



Neutral citation [2026] CAT 54

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

Case Nos: 1582/7/7/23

1572/7/7/22

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

24 June 2026

Before:

THE HONOURABLE MR JUSTICE LEECH  
(Chair)  
JOHN ALTY  
DR MARIA MAHER

Sitting as a Tribunal in England and Wales

BETWEEN:

**AD TECH COLLECTIVE ACTION LLP**

Class Representative

- v -

**(1) ALPHABET INC.**  
**(2) GOOGLE LLC**  
**(3) GOOGLE IRELAND LIMITED**  
**(4) GOOGLE UK LIMITED**

Defendants

Heard at Salisbury Square on 21 and 22 May 2026

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**RULING**

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## APPEARANCES

Gerry Facenna KC, Niamh Cleary and Greg Adey (instructed by Humphries Kerstetter LLP, Geradin Partners Limited and Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Conall Patton KC and Natasha Simonsen (instructed by Freshfields LLP) appeared on behalf of the Defendants.

**Note:** Excisions in this judgment (marked “[&lt;]”) relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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## A. INTRODUCTION

1. On 21 and 22 May 2026 the Tribunal heard the third case management conference (**CMC**) in these proceedings following certification (**CMC3**). One day of CMC3 had been set aside for the hearing of a strike-out application in relation to certain claims which were said to have been barred by limitation. Fortunately, the parties were able to agree on the disposal of that application and also on the disposal of a number of other issues. CMC3 was primarily taken up with argument in relation to a number of discrete disclosure issues which we determine in this ruling. We address those issues in the order in which they appear in the version of the draft order which the parties provided to the Tribunal on the morning of the first day of CMC3 (the **CMC3 Draft Order**).

## B. PRE-EXISTING DISCLOSURE

### (1) The DOJ and Texas Investigations

*Disclosure from the investigations of the Texas Attorney General and the US Department of Justice: the CMC3 Draft Order, §§7–15.*

#### (a) *Background*

2. On 15 August 2025 the Tribunal made an Order following the first CMC (the **CMC1 Order**) in which it required the Defendants (together **Google**) to provide an explanation to the Class Representative (the **CR**) of the documents and datasets which it had provided in connection with certain regulatory investigations (the **Pre-existing Disclosure**) and also its proposals for the disclosure of datasets from that material: see the CMC1 Order, §§6–7.
3. On 24 October 2025 Google served a document titled “Pre-existing Disclosure Explanatory Note and Google’s Proposal” (the **Explanatory Note**) in which it proposed to disclose approximately 2.4 million documents in a number of different categories. It identified five relatively small categories of documents but the bulk of the documents consisted of a tranche of over 2.4 million documents which Google had disclosed to the European Commission (**EC**) in the course of the EC Investigation (as it was defined in the CMC1 Order).

Further, the source of almost all of these documents was in turn identified as the **DOJ Proceedings**. This term was defined in the CMC1 Order to include both the DOJ Investigation and the DOJ Litigation (defined below at §5). In the Explanatory Note, Google’s solicitors explained that from 2019 onwards the US Department of Justice (the **DOJ**) had conducted an investigation (the **DOJ Investigation**) into Google’s affairs in which it had [X] between 30 August 2019 and 20 October 2020. They also explained what searches Google had carried out to answer these demands and that the Google parties had produced approximately [X] documents to the DOJ in the course of the investigation.

4. At the same time the Office of the Attorney General of Texas (the **Texas OAG**) was conducting its own investigation (the **Texas Investigation**) and Google’s solicitors stated that the Google parties had produced approximately [X] documents to the Texas OAG and these were in turn produced to the DOJ as part of the DOJ Proceedings. Google also produced detailed schedules of the search terms which were adopted in both the DOJ Investigation and the Texas Investigation as Schedules 14 and 18 to the Explanatory Note.
5. Google’s solicitors also explained that on 16 December 2020 a coalition of State Attorneys General had filed a complaint in the Eastern District of Texas, which was later consolidated with other complaints in the Southern District of New York. They also explained that on 24 January 2023 the DOJ filed its own complaint in the Eastern District of Virginia (the **DOJ Litigation**) and that in the course of that action Google had produced a total of approximately [X] documents. They confirmed that the disclosure made in the DOJ Litigation was a separate exercise from the disclosure made in the DOJ Investigation.
6. On 18 December 2025 the second CMC (**CMC2**) took place before this Tribunal although the order from it was not finalised until 19 February 2026 (the **CMC2 Order**). By this stage Google had produced the Explanatory Note and the information which we have set out above. The Tribunal gave the following directions in relation to the Pre-existing Disclosure:

“5. By no later than 4pm on 13 February 2026 the Defendants shall provide responses to the requests set out in the Confidential Appendix A to this Order.

6. By no later than 4pm on 27 February 2026, the Defendants shall reproduce to the Class Representative:

(a) on a rolling basis, all the materials from the Pre-existing Disclosure that they proposed to reproduce in their proposals for reproduction dated 24 October 2025;

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

(c) the materials which relate to the period before 1 January 2014, which were previously excluded from the Defendants' proposals dated 24 October 2025 only on that basis, but which the Defendants subsequently agreed to reproduce in their second letter to the Class Representative dated 9 December 2025;

(d) the materials produced in the DOJ Litigation after 17 October 2023 as set out in the Defendants' second letter to the Class Representative dated 9 December 2025; and

(e) the following non-contemporaneous material from the DOJ Litigation (as defined in paragraph 6(e) of the 15 August Order), subject to redactions of non-Google material that is subject to a protective order made in the DOJ Litigation: (i) expert reports; (ii) depositions given by Google employees and associated material, including exhibits, transcripts and written responses; (iii) Google's responses to the DOJ's interrogatories; and (iv) Google's responses to the DOJ's requests for admission.

7. By no later than 4pm on 13 March 2026, the Class Representative shall provide to the Defendants:

(a) any further requests for reproduction of material from the Pre-existing Disclosure; and

(b) a list of specific disclosure requests and requests for information based on the information provided pursuant to paragraph 5 above.

8. By no later than 4pm on 10 April 2026, the Defendants shall provide to the Class Representative their responses to:

(a) any further requests for reproduction of material from the Pre-existing Disclosure pursuant to paragraph 7(a); and

(b) the Class Representative's list of specific disclosure requests and requests for information referred to in paragraph 7(b).

9. By 24 April 2026, the parties shall seek to agree categories of documents and data for disclosure arising out of the exchange directed by paragraphs 7 and 8 above, and the timing for any such disclosure. Any disputes in respect of this paragraph and requests, made prior to CMC 3, for production of Further Disclosure (defined below) shall be determined at CMC 3."

*(b) The evidence*

(i) Streatfeild 4

7. On 5 May 2026 Mr Luke Streatfeild, a solicitor and partner in Hausfeld & Co. LLP, made his fourth witness statement on behalf of the CR (**Streatfeild 4**) in which he gave evidence that on 2 February 2026 Google had produced the DOJ Litigation documents and that on 25 and 26 February 2026 Google had produced further documents relating to the DOJ Proceedings. He also gave evidence that to the best of his knowledge Google only produced approximately 2% of the DOJ Investigation documents, and that Google had disclosed less than half the exhibits from the trial itself in the DOJ Litigation documents.
  
8. Mr Streatfeild also gave evidence in Streatfeild 4 that the CR intended to use a form of “Technology Assisted Review” (**TAR**) to narrow the pool of documents disclosed into subsets and that once it had done so it would use an AI tool called Relativity aiR to conduct a second review based on relevance. He stated that the CR intended “to prioritise the use of technology in identifying the documents that are most relevant to the issues that need to be determined by the Tribunal.” He rejected the proposal made by Google in correspondence, namely, that the CR should review the documents which Google had already produced before making further and more targeted requests. His evidence was that this was likely to be less efficient and more costly.

(ii) Frey 1

9. On 11 May 2026 Mr Nicholas Frey, a solicitor and partner in Freshfields LLP (**Freshfields**), Google’s present solicitors, made his first witness statement on behalf of Google (**Frey 1**). This witness statement was very long and consisted largely of argument. Mr Frey had little evidence to give either from his own personal knowledge or on instructions. Given the large number of issues which the parties had to cover over a two-day hearing, Mr Patton KC did not introduce or take us through Frey 1 and the Tribunal was left trying to discern what evidence of fact Mr Frey actually had to give in a 50-page witness statement. Mr Frey was not alone in producing witness statements of this kind and for the

future we discourage both parties from continuing to deploy witness statements like Frey 1.

10. Mr Frey did not challenge Mr Streatfeild's evidence that 2% of the DOJ Investigation documents were produced in these proceedings or his evidence that the DOJ Investigation and Texas Investigation documents were relevant to the issues before the Tribunal. Nor did he give evidence that Google had disclosed all of the exhibits at trial. However, he interpreted Mr Streatfeild to be giving evidence that disclosure of the DOJ Investigation and Texas Investigation documents was justified on the grounds of relevance alone and that disclosure of these documents was required to assist the CR in a review using TAR and AI.
11. Based on this interpretation or understanding, Mr Frey then argued that the CR had not satisfied the legal requirements for the disclosure of the DOJ Investigation and Texas Investigation documents. Much of Mr Frey's evidence was directed at criticising the CR's proposals for the use of TAR and AI. In particular, he criticised the lack of oversight by the legal team and argued that it was not necessary or proportionate to order disclosure. However, he gave some evidence about the additional costs to Google of the disclosure of the DOJ Investigation and Texas Investigation documents. He challenged Mr Streatfeild's evidence that production would be low-cost, but we found it very difficult to identify where in his evidence he addressed the precise time and additional cost of running searches by reference to the existing search terms in Schedules 14 and 18.
12. Finally, Mr Frey proposed on behalf of Google that the parties should agree which of the expert reports produced in the DOJ Litigation were likely to relate to the expert issues in the present litigation based on the parties' proposals for expert evidence and that Google would produce all of the documents referred to in those reports. He also complained that the CR had sufficient information in the Explanatory Note to make targeted requests for further disclosure but criticised the CR and its legal team for failing to do so.

(iii) Streatfeild 5

13. On 20 May 2026 Mr Streatfeild made his fifth witness statement (**Streatfeild 5**) and, although, it was served very late that day, Mr Patton did not object in his oral submissions to the Tribunal considering its contents. Mr Streatfeild made it clear that his earlier evidence was directed at demonstrating that Google's proposals for piecemeal disclosure were inefficient and likely to increase the costs. It was also his evidence that Mr Frey had drawn some incorrect conclusions from Streatfeild 4 and he set out in detail the process which the CR proposed to adopt for its TAR. In particular, he gave evidence that the TAR and AI tools require iterative training and the CR's legal team would be closely involved in this process. Mr Streatfeild also made it clear that, contrary to assertions made by Mr Frey, the CR's legal team had carried out significant work on the documents which Google had already disclosed.

