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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1589/5/7/23(T), 1424/5/7/21(T), 1596/5/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

22nd June-31st July 2026

Before:

The Honourable Mr Justice Roth
Dinah Rose KC
Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

INFEDERATION LIMITED ("Foundem")
KELKOO.COM (UK) LTD & OTHERS ("Kelkoo")
WHITEWATER CAPITAL LIMITED ("Ciao")

Claimants

- and -

GOOGLE LLC & OTHERS

Defendants

A P P E A R AN C E S

Colin West KC (instructed by Hausfeld & Co LLP) on behalf of Foundem

Daniel Jowell KC, Sarah Love KC, Hugh Whelan & Gianna Seglias (Instructed by Linklaters LLP) on behalf of Kelkoo and Ciao

Meredith Pickford KC, Brendan McGurk KC, Julianne Kerr-Morrison, Emily Mackenzie, David Gregory & Alistair Holder Ross (Instructed by Herbert Smith Freehills Kramer LLP and Bristows LLP) on behalf of Google LLC & Others

Wednesday, 24 June 2026

(9.45 am)

(Proceedings delayed)

(9.49 am)

THE CHAIRMAN: Yes, Mr Pickford —— Mr McGurk, sorry.

MR MCGURK: Good morning, members of the Tribunal.

I indicated yesterday that in order to give a full answer to Professor Smith's questions and, Sir, to your point as to why it is problematic for aggregators or CSSs to dominate page 1 of the SERP I would need to go to the signals, and to do that properly I need to go into closed, and there is nobody left in the room who is not in the LEO ring, so I think we can go straight there.

THE CHAIRMAN: Right, so we will go into closed session and turn off the live stream for a short while and I assume that everyone here is within the LEO ring.

(In private)

Opening submissions by MR MCGURK (continued)

(In public)

MR MCGURK: Panda was launched in April 2011 in the UK, and, like Algorithm A, it was not targeted at CSSs, it applies to all websites. In short summary, Panda arose as a solution to the problem of content farms. This is summarised in Mr Cutts' statement at paragraph 134 to

135. For your note, it is {H3A/5/53}. The short point is that people were effectively gaming the system by adding new words to ensure that they were creating original content but sometimes it was incredibly poor quality and it was just about having non—duplicative content for the sake of it, it was not adding any value to users when they got there. By 2009/2010, because this strategy had been adopted, the SERP was being flooded with sites that were providing generic results on the basis that, entirely strategically, they were offering sufficient original content. So Panda was developed as part of that solution. There is a long discussion of it in Mr Kim's first statement, paragraphs 112 to 218 {H3A/2/26—50}. If we can go to paragraphs 114 and 115 at {H3A/2/26}. It is LEO, so I will just let you read those two paragraphs.

THE CHAIRMAN: Mr Kim's statement?

MR MCGURK: It is.

(Pause)

THE CHAIRMAN: How far do you want us to read?

MR MCGURK: To the bottom of 115.

Then, conscious that we are back in open, I was hoping to take the Tribunal just to recital 357 of the decision. It is {BA/2/87}. It is dealing with the signals on Panda and I would just invite

the Tribunal again to remind itself of those signals.

(Pause)

THE CHAIRMAN: You say the same query —— sorry, forgive me a moment.

There seems to me a difference between what is said by Mr Kim in paragraph 114 and the explanation at 357, which has an additional criterion. As they are both LEO Confidential, I cannot spell it out, but I think you can see the additional qualification that is in paragraph 357. It is in line four of paragraph 357, the words starting with "... when they ...".

MR MCGURK: I understand there is not an inconsistency as ——

THE CHAIRMAN: Which is correct?

MR MCGURK: Well ...

Yes, I think it is —— I do not think there is a difference, I think it is the same concept expressed in different ways. It may be that we set that out in the same note, but I understand there is no inconsistency there.

(In private)

(In public)

MR MCGURK: Yes, well, can we think about what Mr Kim says in light of the way you have expressed that and come back to you on that?

THE CHAIRMAN: I just want to know which it is.

MR MCGURK: We would have to go into closed if we wanted to continue the discussion.

THE CHAIRMAN: Can you put it in the note?

MR MCGURK: Yes, okay.

I have taken you here, just to finish on the decision, can we go over the page to recital 358 {B5/2/88}. It is not LEO. I just wanted to point out (c), the reference at the top to:

"... comparison shopping services being prone to being demoted by the Panda algorithm due to the characteristics inherent in those services."

One of the points that has been made and recorded by the Commission in the decision was in a blog post in relation to the introduction of Panda —— this is (c):

"... the ... algorithm for all English language [sites], which stated that: 'This update is designed to reduce rankings for low—quality sites — sites which are low—value add for users, copy content from other websites or sites that are just not very useful. At the same time, it will provide better rankings for high—quality sites — sites with original content and information such as research, in—depth reports, thoughtful analysis and so on'."

So the broad point is that there is going to be winners and losers from the adoption of the Panda

algorithm.

I raise that because I wanted to address one point that was made in opening, both by Mr Jowell and Mr West, which, with respect, is demonstrably wrong. Mr Jowell sketched a high level narrative that essentially went like this: stage 1, Google signed up lots of merchants while the PU was still free; it then introduced, at stage 2, Panda in April 2011, which he said "nuked" the comparison shopping market, and the phrase that my learned friend Mr West used was "decimated" the comparison shopping market; only then at stage 3, effectively, to switch to paid shopping in 2012 and effectively take the benefit of what was characterised as that three—stage strategy.

Now, that risks being misleading and I want to show you a document that is at {M2/852/1}. I will start at page 1 to show you the author. So this is a Google document entitled:

"Competitive Health of the Shopping Aggregation Space."

You will see it is written by Mr Millet:

"This note presents some empirical findings on the health of the shopping aggregation space."

This is 2015:

"I focus here solely on aggregators, therefore

adopting the Commission's worldview of the relevant locus for competition."

I wanted to show you page {M2/852/13}. It must start on page {M2/852/14}. So in the middle of the page, "Organic traffic evolution":

"Understanding the evolution of the shopping aggregation space.

"...

"As we've seen, 2010 was the best organic year on record for shopping aggregators —— even focusing on the 'Graph 7' set of losing sites ... The question is trying to understand what has happened since then."

Since then included the launch of Panda:

"Focus on the set of sites which were present in our dataset in 2010."

They then do a 2010 to 2014 comparison. The sites that fell into the three categories looked at over that period were:

"Winners: sites ... gain organic traffic;

"Losers: sites ... which lose organic traffic;

"New entrants: sites which were not present in the 2010 set but enter at least in part via organic clicks subsequently."

Then if we turn over {M2/852/15}, you will see that graph, and this is to the point about the CSS market

being "nuked"/"decimated". In fact, it was not at all. The total clicks were down by 19%, that is the drop from the first bar to the second bar between 2010 and 2014, the period in which Panda was launched, and the more nuanced story is that the better sites gained in traffic in that period and the poorer sites lost traffic. So Panda was working as intended, as recorded by that point made to the Commission at recital 358(c).

Can we finally go to page {M2/852/16} in this document. You see they say:

"It's ... worth unpacking this story further.

"The losers.

"In total 154 brands lost traffic. Table 8 shows the distribution of those losses. So for example, 4 sites in the loser set lost less than 5% of their 2010 organic traffic ... Overall, the distribution of losses is skewed at the top, with more than half of [those] losing sites experiencing losses north of 90% ..."

So you will see the breakdown by category of loss.

Then if you go over the page to {M2/852/17}, they are identified:

"... not all sites are equally significant ..."

First bullet:

"The top 3 losing sites [that period] (ciao, twenga and kelkoo) together account for just under 50% of

the total click loss experienced by aggregators between [those two years].

"The top 13 losing sites together account for over 75% of the total click loss experienced by aggregators between 2010 and 2014."

So in that period, Kelkoo and Ciao were the big losers, but the point about winners and losers in that period and taking this point conservatively and attributing this to Panda just for the sake of argument, the market was not "decimated" and the poor sites lost traffic and the good sites gained traffic.

PROFESSOR SMITH: Can you tell us what kind of sites were the sites that gained traffic, because this table is a table of losers?

THE CHAIRMAN: I think if we go to {M2/852/19} ——

MR MCGURK: Table 11.

THE CHAIRMAN: —— we have got a table of winners.

MR MCGURK: So I hope that answers your question.

Yes, and you see "idealo" appearing in the third column —— third row. So we simply say, and I will stop here because we are running considerably behind, but we say that the narrative that was sketched out that the market was "nuked", that the market was "decimated" by the introduction of Panda, is simply wrong.

I was going to address you, members of the tribunal,

on the shortcomings of the Claimants. I am still struggling for time and Mr Pickford has an awful lot to get through, so I may sit down there and let him take over.

THE CHAIRMAN: Yes.

Opening submissions by MR PICKFORD (continued)

MR PICKFORD: Members of the Tribunal, as I mentioned yesterday, what I am going to be doing in the second and final part of my submissions today is to address you, firstly, on the legal framework for abuse of dominance, and I am going to be going back in particular to the Commission Decision there. It has become apparent that is a really important document for us to understand properly and I am going to spend a bit of time on that, because there is evidently something of a divergence between me and my learned friend in our understanding of what has been found.

I am then going to draw those strands together and apply them to the Remedy. Hopefully I should be quite quick through that, because in many senses I have covered quite a lot of that in answering questions from the Tribunal in my opening remarks.

Then I am going to go on and do the same thing in relation to the counterfactual issue, briefly look at the law and then discuss it, and again, hopefully I can

be quite quick in the second part, because a lot of it, not all of it, but a lot of what I need to cover was initially covered at the outset. So that is the scheme of what I am going to be addressing.

So if we start, please, with the legal framework for abuse of dominance, I am going to address three topics: firstly, the abuses found in the Shopping decision and key parts of the decision in particular that go to the distinction between a general search service and a CSS; secondly, briefly, some other principles that concern competition on the merits; and then, thirdly, even more briefly, the rule in Hollington v Hewthorn.

So if I can start then with the abuse of dominance found in the decision. I am going to look at some key findings. I am then going to look briefly at how the Court of Justice frames those findings and then I am going to synthesise those strands together.

Can I just say, before I go through the decision, which I would like to start —— go through chronologically, I anticipate, from the questions that I had yesterday, that the Tribunal has a lingering concern in relation to paragraph 191, which my learned friend says sets out a definition of a CSS. I am going to come to it, but just so you know, so you are not

confused, you are thinking, "But hold on, it has all been defined at 191", my submission in relation to 191, when I get there, is going to be that is not a definition of a CSS, in particular so as to enable one to distinguish what a CSS does from what a general search service does. What it is is a very broad—level description of, broadly speaking, what a CSS is doing, but it is not there as a definition so as to define what a CSS uniquely does, and I will come on to explain why I say that. I say that that is the only reading of it that is consistent with the rest of the decision. But if the Tribunal could bear that in mind when I am beginning. I have it in mind and I will explain it when I get there.

So if I could take the Tribunal, please, back to the beginning of the decision and start at paragraph 8 with the definition of "Google Search". This is about Google, but Google obviously is the leading general search service, and when the Tribunal —— sorry, when the Commission then goes on to make ——

THE CHAIRMAN: Just one moment. I want to get it.

MR PICKFORD: If we go to {BA/2/8}, please, for the ... Yes, that is where we are.

So to save my voice and also because it is more efficient, can I ask the Tribunal to read just initially

paragraphs 8 through to 13.

(Pause)

Has the Tribunal done that?

THE CHAIRMAN: Yes.

MR PICKFORD: Thank you.

So a key point to draw out from this is that there is actually quite a lot of potential for confusion in terminology here as between "general" and "generic" and "specialist results" and "specialist services", but what paragraph 10 in particular makes clear is that a general search service such as Google's can return three different types of results. Those are all general search results in principle. One is generic results, so that is blue links —— I am looking in particular at paragraph 10 here —— second is specialist results, and third is ads. They are all part of a general search service. We know that must be true, because everyone agrees that ads are part of a general search service, but ads are not generic search results services, and equally, in the same breath, specialist search results are something that a general search service can provide. The reason —— and I will come on to develop this, but the reason why they are specialist is because, in particular, you need different technology to provide the best results for users, so you cannot just crawl

the web in the way that you do for blue links, you have to do things that are more sensible for the type of result you are trying to use.

MS ROSE: If you click on "News" or "Images", you will get a specialist ——

MR PICKFORD: Exactly. Exactly. Those are specialist results, because news —— it is no good just crawling. Indeed, I will come —— that is a very good example, if I may say so, because one of the things that I am going to show you is that Google had a problem with news. At the time of 9/11, people started Googling the Twin Towers, and it was not giving the news because it did not understand, because using its normal crawling, it was giving totally the wrong kind of results. It needed to develop a new and different form of responding to when someone is actually after news, and so it is specialist. But it does not mean that that is outside what a general search service does, it just means that it has to tailor its technology appropriately to deliver what it thinks is most useful to the user.

Again, one sees the same theme in paragraph 13, when the results of the two sets of algorithms that it has talked about, the generic and the specialist, come together on Google's general search results page. So that is a critical point to get absolutely clear at

the outset.

So the —— if we go to the next page, please, at paragraph 14 {BA/2/9}, we see an explanation of where generic results appear.

Then if we go on, we can pick it up at paragraph 23 {BA/2/10}, and we see in paragraph 23 an explanation of how specialised results appear.

Now, things get a little bit confusing here. In my submission, this is not the most expertly worded paragraph in the decision, because it says:

"... Google's general search results pages may also return specialised search results from Google's specialised search services."

Well, that is true if there is indeed a specialised search service. But when it goes on in paragraph 24 to explain that:

"Google operates several search services that can be described as 'specialised' because they group together results for a specific category of products ..."

What it cannot mean is that the mere grouping together of some similar, specialised results is therefore a separate service in a separate market.

Why do I say that? I say that for a couple of reasons.

Firstly, as we will come on and see later, we know

that the product results were grouped together and yet the decision is adamant later on that the product results are not themselves a CSS. So that is not the defining feature. Merely grouping some results together is not a defining feature of providing a separate service in a separate market. You have to look more fully, obviously, at the kinds of things that one always does when defining markets, and I am going to come on to that, because that is what happens later in this decision.

Another example would be the pictures. Merely grouping together some pictures does not necessarily mean that you have suddenly offered an entirely separate service in a separate market. For instance, as I will come on to show you, if you typed in "kittens", you could get some pictures of kittens and it might show you a group of different pictures of kittens together, because that is more helpful to you than just showing you one picture of a kitten. That does not mean that that is suddenly, just by doing that, a different service in a different market; that is still part of a general search service.

MS ROSE: There is a distinction between the specialised search results and the advertising and I am slightly confused as to where the boundary lies, because if you

can get inclusion in a specialised result by paying for it, if you can, how is that also not advertising?

MR PICKFORD: Well, it is advertising.

MS ROSE: Right.

MR PICKFORD: In my submission, that is another reason why it is wrong to think automatically that just because the PLAs have the qualities that we have considered in relation to them, that they inherently must be a CSS, because ads are allowed, certainly.

MS ROSE: Did this decision treat advertising and specialised search results as different things, though?

MR PICKFORD: Well, it does. In my submission, that is possibly —— I do not think what it is trying to do is —— or I submit that what it is not trying to do, is draw a hard distinction between ads on the one hand and specialised results on the other. I think it is just a convenient way of trying to introduce different ideas, because, plainly, ads can be both —— well, ads are never generic, because ads are never there by crawling. You always have to have taken a deliberate decision that you want to place your ad on Google's SERP in order to end up there, or someone has to have done that on your behalf. So, to that extent, ads are always going to be sui generis, they are always going to have a special means of getting on the page which is not crawling, and

then there is a question about how sophisticated that means is. So a less sophisticated approach is the text ad, and arguably a more sophisticated ad is the PLA. They are both ads.

Now, my submission is not, to be clear, that just because it is an ad, therefore it cannot be a CSS. I am not saying that. But what I am saying is the mere fact that it is an ad certainly does not make it a CSS.

MS ROSE: So actually, the categories of advertising and specialised search results are actually a Venn diagram, right?

MR MCGURK: Yes, I think that is a more analytically correct way of considering it than the description here. As I say, I mean, this is a very long decision, it is no criticism of the Commission, inevitably I am sure it was drafted by quite a few people. It has arguably some infelicities here and there in terms of its —— the absolute precision of the way in which it is structured. But when one reads it as a whole, one gets a very clear understanding of what they do mean and what they do not mean and I am going to show you that.

PROFESSOR SMITH: Can you help me to understand what —— the distinction this document is drawing between specialised results and a specialised search service, because as I understand, general search operates two

kinds of algorithms, searching through generic results and searching through specialised results and somehow returns both sets of results on the results page, on the general search results page and none of that is paid for, only the ads are paid for from different general search. But paragraph 25:

"Certain of Google's specialised search services are based on paid inclusion."

That implies that Google's specialised search service is different from the general search which includes a search of specialised results. So they are a version of general search that in an appropriate case triggers a specialised search, unpaid, but there is also something else called a "specialised search service" that can be paid for.

I am not —— there is nothing behind this question other than the fact that I am not clear where the line is between these things and what the distinction is.

MR PICKFORD: Professor, if may say so, that is a very pertinent question, because ultimately, these paragraphs are not very clear about that. In my submission, if you actually look at the title to all of this, it is "Specialised search results", so one thinks that that is all they are going to be talking about is specialised search results, which they have previously said in an

earlier section are all part of a general search service. What they then begin to veer into here is noting that there are certain types of results that are associated with particular types of services. So in the paragraph above, for example, one example would be Google Flights. Now, it might well be —— and I am going to come on to show you other bits of the decision that help guide one's analysis of this question —— it might be that Google Flights is in fact in a separate market and is therefore a separate service and therefore, if Google has put it on the page, then it in fact has put a separate service on the page. That is a possibility. I am not saying it is correct, I am saying that, hypothetically, that could be correct.

Hypothetically, it could be correct that Google put its own product specialist service sufficiently on the page that it put a CSS on the page. That could happen, in theory, if Google went so far as to include all of the necessary ingredients of a CSS and stuck them on its general search results page. As I will come on to show you, Google did not go that far, it stopped short, and what it did, and certainly what it does in the Remedy box, is not a CSS. What it is is part of a general search service.

There are other paragraphs in this decision which

help, I think, address your point, Professor. These paragraphs do not particularly help, because they are a little bit muddled, in my respectful submission, of the Commission's.

THE CHAIRMAN: But are they not just saying, going back to recital 10 {BA/2/8}, that when you put in a query in general search, it brings up results, there are three sources of those results: one is blue links, generic search; another is ads, and they explain ads as being —— coming through AdWords, that is what they talk about, the online search advertising results, so you can get AdWords ads; and then there may be results that Google has drawn from its specialist service, not that the specialist service is then on the —— in total on the general page, but it may be taking the result from the specialist service?

MR PICKFORD: Sir, that may be the correct interpretation. I would have to re—read it ——

THE CHAIRMAN: You say the specialist service is paid for, not paid for inclusion on the general search page but the specialist service may operate in a paid way of being paid per click if you go into the specialist service. That is what I think paragraph 25 is saying {BA/2/10} —— recital 25.

We are going to have to, at some point, take

a break, and it looks as though Ms Rose's live feed transcript has stopped. Mine is still going. So if ——

MS ROSE: It was the result of a rogue click, and now it will not let me back on because it refuses to accept that my memorable word is what I believe my memorable word is.

MR PICKFORD: We have all been there. I have that almost every day and I do not know why.

THE CHAIRMAN: Well, shall we take ten minutes now?

(11.04 am)

(A short break)

(11.15 am)

THE CHAIRMAN: Yes.

MR PICKFORD: Thank you, Sir.

Before I continue with the Commission Decision, my clients have drawn something to my attention that I am going to need to deal with on confidentiality. So there was a question from you, Sir, in the earlier session when we were not in camera. Obviously no criticism whatsoever intended, but inadvertently, there is a concern that something that you have said ultimately reveals something about some of Google's signals that should be just in the LEO ring. So what I am going to propose is that the section of the [draft] transcript —— I have got the relevant bits, just eight lines of

the live transcript, that the Tribunal orders that that is immediately put into the in camera bit. Then, if the Tribunal could also direct that anyone who heard the information be subject to the same restrictions that would apply if they were members of the LEO ring, which is that they are not allowed to use that information, because they are not signed up to the LEO ring.

