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IN THE COMPETITION
APPEAL TRIBUNAL

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

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

11th September 2026

Before:

The Honourable Mr Justice Roth
Dinah Rose KC
Professor Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

KELKOO.COM (UK) LTD & OTHERS (“Kelkoo”)
WHITEWATER CAPITAL LIMITED (“Ciao”)

Claimants

- and -

GOOGLE LLC & OTHERS

Defendants

A P P E A R A N C E S

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

Meredith Pickford KC & David Gregory (Instructed by Herbert Smith Freehills Kramer LLP) on
behalf of Google LLC & Others

1 Friday, 11 September 2026
 2 (10.30 am)
 3 (Proceedings delayed)
 4 (10.36 am)
 5 THE CHAIRMAN: I start as always with a warning. These
 6 proceedings, like all proceedings in the Tribunal, are
 7 being live streamed. An official transcript of the
 8 proceedings is being made. It is strictly forbidden for
 9 anyone to make any unauthorised recording or take any
 10 visual image of the proceedings, and to do so is
 11 punishable as a contempt of court.
 12 I made an order, I think it was issued yesterday,
 13 regarding confidentiality. There is some confidential
 14 material in the papers, although I am not sure, really,
 15 that any reference to confidential material will arise
 16 in today's hearing. I know there is a confidential
 17 version of the DMA Decision, speaking for myself
 18 I actually have not looked at it and I doubt the
 19 confidential bits are relevant to the argument that
 20 we are going to hear.
 21 Just pause a moment.
 22 (Pause).
 23 I am told that the live transcript is not coming
 24 through. Are we getting a live transcript today?
 25 MR JOWELL: We should be, I am told.

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1 THE CHAIRMAN: Are you getting it?
 2 MR PICKFORD: No.
 3 MR JOWELL: No.
 4 THE CHAIRMAN: Are you content to start? I think it is
 5 important we do. It is important we finish by, if
 6 possible, 4.15, absolute bar 4.30. We cannot sit late
 7 today. We note there is also an application by your
 8 client, Mr Jowell, to amend, which we think should be
 9 dealt with today. We do not think it can take more than
 10 30 minutes, but it is important that that time is carved
 11 out so it can be dealt with.
 12 MR JOWELL: I am grateful for that indication and
 13 I certainly intend to be relatively brief.
 14 THE CHAIRMAN: We have, of course, looked at the DMA
 15 Decision.
 16 Submissions by MR JOWELL
 17 MR JOWELL: Yes. Unless the Tribunal tells me otherwise,
 18 I will take broadly as read the written submissions that
 19 we filed as well. So I will seek to be largely
 20 supplementary to those rather than -- and hopefully not
 21 too repetitive.
 22 As you will have seen, though, to some extent the
 23 written submissions are a bit like ships passing in the
 24 night and I will therefore seek to try to respond to
 25 some of the points made in Google's submissions. So on

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1 that, it may assist if I start by just identifying at
 2 a high level the two approaches that we have each taken
 3 to the relevance of the July DMA infringement decision.
 4 Our approach and Google's approach.
 5 On our approach, the relevance of the decision
 6 is that it contains legal reasoning on the part of
 7 the Commission that is illuminating in relation to
 8 certain of the similar legal issues that arise in the
 9 present dispute.
 10 We accept that that legal reasoning is not binding
 11 on this court, not least because the DMA is a different
 12 provision to Article 102. But we do say it is
 13 admissible at least insofar as it relates to matters of
 14 law and not to evaluative findings of fact and we also
 15 say that that legal reasoning is something that the
 16 Tribunal may take into account, it can legitimately have
 17 regard to it, and we say that that legal reasoning is
 18 confirmatory and supportive of the points that we have
 19 made in these proceedings already and we say that it is
 20 inconsistent with Google's submissions on a number of
 21 important points. I will go on to elaborate in due
 22 course the specifics of that.
 23 But before I do, I should say that Google in their
 24 written submissions, at least for the most part, seem to
 25 take a rather different approach and they largely ignore

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1 the content and reasoning within the DMA Decision and
 2 instead they focus on the outcome and they seem to
 3 concede that the potential relevance of the DMA Decision
 4 lies in the fact that it establishes that Google has
 5 been, as from March 2024, held to be in breach of the
 6 DMA and they seem to consider that the only point or the
 7 main point that is made against them is this may
 8 circumscribe the legitimate counterfactual or establish
 9 the existence of the abuse. Then on the basis of that
 10 premise they then make a number of further legal
 11 arguments, and as we understand them they make five main
 12 points.
 13 First of all, they say that the DMA infringement
 14 could only be relevant for the period since which the
 15 DMA has bound Google, which is from 7 March 2024, and
 16 not before.
 17 Secondly, they say that the DMA infringement cannot
 18 affect the position in the UK where the DMA does not
 19 apply.
 20 Thirdly, they say that Kelkoo should have pleaded an
 21 infringement of the DMA from 7 March 2024 and we cannot
 22 properly rely on it until we do so.
 23 Fourthly, they say that the *Meta* authority does not
 24 apply in the UK because it is after IP Completion date.
 25 Finally, they say if we or the Tribunal are relying

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1 on the DMA then there should be a stay pending their
2 intimidated appeal to the European Courts from the DMA
3 Decision.

4 Those were all, no doubt, very interesting points
5 and one could spend some time debating at least some of
6 them, which would be controversial, not least the last
7 as regards the stay. But in our submission it is not
8 actually necessary to do so. I do not want to spend
9 long on this. Because it is in our respectful
10 submission really based on a false premise as to what
11 we are seeking to rely on.

12 We appreciate that the Tribunal may take a different
13 view as to the significance of the DMA Decision, but at
14 least from Kelkoo's point of view we do not seek to rely
15 on the ultimate outcome of the Commission's
16 investigation into Google's DMA compliance, or to put it
17 differently, we are not relying on this decision as an
18 output that definitively establishes an infringement of
19 the DMA.

20 The relevance of the DMA Decision is not, we say,
21 that it binds Google as to what is legal and what is not
22 in the period from March 2024, for purposes of
23 identifying the lawful counterfactual, nor in our
24 submission is illegality -- the significance that
25 illegality under the DMA somehow establishes illegality

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1 under Article 102 in the sense that one sees in the *Meta*
2 judgment.

3 We do not take those points. We simply seek to draw
4 on the legal reasoning within the DMA Decision, in
5 particular as regards self-preferencing, and the
6 identification of Google's CSS, which we say is
7 confirmatory of the legal arguments we have already
8 made.

9 We do so in a similar way to the way that we have
10 referred to the German court's legal reasoning in the
11 *Idealo* judgment or the Swedish court's legal reasoning
12 in *PriceRunner*. None of those authorities are strictly
13 binding precedent on this Tribunal, we accept that, but
14 they all constitute authority, we say, that it is
15 legitimate for this Tribunal to have regard to, at least
16 insofar as one stays away from pure findings of fact.
17 In both cases we say that the authorities are supportive
18 and confirmatory of various aspects of the legal
19 submissions we have made in these proceedings.

20 Before I turn to the legal reasoning within the DMA
21 Decision that we do rely on, I should issue a word of
22 caution, in a sense two words of caution. We do
23 acknowledge that the findings in the DMA Decision should
24 be applied by the Tribunal with some care and we have no
25 doubt that the Tribunal will exercise care. That is for

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1 two reasons.

2 First, because in light of the judgment in
3 *Evans v Barclays Bank*, the principle of
4 *Hollington v Hewthorn* has been held to apply with full
5 force to proceedings in this Tribunal. It is fair to
6 say that the precise ambit of that principle is still to
7 be clarified, at least by highest authority, in cases
8 where the party against whom factual findings are
9 invoked were themselves a party to the previous legal
10 proceedings giving rise to the decision that is sought
11 to be relied upon.

12 But as we, I think, make clear in our written
13 submissions, we are content to proceed on the basis of,
14 if you like, a maximalist version of the principle such
15 that it means that evaluative findings of fact in the
16 decision are not admissible at all. But even on its
17 most expansive reading, we say that *Hollington* does
18 permit regard to be had to determinations of law and
19 indeed to legal reasoning underlying those
20 determinations of law and it also permits regard to be
21 had to the record of factual evidence contained in
22 a judgment or decision.

23 You will see for that proposition the authority
24 cited in paragraph 20 of our skeleton argument. So I do
25 not intend to go through the law in *Hollington* because

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1 I do not understand it to be controversial.

2 The other reason for we say there should be some
3 care is that we do accept that the DMA regime and
4 competition law are not identical, there are some
5 differences between their respective requirements. That
6 said, there are also clear areas of overlap, in
7 particular between Article 6(5) and Article 102. One of
8 those key areas of overlap is the question of what
9 constitutes self-preferencing. Indeed, one sees on that
10 point a near identity between the test that is
11 articulated in Article 6(5) and the test for that form
12 of abuse under Article 102.

13 That is not surprising because the genesis of that
14 specific provision in Article 6(5) was indeed really the
15 *Google Shopping* Decision and the subsequent judgments
16 that established the abuse of self-preferencing. One
17 can see that from the impact assessment report of
18 the Commission, which forms part of the travaux
19 préparatoires to the DMA. We refer to that in
20 paragraph 25 of our skeleton, but if I can take you to
21 it, it is at {Q1/4}. If we could have that up. You
22 see, there it is, the impact report.

23 If one goes to the start of the table, I think, at
24 {Q1/4/59}. It is a table which has a list of the
25 obligations with examples and underlying evidence. If

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1 one then goes to page 63, {Q1/4/63}, one sees --
 2 THE CHAIRMAN: 63 within the report?
 3 MR JOWELL: Yes.
 4 THE CHAIRMAN: Just a minute.
 5 MR JOWELL: Forgive me, internal page 57 and 63 of the
 6 bundle, sorry.
 7 You see on the left:
 8 "Gatekeepers shall not treat more favourably in
 9 ranking their own services and products compared to
 10 similar services or products of third-party business
 11 users and shall apply fair conditions to such ranking."
 12 You see that on the left. Then the example:
 13 "A search engine preferring its own vertically
 14 integrated services in its search engine results (eg
 15 shopping or travel searches are featured on top of
 16 search results) ..."
 17 You see on the right a direct reference to the
 18 *Google Shopping Commission Decision* where:
 19 "Google leveraged its dominance in general internet
 20 search services to the separate comparison shopping
 21 service (CSS) market by favouring *Google Shopping* on its
 22 general web search results page."
 23 So it is clear that that is part of the very genesis
 24 of the prohibition. Unsurprisingly, the wording of
 25 Article 6(5) as to what constitutes self-preferencing is

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1 very similar to what one sees in the *Google Shopping*
 2 Decision.
 3 There is also, consistent with that, a similarity in
 4 the remedy that is imposed under the 2017 Commission
 5 Decision, the *Google Shopping* Decision, and the remedy
 6 imposed in the recent 2026 DMA Decision. So if one goes
 7 back to the original decision, and one looks at the
 8 remedy there, it starts at recital 697. If we could
 9 please have up {BA/2/232}.
 10 You see here the -- it is from 697, one sees:
 11 "Google and Alphabet should be required to bring the
 12 infringement established by this Decision to an end ..."
 13 And so on.
 14 THE CHAIRMAN: My feed has stopped.
 15 (Pause).
 16 Sorry, can you just give me the reference again?
 17 MR JOWELL: Certainly. BA, tab 2, page 232.
 18 (Pause).
 19 THE CHAIRMAN: Which recital?
 20 MR JOWELL: It starts from 697, but it is really 700 that --
 21 one sees the principle in 699 that Google should treat
 22 competing comparison shopping services no less
 23 favourably than its own comparison shopping service.
 24 Then you see the specifics of that in paragraph 700
 25 and one sees the scope of it. They should have applied

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1 to "all devices, irrespective of the type of device",
 2 "should apply to all users of Google", and then in (c):
 3 "Should subject Google's own comparison shopping
 4 service to the same underlying processes and methods for
 5 the positioning and display in Google's general search
 6 results pages as those used for competing comparison
 7 shopping services."
 8 You can see that:
 9 "Such processes and methods ... include all elements
 10 that have an impact on the visibility, triggering,
 11 ranking or graphical format of a search result in
 12 Google's general search pages, including ..."
 13 Then it goes on:
 14 "processes and methods and relevant standards ..."
 15 And over the page {BA/2/233}:
 16 "processes and methods [if we could go over the
 17 page, please] determining the positioning and display of
 18 comparison shopping services in response to a query ..."
 19 "type of landing pages ... visual appearance ...
 20 type and granularity of information ... [and] the
 21 possibility of interaction with users."
 22 So it is a very wide -- the ambit is extremely wide
 23 and if one looks at the equivalent in the DMA Decision
 24 one sees something really very similar. If I could
 25 invite you to look at Q1, tab 1, page 19 {Q1/1/19}. You

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1 see at 75:
 2 "To determine whether Alphabet is treating its own
 3 distinct or additional services more favourably in
 4 ranking and related indexing and crawling than similar
 5 services offered by third parties, recital 52 ...
 6 clarifies that more favourable treatment includes 'any
 7 form of differentiated or preferential treatment in
 8 ranking ... whether through legal, commercial or
 9 technical means' and that ranking in this context is to
 10 be understood as 'all forms of relative prominence,
 11 including display, rating, linking or voice results.'
 12 Then you see in 76:
 13 "More favourable treatment in ranking is thus to be
 14 understood as not only including the position in the
 15 lists of search results provided by an [online search
 16 engine] but also any other form of relative prominence,
 17 given to the gatekeeper's distinct or additional
 18 service."
 19 You see then at 77:
 20 "Other examples of ... relative prominence are the
 21 frequency of display, the amount of information
 22 displayed, the type of display features ... and the
 23 engagement possibilities for users."
 24 Then it notes:
 25 "In this context, conditioning the provision of more

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1 prominence to third parties on requirements which do not
 2 apply to the gatekeeper's own distinct or additional
 3 services, does not eliminate favourable treatment.
 4 Specifically, if third-party providers [go over the page
 5 please {Q1/1/20}] of similar services are, without
 6 justification, required to become business partners of
 7 Alphabet in order to receive equal prominence, this does
 8 not constitute equal treatment as required by
 9 Article 6(5) ... but rather makes them suppliers to
 10 Alphabet's distinct or additional service."
 11 You see footnote 43 is interesting because in
 12 footnote 43 you see:
 13 "The same conclusion was reached by analogy in the
 14 context of Union competition law, by the General Court
 15 in the judgment of 10 November 2021 ..."
 16 It quotes then from the General Court on precisely
 17 the same point, that you should not have to as
 18 a condition for access become a customer and stop being
 19 a competitor.
 20 So one sees there the Commission itself drawing
 21 a direct analogy with the *Google Shopping* approach and
 22 that under Article 102. If one goes further forward in
 23 this document, just to see then the remedy and the
 24 principles of compliance, which is at {Q1/1/148} of this
 25 document, one sees at paragraph 711 stipulating that

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1 Alphabet should ensure equal treatment between its own
 2 distinct or additional services ranked on Google Search
 3 and, on the other hand, similar services offered by
 4 third parties in terms of their relative prominence.
 5 Then it notes that Alphabet currently gives more
 6 prominence to its own services in a number of ways and
 7 you see those again set out: displaying in free or paid
 8 search results, services that are distinct, with more
 9 prominence, and so on in (a) and (b), and over the page
 10 {Q1/1/149}, displaying interactive pointers and so on.
 11 Then:
 12 "It is for Alphabet to identify and implement the
 13 measures to ensure compliance with Article 6(5) ... one
 14 end of the range of possibilities to do so ... is that
 15 Alphabet can extend the prominence it gives to its own
 16 distinct or additional services as set out in recital
 17 (712) of this Decision equally to similar services
 18 offered by third parties. On the other end, Alphabet
 19 may remove all prominence it affords its own distinct or
 20 additional services as set out in ... (712) of this
 21 Decision."
 22 So we see really very similar language and a very
 23 similar approach to the content of what constitutes
 24 self-preferencing and to what is required to end that
 25 self-preferencing. We see that the Commission clarifies

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1 that the more favourable treatment test is to be
 2 assessed by reference to not just position in the list
 3 but any form of prominence such as frequency of display,
 4 the amount of information displayed, the type of display
 5 features, and the engagement possibilities for users.
 6 So the criteria used to determine the content of the
 7 self-preferencing prohibition in the two decisions are
 8 in our submission very, very similar and perhaps even
 9 identical.
 10 Google observe that under the DMA, and therefore
 11 under the DMA Decision, the Commission did not need to
 12 consider market definition and nor did it need to
 13 consider competitive effects within a downstream market.
 14 By contrast, under Article 102, one does have of course
 15 to establish dominance on one market, here the search
 16 market, and one also has to establish a potential effect
 17 on competition in a related market, here the CSS market.
 18 But that really is as far as it goes. Market
 19 definition is not in dispute in trial one. Trial one
 20 proceeds on the assumption that the relevant search
 21 markets are those defined in the *Shopping* Decision and
 22 indeed that Google remains dominant in those markets.
 23 Nor, as we understood the expert evidence, was there
 24 ultimately any dispute at least as to the existence of
 25 potential competitive effects, provided that Kelkoo were

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1 correct on the prior issue of the definition and
 2 identification of Google's CSS and the subsequent
 3 existence of self-preferencing.
 4 So we say, yes, there are differences, but those
 5 differences actually do not really matter in this
 6 particular context of looking at self-preferencing
 7 itself.
 8 There is an important overlap, and consistent with
 9 that, the Commission itself does in the DMA Decision
 10 refer to and to an extent rely on the Commission
 11 Decision and on the judgments of the Court of Justice,
 12 upholding that decision. You have already seen recital
 13 78, footnote 43. I should also show you if I may
 14 recital 93, it is at {Q1/1/22}.
 15 Recital 3 we can see at the bottom, it says:
 16 "As shown in Image 1, in response to a transactional
 17 query relating to a product ... the Google SERP displays
 18 a number of different results [if we could go over the
 19 page {Q1/1/23}] and features. The results include
 20 websites ... In the context of product related queries,
 21 VSSs ..."
 22 "... and websites of vertical search services
 23 ('VSSs'). In the context of product-related queries,
 24 VSSs are commonly referred to as comparison-shopping
 25 services ('CSSs')."