*(c) The submissions*

14. In their skeleton argument, Mr Patton and Ms Simonsen submitted that most of the relevant documents in the DOJ Investigation were included in the DOJ Litigation documents which Google had already disclosed and would have been referred to at the trial of that action. They also submitted that it would be more efficient to adopt Google's proposal. In their skeleton argument, Mr Facenna KC and his team submitted on behalf of the CR that DOJ Investigation and Texas Investigation documents are likely to be relevant to the issues in the present proceedings and that the proportion which is not relevant can be identified and eliminated without the need for a relevance review by using the search strings in Schedules 14 and 18 (referred to above at §4). They also submitted that Google's proposal was unduly restrictive and rejected the suggestion that the documents produced from the DOJ Litigation were likely to be the most relevant because the parties in the DOJ Litigation had used them to prove their case.
15. In his oral submissions, Mr Patton submitted that the Tribunal should refuse to order disclosure because the CR could have been expected to review the documents which Google had already disclosed and to make targeted requests

for specific documents or narrow classes of documents by this stage of the proceedings. Mr Patton submitted that there was no authority in which the Tribunal had ordered disclosure for the purpose of training an AI tool to conduct a TAR. In his oral submissions, Mr Facenna submitted that it was not appropriate to treat the application for disclosure of the DOJ Investigation documents or the Texas Investigation documents as an application for specific disclosure because it formed a continuation of the incremental and cautious process which we had already ordered in the CMC2 Order. Google had been ordered to give rolling disclosure based on its selection of documents in the Explanatory Note.

*(d) Decision*

16. Rule 60 of the Competition Appeal Tribunal Rules 2015 (the **Rules**) is headed “Disclosure by parties to the proceedings” and it provides for a single disclosure regime (as opposed to separate rules for standard and specific disclosure as in the Civil Procedure Rules (**CPR**) Part 31 or separate models as in CPR PD 57AD). It provides as follows:

“(1) In this rule, and in rules 61 to 65—

(a) a party discloses a document by stating that the document exists or has existed;

(b) a ‘disclosure report’ means a report verified by a statement of truth, which—

(i) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;

(ii) describes where and with whom those documents are or may be located;

(iii) in the case of electronic documents, describes how those documents are stored;

(iv) estimates the broad range of costs that could be involved in giving disclosure in the case, including the costs of searching for and disclosing any electronically stored documents; and

(v) states which directions are to be sought regarding disclosure;

(c) an ‘Electronic Documents Questionnaire’ means a questionnaire in the form of the questionnaire in the Schedule to Practice Direction 31B of the CPR.

(2) Subject to paragraph (3) and unless the Tribunal otherwise thinks fit

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

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

(3) The Tribunal may at any point give directions as to how disclosure is to be given, and in particular—

(a) what searches are to be undertaken, of where, for what, in respect of which time periods and by whom and the extent of any search for electronically stored documents;

(b) whether lists of documents are required;

(c) in what format documents are to be disclosed (and whether any identification is required);

(d) what is required in relation to documents that once existed but no longer exist; and

(e) whether disclosure is to take place in stages.

(4) A party's duty to disclose documents is limited to documents which are or have been in its control; and for this purpose, a party has or has had a document in its control if—

(a) the document is or was in its physical possession;

(b) it has or has had a right to possession of the document; or

(c) it has or has had a right to inspect or take copies of the document.

(5) A party need not disclose more than one copy of a document, and for that purpose a copy of a document that contains a modification, obliteration or other marking or feature is to be treated as a separate document.

(6) Any duty of disclosure continues until the proceedings are concluded.

(7) If documents to which such a duty extends come to a party's notice at any time during the proceedings, it shall immediately notify every other party.”

17. In *Ryder Ltd v Wolseley UK Ltd* [2020] CAT 3, Roth J, who was then the President of the Tribunal, and Hodge Malek KC gave the following guidance about the application of these rules at §§35–36:

“35. Even in cases where broad disclosure is required, it is possible to lay down some broad principles that are applied by the CAT. These are:

- (1) Orders for standard disclosure will not in general be made.
- (2) Disclosure will be confined to relevant documents. Relevance is determined by the issues in the case, derived in general by reference to the pleadings, although in appropriate cases disclosure can be in relation to matters not specifically pleaded.
- (3) A strong justification would be required to make any order along the lines of the ‘train of inquiry’ test in the classic formulation of the test for disclosure enunciated by Brett LJ in *Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63. An example where train of inquiry disclosure may be justified is a case alleging a cartel infringement where the underlying facts are unknown to the claimants but are in the hands of the defendants.
- (4) Disclosure cannot be ordered in respect of a settlement submission which has not been withdrawn or a cartel leniency statement (whether or not it has been withdrawn). This does not preclude a party which made such a submission or statement providing it by way of voluntary disclosure.
- (5) Disclosure will not be ordered in respect of a competition authority's investigation materials before the day on which the authority closes the investigation to which those materials relate.
- (6) Ordinarily disclosure will be by reference to specific pleaded issues and specific categories of documents.
- (7) Disclosure will only be ordered and the order will be framed to ensure that it is limited to what is reasonably necessary and proportionate bearing in mind a number of aspects, the most important of which are:
  - (a) the nature of the proceedings and the issues at stake;
  - (b) the manner in which the party bearing the burden of proof is likely to advance its case on those issues;
  - (c) the cost and burden of providing such disclosure;
  - (d) whether the information sought can be obtained by alternative means or be admitted; and
  - (e) the specific factors listed in rule 4(2)(c).

36. The search required will be a reasonable and proportionate search and it will be for the disclosing party to specify what search it has carried out and why it contends any particular search would be unreasonable when it complies with the order. In appropriate cases, the tribunal may rule on what would be required by way of a reasonable search prior to disclosure being provided. The factors relevant in deciding the reasonableness of a search include (cf CPR r 31.7):

- (a) the number of documents involved;

- (b) the nature and complexity of the proceedings;
- (c) the costs of retrieval of any particular document which is likely to be located during the search;
- (d) the significance of any document which is likely to be located during the search;
- (e) the location of material, and the type and nature of databases and storage involved; and
- (f) the resources available to the disclosing party.”

18. Mr Patton also drew our attention to the warnings given by the Tribunal in *Gormsen v Meta Platforms Inc* [2025] CAT 85 about the use of technology. In that case, the Tribunal described it as “both a curse and a cure”: see §221. Mr Patton also relied on those passages in which the Tribunal described the process itself: see §§222–239. Mr Facenna also drew our attention to a number of other passages in which the Tribunal had described the use of AI technology in document review as beneficial (when used to supplement and assist human review) and also stated that advances in TAR had reduced the costs of document review: see §§242–243.
19. Having considered the evidence and the argument, we accept the CR’s submissions on this issue, we order that Google shall give disclosure of the DOJ and Texas Investigation Documents and we make the directions set out the CMC3 Draft Order, §§7–12 (subject to pushing the dates back by a further three weeks). We do so for the following reasons:
- (1) In the CMC2 Order, we ordered a three-stage approach to disclosure in the present case. At the first stage, we ordered Google to make rolling disclosure of the documents which it proposed to disclose from the Pre-existing Disclosure (including specified categories of the DOJ Litigation documents). At the second stage, we gave the CR an opportunity to make requests for further disclosure and, at the third stage, we ordered the parties to agree further categories and data for disclosure.
  - (2) Although we did not decide in terms at CMC2 that it was necessary and proportionate for Google to agree to the CR’s requests at the third stage, the context in which those requests were made is very important. We

adopted and ordered the three-stage process at Google's request not because we were satisfied that Google had complied with its disclosure obligations but on the basis that disclosure of the specific documents referred to in the CMC2 Order was much further advanced and that it would significantly increase the burden on Google to require it to carry out a full disclosure exercise immediately. But it was very much intended to be the first stage of an integral three-stage process. In our judgment, Google's refusal to give disclosure of the DOJ Investigation and Texas Investigation documents (and a number of other categories) is, in substance, an attempt to row back from a process which it persuaded the Tribunal to adopt at CMC2 and for its own benefit.

- (3) But in any event, we are satisfied that it is reasonable and proportionate to order disclosure of the DOJ Investigation and Texas Investigation documents on the terms proposed by the CR and its legal team. There is no dispute that the documents are relevant and we reject Google's argument that the most important documents are to be found in the DOJ Litigation documents which Google has already disclosed. Google adduced no evidence to support this contention and it does not logically follow that because documents were disclosed after the issue of the complaint, they are likely to be more important. Indeed, it is equally likely (if not more likely) that many critical documents were disclosed in the DOJ Investigation rather than in the DOJ Litigation. The DOJ issued a number of [§<] which Google had an obligation to answer and the complaint was issued on the basis of the documents disclosed during the investigation. The timing of the issue of the complaint may well have depended on whether the DOJ had gathered sufficient evidence to issue proceedings.
- (4) We are not satisfied that the disclosure of these documents will impose a significant burden on Google. Very sensibly, the CR proposes that Google should adopt some of the search strings in Schedules 14 and 18 and, as such, the final CMC3 order (the **CMC3 Order**) will require it to carry out searches which it has already performed or, more likely, to reproduce the cache of documents which responded to the original

searches and which are likely to be stored in separate folders or repositories. This will no doubt impose an additional cost, but Mr Frey gave little or no evidence about the actual costs of this exercise or the practical burden which it will impose on Google. Nor did he suggest that Google no longer stored the data which responded to the search terms in Schedules 14 and 18 or that it could not get access to them easily. If the production of these documents will impose a huge burden on Google, we would have expected him to say so and to quantify the cost. He did not do so.

(5) We also reject Google's argument based on technology. Mr Streatfeild answered Mr Frey's criticisms about the TAR and the extent to which the CR's legal team are supervising or project managing the process satisfactorily in Streatfeild 5. But in any event, this is a complete red herring. It may be that the CR will use these documents in the first instance to refine its AI tool and its methodology. But Google is not being required to disclose the DOJ Investigation and Texas Investigation documents for that purpose (or that purpose alone). It is being required to disclose them because many of the documents are likely to have a material bearing on the outcome of this litigation. The challenge for the CR is to refine its TAR to identify and extract those documents.

(6) We also reject Google's more limited proposal to disclose the exhibits to those experts reports which it has already disclosed in accordance with the CMC2 Order, §6(e), and which it agrees to be relevant to the issues in this action. For our part, we would have expected Google to produce all of the exhibits to all of the disclosed reports (if asked to do so) under the second and third stages of the procedure set out in the CMC2 Order. In our judgment, this is too little and far too late.

**(2) Appendix 1**

*Additional Disclosure from the categories of documents listed in the Explanatory Note and Proposal: see the CMC3 Draft Order, §18.*

20. The CR sought disclosure of six categories of documents which were set out in Appendix 1 to the CMC3 Draft Order (**Appendix 1**). Categories 1, 2, 3 and 5 identified [X] specific documents. Category 4 specified [X] documents and category 6 specified [X] documents. The parties helpfully produced a Redfern schedule to assist the Tribunal to assess the status of individual disclosure request by setting out the relevant paragraphs from Streatfeild 4 and Frey 1. The only objection which Google took to disclosure of these six categories of documents was that they were not relevant to any pleaded issue. When Mr Patton made his oral submissions, it became apparent that Google took a very narrow view of the pleadings. In our judgment, all of the documents were relevant to the pleaded issues and we order disclosure of all of these documents. We deal with each category in turn.