THE CHAIRMAN: Yes, which do you want ——

MR PICKFORD: So it is [draft] page 28, and it is lines 1 ——

THE CHAIRMAN: This is ——

MR PICKFORD: Of the live [draft] transcript. I do not really want to ——

THE CHAIRMAN: Today?

MR PICKFORD: This is today, yes. This was during Mr McGurk.

THE CHAIRMAN: I am not sure I can go to [draft] page 28.

MR PICKFORD: I do not really want it to be brought up in front of everyone right now, because that will actually compound the problem.

THE CHAIRMAN: Yes. Oh, I see, yes. If you just give me the reference.

MR PICKFORD: Yes, so if I could ask that this does not come up, but the reference is [draft] page 28, lines 1 to 7 of the current live [draft] version.

It is obviously inferential, there was obviously no

direct reference to anything, but as you will have heard because it is (inaudible) many times, these signals are literally Google's Crown jewels, these signals are incredibly important, and their confidentiality, so we simply do not allow inferences to be drawn from information that should not be in the public domain.

THE CHAIRMAN: Will that question, or that clarification, be confidential?

MR PICKFORD: As I understand it, it is just the question.

THE CHAIRMAN: I see.

MR PICKFORD: Yes, because Mr McGurk says, "We will have to go into closed to answer that".

THE CHAIRMAN: Yes.

So I will direct that [draft] lines 1 to 7 should be removed from the publicly accessible transcript and should be treated as if they were —— had been heard in camera, therefore no reference or use can be made of them.

MR PICKFORD: I am very grateful. Thank you, Sir.

So back to my submissions.

We were at paragraphs 23 to 25 {BA/2/10] of the decision, and having had the opportunity to reflect on your comments, Sir, I respectfully agree that your interpretation is the correct one. All it is saying there is that some of the results will have been drawn

from a specialist service elsewhere. That is as far as it goes. It is not saying that the mere appearance on the SERP means that they are therefore a separate service on the SERP. You have to look into that question further.

THE CHAIRMAN: Yes.

MR PICKFORD: Obviously, as we well know, Google's shopping results are one such example of such results.

So if we could then please go to 166.

THE CHAIRMAN: Well, 26 is ——

MR PICKFORD: Exactly, 26 {BA/2/11} —— well, I am very happy to go there as well. I mean, that was the point I was just making. 26 gives Google's shopping service as an example of what it was talking about in paragraphs 23 to 25. That is quite right. There is then quite an extended section describing it, which we do not need to go through for my purposes for understanding the delineation between a general search service and the CSS.

So, with the Tribunal's permission, if we could go to recital 166 {B5/2/31}.

So this is in a section, if you look at the title: "General search services versus specialised search services."

So this was part of the Commission's analysis where

it was seeking to define the limits on the general search services market, which was the market that Google was dominant in, and there was an argument about that because Google were saying it is wide, it is very wide, it has got all sorts of things in, and the Tribunal were saying, no, it has actually just got this narrower set of things in it, and one of the things it does is compare general search services versus specialised search services.

If one goes on in —— well, one sees at the beginning:

"There is ... limited substitutability [it says] between general search services and specialised search services."

Then if we could pick it up at 172, because that is where it goes on to look at particularly Shopping {BA/2/32}, so that is the bit that we are most interested in.

So ——

THE CHAIRMAN: In 167 to 169 {BA/2/31—32}, it sets out some general criteria which distinguish a specialised service from a general search.

MR PICKFORD: It does.

THE CHAIRMAN: Then it goes specifically to Google Shopping.

MR PICKFORD: Yes, at 172 {BA/2/32}.

At 172, could I ask you to read from beginning:

"Regarding specifically Google's comparison shopping service ..."

And then the whole of that recital, please.

(Pause)

THE CHAIRMAN: Yes.

MR PICKFORD: So this is an important recital because we are beginning to get into here what are the distinguishing features of a comparison shopping service from just the mere presence of shopping results on a general search page, and the sorts of things that the Commission identifies as features of a comparison shopping service as compared to just general results are, for example: being able to break down a comparison by category, one sees that in the middle of the page; ordering by price, that is another feature of a CSS; using many search tools, being able to use those is a feature of a CSS. Another feature is pages that are filled with grids or list views of shopping results, again with filters, for example: price, size, technical specifications and different means of arranging and viewing items. Again, that is all —— those are all features of a comparison shopping service.

THE CHAIRMAN: Well, I do not think they are saying that, are they? They are saying this is a feature of Google's

CSS.

MR PICKFORD: Well ——

THE CHAIRMAN: They are not saying this is a necessary ingredient of a CSS.

MR PICKFORD: Well ——

THE CHAIRMAN: What they say is —— and different CSSs will have different features and that is no doubt one way they compete against each other.

MR PICKFORD: Well, Sir, I am going to disagree with that. My reason is this: what I do agree with is that you are entirely right that this paragraph is framed in terms of looking at what Google does. That is entirely correct, that is fair. But we have to remember that what this section is, as I showed you, this section is part of the market definition section. It is not defining Google's product, it is not defining Google's CSS, it is comparing general search to CSSs, and so it is clearly very relevant in that context, obviously ——

THE CHAIRMAN: It says there are four differences between general search, does it not?

MR PICKFORD: I beg your pardon?

THE CHAIRMAN: Four differences between general search ——

MR PICKFORD: Yes.

THE CHAIRMAN: —— yes? The first one is in 167 {BA/2/31} and the second one is in 168 and the third one is in 169

{BA/2/32} of which 172 is a sub—head, and then the final one I think is in 174 {BA/2/33} ——

MR PICKFORD: Yes.

THE CHAIRMAN: —— with sub—heads. Those are the four differences between —— that they rely on —— and this is a sub—part of the third difference.

MR PICKFORD: I think 1—7 —— yes, that may be right, actually ——

THE CHAIRMAN: No, no, it is all those four things together.

MR PICKFORD: Exactly ——

THE CHAIRMAN: This is just an illustration ——

MR PICKFORD: It is.

THE CHAIRMAN: —— of how Google describes its own service.

MR PICKFORD: So that is ——

THE CHAIRMAN: Namely, that they —— what they are saying is —— the point being is in the —— that the market and the development of the products show that they are different services.

MR PICKFORD: Yes. So my reading of this recital, Sir, is that, amongst other evidence, it is saying: and look at you yourselves, Google, look at the way you described these points. It is taking a point against Google on its own evidence, it is saying: look, you describe these as different.

THE CHAIRMAN: Yes.

MR PICKFORD: Here are the differences that you are prepared to admit to. That is yet another reason why we say that these are, in the context of comparison shopping, distinct.
MS ROSE: Is not the point you are making actually it is a sub—category of the fourth distinction? Because if you look at 174 {BA/2/33}, which is the fourth distinction between specialised and general search services, it says that they are "complements" even though the results may overlap.
MR PICKFORD: Yes.
MS ROSE: Then the second reason why they are described as complements is at 176, which is that:
"... specialised services offer certain search functionalities that do not exist ..."
I think that is your point, is it not?
MR PICKFORD: Well, I was going to come on to ——
MS ROSE: Right, but that is the link between the illustration at 172 and the ——
THE CHAIRMAN: Yes, that is right. Yes, I think that is a very fair way of putting it. 172 {BA/2/32} is effectively illustrative and then 174 through to 177 {BA/2/33} is actually —— that is really the nub of the key distinctions between search results provided by general search as opposed to specialised search

services, because ——
MS ROSE: Your reliance is essentially on 176 search functionalities.
MR PICKFORD: Well, I certainly rely on 176. I rely on all of those features from 174 through to 177. In my submission, this is an essential part of the decision, most of it is binding, and what it is is a clear recognition that there is an overlap, obviously, and I have never denied it, between what you might see on a general search service, such as when you see some grouped—together product results, and what you get if you actually go to a dedicated real CSS. As, Ms Rose, you correctly pointed out, 176 is critical in that respect in that the specialised search service offers functionalities which you do not get, or you do not get to the same extent, on the general search service. That is what we saw, yesterday, with that set of filters and ability to sort by criteria that all of the CSSs had and Google's general search page did not have.
MS ROSE: Interestingly, these are exactly the kinds of functionalities that Google's algorithms were not giving credit for.
MR PICKFORD: I am not going to address algorithms, because, firstly, Mr McGurk is our algorithm specialist, and secondly, I am very concerned that I do not know enough

about the confidentiality designations of the signals to do that safely, if that is —— if the Tribunal is content with that. But it may or may not be true.
In relation to the first point that is made in 175, that is another distinguishing feature, and again, we saw that yesterday, that a general search service is different from a specialised search service, such as a CSS. In that, if you go to a CSS, the only thing you see is just tonne of PLAs, basically, and a filter section on the left—hand side. That is it. As we saw, if you go to a general search service, you are going to get lots of little things, and you are not getting the full service of a CSS, but you are getting an organic result here; you are getting some questions about what do people like or what do people ask about Bialetti coffee makers; you are getting, since 2024, the product sites. That is a different experience and the whole idea of it is it is giving a sort of —— a snapshot to help the user then go on to find what they then want. This is an earlier stage in the search process.
At the risk of —— no, in fact, I am not going to repeat myself, I am going to come and make that submission later. I think it is better placed later.
It is probably worth looking at footnote 105, whilst

you are here. So the Commission says: well, our analysis is very similar to the German Monopolies Commission where they reached a similar conclusion. If I could just ask you to read at footnote 105 what that conclusion was.
(Pause)
So it is recognising that core overlap, the point that I have been making again and again, including, in that context, for products.
The Chair was obviously correct to point out that the paragraph that we began by looking at was talking about what Google did in terms of what Google's CSS looked like, but it is not just Google that offers those qualities. We saw all of the pictures that, for instance, showed Kelkoo doing exactly the same thing. For your reference, I do not really need to take you there right now, but Mr Stables, in his evidence, his first statement at paragraph 17, and the reference for future is {H1A/1/5}, he lists out what are the characteristics of a good CSS, and again, they correspond to the sorts of things that we have been discussing. He also includes, one of the things that he mentions as a characteristic of a good CSS, is product reviews and the ability to get more detailed information. That is something else that obviously has

come up on a number of occasions as a quality indicator in a CSS.

So if we could then go on to —— no, actually, sorry, just very briefly, one further reference to the evidence, and again, just for reference. The Tribunal may wish to look at some point at Mr Friedman's first statement at paragraph 80 to 81, and he contrasts the different philosophies that lie behind general search shopping —— general search results, including shopping, and a CSS, and the two paragraphs are at {H3A/7/22}. Just a further perspective.

So if we could go on, please, in the decision to recital 191, which is on {BA/2/35}.

So this is a description, underneath "The market for comparison shopping services", this is a very broad description of effectively what comparison shopping services enable you to do. What it is not is a statement which is seeking to uniquely define these qualities as qualities only of a CSS. So to provide a slightly silly analogy, it is a statement in the logical form of saying dogs are pets that are furry, they need feeding every day and they are often loved by their companion humans. All true, but not necessarily uniquely true of dogs, also true of cats. In this case, those qualities that we see in 191 are true of —— to

some degree, of a box of results, such as the Product Universal or the Shopping Unit, but we know, not just from the previous paragraphs —— recitals that I have been showing you, but also from recitals I am going to come on show you, that ——

Sir, I pause because I can see that there may be some confusion in the —— you are looking sceptical or confused about something I said, which is never a good sign for an advocate.

THE CHAIRMAN: Well, it just appears to be their market definition.

MR PICKFORD: Well, with respect, Sir, it cannot be what the defining unique qualities of a CSS are read consistently with the rest of the statement, and I will jump to the punchline and why that is, because if it were true and one can simply say, ah, well, all you need to be able to do is allow users to search and compare prices and characteristics, and you need to provide leads that link to the websites of merchant platforms, then depending on what it really means by "compare ... prices and characteristics", whether it is talking about using tools or whether it is talking about just in a very general sense, assuming that it is talking about it in a very general sense and not using specific tools, then I would accept that that applies to

the boxes.

But if you look at recitals 408 and 412, which I am going to come to in a moment, they state in terms that those boxes were not CSSs.

MS ROSE: Before we come on to that, if we look at 191, it is saying that:

"Comparison shopping services are specialised search services ..."

With the particular objective that is then set out there.

MR PICKFORD: Yes.

MS ROSE: So, therefore, would you say it is incorporating the definition of "specialised search services" that we were looking at between 167 and 176 {BA/2/31—33} and the various distinctions between a specialised search service, general search services identified in those paragraphs, and what it is saying is the comparison shopping service is a subset of the specialised search service as already explained?

MR PICKFORD: Yes, I think that is a very good point and I adopt it.

THE CHAIRMAN: That is, in a sense, made out, your last point, Ms Rose said, by the next sub—heading.

MS ROSE: Yes.

MR PICKFORD: I am sure this is clear, but just so that I am

clear about what I am adopting there. I am adopting that it is talking about —— when it is talking about specialised search services, it is talking about the separate services that were considered and addressed before from which sometimes results get taken and put onto the SERP. It is not talking about groups of specialised results on a SERP of itself. That is the point.

So if we then go on, please, to recitals 408 to 411 {BA/2/119—120}, this is a series of rebuttals to various arguments that Google was making and we begin at 408 that:

"... the Commission's case is not that the Product Universal was in itself a comparison shopping service. Rather, the Commission's case is that the positioning and display of the Product Universal because one means by which Google favoured its comparison shopping service."

So it can only be correct that, when we were looking at recital 191, it was not talking about the generality of any kind of service that satisfied the criteria, it was only talking about specialised search services as it —— as Ms Rose correctly says, that had already been effectively defined or it is referring back to earlier on in the decision. Otherwise this does not make any

sense because, on the Claimants' case, the Commission simply would not have said that. If they are right that all you need to do is just provide something that has the qualities of allowing you to compare and click through to a merchant, then recital 408 would not be in those terms, it would just say: no, I am sorry, but Google stuck its CSS on the page. That is not what it says.

We see —— if I could ask the Tribunal to read, if they have not got there already, the reasons that are given for that at recitals 409 to 411 {BA/2/120}.

MS ROSE: Are 408 and 412 simply repeated?

MR PICKFORD: No, 408 is about the Product Universal ——

MS ROSE: Ah.

MR PICKFORD: —— and then 412 is about Shopping Unit.

MS ROSE: Oh, I see. I see. It is the same point.

THE CHAIRMAN: The same point.

MR PICKFORD: It is exactly the same idea. I am asking you to look at the Product Universal first.

(Pause)

Is the Tribunal ready for me to make some submissions on this section?

THE CHAIRMAN: Yes.

MR PICKFORD: Thank you.

So it is all about providing a window or a conduit

into Google's CSS. The links take you through to Google's CSS and only Google's CSS. That is the problem that is being identified here. Indeed, Mr Goodrow, again, just for your note, in his evidence, he candidly admits that what the Product Universal was intended to do was to, in his words, allow a peek into the Google Search property. That is at paragraph 57 of his second statement, the reference is {H3A/6/15}. That was the heart of the problem is that, yes, it was allowing a peek through, effectively, but it was not allowing it to anyone else.

Then, at 412 {BA/2/120}, we see effectively the same analysis then repeated for Shopping Units, and it is a very long section and we do not have time to read it all, but the essence of the Commission's reasoning is the same. It is that the links that one gets in that Shopping Unit box are exclusively bound up with Google's CSS, and so that when one sees a PLA, either you end up going through to Google's own shopping search property, or you go through to merchants whose ability to be there was mediated solely through Google's CSS. If you are an alternative CSS, you have got no ability to get your merchants' ads into that box, that is the problem.

PROFESSOR SMITH: The click on a merchant site is of value to Google?

MR PICKFORD: Yes.

So that is the heart of the analysis that one sees in the next section.

Can I ask, if I may, the Tribunal, if I can move on to the next section of the ——

THE CHAIRMAN: But then there is, rather confusingly, what they say at 420 {BA/2/122}. There it is.

Yes, you can move on.

MR PICKFORD: Thank you. I do not think that 420 is really saying anything very different. What it is saying is, certainly from the merchant point of view, the point that is made there —— I believe it is at 420, it is certainly somewhere in this section —— is that if you are a merchant, if you say, "If you contract with Google, I would like my product ad to appear", you do not know whether it is going to appear on the standalone site and/or on the Google SERP. It could be in either place. So, from the merchant's point of view, there simply is not a distinction. I think what it is also saying is that, from a user point of view, there is some degree of presenting it as if they are the same thing, because it is the window. It is saying: here is the window onto what we can offer you.

But it obviously cannot be saying the CSS itself is on the page, because that would be contrary to

everything else.

THE CHAIRMAN: But they are saying they are presented together as part of one service.

MR PICKFORD: Yes. Yes.

So if we do then go to recital 538.

MS ROSE: So, if you like, one of the things that Google is selling to merchants as part of its shopping service is the ability to be featured in the Shopping Unit.

MR PICKFORD: Yes, exactly, and that is what was denied any rival CSS ——

MS ROSE: No other CSS can sell that to merchants.

MR PICKFORD: But they can today. So, today, what happens is Kelkoo can sign up a merchant and say, "We are going to give you traffic, here, let us do a deal, the traffic is going to cost X amount per click", say, and, you know, there might be some discussions about how much they are going to be sent per month, etc, to keep within budgets, but that could be the essential terms of that contract. They are not going to say necessarily where any of that traffic comes from. Then what Kelkoo can do is it can take that ad and it can stick it on its own site, it could stick it on some totally separate publisher site as another ad, or it can stick it on Google's box, to which it now has access in the same way as GSE, and get the click that way. That is the point:

that has now been opened up, when previously it was shut out of that.

So, at 538 {BA/2/178}, we see that there is a statement that:

"... the Commission does not object to Google applying rich features to certain results but to the fact that Google applies such rich features only to its own comparison shopping service and not to competing comparison shopping services."

So here, again, consistent with the theme that I have been developing throughout these submissions, the problem is not that the box is attractive and it has got nice links and you can click through to merchants, it is the fact that, when you do click through, you are only ever going to go through to a Google CSS merchant, you are never going to be afforded the opportunity to go through to a CSS signed—up merchant.

If we then go on, please, to 661, which is on {BA/2/226}, I believe, we come to two really core paragraphs. So, first:

"... the Commission is not preventing Google from applying adjustment mechanisms."

So what we are talking about there is the algorithms:

"The abuse established by this Decision concerns

simply the fact that Google does not apply these mechanisms in the same way to Google's comparison shopping service and competing comparison shopping services."

Why? Because as I said yesterday, there is a special place on the page that Google's CSS gets the benefit of the window where those algorithms do not apply. That is the problem.

Second:

"... the Commission is not preventing Google from displaying categories of specialised search results ..."

Just repeat that again, it:

"... is in the preventing Google from displaying categories of specialised search results, such as shopping results, in its general search results pages when it determines that they are likely to be relevant or useful to a query. The abuse established by this Decision concerns simply the fact that Google does not position and display in the same way results from Google's comparison shopping service [that get access to the box] and from competing comparison shopping services [that can only appear in text ads and generic results]."

At the risk of oversimplifying, obviously we have gone through a number of recitals that I say all make sense as a cohesive whole, but this particular recital

really goes to the heart of answering the Claimants' case, because what it says is it is perfectly okay, it is part of a general search service to have nice pictures, to have boxes of specialised product search results on your page. Obviously it is, because it would be very odd if something that is plainly very useful to the users, because users like them, they go and click on them, could not be provided by a general search service, and it is not saying that that is excluded from what general search services do. On the contrary, it is saying it is included. But what it is saying is that what Google cannot do is, when it is presenting those specialised results, do so in a way that treats its own CSS differently. So it cannot just condemn other CSSs to a worse place on the page than it gives its own CSS the opportunity to be in the box. That is the heart of it, and that answers, in my submission, simply on the basis of the Commission Decision itself, the Claimants' essential case.

So ——

MS ROSE: Just one question in relation to 663.

MR PICKFORD: Yes.

MS ROSE: "... Google has provided no evidence to demonstrate that users do not expect search services to provide results from others."

This refers back to recital 599 on {BA/2/207}:

"... Google did not inform users that the Product Universal was positioned and displayed in its general search results pages using different underlying mechanisms than those used to rank generic search results."

Is the point that is being made there that if you make a general search query and you think you are on a general search engine, not on a CSS, you do not expect to get results only from one CSS?

MR PICKFORD: Yes.

MS ROSE: So is the Commission there making the point specifically that this is general search, not specialised search? That is what is confusing for consumers is they think they are on a general search results page but what they are getting in the Shopping Unit is only results from one CSS, not clearly flagged?