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1 It notes:
 2 "The Union Courts defined CSSs as 'specialised
 3 search services that (i) allow internet users to search
 4 for products and compare their prices and their
 5 characteristics across the offers of several different
 6 online sellers and merchant platforms, and (ii) provide
 7 links that lead (directly or via one or more successive
 8 intermediary pages) to the websites of such online
 9 sellers or merchant platforms.' Unlike merchants and
 10 merchant platforms, CSSs do not predominantly enable
 11 users to purchase products on their own website."
 12 Footnote 50 is the reference to the judgment of the
 13 General Court where -- and it refers also to the Court
 14 of Justice upholding that.
 15 It is worth also noting recital 195, which one finds
 16 at {Q1/1/49} of this document. 195, you can see, again
 17 relies on the General Court's approach in
 18 *Google Shopping* and states:
 19 "In the first place, the product ads unit allows
 20 users to compare products regardless of whether the
 21 offers are brokered by CSSs through whose websites the
 22 clicks are routed. Accordingly, the General Court
 23 confirmed that a CSS may 'provide links that lead
 24 (directly or via one or more successive intermediary
 25 pages) to the websites of online sellers or merchant

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1 platforms. Unlike Alphabet suggests, the General Court
 2 did not simply refer to the Commission's definition of
 3 a CSS. The General Court found that 'in the present
 4 case, it is appropriate to adopt the definition of
 5 a comparison shopping service ... which, moreover, has
 6 not been called into question by Google.'
 7 Again it quotes from the General Court. Then it
 8 says:
 9 "While it is true that Alphabet tweaked the product
 10 ads unit in the meantime, these changes do not take the
 11 product ads unit outside the scope of the definition of
 12 a CSS."
 13 So it is clear that the Commission itself does
 14 consider that it was valid and possible to draw an
 15 analogy between the legal analysis made in the context
 16 of the DMA and the legal analysis made in the context of
 17 *Google Shopping* under 102, and indeed it uses the same
 18 definition of a CSS as that adopted by the General Court
 19 and the Commission in *Google Shopping*.
 20 We say, well, it must in turn be permissible to draw
 21 analogies and inferences back in the opposite direction
 22 from the legal analysis under the DMA to the legal
 23 issues in our own case under Article 102. We say that
 24 the proper approach is for the Tribunal to have regard
 25 to the DMA Decision as potentially persuasive authority

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1 in relation to matters where there is this very close
 2 similarity between the applicable principles under the
 3 two regimes. Once one does that, we say one finds that
 4 the decision clearly supports the approach Kelkoo has
 5 adopted to abuse and to the appropriate counterfactual
 6 and undermines the approach taken by Google.

7 You have seen in our submissions we rely on five
 8 specific aspects of the Commission's legal analysis that
 9 we say are relevant and supportive and you see that in
 10 our written submissions at paragraphs 55 and following.
 11 If I may just briefly remind you of them.

12 First, there is the relevance of the definition of
 13 a CSS and particularly the definition in recital 191 of
 14 the original Commission Decision which we say is the
 15 proper definition of a CSS and you will recall that it
 16 was common ground that the question of a proper
 17 definition of a CSS was ultimately a legal issue. That
 18 was indeed the basis on which Google instructed its own
 19 expert, Mr Noble.

20 Our position has always been that the definition of
 21 a CSS is to be found in recital 191 of the original
 22 decision and the CMU or the Remedy Box or the Product
 23 Ads Unit, as it is called in the DMA Decision, falls
 24 within this definition. Whereas Google's position has
 25 always been that the definition of a CSS is not

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1 contained in recital 191, instead you must look really
 2 to recitals 167 to 176 of the *Shopping* Decision and that
 3 therefore a CSS has got to possess alleged additional
 4 essential functionalities. We say that is incompatible
 5 with the *Shopping* Decision as interpreted by the
 6 General Court and the Court of Justice, including the
 7 General Court at paragraph 328, which you have seen just
 8 now referred to.

9 This of course matters because the question of the
 10 definition of Google's CSS is highly relevant to whether
 11 Google's Remedy Box is a manifestation or forms part of
 12 Google's CSS during the relevant period.

13 We now see that our position is further supported by
 14 the Commission's approach to the definition of CSS in
 15 the DMA Decision where you see that the Commission twice
 16 reproduces verbatim really the definition of a CSS
 17 provided in recital 191. You have already seen recital
 18 93. If I can also show you -- it picks it up again in
 19 recital 117. If we could go to {Q1/1/33}. One can see,
 20 although it does not quote it in italics, it
 21 nevertheless uses it. It says:

22 "Thus, the product ads unit performs tasks
 23 consistent with a CSS. As explained in recital (93) of
 24 this Decision, CSSs (i) allows internet users to search
 25 for products and compare their prices and

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1 characteristics across the offers of several different
 2 online sellers and merchant platforms, and (ii) provide
 3 links that lead (directly or via one or more successive
 4 intermediary pages) to the websites of such online
 5 sellers or merchant platforms."
 6 So again, they are not quoting it in italics but
 7 that is verbatim the same words.
 8 You see also I have already shown you recital 195
 9 where they reject Google's argument that the
 10 General Court merely referred to the definition without
 11 adopting it.
 12 MS ROSE: And also recital 118.
 13 MR JOWELL: Yes, indeed.
 14 Now, Google's argument, as we understand it from its
 15 written submissions, as best I understand it, is that
 16 the Tribunal should still somehow hold that there are
 17 two different definitions of a CSS, one for the purposes
 18 of the 2017 Commission Decision and one for the purposes
 19 of the 2024 decision. We say that really is impossible
 20 to square with the constant references in the DMA
 21 Decision back to the definition in *Google Shopping* and
 22 the analogies that are directly drawn.
 23 So that is point 1, the definition of a CSS and the
 24 adoption of it. The other point that is illuminating is
 25 the distinction the Commission in the DMA Decision

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1 adopts between general search services and specialised
 2 search services. As you will recall, Google has
 3 attempted to conflate what is contained in or on the
 4 search engine results page with its general search
 5 service, effectively it says a general search service
 6 can include specialised results provided that all
 7 appears on the general results page.
 8 Before the Commission in relation to the DMA, it
 9 advanced a very similar argument. Again it seems to
 10 have been argued that essentially anything appearing on
 11 its SERP in response to a query must be regarded as
 12 forming part of an OSE, an online search engine, and not
 13 an online intermediation service, an OIS, or a distinct
 14 other service. You see that referred to in recitals 38
 15 to 49, I do not think I need to go through all of those,
 16 but that is where it makes that argument.
 17 If that argument had been correct then that would
 18 have had the same consequence as Google's submission in
 19 these proceedings, that the Product Ads Unit or the
 20 Remedy Box formed part of Google's general search
 21 services and did not form part of Google's specialised
 22 search services. It is clear that again the Commission
 23 rejects Google's argument, finding that there was
 24 a clear distinction between, on the one hand, what is
 25 contained on Google's search results page and, on the

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1 other hand, Google's general search results -- general
 2 search service. In particular, the Commission
 3 emphasises that search results may contain and rank
 4 services which are distinct or additional to an online
 5 search engine and that depends on the functionality of
 6 the services. You can see that in recital 50, if we go
 7 to that, it is on page 13 {Q1/1/3}. You see that in the
 8 first sentence of 50.
 9 In paragraph 51 we see that dedicated units on
 10 that -- it relies on the fact that those dedicated units
 11 come only from a specific pool of shopping-related
 12 websites selected by Alphabet on the basis of specific
 13 eligibility criteria and predefined constraints. They
 14 say that that feature means that it does not meet the
 15 definition of an online search engine.
 16 Again, similar to the points that we have been
 17 making. General search services are indeed distinct
 18 from specialised search services because specialised
 19 search services come from this narrower pool, typically
 20 from data feeds rather than from crawling the web
 21 results, and crawling in principle, as they put it in
 22 this decision, all websites.
 23 So that is the second point we rely on. The third
 24 point concerns then the proper legal approach to the
 25 application of the definition of a CSS as to how to

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1 delineate Google's CSS. In particular, in finding that
 2 the Product Ads Unit or the Remedy Box constitutes
 3 a CSS, the Commission considered certain factors at
 4 recitals 114 to 115. If we go to {Q1/1/32}, we can see
 5 the key factors identified as relevant to the analysis,
 6 as I have just mentioned, were that the Product Ads Unit
 7 presents a group of results specialised in a certain
 8 topic with functionalities allowing users to compare
 9 such results and in particular with transactional
 10 information such as price, provider, star rating,
 11 shipping cost and product characteristics, for example
 12 energy efficiency or colour, and presented in
 13 a standardised manner. You see all that in 114 to 115.
 14 So it is the functionality that it provides on an
 15 objective basis to users.
 16 MS ROSE: Does the ability to filter -- is that --
 17 MR JOWELL: No, we say that is not essential.
 18 MS ROSE: That is referred to.
 19 MR JOWELL: It is referred to. I will come on to that if
 20 I may as a separate point because Google relies on this
 21 quite heavily. But we say that actually when you do
 22 a careful analysis of this, it is clear that the ability
 23 to filter in the sense of the chips is not an
 24 essential -- it is a factor they rely on, it is an
 25 indicia, but it is not an essential feature.

24

1 One looks at what is essential is does it provide
2 users with the functionality that enables them to -- for
3 it to act as a CSS for them, for them to compare results
4 in line with the definition in 211. That depends on
5 whether, looking at it as a whole, whether you are
6 grouping the results on a particular topic and providing
7 sufficient transactional information, they can then
8 compare results.

9 It is also interesting to note if one goes over the
10 page {Q1/1/33} one sees in 117 at the end that it is
11 found that it does not matter that Google had introduced
12 what we call the PLACSS functionality as part of the
13 March 2024 changes. As you can see, that is because, it
14 says, these merely directed users to a rival CSS as an
15 intermediary step and that in any event most of the
16 slots were taken up by merchants' PLAs. So we say the
17 introduction of a PLACSS did not work for those reasons
18 and you can have regard also to those same reasons.

19 In paragraph 118 we see this is further reinforced
20 by the fact that the Product Ads Units sourced
21 information from feeds rather than from all types of
22 websites. Again, a point that we have relied on.

23 The Commission also gives consideration to Google's
24 submission that the Product Ads Unit does not constitute
25 a CSS because it operates differently from third party

25

1 CSSs as it is open to all interested CSSs. That is,
2 of course, a similar argument to the one made by Google
3 in the present proceedings and one can see that argument
4 recorded in recital 156 if I can show you that. It is
5 on page 41 {Q1/1/41}. You see -- this is now recording
6 Google's argument:

7 "Third, Alphabet argues that the product ads unit
8 does not constitute a CSS because it operates
9 differently from third-party CSSs. Since 2017, the unit
10 is open to all interested CSSs to comply with
11 the Commission's *Google Shopping* Decision. Since
12 March 2024, Alphabet allows CSSs to link either to their
13 own site or to the websites of their merchant partners
14 to ensure compliance with [the DMA] Regulation ... Given
15 that CSSs can choose between these options, it is
16 immaterial that de facto most ads in the unit link to
17 merchants' websites. The distinction between the
18 product ads unit and a CSS is not called into question
19 by the broad definition of a CSS in the General Court's
20 ruling. The ruling concerned the situation before
21 Alphabet introduced the above-mentioned changes to the
22 product ads unit and, in any event, the definition
23 simply refers to the one in the Commission's decision."

24 Then it quotes, saying:

25 "In that decision, the Commission did not treat the

26

1 Product Ads Unit as a CSS and, the 'Court of Justice, in
2 turn, found that product ads "boxes do not constitute an
3 infrastructure that is separate" to Google's search'."

4 So that is all Google's argument and one can see how
5 the Commission deals with that argument, which is very
6 similar to Google's contention at trial that the CMU
7 linking to other CSSs is impossible to reconcile with
8 the Remedy Box being a CSS. That submission is rejected
9 in the DMA Decision. If one goes to recital 195,
10 please, which is on {Q1/1/49}, we see the Commission --
11 194:

12 " ... the Commission disagrees with Alphabet's view
13 that the product ads unit does not constitute a CSS.

14 "In the first place, the product ads unit allows
15 users to compare products regardless of whether the
16 offers are brokered by CSSs through whose websites the
17 clicks are routed."

18 And so on. Then in 196 we see, and I think I have
19 shown you 195 already, at 196 we see:

20 "In the second place, the distinction between the
21 [online search engine] ... and the product ads unit is
22 not called into question by Alphabet's reference to the
23 Court of Justice's ruling [and so on]. A comprehensive
24 reading of the quote reveals that the product ads 'do
25 not constitute an infrastructure that is separate from

27

1 [Google Search] in the sense of an independent results
2 page' ... The Commission does not contest, indeed it
3 makes the point that the product ads unit is integrated
4 in Google's results page. This is confirmed by recital
5 51 of [the DMA regulation] mentioning that a distinct
6 service can be entirely embedded in groups of results
7 specialised in a certain topic no matter if those groups
8 are on a separate infrastructure or not."

9 Just two further points that we seek to draw very
10 briefly. Fourth is we say there is a parallel between
11 Google's invocation of other stakeholders and we just
12 observe that that -- this received very short shrift in
13 the context of the DMA Decision, as we record in
14 paragraphs 63 to 66 of our written submissions. We say
15 that similarly other stakeholders are irrelevant really
16 when it comes to the context of Article 102 and whether
17 there is self-preferencing.

18 The final point we draw on is really just the
19 corollary of the other points. Once one acknowledges
20 how a CSS is properly to be defined and identified and
21 applies that definition properly, it must follow that
22 Google's CSS has been given prominence and that none of
23 the changes that Google has introduced have altered
24 that. If one goes to page 52 {Q1/1/52} one sees recitals
25 208 to 233, it is a long section, I am not going to read

28

1 it out, but you may wish to read it yourselves. One
 2 sees the reasons given by the Commission in that
 3 section, in particular as to why Google's Product Ads
 4 Unit, what we have called the Remedy Box or the CMU, and
 5 indeed the more recent product unit, are still given
 6 more favourable treatment in ranking on Google Search as
 7 compared to third party CSSs. They are still embedded
 8 and ranked prominently on Google Search.