**(a) Category 1**

21. The CR seeks specific disclosure of [X] documents which include details of agreements between Google and [X] and [X] internal documents relating to the [X] option. Mr Facenna submitted that this was directly relevant to the CR's pleaded case in the Re-Re-Amended Collective Proceedings Claim Form (the **Claim Form**), §93, in which the CR alleges that publishers consider that access to both Google Ads and DV360 advertising demand is a "must have". The allegation in relation to Google Ads is pleaded in §93(1) and the allegation in relation to DV360 is pleaded in §93(2) (footnotes omitted):

"93. Moreover, publishers also consider access to Google programmatic demand, i.e. Google Ads and DV360, to be a 'must have'.

(1) Google Ads is widely used by hundreds of thousands of small advertisers across the UK. In most cases Google Ads is the only ad buying tool such advertisers use, as multihoming is complex and thus only an option for larger, sophisticated advertisers. For small advertisers that 'single home', Google Ads is the preferred platform, since it provides access to (a) Google Search, by far the most important source of search inventory in the UK; (b) YouTube, by far the most important source of video inventory in the UK, which is exclusively available through Google's DSPs; and (c) Google's vast Display Network (with access to over 2 million third-party publishers). As found by the CMA: '*[b]y providing a one-stop shop solution for those advertisers who genuinely want to make use of both search and display advertising, and by nudging other small advertisers into using display ads through default settings, Google has managed to leverage part of*

*its search advertiser base to increase its importance as a source of demand in open display*', i.e. in the DSP market.

(2) For larger advertisers, Google's ad buying platform is DV360. Since 2016, marketers wishing to advertise on YouTube have no choice but to use Google's ad buying tools (DV360 or Google Ads). This has spill-over effects, as it affects advertisers' choice of a DSP for non-Google inventory as well, the reason being that advertisers typically use a single DSP per campaign to enable accurate frequency capping (limiting the number of times an ad is shown to a user) and conversion measurement (measuring whether users exposed to the ad 'converted', that is performed the desired action such as purchasing a product). The result is that, as found by the CMA, advertisers that want to include YouTube inventory in their campaigns 'have a strong incentive to use DV360 for the entire campaign.'

(3) Specifically in relation to the significance of YouTube, the CMA found that 'YouTube is, after Facebook, the second largest platform in terms of display advertising sold in the UK, and it is particularly important for video inventory (see Appendix C). Advertisers can buy YouTube inventory programmatically only through Google's DSPs. This affects advertisers' choice of DSP for non-Google inventory as well, because a single DSP is typically used for a given campaign'. The CMA concluded that 'it appears that lack of access to YouTube inventory has the greatest impact on DSPs' ability to compete with Google, while the difference in access to data may currently be less important. The two factors combined are likely to result in a significant advantage for Google's DSPs'. Prior to 2015, YouTube's ad inventory was available through non-Google as well as Google DSPs. In 2015, however, Google made YouTube's ad inventory exclusively available through Google Ads and DV360."

22. Mr Patton submitted that the documents in category 1 are not relevant to this allegation for three reasons: first, because it is not in dispute that [X]; second, because the documents are not relevant to the intentions or understanding of publishers; and, third, because the CR did not specifically plead the [X].
23. We reject those submissions. Google denied the allegations that both Google Ads and DV360 were each a "must have" source of advertising demand for publishers in its Re-Amended Defence, §45(f). When we asked Mr Patton whether Google now conceded this allegation, he backtracked and drew a distinction between exclusive access and being a "must have". It is obvious, therefore, that this remains a contested allegation. Furthermore, although the allegation is directed specifically to publishers, the terms which Google has negotiated with [X]. Finally, contrary to Mr Patton's submission, the CR's legal team referred in terms to the [X] in the Claim Form, §93(1) (although it

may not have used the precise term as used in the Glossary to Google's Re-Amended Defence).

**(b) Category 2**

24. The CR sought disclosure of [REDACTED] documents which relate to the [REDACTED]. Mr Patton's objection to disclosure was that this feature was not mentioned expressly by name in the Claim Form. Mr Facenna took us to the EC Decision (as we define it in greater detail below at §37 in the context of the redactions made to it) to demonstrate that this feature was relevant to the wider allegations of abuse. He also submitted that these documents were directly relevant to the particular allegations pleaded in the Claim Form at §108 and also §172, the latter of which provides as follows:

“One way in which Google undermined header bidding was through the operation of Dynamic Allocation which provided AdX with a ‘last look’ advantage over rival SSPs bidding: as discussed at §§116-117 above. Prior to the introduction of header bidding, the operation of Dynamic Allocation had given AdX a right of ‘last look’ over the highest estimated bid for rival SSPs (calculated based on their historical average bids), which operated as the price floor that AdX bidders had to beat. Once header bidding was introduced, Dynamic Allocation gave AdX a right of ‘last look’ over the highest live bid submitted by rival SSPs through header bidding.”

25. We accept Mr Facenna's submission. It is clear from the EC Decision and the description of “Dynamic Allocation” in §172 that the [REDACTED] was one way in which Google is alleged to have achieved dynamic allocation and the documents in category 2 are relevant, therefore, to the determination of the specific allegation in that paragraph and the wider allegations of abuse made earlier in the Claim Form.

**(c) Category 3**

26. The CR also sought disclosure of [REDACTED] documents relating to [REDACTED]. This form of bidding was also referred to as [REDACTED] and, as Mr Facenna explained, it was found by the EC to be a method by which [REDACTED]. Mr Patton submitted that the Tribunal should refuse disclosure because the CR's legal team had not pleaded either [REDACTED] as part of its case as pleaded in the Claim Form at §244(1)–(3):

“Google’s other DSP, DV360, similarly treats rival SSPs differently from AdX, with the result that the large majority of DV360 demand is also channelled to AdX.

(1) Google gives and/or used to give AdX exclusive access to DV360 demand when certain features were enabled within Google DV360 (e.g., ‘Targeting by “household income demographics”’, ‘Life Events’, etc.).

(2) This feature is not disclosed to DV360’s advertiser clients clearly or at all, with the result that many unknowingly make selections that result in DV360 only bidding for ad impressions through AdX.

(3) Google has actively sought to direct purchases made via DV360 towards AdX. For example, a document provided by Google to the FCA during its investigation (and referred to in the FCA Decision) states that DV360 allows for smarter buying when mediation or header bidding is detected, favouring AdX when possible.”

27. We reject Mr Patton’s submission. He did not submit that the CR did not have a real prospect of demonstrating at trial that the function of [§<] was to direct purchases made through DV360 to AdX. His only point was that the CR’s legal team had not pleaded [§<] or its function by name. But even by the strictest standards of pleading, a party has never been required to plead the evidence upon which it relies to prove a factual allegation. In our judgment, the documents in category 3 are directly relevant to the allegation in §244(3) and provide further evidence in addition to the pleaded example.

**(d) Category 4**

28. The CR also sought disclosure of [§<] documents relating to the [§<]. These documents formed part of the disclosure to the EC and upon which it based its findings below. Mr Facenna took us to one of the documents which explained how this feature operated and he submitted that it was one of the features specifically pleaded in the Claim Form at §244(1) (above at §26). He also submitted that the [§<]. If this is correct (and Mr Patton did not submit otherwise), then the documents are plainly relevant to an allegation pleaded in the Claim Form. But even if the CR’s legal team did not have them specifically in mind when pleading this allegation, they are plainly relevant to the broader allegation made in the first sentence of §244 itself.

(e) *Category 5*

29. Next, the CR sought disclosure of a category of documents relating to [REDACTED]. Category 5 consisted of [REDACTED] documents taken from the disclosure to the Competition and Markets Authority (CMA) relating to Google's [REDACTED], and Google described them in more detail in the Explanatory Note, [REDACTED] as relating to: [REDACTED].

30. Mr Facenna submitted that these documents were directly relevant to the allegations made in the Claim Form, §93, and, in particular, that [REDACTED] contributed to making Google Ads and DV360 a “must have” source of advertising demand. He also relied on the following allegations at §§148 and 239:

“148. The claim also contends that Google is dominant in the DSP market. Google's share in the DSP market exceeds 50%, above the level at which dominance is presumed, while none of Google's competitors have a market share above 10%. Google's DSPs also benefit from a number of significant advantages relative to its rivals, including because they enjoy exclusive access to YouTube inventory, and because they offer a one-stop-shop solution for advertisers looking to buy both Google search advertising as well as open display advertising, which as well as offering cost savings allows advertisers to engage in cross-channel advertising. They are also significant barriers to entry in the DSP market.”

“239. Access to the advertising demand that flows through Google's DSPs is important to publishers, as increasing the volume of bids increases the level of competition for their ad inventory, which in turn increases the prices they are likely to receive and reduces the risks of inventory going unsold. As a result, Google's DSPs are generally regarded by publishers as a ‘must have’ source of advertising demand.”

31. Mr Patton submitted that it was necessary to pay attention to the detail of the requests which went far beyond what was necessary to address the allegation that access to advertising demand via Google Ads and DV360 were “must haves” for publishers. For instance, he submitted that research into [REDACTED]. In reply, Mr Facenna explained the relevance of these documents to the pleaded issue as follows:

[REDACTED]

32. We accept Mr Facenna's submissions. In our judgment, all of the documents in category 5 are relevant to the allegations set out in the Claim Form, §§93(3) and

239. The CR has specifically pleaded the CMA's findings in relation to the significance of [REDACTED] and the category 5 documents formed part of the disclosure to the CMA and upon which it based its conclusions. Whether or not those findings are relevant and admissible themselves (and we consider this issue in more detail below), they provide clear support for the submission that the documents are relevant. Finally, category 5 consists of only [REDACTED] documents in total and all four types of document are relevant for the reason which Mr Facenna gave, namely, that they provide objective evidence of [REDACTED] importance.

*(f) Category 6*

33. The second category of [REDACTED] documents, category 6, consisted of up to [REDACTED] internal documents relating to [REDACTED]. Mr Facenna also pointed out that these documents were taken from the disclosure to the EC and he took us to the EC Decision to show what reliance it placed on Google's internal documents and strategic decision-making. Mr Patton disputed the relevance of all of these documents and he emphasised the fact that [REDACTED] is mentioned only once in the Claim Form and then in a footnote. We consider that the category 6 documents are relevant to the CR's pleaded case and for the same or very similar reasons to the category 5 documents. They provide clear and objective evidence of [REDACTED] importance.
  