MR PICKFORD: Yes, I think that is fair. But I think that is entirely consistent with the submissions that I have been making, because it is all about where —— knowing, because it has been established by this point in the decision, that there is a separate CSS market, knowing that that separate market exists and therefore lots of companies are competing to sign up merchants and get their PLAs and do deals with them and make promises

to advertise them.
MS ROSE: So this is —— does this go to the point about leveraging its dominance in general search to restrict competition in specialised search, that people think they are doing generalised search but actually Google is funnelling them to a specialised search?
MR PICKFORD: Yes, in effect. It is only going to Google.
MS ROSE: Yes.
MR PICKFORD: At least in the box, in the bit that is the nice bit of the page.
Then if we go on to the next recital, 664 {BA/2/226}, if I could ask the Tribunal to read that, if you have not read it already.
(Pause)
They are just making very clear there that there is no problem with monetising its general search results pages. So it can stick ads there, it can stick nice ads there, it just has to be careful about where it has selected them from.
Then 668 {BA/2/227}, there is a more general statement on there not being restrictions on "Google's rights and freedoms" to respond to a given query in the way it sees fit:
"... including in terms of grouping together product information."

Again, all consistent with the point that I have been making.
If the Tribunal are content, may I move on to the next section of this decision, which is less —— it does not go to the abuse point, it goes to the counterfactual point?
So if we go back, in fact, to the potential effects section, which begins at recital 589, which is at {BA/2/206}. We see the subtitle:
"The Conduct has potential anti—competitive effects on several markets."
As the Tribunal will be well aware, there are two ways of demonstrating compliance with the effects part of an Article 102 analysis. You can demonstrate actual effects and/or you can demonstrate potential effects, and this is a potential effects analysis, it says so in the title, and it is abundantly clear from a number of recitals. I am not going to read them all now because this section goes on for several pages, but I am just going to pick up one example of this and I would invite the Tribunal to read the whole section at its leisure.
If you could go on, please, to recitals 605 to 606.
THE CHAIRMAN: 605 {BA/2/209}, probably, to 607?
MR PICKFORD: I am very happy to go on to 607 ——
THE CHAIRMAN: (Overspeaking — inaudible).

MR PICKFORD: —— but it is —— but my point is established by the time you get to the end of 606 and I can explain why.
So the issue here is Google were saying, "Ah, you have failed to demonstrate a causal link".
THE CHAIRMAN: Yes.
MR PICKFORD: The Commission turns around and says: they are not required to demonstrate that causal link. We simply have to demonstrate that it is capable of having or likely to have such an effect, and of course capability is a weaker standard.
THE CHAIRMAN: They then go on to say:
"In the second place, and in any event, [we have] demonstrated ..."
The causal link.
MR PICKFORD: Well, they do, but ——
THE CHAIRMAN: So you are right, they say: in the first place, it is not necessary for us to do so, and in the second place, in any event, we have done so.
MR PICKFORD: Yes, so that is ——
THE CHAIRMAN: That is a complete answer to the point.
MR PICKFORD: It is, but that is why it is important to then go on to see what the Court of Justice ultimately makes of this when the same issue arises in the Court of Justice.

THE CHAIRMAN: Yes.
MR PICKFORD: Because basically the point comes back and Google is making similar complaints about the causation analysis in the decision, and —— well, rather than anticipate my submission, why do I not just ——
THE CHAIRMAN: I do not know why this is important, because we are not dealing with damages now. Whatever happens in this case, it is quite open to Google to say at the subsequent trial, "Yes, but no actual damage has been caused to the Claimants".
But in any event, 607 is binding, is it not?
MR PICKFORD: Well, insofar as it goes. Insofar as it goes. Can I explain why —— let me explain why this is relevant, Sir. It is relevant to Trial 1 for this reason. The argument that my learned friend made, on Monday, is that you are bound by the findings in this decision as to the approach that the court took when it came to the counterfactual issue, where it said: well, in relation to potential effects, it is good enough to imagine a world where you take away not only the box, but also the algorithm. In that context, when looking at potential effects in that context, they say, well, that is good enough for that.
We, in this trial, when we are determining what the counterfactual is, are not concerned with

a potential effects analysis, we are concerned with a "but for" —— an English "but for" causation of loss analysis, and I will show you that that is different.
THE CHAIRMAN: Well, you will come on to that. I do not quite follow that, but you will come on to it.
But here, in any event, what they are saying here is pretty clear, is it not? I mean, Google argues you have not shown any anti—competitive effect and the Commission says, as we often do: in the first place, we do not have to, because it is only potential effect, and in the second place, in any event, we have. That is all that 605 to 607 is doing, is it not?
MR PICKFORD: It is, but, Sir, trust me, it comes back when we get into a legal analysis of the competing counterfactuals.
THE CHAIRMAN: Okay.
MR PICKFORD: I will show you that.
THE CHAIRMAN: All right.
MR PICKFORD: So could I then go to the Court of Justice. So this is to be found in {BA/4/27}. If we could go —— sorry, I think I misspoke. It is {BA/4/27}. I think I might have said "tab".
There are two core elements that are identified at 158 for why there was a leveraging abuse in the present case. There is a reference back to what

the General Court said. It said:
"... the General Court held that the Commission had not inferred the leveraging abuse from the existence of exclusionary effects arising from those practices, but had justified its analysis on the basis, first, of suspect elements in the light of competition law, in particular an unjustified difference in treatment, and, second, of specific relevant circumstances relating to the nature of the infrastructure giving rise to that difference in treatment, which had in fact enabled it to conclude that there had been an infringement of Article 102 ..."
So what this is saying is it is referring back to what the General Court does. We will come on and see shortly that it is agreeing with the General Court, it adopts the same analysis, that there were two core elements to demonstrating that there was a deviation from competition on the merits in this case.
The first aspect is the differential treatment, and we have obviously discussed that at length already. Then the second aspect was the specific factual circumstances in which that differential treatment arose. There were three specific circumstances that the Commission referred to, and they are picked up in this judgment at paragraphs 159 through to —— or 158,

I beg your pardon, through to 161. So ——
THE CHAIRMAN: Shall we read those?
MR PICKFORD: That would be convenient. Thank you.
THE CHAIRMAN: Yes, let us just read those to ourselves. 159 to 161?
MR PICKFORD: Having read 158, yes.
THE CHAIRMAN: Yes.
(Pause)
MS ROSE: And 162?
THE CHAIRMAN: Yes. Yes, indeed.
MR PICKFORD: Yes.
(Pause)
I am pausing to make sure that I can continue, but ——
THE CHAIRMAN: Yes, yes.
MR PICKFORD: Thank you.
So, in essence, just in broad summary, the three criteria are the importance of traffic to CSSs, users tending to concentrate on the first three to five results, and then the diverted traffic representing a large proportion of CSS traffic that could not be effectively replaced from other sources. Those are the three core factors that are, in conjunction with the unjustified difference in treatment, what led the Commission, then the General Court and then

the Court of Justice to conclude that what Google had done was unlawful.
The judgment here does not define what it means by "unjustified". That is left open. Indeed, the case law generally does not particularly define what is meant by "unjustified". There is a strand of case law. I mentioned it yesterday, which talks about "arbitrary" as an alternative word. So, for example, I do not need to go there, but it is the case of Union des Minotiers, which is in the bundle. It is quite an old case. That talks about "arbitrary differences". More recent cases tend to talk about "unjustified difference in treatment". Certainly, in this case, it was held to be unjustified.
Then we see at paragraph 164 a classic statement, but nonetheless a relevant one in this case {BA/4/28}.
THE CHAIRMAN: Well, yes, we know that.
MR PICKFORD: Very good.
THE CHAIRMAN: I think we need to move a bit quicker, Mr Pickford.
MR PICKFORD: The only reason why I draw attention to it is because it does become relevant to some of Mr Hunt's analysis.
THE CHAIRMAN: Yes.
MR PICKFORD: Then 186 {BA/4/31}, that is making the point

that it is not inherently unlawful for a dominant undertaking to treat its own products and services more favourably than those of its competitors. Indeed, that happens the entire time. The departure from the competition on the merits in this case was because of that two—stage test. You have got an unjustified difference in treatment, so that is the first bit, it needs to be unjustified, and secondly, it needs to happen in the context of the relevant circumstances relating to the nature of the infrastructure. That is the sort of the magic ingredient that turns this into problematic discrimination.

The reason for that is because there are all sorts of examples of times when dominant undertakings discriminate in favour of themselves. A classic example is in the context of refusal to supply where the dominant undertaking says, "It is mine, you are not having it, I do not care if it is useful", and one incursion into that is, well, there is the Bronner doctrine, which says you cannot do that if it is indispensable and it would eliminate all competition. This effectively is seeking to set up a different incursion, which is that if it is unjustified difference in treatment and you have got those particular circumstances, well, we say that we can get you then as

well.

MS ROSE: Is that the relevance of the comment in 158, where they say it is not about exclusionary conduct per se?

MR PICKFORD: Sorry, I am just skimming back to 158 to see it in context {BA/4/27}.

MS ROSE: "... not inferred the leveraging abuse from the existence of exclusionary effects ..."

MR PICKFORD: Yes.

MS ROSE: So in other words, it is saying this is not a Bronner case.

MR PICKFORD: I am not sure that that is quite what it was saying. So ——

MS ROSE: It is not just about excluding you from the search engine.

MR PICKFORD: So it might be, I think. So the reason why I am pausing is because I know the argument that was being advanced.

MS ROSE: Okay, what was the argument?

MR PICKFORD: So the argument that was being advanced is it was said those three circumstances that you have got, the importance of traffic, etc, those are just effects points, and in any competition, in any abuse of dominance case, you have got to have effectively three elements. So element number 1 is a departure from competition on the merits, element number 2 is

the potential or actual effect, and element number 3 is "not objectively justified". The argument that we were making is we were saying: all of your three criteria, they all go to the effects part of the analysis, they are all about the effects, you cannot rely on those in the context of —— to satisfy the criterion that you need to satisfy for departure from competition on the merits. That was rejected ——

MS ROSE: Because of the discrimination, essentially.

MR PICKFORD: Well, because —— no.

MS ROSE: It is the conjunction ——

MR PICKFORD: (Overspeaking) It is the conjunction, exactly. It was because of the conjunction of both the unjustified discrimination together with effectively the particular effects ——

MS ROSE: (Overspeaking — inaudible) —— which means that they are just completely stymied.

MR PICKFORD: Yes, the particular nature of those effects, as it is described, the "relevant circumstances relating to the nature of the infrastructure giving rise" to that.

MS ROSE: Yes. So this does not tell you —— so this judgment is not —— if there was no discrimination, but nevertheless these particular parties could not get a high ranking ——

MR PICKFORD: Yes.

MS ROSE: —— that would not have been sufficient to establish an abuse of dominance.

MR PICKFORD: Correct.

MS ROSE: On this analysis.

MR PICKFORD: Correct.

MS ROSE: It is not saying that CSSs have a right to be on page 1.

MR PICKFORD: No, obviously not, because that goes back to —— and this is a really fundamental point, which actually, in my submission, is part of why the whole perspective of the CSSs is highly solipsistic. They, particularly Foundem, but to some degree Kelkoo, approached the world always through —— you know, naturally, because they are commercial undertakings, but they approach the world always through, "We want that traffic, we want to be there", you know, "If we do not get it, well then our business is not going to be as good as it could be". What they fail to remember is that everyone wants to be there, literally everyone wants to be there. Amongst the CSSs, there are hundreds of CSSs that want to be there. Amongst intermediaries, there are hundreds of other intermediaries that want to be there. There are millions of merchants that want to be there. Google has to find a way of balancing all of

those interests, and that is a very difficult job. As we have seen when we were looking at some of the algorithms, it does its best. It does not, and could not, attain perfection in that, it just has to have proxies and rules for trying to do that.

So that is why the mere fact that the second criteria, that you might not do as well as you like, indeed you might not be able to run your business unless you have got traffic, cannot be good enough.

I mean, take an example, I might have, myself, a totally brilliant idea, I think. It is fabulous, just one catch, I do need to be on the first five results of Google's search page, but I am pretty convinced, as long as I am there, my idea is going to be brilliant. That alone obviously does not give me a right to be there, even if my business model is nothing without it.

So I think we —— so we went back to 158. I think otherwise we had gone on through to 163, and then we were just looking at 164, and then 168, I think it was. If you will bear with me, I will just find my place. 186, I beg your pardon. 186.

THE CHAIRMAN: 186 you were looking at, I think.

MR PICKFORD: Yes, thank you. {BA/4/31}.

So it applies both ways. So, Ms Rose, I was addressing you on the second aspect, which is just

having those effects, that is obviously not good enough, because anyone could basically complain about that. What 186 is saying is also just having the unjustified differential —— well, the differential treatment is not good enough either, you have got to have all the things that come together, and it is only that conjunction that leads to the unlawfulness.

So I would like then, if I may, to go on to the issue of potential and actual effects because this comes back to the point I was picking up from the Commission Decision. We find that, if one could begin, please, at recital 220 on page {BA/4/36}. If you have got to the end of recital 220, 221 is the core part, for my purposes:

"The evidence concerning the variation in traffic from Google's general results pages to competing comparison shopping services and to its own comparison shopping service did not therefore constitute actual anticompetitive effects relied on by the Commission, but tangible evidence on which the finding of the potential anticompetitive effects of the conduct at issue was based."

This Chair may have some quarrel with that. You may say, "I am not sure I agree that that is what the Commission did in its decision". But that is what

was found by the Court of Justice and the reason it is important is what I will come on to, because the Court of Justice uses that as its reasoning for rejecting Google's complaint about the implicit counterfactual that had been adopted.

THE CHAIRMAN: I do not really quarrel with it, because they recognise at 219 what the Commission found {BA/4/35}:

"The Commission found there that there was a decrease in that traffic in each of the [Member States] ... "

But it is saying that that was not the basis of —— that the Commission went on to just then focus on potential anti—competitive behaviour.

MR PICKFORD: Yes.

THE CHAIRMAN: It had to —— so it is entirely consistent, is it not, with that part of the Commission's Decision?

MR PICKFORD: Sir, with respect, it is not quite, and I would like to show you why. What is actually being referred to in recital 219 is that —— I will just find the right words —— yes:

"The Commission found ... that there was a decrease in that traffic in each of the 13 EEA countries in which those practices had been implemented."

It does not actually say there in terms "caused by", it is referring to a correlation.

I am going to come and show you —— I apprehend, Sir ——

THE CHAIRMAN: It says:

"... the analysis of the impact of [the] conduct on traffic ... "

MR PICKFORD: It does. It does.

THE CHAIRMAN: I do not think we should spend time now on that.

MR PICKFORD: Sir, with respect, I really would like to spend some time on it. I am not going to spend very long on it, but there are later recitals that I do need to get to which make my point and they are important. But I will obviously go as quickly as I possibly can.

So if we could go on, please, to recital 223 {BA/4/36}, it is said that:

"... the appellants seek to demonstrate, in essence, that the General Court reversed the burden of proof by upholding the decision at issue without the Commission's having conducted a counterfactual analysis in order to establish the causal link between the conduct at issue and its effects."

So this is an important section, because this is the Court of Justice responding to our complaints about the counterfactual, and this really does bear on the counterfactual issues that we are debating. One has

to see the background to see the proper context, which is why I took you to it.

If you then go to recital 225, you see that there is reference to the recital of:

"... the judgment under appeal, which is not disputed by the appellants, supplements the General Court's reasoning ... It is ... stated therein that, in order to establish the actual or potential effects of practices examined, the Commission may rely on information obtained by observation of the actual evolution of the market or markets concerned by those practices. If a correlation is observed between those practices and the modification of competition on those markets, additional information, which may include inter alia the assessments of market participants [etc] ... may be capable of demonstrating the causal link between the conduct concerned and the evolution of the market."

Now, the causal link in this context it is referring to is the potential effect, because we saw that higher up, and it is saying that correlation may be sufficient.

Then if we go on to —— over the page {BA/4/37} and look at recitals 227 to 228:

"In that context, the General Court held, in ...

the judgment under appeal, that ... the context of the allocation of the burden of proof, an undertaking may put forward a counterfactual analysis in order to challenge the Commission's assessment of the potential or actual effects of the conduct concerned.

"In so doing, the General Court neither reversed the burden of proof borne by the Commission as regards the obligation to demonstrate the causal link between the conduct at issue and its effects, nor ruled out the usefulness of a counterfactual analysis. It merely found that it is permissible for the Commission to rely on a range of evidence, without being required systematically to use any single tool to prove the existence of ... a causal link."

What we say is happening here is that the court is rejecting our case that there was a problem with the counterfactual analysis. It is saying: if you want, as a defendant, you can advance a counterfactual analysis, but it is not essential for there to be one, you do not have to do that, as the Commission, at all, you can in fact just point to a correlation and some other evidence and satisfy your potential effects analysis in that way. Because, as I showed you earlier, the context of all of this is in relation to potential effects.

I did refer the Tribunal, I think, to paragraph 221 {BA/4/36}. I very much hope I did. The point that I do not want to lose from that is that they say that:

"The evidence concerning the variation in traffic from Google's general search results pages to competing comparison shopping services and to its own comparison shopping service did not therefore constitute anticompetitive effects relied on by the Commission, but tangible evidence on which the finding of the potential anticompetitive effects of the conduct at issue was based."

The reason why it was saying all of this is because the argument that we were making was effectively the same —— it was the same argument we make now, but the context was different. We were saying: your analysis of effects does not make any sense because you are envisaging a world where Google gets rid of the algorithms and also the boxes, and we are saying that is not a sensible world, because we would never have got rid of the algorithms. What we were told, basically, is: tough, not actually an obligation to carry out a counterfactual analysis at all, and also the Commission has not purported to find actual effects, it has only purported to find potential effects, and in a potential effects context, it is allowed to do what it

did, it looked at those correlations, that is good enough.

So I do not think I actually need to particularly draw the strands together from that, because I think I have made my points already during my submissions. If one —— for reference, the core points that we take from the decision are set out at paragraph 114 of our opening submissions {A2/1/53}. Effectively, we set out, firstly, the non—discrimination rule that we get. Actually, sorry, I am going to do it very briefly but by reference to the skeleton, because I think it is probably helpful just to show it to you. So the reference is {A2/1/53}.

So in point 1 you will see that two—part test that I showed you from paragraph 158 of the judgment of the Court of Justice {BA/4/27}. The one thing that I would say about the way we put it in our opening submissions is we have effectively —— there were three elements to the test. We have effectively here condensed them into the third one, which is effectively taking —— it is a point against us, because we are not setting them all out, because really that is what it amounts to. If you have satisfied the first one, it is very difficult to see how you get there without having satisfied the previous two elements, so that is why we

have done that, it is effectively shorthand, but if one is looking at it technically, one looks back to all three circumstances that are set out in 159 to 161 of the Court of Justice's approach.

Then point 2 is basically our point on algorithms, and we took that from in particular decision, 661 {BA/2/226}.

Point 3 is our point on the way that you can show your results. We took that in particular from decision, 662, in conjunction with all of the other parts of the decision that I showed you that kind of lead us to that conclusion.

Point 4 {A2/1/54}, which is about the discretion for us to present things in the way that we like, we take, again, from the description of what general search results can do in general, plus the decision at recitals 664 and 668 {BA/2/226}. So that is how we get to these key propositions.

Very, very, briefly, there are just two further points that I wanted to cover in terms of further principles that we say are relevant, and this is where I was also going to address the Tribunal on the Android Auto point that you put to me yesterday.

THE CHAIRMAN: So we can now put away the decision of the Court of Justice?

MR PICKFORD: Yes, thank you, you can put away the decision.

So the next point we make —— there are two further general points of law that we say are relevant context for this trial.

The first is that there is no general duty under Article 102 TFEU to give rivals access to assets or to guarantee the commercial viability of particular rivals. There is no general duty of that nature. Now, I referred yesterday to the Bronner incursion into that and, Sir, you quite rightly picked me up and said, well, it is not just Bronner, there is also Android Auto, that is another type of incursion. I agree that, in general terms, it is. The reason why it was not part of my submissions is because, as I will explain, Android Auto does not apply in our case, it is a case on very different facts and the principles are very different from any that could be applicable to general search results.

So let me go to Android Auto. It is in the authorities bundle, so it is {AB2B/21}, and if we could start at {AB2B/21/2}, please. Does the Tribunal have that?