9 In those recitals, from recital 213, one sees that
 10 the Commission goes through all of the various minor
 11 opportunities that have since, at least since 2024, been
 12 offered to third party CSSs to feature in some way or
 13 another within Google Search results page. So that
 14 includes not just what our trial focused on, which is
 15 namely the CSS's ability to act as intermediaries
 16 between the merchants and Google when it comes to the
 17 Product Ads Unit, it also includes the other more recent
 18 bones that Google has thrown to the Commission, those
 19 things to appear in the preview pages or in the organic
 20 results in Rich Text Format, and it also covers the
 21 ability to appear in page results and in CLAs.

22 In each case the Commission explains why it
 23 concludes that third party CSSs are still disfavoured
 24 compared to Google's CSS, and in particular one sees
 25 the Commission's repeated observation that in none of

29

1 those cases is the opportunity offered to a third party
 2 CSS the same or equivalent to that offered to Google's
 3 CSS, because Google's CSS has its own box embedded in
 4 the SERP, which is visible immediately after entering
 5 a product-related query, and with that that box contains
 6 several product offerings that allow a user to compare
 7 directly on the SERP.

8 So we say that a number of principles, really,
 9 emerge from that discussion as to the proper approach.

10 The first principle, one sees that set out in
 11 recital 214, I think it is just over the page {Q1/1/53},
 12 which is that:

13 "Conditioning equal prominence on requirements that
 14 do not apply to the gatekeeper's own services is not
 15 granting equal prominence on the SERP."

16 So if you condition on something that is not
 17 conditional on your own service, that does not
 18 constitute equal prominence.

19 Secondly, one takes a general principle point, which
 20 is one looks at relative prominence from a wide
 21 perspective, including from the immediacy of the results
 22 and the scope and the characteristics of the results;
 23 and the third principle really is an obvious one, which
 24 is it is not enough to say, well, things have got better
 25 for third party CSSs, there must be genuine equality.

30

1 You see that set out clearly in recitals 249 to 250. If
 2 we could go to {Q1/1/58}.

3 At 249 they say:
 4 "... the Commission does not contest Alphabet's
 5 statement ... that it has created multiple new designs
 6 for CSSs and that some of these designs have increased
 7 the prominence of CSSs on the Google SERP."

8 Then it goes on:
 9 "However, providing more prominence to CSSs than
 10 before March 2024 is not equivalent to providing the
 11 same prominence to Alphabet's own CSSs ..."

12 So doing better is not good enough, there actually
 13 has to be equal prominence.

14 Finally, in recital 260, if we go to {Q1/1/60},
 15 please, we see the Commission rejects as legally
 16 incorrect the proposition advanced by Google that the
 17 Google CSS does not get a box of its own either because
 18 they say that ignores the correct definition of Google's
 19 CSS, namely that the Product Ads Unit itself is an
 20 Alphabet CSS.

21 So that really all goes to abuse. As regards the
 22 counterfactual, that really is simply the other side of
 23 the coin. As we say in our written submissions, for all
 24 the reasons that the DMA Decision supports the
 25 proposition that Google is continuing to self preference

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1 and hence abuse, one must also conclude that Google's
 2 only pleaded counterfactual, the remedy, is also not
 3 a counterfactual that is lawfully available to it.

4 On the other hand, the DMA Decision contains nothing
 5 that is incompatible with the counterfactuals that
 6 Kelkoo proposes and which you will be familiar with.

7 I should mention just one matter that has --

8 THE CHAIRMAN: When you say counterfactual not lawfully
 9 available, do you mean lawfully as a matter of
 10 Article 102?

11 MR JOWELL: Yes.

12 THE CHAIRMAN: Not the separate point --

13 MR JOWELL: Yes, for pragmatic reasons, for purely pragmatic
 14 reasons, we do not want to get entangled in that debate.

15 MS ROSE: As I read your paragraph 73 of your submissions,
 16 I understood you to be saying that you can level -- in
 17 the counterfactual you can level up or you can level
 18 down.

19 MR JOWELL: Yes.

20 MS ROSE: So either you do not have any boxes, you just have
 21 results, applicable, same algorithms to everybody, or if
 22 you have a box then it has to be an equal prominence
 23 box, and you are saying each of your counterfactuals
 24 meets those definitions.

25 MR JOWELL: Yes.

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1 MS ROSE: Does that mean that you are not laboursing the
 2 argument that in order for a counterfactual to be
 3 legitimate, say 3A, there would also have to be the
 4 modification of Panda and algorithm A; provided you had
 5 algorithm A -- provided you had 3A that would be
 6 sufficient ?
 7 MR JOWELL: Subject to the legal argument that we made, but
 8 of course entirely stands based upon you being bound by
 9 the judgments and by the Commission decision, we do not
 10 resile from that. But we accept that, leaving that
 11 legal argument aside, one would not, subject to the fact
 12 that there is the reality check, which is in a sense
 13 would they in fact ever do away with boxes entirely
 14 without also adjusting the algorithm?
 15 Actually, there one has another interesting
 16 development which I do not think we need to go into, but
 17 we do observe that Google has started -- there was
 18 recently, I think two days ago we were put out a press
 19 release in which it noted -- I think it is starting the
 20 process of changing its format. One thing we did not
 21 observe them doing is simply getting rid of all boxes.
 22 What they are starting -- it appears that maybe Google
 23 can illuminate you further on this, but we understand
 24 that at least according to their press release they are
 25 making changes.

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1 So the sort of Turkey option that is sometimes waved
 2 around as a scare tactic by Google does not seem to --
 3 MS ROSE: In that they would be voting for Christmas?
 4 MR JOWELL: Exactly.
 5 MS ROSE: The 3A option is an equal access, equal
 6 opportunity box.
 7 MR JOWELL: Yes.
 8 MS ROSE: In that case there would be no self-preferencing
 9 if there were still algorithms.
 10 MR JOWELL: Yes.
 11 MS ROSE: That would be different from the option that
 12 Google was advancing to the General Court that fell foul
 13 of their both elements point because on 3A everybody has
 14 an equal chance to be at the top of the SERP.
 15 MR JOWELL: It would be different. I think one still has
 16 to -- as I think we argued, we still say that you are
 17 bound by that finding in the same way as in the myth
 18 case that we looked at, there was a less -- the lower --
 19 a slightly different but lower proposition was put
 20 forward in the context of it being exemptible and they
 21 were found nonetheless to be bound.
 22 We say for the period of the decision -- we still
 23 maintain that you are bound by that.
 24 So we do have this interesting situation that --
 25 THE CHAIRMAN: A bit odd if in a decision you have to remove

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1 the algorithms.
 2 MR JOWELL: We do say for the subsequent period one then has
 3 to look at what they would in fact have done on the
 4 basis of the assumption that they had removed the
 5 algorithms.
 6 THE CHAIRMAN: Yes.
 7 MR JOWELL: We say if they had removed the algorithms they
 8 would not have brought them back as a matter of fact.
 9 But I cannot say that for the period after the decision
 10 that you are bound.
 11 I should come back briefly to the one point in the
 12 DMA Decision that Google refers to and prays in aid in
 13 its favour and those are the various references in the
 14 decision to the existence of shortcut chips that allow
 15 the refinement of search results .
 16 Google suggests that this indicates that they are
 17 correct that the existence of filters is a necessary
 18 condition for there to be a CSS. We say, first of all ,
 19 the very existence of shortcut chips if anything assists
 20 us. But even leaving that aside, we say it is not
 21 necessary for the Tribunal to get over the factual
 22 detail of that because on a fair analysis of the DMA
 23 Decision it is clear that the existence of shortcut
 24 chips is simply an indicia , as I have said already, in
 25 response to Ms Rose's question.

35

1 One can see that in a number of places. The
 2 reasoning really as to why the Product Ads Unit is a CSS
 3 is found in recitals 114 to 119, we have already looked
 4 at several of those recitals . We say that whilst
 5 mention is made of "query shortcut chips", it is
 6 actually clear that this is not the decisive factor and
 7 the key part of the reasoning we say is that -- well,
 8 really , there are two aspects. One is that the Product
 9 Ads Unit objectively performs the tasks which are
 10 consistent with the purpose of a CSS as defined and
 11 that is the definition of a CSS, the one that we have
 12 looked at many times now, that it allows comparison of
 13 prices and characteristics and provides links to
 14 websites.
 15 You see that, if one looks at recitals 167, 170, 172
 16 and 176 to 177, that is the first core part of the
 17 reasoning. The other aspect, the other core part of the
 18 reasoning, is the limited pool of websites from which
 19 the results in these particular boxes are drawn.
 20 If one looks, for example, to give you one example,
 21 at recital 53, which is on -- if we could go to page 14
 22 {Q1/1/4} of this document. One sees it says:
 23 "... Alphabet notes that, if a user searches for
 24 a specific topic ... an [online search engine] will
 25 return results for websites that provide information on

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1 that specific topic ... and not websites relating to
 2 other topics ..."
 3 It accepts that:
 4 "It is true that returning results sourced from, in
 5 principle all websites, limited only to the extent that
 6 they have some relationship to each user query, is
 7 consistent with the definition of an OSE ... However,
 8 limiting results to those that have relevance for the
 9 query is not what the Commission refers to when
 10 describing situations where elements on the SERP are not
 11 assembled based on a search of 'in principle, all
 12 websites' ... specifically, whereas, eg, the simple blue
 13 link shown by Google Search on the SERP can refer users
 14 to all types of websites that provide information that
 15 is relevant and specific to the topic of each user
 16 query, there are elements ranked on Google Search which
 17 contain information that is systematically not sourced
 18 from 'in Principle, all websites'. For example, showing
 19 users who enter a query indicating they want to buy
 20 products results that are relevant for that purpose can
 21 be consistent with the definition of an [online search
 22 engine]. On the other hand displaying a dedicated unit
 23 which, for example, for purposes of enabling comparison
 24 of product offers systematically shows only shopping
 25 results that are sourced from a specific pool of

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1 shopping-related websites does not show results from in
 2 principle, all websites, in particular when the websites
 3 participating in these units are pre-defined or selected
 4 by Alphabet on the basis of specific eligibility
 5 criteria selecting only shopping-related businesses that
 6 share specific data or display pre-defined website
 7 elements."

8 So we say that what is really the core here are
 9 these two factors. One, it meets the functional
 10 definition of a CSS; and two, that it is from this
 11 limited pool of websites which is typically supplying
 12 feeds. The existence of "query shortcut chips" is just
 13 something that may contribute to the conclusion that
 14 there is a service distinct and additional to an online
 15 search engine. Indeed, if it were really the case that
 16 "query shortcuts" were so crucial then it would follow
 17 that, well, Google could remedy the whole position by
 18 just removing "query shortcut chips" from its search
 19 results page and we say that is simply a totally
 20 implausible reading of this decision, looked at as
 21 a whole.

22 So we say in summary the decision assists Kelkoo,
 23 it is confirmatory of its submissions and it certainly
 24 does not at all assist Google, indeed it is inconsistent
 25 with central aspects of Google's submissions.

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1 THE CHAIRMAN: We have not heard a lot about the shortcut
 2 chips, and there was not much if any evidence about it.
 3 I think we were told they came in in March 2024; is that
 4 right, as part of the adjustments made in March 2024?
 5 MR JOWELL: I will need to take instructions on that.
 6 THE CHAIRMAN: I think there was a compliance report and
 7 I think that is somewhere. It has certainly been
 8 disclosed.
 9 MR JOWELL: Yes.
 10 THE CHAIRMAN: Which referred ...
 11 PROFESSOR SMITH: That appeared in the UK for only a
 12 (inaudible).
 13 MR JOWELL: I think that is what we were told, yes. I am
 14 told that in March 2024 they came in in Germany, France,
 15 UK and the Czech Republic and then they were removed in
 16 the UK in August 2024, but expanded across the EEA
 17 subsequently. I am sure Google will have -- be able to
 18 confirm whether that is correct.
 19 So I can give you my submissions in relation to the
 20 amendment now or separately if you prefer.
 21 THE CHAIRMAN: I think we will deal with it separately
 22 because it is quite discrete.
 23 MR JOWELL: I am grateful.
 24 MR PICKFORD: I was actually planning to deal with it with
 25 one of my points because I say it relates to the

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1 jurisdiction point, which may not particularly have so
 2 much force now, it depends a bit on what the Tribunal
 3 wants to say. I am happy to deal with it separately.
 4 I was going to warn the Tribunal that I brought my
 5 submissions together on it.
 6 THE CHAIRMAN: Yes. It obviously does go to the
 7 jurisdiction point. The jurisdiction point may not
 8 relate to this argument, but --
 9 MR PICKFORD: On the way that Mr Jowell is putting his case,
 10 I can deal with it separately. The reason why I had
 11 wrapped them together is because I was responding to
 12 some points that the Tribunal had raised and those
 13 arguments do require me to grapple with the jurisdiction
 14 point. I am simply putting that to be totally
 15 transparent.
 16 THE CHAIRMAN: I think Mr Jowell has made clear Kelkoo was
 17 not seeking to run it is an abuse because it violates
 18 the DMA, the *Meta* point, which -- without having to
 19 decide it now, I have some sympathy with your argument
 20 that would have had to be pleaded.
 21 MR PICKFORD: Yes.
 22 THE CHAIRMAN: Secondly, they are not for pragmatic reasons
 23 seeking to run the separate point, namely the
 24 counterfactual, it has to be lawful and if it violates
 25 the DMA, the counterfactual is not open to --

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1 MR PICKFORD: Yes.
 2 THE CHAIRMAN: I think that is right, Mr Jowell.
 3 MR JOWELL: Yes, that is correct, we are not taking this.
 4 I should just mention that of course Kelkoo and Ciao
 5 both fully reserve their rights to bring separate
 6 proceedings for violation of the DMA in due course.
 7 THE CHAIRMAN: Yes, but not before us. That concludes
 8 your --
 9 MR JOWELL: That concludes my submissions.
 10 THE CHAIRMAN: Would that be a sensible point to take
 11 a 10-minute break and come back at 11.50?
 12 (11.40 am)
 13 (A short break)
 14 (11.58 am)
 15 THE CHAIRMAN: Yes, Mr Pickford.
 16 Submissions by MR PICKFORD
 17 MR PICKFORD: Thank you, sir. In the light of the helpful
 18 clarifications that Mr Jowell has given in relation to
 19 the points that they are not taking, I can hopefully be
 20 somewhat briefer than I might have had to have been.
 21 Even Kelkoo I think have decided that you can have too
 22 much of a good thing ultimately.
 23 So there are only three points that I need to
 24 address you on. The first is very brief, it is
 25 *Hollington v Hewthorn*, just a couple of minor points

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1 I would like to pick up on that.
 2 Second, which is obviously the meat of the
 3 discussion, which is the relationship between the
 4 analysis in the DMA and Article 102. That is what
 5 Mr Jowell concentrated on and that is what I will focus
 6 on.
 7 Thirdly, related to that, what I say are the
 8 different factual matrices involved in the DMA Decision
 9 and the facts that were in issue in our proceedings.
 10 So those are the three points that I am going to be
 11 addressing.
 12 If I can just start then with the
 13 *Hollington v Hewthorn* point briefly. Two points to make
 14 there. Mr Jowell, I think slightly begrudgingly, does
 15 not seem to be taking issue with the fact that the
 16 principle does apply when the party seeking to rely on
 17 it took part in the prior proceedings and I just want to
 18 direct the Tribunal's attention to the fact that there
 19 are a number of cases we cite in our skeleton argument
 20 which make abundantly clear that the principle does
 21 apply, both when you took part in the prior proceedings
 22 and obviously when you did not. *Hollington v Hewthorn*
 23 itself is an example of a case where the party relying
 24 on the principle took part in the previous proceedings
 25 and there are a number of others. That does not seem to