34. Mr Patton submitted as a fall-back position that Google was prepared to carry out a relevance review for categories 1 to 5. We do not consider that to be appropriate given that Google has taken a stand on the relevance of these categories to the pleaded issues. If the reviewers are instructed that documents relating to [REDACTED] are not relevant to pleaded issues, it is difficult to see what purpose such a review would serve. Moreover, now that we have decided that the documents in category 6 are relevant, we see no reason why they should not disclose them all. We will, therefore, order disclosure.

## C. FURTHER DISCLOSURE

### (1) The DR and EDQ

35. Mr Facenna invited the Tribunal to make an order for the CR to raise any questions about the Disclosure Report (**DR**) and Electronic Disclosure Questionnaire (**EDQ**) and for Google to respond to them. Mr Patton opposed such an order on the basis of Mr Frey’s evidence that the parties should correspond in the normal way and that no order was necessary. We prefer Mr Facenna’s submissions on this issue. There is no hardship to Google in requiring it to respond and we take the view that it is time for the Tribunal to exercise its case management powers more actively and to impose some discipline. Subject to slippage in the dates, we will make an order in the terms of the CMC3 Draft Order, at §§20–21.

36. Mr Facenna also asked the Tribunal to make an order for the CR to set out any requests for further disclosure based on the DR and EDQ and for the issue to be resolved by the Tribunal at the next CMC (**CMC4**) if the parties could not agree them. Mr Patton did not object to these directions in principle but wanted to qualify the wording to “necessary, reasonable and proportionate additional disclosure” and to require the CR to justify disclosure by reference to “the materials already disclosed by the Defendants”. We prefer and adopt the CR’s wording. Google’s wording appears to us to provide yet further opportunities to dispute the disclosure process in what is rapidly becoming trench warfare. We will make an order in the terms of the CMC3 Draft Order, §§22–23 (excluding Google’s proposed amendments).

### (2) The Confidential EC Decision

#### (a) *Background*

37. On 5 September 2025 the EC handed down its decision relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the European Economic Area (**EEA**) Agreement (Case AT.40670: Google – Adtech and Data-related practices) (the **EC Decision**). The EC stated

that it considered that Google was or had been abusing its dominant position in the EEA-wide market for programmatic ad buying tools for the open web and abusing its dominant position in the EEA-wide market for publisher ad-servers for online display advertising.

38. The EC Decision was heavily redacted to preserve not only the confidentiality of Google itself but also the confidentiality of third parties, and on 15 January 2026, the EC published a provisional non-confidential version. The CR now asks the Tribunal to give directions which are intended to lead to the disclosure of a confidential version (the **Confidential EC Decision**) from which the passages redacted from the public version have been removed (except where third parties have raised objections and those objections have been accepted by the CR or upheld by the Tribunal itself). The CR's proposed directions provide that the Confidential EC Decision would be designated as Confidentiality Ring Information.

*(b) The evidence*

(i) Streatfeild 4

39. Mr Streatfeild described the original EC Decision in Streatfeild 4 and he gave evidence that although the redactions were extensive Google had refused to provide a copy of the Confidential EC Decision and summarised the objections which it had raised. He also gave evidence that the Confidential EC Decision is highly relevant to the issues in these proceedings and that it is a single document readily available to Google. Finally, he stated that it will “also allow the CR to more effectively deploy its TAR and AI tools during its review of Google’s disclosure, leading to a more time- and cost-efficient review”: see Streatfeild 4, §30.

(ii) Frey 1

40. Mr Frey gave evidence that disclosing the Confidential EC Decision required extensive consultation with third parties. He gave evidence that he understood from Google’s external advisers in the EC proceedings that approximately [X]

parties submitted responses to the EC during the investigation and that Google does not have all of their contact details. He also argued that it was inadmissible and not necessary as a route map to Google’s existing disclosure and that the CR had other guides such as the Explanatory Note. Finally, he also gave evidence that the decision was not required to train the CR’s TAR and AI tools and, indeed, that it would be positively harmful:

“First, relying on an inadmissible document to ‘train’ AI and TAR models risks embedding irrelevant or inadmissible biases into the entire workflow, undermining the reliability and accuracy of the subsequent output and ultimately the integrity of the review process itself (thereby increasing, rather than decreasing costs).”

41. Finally, after making a number of legal arguments and at some length, Mr Frey then gave evidence in response to the CR’s proposal that within seven days of CMC3, Google should disclose a version of the EC Decision with Google-only redactions removed. He argued that this was not reasonable or proportionate because Google “cannot definitively isolate third-party redactions from redactions applied for other purposes” and that “Google’s own redactions included redactions over third party information”.

**(c) *The submissions***

42. Mr Facenna and his team summarised the effect of Mr Streatfeild’s evidence in their skeleton argument. Mr Facenna also explained the CR’s position in the following passage from his oral submissions which captured the essence of the CR’s case:

“The reason why this document really matters is to make the disclosure that we have usable. I can give you some concrete examples of this. You might recall that the pre-existing disclosure, which you have already ordered to be provided, essentially includes the material that was provided to the European Commission. So we our understanding is that we already have most of the material that the Commission would have relied on, or would have had access to. The confidential, the basic points, the public version of the decision is extremely heavily redacted. I’ll give you, in a minute, an example of that. The documents the Commission relies on; what it says about those documents; what the documents establish; what the documents really are: those are redacted effectively in the public version. So one needs the confidential version to identify both what these highly relevant documents are within Google’s production, to understand their significance, and then also to identify gaps in the material that we have already had disclosed to us. The other aspect of this is that this is currently the only well, certainly the most important resource

which we'll be able to be used to train the AI models, which we are then relying on to be able efficiently to go through the currently three million, likely to be more, documents, which we need to get through in order to obtain a sensible subset of highly relevant documents.”

43. Mr Patton and Ms Simonsen argued that it was “wrong in principle” to order disclosure of the Confidential EC Decision for the purpose of increasing the efficiency of its TAR and training its AI tools. They also argued that the process of notification and review would be time-consuming and costly because the redactions included not only matters covered by third-party confidentiality but also Google’s without prejudice privilege and its “*Pergan*” rights (Case T-474/04 *Pergan* [2007] ECR II-4225, EU:T:2007:306): see *Emerald Supplies Ltd v British Airways plc (No 1)* [2015] EWCA Civ 1024, [2016] Bus LR 145. They also relied on the fact that the EC Decision was inadmissible under the rule in *Hollington v Hewthorn* [1943] KB 587 and distinguished a number of Tribunal decisions in which disclosure of EC decisions had been ordered on the basis that they were follow-on claims.
44. In his oral submissions, Mr Patton focussed on the argument that the Confidential EC Decision would provide a route map through disclosure. His submission was that Mr Facenna and his team had identified a number of other either larger or smaller scale maps at earlier stages of the proceedings and that it was not open to him to argue that an additional map was required to navigate the same terrain:

“We do submit that, having received all of those materials on that basis, it’s not really open to the class representative now to say, ‘Well, actually, none of that really assists and what we need is something else, which is the confidential version of the Commission decision’. The other justification they put forward is that this would reveal the reliance that the Commission placed on the underlying evidence, ie what did the Commission make of the underlying materials? We say that’s simply wrong in principle because the class representative has got access to the substantial disclosure that was given to the Commission. It’s got the actual materials itself. It’s got the non-confidential version of the decision. It’s going to receive the RFI responses to the Commission. It is in a position to consider those materials for itself and to decide how best to deploy that material to prove its pleaded case. It doesn’t need the commission’s analysis on top of that.”

**(d) Decision**

**(i) The law**

45. Redactions: It is important to remember that a party to legal proceedings in England and Wales is not entitled to withhold disclosure of a relevant document or to redact it on the grounds of confidentiality alone. A party may redact parts of a document which are privileged from production (subject to certain qualifications) and also parts of document which are irrelevant but not exclusively on grounds of confidentiality. In *Promontoria (Oak) Ltd v Emanuel* [2021] EWCA Civ 1682, [2022] 1 WLR 2004 the Court of Appeal summarised the applicable principles at §44 (and the paragraph references below are to the earlier and related decision of the Court of Appeal in *Hancock v Promontoria (Chestnut) Ltd* [2020] EWCA Civ 907, [2020] 4 WLR 100):

“44. For our part we consider that *Hancock* provides sufficiently clear guidance for future cases. Without attempting to re-write that guidance, it can in our view be summarised as follows:

(1) Where the court is called upon to resolve a question of construction of a contractual document, the document must in all normal circumstances be placed before the court as a whole: para 74. The starting point must always be that the entire document should be made available to the court: para 89.

(2) But it may be obvious that some parts, such as the details of third party transactions, can be omitted or blanked out. In such a case a clear explanation must be given of the nature and extent of the omissions and the reasons for making them: para 74. In general, irrelevance alone is not enough to justify redaction; there must be some additional feature such as privacy or confidentiality: para 74.

(3) Mere confidentiality can seldom, if ever, justify redaction, but provisions can be redacted if it is obvious that on any reasonable view the provisions in question would be completely irrelevant to the question of construction, and the reasons for taking that view are clearly and fully articulated by the solicitor for the party seeking that redaction: para 75.

(4) But redactions on the ground of relevance should either be forbidden or if permitted at all convincingly justified and kept to an absolute minimum: para 89. Except in the clearest of cases, the question of relevance to the process of construction is one that the court should be left to decide for itself: para 89.

(5) In a sentence, in all normal cases, the entire document should be placed before the court and if, exceptionally, any redactions are made, they should be fully explained and justified by the party making the redaction, with sufficient particularity for the court to be able to rule on the need for redaction if it is challenged: para 89.”

46. Although the *Promontoria* cases were concerned with the construction and effect of individual documents (and, in particular, whether they were or took

effect as assignments for the purpose of s. 136 of the Law of Property Act 1925) the principles set out above are of general application (although it is fair to say that the Court of Appeal accepted that not all cases are alike and that the context in which the redactions have been made is very important: see §45). The Court also considered that it was unsatisfactory for the issue to be raised for the first time at trial: see §47.