MS ROSE: We do not have that.

THE CHAIRMAN: We do not have a tab ——

MR PICKFORD: Ah.

THE CHAIRMAN: It will be on the screen. It is online. It is on the screen.

MR PICKFORD: I apologise for that.

THE CHAIRMAN: No, that is all right.

MR PICKFORD: It is not actually our authority, but obviously it is important that I address it, because ——

THE CHAIRMAN: We have got it, yes.

MR PICKFORD: —— Sir, you raised it with me.

So we will see there on the screen, if we pick it up at recital —— paragraph 5, it says that:

"Google developed Android OS, an operating system for mobile devices from different manufacturers. That system, which is made available under an open source licence ... "

That is quite an important point:

" ... may, in principle, be used free of charge and modified without the need for permission."

So what this is concerned with, this case, is an extension of the well—known Android operating system which powers a lot of mobile phones, basically all the non—Apple ones, and it is an extension of that to cars and the way that that interacts with vehicles.

Then what one sees at paragraphs 8 to 10 {AB2B/21/3} is the request by a company, Enel X Italia, that wanted access to the Android platform in order to provide an

EV charging app, and what it said to Google is, "We want you, on your open source platform that you have generally made available to people, to be interoperable with us", and Google said, "No, we do not interoperate with apps of your type, we only interoperate with apps of other types", and then there was a complaint about that. The reference here to the Court of Justice concerned whether the Bronner criteria had to be fulfilled in order for there to be the possibility of a departure from competition on the merits. There is no finding that there was, the question is: is that a threshold issue that has to be satisfied first?

The court said it was not, it was not necessary to fulfil those criteria on these facts, and if you go, please, to paragraph 49 to 50 on {AB2B/21/9}, you will see the court's analysis of that.

THE CHAIRMAN: We will probably start at 47, I think.

MR PICKFORD: I am very happy, Sir, for you to do that {AB2B/21/8}.

(Pause).

MS ROSE: Go over the page {AB2B/21/9}.

(Pause).

THE CHAIRMAN: Yes.

MR PICKFORD: So what this was was a case where Google, from the outset, had developed a platform to enable

third parties effectively to come and plonk themselves into the platform and provide their own services, using their own software, directly from that platform. It was open source. The whole essence of it was to provide the platform for others to provide their services. That is what the court is referring to. They are saying, in those circumstances, Google cannot say, well, it developed this particular service for itself to offer services. On the contrary, the whole idea is that third parties use it as a platform from which they offer their third party services to users.

Now, in my submission, that is virtually the antithesis of Google's general search page, because Google's general search page has never welcomed/brought in any third party to provide their results, in terms of their algorithm selecting the answer, to a user's query. Every single query that goes into that box in the middle of the Google page is analysed by Google. Google chooses the results using Google's algorithms, Google decides how it is going to present them, and it does so using, as we heard this morning, technology which is an incredibly closely guarded, highly confidential secret. So Google's search page has never been open to allowing third parties to plonk themselves on the page and provide their services directly to users. That is what

the Claimants want to do in particular in their counterfactual 3b and we say you cannot do that. In order to even get that case off the ground you would have to be in some kind of Bronner territory, and Android Auto is not a way around that, that is not a route in, because it is a totally different kind of case.

Now, just to close that point off, there is, of course, an important distinction here between a third party that actually plonks itself on the page and uses its software, its algorithms, to choose results and showing links that could go to a third party. Obviously we do show —— the whole of Google Search shows links, basically, to third parties, obviously; that is the idea behind it. But the key point is it is we, Google, who get to choose how that operates and only ever Google that does that.

So the second general point, which I can deal with very, very briefly, is that there is no rule against a dominant undertaking reaping the rewards from its commercial success that often accompanies having a dominant position, in terms of healthy profitability, and by taking the opportunity to charge rivals for services, or indeed charge anyone who uses your —— for services, when it can. We saw in the decision that

the Commission fairly accepted Google's freedom to monetise the SERP at paragraph 664 {BA/2/226}, and what we say is that there are really only, in competition law, two main recognised incursions into this area of profitability. One is excessive pricing, so obviously you cannot price so high as to price excessively, and the other is margin squeeze, so you cannot offer undertakings your service at such a price that they cannot compete, if they were as efficient as you, in a downstream market.

MS ROSE: And discrimination.

MR PICKFORD: Well, sorry, when I say "incursion", I am just talking about the pricing issue. I mean, so you are right, discrimination is an example. In a pricing context, discrimination is margin squeeze, in my submission. That is the competition law ——

THE CHAIRMAN: Margin squeeze is favouring yourself, but you could not discriminate on price just as between suppliers, could you ——

MR PICKFORD: (Overspeaking) That —— that ——

THE CHAIRMAN: —— (inaudible) distort competition in the supply market?

MR PICKFORD: That is, I think, a difficult question to answer. The case law on that is not entirely clear. It does not —— we do not need to answer it here, because it

is just not relevant.

THE CHAIRMAN: (Overspeaking – inaudible) —— not trouble with that.

MR PICKFORD: No one is saying that that is what we are doing.

Then, finally, and I can be very, very brief on this, this is the final legal issue just to get out of the way related to abuse, Hollington v Hewthorn, and I apprehend the Tribunal will know the key points I am going to make here. We say it has two areas of application: firstly, to the DMA; secondly, to foreign judgments. I am sure the Tribunal will obviously be very well aware that the rule was considered very relatively recently by the Supreme Court in Evans v Barclays, and it makes clear that the rule that prior findings of other bodies are not admissible in themselves as those ——

THE CHAIRMAN: Findings of fact.

MR PICKFORD: Findings of fact, yes.

THE CHAIRMAN: Not legal analysis.

MR PICKFORD: No, legal analysis obviously is admissible. How persuasive or not ——

THE CHAIRMAN: (Overspeaking – inaudible).

MR PICKFORD: —— it is all depends.

THE CHAIRMAN: (Overspeaking – inaudible).

MR PICKFORD: Exactly. So any findings of fact that might be made in relation to the DMA we say would be inadmissible, and the DMA obviously is a different regime as well.
THE CHAIRMAN: They have not been made.
MR PICKFORD: There is not even a decision yet, but we keep getting the prospect —— the DMA keeps getting mentioned and my response ——
THE CHAIRMAN: Because it goes to simply an answer to your point that the Commission is clearly very happy with Google, Google's Remedy. It is just a counter to that, but it is not a factual finding and I think we have been there. I think we have got your point, and I am a bit concerned about timing, and I do not think we need that to approach the evidence, Hollington v Hewthorn, and we can revisit it in closing, I think.
MR PICKFORD: I am very happy with that.
THE CHAIRMAN: Because if there are particular points you want to say about —— and then you will see to what extent the Claimants seek to use, say, the German judgment and you can make your objection.
MR PICKFORD: My basic point on all those judgments is I am more than happy to meet any point on the substance, and I will explain to you why I am right and they are wrong. It does not really help, I say, to do that through

the additional lengths of trying to understand what a foreign court said about it and then apply it as if it were an authority.

The foreign courts have said different things in different jurisdictions. As we know, the French courts agreed that the abuse ended in 2017. Mr Jowell made a submission yesterday on that that was incorrect. He said that was in a case where the issue of whether the abuse was ongoing was not raised, if you recall that?
THE CHAIRMAN: Yes.
MR PICKFORD: I can show you that that is incorrect, if that would be helpful to see, or I can simply give you the reference.
THE CHAIRMAN: Just give us the reference.
MR PICKFORD: So the reference is {P/5/6}, and what the judgment records is the submissions of AMC in that case which are that:

"Google's infringement, which began in 2007, is still ongoing and Google has no intention of ending its practices."

So that was the allegation that the French court was dealing with: there was a continuing abuse. The French court found that, with the Remedy in 2017, the abuse ended, so Mr Jowell was wrong about that.

THE CHAIRMAN: Yes.
MR PICKFORD: If that would be, perhaps, a convenient moment, if we would like to pause and then perhaps come back a little bit earlier, because that is all of the law, at least save for a couple of points on counterfactuals which I am going to deal with when I get to counterfactuals.
THE CHAIRMAN: Yes. So you will have about another hour; is that right? That is what we ——
MR PICKFORD: Yes, I think I will have about another hour, and I think Mr McGurk will have about half an hour, and then I think we are ——
THE CHAIRMAN: Well, I do not think so, because we started —— we said you were going —— you wanted two hours, we started 45 minutes early.
MR PICKFORD: Yes.
THE CHAIRMAN: So, I mean, technically you have an hour and a quarter. I think we do need to stick to that, Mr Pickford.
MR PICKFORD: So, I am sure, Sir, you are right. I cannot do the maths on ——
THE CHAIRMAN: Well, you were complaining that you had lost two hours.
MR PICKFORD: Yes. Yes, so certainly we did need those further two hours. I will do the maths over lunch ——

THE CHAIRMAN: (Overspeaking — inaudible).
MR PICKFORD: I will make sure that we stick to that.
THE CHAIRMAN: Some of the legal submissions can be really made in closing. What we need is an opening so that we see the factual context, which is very important, that we see how you put your case in terms of the decision which concerns this abuse ——
MR PICKFORD: Yes.
THE CHAIRMAN: —— so that we can approach the evidence that we have on that basis.
MR PICKFORD: Yes. Well, that is —— what I have obviously focused on is the Commission Decision, because we say that you have really got to understand that ——
THE CHAIRMAN: No, no, I understand that.
MR PICKFORD: Yes.
THE CHAIRMAN: But I am just saying in terms of what comes next.
MR PICKFORD: Yes.
THE CHAIRMAN: Very well, so we will come back at 1.50.
(12.53 pm)
(The short adjournment)
(1.53 pm)
THE CHAIRMAN: Yes, Mr Pickford.
MR PICKFORD: Thank you, Sir.
So, before the short adjournment, obviously we had

a very extended period where we went through the Commission Decision, and in the light of the depth with which we went through that I am not going to need to repeat, effectively drawing the strands together, everything that we got out of that decision, because you already have, I think, my submission as to why we are —— the Remedy box is compliant with the problem that the Commission identified and why, therefore, the Claimants are wrong to say that the Remedy box infringes, and you can see it infringes, it is just an extension of the reasoning in the decision. Unless the Tribunal tells me that you have not got why I said that, I do not think I really need to repeat my reasons for it. It all comes down to the privileged window point, ultimately. The privileged place that has advantages both in terms of promotion and in terms of freedom from demotion, and that privilege window we only afforded to ourselves, our own CSS, and now, following the Remedy, every CSS gets to take part in that in exactly the same way as our CSS GSE does. That is the essence of the point as to why we comply.

I have also shown you the various points in the decision which show that the things that the Claimants say, for instance, the CSS —— Google's CSS is on the page, they cannot be right, because they do

not square up with the definitions and the approach that the Commission took when it defined what was a legitimate part of a general search service. The Commission's complaint was not that we had stuck our CSS on the page, it was that we had given ourselves a privilege, an unfair window.

MS ROSE: So what —— just on that point, what are the reasons why you say that the window, the Remedy window, is not a CSS, is not Google's CSS? What is it about that that is insufficient for it to be a CSS?

MR PICKFORD: So there are a number of points.

Firstly, it does not contain the core special functionalities that CSSs provide, the additional functionalities. I cannot remember whether it is recital 172 or 174, but the reference to it in the Commission Decision, where it says that there are additional functionalities that are provided by a CSS, and those are: the ability to filter the results; the ability to sort the results, for example by price, as a tool to price comparison; the provision, certainly by any good CSS, of additional product information in the form, for example, of product guides, that type of thing. The final point of distinction can be looked at either way, it is something that CSSs do and they do not do. So what CSSs do is they have a complete page that

is dedicated to the shopping experience and it is full of PLAs with a set of tools down the side to enable you to carry out the specific functionalities that I mentioned.

Whereas a box, not only does it not have those additional functionalities, it does not have that full service in terms of product guides, etc. It is also appearing on a page with all sorts of other results, and that is one of —— again, I cannot remember where in 172 or 174 it is mentioned, but that is the other distinguishing feature that the Commission refers to when it is distinguishing between general search services and specialist search services, such as CSSs. The specialist ones are just giving you this in-depth experience that is more advanced and enables you to do more in that particular area, whereas a general search service is giving you less and it is also giving you other things as well, it is giving you all sorts of results. As we saw, it gave you, for example, answers to what people like to know about Bialetti coffee machines, etc.

MS ROSE: In order to get access to the Remedy box, is it right that merchants have to go via a CSS?

MR PICKFORD: Yes.

MS ROSE: Why is that? I mean, on your case, presumably it

would be just as lawful for Google to have introduced as a Remedy a box which was simply PLAs, and say, well, you can bid via a CSS or individual merchants can bid for inclusion in the box.

MR PICKFORD: Sorry, so you could be a CSS or you could be a merchant, did you say?

MS ROSE: Sorry. You have got individual merchants appearing in the box.

MR PICKFORD: Yes.

MS ROSE: But they at the moment come via a CSS.

MR PICKFORD: Always, yes.

MS ROSE: But my question to you is, is that a necessary feature of a compliant Remedy, or could you, Google, not simply have had a box that had individual merchants bidding for it, whether via CSSs or on their own —— or just alone? You know, so a merchant could say, "Well, I do not want to give a portion of the fee —— an extra portion to a CSS as an agent, why do I not just pay Google", so effectively just have it as an advertising box.

MR PICKFORD: Yes.

MS ROSE: If Google could have done that, why did it not, because it would be more profitable? If Google thinks it could not have done that, why not?

MR PICKFORD: Well, it is a good question and I can answer

it. There are some difficulties in answering it, because in the second part "why not", there may be some privileged responses in relation to "why not", but I can —— so I am giving that warning and I am just thinking back in my mind is everything that I am about to say legitimate.

But obviously, notwithstanding the Commission —— sorry, that the Tribunal was not very attracted to my point that this was something that we negotiated with the Commission, was a Remedy that they were effectively not going to launch proceedings saying that we were still in breach for, because that is obviously what we wanted to avoid, we, as you will see in the documents, engaged in quite a lot of dialogue with the Commission about what they wanted to see, and obviously something that they really wanted to see was CSSs having a bigger role in shopping. Had we adopted the type of box that you have described to me where merchants can come direct or they can go via a CSS, one can see that from the Commission's point of view, if it had a political objective, namely to keep CSSs happier and to see more CSS activity, that would not have helped the Commission, because why would merchants particularly want to go via a CSS if they could come direct?

So one can well see that that would have not been

such a politically helpful outcome.

MS ROSE: On your case, the Commission did not actually have the power to insist that you adopt a Remedy in this form because, on your case, it would have been just as lawful for you to adopt what you are now saying is the more efficient process, which is that merchants do not have to go via an agent.

MR PICKFORD: Well, my primary case ——

MS ROSE: That would have been lawful, and that must be the logic of your position.

MR PICKFORD: Yes, my primary case is it would have been, but also one does have to remember that this took place in a real life political context, and so —— (pause).

But, as I was saying, my primary case was that answer.

There is also a secondary case, so a point I can take against myself. What might have been said by the Commission had we adopted that approach is that there was still discrimination because effectively you could come and get your place straight away by coming directly to Google Search, and what Google Search would be presenting would be results from its own CSS, whereas if you wanted to use an alternative CSS, to get an alternative CSS's results on the page you have to go via the CSS. So it might be said that we had provided

effectively a shortcut for our own CSSs, which was an advantage.

Ms Rose, do you see my point there? The concern —— my primary case is, actually, maybe we could have done it, but there is an argument, one can see, that perhaps the Commission would have said, "Mm, not quite sure about that because you have got rid of a lot of the problems, yes, sure, but is it not the case that now you can get direct access via one route for your CSS, whereas it is indirect for everyone else and that is a problem". So whether or not we had to, what we did decide to do is to make sure that there was a complete separation so that it could never be said that we had given any advantage to our own CSS, because we simply said, okay, everyone —— let us just assume that everyone has to be mediated through a CSS to get access to this box. If that is the rule, even if it goes slightly further than we have to do on a strict legal analysis, what it does do is cut through any possible remaining argument about whether the first proposal, Ms Rose, that you made to me is quite sufficient.

PROFESSOR SMITH: Could Google instead simply have closed down its CSS?

MR PICKFORD: Well, that was ——

PROFESSOR SMITH: Given that, after 2012, almost all

the traffic was through the PLA.

MR PICKFORD: That was one of the options it considered, as we saw in some of the documents that Mr Jowell took us to. On my submission, I think that, strictly speaking, it could have done. But I repeat the point that I made previously, that Google was operating in a political context. The Commission had a large number of —— in brackets —— (European) companies that had complained about the US company Google and it needed to get a result, and Google wanted the Commission —— probably —— you know, I think I can say without revealing anything, it obviously wanted the Commission off its back. It did not want to be subject to 5% daily fines in relation to its worldwide revenue for every day that it continued to do what the Commission might consider to be a breach.

So as you will see in the documents, Google's overriding imperative was to comply with the decision, and that means in a way that the Commission was willing to accept, and there was a dialogue with the Commission about what the Commission was not and was willing to accept, and we ended up with the box.

So in my submission, you cannot say that there is a flaw in my case just because there are arguments that our Remedy goes slightly beyond what we had to do.

Of course, there is also the commercial aspect. I mean, there may well be a number of different ways that are lawfully permissible to deal with the discrimination. Which of those is most profitable depends obviously on an analysis of all the circumstances. It may be that the option, Professor, that you suggested to me would have been profitable and the reason why it was rejected was because it was not good enough for the Commission. I am not able to say. But obviously all of this decision-making took place in a multi-variable context in which there are a number of considerations, including the political one, that were being balanced.

PROFESSOR SMITH: But that does seem to mean that we -- the Tribunal is not bound to take the Remedy box as the counterfactual? I just wanted to see. Right?

MR PICKFORD: You are not bound in law, certainly. I mean, in my submission -- and I am going to come on to the counterfactual very shortly -- it is -- if I am right on the abuse case that we have been considering, in my submission, it is basically unequivocal that it is the right counterfactual from 2017 onwards, because it is actually what we did. So assuming it is lawful, it is hard to say it is not the correct counterfactual. I accept, as a matter of theory, that does not

necessarily make it the right counterfactual in 2008, and I am going to come on to address you as to what in fact would have been and why.

Does that address the Tribunal's questions?

So that was dealing with the relationship between the Remedy box and the Commission Decision. That is one strand of the case against Google.

The other strand is best articulated by what Mr Jowell said on Monday, and I think he was quoting from his skeleton when he said this. They also argue that the factual and economic evidence supports that the Remedy box is the manifestation of Google's CSS on the SERP. They sort of say that in any event. I say, of course, well, firstly, actually, it cannot be, because if you look at what the Commission Decision says, that already answers that, but I am also happy to grapple with it in substance on its terms. What Kelkoo says in particular is that {A1/1/39}:

"... it is Google, the operator of the CMU, who designs and runs the display of the box; Google who decides where the ads link to; Google who sets the rules and runs the auction for ads; Google who owns the user-behaviour data; and (vitally) Google who decides which product offers appear in response to user queries, in what order, and how those offers are

presented."

From that, they deduce that the box must be a CSS.

My response to that is, there is a non sequitur there, because if one imagines the points that I have just made quoting Kelkoo, and rather than thinking about the Remedy box one thinks about text ads, all of those considerations apply equally to Google's presentation of, say, text ads. In that context, it is Google who designs and runs the display of the text ads, it is Google who decides where the ads link to, etc, etc. The mere fact that Google is in control of functionality on its own SERP cannot be a justification for saying therefore what appears on the SERP is a CSS. That is simply illogical. Because it is Google's SERP, it is always, 100% of the time, Google that does the things that Kelkoo were complaining about. It is always Google that selects the results using its algorithms, and that is true whether it selected a merchant to go to or it selected a CSS site that might be relevant to a user. Of course those other third parties have their own sites, CSSs have their own results, but the only person who is ever choosing what goes on the SERP is Google, and that applies both to the specialist box, it applies to text ads, it applies to generic results, it applies to literally everything.

Now, in that context, just very briefly, it might be helpful for me to take you to the table in our written openings that Mr Jowell referred to in his openings. That is to be found in {A2/1/64}. Unfortunately, it seems to be spread across two pages {A2/1/64-65}, ultimately. There was one point when it was all on one page.

THE CHAIRMAN: I think we have it in hard copy, in fact.

MR PICKFORD: Thank you.