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1 be disputed but I want to make it very clear that if
 2 authority is needed you can find a number of examples
 3 given in our skeleton.
 4 THE CHAIRMAN: Yes. What the Supreme Court says is the weak
 5 form.
 6 MR PICKFORD: Yes, in my submission that is slightly, with
 7 respect to the Supreme Court, it is not quite clear what
 8 is meant by that because what it might mean and what
 9 Mr Jowell submits it means in his skeleton is that there
 10 is some weaker rule, effectively, that where the party
 11 took part in the previous proceedings the rule itself is
 12 not as strong. But in my submission that does not make
 13 (overspeaking).
 14 THE CHAIRMAN: I do not think that is what they mean. They
 15 may be reserving the point that at some stage it might
 16 be revisited by the Supreme Court. Of course it has
 17 been criticised by other judges. But we do not have to
 18 go there because it is agreed it applies.
 19 MR PICKFORD: I am grateful. The other point is that it has
 20 been suggested that we have conceded that legal analysis
 21 generally is admissible. That is not the way that
 22 we would accept that *Hollington v Hewthorn* works here.
 23 *Hollington v Hewthorn* makes inadmissible both findings
 24 of fact and also mixed findings of fact and law. Where
 25 the law and the facts are intertwined, that is the

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1 previous decision-maker expressing their opinion on that
 2 mixture of fact and law. That, in my submission, is
 3 equally not something that this Tribunal can rely on.
 4 What this Tribunal can rely on is principles of law
 5 that can be clearly extracted in the same way as one
 6 might for another authority. That is the way that
 7 Mr Jowell I think says that he is basically relying on
 8 it. He says he is relying on it effectively as if it
 9 were an authority.
 10 I dispute that it is relevant because I obviously am
 11 going to come on to explain why I say the DMA and
 12 Article 102 are sufficiently different that you should
 13 not do that, but that is because of the differences
 14 between the DMA and 102, it is not because of the
 15 *Hollington v Hewthorn* point.
 16 The other thing that you are permitted to rely on is
 17 records of fact, but again, as I am going to come on to
 18 explain, that does not help in this instance because the
 19 facts on which the DMA Decision is based are 2024
 20 onwards and those were not the facts that were in issue
 21 in our proceedings. So that is what I have to say about
 22 *Hollington v Hewthorn*.
 23 Then I can turn to the relationship between
 24 Article 102 and the DMA. In that context my submission
 25 is that the DMA and competition law are complementary

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1 but not co-extensive legal instruments. There is no
 2 doubt that they may overlap and they may prescribe the
 3 same conduct in some cases. However, there is obviously
 4 conduct that is impermissible under competition law, for
 5 example excessive pricing or predatory pricing, which
 6 has no analogue under the DMA, and there is conduct
 7 under the DMA that became unlawful for the first time
 8 when that instrument was issued. There would obviously
 9 have been limited point in legislating for the DMA if it
 10 essentially just replicated the content of competition
 11 law.
 12 THE CHAIRMAN: Except that it provides for ex ante.
 13 MR PICKFORD: That is a difference.
 14 THE CHAIRMAN: A pretty fundamental one in practice.
 15 MR PICKFORD: In my submission it goes quite a lot further
 16 than that in terms of the differences. Yes, it is ex
 17 ante versus ex post, but there are also other key
 18 differences between the regimes, which I will seek to
 19 draw out.
 20 Kelkoo recognise that to some degree, and they point
 21 to the limited examples that do not get in the way of
 22 their argument, so they point to the fact that
 23 a gatekeeper does not need to be dominant under the DMA
 24 and they point to the fact that there is no need for an
 25 effects analysis under the DMA. But in my submission,

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1 it goes much further than that. I am going to seek to
 2 develop the submission that the non-discrimination
 3 obligation under Article 6(5) by design goes further
 4 than Article 102 case law on leveraging. I say that is
 5 clear given the legislative background and the
 6 legislative wording.
 7 So if I start with the background. The instrument
 8 itself is a regulation on contestable and fair markets
 9 in the digital sector. That implies an important
 10 difference from competition law because competition law
 11 places an onus on a dominant undertaking not to further
 12 weaken markets where competition is already weakened
 13 because of their dominance, including by unfair
 14 exclusionary practices, whereas this is an instrument
 15 that is essentially affirmative action designed to make
 16 markets contestable and fair.
 17 If one goes to the preamble, we see that the legal
 18 basis of the DMA is Article 114. If we could go,
 19 please, to {AB1/5/1}. You see in the very first line:
 20 "Having regard to the Treaty ... and in particular
 21 Article 114 thereof,"
 22 I am not going to take you to Article 114. For your
 23 note, it is in the bundle at tab 20 of AB5 {AB5/20}.
 24 But it concerns the establishment and functioning of the
 25 internal market. It is a general harmonisation

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1 provision that is used, for example, in the context of
 2 regulating tobacco packaging or setting safety standards
 3 for batteries.

4 What the Digital Markets Act does not refer to is
 5 Article 103, which is the provision that enables the EU
 6 Council to give effect to the principles set out in
 7 Articles 101 and 102. So it is a distinct part of the
 8 treaty that is relied upon. That gives an initial clue
 9 that the DMA is doing something different from
 10 competition law.

11 The recitals to the DMA I say indicate multiple
 12 distinctions from competition law. If one turns to
 13 recital 1, please, which is to be found still on this
 14 page. We see down the bottom that one of the objectives
 15 is about "opening entirely new business opportunities to
 16 a large number of companies in the Union to the benefit
 17 of consumers in the Union".

18 So it is not saying that it is seeking to ensure
 19 that competition law is working here, it is saying that
 20 there are new opportunities for EU companies, and
 21 that is the very first thing -- it appears in the very
 22 first recital with which the Act is concerned.

23 Then at recital 5 {AB1/5/2} we have got the
 24 gatekeepers point that Kelkoo refer to, but that is
 25 distinct from those having dominance, so that is an

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1 initial distinction from Article 101 -- 102, rather.

2 If we go to recital 10, please, on {AB1/5/3}, one
 3 sees that it says:

4 "... since this Regulation aims to complement the
 5 enforcement of competition law, it should apply without
 6 prejudice to Articles 101 and 102 TFEU, to the
 7 corresponding national competition rules and to other
 8 national competition rules regarding unilateral conduct
 9 that are based on an individualised assessment of market
 10 positions and behaviour, including its actual or
 11 potential effects and the precise scope of the
 12 prohibited behaviour, and which provide for the
 13 possibility of undertakings to make efficiency and
 14 objective justification arguments for the behaviour in
 15 question, and to national rules concerning merger
 16 control. However, the application of those rules should
 17 not affect the obligations imposed on gatekeepers under
 18 this Regulation and their uniform and effective
 19 application in the internal market."

20 So very clearly drawing out that the two instruments
 21 are complements and apply without prejudice to one
 22 another.

23 Then 11:

24 "Articles 101 and 102 [of the treaty] and the
 25 corresponding national competition rules concerning

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1 anticompetitive multilateral and unilateral conduct as
 2 well as merger control have as their objective the
 3 protection of undistorted competition on the market.
 4 This Regulation pursues an objective that is
 5 complementary to, but different from that of protecting
 6 undistorted competition on any given market, as defined
 7 in competition-law terms, which is to ensure that
 8 markets where gatekeepers are present are and remain
 9 contestable and fair, independently from the actual
 10 potential or presumed effects of the conduct of a given
 11 gatekeeper covered by this Regulation on competition on
 12 a given market. This Regulation therefore aims to
 13 protect a different legal interest from that protected
 14 by those rules and it should apply without prejudice to
 15 their application."

16 So again, emphasising the distinct objectives of the
 17 regimes and the distinct approach to determining breach.

18 In our skeleton we also noted the political context
 19 of the DMA and, to be very clear, we are not taking
 20 a point here criticising the DMA on that basis at all.
 21 All we are saying is it has been more controversial
 22 perhaps than Article 101 and 102. That reflects the
 23 fact that it is a very different instrument. They are
 24 not doing the same thing. But I go no further than that
 25 and we are certainly not taking criticism of the DMA in

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1 these proceedings obviously.

2 So then we come on to the Article 6(5) prohibition.
 3 What I want to consider is the provision itself and
 4 explain why having regard to its precise scope, it is
 5 not a guide to the scope of the competition law
 6 leveraging infringement. So the provision itself is to
 7 be found on page 35 of the regulation, which is at
 8 {AB1/5/35}:

9 "The gatekeeper shall not treat more favourably, in
 10 ranking and related indexing and crawling, services and
 11 products offered by the gatekeeper itself than similar
 12 services or products of a third party."

13 That is an important point, "similar services or
 14 products of a third party", because that is distinct
 15 from the test that is necessary in competition law.

16 "The gatekeeper shall apply transparent, fair and
 17 non-discriminatory conditions to such ranking."

18 My submission is this: let us put to one side that
 19 you do not need to be dominant under the DMA and let us
 20 put to one side that there is no effects analysis and
 21 let us put to one side that there is no freestanding
 22 objective justification defence. This provision is
 23 critically different from competition law because it
 24 requires equal treatment in different circumstances and
 25 ultimately between different things.

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1 The similar services point means that ultimately you
 2 do not need to establish different markets as one does
 3 for leveraging under Article 102, I am going to come
 4 back to that. Also, at least as interpreted by
 5 the Commission in the DMA Decision, what they find
 6 is that what is required is similar services must have
 7 their own box, whereas we say competition law does not
 8 require that, or at least it finds that they have to
 9 have their own box to the extent that we have a box of
 10 results at all. On the basis of the --

11 THE CHAIRMAN: They have to be treated equally. Either
 12 you have no box or, if you have a box, they have got to
 13 have a box?

14 MR PICKFORD: Yes, that is right. They are obviously
 15 focused on the fact that we have what they define as a
 16 box in the context of -- what they define as the CSS in
 17 the context of the DMA. In my submission there are
 18 distinctions between that and the analysis that
 19 the Commission carried out in the *Shopping* Decision,
 20 which lead to a different conclusion in terms of the
 21 remedy.

22 So if we just remind ourselves very briefly what the
 23 theory of harm was in the *Shopping* Decision, it was
 24 a leveraging abuse whereby a party, us, used our
 25 dominance in market A, general search services, to gain

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1 an unfair advantage in market B, comparison shopping
 2 services. That was through discrimination.

3 For that abuse to hold, an absolutely essential
 4 central question was market definition, because if all
 5 the conduct had occurred in the same market, there would
 6 not have been a leveraging of use. As an example,
 7 Google is allowed to favour its own general search
 8 results over, say, Bing's in the same market, indeed
 9 that is the very purpose of competition. It would be
 10 anathema to competition law if we had to show Bing's
 11 results, the whole idea is we are supposed to be
 12 competing against our rivals.

13 So the Commission devoted a lot of attention in the
 14 decision that we focused on at trial in demonstrating
 15 where the division between the markets lay and how the
 16 leveraging occurred. In that context one has, for
 17 instance, the binding findings in the decision at 408
 18 and 412 that the boxes were not themselves CSSs but
 19 means of favouring Google's CSS.

20 That is an unhelpful finding for Kelkoo's theory
 21 advanced at trial and that is why they are seeking to
 22 undermine it and they are seeking to leverage the DMA
 23 for that purpose, but I say that is not legitimate.

24 By contrast to the theory in the *Shopping* Decision,
 25 the DMA advances a different essential test for whether

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1 there is breach of the DMA. If we could go, please, to
 2 recital 26 of the DMA, which is found at {Q1/1/9}.

3 Could I ask the Tribunal, please, to read recital
 4 26?

5 (Pause).

6 One sees it is not a market based analysis, it is
 7 based on simply analysing something that is distinct to
 8 an OSE -- I am going to come on to how they define OSE
 9 because that is critical -- and whether third parties
 10 offer similar services to that service that is
 11 identified as distinct, but not necessarily in
 12 a different market.

13 They approach the issue of what is an OSE, it begins
 14 in fact back at recital 22 {Q1/1/8}. Reference is made
 15 to Article 2, point (6) of the DMA, which defines OSEs
 16 by reference to Article 2, point (5) of the platform to
 17 business regulation or, as it is often known, the P2B
 18 regulation, and it sets out there:
 19 "The latter ... defines OSEs as ..."

20 And if I could ask you to read the definition there.
 21 (Pause).

22 THE CHAIRMAN: Yes.

23 MR PICKFORD: What the Commission then comes on to focus on
 24 particularly in that definition, which is a recurring
 25 theme throughout the whole of this DMA Decision, is the

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1 "in principle, all websites" aspect of that decision.
 2 An OSE allows "input queries in order to perform the
 3 searches of, in principle, all websites". So one sees
 4 this certainly, for example, coming back at recitals 36
 5 to 37 on page 10 {Q1/1/10}. 36 is telling. It says
 6 {Q1/1/11}:
 7 "Finally, a distinct or additional service to an OSE
 8 can also be shown when, regardless of its purpose",
 9 I emphasise those words, "regardless of its purpose,
 10 a given group of results or dedicated unit specialised
 11 in a certain topic is not assembled by performing
 12 searches of, in principle, all websites, or all websites
 13 in a particular language, as required by the definition
 14 ... in Article 2 ..." et cetera.

15 So just pausing there, that is highly distinct from
 16 a competition law analysis. Competition law analysis
 17 that looks at the extent to which one service competes
 18 with another will by necessity look at the purpose of
 19 a service, and here that is eschewed, it is something
 20 you do not need to worry about that, you just go
 21 straight to that statutory definition.

22 On that topic, just to remind you, that was picked
 23 up, for example, in the evidence of Mr Noble. For your
 24 reference, it was {Day13/27-28}, where he emphasised the
 25 need to look at substitutability analysis and purpose

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1 under a competition law analysis.

2 Then also, just before moving on to the next
 3 recital, another reason why this approach here,
 4 emphasising that by definition what matters is simply
 5 whether you can search in principle all websites, is in
 6 the 102 context it was never argued that text ads were
 7 not part of general search. That point was never taken
 8 against us. My understanding is that it is conceded
 9 that text ads are ultimately part of general search.

10 THE CHAIRMAN: Conceded by who?

11 MR PICKFORD: By -- well, I did not understand that Kelkoo
 12 were taking the point against us that text ads are
 13 a distinct service.

14 MS ROSE: It is not an issue that arises.

15 THE CHAIRMAN: No, I do not think it was ever discussed.

16 MR PICKFORD: It was discussed, sir, to the extent that we
 17 relied on the following proposition. We said, look,
 18 you have not got a complaint about text ads, and we did
 19 say if you have not got a complaint about text ads then
 20 really what is so different, effectively? This is the
 21 gist of the point that we were making about PLAs. That
 22 was a point that I made at the last hearing.

23 Now, in this context the reason why I am drawing
 24 attention to it is irrespective of whether that argument
 25 works or does not work under the DMA, text ads are

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1 certainly not produced by searching the whole of the
 2 Internet because you have to sign up to be part of the
 3 AdWords program.

4 So I say this does not translate across well to the
 5 context in which it is accepted in my submission under
 6 Article 102 that there is not a problem with providing
 7 text ads on the page. Indeed, if we could not have text
 8 on the page we could not monetise our service.

9 THE CHAIRMAN: There is not a problem because text ads are
 10 not a CSS, they are not Google CSS. It is not
 11 a question of whether they are part of the general
 12 search results or not, they are just not a CSS.