47. Where the document in question is an EC decision, a party to legal proceedings has the right to refuse to disclose confidential information on the basis that English law affords the same protection to that decision as is afforded at Community level to what are described as “*Pergan* materials” and which might incriminate the disclosing party in proceedings before a national court: see *Emerald Supplies* (above) at §§68–70. In that case, the Court of Appeal held that this right rested on both principle and regulation, namely, Article 4(3) of the Treaty on the European Union. In the passage from his oral submissions which we have quoted above, Mr Facenna conceded that Google was not required to disclose those passages in the decision which have been redacted because they refer to *Pergan* materials or without prejudice correspondence.
48. Admissibility: It was common ground that the factual findings made by the EC in the EC Decision were inadmissible as evidence in subsequent proceedings unless the relevant parties are bound by an estoppel: see *Rogers v Hoyle* [2014] EWCA Civ 257, [2015] QB 265 at [32] (Christopher Clarke LJ). But again it is important to remember that the justification for the rule is to preserve the integrity of the decision-making process (by ensuring that the decision is made by the appointed judge or tribunal alone rather than by a third party) rather than the rule against hearsay or the exclusion of expert evidence: see §§39–40.
49. Moreover, it does not follow from the fact that the individual findings of the EC are inadmissible that a party is not entitled to disclosure of an unredacted version of the EC Decision or, indeed, that the entire decision is inadmissible. In *Evans v Barclays Bank plc* [2025] UKSC 48, [2026] Bus LR 328, the Supreme Court accepted that a decision of the EC was admissible for other purposes. Lord Sales JSC stated as follows at §§158–159:

“158. The argument that counsel for Mr Evans put at the forefront of their submissions on admissibility is that, even if the rule in *Hollington v Hewthorn* or the principle underlying it would apply at a trial of proceedings before the Tribunal, it does not (and would not in the High Court) preclude reliance on findings made by another decision-maker for the purpose of defeating a strike-out or summary judgment application or otherwise demonstrating the strength of claims at an interlocutory stage. In support of this argument, reliance was placed on cases holding that a party could rely on findings of another court for the purpose of demonstrating that there was a serious issue to be tried: see *JSC Aeroﬂot Russian Airlines v Berezovsky* [2013] EWCA Civ 784; [2013] 2 Lloyd’s Rep 242, paras 115-116 ; *Sabbagh v Khoury* [2014] EWHC 3233 (Comm), paras 202-207; *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWHC 2437 (Ch), paras 17-57. In the last of these cases, at para 40, Mellor J concluded from the earlier authorities that:

‘there is a limited exception to the rule in *Hollington v Hewthorn* which is applicable in situations where the case is at a preparatory stage yet the court has to consider what evidence at trial there might be. ... [M]aterial (inadmissible at trial) can assist in identifying the evidence which can reasonably be expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage.’

159. We endorse this analysis save only to observe that reliance on findings of another decision-maker for the purpose of identifying evidence which can reasonably be expected to be available at trial is not inconsistent with the rule in *Hollington v Hewthorn* and is therefore not strictly an exception to it. Likewise, it is not inconsistent with the principle underlying that case to rely on prior judgments or reports in so far as they record evidence of relevant facts: see eg *Rogers v Hoyle*, p 307, para 49. It is only in so far as such material contains opinions on matters of fact (as opposed to recording evidence) that the material is inadmissible (unless it qualifies as expert evidence).”

50. Indeed, a court or tribunal may rely on an earlier decision in deciding whether to grant summary judgment. In *Wright v Chappell* [2024] EWHC 2052 (Ch), [2024] 6 WLUK 789 the Chair of the present Tribunal granted summary judgment against a company director based on the very detailed findings which he had made at an earlier trial: see [2024] EWHC 1419. He did so in reliance on an earlier decision of Hamblen J (as he then was), at §7:

“In support of that proposition I rely on the decision of Hamblen J (as he then was) in *Arts & Antiques Ltd v Richards* [2014] PNLR 10. In that case, the judge had to consider both issue estoppel and abuse of process but concluded that even if the relevant parties were not bound by the findings which he made because there was no issue estoppel or res judicata or abuse of process, he could nevertheless go on to order summary judgment. It is clear from the relevant part of the judgment that he approached that decision by asking himself whether there was any reasonable prospect of the relevant party disturbing the findings of the underlying arbitration award: see [48] to [59]. I respectfully adopt the same process in the present case and I ask myself whether Mr Chappell has any real prospect of disturbing the findings which I have made in relation to the individual claims made against him. It is necessary therefore for

me to go through the individual findings which I have made and ask myself that question in relation to each one.”

(ii) Google redactions

51. There is no dispute that Google has a copy of the unredacted Confidential EC Decision in its possession, custody or power and could disclose it. It also appears to be common ground that the EC Decision itself is a relevant document. We were taken to it a number of times in the course of the hearing and Mr Patton did not seek to argue that the entire decision was irrelevant or inadmissible for the purpose of deciding the present disclosure issues. In our judgment, therefore, the CR is entitled to disclosure of the Confidential EC Decision on the basis of the *Promontoria* principles (above) unless Google is able to give a clear explanation for the redactions. In particular, based on the passages to which he took us, we accept Mr Facenna’s submission that it is almost impossible to make sense of parts of the decision without the redacted material.
52. The CR accepts (as do we) that Google is entitled to redact the decision for *Pergan* materials, references to without prejudice correspondence and subject to material which is confidential to third parties (until, at least, they have been given an opportunity to challenge the disclosure of that material before the Tribunal). But we see no reason why Google should be entitled to redact the EC Decision to protect its own confidentiality and it offered none. We will, therefore, make an order in the form of the CMC3 Draft Order, §24.
53. In reaching this decision we have taken into account Mr Frey’s evidence that Google cannot definitively isolate third-party redactions from redactions applied for other purposes, and that “Google’s own redactions included redactions over third party information”. This is a justification for not requiring Google to disclose those passages which are redacted on the grounds that they contain material confidential to both Google and third parties or to give Google more time to carry out the exercise. But it is not a justification for refusing to order Google to do it at all. We will, therefore, make the order subject to a proviso that Google may redact those passages which protect the confidentiality of both Google and third parties or where there is a real doubt whether they do so. We will also consider any application for an extension of time.

54. But even if it is not appropriate to apply the *Promontoria* principles to the disclosure of those passages in the EC Decision which are redacted on the grounds that they protect the confidentiality of Google alone, we consider it reasonable and proportionate to order disclosure of the passages in the Confidential EC Decision which protect Google's confidentiality for the reasons which we set out below in relation to the redactions which protect the confidentiality of third parties.

(iii) Third party redactions

55. We reject Mr Patton's primary submission that the Confidential EC Decision is not necessary because there were other route maps available. We consider that the decision is both relevant and material to the issues which we have to decide in this action. Mr Facenna took us to various passages in the course of his submission in relation to the disclosure of the documents in Appendix 1 and this limited exercise was sufficient to demonstrate both the relevance of the EC Decision itself and also the difficulties which any reader will encounter without access to the unredacted passages. We do not consider it decisive in any way that the CR has been able to identify other documents of similar significance or that it has deployed them at earlier stages of the proceedings. Indeed, for all we know Mr Facenna would have made much more use of the EC Decision if Google had disclosed an unredacted version to begin with.
56. We also reject Mr Patton's related submission that the Tribunal should not order disclosure of the Confidential EC Decision because it is inadmissible and is required only for the purposes of TAR and training the CR's AI tool. We reject this argument because it confuses the means with the end (as it did in relation to the DOJ Investigation and Texas Investigation documents). The immediate use to which the CR's team will put the Confidential EC Decision is to train its AI tools to identify relevant documents in the course of the TAR. But the Confidential EC Decision will remain an important tool for Mr Facenna and his team when they come to analyse the individual documents upon which the decision was based or those which have been produced from the TAR. Indeed, it is likely that they will make extensive use of it when they come to prepare their submissions for trial.

57. Indeed, we see no reason why Mr Facenna and his team should not be entitled to rely on the Confidential EC Decision at trial even though the findings themselves are inadmissible. In *Evans*, the Supreme Court held that the findings of the EC were irrelevant and inadmissible and overturned the Court of Appeal's decision that they had "probative value". But it is not authority for the proposition that the EC Decision should not be deployed at trial or used as a forensic tool provided that the Tribunal is careful not to be relying on the findings themselves or to be influenced by them. For a case on this scale and involving complex technological issues, the Tribunal will need all the help it can get, and the Confidential EC Decision is likely to provide a very useful starting point. We make no final decision on this issue for present. But these considerations underscore the real relevance of the Confidential EC Decision.
58. We also reject Mr Frey's evidence that the use of the Confidential EC Decision will be positively harmful to the review of Google's disclosure. His evidence appeared to us to be based solely upon the fact that the findings are not admissible and, therefore, that the entire decision is irrelevant and unreliable. We consider these assumptions to be ill-founded or, more charitably, no more than a forensic flourish. As we have set out above, the rule does not exclude the findings of the EC because they are unreliable or irrelevant but because the rule preserves the integrity of the trial process. Moreover, Mr Frey appeared to us to be giving expert evidence although he does not have the first-hand experience or expertise to give evidence about the TAR which the CR is proposing to carry out or the AI tools which it proposes to use.
59. Finally, we do not accept that it is reasonable and proportionate to refuse disclosure because of Mr Frey's evidence that [X] parties submitted responses to the EC during its investigation. Whether or not this assertion is correct, we note that Mr Frey did not specify the number of third parties referred in the EC Decision itself or the number of passages which would require redaction. Indeed, it is unclear from Frey 1 whether Mr Frey or any members of his team have actually carried out the exercise of isolating the relevant passages which they would be required to uncover if we made an order for disclosure. Nor do they appear to have assessed what the practical consequences of producing the Confidential EC Decision will be or how long it will take.

(iv) Third party protection

60. Subject to one point, we are satisfied that the directions which the CR proposes in the CMC3 Draft Order, §§25–33, strike a fair balance between the interests of the parties to these proceedings and the interests of third parties. The one issue which we raise concerns the CMC3 Draft Order at §30. The Tribunal would be prepared to order Google to disclose the Confidential EC Decision without redacting those passages which protect the confidentiality of third parties if they have an opportunity to object but have chosen not to do so. As we have explained, confidentiality is not itself a justification for redacting a document on disclosure.
61. However, those third parties who are named in the Confidential EC Decision have the substantive right to insist that their own *Pergan* materials are not made public and we do not consider that it is reasonable or proportionate to order Google to disclose that information even if the third parties in question do not engage with the process. We consider, therefore, that Google should be entitled to redact those passages which protect the *Pergan* materials and also the without prejudice privilege of third parties (unless the Tribunal has made a specific order otherwise) and we have included a proviso to that effect in the CMC3 Order.
62. It may be that this issue is more apparent than real given that the Google parties (or related entities) only are named as the addressees of the EC Decision. But it may be that this will give rise to practical problems and that Google will be placed in a difficult position in trying to decide whether information set out in certain passages should be redacted. But whether or not this is a genuine issue, it is unlikely to arise for some time. We will, therefore, order the process of consulting third parties to begin and give Google permission to apply to the Tribunal in the event that it arises.

## **D. EXPERT EVIDENCE**

### **(1) Competition economics**

63. Three issues arose at CMC3 in relation to expert evidence. The first related to the CR's expert evidence in relation to competition economics: see the CMC3 Draft Order, §35. Mr Frey confirmed in evidence that Google did not object to the CR having permission to call two experts provided that they did not duplicate the evidence of each other and that they engaged with Google's experts in such a way to avoid additional or duplicative costs. In his oral submissions, Mr Facenna assured the Tribunal that the CR was not engaged in expert shopping. He also submitted that there should be no duplication, a clear allocation of topics, sensible management between the experts and cost discipline (although it was not necessary for the CR's experts to mirror Google's own "internal architecture" to which we refer below at §64). We accept those assurances and will make an order in the form of the CMC3 Draft Order at §35.