So the only point really being made here is this, that when one goes through looking at functionalities and one looks at the sorts of things that Mr Jowell relies upon in his submissions, as well as the sort of things that I rely upon in my submissions, you see that there is a considerable correspondence between what text ads do and what the Remedy box does. The main difference between the two is pictures. So I accept that a text ad does not include pictures. But that cannot be the basis for saying, well, the fact that it has got pictures has taken it out from being a general search result and it is now a CSS, because pictures are inherently part of what Google's general search results show time and time again.

Just for your reference, because it is quite nice, there is a Google submission which is in {N/4/1} and it

has lots of pictures, for example, of kittens, just as an example of the types of pictures that inherently a general search result would provide. Then there is some discussion after that, which I would invite you to read, on page —— the following page, so it is {N/4/2} of that submission, where Google goes on to explain why specialist search results are required to deal with specialist —— to deal with certain types of queries. It gives the 9/11 news example that I referred to.

MS ROSE: Do we have this coming up on screens?

THE CHAIRMAN: No, because I think ——

(Simultaneous speakers — inaudible)

MR PICKFORD: It is just —— just for timing, I am not actually wanting to bring it up now. But it is just —— well, the main reason why that document is actually interesting is because, if you go on to the second page, you will see the references to the explanations as to why Google has particular types of infrastructure to deliver particular types of result.

So that is my position in relation to the functional comparison between a CSS on the one hand and a Remedy box on the other. You will see, towards the bottom of that page, the differences that crop up, and they are: at 9 {A2/1/65}, the provision of the filtering tools, which the box does not, but CSSs do; at 10,

the provision of the price comparison functionality. Now, I should probably say "price comparison tools" might be fairer. Mr Jowell made the point, well, you could compare prices in your head between two different PLAs, and that is a fair point. But what you do not have is specific price comparison functionality, for example sorting by prices or filtering by prices, that type of function. Then there is also the provision of the detailed product information and guides, etc. So those are the things that I have highlighted there that correspond to the submissions that I made previously.

The one thing, I think, that may not be there is that you can appear —— no, sorry, "Other types of results also on page", that is at 8, that was the other feature that I noted, that a CSS is dedicated, whereas a Remedy box, because it is a general search result, is not dedicated, it is just there with various other things on the page.

So I think there is just one further point that I need to address on abuse before turning to counterfactual and that is the complaint that the Remedy requires CSSs to change business model. Now, I do not understand that this is actually independent of the submission that the box is the manifestation of Google's CSS on the page. My understanding is that it

is a corollary of that submission. So I think, if I win the primary point, my understanding is that the secondary point collapses. But in any event, I will address it.

What we say is that a CSS —— anybody is entitled to provide a CSS service, a full CSS service on their own site, if they want to. What they are not entitled to do is demand a particular form of access to Google's SERP to help them with that endeavour except if they can find one of the incursions, for example —— well, in this case, the only one that would exist, in my submission, that would be relevant, would be the Bronner doctrine and that is why I referred to that.

What CSSs can ask for, however, is access on equal terms to that which Google provides its own CSS. They are entitled to that, so insofar as we give an advantage to ourselves, if we do something that helps our CSS, what Google Shopping decides is we have got to give that same advantage on entirely equal terms to other CSSs, and we changed our behaviour in the light of that and that is what we do. But we do not ourselves put our CSS on the page, so there is no reason why we should require —— we should permit CSSs to put their CSS on the page. The fact that there is only a limited benefit, and I accept it is not the full benefit of being a CSS from

access to the box, in my submission, is neither here nor there, but it is still a significant benefit.

If we could just go to one of the documents in the bundle, which is {M2/887}. This is a presentation that Kelkoo made in relation to the Remedy.

If we could go on, please, to {M2/887/6} of that, and one sees, the pre—penultimate and penultimate bullets, there were some estimates of the kind of traffic that Kelkoo might be getting. This is non—confidential, so I can read out those numbers. So we see that it was imagining potentially:

"If direct to website: 300 ... visits, 120 ... leads."

(Off microphone discussion)

Sorry? I beg your pardon 300 million, of course. 300 million visits and 120 million leads.

Or:

"If direct to merchants via redirect: 300M leads."

The reason why there is an either or here is this is Kelkoo getting ready for the Remedy. It did not know what the Remedy was going to look like at this stage, so it is thinking, okay, well, if what the Remedy is is that we get the traffic, so it comes to us, then let us imagine we are going to need to be ready for 300 million visits, and then it thinks, from those 300 million

visits, we will end up with 120 million leads. That is the 60% attrition rate point that I referred to some time earlier in my submissions.

The ——

THE CHAIRMAN: Sorry to interrupt you, I was not quite clear. You said this is a Kelkoo presentation.

MR PICKFORD: Yes, sorry.

THE CHAIRMAN: Is this an internal Kelkoo document?

MR PICKFORD: This is an internal Kelkoo presentation, yes.

THE CHAIRMAN: It is not a presentation to the Commission? No, it is ——

MR PICKFORD: No. I beg your pardon, I am going quite quickly because I know that I have got to stop.

THE CHAIRMAN: No, just to understand what it is.

MR PICKFORD: Yes, so on the first page {M2/887/1}, it says:

"Success criteria & action plan ..."

Then on the next couple of pages it starts speculating as to "Potential solutions", "What might the solution be?", on {M2/887/3}.

THE CHAIRMAN: Yes. No, I understand.

MR PICKFORD: Then, so by the time we get to {M2/887/6}, when it says:

"To be ready for Google EU ..."

"Google EU" means basically the Remedy:

"... Kelkoo needs to have."

It needs to have systems that are going to be able to deal with "300M New Annual PLA Leads", potentially. We see that in the fourth bullet point up. There are two different ways in which it anticipates that that might happen. One is if the Remedy is taking people direct to the website, and the other is if it is direct to merchants via a redirect. What they ultimately got was the redirect option, in the main. Obviously, you can, as we know, click on the Kelkoo —— the "By Kelkoo" link, but everyone accepts that that is not driving huge amounts of traffic. Most users click on the picture and they go through to the merchant.

So what this illustrates, I take two points from this. Firstly, the box was an immediate source of a substantial amount of traffic, a very substantial amount of traffic in terms of certainly what they were anticipating —— we can go and see exactly what happened in terms of development of the box in due course —— and that is a good thing. That was something that Kelkoo was getting out of this. It helped its business.

THE CHAIRMAN: (Inaudible) they expected to get.

MR PICKFORD: Sorry, I beg your pardon, that is fair. It expected to get out of it. I chose this slide because it is quite simple and I need to make a simple point in the short amount of time. But you are right, it was

expecting to get traffic out of it and it did get traffic out of it. We will see that it got a lot of traffic out of it in due course, during the cross—examination. So that is one point and that is a benefit to Kelkoo, just as it is a benefit to Google's CSS if it gets traffic by Google's CSS having been the company that put the ad on the page.

Then the other point I get out of it is just the attrition rate, that one sees that 300 million could be direct —— the anticipation is that will be direct if it is a link to a merchant, but it is going to end up at only 120 million leads if it is via Kelkoo.

So my submission is this was a Remedy that benefited CSSs. The fact that it did not —— and it has benefited their very CSS businesses, which is basically selling traffic on to merchants and earning a margin on it, and the fact that it did not allow them to stick their whole CSS on the page is not a cause for criticism in competition law.

Sir, on that basis I am going to turn very briefly to the counterfactual issue. So I need to respond very briefly to Mr Jowell on the law. I am not going to go into lots of detail, but I think it is only appropriate, as Mr Jowell gave you one exposition of what he says the law is, that I at least set out our stall as to what

we say the alternative is so that you are aware of the two positions. Then I am going to very, very briefly deal with the issue of the application of that.

So there is essentially one big issue of law between us in this case that we will ultimately come back to in closings and it is this. Google says that the counterfactual for assessing damage is to be determined based on what Google would realistically have done but for the infringement and the infringement alone. That is the way that we put the test. What the Claimants say, their primary case, in reliance on the decision, is that it is to be assessed by removal of both the demotions and the promotions limb of the abuse as effectively underpinned the potential effects analysis under Article 102. I say the Claimants are wrong about that and there are three reasons.

The first is that causal enquiries for potential effects on the one hand and assessing damages on the other are fundamentally different and so they can have different outcomes without one running counter to the other. That is my first point.

My second point will be that the assessment of damages is to be conducted by reference to English law and English law establishes that the test to determine the damage is the minimum change necessary to comply

with the duty that was breached so long as that resulting counterfactual is realistic.

Then my third point in response to Mr Jowell's submissions of Monday is that the Claimants' approach would lead to absurd results.

So just very, very briefly to elaborate on those points. I showed you what the court decided about what the Commission had done in its analysis of potential effects, and it said ultimately that it was a potential effects analysis for which the approach that the Commission had adopted, which did not actually involve, strictly speaking, a counterfactual but did involve looking at various correlations, was legitimate, and we cannot reopen that. We accept that on the question of potential effects, that is res judicata. But it is not the job of this Tribunal to assess potential effects, the job of this Tribunal is to determine under English law the actual amount that the Claimants lost and need to be compensated for as a result of the abuse, and that does require, in my submission, a different approach to the one that the Commission adopted in its decision on potential effects.

The reason for that is because it is a pure matter of English law to determine the existence of any loss

and a direct causal link between any loss and an agreement or practice. Those are matters for the national court. I am not going to take you there, but I am quoting directly from Deutsche Bahn, which is in the bundle at {AB2A/10/5} and it is paragraph 11. I am happy to go there, but I am assuming ——

THE CHAIRMAN: No, I think that is understood.

MR PICKFORD: The other —— the court test, I think we are in vehement agreement with Mr Jowell in relation to the test, as it seems. He agrees that Lord Leggatt's dicta in Rukhadze are appropriate and those dicta are that the damages counterfactual is —— and I quote {AB2A/23/60}:

"... a hypothetical scenario in which the defendant's conduct is changed to the minimum extent necessary to achieve compliance with the duty."

That is our job. Our job is to work out what the duty is and then to work out what was the minimum change necessary to achieve compliance with that duty.

Now, to be clear, we have never said, which was the point that Mr Jowell was meeting, that we are allowed to choose a counterfactual with the sole object of minimising damages. That is not our case, it has never been our case. We accept that a counterfactual has to be realistic, and if realistically we would have

done something different from the thing that minimises damages, well, then we will be stuck with the realistic counterfactual. But it is also subject to Lord Leggatt's dicta that the change needs to be "the minimum extent necessary". The reason that obviously matters in this case is because we say the minimum change necessary is to address the box issue, which the Remedy does, it is not to then go on and commit an act of effectively commercial self—harm and also remove algorithms which, as long as we have corrected the behaviour through the box, we do not need to remove. But that is going further than necessary to address the abuse.

The third and final point to make on this aspect of the counterfactual issue, the law, is that —— and it is the relationship between what the Claimants say about abuse and what they say about the counterfactual —— they do not —— Mr Jowell did not allege, he does not allege in either his written opening or his oral openings, that if their box was on the page, there would be an abuse because Google still uses its algorithms. So they have a world, it is an alternative world because their case on counterfactual says that they are allowed to choose a different world, but one of their worlds is 3a and 3b. Those are lawful worlds, on Mr Jowell's case, because he

has not advanced any explanation for why, if we did what they would like us to do in relation to the boxes, supposing we created a box that looked like 3a where everyone just gets funnelled through to a CSS. Let us imagine that world. You heard nothing from Mr Jowell as to why that would be an abuse, even if the algorithms stay in place.

Where that takes us is that, because they have no case to explain why that would be abusive, if we had their box but we still kept the algorithms, it is illogical and nonsensical to imagine a counterfactual world where nonetheless we remove something that we would not be required to remove in order to be acting lawfully.

So that is the first point on the counterfactuals.

The next issue —— and there are just two more main topics —— the next one is suppose that we are right and we are right about abuse and so the box is okay. This comes back to answer a point the Professor raised with me. Mr Jowell says, okay, even in that world, where you are right about the abuse question, you still cannot assume that you would have had the Remedy box in 2008. Why does he say that? He says that because we had a Product Universal in 2008 until —— we did not introduce PLAs until I think it is November 2011 and

then they ultimately became the Shopping Unit in 2013. He says that because our box was free to merchants then, you can reasonably infer that in a counterfactual world there would have been a free box. My response to that is that does not make sense.

Why does it not make sense? There are two main reasons, and they are related.

Firstly, in 2008, what we did have was text ads that were profitable and CSSs and merchants both were very happy to pay for. So the idea that they would not have been happy to pay for access to something better is, in our submission, a non-starter. Obviously if we produce a more attractive box with pictures, that is going to be, all else equal, more attractive than a text ad, and we were already quite happily selling text ads on our page.

But the second point is the really core one, which is, Mr Jowell posited a situation where he said, well, look, the PU was free to merchants and therefore Google would have wanted to continue that advantage, that was something good for Google, it was a marketing advantage to be able to say to merchants, "Look, this is free", and that does not work in his counterfactual world, because in his counterfactual world, as I sought to explain yesterday, even if access to the box is free,

and that is what we are concerned with here, that is the question, the issue is what does the Remedy box look like, is it -- do you have to pay to get into the Remedy box or is it free. So let us go to Mr Jowell's world where access to the Remedy box is free. What happens there?

Well, CSSs are the gatekeepers to the Remedy box, so if you are a merchant, you do not get the box for free, you have to go through a CSS, you have to go to, say, Kelkoo, because what Kelkoo will do is charge you for traffic in just the same way as Kelkoo always charges for traffic. It will have some deal with a merchant and it will say, "We will send you X amount of traffic and here is what it is going to cost per click", for example. So CSSs are going to make a margin out of the box. So what Mr Jowell's scenario involves is Google saying: okay, we have got this incredibly valuable real estate, we have got prime position at the top of our SERP and what we are going to do is we would like you, CSSs, to have it for free, so you can charge your merchants to appear in it on our behalf, and do not worry, you know, do not worry about the cash, we have got more than enough of that already, we do not need to charge for it. That is absurd. I am sorry, but, with respect, that is a commercially absurd

suggestion. There is not any world in which once one has a non-discriminatory box to which all CSSs get access and they are the conduit by which merchant ads get placed in that box, that we would just give that value away. We were obviously willing to give some value away to merchants for a period when it was merchants, because in that situation we were building up a business with merchants. But we are not building up a business with our rivals in the same way.

Professor, you -- I was not sure whether you were looking to ask me a question. No.

PROFESSOR SMITH: (Off microphone - inaudible).

MS ROSE: In 2008, CSSs were doing pretty well and we saw some evidence that they were regarded as quite desirable by --

MR PICKFORD: Some were doing better than others.

MS ROSE: Yes, and Google was trying to build up its own CSS.

MR PICKFORD: Yes.

MS ROSE: Which is why it was offering merchants free access to its CSS, yes?

MR PICKFORD: Yes. Yes.

MS ROSE: Because Google had got slightly behind the curve on the CSS game.

MR PICKFORD: I mean, I think the evidence is it is probably

a bit complicated, but I am willing to take that --

MS ROSE: Would it have been feasible and realistic for Google to offer merchants access to its CSS for free but to charge them for traffic that they got as a result of being in the Remedy box?

MR PICKFORD: So it is a very good question, and the answer is, if we put aside the law for a moment, then, yes. So if we put aside the law, it could have said: okay, well, it is free -- sorry, it depends what one means by "access". If what you are saying is that --

MS ROSE: It will appear on your Google Shopping website for free.

MR PICKFORD: Well, the question is -- no, they could not, because that would not be consistent with the Remedy. The whole point of the Remedy is that a merchant must come through a CSS. That was what we discussed is -- whether it was required by law or whether it is political or not, that is the solution. There is no opportunity in the box for a merchant ever to come direct into the box themselves, and that is the way by which we avoid any possible argument, whether it is a good one or a bad one.

MS ROSE: But could Google have said to a merchant: in order to give you an opportunity to have your product featured on the SERP, you have to pay per click, if it comes via

the SERP, but if you just want to be featured on the Google Shopping website, that is free? I mean, I am just trying to ——

MR PICKFORD: That might be possible. So that is a fair question. That might be possible without infringing —— so I thought the question you were going to ask me, but you asked me slightly different. I thought the problem was going to be margin squeeze, because obviously what Google could not do is charge for its access to the box through the CSS —— sorry, it could not offer that service for free because it would squeeze everyone else out of the market and that would destroy the effectiveness of the Remedy and we would be back to square one. So it could not do that.

I think what you have put to me is something different and it is a cleverer alternative to that, which is that if the merchant is ultimately ending up in the box, then they do have to pay, but if they are ending up just on the separate site, they do not have to pay. Now, as a matter of law, I think my answer is they could probably have done that. However, that is a radical departure from the entire way that Google was organised and indeed all the CSSs were organised, because that requires you to say, actually, there is two different products here. You can have product A, which

is via us onto our SERP, or product B, which is you stop at the CSS. That potentially becomes very complicated and difficult and I do not have instructions on it, but I imagine that was not something that we would have thought commercially or potentially and technically we would have done.

MS ROSE: So then if Google has to charge ——

MR PICKFORD: Yes.

MS ROSE: —— then is there a likelihood that the effect of that is that Google simply never really establishes its own CSS so that effectively the remedy box is populated overwhelmingly by merchants who have come via other CSSs?

MR PICKFORD: In my submission, no.

MS ROSE: Because Google's strategy of building up its own CSS by offering free access would have not been viable.

MR PICKFORD: In my submission, my answer to that is no, because although we accept that Froogle was not a very good product, by 2008, we had already put very considerable resources into making the new Google Shopping experience a great one. We do have to remember here ——

MS ROSE: So why were you not charging for it?

MR PICKFORD: Because —— well, we actually —— because obviously there was a strategy of providing free

results, because that was considered to be at that point beneficial, because, remember, what Google's objective was, we saw it in one of the early papers, it did not succeed in this objective, but what it wanted to be is where all shopping searches started. Its objective was to —— sorry. Can I just take instructions? I think apparently I need to be told something.

(Pause)

So, sorry, I slightly lost my train of thought there because I was just being alerted to something that was about five minutes ago in my submissions.

MS ROSE: Okay.

MR PICKFORD: But I think I was addressing you, madam, on the ——

MS ROSE: Your strategy was that Google should be the starting point for all buying journeys.

MR PICKFORD: Yes, exactly, and this was in a world, remember, where we believed ——

MS ROSE: You wanted to beat Amazon.

MR PICKFORD: Not only did we want to beat Amazon, but we believed in this period, because there is no finding that we were deliberately —— we had a deliberately anti—competitive strategy, what we thought we were entitled to do at this stage, wrongly, was to self—preference. So we believed we could have a box on

our page that just went to our own CSS, and obviously in that world, if your objective is bring everyone, absolutely everyone to you, that is what you want to try and achieve, and you believe that you are quite entitled to self—preference, because that has not yet been decided against you ——

MS ROSE: You are trying to soak up as many merchants as possible ——

MR PICKFORD: —— then obviously that is one strategy.

MS ROSE: So that strategy is obviously not going to be feasible, so is there a world in which the reality is that Google would not have bothered with its own CSS but would have simply had the remedy box and taken the rent from the CSSs who were sending other merchants to the remedy box?

MR PICKFORD: I am not really able to —— it depends what one means by a possible world. My submission is what is likely is that Google would have continued to invest in its own CSS, because by 2008 already it had a great CSS. Google is one of the world's biggest, most profitable businesses. If Google decided that it wanted to put some investment into getting a great, state—of—the—art service, having worked out what it was doing wrong before, it was well capable of doing it and it did do it. It never managed to beat Amazon, because Amazon was

ultimately doing something different and beyond what Google was able to do and that is what consumers wanted, but there is no doubt and there is no question that Google was able to develop its own, very effective CSS very quickly from 2008.

THE CHAIRMAN: I am now a bit confused. We know that despite Google being immense and profitable and having lots of money, its CSS was not very successful for some years.

MR PICKFORD: Yes.

THE CHAIRMAN: That was obviously not what Google wanted.

MR PICKFORD: No.

THE CHAIRMAN: So it was failing. So if we are now in a hypothetical world where the remedy, that is your remedy, would have been in place from 2008 ——

MR PICKFORD: Yes.

THE CHAIRMAN: —— and your remedy was that only CSSs can bid for merchants to be on the box ——

MR PICKFORD: Yes.

THE CHAIRMAN: —— and Google's CSS could bid in competition but was not favoured as against other CSSs ——

MR PICKFORD: Yes.