13 MR PICKFORD: Well --

14 THE CHAIRMAN: So they were not being complained about, but
 15 I do not think it went any further than that, did it?

16 MR PICKFORD: The reason why I make this point is because of
 17 the way that the DMA reasons, because the way that the
 18 DMA reasons is it starts with this very narrow, in my --
 19 approach to what an OSE can be and basically you have
 20 to -- and anything that involves going beyond searching
 21 the entire internet is certainly not an OSE. Therefore
 22 it is in the other box. Then all you need to do,
 23 effectively, to satisfy the rest of the steps under the
 24 DMA is to point to someone else, a rival, that does
 25 something that is similar to something that you have put

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1 into the other box. Then under the DMA you are
 2 effectively home and dry.
 3 In my submission that is a very formalistic
 4 approach, it is not a market-based approach, it does not
 5 rely on the purpose for which different services are
 6 provided, and that is why one has to be very careful
 7 about drawing across from the DMA and the analysis there
 8 and saying it is analogous to what is happening under
 9 Article 102 in our case.
 10 I would also -- because I think I was going to make
 11 this point earlier on and then because I re-arranged my
 12 submissions I think I might have skipped it. There is
 13 a really fundamental point here about reliance on the
 14 DMA in this context, which is I say that the decision is
 15 an instrument that needs to be construed as a whole on
 16 its own terms. Obviously, you can take account of what
 17 the higher courts, general court and CJEU said about it
 18 in appropriate circumstances, but it is self-contained
 19 and it pre-dates the DMA and it would be an error of
 20 law, in my submission, to work backwards from a later
 21 instrument and say, aha, there is this analysis here,
 22 that now enables us to understand what the Commission
 23 really meant in the context of the *Shopping* Decision.
 24 The *Shopping* Decision can be and must be construed
 25 on its own terms without reference to a later

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1 instrument. It simply does not in my submission --
 2 THE CHAIRMAN: If a judge gives a judgment which is then --
 3 in a later case people rely on that judgment, the judge
 4 may say in the later case, well, this passage you are
 5 relying on, what I meant was this, this is what it is
 6 meant to say and this is how it should be understood,
 7 and that happens sometimes because judges are confronted
 8 with what they have said earlier.
 9 Now, if in a subsequent case people want to rely on
 10 the first judgment, it must be admissible to say, but in
 11 this case the judge explained his judgment.
 12 MR PICKFORD: Well, I make two points responsively to that,
 13 sir. Firstly, that is not what the Commission is doing
 14 here. The instrument as I showed you at the outset is
 15 without prejudice, the DMA is without prejudice to
 16 Article 101 and 102, and I am going to come on to show
 17 you parts of the --
 18 THE CHAIRMAN: Yes. I was on a different point. I thought
 19 you were on a different point, namely that one cannot
 20 look at this because it is a later decision to explain
 21 anything in the earlier decision.
 22 MR PICKFORD: I do maintain that. What is really
 23 happening -- and I need to think about it hard because
 24 it is a good example. But my response in relation to
 25 what is really happening when a judge says, "This is

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1 what I meant", is we are focused on what does the law
 2 actually say now as in what is the true law today, and
 3 it is all one law for a start. What we are
 4 hypothesising is that the judge has said X about, let us
 5 say it is Article 102, and he has gone on to say
 6 something else about 102 and he says what I really meant
 7 before --
 8 THE CHAIRMAN: People in the subsequent case say in your
 9 first judgment there is this passage, this is what it
 10 means; the judge can say, no, that is not what it means.
 11 If there is a subsequent case where there is argument
 12 about the initial passage, you cannot look at what the
 13 judge subsequently said about how that should be
 14 interpreted, it is inadmissible. That would be very
 15 odd, would it not?
 16 MR PICKFORD: In my submission that is a distinct legal
 17 exercise because what one is concerned with there is
 18 deriving what is the law about a given thing. Let us
 19 assume it is Article 102 and what we are seeking there
 20 to do is derive what is the true law in Article 102.
 21 THE CHAIRMAN: Yes.
 22 MR PICKFORD: What is happening if there is clarification of
 23 what was previously said is that cannot ultimately
 24 change that previous judgment but what it can do is
 25 effectively allow the judge to say, well, I am telling

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1 you what the law is now and insofar as you might have
 2 misunderstood what I said previously, then do not be
 3 misled by that because I am now clarifying what the law
 4 is as of today on that subject. In my submission
 5 that is very different from taking an instrument, namely
 6 the Commission decision, which is on topic A, then
 7 looking at a later instrument on topic B, albeit that
 8 overlaps, and then reading back from that distinct
 9 different instrument into what the earlier instrument
 10 must have meant. I say that that is where it is
 11 illegitimate.
 12 MS ROSE: Accepting for a moment for the sake of argument
 13 that you are right that the DMA has a different function
 14 and purpose and a different legal test from Article 102,
 15 there still might be in the course of answering
 16 a particular case brought under the DMA -- there might
 17 still arise legal questions that were relevant under 102
 18 as well. One of those questions might be: what is the
 19 definition of a CSS? The question of what is the
 20 definition of a CSS could arise for the purposes of
 21 competition law breach and could also arise for the
 22 purposes of the DMA. Are you saying that a CSS means
 23 something different in those two different legal
 24 contexts as a matter of law?
 25 MR PICKFORD: I am certainly saying that it certainly could.

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1 It certainly could mean something different because of
 2 the different nature of the exercises that one is
 3 ultimately carrying out.
 4 MS ROSE: The question whether self-preferencing a CSS
 5 amounts to a breach of 102 is obviously a different
 6 question from whether it amounts to a breach of the DMA.
 7 But the question whether it is a CSS, why is that
 8 a different question?
 9 MR PICKFORD: Because of the different way in which the two
 10 decisions go about examining what a CSS is. So what
 11 I say happened in the Commission Decision in *Shopping* --
 12 I am not going to go through all of it again because
 13 there was obviously a large textural analysis. But in
 14 summary, what it was doing was looking at whether the
 15 box or, in that case, the box combined with some other
 16 things, because it was actually the box together with
 17 the stand-alone service -- that is my submission on what
 18 it is doing.
 19 MS ROSE: Subject to Sweden.
 20 MR PICKFORD: Subject to Sweden, but I am not going to argue
 21 Sweden again now.
 22 That analysis is a market-based analysis, so what
 23 that required to be undertaken was looking at the issue
 24 of substitutability as between a CSS -- a true CSS
 25 service that is indisputably a CSS and what Google was

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1 doing in a combination of the box on the page and its
 2 linkages to other aspects of what it did.
 3 That brings into play critically issues, in my
 4 submission, about the extent of -- it is an empirical
 5 analysis and it brings into question about the extent of
 6 the overlap between the two in terms of how users
 7 perceive and use those different services. It is an
 8 economic question and that is the way that then having
 9 gone through that exercise they come to certain views
 10 about what is and is not a CSS. I do maintain, it is
 11 an important part of my case, that the finding that the
 12 box itself is not -- the box is not of itself a CSS is
 13 critical in the decision.
 14 That is to be contrasted in fact when we come to it
 15 with the DMA Decision which finds that the box of itself
 16 is a CSS. So there is an obvious difference there.
 17 MS ROSE: But we do see the Commission here adopting
 18 paragraph 191.
 19 MR PICKFORD: Can I come to that?
 20 THE CHAIRMAN: We will not interrupt you again.
 21 MR PICKFORD: Because I agree, it is a point that is made
 22 against me and I will come to it.
 23 Just to finish off, because I will address 191, but
 24 I have not fully answered your question, madam, about
 25 why can the definition of a CSS be different. It is

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1 because in the former case the definition of a CSS is
 2 driven by questions of substitutability. It is
 3 a question -- in the decision itself it is an economic
 4 question, and then in my submission, and I think both
 5 Mr Jowell and I agree on this, having gone through all
 6 of that analysis, most of which is binding, it then
 7 becomes a legal point for both of us, albeit we have
 8 different constructions on what was actually decided by
 9 the Commission.
 10 By contrast, the approach under the DMA is not based
 11 on issues of substitutability or the purpose of the box,
 12 it is based on a formalistic, statutory interpretation
 13 point, which is that it just refers back to the
 14 definition in the P2B for what an OSE is, so it starts
 15 with what an OSE is, and it says everything that does
 16 not fall within that statutory definition of an OSE is
 17 up for grabs as to something to which the DMA might
 18 apply, and then all you need to do is find a similar
 19 service to something in that residual box and you are
 20 effectively home and dry in your DMA service if you do
 21 not treat those two things in the same way.
 22 It is in that context that they are saying that
 23 something that they put into the residual box, which is
 24 our box of PLAs, is a CSS. It is a CSS for the purposes
 25 of the DMA. That does not mean it is a CSS for the

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1 purposes of a competition law analysis.
 2 PROFESSOR SMITH: But on the face of it, to say two things
 3 are similar services is a less demanding requirement
 4 than to say they are in the same market.
 5 MR PICKFORD: Exactly, I agree. That is why the DMA has
 6 broader scope. So something can be caught by the DMA
 7 but not caught under an economics-based Article 102
 8 analysis. So I adopt that point. That is entirely
 9 right.
 10 THE CHAIRMAN: But if it is caught by an economics-based
 11 Article 102 analysis it would be caught by the DMA. It
 12 goes one way. It is broader but it embraces the other,
 13 does it not?
 14 MR PICKFORD: I think the way that I would put it is
 15 this: certainly if you satisfy the DMA -- if we can
 16 develop a remedy that the Commission is happy with under
 17 the DMA, that, we would say, must satisfy Article 102.
 18 But the reverse does not hold. I think that is the
 19 way -- I think we are agreeing.
 20 If I can move on to 37 {Q1/1/11}. This is the other
 21 recital I was drawing attention to as an important step
 22 in the Commission's reasoning. It says:
 23 "This is the case, for instance, when, in response
 24 to a transactional or content-related query, a given
 25 group of results or dedicated unit specialised in a

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1 certain topic, rather than showing results obtained by
 2 searching in principle all websites, shows results that
 3 have been sourced only or predominantly through means
 4 other than searching in principle all websites (e.g.,
 5 they are exclusively or predominantly sourced through
 6 licensed data, through data feeds or through data
 7 obtained from distinct or additional services of the
 8 gatekeeper), or shows only results obtained from a
 9 limited data source or pool of websites pre-defined or
 10 selected by Alphabet."

11 Basically, what it is saying here is, in my
 12 submission, applying a very, very broad test that can
 13 catch all sorts of things, if the data is obtained
 14 through data feeds then it is potentially -- it is not
 15 an OSE, and therefore it is potentially subject to being
 16 caught by Article 6(5) of the DMA. That simply is not
 17 the analysis. You do not find that analysis in the
 18 *Shopping* Decision.

19 If I could then please go to recital 53, which is on
 20 page 14 {Q1/1/14}, and the last eight lines. It begins,
 21 "On the other hand ...", about eight lines up from the
 22 end. It says:

23 "... displaying a dedicated unit which, for example,
 24 for purposes of enabling comparison of product offers
 25 systematically shows only shopping results that are

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1 sourced from a specific pool of shopping-related
 2 websites does not show results from in principle, all
 3 websites, in particular when the websites participating
 4 in these units are pre-defined or selected by Alphabet
 5 on the basis of specific eligibility criteria selecting
 6 only shopping-related businesses that share specific
 7 data or display pre-defined website elements. Those
 8 units do therefore not meet the definition of an OSE."

9 Again it is the same point that is coming back
 10 repeatedly. That is at the heart of the analysis about
 11 what is and is not an OSE.

12 Then in the light of that developing analysis, if
 13 you go to recital 113, which is to be found on page 32
 14 {Q1/1/32}, it is then that you get to the Commission's
 15 position on CSSs. It says:

16 "Alphabet provides two CSSs which are ranked on and
 17 embedded in the SERP but are distinct and additional to
 18 the OSE Google Search."

19 Then we see the conclusion at 119 {Q1/1/33}:

20 "In summary, the product ads unit presents a group
 21 of results, specialised in a specific product category,
 22 which allows users to compare offers, including through
 23 the use of refinement mechanisms in the form of query
 24 shortcut chips, directly on the SERP. Its purpose
 25 therefore goes beyond the purpose of an OSE which is, in

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1 essence, to search the Internet and deliver users
 2 results in which information related to the requested
 3 content can be found. Moreover, this group of results
 4 specialised in a certain topic is assembled from
 5 a limited pool of websites, pre-defined and selected by
 6 Alphabet, namely, CSSs, which meet Alphabet's
 7 eligibility criteria and are its advertising partners,
 8 and not by performing searches of, in principle, all
 9 websites as required by the definition of an OSE [Back
 10 to that statutory definition]. Accordingly, Alphabet
 11 provides the product ads unit which is a distinct or
 12 additional CSS, directly ranked on and embedded in the
 13 SERP."

14 So the two factors there that I would emphasise in
 15 relation to the finding of the CSSs is distinct from the
 16 decision itself, the PLA box under the DMA is said to be
 17 itself a CSS, and that is contrary to what the
 18 Commission found in the decision. So implicitly, in my
 19 submission, there must be a different analysis that is
 20 underpinning that.

21 As one then sees by examining it, it is clearly
 22 based on a different analysis because it is based on
 23 that statutory -- it all goes back to that statutory
 24 definition rather than an economics-based competition
 25 analysis.

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1 Then if you go, please, to 176 of the -- recital
 2 176, which is on {Q1/1/46}. About halfway down, there
 3 is a sentence just after the reference to recital 118 of
 4 the decision, it then says:

5 "Therefore, the decisive factor for finding of
 6 a distinct service in this case is the fact that the
 7 dedicated units in question are assembled based on data
 8 feeds that are provided by a limited pool of websites
 9 pre-defined and selected by Alphabet instead of
 10 searching, in principle, all websites."

11 So I have shown you how the DMA Decision builds up
 12 to that conclusion and in my submission 176 is the
 13 decisive factor. It says so in terms and it all again
 14 relates back to that statutory definition of what an OSE
 15 is.

16 MS ROSE: Is there not quite a striking similarity between
 17 that and recitals 166 to 177, the original Commission
 18 Decision, which is looking at the distinction between
 19 general search services versus specialised search
 20 services? That of course was one of the building blocks
 21 which then led to the conclusion that the CSS was
 22 a particular type of specialised search service then
 23 defined at 191.

24 MR PICKFORD: There were obviously overlaps.

25 MS ROSE: There is more than -- I mean, specifically in

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1 those paragraphs it says the nature of specialised
 2 search services and general search services is
 3 different. Specialised search services do not override
 4 all possible relevant results, focus on specific
 5 information, et cetera, et cetera. By contrast, general
 6 search services search the entire Internet. Then they
 7 talk at 168 about data feeds instead of web crawling.
 8 MR PICKFORD: There are some similarities, but then the key
 9 point -- I do not actually have that open here, but from
 10 my recollection, if you then go to recitals 174 to 176,
 11 that is when -- or possibly 172 through to 176, there is
 12 then the examination of the extent to which
 13 specialised -- something is going to be either
 14 a specialised search service or a general search service
 15 and there is a recognition at that point that there is
 16 an overlap. But ultimately, it says that specialised
 17 search services are complementary. That is what --
 18 I can probably bring it up.
 19 MS ROSE: {BA/2/32}.
 20 MR PICKFORD: Thank you. So I last time placed reliance
 21 particularly on 174 to 176 in explaining that even
 22 though -- what the Commission was saying here was that
 23 {BA/2/33}:
 24 "... contrary to what Google claims, even though
 25 search results provided by a general search service may

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1 sometimes overlap with the results provided by
 2 a specialised search service, the two types of search
 3 service act as complements rather than substitutes."
 4 The two key points that are relied upon here are:
 5 "In the first place, a general search service is the
 6 only online search service on which users can seek
 7 potential relevant results from all categories at the
 8 same time."
 9 So it is obviously wider.
 10 "In the second place, specialised search services
 11 offer certain search functionalities that do not exist,
 12 or not to the same extent, on general search services.
 13 For instance, on search services specialised in travel
 14 users may look for hotels with a certain number of
 15 stars, or within a certain range of a city, or they may
 16 read user reviews of these hotels. These
 17 functionalities are unavailable to the same extent on
 18 a general search service for the same queries."
 19 So in my submission ultimately what it came down to
 20 is a distinction between on the one hand a general
 21 search service that by definition does allow you to do
 22 everything but not in the same ways and in the same
 23 degree of detail --
 24 MS ROSE: And also about the source of the feed, that
 25 you are not crawling the web versus a data feed.