### **(2) Auction economics**

64. The second issue related to auction theory or auction economics. Google intends to call expert evidence from one expert in the field of competition economics and one expert in the field of auction economics to address auction mechanism design and the impact of auction models: see the CMC3 Draft Order, §36(b). (This is what Mr Facenna was referring to as Google's internal architecture, referred to above at §63.) The CR consented to an order in these terms and asked for permission to adduce expert evidence in reply, but provided that this evidence did not duplicate any expert evidence given by its competition economics experts. The CR was also prepared to consent to Google having permission to serve responsive evidence on any new issues raised in the report. Mr Facenna explained the rationale for the additional evidence as follows:

"But the auction issues that Google is proposing to address are very broad. You'll see, for example, the impact of auction models as well as the auction mechanism design. So we are seeking permission at this stage, if it's necessary, to serve responsive evidence from a separate auction expert, after we've seen Google's auction evidence. Really, that's designed as a safeguard to avoid unnecessary cost, if it turns out that actually our competition experts can deal with the issues, but it will also preserve equality of arms, if you like. It ensures

that we won't be prejudiced if the specialist auction evidence goes beyond what the competition economist can fairly answer. Google's raised a concern about that being a second bite at the cherry, but that can be answered by the safeguards that we've proposed, which would be that the responsive auction evidence again must be non-duplicative of the evidence that's given by the other experts. It has to be a proportionate volume, and there should be a provision for Google's auction expert to provide a reply, if necessary. That's all reflected in our proposed wording at paragraph 37. So that's why we asked for that. Essentially, Google's the party choosing to introduce specialist auction expertise. We ought to be able to see that case, we say, before we are committed to saying whether a separate responsive expert is needed. If it is needed, then Google will have the opportunity to reply to anything we say."

65. Mr Frey gave evidence opposing this application on the basis that it involved the CR having a second bite at the cherry. In his oral submissions, Mr Patton objected on the basis that the CR was really asking for permission to call three experts. He also submitted that it would not be possible to include the further evidence in timetable. He took the Tribunal to the CMC2 Order and submitted that there was insufficient time to serve a reply report before the expert meeting which is due to take place on 28 April 2028.
66. We accept Mr Facenna's submissions and reject Mr Patton's submissions on this issue. Google has requested permission to call an expert in auction economics and chosen to treat it as a separate discipline. The CR and its team does not necessarily accept that it is a separate discipline and we consider it reasonable for the CR to instruct its competition economic experts to address the two issues which Google has identified in the first place, but to have permission to call a specialist in auction economics if they are unable to do so. As Mr Facenna accepted, this is not an open invitation to the CR to call three experts, and the auction expert's report will limited to dealing with issues which Google's auction expert has raised and which the competition economics experts have been unable to address.
67. Furthermore, there is no reason why the auction experts need to meet at the same time as the other experts, and there is sufficient slack in the timetable for the CR to serve a reply report, Google to serve a rejoinder report and the parties to meet and prepare their joint statement. In particular, the CMC2 Order provides for a six-week gap between joint statements on 2 June 2028 and the pre-trial review on 24 July 2028. More to the point, these dates are still two years away and it is

highly unlikely that the timetable will remain the same between CMC3 and the pre-trial review or the trial. There is also ample time for the parties to accommodate the limited additional evidence which is contemplated in the CMC3 Draft Order at §37. We will make an order in those terms.

**(3) Industry and technology experts**

68. The third and final issue related to industry technology experts. The CR asked for permission to call an expert in ad tech technology and an expert in the online publishing industry. Mr Facenna submitted that this evidence was reasonably required for the following reasons:

“We are seeking permission to rely on an expert in tech technology and/or an expert in the online publishing industry. Again, from our side, that’s likely to be reasonably required by us and to assist the tribunal, because we’re in a situation where these are Google’s systems, their products, technology that they’ve designed. They understand the interaction between their own products and third party tools. As I showed you from some of the documents yesterday, they appear to have a lot of internal resource, which is monitoring the entire market and the position of their products relative to other developments in the market. Obviously, neither the class rep nor an individual class member can give that sort of comparable factual evidence that Google can rely on. Certainly, class members can’t give industry wide evidence. So that’s why, on our side, we will need expert assistance to understand the way in which the market operates, the interaction between Google systems and its rivals, and the commercial operation of the relevant markets. It’s not going to be replacing factual evidence insofar as there will be factual evidence. It’s essentially expert input needed to assist the tribunal in understanding the marketplace and this technology, and the industry context.”

69. Mr Facenna and his team referred us to a number of authorities where the Tribunal has given permission to call industry and technology evidence: see *Kent v Apple Inc* [2023] CAT 22 at §§16–20 (where the Tribunal permitted the CR to adduce evidence from experts in the app industry and in payment systems); *Merricks v Mastercard Inc* [2023] CAT 39 at §§13 and 24 (where Roth J allowed the CR to call an industry expert late and stated that the Tribunal would have given permission); and *Coll v Alphabet Inc* [2023] CAT 47 at §46 (where the Tribunal permitted each party to call six experts including experts in mobile security, payment systems and the development and use of apps and digital content). Mr Facenna and his team also relied on a number of orders made in other cases and the decision in *London & SE Railway Ltd v Gutmann*

[2022] EWCA Civ 425, [2022] ECC 26 where Green LJ expressed the view that the probative value of consumers themselves was of limited weight: see §62.

70. Mr Frey also gave evidence opposing this application on the basis that any evidence would be speculative and that the Tribunal should only give the CR liberty to apply for permission to call these experts at a later stage provided that the application identified the precise issues by reference to the statements of case as well as setting out the legal basis for the evidence. Mr Patton took the Tribunal to *Bulk Mail Claim Ltd v International Distribution Services PLC* [2025] CAT 84 where the Tribunal made such an order (although it was not as prescriptive as the one which Mr Frey urged on us): see §§10–21. In his oral submissions, Mr Patton made it clear that Google was not seeking to shut out the CR from giving evidence of this kind but submitted that the Tribunal should not give permission now because the application involved a “completely undeveloped proposal” which did not identify specifically the nature of the expertise or the issues which the experts would cover.
71. We consider that this issue is primarily one of timing and that we should grasp the nettle now. Mr Patton did not submit that the evidence of an ad tech technology expert or an online publishing expert would not be admissible as a matter of principle or that there were other reasons for refusing permission altogether. We are also satisfied that this evidence is reasonably required for the determination of the issues in the proceedings even though the CR has not yet produced a detailed list of issues which the expert should address.
72. The authorities to which we were taken demonstrate that the Tribunal is increasingly prepared to admit industry and technological evidence in complex cases like the present case (despite some reservations expressed in *Bulk Mail*). Furthermore, given Google’s own internal expertise, it is important to maintain a level playing field by giving permission to the CR to call experts who understand the relevant technology and can (if necessary) challenge the factual evidence of Google or to put in context. Finally, we consider that these experts are likely to be of considerable assistance to the Tribunal in explaining the relevant technology and its implications for the market.

## **E. CLASS MEMBER DISCLOSURE**

73. The final issue between the parties was whether the Tribunal should give directions for disclosure by class members (none of whom had opted in to the proceedings). In particular, Google sought an order for the CR to provide a list of those publishers who account for the majority of the claim value (the **Large Publishers**) and any other publishers from whom the CR proposed to adduce witness evidence or request data or documents for the purpose of disclosure in these proceedings (together the **Disclosing Publishers**): see the CMC3 Draft Order, §43. Google then invited the Tribunal to give directions for the CR to write to them requesting disclosure and for the CR to produce all data and documents which it received from them: see the CMC3 Draft Order, §42A and §§44–49.

74. On 5 May 2026, Dr Adrian Majumdar made an expert report in which he addressed the need for disclosure by class members (**Majumdar 1**). Annex A to Majumdar 1 consisted of three template tables for requesting data from publishers which were disclosed by Freshfields separately under cover of a letter dated 21 April 2026. Annex B to Majumdar 1 consisted of a detailed list of 15 questions a number of which had multiple parts. These annexes were also appended to the CMC3 Draft Order as **Appendix 2** and **Appendix 3** and we will refer to them as such. The text of the final version of the CMC3 Draft Order put before the Tribunal did not refer directly to Appendix 2 or Appendix 3 but they were put before us as the data requests which Google required Disclosing Publishers to answer (subject to further discussion and agreement between the parties).

### **(1) The Evidence**

#### **(a) *Latham 2***

75. Mr Patton addressed class member disclosure most fully in his oral submissions and we therefore focus on the material to which he took us. He took us first to the second report of Dr Oliver Latham dated 29 September 2023 (**Latham 2**) which Dr Latham made in support of certification. He estimated that there were

around 100,000 class members of which 20,000 would be making use of publisher ad servers and SSPs. He had made a preliminary estimate of damages of between £1.2 and £7 billion taking into account only sales through SSPs, and between £3.3 and £13 billion once potential umbrella effects were taken into account.

76. Assuming a class size of 20,000, Dr Latham had also made a preliminary estimate of damages per class member and arrived at a range of £97,000 to £356,000. He then stated that if the “usual 80/20 Pareto rule” applied the preliminary damages estimate for each publisher in the top 20% range increased from £386,000 to £1,425,000. He also explained in a footnote that the usual 80/20 Pareto rule assumed that “80% of the damages are incurred by 20% of the publishers” and that based on a class size of 100,000 this implied that 20,000 publishers suffered 80% of the aggregate damages.

**(b) Letter dated 21 April 2026**

77. In their letter dated 21 April 2026 Freshfields addressed class composition. They enclosed at **Annex C** a confidential list of Large Publishers by percentage of AdX revenue with a UK billing address. This list showed that a very small number of publishers accounted for approximately 80% of the revenue. They also stated that applying Dr Latham’s calculations, the share of AdX revenue could be used as a rough proxy for the proportion of damages which Large Publishers might incur. They stated that their analysis “indicates that an extremely small minority of the class may hold the vast majority of entitlement to damages, if any.”

**(c) Majumdar 1**

78. In *Majumdar 1*, Dr Majumdar gave evidence that disclosure from class members was necessary on a number of themes: (i) market definition and degree of market power held by any relevant market; (ii) the competitive effects of Google’s conduct (as pleaded in the Claim Form); and (iii) the scope for umbrella effects. He gave evidence that Google had only limited information in relation to “Header Bidding” and that he considered it necessary to obtain

information about it from publishers. He also gave evidence that the requests in Appendix 2 and Appendix 3 were necessary. He recognised that it was not possible to seek disclosure from the entire class but expressed the opinion that it was sufficient to receive disclosure from the largest publishers and any class members whom the CR intended to call to give evidence. He also expressed the opinion that the largest publishers were likely to record the relevant data and information.

79. The CR's legal team challenged Mr Majumdar's evidence on the basis that he was not necessarily the expert whom Google intended to call at trial. But Freshfields confirmed in correspondence (and Mr Patton also confirmed orally) that Google intended to call Dr Majumdar to give evidence but that no formal instructions had yet been given to him. We accept these assurances that Google intends to call Mr Majumdar to give expert evidence at trial. Mr Facenna also challenged Mr Majumdar's evidence on the basis that he had not reviewed Google's disclosure and, in particular, the Explanatory Note. Mr Patton accepted that he had only carried out a limited review of Google's disclosure at this stage. But it is clear from the recent correspondence and from Majumdar 1 itself that he had done a reasonable amount of preparatory work.

