATRICK**

26 **MS FITZPATRICK:** I will be quickest, I think, so I will go first.

1 This application is not really directed at us, because it is an application for
2 an extension of time for the service of evidence in the other two proceedings. Insofar
3 as it was directed at us, there was reference to the relevance of the deadline for our
4 reply, 1 April, falling on the same date as the current date the reports are due. You
5 have seen the point in our skeleton.

6 **THE CHAIRMAN:** That's irrelevant.

7 **MS FITZPATRICK:** It is completely irrelevant. That's my first point, and it is a simple
8 one.

9 My second point is also a simple one, but it is a big point of principle. We of course
10 have waited an extra year for Ms Coll's trial to come on, as a result of joint case
11 management. So, in these circumstances, any extension of time with knock-on
12 effects, and it is the JES that we are particularly concerned about should it move. Any
13 such extension of time with those effects, needs really careful justification in my
14 submission. I will leave it to my learned friends to make their submissions on the
15 nature of the justification as it regards them, but you have my submission that the
16 reliance on our reply goes nowhere.

17 **THE CHAIRMAN:** Okay. Yes.

18

19 **Submissions by MS BLACKWOOD**

20 **MS BLACKWOOD:** Yes, my learned friend Mr Scannell very kindly offered for me to
21 go next.

22 Google effectively gives three reasons for its application for an extension of time to file
23 its responsive evidence in relation to Professor Rodger. I will try and address those
24 quickly in turn.

25 First, Google complains that Professor Rodger's amended claim form was only served
26 and finalised on 13 February. However, it is difficult to see how, in practice, this could

1 have any impact on the responsive evidence. As the vast majority of the amendments
2 are either my updates to reflect the progress of the case, which are not relevant to the
3 responsive evidence, for example changes to reflect that we passed the CPA stage;
4 or they are amendments which have reduced the scope of the pleaded case, for
5 example removing our compound interest claim, which reduces the volume of
6 responsive evidence required.

7 To the extent that there is any new substantive pleading that might be relevant to the
8 responsive evidence, this essentially reflects matters that were already set out in
9 Professor Fletcher and Mr Harman's expert reports, which they received in December.
10 As such, there should be nothing new that Google or its experts are having to deal
11 with, as they have had those reports for some time.

12 **THE CHAIRMAN:** So, your first point is that the date of service of the amended
13 pleading is not relevant to --

14 **MS BLACKWOOD:** It is a bit of a red herring. All the points of substance we knew
15 about already in December.

16 **THE CHAIRMAN:** Okay.

17 **MS BLACKWOOD:** The second point is that Google notes that Professor Rodger
18 was permitted an extension of time for filing Professor Fletcher's report. That was six
19 days, or four working days, they seem to bounce between days or working days slightly
20 interchangeably in their submissions, and then contend that they should have a longer
21 extension of time of nine days or five working days. So, they are asking for an extra
22 working day longer than what we were permitted.

23 Your attention has obviously already been drawn by Ms Smith to your decision back
24 in December, where you had submissions from Google for a commensurate extension
25 of time, and you took the position that that extension at that time wasn't required.

26 **THE CHAIRMAN:** Remind me, they actually asked -- so, at the time when you got

1 an extension --

2 **MS BLACKWOOD:** There was quite a bit of correspondence from all the parties.

3 **THE CHAIRMAN:** I can't remember.

4 **MS BLACKWOOD:** Objecting or suggesting various extensions of time. Those were
5 before you, sir.

6 **THE CHAIRMAN:** Yes, it is ringing a bell.

7 **MS BLACKWOOD:** You said I am not going to give an extension of time but I will
8 give permission for any of the parties to apply, as necessary, for an extension.

9 My point, arising from that, is that nothing of substance has changed since our expert
10 reports have been filed. The main point that Google seems to raise is the extent of
11 the expert evidence. But Mr Harman and Mr Paul's expert reports were limited to
12 50-pages each, as directed by the Tribunal, so they were the length that they were
13 expected to be. Professor Fletcher's expert report was 376-pages, including all the
14 appendices that had a CV and so on, and that is quite concise and succinct when you
15 consider the volume of evidence she was responding to.

16 I think Mr Noble's first expert report alone is 578-pages, and Professor Easton's report
17 was 176-pages. So, there wasn't -- there shouldn't have been anything unexpected
18 or untoward about the length of our expert evidence. In fact, it was quite concise.
19 There is nothing which justifies an extension of time now.

20 Certainly, we would say Google should not be permitted an extension of time longer
21 than Professor Fletcher had before Christmas.