THE CHAIRMAN: —— for Google's CSS to bid, it would have to pay money, clearly. But how could it be paying money as a CSS if it was free to merchants at that time, because

if it is a separate entity within Google, GSE, where is it getting the money from to bid?

MR PICKFORD: Well, that was —— I am not saying it would be. My answer to Ms Rose previously is that in this world, Google would obviously be charging its merchants. The reason that I gave is because, if it did not, it would be margin squeezing because —— but there is —— an alternative way of looking at it, Sir, is the way that you have put it, which is effectively it would be running at a loss.

Now, of course, economically, that is effectively what —— that is what a margin squeeze is. It is when the downstream operation runs at a loss, it does something that it cannot actually properly sustain, apart from the fact that it has got its dominant undertaking up here which is able just to keep that going. So, in my submission, that is just —— that is another way of putting the same point.

THE CHAIRMAN: It means that your counterfactual for the period, from 2008 to I do not know if it was 2011 or 2013, would be not just the remedy as it now is, but also in a situation where Google was charging merchants to access its CSS?

MR PICKFORD: That is true. That is the corollary of the box being chargeable ——

THE CHAIRMAN: So that feeds into the counterfactual.

MR PICKFORD: It feeds into it, yes. That is very helpful. Thank you for asking that question, because we have drawn that out in our submissions, but that is right. We certainly have not intended to say anything that is contrary to that. The essence of our case is that the world as we know it today and the world as we know it in 2017 would also, by effectively logical deduction, have also been the world in 2008 and ——

MS ROSE: That might have had adverse effects on Google's ability to build up its own CSS, potentially.

MR PICKFORD: It may or may not have done. You would obviously have to judge that on the basis of the evidence as to how effective Google was as a comparator CSS.

THE CHAIRMAN: That will come into a damages calculation eventually.

MR PICKFORD: Yes. We will see during cross—examination some evidence. It is not the sort of the main part of it, but there is evidence on, in particular, how Kelkoo fared against its competitors that is very important evidence in this, and one of those competitors is Google. So we will see evidence on that that shows you that Google, very rapidly, was doing much better than Kelkoo.

MS ROSE: Not that surprising given the self—preferencing.

MR PICKFORD: It is —— obviously that will need to be taken —— that is something that the Tribunal is going to have to factor in, but something that we are going to be legitimately exploring is whether that can be said, there is evidence that, well, it is all Google's fault, and my submission is, no, there are some very big things in the background here.

I think that has hopefully addressed the Tribunal in relation to those very helpful questions on the counterfactual.

Oh, I have been asked to go back to one point, which is ...

(Off microphone discussion)

Right, so this is the risk of trying to answer things hypothetically without all of the facts.

I am instructed that we believe, and obviously we can provide support for this, that Google did offer a mixed free and paid model for the CSS. So you could potentially be —— you could potentially elect to be in the CSS and not pay, and you could also be in it and pay. I assume —— I will clarify this —— that you could only get into the Google SERP if you paid. Yes.

MS ROSE: So that was the hypothetical I was talking about ——

MR PICKFORD: So that was the hypothetical. So, yes, so ——
MS ROSE: Over what period?
MR PICKFORD: That is since 2017.
MS ROSE: So you are still offering free access to your CSS?
MR PICKFORD: We are —— so I was concerned ——
MS ROSE: But, yes, I mean, Google is still offering free access to its CSS?
MR PICKFORD: Yes, today. Yes. I was concerned, and it was a misunderstanding of mine, that that had commercial and technical difficulties . I said that, I was wrong, and my clients have corrected me that we did in fact do some variant of that split model.

If the Tribunal would just give me a moment. I realise I am running out of time and I am going to draw to a close very, very shortly .

The final point I am going to make is Turkey. So what we have been dealing with is a world where I won on the abuse question and then we were examining whether Mr Jowell has a sensible case that, notwithstanding that, we would have had a free box.

I am now turning to: let us suppose Mr Jowell is correct and we are not allowed the remedy box, what would we have done then?

My answer to that is that the example of Turkey effectively tells you the answer. If we could go

actually to Mr Jowell's/Kelkoo's skeleton argument, please, at —— sorry, I have got a problem with my computer —— which is page 52, and I think it is actually {A1/1/57} of the bundle.

At the end of (a) what Kelkoo says is:

"It is plausible that Google would have redirected funds to lawful alternatives , such as AdWords, as it did in Turkey, following the national competition authority's rejection of the CM ..."

So what he is dealing with there, what Kelkoo are dealing with there is their scenario 1 counterfactual, which is —— that is their first and their primary counterfactual. Their primary counterfactual is that they say we would have done two things: we would have got rid of the box all together and also that we would have got rid of the algorithms. That is, in a nutshell, what their counterfactual number 1 involves.

What I say in response to that —— and this is obviously in a world where they are right —— is you are almost there. Almost there. But what we would not have done is also got rid of the algorithms, because we did not need to, because once we had got rid of the box, we would have dealt with the discrimination problem.

Why do we believe that that is the most likely thing? Because that is exactly what Google did do when

faced with that —— with the problem of being told that the remedy box was not permissible. That is what the Turkish Competition Authority said to it and that was how Google responded.
MS ROSE: But the algorithms remained in Turkey?
MR PICKFORD: Sorry?
MS ROSE: The algorithms remained?
MR PICKFORD: So, in —— yes.
MS ROSE: So no box, but still algorithms?
MR PICKFORD: Yes.
MS ROSE: Instead of having a box, you just had promoted advertising?
MR PICKFORD: Yes, we basically turned back the clock to ——
MS ROSE: That is text ads and organic search?
MR PICKFORD: We tried to turn back the clock to 2005 or something.
THE CHAIRMAN: The algorithms applied to your CSS?
MS ROSE: Does not matter ——
(Simultaneous speakers — inaudible)
MR PICKFORD: No, because we treat ourselves worse.
THE CHAIRMAN: Yes, I see.
MS ROSE: So the result then there is that CSSs can pay for advertising and will be at the top of the search, otherwise they get pushed down by the algorithms?
MR PICKFORD: Yes.

It might be helpful to look at the document that explains to the Commission what happened in Turkey. I am just trying to find it in my notes. If we go to {K3/17/4}, if I could ask the Tribunal to look at the bottom of the page:

"Turkey real—life experience."

THE CHAIRMAN: This is —— this document is?
MR PICKFORD: This is a letter that Oliver Bethell at Google sent to the Commission. The date is 19 January 2021. So it is dealing with a number —— obviously there is an ongoing dialogue with the Commission where the Commission has CSSs that are leaning on it saying, you know, "We want something better", and this is Mr Bethell updating the Commission on what happened in Turkey.
(Pause)
MS ROSE: What is the date of this letter?
MR PICKFORD: It is 2021.
THE CHAIRMAN: January 2021.
MR PICKFORD: 19 January 2021.
MS ROSE: What was the reaction of the Turkish Competition Authority?
MR PICKFORD: I would have to take instructions. I do not know. To my knowledge, nothing has changed, but ...
MS ROSE: Okay.

MR PICKFORD: I think the Turkish Competition Authority said fine.
MS ROSE: So that remains the position in Turkey?
MR PICKFORD: Yes.
MS ROSE: Essentially, what the Turkish Competition Authority was demanding was 3a, option 3a?
MR PICKFORD: I have people behind me nodding, so I am saying yes, but I am not in a position myself to demonstrate to you exactly that on the documents, because I am afraid I do not know, personally.
MS ROSE: But if option 3a was found to be the lawful counterfactual, would Google do the same thing in this market and across the EU?
MR PICKFORD: Shutdown the boxes?
MS ROSE: Mm.
MR PICKFORD: Yes, that is our submission.
MR JOWELL: Forgive me for interrupting, I would not normally, but I do think I should just put down a marker that this is a counterfactual that is not pleaded by Google. They had the opportunity to plead their counterfactuals; they pleaded the remedy as the counterfactual, but they specifically said they do not have any other back—up counterfactual at the PTR. If they had said, "Our back—up counterfactual is the absence entirely of the Shopping Unit and that is

what we would have done", we would have sought disclosure, for example, in relation to Turkey so that this Tribunal would not just have this kind of letters of advocacy from Google to the European Commission and so that we could interrogate the real reasons and the underlying economics fully of whether they would get rid of the Shopping Unit.
MR PICKFORD: So what I say in response to that is this. Mr Jowell is quite right that we do not have a positively pleaded counterfactual in this scenario, but I am entitled to critique his counterfactuals. Ultimately, all I am doing by this submission —— I probably went slightly further when I was responding to, Ms Rose, your question about what we would have done, because I was seeking to be helpful. It may be that we cannot go that far, but what we can legitimately do is this. Mr Jowell himself raised Turkey in his submissions. I showed you those submissions. He says: look, this is why we are right about our counterfactual number 1, look, this is what Google did in Turkey, this is our primary case, and they did it in Turkey —— or this is evidence of it. All I am saying is, well, actually, if you apply the legal submissions that I have made, you have drawn a slightly incorrect inference in relation to Turkey, because you are —— we are willing to

accept what you say, that we would have got rid of the box, what we are not willing to accept is your submission that, as a matter of law, we should be assumed to have got rid of the algorithms, because that is contrary to Lord Leggatt's dicta that you only go so far as to remove the —— make the minimum change necessary to comply, and once we had got rid of the box, we would be compliant. That is the sum extent of my submission and that is an entirely legitimate responsive submission to his counterfactual. I am just saying he has got it wrong.

I do agree that if I then go further and make positive submissions, then that is slightly different.

So I have exhausted my time. I have obviously sought to answer the Tribunal's questions to the best of my ability.

What I propose is, what we did not get onto is Foundem's case. Now, the way that I would suggest that we deal with that is, we obviously do not —— that does not mean we accept it. In our closing submissions we will explain what we say is wrong with the case that you heard. You obviously heard quite a bit from Mr McGurk earlier on, on some of the really core issues. He has not had the opportunity to develop that orally and close it off, but we are effectively timed out at this point

unless the Tribunal would like —— I mean, I have got —— I would have about five minutes to respond to Foundem on, because they said something about counterfactuals which is entirely new, and I could respond to that, and Mr McGurk could also respond. But I am not —— I am in the Tribunal's hands as to what you would like from us, because I do accept that I have had my two hours.
THE CHAIRMAN: Yes. Give us just a moment.

(Pause)

Well, we have two points that we need to deal with. One is we want to make sure that Dr Stables finishes his evidence tomorrow.
MR PICKFORD: Yes.
THE CHAIRMAN: Therefore hearing your response to Foundem's case should not deflect from that.
MR PICKFORD: Yes.
THE CHAIRMAN: Secondly, there is still the amendment, which I think Mr McGurk is going to address and that has to be dealt with, and it has to be dealt with, I think, before Google's evidence. That should not take long, but we thought that was going to be dealt with today.
MR PICKFORD: Yes.
THE CHAIRMAN: If we deal with that, that is probably the thing to do now.

We can see if, for example, on Monday, before

Foundem's evidence starts, if you want 20 minutes to address Foundem's counterfactual, that could be done on Monday morning.

MR PICKFORD: I have bitten your hand off, Sir, and I will take that 20 minutes.

THE CHAIRMAN: I think that is a better way to do it rather than risking —— we obviously have no idea what sort of questions might be put to Dr Stables and how long it might take, but you tell us it could be a day and a half so we had better get on with it.

MR PICKFORD: Yes.

THE CHAIRMAN: So I think we will deal then with the amendment now.

MR PICKFORD: Yes.

Discussion re amendment application

THE CHAIRMAN: We have read the letters including, of course, Hausfeld's response. Let me just get the pleadings.

(Pause)

In fact, Mr West, can we perhaps start with you. We have looked at —— the objection, as we understood it, is to paragraph 49AA. That is I think the only part of the amendment that is being objected to.

MR WEST: Yes.

THE CHAIRMAN: If you have your pleadings, not just

the amended reply but the earlier pleadings, as it were, the substantive pleadings, as we understand it, your case is, even after Foundem was whitelisted, it still was suffering a significant loss of traffic, you do not know why, you infer there must have been some penalty, either algorithmic or manual, applied, you cannot point to what it is because that is not in your knowledge, you have not found in the disclosure —— or Google says, "Well, we have disclosed everything and there is nothing there", you say, "Well, but Google acknowledges that the Penaltyserver is not complete and things might have been missed", and so the inference from fall in traffic, you say, in comparison with other search engines is that something must have happened. That seems to us to be the essence of what you are saying.

MR WEST: Yes.

THE CHAIRMAN: In your latest particulars of claim, which I think are May of this year, the latest amendment of the primary claim, you say at 68A—— and this is {C3/3/56}, and it is 68A:

"Foundem was also subjected (and may continue to be subjected) to further search penalties (in addition to Algorithm A and Panda) ..."

You rely on the following facts and matters.

On page {C3/3/61}, at subparagraph (g), you say:

"A number of Google's [algorithms] ... in addition to Algorithm A ... were also targeted at characteristics inherent to CSSs and were therefore prone, and sometimes even explicitly intended, to demote them. For example ..."

Then you refer to the Anchor++ demotion.

So you have pleaded that and that was pleaded, if I have got the date right, back in August 2025.

MR WEST: Yes.

THE CHAIRMAN: So you have made that point.

Then, two pages back on {C3/3/59}, at subparagraph (5A) of this paragraph 68A, you now, by recent amendment, have pleaded:

"Given that the other penalties to which Foundem's site was subject, as pleaded herein, operated at the level of (in effect) of Foundem's whole website, it is to be inferred that any such further penalty also operated at the level of Foundem's whole website ..."

That is your recent amended plea.

Then if we turn to the latest amended defence which came in response to that, so this was an amendment of 21 May, and then you get, on 28 May this year, Google's resulting re—amended defence, which is {C3/4}, starting at page {C3/4/1}, it is the start of the document. Then if we go into that at {C3/4/70}, Google pleads at

54A.7A, the pink colour:

"The inference sought to be drawn by Foundem in paragraph 68A(a)(5A) ..."

Which we have just looked at:

"... is denied. Google's algorithms operate at different degrees of granularity and may be applied to an individual URL or to a larger portion of a site."

Then it states:

"It is in any event noted that Foundem does not particularise or identify any other specific search penalty as having been applied to it; paragraph 54A.1A is repeated."

Paragraph 54A.1A is in this document at {C3/4/65}, so a few pages back. There you see Google had, at 54A.1A, said in response to your 68A, in the second sentence:

"It is noted that Foundem has now received disclosure, including of penaltyserver data, but does not particularise or identify any other specific penalty as having been applied to it."

So that paragraph, 54A.1A that we were just looking at, that was pleaded, as I understand it, on 3 October of 2025, and the new paragraph in pink, at page 70 {C3/4/70}, just refers back to that and adds this new point about different degrees of granularity and levels

of the site.

Now, in the contested paragraph of your reply, it seems to us that your 49AA, you are really just responding to the last sentence of 54A.7A, which is really just a repetition of the previous pleading that had been there all along. It is not really a response —— which was unnecessary anyway. It is not really a response to the new allegation, which is the first sentence of 54A.7A. So if you wish to rely specifically on other potential algorithms as a source of penalty, that is something that you could have done in response to what Google said in the same terms and the same words, effectively, on 3 October of last year, in the 54A.1A. So that is the first point.

But insofar as you now seek to rely on the Anchor++ penalty, well, you have done that already. It seems to us you do not need to, it is already there in your pleading. Insofar as you now wish to rely on —— identify others, I can see some force in Google's objection that that is rather late because they would then have addressed them in their evidence. But in any event, I mean, you have seen what they say about them in the correspondence, your basic case, as I understand it —— and I think you nodded in confirmation when I put it —— is based on inference. You do not know that it is

these algorithms, you are saying there must have been something, and either Google can explain why you were demoted, or if they cannot —— and they may say it is because your site lacked various qualities which attract the application of the algorithms, as we have seen, but if not, you will be inviting us to infer that something happened, and that is a question of whether there is force in that inference or not.

As I say, Anchor++, you have already got, and it seems to us you do not need to put your case, the other two, and it is a bit late to be advancing, shortly before trial, specific reference to two algorithms which have not been pleaded before in response really to a sentence that was pleaded in identical terms back in October '25.

Have I made myself clear on the point?

MR WEST: Yes. It is in fact the case that the algorithm mentioned at (c) was already in the pleading as well.

THE CHAIRMAN: Ah, I missed that.

MR WEST: That is at {C3/4/61}, (f), about four lines down.

THE CHAIRMAN: "js demotion", oh, yes. So that is already there.

MR WEST: The only one not previously pleaded is (a), and the reason for that is simply that it is in reviewing the disclosure in preparation for the trial that

the significance of the relevant disclosure on this has been appreciated. We say, yes, it is not something which we should be required to set out in a pleading, because it is not within our knowledge. We do say that we are entitled to explore it with the witnesses and they can provide such answers as they are in a position to provide.

If the Tribunal thinks it is not necessary or appropriate for it to be pleaded, then as I say, I accept that, but we would like to be able to at least explore with the witnesses what the algorithms may have been and whether or not we have specifically been able to identify them. As I say, it is not a matter which is within our knowledge in the first place. We are doing the best we can based on Google's disclosure; if anyone is in a position to address this, it is Google and not Foundem. So we will wish to explore with the witnesses what the position may have been, although, as your Lordship rightly says, it is all a matter of inference and none of it is within our knowledge as such.

THE CHAIRMAN: Yes. Well, just pause a moment.

(Pause)

Yes, Mr West, apologies, I missed "js demotion". So you have got that one already anyway in the pleading,

you do not need it in the amended reply, and I think it is not appropriate, we feel, to plead a new algorithm.

But I do not think, subject to anything that Mr McGurk says, that you need a pleading to put to the appropriate Google witness reference to another penalty that you have come across and saying, "Well, what about that one"? In fact, you know what the answer will be, because it has been put in the letter, but if you wish to explore it. So it does not really need a pleading.

MR WEST: On that basis, I am happy not to press this application.

THE CHAIRMAN: Yes.

Well, I obviously need to hear from Mr McGurk. So it seemed to us that it is a bit of a fuss about nothing really.

Mr McGurk, so you have heard what I have said and I took on board obviously the points made in the very full letters from Herbert Smith FK.

MR MCGURK: Thank you for reading.

A few short points.

I am not going to die in a ditch about B and C as pleaded out in 49AA. They were referred to —— they are inadequately pleaded, but insofar as we have given full explanations as to how they cannot have impacted in

the interim period, but that is what it is, we can have an argument about that at trial.

What I do object to ——

THE CHAIRMAN: You pleaded in response to one of them.

MR MCGURK: I am sorry, Sir?

THE CHAIRMAN: You have actually pleaded in response to one of them in your subsequent defence.

MR MCGURK: Yes, so the focus of my fire is keyword stuffing. It is —— as you say, we have pleaded out 54A.1A, and across the October '25 and the May '24 amendments, asking them to explain —— to identify and explain when and to what effect these algorithms applied. Keyword stuffing has emerged in a reply two weeks before trial and, crucially, our witnesses have not been able to address them in their evidence, and I think, for that reason, I do stand over my objection to keyword stuffing, but I hear what you say on the other two.

THE CHAIRMAN: Yes. But I mean, you say it is not addressed in the written evidence and no one can complain about that, but you have —— obviously those instructing you have taken full instructions on it and indeed have covered it in their letter. So they indeed say that it could not apply and it would have been revealed if it had applied.

So you have got an answer to it. It can be put by your witness if the question is put to it, because presumably these instructions come from people in Google who know about it. I think it is getting a bit technical to say: well, they cannot put that possibility if it has not been pleaded.

I mean, they would be entitled to ask your witnesses, "Are there any other penalties that applied to CSSs", and from what we are told, well, keyword stuffing does sometimes apply to CSSs.

MR MCGURK: Sir, I hear what you say.

THE CHAIRMAN: Well, I think, on that basis, we will not allow the 49AA, but you are not precluded from putting questions about these three algorithms to Google's witnesses.

MR WEST: I am very grateful.

THE CHAIRMAN: Yes.

MR PICKFORD: Sir, just before —— and I apologise for making this submission just before we rise —— I am not making any application for any more time now. We are starting the cross—examination a little bit late because of Foundem's application. I would just like to note that now in case I have to make an application tomorrow for a few extra minutes.

THE CHAIRMAN: We are not measuring time in exact

equivalence in minutes.

MR PICKFORD: That is understood.

MS ROSE: Just one thing, my centre screen is not displaying the documents as we go through.

THE CHAIRMAN: We are going to rise now, so if that could be looked at.