*(d) Starr 6*

80. On 11 May 2026 Mr Toby Starr, a solicitor and partner in Humphries Kerstetter LLP, made his sixth witness statement (**Starr 6**). Mr Starr rehearsed the evolution of this issue going back to certification and he criticised Majumdar 1. Like Frey 1, Starr 6 consisted largely of argument and it was difficult for the Tribunal to identify the relevant evidence which Mr Starr was able to give. He made the assertion that an order for class member disclosure might lead to class members feeling undue pressure either because of the sensitivity of the requests themselves or because they depend on Google's products and services and that they might be concerned about being seen to put themselves in direct opposition to Google's interests. He relied on the fact that the only opt-in class member had withdrawn from the litigation citing such concerns. But he gave no further evidence to support this assertion.

81. Mr Starr also stated that the CR did not necessarily accept that disclosure of documents from class members was the most appropriate and proportionate means of obtaining the necessary information. He then stated that the “parties will need to give thought” to a number of alternative methods of capturing information such as survey evidence. However, Mr Starr’s statements were not supported by any expert evidence or any documents from which the Tribunal might have drawn the inference that this evidence would be more reliable than evidence directly from class members.

**(2) The law**

**(a) Rule 89(1)(c)**

82. Rule 89(1)(c) of the Rules confers an express power upon the Tribunal to order disclosure to be given “by any represented person to any other represented person (including a person who is within a different sub-class), the class representative or the defendant.” Mr Patton contrasted r. 89(1)(c) with r. 63 which confers power on the Tribunal to order disclosure by a person who is not a party to the proceedings. Mr Facenna and his team did not argue that class members who had not opted into the class did not fall within r. 89(1)(c) and we consider that he was right not to do so. We accept, therefore, that the Tribunal has jurisdiction under the Rules to make an order for class member disclosure.

83. There was more of a dispute about the principles which the Tribunal should apply in the exercise of this jurisdiction. In *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd* [2023] CAT 71, Ms Bridget Lucas KC considered the status of class members in the context of disclosure. She stated that class members are not parties and not subject to the ordinary burdens which fall on parties to litigation (including disclosure): see §27(3). She also stated that it was intended to be the exception not the rule that class members should participate in a collective action at §27(4) and (5):

“(4) Class members are not parties, but nor are they ‘non-parties’ in the technical sense that that term is used in relation to, for example, disclosure. If the class representative is successful in the pursuit of the class members’ claim, the class members stand to benefit, ordinarily financially. The class members therefore occupy an area of middle ground where they ordinarily ought not to

be subject to the burdens of litigation but where, given that they are the ones intended ultimately to benefit from the collective proceedings, it may be necessary for them to participate, whether that be to produce documents or information, for example. However, that is intended to be the exception rather than the norm and will be subject to careful scrutiny by the Tribunal, which will be astute to ensure that the burdens on class members do not become such that the entire purpose behind the collective proceedings regime is undermined. That is a point of difference as between class members and non-parties: whilst third party disclosure will undoubtedly place burdens on the third party (and ordinarily the applicant for disclosure can be expected to provide recompense), the making of the request does not run the risk of undermining the policy reasons behind collective proceedings. A request made of class members runs the risk of doing so, in particular in ‘opt out proceedings’, if the alternative course is for the class member simply to opt out so as to avoid the hassle.

(5) For that reason, whilst the parties to litigation are generally to be permitted to prepare and frame their cases as they see fit, the Tribunal will exercise its supervisory jurisdiction to ensure that the interests of class members are adequately protected.”

84. Ms Lucas then referred to the Tribunal’s earlier ruling ([2022] CAT 53) that it was impermissible for the defendant to communicate directly with class members: see §28. She then continued as follows:

“29. It seems to me that, generally, if it is likely that there may be a need to contact class members to seek data, documentation or information that could also be raised at the certification stage, or at a CMC (whether the first post-certification, or a CMC specifically convened to deal with issues arising on disclosure), and directions sought. The directions that may be appropriate are likely to depend on the particular facts in dispute, but in general:

(1) one of the issues that the Tribunal is likely to wish to consider is who it is who should have the conduct of such communications as may be necessary: the class representative (which is in most situations likely to be the case) or the defendant.

(2) If a defendant wishes to correspond with the class members in order to understand the extent and nature of the data and documentation that class members may hold then the first step is to raise the issue with the class representative to seek to reach agreement. If it is not possible to reach agreement the defendants may approach the Tribunal for directions. Either way, the Tribunal must be informed as to what is proposed. Any direction that the Tribunal might give is likely to require the request to be communicated in simple and straightforward terms, so that a class member readily understands what it is that they are required to do, and can do so at minimal inconvenience and cost. It may be that this is best achieved by adopting a tailored ‘disclosure report’ approach.

(3) The Tribunal has recently made clear that it is the expert economist who is likely to be best placed to explain how it is envisaged the evidence will be developed to trial, and that the Tribunal is likely to have particular regard to what the expert says they need, and what is the most efficient and proportionate way to proceed to trial: *Boyle v*

*Govia Thameslink Railway Limited* [2023] CAT 63 at [9(7)]. That applies equally to any request for disclosure from class members.”

85. Finally, it is important to appreciate how Ms Lucas resolved the application for class member disclosure before her. She made an order for disclosure which was limited to a number of “large fleet owners” or “LFOs” and on the basis that there were a number of “evidential lacunae” which needed to be addressed. She also made the order on the basis that this was a limited carve out from the general principle (at §30–33, footnotes omitted):

“30. The balance that has been struck on the facts of this particular case is that (1) the Defendants are not prevented from contacting class members in the ordinary course of their business operations 11 and, subject to one important point of clarification, (2) the Defendants have general permission to communicate with the class members for the purpose of seeking to obtain evidence or information in relation to factual or expert issues in the proceedings without having to seek prior permission from the Tribunal or notify the Class Representative, but must seek specific permission from the Tribunal if reference is to be made to the possibility of a formal application against the class member.

31. The important point of clarification is this: the Communications Ruling and Directions Order both proceeded on the basis that the Defendants only contemplated contacting a limited group of class members, namely the LFOs. It ought to be obvious from what I have said that it is difficult to foresee a case where communication by the Defendants with all class members would be permissible. To be fair, the Defendants do not seek to suggest otherwise but, having had cause to scrutinise paragraph 5 of the Directions Order in relation to this application, it seems to me that there is a risk of its extent and effect being misunderstood. Given the fact that this is a new regime and all Rulings and Orders are inevitably scrutinised by those involved in other collective proceedings, I should clarify that paragraph 5 is intended to be limited in effect to the LFOs and, if necessary, the Directions Order will be amended to reflect that fact.

32. In this particular case, the LFOs are limited in number and likely to be large businesses. The Defendants have identified less than twenty they wish to contact. I am told by the Defendants that if a fleet size of over 20,000 vehicles is taken then those twenty LFOs are likely to account for approximately 40% of the estimated claim value. Further, it is clear in this case that there is an evidential lacunae which needs to be addressed, and the Defendants consider it is necessary to consider whether or not the LFOs have data and documentation that will enable them to address it.

33. Paragraph 5, understood in this context, seeks to strike a balance between the Defendants' ability to prepare their defence, and ensuring that the principles underpinning collective proceedings, as set out in the Communications Ruling, are not undermined. It is intended to represent a limited carve out from the general principle that communications with class members ought, in the ordinary course, to be directed through the class representative, and reflects the exercise of the Tribunal's supervisory jurisdiction.”

86. Mr Facenna relied heavily on Ms Lucas’s statement of principle that class member disclosure is the exception not the rule: see §27(4) (above). Mr Patton challenged this statement of principle on the basis that Ms Lucas made it on an incorrect basis, namely, that the defendant was not entitled to contact class members directly and this decision was later overturned by the Court of Appeal: see [2023] EWCA Civ 1471, [2024] Bus LR 490. Popplewell LJ described Ms Lucas’s approach as being that because the Rules impose a ban on communication, any departure from that presumed norm required justification by the least invasive approach and subject to careful scrutiny: see §21.
87. It is clear from the judgment of Popplewell LJ (with whom Butcher J agreed) that Ms Lucas’s subsequent decision on disclosure was before the Court of Appeal because he commented on it when addressing the practical consequences of their decision on communication with class members. He dealt with those practical consequences at §§99–101:

“99. At first sight the difference between the parties might be thought to be a relatively narrow one. The Ruling of the Tribunal, and MMCR’s case, recognises that communication might be justified in some circumstances and permitted by the CAT. The CAT has recognised that such communication is in principle appropriate in this case for the purposes of disclosure of documents by its order of 6 April 2023. Conversely, the appellants recognise that if there is no a priori restriction, the CAT can nevertheless impose a restriction by way of its case management powers in appropriate circumstances in individual cases. The dispute would therefore appear to be about what the default rule should be, rather than about whether a particular communication should be permitted in a particular case.

100. However the difference is of practical importance for two reasons. First the default rule affects what happens as a matter of timing, which may cause damage which cannot readily be undone by an order from the Tribunal which applies prospectively. This applies in both directions. If a defendant were to undertake a multi media campaign on the morning of the last day for opt-out, misleadingly telling class members that they had best opt out because the claim was hopeless and they would suffer disastrous costs consequences if they didn't, it is not easy to see that the damage could be fully remedied by any subsequent order: merely extending the opt-out date and ordering the defendants to publish corrective material would not do so. Conversely, if the class representative gives an interview about the claim which is prominently published in the media, which sometimes happens, the defendants should be entitled to respond. Business reputation may be at stake. It would unfairly prejudice the defendants if they had first to come to the CAT and have the terms of any response scrutinised, which might be a lengthy process, and subject its proposed response to objections from its opponent, the class representative. Damage to reputation is most readily mitigated by a swift response and the news cycle moves on quickly. The damage may have been

irremediably done. Moreover in such circumstances the journalistic aspect of article 10 rights would be engaged as well as those of the defendants.

101. Secondly, the decision of the CAT on the disclosure application illustrates that the Ruling has been interpreted as requiring intensive scrutiny of any permission to make a direct communication because it involves an exception to a general rule, and this is encouraged by what was said by the Tribunal at paragraph 29 of the Ruling that it is a 'process which should be conducted under the overall supervision of the Tribunal'. MMCR maintains that this is the correct approach. The Ruling therefore affects not only whether permission is granted but how applications for permission are to be approached. That has ramifications for a number of arguments advanced by Ms Demetriou for the appellants as to the practical consequences of the Ruling."