22 **THE CHAIRMAN:** Which is four working days, not five?

23 **MS BLACKWOOD:** Four working days, not five.

24 Thirdly, Google notes that their responsive evidence is due five days after
25 Professor Rodger's reply is due to be filed, so not responsive evidence but just reply
26 and its pleadings. However, given the limited number of claim form amendments of

1 a substantive nature, we don't anticipate that the reply, any reply that
2 Professor Rodger may file, is likely to result in Google needing more time for its
3 responsive evidence.

4 **THE CHAIRMAN:** Both the amended pleading, in terms of claim form, and the reply
5 that's coming, you say is not going to be relevant to the expert evidence, reply
6 evidence?

7 **MS BLACKWOOD:** Well, I can't say for sure. I can't say that. But given the quite
8 discrete subset of issues --

9 **THE CHAIRMAN:** You say there is nothing new in the amended pleading?

10 **MS BLACKWOOD:** There is nothing new, beyond what was already in Professor
11 Fletcher and Professor Harman's expert reports.

12 **THE CHAIRMAN:** Okay. Sorry, I am concerned about the time. I don't really want
13 to --

14 **MS BLACKWOOD:** Yes. However, if you are minded to grant an extension of time,
15 we would say we need a commensurate extension of time for the filing of our
16 responsive evidence.

17 **THE CHAIRMAN:** Until when?

18 **MS BLACKWOOD:** Well, we say that if four extra working days are given to Google,
19 we should likewise be given four working days.

20 **THE CHAIRMAN:** Okay. Do you say that won't jeopardise the date for the joint expert
21 report?

22 **MS BLACKWOOD:** We say it is manageable, sir. Certainly, we are quite compressed
23 in our time for filing our responsive evidence. We have six weeks. So simply scooping
24 out nine days isn't possible.

25 **THE CHAIRMAN:** All right. Mr Scannell?
26

1 **Submissions by MR SCANNELL**

2 **MR SCANNELL:** We don't accept the suggestion that our expert evidence was served
3 late in any sensible or material sense.

4 **THE CHAIRMAN:** How many days were you late?

5 **MR SCANNELL:** Two. We requested two extra days because of a personal
6 circumstance that arose, and that was granted. Google is now asking for 10 days.
7 We don't --

8 **THE CHAIRMAN:** Six working, isn't it? Five working days. Definitely 5.20 in the
9 afternoon, isn't it.

10 **MR SCANNELL:** In the context of this case, one suspects that, in fact, what we are
11 talking about is 10 working days.

12 **THE CHAIRMAN:** Yes, that's probably true.

13 **MR SCANNELL:** We don't accept, either, that the pleading amendments that were
14 made provide any basis whatever for the application. The short point there is that
15 Google ought to have agreed to those pleading amendments. All of them came within
16 the scope of the existing pleadings in the case, and that is the whole basis on which
17 the pleading amendments were allowed. The Evans points were withdrawn, of course.
18 We do not accept that the volume of expert evidence provides a good reason either.
19 Page limits were imposed by the Tribunal at the 1 August 2025 hearing, and they have
20 been complied with. At the same time as those page limits were imposed, a deadline
21 was set for Google to respond to the expert reports. That deadline was 1 April.
22 Nothing has changed in relation to that.

23 Finally, we do not accept that the extension that Google is seeking will not affect the
24 production of our reply expert evidence. Of course it will. We have six weeks to
25 produce our reply expert evidence; two of them, effectively, are being taken away from
26 us by the suggestion that Google gets an extension but we do not get an extension for

1 the production of our reply expert evidence.

2 **THE CHAIRMAN:** Two weeks because it is 10 days -- sorry, five working days.

3 **MR SCANNELL:** Which is 10 days.

4 At the very least, if the Tribunal were minded to accede, notwithstanding the
5 submissions, to an extension, we should get a commensurate extension.

6 As to whether or not that will affect the joint expert's statements, in all likelihood it will
7 affect the joint expert statement. We don't know how seriously it will, but there will be
8 knock on effect if a 10 day extension is granted.

9 The important point that I make immediately, however, is that, if the Tribunal accedes
10 to this request, an extra 10 days will need to be given to us as well. We only have six
11 weeks to reply.

12 **MS SMITH:** Can I make one point? I may have misspoken and it is simply a point of
13 correction.

14 Currently, as you will see from SB2, page 25.5, the 4 August order currently says the
15 defendants are to file and serve evidence in response to the expert evidence filed and
16 served in the Rodger proceedings. It is not limited to expert evidence in response. It
17 may also be some factual evidence, as you will recall, having been discussed back
18 in August.