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1 MR PICKFORD: Well, I do not disregard that the results come
 2 from different places, but my point is that that can
 3 be --
 4 MS ROSE: That is one reason they are not substitutable.
 5 MR PICKFORD: In my submission it can still be consistent
 6 with the Commission's analysis a specialised -- sorry, a
 7 part of a general search service even though the
 8 information for that comes from a specialised feed, for
 9 all the reasons I explained over the past year.
 10 THE CHAIRMAN: I think we have the point.
 11 MR PICKFORD: I would refer back to both our written and our
 12 oral submissions from last time, because this is
 13 obviously something that was developed at quite a lot
 14 of -- at length. It was not the purpose, as
 15 I understood it, of these submissions, which were to
 16 look specifically at the DMA.
 17 THE CHAIRMAN: Yes.
 18 MR PICKFORD: So that is what I would refer back to. Okay.
 19 I think we had a look at 176, which I say is the
 20 decisive factor in the DMA. It is the basis on which
 21 the Commission concludes that there is then a breach
 22 because Google's product ads constitute a separate
 23 service from its OSE, is what it says, its PLAs, and
 24 that they are similar to third party services ranked on
 25 the SERP.

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1 From that, it then finds that the CSSs need their
 2 own box because it defines that the box that we have is
 3 our own CSS on the basis of that particular analysis.
 4 In the decision you will recall -- and Mr Jowell
 5 took you to it before the short break -- that what
 6 the Commission says in the *Shopping* Decision is that we
 7 should subject our own comparison shopping service to
 8 the same underlying processes and methods for the
 9 positioning display in Google's general search results
 10 as used for competing comparison shopping services.
 11 That is what we say we did by creating the distinct
 12 *Google Shopping* entity and then applying the same
 13 approach to both. That would not satisfy the DMA, but
 14 we say it does satisfy what we are required to do in
 15 700(c) of the decision. At least it would not satisfy
 16 the DMA -- to be clear, it would not satisfy the DMA
 17 according to the reasoning in the DMA Decision.
 18 Obviously, Google has the right to appeal the DMA
 19 Decision and I think it goes without saying, but I am
 20 going to make it very clear, everything that I say here
 21 is predicated on the assumption that the DMA Decision is
 22 correct. Even assuming that the DMA Decision is
 23 correct, this is why I say that we should not read
 24 across back into the *Shopping* Decision. That is without
 25 prejudice to the fact that Google obviously has an

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1 entitlement which it may then exercise to say that
 2 everything in the DMA Decision is not correct.
 3 I am loath to get too drawn back into something we
 4 debated at the last hearing which is not strictly
 5 relevant to the DMA, but I am reminded in my notes that
 6 recital 13 of the decision, as well, is something we
 7 relied on at the last hearing as showing that general
 8 search engines can show specialised results on the --
 9 THE CHAIRMAN: Yes, we got all this last time. If we are
 10 going to repeat them, we will not get through.
 11 MR PICKFORD: So I have been at pains to explain why I say
 12 the approach under the DMA and the approach under
 13 Article 102 is distinct. You do not need to take my
 14 word for that because there are many places in the DMA
 15 Decision itself that make that point as well. If
 16 I could ask you please to go to {Q1/1/16}.
 17 Beginning on -- there is a passage which begins at
 18 recital 61 and continues through to 64. The key part
 19 for my purpose is about halfway through 64 {Q1/1/17}
 20 where it says:
 21 "The purpose of a service must be assessed by
 22 reference to its objective [functions] and tasks."
 23 It has a very particular view of what objective
 24 functions and tasks means under the DMA. It says:
 25 "Indeed, given that user perceptions are not

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1 homogeneous, relying on the latter for determining
 2 a service's purpose would risk undermining the
 3 consistent interpretation of Article 6(5) of Regulation
 4 (EU) 2022 ...", ie the DMA. "It would also imply an
 5 effects-based analysis similar to what is required for
 6 the assessment of conduct under Union competition law
 7 rules. However, as follows, inter alia, from recitals 5
 8 and 11 of [the DMA], that regulation aims to assess the
 9 conduct of gatekeepers without requiring an effects
 10 analysis."
 11 So in my submission, it actually goes somewhat
 12 beyond just the idea of effects in terms of the final
 13 stage in an examination analysis where one is looking at
 14 potential effects because actually it is saying that you
 15 should not even get into the question of a services
 16 purpose from the perspective of users because that, they
 17 say, could potentially undermine the uniform application
 18 of this particular instrument, whereas under
 19 a competition law analysis that is precisely what one
 20 would do as part of the analysis.
 21 Then a page or so on, recital 68 {Q1/1/18}. It is
 22 noted that the Commission says:
 23 "... the notion of 'similar' services does not
 24 necessarily coincide with services belonging to the same
 25 relevant market or being substitutable for users within

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1 the meaning of Union competition law."
 2 That in my submission is a critical recital. That
 3 says in terms precisely what I was seeking to say to
 4 the Tribunal a short while ago, that these are distinct
 5 approaches to determining the extent of what is a CSS
 6 and what is similar to a CSS. That is why you can have
 7 very different outcomes potentially in terms of what
 8 each instrument requires.
 9 "As recital 11 of [the DMA] points out, this
 10 Regulation pursues an objective that is complementary
 11 to, but different to that of Union competition law,
 12 which is to protect undistorted competition law on any
 13 given market. Consequently, the application of Union
 14 competition law, including competition law precedents,
 15 is without prejudice to the application of [the DMA],
 16 for the purposes of establishing the existence of
 17 similar services to those of a gatekeeper."
 18 Then we have 86 through to 87 on page 21 {Q1/1/21}.
 19 In particular, 87. It says that Article 6(5) of the DMA
 20 is about "equality of opportunity, not of outcome, which
 21 confirms that an analysis of the effects of the
 22 prominence afforded to first- and third-party services
 23 is not a requirement to the application of Article 6(5)
 24 of that Regulation".
 25 PROFESSOR SMITH: In the DMA it is less demanding.

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1 MR PICKFORD: Less demanding for the Commission, yes.
 2 Therefore implicitly more demanding in terms of the
 3 burdens that it places on us.
 4 I have sought at some speed to go through the issues
 5 that concern what is the decisive factor under the
 6 analysis in the DMA, and it all goes back to that
 7 statutory definition of what an OSE is. There are other
 8 factors that also are addressed which I can deal with
 9 briefly.
 10 The first of those is that the Commission also
 11 relies on the fact that PLAs allow users to make
 12 comparisons and to initiate commercial transactions.
 13 Mr Jowell showed you recitals that say that. That is
 14 not determinative under a competition law analysis
 15 because both generic and certainly specialised search
 16 results provided as part of a general search service
 17 also allow a degree of comparison and also permit
 18 initiation of a transaction. So whether that is good or
 19 bad under the DMA, that cannot be right as a criterion
 20 under Article 102.
 21 For example, suppose, putting aside everything to do
 22 with PLAs, one just has a few text ads that come up,
 23 three text ads. One can compare between those and one
 24 can click on them and potentially initiate a commercial
 25 transaction. That cannot be an essential criterion for

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1 a competition law analysis.
 2 Secondly, the Commission has regard in the DMA
 3 Decision to the fact that the PLAs that it was
 4 considering, it said, allowed filtering and interaction
 5 through chips.
 6 The final point I am going to be making is that
 7 irrespective of the merits of using the DMA as one legal
 8 instrument to interpret the previous *Shopping* Decision,
 9 query shortcut chips, which is what that is all about,
 10 are not a live issue in our damages proceedings. Both
 11 parties took the position that they were arguing about
 12 the nature of the *Shopping* Remedy essentially from 2017.
 13 We did not rely on anything that we did to say it will
 14 get out of the hole, and they did not rely on anything
 15 that we did to say it got worse. So because they were
 16 not in our proceedings, it would be improper for
 17 the Tribunal to rely on issues that are now raised in
 18 the context of the DMA, which shortcut chips is the key
 19 one, in these proceedings, because they were never put
 20 in issue and we do not have evidence on them.
 21 I am now going to come on to address the -- sorry,
 22 I see we are at 1 o'clock, so maybe I should pause.
 23 THE CHAIRMAN: If you are moving on. You are going now to?
 24 MR PICKFORD: I was about to address the point about the
 25 *Shopping* Decision, recital 191, and the use of the same

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1 words from the definition, which is a point that Ms Rose
 2 asked me about. I am making good progress, I do not see
 3 there is any problem.
 4 THE CHAIRMAN: You will be how much longer, do you think?
 5 MR PICKFORD: I probably need to give that a little bit of
 6 thought because I had to sort of re-arrange things
 7 hastily. I certainly think that -- Mr Jowell said he
 8 wanted about 20 minutes, I think, for his application,
 9 or you suggested that, sir, I cannot remember.
 10 THE CHAIRMAN: I said maybe half an hour.
 11 MR PICKFORD: I think even if we allowed an entire hour for
 12 debate about that, I am not suggesting that you want to
 13 hear an hour but I am just saying, then we would have
 14 enough time to finish.
 15 MS ROSE: There is also the amendment.
 16 MR PICKFORD: I am saying even if the amendment issue took
 17 up a whole hour, I still think that we should finish in
 18 time. I do not think I am going to be more than an
 19 hour, I may be somewhat less, I would need to look
 20 through my notes to give you a more accurate view, but
 21 I do not think we are under pressure of time is what
 22 I am saying.
 23 THE CHAIRMAN: We will come back at 1.50.
 24 (1.03 pm)
 25 (The Short Adjournment)

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1 (1.56 pm)
 2 THE CHAIRMAN: Yes.
 3 MR PICKFORD: Thank you, sir. I said I was going to address
 4 you on the reference back in the DMA Decision to the
 5 General Court judgment at 328, which in turn refers back
 6 to the decision at 191, the definition of a CSS there.
 7 Kelkoo seek to make much of this chain of
 8 cross-reference. Perhaps we could start, please, by
 9 picking up the decision at 191, just to remind ourselves
 10 what it actually says.
 11 THE CHAIRMAN: The *Shopping* Decision?
 12 MR PICKFORD: Sorry, the *Shopping* Decision, yes. That is at
 13 {BA/2/35}.
 14 THE CHAIRMAN: Yes. We had an argument about this last
 15 time.
 16 MR PICKFORD: We did. I am going to try and not labour the
 17 same points again, potentially on some of my responses
 18 I am just going to point back to things I have said
 19 before, but I am not going back over them all in detail.
 20 My responses to the reliance on this now are as
 21 follows. First, as I adverted to earlier, the Tribunal
 22 already ruled in the preliminary issues judgment that,
 23 properly read, the decision and the General Court found
 24 that the boxes were not CSSs of themselves. That is
 25 contrary to Kelkoo's reading of 191 that it now

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1 advances, which it says should be adopted by
 2 the Tribunal in our proceedings, which is that all that
 3 matters is whether sub (i) and (ii) are satisfied,
 4 because if that was all that mattered to the definition
 5 of a comparison shopping service then the boxes would
 6 themselves have been CSSs because they do satisfy (i)
 7 and (ii).
 8 The point is they are not specialised search
 9 services and that brings us back to the debate that we
 10 had before. So that is the first point I make in
 11 response.
 12 Secondly, as we explained at trial, properly read,
 13 it is those critical words "specialised search services"
 14 that matter and we had a short debate earlier about some
 15 of those recitals we refer to for that and I am not
 16 going to go over all of those.
 17 Nothing that happens in the General Court's judgment
 18 at 328 upsets any of that analysis. If we go to the
 19 General Court judgment, which is to be found at
 20 {BA/3/58} on this issue, the reference to recital 191 of
 21 the contested decision is at 328. Then there is
 22 analysis that goes all the way through to 339 of the
 23 General Court responding to Google's arguments before
 24 the General Court.
 25 None of that analysis proceeds on the basis that the

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1 only thing one needs to worry about in the definition of
 2 comparison shopping services is (i) and (ii). On the
 3 contrary, the General Court, in my submission, takes as
 4 read that Google has a CSS and the discussion that
 5 follows is about the ambit of Google's CSS and it is in
 6 the context of the facts as they then were.
 7 I emphasised during the previous hearing we had in
 8 this matter passages in the Commission Decision that
 9 were all about the exclusive linkages between the boxes
 10 and --
 11 THE CHAIRMAN: Yes. I remember that.
 12 MR PICKFORD: That is the same reasoning that the
 13 General Court then goes on to refer to in the analysis
 14 that follows, in particular from recitals 333 and
 15 following. I am not going to develop it all because
 16 it is basically argument from before, but this is why
 17 I say that too much is being read into the DMA Decision
 18 and the cross-reference back by Kelkoo on this issue.
 19 Of course, we say that it is those very
 20 interlinkages that were broken by the Remedy Box.
 21 The next factor is that even the DMA Decision does
 22 not actually take this definition based on (i) and (ii)
 23 as the decisive factor because I showed you what the
 24 decisive factor was in the DMA Decision and it is the
 25 reference back to the statutory definition of an OSE

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1 from the P2B regulation. So the DMA Decision itself is
 2 contrary to Kelkoo's case as advanced at trial and as
 3 advanced before you today.
 4 Those are my short submissions on 191. What do we
 5 draw from all of this? What I say is that the DMA is
 6 a deliberately complementary to and free-standing piece
 7 of legislation which is distinct from competition law.
 8 The DMA Decision deliberately eschews a competition law
 9 analysis in its own analysis of a breach of
 10 Article 6(5). The DMA Decision relies on a formalistic
 11 statutory definition, not grounded in competition law,
 12 and it should not therefore be relied upon by
 13 the Tribunal as a guide to the correct approach under
 14 competition law in this case.
 15 Moreover, as I said, I was outlining my submissions
 16 earlier, that all assumes that the DMA Decision is
 17 right, but as I was at pains to point out, Google has
 18 a right of appeal against the DMA Decision and if it
 19 exercises that right there will obviously be the
 20 possibility that the European Court will agree with
 21 Google about the DMA. So if the Tribunal relies on the
 22 reasoning in the DMA Decision now, it will be doing so
 23 on the basis of a decision which may yet be overturned
 24 and, in my respectful submission, that would not be
 25 appropriate.

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1 I have obviously sought to argue that you do not
 2 need to trouble yourselves effectively with the DMA
 3 Decision, but if that submission is rejected and it is
 4 considered that the DMA Decision really is important to
 5 the outcome in these proceedings, I say that the
 6 appropriate course would be to stay these proceedings
 7 pending the outcome of Google's potential appeal.
 8 Obviously, that is not my primary case.
 9 THE CHAIRMAN: Which could be another eight years.
 10 MR PICKFORD: It could be some considerable time.
 11 THE CHAIRMAN: If we look at the other appeal of the
 12 *Shopping* Decision.
 13 MR PICKFORD: In my submission, this underscores why one
 14 does not seek to draw in other decisions based on other
 15 legislation into a competition analysis. If it were
 16 really so important as to need one to do that then there
 17 are ramifications to it, but obviously I say that you do
 18 not need to stay because you do not need to do it at
 19 all.
 20 So that is what I say about the legal relationship
 21 between Article 102 and the DMA.
 22 I just wanted to address briefly the point on the
 23 different facts at issue. I think I have mostly covered
 24 that in fact, given things that I said earlier, but
 25 there are a couple of points I want to cover off.

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1 Before the short adjournment I made the point, and
 2 I think the Tribunal has it on board, that neither of
 3 the parties in these proceedings relied on developments
 4 in the SERP brought into play in contemplation of the
 5 DMA. I have addressed you on the chips issue, so I am
 6 not going to bring that up again.
 7 But the point is actually a general one that applies
 8 across the board and it is not one that the claimants
 9 sufficiently pay regard to. I think they pay lip
 10 service to this point, but some of the points they make
 11 still seek to go behind the basic principle. Can I make
 12 that good by reference to their submission at
 13 paragraph 75 of their skeleton. That is to be found at
 14 {AAA1/1/29}.
 15 What they are arguing here is they say that the DMA
 16 non-compliance decision records that we have introduced
 17 Rich Web Results in 2024 and then there are some
 18 findings, factual findings made about that. So there is
 19 a *Hollington v Hewthorn* point for a start. They then go
 20 on to say, putting that aside:
 21 "To the extent that Google is continuing to dispute
 22 the technical feasibility of Scenario 2, that objection
 23 appears now to be untenable, given that it is clear that
 24 Google implemented a format very similar to Scenario 2
 25 in the actual. Further, none of the witnesses at the

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1 First Trial pointed to specific technological
2 development(s) between 2008 and 2024 that would have had
3 a bearing on its technical feasibility and that could
4 not have been introduced sooner."