MS ROSE: Thank you very much.

THE CHAIRMAN: The "follow presenter" screen, I think.

So we will come back in ten minutes.

(3.31 pm)

(A short break)

(3.45 pm)

MR JOWELL: I call Dr Richard Stables, please.

DR RICHARD STABLES

THE CHAIRMAN: Do sit down, Dr Stables.

Examination—in—chief MR JOWELL

MR JOWELL: Mr Stables, you should have a file in front of you. If you could open it, please, on {H1A}, tab A, and you should see there what is marked as a copy of your first witness statement {H1A/1}; is that correct?

A. Yes.

Q. If you could go, please, to {H1A/1/53}.

A. Yes, there.

Q. You see there a statement of truth and a statement of compliance —— a confirmation of compliance. Are those

your signatures?

A. Yes, they are.

Q. Is that statement true to the best of your knowledge and belief?

A. Yes, they are true to the best of my knowledge and belief.

Q. Could you go, please, to the next tab {H1A/2}. You should see there a copy ——

THE CHAIRMAN: Just pausing there.

MR JOWELL: Yes.

THE CHAIRMAN: You said it is true to the best of your knowledge and belief. I think you have made a small correction, is that not right, to a footnote, 81, in that witness statement, which is at {H1A/1/47} in your third witness statement. If you look at footnote 81, where you give dates of meetings and there is the date 15 July.

A. Yes, your Honour, that's in statement 3. That's ——

THE CHAIRMAN: Yes, so there is —— when you said this statement is correct, you have now realised there is this one mistake?

A. Yes, Sir.

THE CHAIRMAN: So I think that is right, is it not?

A. That's right, yes.

THE CHAIRMAN: Yes. That should be 7 July, not 15 July?

A. That's right.
THE CHAIRMAN: Yes.
MR JOWELL: If you go in {H1A/2}, you see page {H1A/2/1—2}, again, this is your second witness statement; correct?
A. That's correct.
Q. If you could go, please, to {H1A/2/39}, where you will see the statement of truth and confirmation of compliance, again, is that your signature?
A. Yes, that's my signature.
Q. Is that statement, subject, I should add, subject to any corrections you make in the subsequent statements which we will come to, true to the best of your knowledge and belief?
A. True to the best of my knowledge and belief, yes.
Q. If you could go, please, to tab 3 {H1A/3}, and you see there pages {H1A/3/1—2}, again, is that your third witness statement?
A. Yes, it is.
Q. If you could go, please, to {H1A/3/3}.
A. Yes.
Q. Are those your signatures?
A. Yes, they are my signatures.
Q. Is that statement true to the best of your knowledge and belief?
A. Yes, that statement is true to the best of my knowledge

and belief.
Q. Could you please go to {H1A/4}, and, again, you see pages {H1A/4/1—2}. This is your fourth witness statement, is it?
A. That's right. That's correct, Sir.
Q. If you go, please, to {H1A/4/4}, are those your signatures?
A. Yes, they're my signatures.
Q. Is this fourth statement true to the best of your knowledge and belief?
A. Yes, it's true to the best of my knowledge and belief.
Q. If you could go, please, to {H1A/5}, we see again pages {H1A/5/1—2}, this is your fifth statement; correct?
A. That's correct.
Q. If you could go, please, to {H1A/5/6}.
A. Yes.
Q. You see a statement of truth and a confirmation of compliance. Are those your signatures?
A. Yes, they're my signatures.
Q. Is this statement true to the best of your knowledge and belief?
A. Yes, this statement is true to the best of my knowledge and belief.
MR JOWELL: Thank you.

Before we start, I just want to check, Dr Stables, are you able to see the transcript coming up in front of you?
A. Yes, I can see the transcript.
MR JOWELL: That is good. There are no annotations on it? Anything come —— it should be an entirely neutral transcript. I just want to make sure that we are not connected to someone annotating it on our side.
A. No, it's —— it's just the transcript.
MR JOWELL: That is great. Please wait there.
THE CHAIRMAN: Can I also just mention, Dr Stables, you will know, and indeed you mention it in your statement, that there are just a few passages or figures that are highlighted in colour in the statement, and that is because there are some confidential figures, some I think confidential indeed to your company, or your group. For example, if you go to page 26 of your first statement {H1A/1/26}, you see, in paragraph 72, there is some highlighting?
A. Yes, Sir.
THE CHAIRMAN: So it may have been explained to you, the way we work is that they are confidential within a confidentiality ring, so you can see them, the Tribunal can see them, counsel can see them, but they are not available to the general public and this is

of course a public hearing. So if you are asked any questions or you want to refer to those passages, or indeed confidential material on any document that is put to you, what we generally do is, if you just say, "Well, the figure in paragraph 72", or something to direct us to it, without actually speaking it out loud, because if you speak it out loud, the confidentiality is blown. I am sure you understand the point. That is how we try and work. Sometimes it is not easy, but I am sure you will be able to work through that.
Yes, Mr Pickford.
MR PICKFORD: Before I begin my cross—examination, there is one very tiny point of effectively tribunal hygiene to check, and I am not casting any aspersions on Dr Stables at all in relation to this, I just want to check something.
I understand that he is logged in to see the transcript. I have got no objection to him seeing the transcript. There is a problem if someone is logged in through their own system, which is not anything that is pre—marked up, but we can all send each other messages, you could mark up something on the transcript. I am not for a moment suggesting that the Kelkoo team is going to be doing that, but just for all witnesses, I would say that it would be appropriate that there is

a neutral log—in so that no witness on any side could ever —— there is no possibility of anyone basically feeding them information.
THE CHAIRMAN: Yes, well, we are getting the live transcript. I do not think we get information from anyone.
MR PICKFORD: No, but the way that the Opus system works is that I have a bundle that is different to what you see.
THE CHAIRMAN: Yes.
MR PICKFORD: For instance, I can mark something up and I can send markups to other members of my team. So within teams, there is kind of like a walled garden, respectively, like we can all do things that only the Kelkoo team can see, or only the Google team can see, or only the Tribunal can see, and purely as a matter of basic, as I put it —— cleanliness, I think it would be appropriate to log in via a neutral log—in, not Mr Stables' own log—in.
MR JOWELL: I am told that this is a neutral log—in.
THE CHAIRMAN: Yes ——
MR PICKFORD: Great. I am grateful. I just wanted to clarify.
THE CHAIRMAN: That applies to all the witnesses.
MR PICKFORD: Exactly.
THE CHAIRMAN: Yes.

The only other thing I should mention at the outset, Dr Stables, we are working largely off electronic bundles. I am sure you are obviously extremely experienced electronically, but if a document is put to you and you cannot see it well on screen and if you want the screen to be enlarged or whatever, just say so, so that you can see it in the way you would like to see it.
A. Thank you, your Honour.

Cross—examination by MR PICKFORD

MR PICKFORD: Good afternoon, Dr Stables.
A. Good afternoon.
Q. Have you had any witness training?
A. Yes.
Q. Was that in connection with this particular case?
A. Yes, it was.
Q. Who was it with?
A. It was a company that Linklaters had put me in touch with. I can't remember the name of it, to be completely honest.
Q. Do you know when it was, roughly?
A. Gosh, probably about two months ago.
Q. What did it involve, very roughly?
A. How to breathe, how not to get wound up by the person asking questions, how to answer the question, how to look at the Tribunal, structural stuff like that,

basically.
Q. Thank you.
How long have you spent preparing for giving this evidence today?
A. 17 years.
Q. Very good.
So as you will have understood from my opening submissions, I am going to be asking you some questions later about aspects of Kelkoo's business strategy and I would like to understand, first, some background on precisely who is responsible for what at Kelkoo.
So I presume that as CEO you had ultimate responsibility for Kelkoo's business strategy; is that right?
A. That's correct.
Q. What about anyone else? Is there a separate head of strategy at Kelkoo?
A. There would have been people who were involved in strategy. They didn't have a job title of "head of strategy", but the executive team would be involved and then we would report to the board and explain what we're going to do.
Q. Okay, so there is no head of strategy at all?
A. I don't think we've had a head of strategy or a title like that for —— you know, I can't think —— I can't

think of anybody with a head of strategy title.
Q. Okay.
Who were the people that you just mentioned who would assist you in developing Kelkoo's business strategy?
A. Typically, the execs, so: CTO, chief technical officer, obviously; marketing director; product director; general counsel; obviously the CFO. We've had, at times, various different commercial directors, sometimes two or three, and then other times we will bring other people onto the exec when we're talking about strategy, so there will be other people dealing with strategy matters.
Q. Sorry, I missed that last part of your answer. You said:
"... other times we will bring other people onto the exec ..."
Who would those other people be?
A. Not onto the exec team, but to meet with the exec to discuss strategy. So somebody from finance, somebody from commercial, that sort of thing.
Q. Thank you.
I wonder if you could just help me with one thing in the light of those answers. Could we go, please, to the bundle at tab F. Sorry, I meant, sorry, {F/43/1}.

Could we bring up on screen so that we can see the Kelkoo —— who the Kelkoo Claimants are.

Then obviously you are familiar with the Kelkoo Claimants?

A. Yes, I am.

Q. My questions that I asked in relation to Kelkoo, that applies generally to the Kelkoo Claimants, there is not any different answer that you would give for any of these particular Claimants?

A. No.

Q. Then if we could go ——

THE CHAIRMAN: Just so I understand that. There is the Kelkoo Group, for which you are the CEO, that is right?

A. That's correct, yes.

THE CHAIRMAN: Would it be right that there is some strategy that is at group level and there might be strategic decisions at country level as well, or ...?

A. So I'm on the board of all of the countries and we may have other directors in local jurisdictions, but typically the group would direct the countries, the way it works, so it all comes from the group.

THE CHAIRMAN: Thank you.

MR PICKFORD: So can we go on to {F/43/2} of this, please.

So this is a confidentiality order in this case, and

you will see it is dated 15 May 2024, I think. I think it might be on the next page that we have to go to to see that {F/43/3}, or even —— either there or the next page after that {F/43/4}.

I will find the date in a moment. I cannot immediately see it on my screen.

Now, could we go, please, to —— sorry, I beg your pardon, it is {F/43/12}. 15 May 2024.

Could we go, please, to the next page {F/43/13}. Sorry, so we are not where I would like to be. So the page I would like to be on is page 13, so the next on from 12. I beg your pardon.

Now, you told me very clearly there was no head of strategy at Kelkoo, although you did mention various other people that would help you in developing strategy. Who is George Milford Haven, "Head of Strategy, Kelkoo"?

A. Yeah, George is one of the shareholders, and he does from time to time get involved in discussions on strategy. Sorry, I should have said that. I assumed that was part of when I said that we talked to the board and the shareholders.

Q. But what is confusing me is you told me you did not have a head of strategy. I asked that question and you were very clear that you did not have a head of strategy, but you told the Tribunal in this confidentiality order that

you do have a head of strategy?

A. Yes, I'm mistaken. I forgot about that.

Q. You forgot that George Milford Haven was your head of strategy?

A. I forgot that he was given that title as he's one of the shareholders, so, yeah.

Q. When was he given that title?

A. Gosh. I —— I can't tell you off the top of my head.

Q. Was he given that title for the purposes of obtaining access to documents in the confidentiality order, because that is what it looks like?

A. No, definitely not. They've been —— they've been with those titles for some time and it wasn't to do with the litigation.

Q. Right. Okay.

Now, I would like to ask you about your fourth statement. You say in that that you are entitled to a small digit percentage of the proceeds of any litigation {H1A/4/3}. You remember that?

A. Yes, I do.

Q. That was given to you as an explicit litigation incentive?

A. That's correct.

Q. So that is an incentive, presumably, to maximise the amount that Kelkoo get in this litigation?

A. Sorry, what was the question?

Q. Your litigation incentive is an incentive that has been given to you to maximise the amount that Kelkoo get in this litigation, because you have been given a cut?

A. I'm still not quite sure of the question, but ...

Q. So, okay, I will take it slowly.

You have been given something called a "litigation incentive", yes? That is how you describe it?

A. Yeah, that's correct.

Q. I am saying, much like, for example, how an estate agent is given a cut of a house price as an incentive to maximise the value of the house that they are selling, or an auctioneer is given a percentage of the goods that are sold at auction to maximise the value of the auction, you have been given an incentive, I presume, to maximise the value of Kelkoo's claim?

A. As you'd expect, with the CEO, it makes total sense; it's appropriate that I be given an incentive that's aligned with shareholders in the company.

Q. Yes, so I think you are agreeing with my question?

A. Yes, I am.

Q. Thank you.

Now, I take it by "small ... single digit", you mean somewhere between 1% and 5%?

A. I think you've seen this before, so I'm not sure where

you're going with this, but I think the Tribunal has already seen this already.
THE CHAIRMAN: I think if you can just answer the question.
A. Yes, 1 and 5%.
THE CHAIRMAN: Between 1 and 5.
MR PICKFORD: Would it harm either Kelkoo's legitimate business interests or you personally for it to be known where between 1% and 5% that figure is.
A. Well, we have GDPR types of things in this country and certain things, you know, are private as much as possible, and I think it's reasonable for me to have that privacy.
Q. So you are asserting your personal privacy to say that you do not want to answer where between 1 and 5% your figure is?
A. Correct.
Q. Okay.
I need to make some submissions and I am going to have to make them on a hypothetical basis if you are not going to tell me what the answer is in open court.
If I assumed, hypothetically, a sum of —— a percentage of 3%, that is not a stupid sum for me to take, is it? That would not be unfair? I am not saying that is the figure, I am just saying it would not be unfair of me?

A. That wouldn't be unfair of you.
Q. When were you first told that you would need to disclose your litigation incentive in these proceedings?
A. We discussed it at Linklaters and ——
THE CHAIRMAN: I think that is a difficult question.
MR JOWELL: This is privileged material.
MR PICKFORD: He has already told us. I know what the answer is. The answer ——
THE CHAIRMAN: Yes, well, I mean, are you saying that privilege has been waived? Is that the point you are making?
MR PICKFORD: Well, there cannot be privilege in it. Yes, I mean, if it were privileged, it has been waived, because we were told. So, yes, I know the answer, but obviously it is not my —— I am not giving evidence, I am asking Dr Stables, and I do not see how that can be confidential, so it is not privileged any more, if it ever were, and it is not confidential.
When were you first told you need to disclose your litigation incentive in these proceedings?
A. So we had discussions with Linklaters and decided that we should be full and frank about all of my compensation, because we thought that it would be an area that you would be interested in and the Tribunal would be interested in. So I put down what I earned,

what my incentives are and how this all worked.
Q. My question was when? When did you have that conversation, can you remember?
A. It was probably after we'd done witness statement 2, between 2 and 3, I think. I think some time there.
Q. Would you disagree with me if I said it was August 2025?
A. I think I would disagree the year. August 2025? It's '26 this year, yes —— no, I think this was done —— let's have a look at the dates.
Q. Could we go, please, to the bundle at {H1A/4/3}.
A. Sorry, say again?
Q. So you do not have to go anywhere because it is going to come up on your screen.
THE CHAIRMAN: It will come up on screen to you.
MR PICKFORD: So can you see a document there that has come up? This is part of one of your statements, it says "Non—Confidential" at the top. Can you see paragraph 15?
Just 15, that is all I am asking you to read.
A. Yes.
Q. So it was in August 2025, was it not?
A. It looks like it was in August 2025, yes.
Q. So that is your evidence.
So my question is why did you not disclose your litigation incentive until a few weeks ago? It is about

a month, I think, but it is a long time after August 2025 and several witness statements later.
A. It didn't really come up as this needed to be done straight away. I mean, we just went, you know, we need to talk about this and let's do a witness statement on that. That's how it worked out.
Q. It did not come —— so it did come up in August 2025? We are agreed about that?
A. Correct.
Q. You then subsequently put a number of statements in to the Tribunal after August 2025 that did not address this issue. I do not understand your answer, Dr Stables, that it did not come up in a way that you needed to address it, because you had been told by your legal team that you had to address it in August 2025. So what I am trying to understand is what happened? What was the problem that it did not then get addressed until nearly a year later?
A. There wasn't a problem. Busy answering and creating all these statements, yes.
Q. Sorry, there was not a problem, it was because you were too busy?
A. Just we did the statement when we did it and there was no reason that we delayed it and we just decided to do it at that point.

Q. Okay, so just so I am clear. You knew that you had to do it, you were very busy doing your statements, and so you deliberately chose to wait until when you finally did do it to tell us about it; is that right?
A. I don't think there was a deliberation of "I am not going to tell you my statement until this date". We did a statement, which was the first one, which was pretty comprehensive and took a lot of my time, a lot of effort. We then did a secondary one, and then a third one, which was the correction. Then it was, we need to make sure that I've covered off remuneration, which is this fourth one.
Q. Right.
The statement that you have now given us in your fourth statement, it does not tell us —— it tells us about the percentage between 1% and 5%. What it does not tell us anything about is another key aspect of the picture in relation to your incentive, does it? There is something missing. Do you know what I am referring to that is missing?
Let me suggest. What is missing is some understanding of what that is a percentage of, because if it is a percentage of something really very, very small, that might not mean very much. But if it is a percentage of something much larger, that casts

a different complexion, does it not? Do you agree with that?
A. No, not really, because I'm telling the truth, I'm not acting in any way because of incentive, it is what it is, and whether it's a very big number or a very small number, in due course we will find out.
Q. Okay. I would like to, for my benefit, understand a bit more about the extent of that potential incentive.
So are you able to say what, in very rough terms, the total size of the damages claim that you have a percentage share in is being sought? I am not asking you to say what it is worth, I am not asking you to give away any confidential information about what you think you might ultimately get. What are you asking for across all of your claims, if you added it up?
A. Well, in the press, I think it's been disclosed it's in the billions.
Q. Yes, and how many billions?
A. I think we just did the plural.
Q. Sorry?
A. I think we just did the plural.
Q. Okay. So that is what you said in the press.
Now, you are the CEO of a company who has a litigation asset; that is fair enough, is it not? This is a key litigation asset of Kelkoo?