88. Mr Facenna submitted that the fact that Popplewell LJ commented on the disclosure decision at §101 without adverse criticism shows that the Court of Appeal accepted that it was correct. We do not agree. It is clear from the passage that the Court of Appeal considered that the question whether a defendant is permitted to communicate directly with class members has a direct and practical consequence for disclosure issues. Once it is accepted that the Rules do not impose such a prohibition, the justification for treating an order for class member disclosure as an exception falls away. Indeed, Popplewell LJ returned to the question of disclosure at §108:

"108. My conclusion so far as practical consequences are concerned is that whilst there are potentially unsatisfactory consequences on both sides' case, there are three aspects which militate against the implication contended for, which, it is worth re-emphasising, must be a necessary one. The first is that it is likely to inhibit a defendant's ability to conduct its defence, and thereby operates unfairly, an unfairness which is not remedied by the ability to seek permission from the CAT which involves having to forego legal privilege. The second is that it may unfairly interfere with a defendant's legitimate interests in the normal conduct of its business, and the normal course of business of class members. It might be said that each of these could be avoided by a careful case management approach by the CAT towards the applications for permission, so as not to require disclosure to the class representative in anything more than a generic form, and/or the use where appropriate of confidentiality clubs with which the CAT has plentiful experience. But that has not been the experience of the application of the Ruling in this case, which has treated the implication in the Rules of a prima facie restriction on all communications as requiring detailed scrutiny by the tribunal itself (and therefore disclosure to the class representative of the scrutinised material) if any departure from the restriction is to be allowed. Further, if the application for permission were framed in such generic terms as to avoid the problem (e.g. we wish to seek some disclosure of documents from some class members) it would not enable the CAT to determine whether a departure from an existing prohibition implied in the Rules is justified. I am not persuaded that the adverse practical consequences of the Restriction can be avoided in this way."

89. Finally, Mr Patton relied on *Evans* (above at §49) and certain comments made by Lord Sales JSC about class composition. In particular, he relied on Lord Sales’s statement that it was difficult to see why large financial institutions with substantial claims should be permitted to proceed by way of opt-out proceedings, at §§122–124:

“122. According to the Tribunal’s assessment of the evidence in the present case (at para 381 of the judgment), there is a group of financial institutions and fairly large commercial entities, likely to be sophisticated potential litigants, which have allegedly suffered what on average are significant losses. There is also a very large number of individuals and smaller entities who have allegedly suffered loss but only in very small amounts. There are members of the former group who, given their sophistication and the potential size of their claims, would be in a position to bring claims on an opt-in basis, if they so chose. It could be inferred from their unenthusiastic reaction to efforts by Mr Evans and his solicitors to interest them in bringing proceedings that, for reasons of their own, they did not wish to participate in such an action. As regards the latter group, the Tribunal accepted, at para 381(10), that it would not be practicable for them to pursue opt-in proceedings. Their claims will be small, they may well not realise that they have a claim because they made a few FX trades many years ago and, if they know that in theory they have a claim for a very small sum of money, they may not think it worth the trouble to pursue it.

123. In the light of its assessment of the composition of the class, the Tribunal majority stood back and made the overall assessment which was required. It concluded that it should not allow a sub-class of persons whose total claims were by value a tiny fraction of the aggregate claim to alter their conclusion on practicability. ‘That would be to allow the tail to wag the dog’: see para 381(10).

124. It is difficult to see why the financial institutions and large entities with substantial claims should be allowed to proceed by way of opt-out collective proceedings. The additional leverage that this would give them cannot be justified having regard to their particular circumstances. The Tribunal was entitled to conclude that they should not be permitted to bolster their position by pointing to and bundling themselves together with another group of potential claimants with a different profile who, for quite separate reasons, are not able to bring their claims. It would certainly not be appropriate for the Tribunal to order opt-out proceedings simply to give the large commercial operators the advantage arising from the expectation that the smaller entities for whose benefit the opt-out proceedings are supposedly being brought will increase the overall award of damages but will not ultimately come forward at the end of the day to claim their share of the award.”

90. It is unnecessary for us to reach a final conclusion on this issue because the directions which Google proposes in the CMC3 Draft Order follow the guidance which Ms Lucas set out in her decision at §27 (above at §83). Indeed, it is apparent that the directions which Google proposes are in some ways more limited than in *McLaren* because the Tribunal had already permitted the

defendant to contact class members for the purpose of evidence gathering in its communications ruling: see §30. In the present case, Google is not seeking to communicate directly with class members (other than, perhaps, in the ordinary course of business).

91. Furthermore, we are not satisfied that when she described an order for class member disclosure as the exception not the rule, Ms Lucas was intending to lay down a principle that there must be a truly exceptional basis for disclosure before such an order can be made. Rule 89(1)(c) is not qualified in this way and this is not the way in which she herself exercised this case management power: see §§30–33 (above at §85). We understood her to mean that the fact that class members occupied a middle ground meant that it was necessary for the Tribunal to adopt an exceptional process in scrutinising and supervising the disclosure process. Indeed, this appears to have been the way in which the Court of Appeal understood her ruling: see §101.

92. But, if it was necessary for the Tribunal to be satisfied that there are exceptional grounds for disclosure, then she clearly considered the composition of the class and the limited number of LFOs from whom the defendant was asking for disclosure to be sufficiently exceptional to justify a limited carve out from the general principle: see §33. This conclusion is also supported by the reasoning in *Evans*. Large commercial organisations who stand to gain substantially from collective proceedings and who have the most “skin in the game” must be expected to engage with the process more fully than the smaller entities for whose benefit opt-out proceedings have been brought and certified.

### **(3) Application**

#### ***(a) Large Publishers***

93. Mr Facenna challenged Google’s claim that the Large Publishers listed in Annex C are likely to recover 80% of any damages award or that they provided a reliable proxy to any extent. He submitted that the list did not include those publishers who used other SSPs and it ignored entirely the umbrella effects on other categories of sales. He placed particular reliance upon Dr Latham’s

evidence in Latham 2 that the umbrella effects could increase the award of damages by almost double, that there was a long tail of small publishers and that they were more likely to benefit from recovery based on the umbrella effects of Google's conduct.

94. We reject those submissions. Although the Large Publishers in Annex C have been identified by reference to AdX revenues and by billing address, we consider that to be a reliable proxy for the recovery of direct damages. Furthermore, even if the direct damages are limited to 50% of any overall award, the Large Publishers in Annex C are likely to recover approximately 40% of those damages and Ms Lucas considered this sufficient to justify class member disclosure in *McLaren*. The primary justification for requiring Large Publishers to give disclosure is that given in *Evans*: namely, that they have skin in the game. As Mr Patton submitted, if the claim succeeds, all of the Large Publishers stand to recover substantial sums of damages and up to £1.4 million based on Latham 2. It is reasonable to expect them to engage with these proceedings and to engage with them now.
95. Finally, the identity of the class members from whom the CR will be required to submit disclosure requests is not set in stone. Google's proposed directions provide for the parties to reach agreement on the Disclosing Publishers: see the CMC3 Draft Order, §§43–47. The CR has had more than sufficient time to identify those class members from whom it intends to seek disclosure and, possibly, to call them to give evidence. As Mr Starr accepted in Starr 6, Dr Latham identified the need for voluntary disclosure from class members at certification and the CR indicated that it would put proposals before the Tribunal at CMC3. However, it did not do so and we do not accept the justification given by Mr Starr, namely, that it was necessary to review the Google disclosure first.

**(b) Necessity**

96. Mr Facenna and his team launched a sustained attack on Dr Majumdar's evidence both in their skeleton argument and in oral argument. They submitted that Google had not provided him with adequate information to decide whether disclosure was necessary from class members and, in particular, that they had

not provided him with the Explanatory Note and he had not reviewed the Pre-existing Disclosure. Mr Facenna also provided us with an example of the sophisticated materials which Google has produced in disclosure and which are directly relevant to the behaviour of publishers in the market. He took us to two internal presentations dated May 2017 and Q1 2018 in which Google carried out a detailed analysis of header bidding (which was a rival bidding process).

97. Although there was substantial force in Mr Facenna's submissions, we accept Dr Majumdar's evidence that it is necessary for class members to give disclosure. He is the expert whom Google intends to call at trial and it would be unreasonable for the Tribunal to reject his evidence on this issue at this stage or to constrain the evidence upon which he wants to rely. Moreover, as we have pointed out above, Dr Latham clearly contemplated that it would be necessary to obtain voluntary disclosure from class members in Latham 2. Finally, it seems to us that the question whether the evidence of publishers (which may be subjective or anecdotal) provides reliable evidence upon which the experts and ultimately the Tribunal can safely rely is an issue of principle which can only be decided at trial. We consider that it would be unjust to exclude evidence from publishers at this stage. We are, therefore, prepared to make an order for class member disclosure in principle.

*(c) Undue pressure*

98. We attach little weight to Mr Starr's evidence that class member disclosure will place "undue" pressure on individual class members since his evidence was not based on any inquiries or consultation which the CR had carried out. We accept that individual class members who are chosen as Disclosing Publishers may feel under some pressure because of their existing commercial relationships with Google, but that can often be a feature of litigation and we do not consider that the Large Publishers are deserving of any special protection. We do not consider, therefore, that this is a reason to refuse disclosure.

*(d) Directions*

99. As we stated in oral argument, we have concerns about the length and complexity of Appendix 3. However, we are prepared to make an order in the form of the CMC3 Draft Order, §42A, requiring the parties to agree the scope of the disclosure requests to class members, and also to give the directions set out in the CMC3 Draft Order, §43–46, requiring the parties to agree the list of Disclosing Publishers. If the parties are unable to agree the form of the disclosure or data requests and the identity of the Disclosing Parties, we have included a provision in the CMC3 Order for the parties to apply for a short hearing at which the Tribunal will settle the form of the requests and the identity of the publishers. We will also give directions in the form of the CMC3 Draft Order, §§47–49 within 21 days of agreement in relation to the Disclosing Publishers and the disclosure requests (or their determination by the Tribunal).
100. We make it clear that if the parties are unable to reach agreement on the Disclosing Publishers and the disclosure requests, the Tribunal will adopt a robust approach to the determination of these issues if a hearing becomes necessary. The parties cannot expect the Tribunal to re-write the disclosure requests or identify alternative publishers. The parties may expect, therefore, the Tribunal to adopt the proposals of one party or the other. It is in the interests, therefore, of both parties to adopt a reasonable and cooperative attitude and to reach agreement on these issues.

**F. DISPOSITION**

101. We enclose the CMC3 Order (a revised version of the CMC3 Draft Order). In general terms, we have pushed all of the time limits in the CMC3 Draft Order back by 21 days to accommodate the time taken to hand down this decision. We have also made the modifications to the CMC3 Draft Order mentioned in §§61 and 100 (above). We invite the parties to agree to the CMC3 Order in this modified form or, if they propose further modifications to it, to set them out in writing as soon as possible.

The Honourable Mr Justice Leech    John Alty  
Chair

Dr Maria Maher

Charles Dhanowa, CBE, KC (Hon)  
Registrar

Date: 24 June 2026