5 Now, the problem with that submission is that none
6 of this was ever pleaded out, so we never adduced
7 evidence on what was happening in 2024, so the absence
8 of evidence from our witnesses explaining differences
9 between 2008 and 2024 tells you nothing.

10 We have had the trial and the claimants cannot
11 opportunistically, I say now, on the back of the DMA
12 Decision, seek to put little bits of 2024 designs in
13 issue because it suits them to do so. That would
14 involve -- to do that fairly would involve a new trial
15 with new steps to trial for us to be able to properly
16 grapple with any new factual points that have been put
17 in issue. They have not done it and they cannot do it
18 on the sly.

19 That goes equally for another one of Mr Jowell's
20 submissions about a press release that we put out
21 in relation to the DMA. For your information, just for
22 a point of clarification, given Mr Jowell's submission,
23 that press release deals with three results, not PLAs.
24 So it does not go to the issue of PLAs. But in any
25 event, it is not appropriate for him to introduce and

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1 rely on points in that way that are not in evidence.
2 THE CHAIRMAN: We have not actually seen the press release.
3 We do not know what it says, so I do not see how we can
4 draw anything from that.

5 MR PICKFORD: I do not think you can.

6 THE CHAIRMAN: No. 106, recital 106 --

7 MR PICKFORD: 106 of what, I beg your pardon, sir?

8 THE CHAIRMAN: 106 of the DMA Decision. Speaking for
9 myself, you can forget about the press release. This
10 does not look like a finding of a contested factual
11 question, it is just a description of how the Google
12 offering has developed. It is not as though they are
13 making a finding as between challenged issues of fact,
14 is it?

15 MR PICKFORD: I am afraid I do not know because I am not
16 sufficiently close to the DMA. It is conceivable, as
17 a matter of theory, that just because the Commission
18 purports to make a finding where something does not
19 appear on the face of the decision to be contested, that
20 Google would still contest it. I simply do not know
21 because as I say, I am not involved. But one cannot
22 conclude at this stage, ahead of Google's potentially
23 exercising its right of appeal, that this is not
24 a factual finding as opposed to a recording of fact.

25 That is merely the *Henderson v Henderson* point. In

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1 this context --

2 THE CHAIRMAN: *Hollington v Hewthorn*.

3 MR PICKFORD: I beg your pardon, *Hollington v Hewthorn*.

4 H and H; a bit of brain failure.

5 The other point that I am making here is
6 a procedural fairness issue, which is that the claimants
7 have not pleaded a case about the DMA -- well, either
8 the DMA or the designs that Google introduced for the
9 purposes of the DMA. Had they done so we could have put
10 all of these issues in their proper factual context and
11 put in evidence to respond to them.

12 What the Tribunal should not do, in my respectful
13 submission, at this stage is pick little bits that are
14 appealing to the claimants to support their submissions
15 when we have not had a proper trial about these issues.
16 That is the fundamental point here, even putting aside
17 whether there is or is not a *Hollington v Hewthorn*
18 point.

19 THE CHAIRMAN: You basically say Google did certain things
20 in 2024, that was known and knowable.

21 MR PICKFORD: Yes.

22 THE CHAIRMAN: If Kelkoo wish to rely on that to say that it
23 shows that there is no technical objection they could
24 have done so. You do not need a DMA Decision for that.

25 MR PICKFORD: Absolutely.

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1 THE CHAIRMAN: It is nothing to do with the DMA. That might
2 have been the motive for Google to do it.

3 MR PICKFORD: Yes.

4 THE CHAIRMAN: But the fact that Google did it and that was
5 not put in evidence should not come in now just because
6 it is recorded in the decision. That is basically what
7 you say.

8 MR PICKFORD: That was two and a half years ago. There was
9 plenty of time to deal with it ahead of trial. Exactly
10 sir, thank you, that is very much the point.

11 So sir, I think in the light of the concessions that
12 Mr Jowell made that he characterised mostly as
13 pragmatic, but nonetheless they are important
14 concessions, I do not think that there is anything
15 further that I need to address you on other than the
16 important jurisdictional points that arise as a result
17 of the attempt to amend the case to bring in foreign
18 law.

19 THE CHAIRMAN: Yes.

20 MR PICKFORD: Can I check and turn around with those behind
21 me that I am not speaking out of turn? Yes. Thank you.

22 THE CHAIRMAN: Mr Jowell.

23 Reply submissions by MR JOWELL

24 MR JOWELL: I think I can be very brief. Of course we
25 accept that the DMA has a different legal basis.

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1 Nonetheless, we say that it is still clear that
2 self-preferencing in particular has its origin not just
3 in competition law but in the very competition law
4 infringement that grounds the current claim, the
5 *Google Shopping* Decision.

6 It is true of course that some of these statutory
7 definitions allow the Commission under the DMA
8 regulations to in effect take a sort of short cut, so
9 one sees the definition of similar services allows
10 the Commission to short-circuit the need to go through
11 the whole market definition process.

12 Similarly, one sees in the statutory definition of
13 an online search engine an ability simply to refer to
14 that, but again in relation to an online search engine
15 it is quite clear, and the definition therein, it is
16 quite clear that that very closely mirrors, as Ms Rose
17 rightly observed in the course of argument, the
18 distinction between specialised search services and
19 general search services that is adopted in the
20 *Google Shopping* Decision. If I could take you back to
21 that. It is at {BA/2/31}.

22 It starts off in 166, noting "limited
23 substitutability between general search services and
24 specialised search services". The first point that is
25 made in 167 is that:

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1 "Specialised search services do not aim to provide
2 all possible relevant results for queries; instead, they
3 focus on providing specific information or purchasing
4 options in their respective fields of specialisation."

5 That is very close to the language that is used in
6 the statute for the definition of online search engines.
7 Then in 168 -- and it goes on to say:

8 "By contrast, general search services search the
9 entire internet and therefore generally return
10 different, more wide-ranging results. Their services
11 are not limited beforehand to one of several particular
12 content categories."

13 We say you cannot really put a cigarette paper
14 between that and the definition of it, of an OSE as in
15 principle searching all websites.

16 Similarly, in 168 we then see that it notes:
17 "... a number of differences in the technical
18 features of specialised and general search services. In
19 the first place, specialised search services and general
20 search services often rely on different sources of data:
21 the main input for general search services originates
22 from ... 'web crawling', whereas many specialised search
23 services rely on user input or information supplied by
24 third parties."

25 It goes on.

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1 So that is essentially, again, the same point about
2 the use of feeds that one sees in the regulation.
3 Again, on a more general note, it is said, ah, well,
4 leveraging is the underlying theory for this type of
5 abuse, for self-preferencing abuse. But leveraging is
6 also an underlying theory underlying the whole of the
7 Digital Markets Act and one sees it referred to in
8 various of the recitals.

9 If one goes to that at {AB1/5/2}, please. One sees
10 in recital 3 -- perhaps if you can just read recital 3.
11 But you see within there the reference to leveraging.
12 You see in the second sentence:

13 "Typically, they feature an ability to connect many
14 business users with many end users through their
15 services, which, in turn, enables them to leverage their
16 advantages ... from one activity to another."

17 If one goes forward to page 8, {AB1/5/8}, one sees
18 it again in recital 31, if we could focus on that, and
19 you see the last sentence.

20 (Pause).

21 So there is not such a -- whilst of course we accept
22 it has a different legal basis, it is still concerned
23 with leveraging. Indeed, the very notion of
24 self-preferencing implies an ability -- it implies some
25 form of control over the provision of one service into

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1 the provision of another service.

2 It is said that if --

3 THE CHAIRMAN: Maybe recital 52.

4 MR JOWELL: That may be right. I will have to look at it.
5 Yes.

6 That is the general description of the nature of the
7 self-preferencing, which is wide, as is the same type
8 of -- broad definition of self-preferencing that you saw
9 in the *Google Shopping* Decision.

10 Of course we do say that one is looking at this
11 simply for some additional assistance and confirmation.
12 We do not say that what one draws from the DMA is
13 essential to our arguments and therefore we are very far
14 away from needing any form of stay, which would be quite
15 disproportionate and unneeded.

16 My learned friend made two specific points that he
17 took objection to a moment ago. The first related to
18 Rich Text results and he said we have not pleaded that.
19 But of course that is not quite right. Rich Text
20 results have been pleaded in our scenario 2. So that is
21 in play.

22 It is quite fair to say, well, we have not made an
23 evidential point of the fact that since March 2024 they
24 have been incorporating this in Rich Text results. One
25 would have thought that is really a matter that is

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1 actually in the public domain, as also is their recent
 2 press release a matter in the public domain. I do not
 3 think we can be faulted for not having taken that up in
 4 the evidence since that only appeared three days ago.
 5 If the Tribunal wants to see copies of the Reuters
 6 article we do have copies available if that would be of
 7 interest, but we are in your hands.
 8 Finally, just on the point that my learned friend
 9 made about text ads, which he constantly comes back to.
 10 I would just remind you of the *Google Shopping* judgment,
 11 paragraph 315, which is in {BA/3/56}. This is the
 12 General Court and the same argument was raised.
 13 You see how they dealt with it. They say:
 14 "Google is ... wrong to claim ..."
 15 Page 56 of the bundle, paragraph 315.
 16 They note:
 17 "Google is ... wrong to claim, by extension, that
 18 the Commission is calling into question the legality of
 19 its text ads, which form the basis of its business model
 20 and account for its commercial success and with which
 21 the Commission has never taken issue. Unlike *Shopping*
 22 Units, text ads are not part of Google's comparison
 23 shopping service and are not being challenged for having
 24 happened competitors in the context of a practice of
 25 favouring."

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1 So they did not arise and they do not arise, whether
 2 or not -- we would not characterise them as being part
 3 of Google's general search service, they are something
 4 that is provided alongside it, essentially as a service
 5 to advertisers, and it is a way of monetising, but it is
 6 not part of the service itself, it is a different thing
 7 and it is not alleged to be a CSS, either by us or by
 8 the Commission.
 9 Those are the only points, unless I can be of
 10 further assistance, that I would like to make in reply.
 11 THE CHAIRMAN: Thank you very much.
 12 MR JOWELL: That brings me to the amendment application.
 13 THE CHAIRMAN: Yes. Just one minute.
 14 MR JOWELL: Yes, of course.
 15 THE CHAIRMAN: I will put some things away.
 16 (Pause).
 17 Application by MR JOWELL
 18 MR JOWELL: The amendment application is to be distinguished
 19 from the wider jurisdiction issue. By the jurisdiction
 20 issue I mean the issue of whether either this Tribunal
 21 or the High Court, in relation to a claim brought in the
 22 UK but under the governing law of an EU or EEA member
 23 state, has the power to make a determination that
 24 Article 102 has been infringed.
 25 That wider jurisdiction issue, the parties -- and

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1 I think it is a joint proposal, is that that should be
 2 the subject of a further round of short written
 3 submissions, we have suggested prior to the hand down of
 4 judgment in trial one, but of course that is a matter
 5 for the Tribunal or indeed if it wishes to deal with it
 6 by way of written submissions at all or when it does.
 7 We do say, of course, that if it does deal with that
 8 in advance of the hand-down of judgment then it would
 9 allow a judgment to be handed down that is not caveated
 10 as to the existence or not of jurisdiction in relation
 11 to the claims relating to damages suffered in those
 12 member states after IP completion date. So it would
 13 have that advantage that it would not have to be
 14 caveated in that way. But of course we are in the
 15 Tribunal's hands and we appreciate that there are
 16 alternative ways that it could be dealt with.
 17 But the point that I am on today is simply the
 18 logically prior point, which is our narrow amendment
 19 application. That relates to really what we say is
 20 a very straightforward point. It arises out of the fact
 21 that in the course of Google's submissions on the
 22 jurisdiction point, it was suggested that we had not
 23 pleaded that the claims under Article 102 for the
 24 damages suffered outside the UK were governed by the law
 25 of the various member states.

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1 As I mentioned at the conclusion of the main
 2 hearing, we regarded that as implicit in our pleading,
 3 not least from the fact that we expressly did not claim
 4 for damages in respect of loss suffered in the UK after
 5 IP completion date under Article 102. We only claim for
 6 the UK under part 2 of the Competition Act for that
 7 period. But we do continue to claim for other member
 8 states and we do make that clear that we do indeed claim
 9 for those damages in those other member states.
 10 So by implication, we were seeking to allege that
 11 the relevant foreign laws and not UK law govern those
 12 claims. But nevertheless, in light of Google making the
 13 point, we have now made that express in our draft
 14 amended pleadings and the point of us doing so is we can
 15 then clear away this, what I think Mr Chairman you
 16 described as a technical pleading point, and one can
 17 then have a sensible debate about whether there is
 18 jurisdiction either here in the CAT or alternatively, if
 19 the matter is transferred to the High Court, for foreign
 20 law claims that incorporate Article 102 after IP
 21 completion date.
 22 So if I may just show you the amendments. The first
 23 is at {L6/66/60}. We have set this one out in our
 24 skeleton at paragraph 78 as well, but you can see it
 25 here in the light blue in 95D(c).

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1 THE CHAIRMAN: Sorry, this is L6? This is the amended
 2 pleadings --
 3 MR JOWELL: L6, tab 66, page 60.
 4 THE CHAIRMAN: The proposed amendments put in the pleadings?
 5 MR JOWELL: Yes. You can see it in the -- it may be on the
 6 screen in front of you. It is set out in our skeleton
 7 argument at paragraph 78.
 8 THE CHAIRMAN: Yes. 95D(c).
 9 MR JOWELL: You can see the changes are in the light blue,
 10 the additions are in the light blue.
 11 THE CHAIRMAN: Yes. Is it possible to make that a bit
 12 bigger? Thank you very much.
 13 MR JOWELL: You can see that we state:
 14 "In these circumstances [this is the original text],
 15 by reason of its aforesaid abusive conduct, Google has
 16 continued to be in breach of Article 102 TFEU in all of
 17 the relevant national markets", we just added the words
 18 "affected by the conduct", "as particularised above at
 19 75E ... (with the exception of the UK) and, for the
 20 avoidance of doubt, whose national laws incorporate
 21 Article 102 TFEU and Article 54 EEA as Member States of
 22 the EU and EEA and whose respective laws govern the
 23 claims for breach in respect thereof) ... "
 24 So we have simply made that express. One can see
 25 the equivalent amendment, which is in the Ciao claim,

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1 which is at {L6/65/38}. In 94, at the bottom, perhaps
 2 we can make that a little larger, we see:
 3 "In the premises, by the aforesaid conduct described
 4 above and as established by the *Google Shopping*
 5 Decision ... Google has violated EU and UK antitrust
 6 laws, specifically Article 102 TFEU in all of the
 7 relevant national markets affected by the conduct as
 8 particularised above [and so on] ... and for the
 9 avoidance of doubt, whose national laws incorporate
 10 Article 102 TFEU and Article 54 EEA as Member States of
 11 the EU and EEA and whose respective laws govern the
 12 claims for breach in respect thereof, and [section 18
 13 Competition Act 1998]."
 14 One might have hoped that this would be an
 15 uncontroversial amendment because it simply is doing
 16 something very straightforward, which is making clear
 17 that it is governed by those governing laws of the
 18 markets effective insofar as one is concerned with
 19 Article 102.
 20 In response to that we have had a set of really
 21 prevarication and obfuscation by Google and the latest
 22 objection appears to be that we do not explain on what
 23 basis the foreign laws arise.
 24 Well, we are simply confused by that because
 25 Article 102 arises within those foreign laws because, of

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1 course --
 2 THE CHAIRMAN: Member states.
 3 MR JOWELL: It is member states, indeed. Either there is
 4 the principle of direct effect for the EU, and for the
 5 EEA there is always an incorporating act, which in the
 6 case of Norway, which is the one EEA state affected, it
 7 is the EEA Act of 1992. As for why it is that those
 8 laws do apply, that is simply the effect of the Rome II
 9 regulation as now incorporated into English law by -- as
 10 retained law.
 11 If I can perhaps show you that. {AB5/21}. One sees
 12 the -- this is the Rome regulation. If one goes to page
 13 {AB5/21/5} one sees Article 6, which deals with -- this
 14 is a regulation of course that deals with
 15 non-contractual obligations, and one sees in Article
 16 6.3(a):
 17 "The law applicable to a non-contractual obligation
 18 arising out of a restriction of competition shall be the
 19 law of the country where the market is, or is likely to
 20 be, affected."
 21 So that is why we use that language in the pleading
 22 of the markets affected.
 23 These amendments, as far as we are aware, do not
 24 give rise to any limitation issue, so one is not really
 25 in the territory of CAT Rule 32.2. But even if one were

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1 in that territory this would not amount to a new cause
 2 of action, and even if it did amount to a new cause of
 3 action it certainly would arise out of substantially the
 4 same facts as the existing claims. There are no new
 5 facts pleaded. At most there is simply a new governing
 6 law -- new governing laws.
 7 So we say there is no relevant prejudice to Google
 8 in permitting the amendment now and it is efficient to
 9 do so so that we clear that issue out of the way and
 10 we can have a sensible debate about jurisdiction. So we
 11 on that basis invite the Tribunal to grant the
 12 amendment.
 13 THE CHAIRMAN: Yes, thank you.
 14 Submissions by MR PICKFORD
 15 MR PICKFORD: Thank you, sir. My submission is that this
 16 application puts the cart before the horse because it is
 17 said that we can consider whether the Tribunal has
 18 jurisdiction to hear these foreign law claims once the
 19 amendments have been permitted. It is my submission
 20 that the Tribunal cannot permit the amendments unless it
 21 has jurisdiction to hear them. So I am going to deal
 22 briefly with jurisdiction because I say that inherently
 23 arises on this amendment application.
 24 THE CHAIRMAN: If the Tribunal has not got jurisdiction
 25 would you accept the High Court has jurisdiction?