A. That's correct.
Q. Probably one of Kelkoo's main assets, if not its very main asset?
A. I think that's probably fair to say, yes.
Q. You are both the CEO of the claimant and you have got a percentage cut interest in it yourself. What I am asking is, have you any idea about what the maximum value of your claim is? Now, you have said, "I reported to the press that it was billions", and what I am asking you is, sure, that is what you reported to the press, but what do you actually believe that your claim's headline figure is?
A. Well, clearly, we —— how this all works out is going to be based on what the Tribunal in this case decides in terms of what a counterfactual looks like, the length of the counterfactual, what the margin should be, what Kelkoo's share of that market might look like, what the market size grows to, what costs they may think. There's an awful lot of variables involved in that.
Q. Yes. So I am not asking you to say —— to guess what the Tribunal is actually going to give you. What I am asking you is a different question, which is, typically in proceedings in this Tribunal, Claimants are required to say what the value of their claim is. They have to say, "Our claim is worth X, here is how we got to that",

and that does not mean that is what they are going to get, but it means that is what they come to the court and ask for. What I am asking of you is what are you —— what are you going to ask for when we get through to the next trial?
A. I think we'll have to wait for the next trial because we've got to work through and listen to what the Tribunal says about all of the various bits, because up until this point it is going to be supposition.
Q. Okay.
So have you given it any thought yourself?
A. Yes, of course.
Q. You are, I think, not willing to engage with me in terms of revealing any of your inner workings in relation to that, so I am going to put ——
THE CHAIRMAN: That is a bit difficult, because Dr Stables' expectation, and no doubt they will have discussed this in the board of Kelkoo, will depend on the legal advice they have got of their chance of success on these various matters ——
MR PICKFORD: Yes.
THE CHAIRMAN: —— and understandably, no one wants to reveal that.
MR PICKFORD: No, and I am not asking that ——
THE CHAIRMAN: So, I mean, you said it is obviously, you

know, potentially a very large sum, and we can all see what the small percentage can be of a very large sum.
MR PICKFORD: So let us —— let me take a hypothetical.
If I was to guess that if you had been required to put a claim form in, it might say 20 billion. You are not in any position to say that is a ridiculous sum for me to have come up with? I am not asking you to tell me what the sum is, I am just saying that is not like an outlandish, ridiculous sum, is it?
A. Well, I guess Kelkoo was at sort of 12/15% of the market prior to your abuse. Google, I think, is making about 14 billion a year in 2026. Somebody could turn around and say, if you had 15 or 20% of the market over the —— you know, however many years of the abuse, so if it goes up to today, that's a lot of years, so it could be a big number. But as I've just indicated, there's an awful lot of assumptions, suppositions that there is going to be, this court is going to help us with to narrow that down.
Q. That is understood.
So just as a hypothetical, let us just suppose that we took 3% and the sum we took it of was 20 billion. That would give you a litigation incentive, if those were the numbers, and they are just —— at this stage, they are hypothetical because you will not tell me

the actual numbers, of £600 million. That would be a life—changing sum of money, would it not, if you got £600 million?
A. That would be quite a big number.
Q. Are you willing to say what your approximate annual salary is, Dr Stables?
A. I think I put that in the statement.
Q. You did.
A. Yes.
Q. It is just —— so are you willing for me to tell the Tribunal?
A. Well, I'd prefer that you didn't call it out in court, but I think it's —— I'm not sure if it's ——
Q. Okay, let me put it this way. These are hypotheticals, but by what I calculated, the litigation incentive is in the vague order of about 2,000 years' worth of your salary, is it not? In that vague order?
A. If it was that number, yeah, it would be —— that sounds —— the maths seems correct.
Q. Right.
But you are totally clear that there is no risk whatsoever that notwithstanding that extraordinary incentive, that you would ever conceal anything that is damaging to your case?
A. Look, I'm one of the wealthiest people I know. I have

got a wife, I've got three amazing kids, I have a dog, I've got perfect health and I've got a very good family, and that, to me, is what wealth is. If there's a lot of money that comes out of this, then so be it. Google has done an awful lot of bad things. It's for the Tribunal to decide. I'm here, I'm going to speak the truth, the whole truth, I am not going to make things up. Everything I've said is followed up with documents and fact, and that's —— that's who I am.
Q. Thank you.
A. For the Tribunal, whether they believe that or not, that's up to them, and that I think is what we should say on that.
Q. So you have not been misleading in any way in your evidence, that would be your position?
A. I would not mislead, no.
Q. Okay. If we can move on then.
You started at Kelkoo in February 2009, yes?
A. That's correct, yes.
Q. At that point, Kelkoo had been sold to Jamplant the year before?
A. Yes, I think it was in November 2008.
Q. Kelkoo had been bought originally by Yahoo! in 2004 for around US$600 million; that is right, is it not?
A. I think the number is slightly lower than that, but,

yes, something around that sort of figure, yes.
Q. Then Yahoo! sold it in 2008, as you said, for around about $125 million, so a quarter of what they had bought it for four years earlier; that is right, is it not?
A. I don't know. I am not privy to what it was sold for.
Q. Okay, let us go, if I could, please, to {M2/693/10}.
This is an article by Michael R Baye and others about the evolution of CSSs and shopping.
We see, about ten lines down or so, that:
"Yahoo! purchased Kelkoo in March 2004 for $598 million but sold it ... for 125 million ..."
You are not in any position to disagree with those figures?
A. I'm not in a position to disagree with those figures, no.
Q. Now, you say in your written evidence that, from 2006 onwards, the decline in Kelkoo traffic, leads and revenue, is predominantly a function of Google's algorithms severely hurting Kelkoo. You obviously remember that part of your evidence?
A. Correct.
Q. Whilst there were other issues, you say that they were temporary and of limited scale; you recall that?
A. Probably better to go to the actual document to ——
Q. Of course. So if we go to {H1A/1/26} and it is

paragraph 74.
Do you want to just take a moment to refresh your memory of paragraph 74?
(Pause)
A. I'm reading 74, yes.
Q. Okay.
So I would like to look at the evidence with you about how Kelkoo was doing in early 2006, okay? That is where I am going to start.
So are you aware that as early as March 2006, Yahoo! had raised significant concerns about how Kelkoo was seeking to attract traffic? Does that sound familiar?
A. I —— I have since looked at some of the documents, but I wasn't aware until the point when I was looking at the documents after you'd raised them in the —— in your skeleton, I think it was, or whatever.
Q. Okay, well, maybe I can assist with this part of the cross—examination by taking you to some of those documents that you may have looked at.
So could we go, please, to {M2/118}. So this is a Kelkoo presentation. Please could we go to slide 6 {M2/118/6}. This is just the context for you for the next slide. It says:
"Spam content within 'Top Searches'.
"Duplicate Content.

"Multiple Redirects."
Then could we go on, please, to the next slide {M2/118/7}.
Now, on that, we see some "auto—generated 'Top Searches'". It says —— you see it says:
"Risk:
"The auto—generated 'Top Searches' pages contain irrelevant spam keywords ..."
Do you see that?
A. Yes, I do.
Q. "... (including misspellings, porn etc)."
Then there is a snippet below of what appears at the top of the Google Search page; do you see that at the second half of the page?
A. Yes, I do.
Q. You see that if the user searches for "sexy homme", the top result that comes up is from Kelkoo Belgique; do you see that?
A. Yes, I do.
Q. But Kelkoo did not offer a sexy man comparison service, did it?
A. I don't know, I wasn't at Kelkoo at that point, but I don't believe so.
Q. No.
So what it must have been doing here, therefore, was

trying to cheat its way into traffic because it is the top result if someone puts in "sexy homme"?
A. I'm not going to agree with your statement about trying to cheat. I think that's a —— that's your statement.
Can I just, for the record, check with the Tribunal, do you want me to comment on this in the sense of me being an expert in price comparison, because this was prior to me being at Kelkoo, so I'm happy to discuss it from that perspective, but I wasn't obviously in Kelkoo at 2006.
THE CHAIRMAN: I am not quite sure where this line of questioning is going. You have asked whether Dr Stables knew that Yahoo! had raised concerns. His answer was he did not know in March 2006, he did not know until he learnt that from some of the documents that have been referred to. You are now asking him about documents about three years before he joined Kelkoo. Are you asking him to hypothesise on what was going on, or are you asking him from his experience?
MR PICKFORD: I am asking him what he was aware of in relation to what was happening in his business prior to him arriving. Now, he may say, "I am sorry, I simply —— I knew nothing about the business, it was a total blank slate".
THE CHAIRMAN: These concerns raised by Yahoo!, I think

Dr Stables did say he did not know about them, they were raised in 2006.
I think one can fairly ask you, Dr Stables, when you came to Kelkoo, in I think February 2009, were you made aware then that there had been these concerns of this kind?
A. Not —— not —— I mean, not that specific one. I mean, obviously we were looking at things in the business in 2009: what was good, what was bad, what we needed to improve. But I didn't know what —— and you don't typically go back and look at all this sort of stuff. When you start in a CEO role in 2009, you wouldn't be going back and looking at all of this stuff, you're looking forward.
THE CHAIRMAN: You were not told, do I take from that, that Yahoo!, who no longer owned Kelkoo, had made this presentation or had raised this?
A. No.
THE CHAIRMAN: No. Thank you.
MR PICKFORD: Okay, so I think I can probably move then relatively quickly to some other things that you probably do not know about, but I am going to ask you anyway just to make sure that I am not making an incorrect assumption.
So are you aware that in around the end of 2006,

certainly before —— a couple of years before you arrived, that Yahoo! had raised significant concerns about the user experience offered by the Kelkoo site? Is that something you were aware of when you joined as CEO?
A. No, I wasn't aware.
MR PICKFORD: So, on that basis, I am not proposing to put further documents on that to Dr Stables. We will of course be referring to those documents in our closing submissions.
THE CHAIRMAN: Yes.
MR PICKFORD: But what I want to be clear about is that no one is going to take a point against me that they were not put to Dr Stables. I am happy to do so, but I do not want to annoy the Tribunal and I do not want to take up unnecessary time. So as long as everyone is content with that, I propose to skip on to another question.
I am giving my learned friend an opportunity to stand up and object and say, no, he wants me to take him to the documents. Otherwise I am not going to put —— take Dr Stables to pre— ——
MR JOWELL: I can confirm that we do not object if my learned friend does not take Dr Stables to documents that pre—date his time at Kelkoo.

MR PICKFORD: Thank you.
There is another document I just want to be clear about, because it is possible this is the sort of thing that you might have seen. If we could go, please, to {J1A/11}.
So this is a "Confidential Information Memorandum" prepared by Jefferies, and this was prepared on behalf of Yahoo! for selling off Kelkoo.
Now, I do not know exactly what involvement you had, if any, at this stage, so can you tell me, please?
A. Yeah, I had no involvement in the purchase of Kelkoo in 2008. I wasn't involved in this memo. I did actually read this memo a year later, but, no, I wasn't involved in it and didn't have any part of the process of the shareholders buying Kelkoo.
Q. Okay, but this is something that therefore you were aware of within your first year of coming to Kelkoo?
A. Yes, I was.
Q. Thank you.
So in that case, please could we go to the bottom of {J1A/11/16}, and could you read, please, those two paragraphs on "Positioning". They begin:
"A clear distinction exists ..."
Then down to the end of the page, please.
(Pause)

A. Yes, I've read them.
Q. So that describes a clear distinction between on the one hand review—focused sites like Ciao, which have good SEO ranking but low conversion rates, and then sites on the other hand like Kelkoo, which are leads—focused and have higher conversion rates. You agree with the description that is presented here in this document?
A. I agree they've made a description about sites. Whether they were correct or not at the time, I couldn't tell you, but, yeah.
THE CHAIRMAN: Do you think this distinction, never mind which site falls into which category, but that is a meaningful way of looking at it, that some are more review—focused, some more lead—focused? Is that a fair ——
A. Yeah, I think it's fair to say that Ciao, for example, was very much a review—focused site. It was product reviews, and millions of people went to Ciao to look at product reviews. They didn't monetise as well as they wanted to, and then they were spending a lot more time trying to monetise, so definitely visit—to—lead rates would be much lower. Then price comparison, in terms of the traditional price comparison, which is the ones there, are definitely much more about getting more traffic in and trying to make leads to sales for

consumers, for merchants.
MR PICKFORD: So as I understand it, you are agreeing both with the general distinction and I think you referred to the sites there. Are you also agreeing, in fact, where Kelkoo was in this broad distinction between two different types of CSS?
A. I think it's fair to say that Kelkoo had product reviews and merchant reviews, but not to the extent of Ciao, as you'll see in the evidence. I think you know that. But, yeah, I would say that Kelkoo had that sort of thing, but it was much more about generating leads than, I guess, reviews, in the way that Ciao was.
Q. Thank you.
Could we go on to the next page, please, {J1A/11/17}, and we see something called "Exhibit L". You will see from that graph that even by September 2007, which is the date just underneath the graph, Kelkoo is the second—least dependent on SEO traffic, so 72.3% ...
THE CHAIRMAN: Where are you?
A. I've got 81% here.
THE CHAIRMAN: Where are you?
MR PICKFORD: I beg your pardon, we are on the wrong bit of the page. If we could scroll out, I am looking at Exhibit L.

Sorry, you were not taken to Exhibit L. So if we look at Exhibit L, you will see that, even by September 2007, Kelkoo was the second—least dependent on SEO —— that is search engine optimisation —— Google traffic ; do you see that?
A. I see that, yes.
Q. By the time you arrived, around a year later, you are not aware that anything had radically changed in terms of Kelkoo's dependency, or lack of it, on Google traffic , are you?
A. I think they've —— to be honest, I think they've got this all wrong, because this is talking about incoming traffic , and what they've obviously made the mistake of is they've been mixing up the publisher with the site traffic , and Kelkoo had a reasonably large publisher business by this stage and that's probably why they've got that percentage. So it's —— it's not incoming traffic to the Kelkoo site. So in terms of how the CSS operated in terms of its traffic from Google, these —— these percentages don't make sense.
Q. Can I just unpack that and understand that more. You said that Kelkoo had, by this point, an established publisher business; that is right?
A. That's correct, yeah.
Q. So traffic that goes to a —— that ends up at a merchant

from a publisher who is part of the Kelkoo network, Kelkoo does not, obviously, need to rely on Google for that traffic , does it?
A. That's correct, yeah.
Q. So is your point, when you say —— when you are talking about incoming traffic, that you are saying, well, if it is publisher traffic , publisher traffic does not actually ever come into Kelkoo, it goes directly from the publisher to the merchant and so it is not quite right to describe it as incoming traffic? Is that your point?
A. It's not quite technically correct, because we'd have this thing called an interstitial page, and the way that publishers would then click on it and it would bounce on a —— it was like a Kelkoo interstitial page and then went on to the merchant, so that was, like, how they would do the tracking, but it wasn't part of what you would call traffic to the site. So the user would never see that, it was, like, in the background, so it's sort of a technical point. So I would be incorrect to say that traffic didn't come to the Kelkoo site, but the user would never see it.
Q. So this is, as I understand it, a definitional point that you are making where —— would you accept that, of all of the traffic that Kelkoo sends to merchants, 72.3%

of traffic that goes to merchants does not come from Google, putting aside the issue of whether it goes via the Kelkoo site; is that fair?
A. I think that's a fair statement, yeah.
Q. Thank you.
Now, if we could go, please, to the next document, which is {J1A/11}. Sorry, I beg your pardon, it is the same document, it is just the next bit of it. I would like to go, please, to {J1A/11/19}. My mistake. So can you see Exhibit O? This is "Total Revenue per Visit"?
A. Yes.
Q. We see that Kelkoo has the highest total revenue per visit , much, much higher than Ciao?
A. Yes.
Q. Then if you look down to about sort of a third of the way up from the bottom of the page, we see a description that begins:
"Kelkoo has experienced audience attrition since early 2006 ..."
Can I ask you please to read those three bullets and the factors there.
A. Is it the three bullets below:
"Kelkoo has experienced audience attrition ... "
Q. That is right, yes.

(Pause)
A. Yes, I've read them.
Q. Now, given what you understood when you joined a little later, when you read this document now, do you consider that that is a fair assessment of Kelkoo's business, as far as you have understood the business that you were inheriting?
A. So I think there's two parts to that question, if I understand. You're asking me, now, with everything that I know, do those statements make sense. I think that's the question?
Q. Yes, I am very happy to ask that version of the question.
A. Okay. So businesses were trying to figure out what was going on, and their understanding of what was going on and that description at the time made sense. In hindsight, now having seen all of the things that Google were doing, there's obviously an awful lot of other things going on that they weren't aware of that would impact them. So, you know, they were obviously trying to understand why Kelkoo's business was flatlining, or potentially coming down, and they weren't aware of any secret algorithm, as was —— and neither was I until this litigation , or, sorry, until the decision from the European Commission, and obviously in the FTC demo

—— memo that came out, there was some talk about some algorithmic type stuff. So in the light of that, some of these paragraphs look a little strange now.

Q. Back in —— when you joined the business, did you understand that there was an essential tradeoff between, on the one hand, Google ranking, which required a site to be content rich, like Ciao, and on the other hand, the revenues per visit that you could generate, which required achieving quick clicks, like Kelkoo did?

A. No, I think that, again, this is quite complicated, and I'm not trying to make it complicated, but let me —— let me try and make it simple. Clearly, what is a price comparison site and what is it trying to do?

The content is effectively the taking of these hundreds of millions of offers from thousands of merchants, categorising them, putting them into useful pages that —— for example, under products or offers, so that the user can then see them. That is something incredibly useful and that's what price comparison is, and that was a business that Kelkoo was doing and a number of other CSSs were doing, and indeed that's what Google ended up copying and doing. The —— what's interesting about this whole debate is, when Google turned around and says, "Yeah, you don't have any original content", it's like —— and it was very

confusing at the time, because you're sitting there going, well, the categorisation of those offers and the putting them into products and into category pages, that is the content.

On top of that, obviously there's things like merchant reviews and product reviews, but a user's coming to our site to see, if it's buying a washing machine, or a kettle or a TV, they want to all of the merchants, and they want to see the prices, and they want to see whether they're available or not, and that's —— that's why they're there. At the same time, they may want to have information around which —— which TV to buy, or which merchant is a good merchant, but if you haven't got that type of information, then you're a different type of site, and you may be a site that's just talking about which —— which TV to buy, but then you don't have all the list of merchants.

So I think it's very easy for me to turn around and say, yes, yes, you're right, it's all this content stuff that we didn't have, but this is —— this is the fundamental, I guess, problem that we have here is that the CSS industry was told it needed to do all this other stuff, but that's exactly what Google did on its CSS and what it did at the top of Google, and that's —— that's where this gets difficult. I believe we had

really good content on our site and we were giving users what they needed.

Q. Okay. Could we —— probably a final question, because we are going to finish very shortly. Could you go, please, to {M2/196/27}. So this is from a Yahoo! and Kelkoo merger presentation. Sorry, probably it would be helpful —— it would be fairer of me to take you to page 1 first, just so you can see what it is before we go back to page 27 {M2/196/1}. So:

"Y[ahoo]! Shopping & Kelkoo.

"Third Party Options.

"May 2007."

Have you ever seen this before?

A. I saw it as part of the preparation for this. I hadn't seen it before. It was when I looked at it after it was in your skeleton, so I hadn't looked at it before.

Q. Understood.

So if we could go back to {M2/196/27}, please. Do you agree or disagree with the assessment of whoever wrote this slide at Kelkoo that the:

"Current CSE position has limited engagement and differentiation resulting in explicit traffic arbitrage model."

Is that a fair assessment of the business that you inherited?

A. I think I'd need to look at some of the pages above and below, because it seems a bit out of context, to be completely honest.

THE CHAIRMAN: Sorry, can you just help me, what is "CSE"?

A. It's comparison shopping engine. So it has been called various things over the years, price comparison, comparison shopping site, comparison shopping engine, shopbot, it's all very confusing and I think the Commission came down with a CSS rather than a CSE, but other people have called it various things.

MR PICKFORD: So I am not asking you to perform a textual analysis of this, all I am asking for is, do you agree with that statement that was made in a Yahoo! presentation the year before you joined? Is that fair in relation to the business that you inherited?

A. I think this is two years, isn't it? 2007?

Q. 2007, yes, sorry.

A. I can't agree or disagree with three lines in a statement like that without reading the whole document, to be completely honest.

Q. Okay, let us pretend it is not in a document. Do you agree that when you arrived at Kelkoo, the basic model of comparison shopping engines was an explicit traffic arbitrage model? Do you agree with that statement?

A. So I think arbitrage is a prerogative —— whatever you

guys call the word —— sorry, dyslexia kicking in there —— is a dirty word. Our whole business was about taking users, getting them to our site, giving them something of value, and sending them to merchants for them to potentially buy things. That two—sided market was very —— was a healthy type of business. If, of course, we made money out of it, that's how —— that's how those businesses worked. Google is an arbitrage business. Kelkoo is an arbitrage business. But that doesn't really sum up what they're doing; the value is in the price comparison and what they're doing there.

Q. So do I take it that you agree that it is an arbitrage model but you say, nonetheless, "I am not willing to agree to anything negative being inferred from that"? Is that a fair summary?

THE CHAIRMAN: I think Dr Stables is saying businesses, as he described it, if you want to call that arbitrage, you can call it arbitrage, but the essence of the business is the description you have given.

A. Yes.

THE CHAIRMAN: Is that right?

A. Yes.

MR PICKFORD: Thank you.

We have reached the end of the day.

THE CHAIRMAN: Yes. So we will stop now.

Now, for tomorrow, we are extremely anxious that you should complete your evidence tomorrow, which means you are then, as it were, released over the weekend, and so Mr Pickford, if we start at 10 o'clock, will that ...

MR PICKFORD: So you ——

THE CHAIRMAN: I suggested 9.45 ——

MR PICKFORD: —— promised me 9.45 before.

THE CHAIRMAN: Yes, so you want 9.45.

Is that a problem for you, Dr Stables?

A. Not at all, Sir. That's fine.

THE CHAIRMAN: So we will start at 9.45 tomorrow.

MR PICKFORD: Thank you.

THE CHAIRMAN: Is there anything else on timing?

MR PICKFORD: There is not anything else on timing.

THE CHAIRMAN: No.

So Dr Stables, as you may have had explained to you, you are now in the course of giving your evidence, which means you must not discuss your evidence or the case with anyone else. Always difficult, because it is the thing most prominent in your mind, but we rely on you that you will not discuss it, not only not with your lawyers, but even with others, particularly anyone in the business, until you have completed your evidence. That is one of the reasons we are keen you should complete it by the end of tomorrow.

A. Yes, your Honour.

THE CHAIRMAN: So 9.45 tomorrow.

(4.51 pm)

(The Court adjourned until 9.45 am on Thursday, 25 June 2026)

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