19 I would only be repeating myself if I made any further submissions.

20 **THE CHAIRMAN:** Right. There was one other matter raised which was about the
21 opt-out/opt-in notice that you, I think, Google, suggested that you wanted to be
22 notified?

23 **MS SMITH:** That was simply -- there is no objection to the service of the notice or the
24 time, or anything else.

25 **THE CHAIRMAN:** I think you raised --

26 **MS SMITH:** Simply that, once responses had been received to the new Coll expert

1 | opt-out notice, that we would be given details of that.

2 | **MS FITZPATRICK:** That's agreed.

3 | **THE CHAIRMAN:** That's agreed. Okay, fine. We will rise to consider this issue.

4 | Thank you very much.

5 | **(5.23 pm)**

6 | **(A short break)**

7 | **(5.30 pm)**

8 |

9 | **Ruling**

10 | **THE CHAIRMAN:** I won't make reference to iteration 4 of today's Tribunal. As
11 | Mr Frazer correctly pointed out, in fact this isn't a change because, technically, when
12 | I sit with him, I am the one making the decision and he is just sitting there to help,
13 | rather than being fully constituted.

14 | In respect of this last issue, what I have decided is that we are going to grant
15 | an extension for Google's reply evidence, which is reply to the expert evidence of
16 | Professor Rodger and Epic, until 7 April, which is, I think, 4 pm or whatever, 5 pm, on
17 | the 7th. Which is Easter Tuesday, the day after Easter Monday. It doesn't give them
18 | much more, but it gives you a little bit more time. We are not prepared to grant the full
19 | extension because we are concerned about the knock-on effect.

20 | We are also going to give a commensurate, in terms of days rather than working days,
21 | extension to the claimants for their reply expert evidence, until, I think, 19 May,
22 | because it is effectively six days.

23 | We are obviously not going to give any extension in respect of the deadline for the
24 | joint expert report, and we remain very concerned that that date should be stuck to.

25 | I know that gives the experts six days less, in theory, from that previous deadline, but
26 | I would like the message to be got back to the experts that there is no reason why they

1 can't start working on that joint expert statement before they get the final tranche of
2 expert evidence. I don't know their process and what process they have in mind, but
3 I would very much ask all the parties to get that message back to the experts, because
4 we will be very reluctant to let that deadline slip. We would hope that the loss of, in
5 theory, six days out of seven weeks would not have an adverse impact on that. So
6 that is what --

7 **MS SMITH:** Sir, can I just check those dates. 7 April is the Tuesday, yes, which gives
8 us Thursday and --

9 **THE CHAIRMAN:** Two extra working days.

10 **MS SMITH:** Yes. That gives us two extra working days.

11 **THE CHAIRMAN:** It is an extension of six days.

12 **MS SMITH:** And an extension for the others from the 13th to the 19th, which gives
13 them five extra working days?

14 **THE CHAIRMAN:** That is what I have decided. The reason is that they should have
15 the same period of time in which to respond. That is six days extra in terms of
16 the -- I don't know what the gap between 1 April and 13 May is, but that is the gap,
17 and they should have the same gap.

18 Okay, I think that covers everything. Apart from, I can't remember what we decided
19 about the transaction data application and whether it was going to be -- whether there
20 was a timetable for that or not? What did we -- you are going to liaise, are you, and
21 agree a timetable for that?

22 **MS SMITH:** I think that is what was indicated.

23 **THE CHAIRMAN:** Was it going to be something that we could decide on the papers?
24 I think we thought --

25 **MS SMITH:** I would hope the timetable is.

26 **THE CHAIRMAN:** Not the timetable, the decision itself?

1 **MS FITZPATRICK:** We can liaise about that. Our primary position is that it can be
2 done on the papers, but --

3 **THE CHAIRMAN:** Okay. You are going to respond with a witness statement and
4 submissions -- that's right, I remember now -- and you are going to respond with
5 submissions, and then you can come back to me and say we think it can be decided
6 on the papers or we want a short hearing.

7 I mean, that is something, I suspect, I might be able to deal with on my own. I am out
8 of London from next week, but I am able to carve out -- actually, I shouldn't tell you
9 this. I am not able to carve any time out whatsoever! I am able to carve out time if
10 anything does need resolving, even remotely.

11 Any other matters for the day? Thank you all very much.

12 **(5.35 pm)**

13 **(The hearing concluded)**

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?