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1 MR PICKFORD: No, I do not. I do not accept that the High
 2 Court has jurisdiction in relation to anything
 3 in relation to the Ciao claim.
 4 THE CHAIRMAN: The Ciao claim, but it does for the Kelkoo
 5 claim?
 6 MR PICKFORD: I accept that it is -- subject to an important
 7 point that I am going to come to, yes, the High Court,
 8 were these proceedings in the High Court, and they are
 9 not, we are currently before the Tribunal, and this is
 10 the forum that the claimants seek to pursue the
 11 amendments in, but were we in front of the High Court
 12 then the High Court could in theory have jurisdiction to
 13 determine foreign law claims because of its inherent
 14 jurisdiction and the way that jurisdiction works there.
 15 But this Tribunal only has the statutory
 16 jurisdiction, as you of course will be aware, that has
 17 been granted to it, particularly under section 47A of
 18 the Competition Act. That does not provide the
 19 necessary jurisdiction to hear these post-IP completion
 20 date foreign law claims.
 21 THE CHAIRMAN: What is the distinction with the Ciao claim?
 22 MR PICKFORD: So the distinction is that the Kelkoo claim
 23 was brought in the High Court and so were these
 24 proceedings to be recommenced in the High Court then
 25 it would be open to the Kelkoo claimants to make

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1 arguments in the High Court based on foreign law subject
 2 to a point I am going to come to about whether it is
 3 fair to allow the pleading now.
 4 But the Ciao claim was brought in the Tribunal.
 5 There are no High Court proceedings. So they cannot
 6 possibly in my submission avail themselves of a High
 7 Court jurisdiction. You could not transfer --
 8 the Tribunal cannot transfer something over which it has
 9 no jurisdiction into the High Court and thereby create
 10 a claim that the High Court can hear. That is a legal
 11 nonsense in my submission. So I will if I may --
 12 THE CHAIRMAN: Ciao could commence proceedings in the High
 13 Court.
 14 MR PICKFORD: They could try and then there would probably
 15 be arguments about limitation that would arise at that
 16 point.
 17 THE CHAIRMAN: There will be about nine months, I suppose,
 18 because this is only from January 2021.
 19 MR PICKFORD: These are claims that they say are governed by
 20 foreign law, so for a start we would have to consider
 21 the foreign law issues that arise in that respect on
 22 limitation. Because the whole point of this is that
 23 the Tribunal raised with my learned friend a way of --
 24 we say there is a problem -- this actually arose I think
 25 out of the DMA. We say there is a problem here.

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1 I might have misremembered that. But in any event --
 2 THE CHAIRMAN: Yes.
 3 MR PICKFORD: The reason why they were seeking to bring
 4 foreign law into play was their means of continuing 102
 5 claims post-IP completion date because an issue arose
 6 about whether that was something that the Tribunal had
 7 jurisdiction over. I think it was actually at the
 8 Tribunal's suggestion, I think, sir, you said, what
 9 about foreign law? And they went away and said, oh yes,
 10 this is all under foreign law.
 11 THE CHAIRMAN: Just to be clear, your objection to the
 12 amendment is really founded on the jurisdiction point?
 13 MR PICKFORD: That is the first reason. Then I have
 14 a fairness reason that I am going to come on to. So if
 15 I may I would like to develop the jurisdiction point and
 16 then --
 17 THE CHAIRMAN: You say they go together.
 18 MR PICKFORD: Yes.
 19 THE CHAIRMAN: And the jurisdiction point Mr Jowell said is
 20 something he does not want to argue today, I think. It
 21 may be a complex argument, I do not know.
 22 MR PICKFORD: What cannot happen today, in my submission --
 23 obviously there is a potential way through, which is
 24 that you hear all the argument, including on the
 25 amendment, once you have heard the jurisdiction point.

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1 THE CHAIRMAN: Yes.
 2 MR PICKFORD: But in my submission you cannot grant these
 3 amendments without hearing the jurisdiction point
 4 because I say that if you do not have jurisdiction to
 5 hear these claims you cannot allow them in. It is very
 6 simple, really. They are either section 47A claims or
 7 they are not. That is the extent to which -- that is
 8 the complete extent of the Tribunal's jurisdiction here.
 9 I say these are not section 47A claims post-IP
 10 completion date. You can see that abundantly clearly
 11 just by looking at the terms of section 47A that does
 12 not refer to Article 102 anymore. There is a small
 13 point about the 2019 regulations and I can come to it,
 14 but I say there is a cast iron jurisdictional problem
 15 here that prevents the Tribunal granting the relief
 16 that is sought in relation to amendment.
 17 So either we hear it now, but there is the
 18 difficulty that Mr Jowell says he is not ready to do
 19 that, or it all has to be adjourned.
 20 THE CHAIRMAN: I do not know if he said he is not ready,
 21 perhaps I was being unfair, he said he was not proposing
 22 to.
 23 MR JOWELL: I thought that we had agreed in correspondence
 24 with Google that at their insistence they did not want
 25 the jurisdiction hearing to be heard today. So we

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1 agreed to postpone that.
 2 THE CHAIRMAN: Yes. I think Mr Pickford has a fair point
 3 that if we have no jurisdiction to hear that part of the
 4 Kelkoo claim or more particularly the foreign claims of
 5 the Kelkoo claimants, which is really what we are
 6 dealing with, then it would not be right to allow an
 7 amendment which -- an amendment to make a case for which
 8 we have no jurisdiction.
 9 MR JOWELL: I respectfully disagree with that, but I do not
 10 know whether you want to hear me on that now. I can
 11 conveniently deal with it now.
 12 THE CHAIRMAN: There is the further complication on the
 13 Kelkoo claim that the transfer of the Kelkoo claim from
 14 the High Court to the Tribunal did not transfer that
 15 part of the claim over which this Tribunal has no
 16 jurisdiction, so it retained the jurisdiction in the
 17 High Court.
 18 MR PICKFORD: That is why I made the concession that I did,
 19 sir.
 20 THE CHAIRMAN: On that basis you could apply to amend in the
 21 High Court and I could hear the application to amend
 22 Kelkoo in my capacity as a High Court judge, or sitting
 23 in retirement in the High Court, I would have thought,
 24 because it remains an action in the High Court for that
 25 purpose as I read the transfer order.

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1 MR PICKFORD: Yes, sir. I am not sure whether you are
 2 suggesting this, not today in my submission, because
 3 that is not the application that I am facing and I would
 4 want the opportunity to consider what the implications
 5 of that were.
 6 THE CHAIRMAN: (Overspeaking) sorting that out.
 7 MR JOWELL: It has become -- if I may briefly, I think my
 8 friend is rather overcomplicating things because we are
 9 simply seeking to assert by the amendment that our
 10 claims are for the entire period, insofar as they relate
 11 to Article 102, governed by the laws of all of the
 12 respective member states of the EU and the EEA. That is
 13 not seeking to say -- that does not -- allowing us to
 14 bring that claim does not prejudice the issue of whether
 15 for the latter part of the claim the tribunal has
 16 jurisdiction to hear the claim; it is simply saying
 17 that is the basis on which these claims are brought.
 18 The Tribunal is entirely within its rights to say
 19 you are going to permit the amendment but that is
 20 subject to a subsequent argument that we are all agreed
 21 we will have in relation to jurisdiction of this
 22 Tribunal over those latter parts of the claim. So there
 23 is no problem, we say, in allowing the amendment on that
 24 basis, provided it is on that basis, and on the basis
 25 that subsequently the Tribunal will decide jurisdiction.

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1 That is all that we are suggesting. We have proposed
 2 the amendment precisely because previously it was said,
 3 well, we do not have jurisdiction because you have not
 4 pleaded it in that way. So we are now pleading it in
 5 a clarified way so the court may now determine the
 6 jurisdiction issue. It is overcomplicating things,
 7 really, to say that you do not have jurisdiction to make
 8 that. You do have jurisdiction provided you make it on
 9 a caveated basis. We say it is subject to that.
 10 THE CHAIRMAN: Just a moment.
 11 (Pause).
 12 It is really a question, it seems to us, of what is
 13 a practical way forward. Everyone knows now that Kelkoo
 14 or the foreign Kelkoo claimants, if I can put it that
 15 way, wish to argue this on the basis of Article 102 as
 16 part of their national laws. That has been made clear.
 17 Insofar as it was not clear, it has been explained.
 18 We also all know that Google are saying this
 19 Tribunal has no jurisdiction to do that, to hear those
 20 claims because of the limitations on the Tribunal's
 21 jurisdiction. Whether one, subject to the unfairness
 22 point you have, which is an additional point, whether
 23 one lets the amendment be pleaded and says there is
 24 going to be a jurisdiction argument that we are going to
 25 hear or whether one hears the jurisdiction argument and

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1 then, if Kelkoo is successful, allows the amendment, it
 2 does not seem to us to make a huge difference. But we
 3 think our present feeling is it might be sensible to do
 4 the two together and, rather than hearing argument on
 5 that now, to have written submissions on both matters
 6 together, in other words separately. I do not think it
 7 necessarily affects judgment here because this case --
 8 I imagine you can do it fairly quickly in any event
 9 because that can be made clear in the judgment subject
 10 to this point.

11 Our preference at the moment is that you,
 12 particularly given the matter in the transfer order
 13 which has just been drawn to our attention -- I do not
 14 know if you have seen that, Mr Jowell, about asserting
 15 that jurisdiction remains in the High Court, in the
 16 Kelkoo action that doesn't apply to the Ciao action. So
 17 one could even have a different outcome, potentially,
 18 and Mr Pickford was alluding to that. So it is quite
 19 complicated.

20 I think our preference is that we do not decide this
 21 now and that you make written submissions, how you think
 22 it should be done on jurisdiction, and consider, if
 23 it is not done here, something should be done in the
 24 High Court, one way forward, and Mr Pickford can respond
 25 to that. You should go first, I think, because you are

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1 saying there is jurisdiction, you want the amendment,
 2 and we can take your -- we have not heard your
 3 unfairness point.
 4 Is that a course -- we can rise for you to take
 5 instructions.
 6 MR JOWELL: I think I can say, provided, if you like, that
 7 it is understood that we are making our claim on that
 8 basis then there is no difficulty. So I think one does
 9 need to hear Mr Pickford on his unfairness point perhaps
 10 first because I think one needs to at least clear that
 11 out of the way, that there is somehow no independent
 12 reason why we cannot clarify our pleading in the way
 13 that we have proposed to do so.
 14 THE CHAIRMAN: Yes. It would probably be helpful just to
 15 hear what the unfairness point is. That is assuming
 16 that there is jurisdiction, it would be unfair in any
 17 event. Is that what you are seeking to say?
 18 MR PICKFORD: Yes. Yes, I mean, I can explain. I think
 19 it is difficult to dissect all of these arguments. I am
 20 not particularly in favour of having a few bits and all
 21 the others, but we are very happy to make clear in
 22 correspondence to Kelkoo what the unfairness point is.
 23 I think we probably have done, but if there is any
 24 ambiguity about it --
 25 THE CHAIRMAN: Can you tell us in a nutshell?

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1 MR PICKFORD: In a nutshell the point is this: the pleadings
 2 up until the amendment that was sought did not raise any
 3 foreign law issues. They did not have to because,
 4 of course, under Article 6(3) of Rome II they were
 5 entitled to rely on English law across the entire claim.
 6 One might reasonably infer from the way that they
 7 pleaded their claim without reference to any single
 8 foreign law that that is what they were doing.
 9 Now, because it suits them, they want to bring in
 10 foreign laws and they want to do that, they say -- they
 11 say they are clarifying their case, I say it is new.
 12 The difficulty that that gives rise to is this: if they
 13 are right that it is foreign law on which the claims for
 14 the foreign claimants depend, that is the applicable law
 15 post-IP completion day, we have argued the
 16 counterfactual issues in this case on an incomplete
 17 basis because we have only argued counterfactual under
 18 English law; it had six weeks of trial where we only
 19 addressed the counterfactual under English law.
 20 Now what they are saying, right at the end of the
 21 trial, is, aha, the applicable law is not just English
 22 law, the applicable law is -- and then they do not
 23 actually tell us, they still do not tell us which
 24 applicable laws they are relying on, they just say it is
 25 all of them.

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1 THE CHAIRMAN: Well, I think they do, they say it is the law
 2 of the nationality of each Kelkoo which incorporates
 3 Article 102, so they rely on Article 102.
 4 MR PICKFORD: Well, there are some -- so the way in which
 5 the provision actually works is it depends on what the
 6 markets are in issue and, in my submission, they
 7 actually just need to set it out properly. But putting
 8 that to one side, if it is that mosaic now of national
 9 laws that are the applicable laws then we are going to
 10 have to have argument on how a counterfactual works
 11 under each of those national laws, which I had not ever
 12 understood was part of what we were going to be arguing
 13 in this claim. Indeed, if Kelkoo really had understood
 14 that their claim was based on a mosaic of national laws
 15 rather than English law then it is a bit odd that they
 16 did not raise that for the purposes of the -- for trial
 17 one.
 18 I say this is all after the event and it is not
 19 actually how either side has approached this trial.
 20 That would open up a whole new flank which so far none
 21 of the parties --
 22 THE CHAIRMAN: So you say the counterfactual might be
 23 different?
 24 MR PICKFORD: Well, at the very least we would have to
 25 consider other domestic laws on counterfactual. Now,

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1 I do not know to what extent those other national laws
 2 are the same as English law or differ from it. One
 3 thing that we do know is that the European Court had an
 4 approach to counterfactual which I say does not marry
 5 English law counterfactuals from a damages point of
 6 view. What the answer is under all of the respective
 7 national laws I simply do not know at this stage;
 8 we would have to research it, consider it, have
 9 pleadings on it, potentially have expert evidence on it,
 10 and those are all things that, in my submission, are
 11 quite inappropriate to do at this stage of the
 12 proceedings. So that is the essence of -- that is the
 13 problem.
 14 THE CHAIRMAN: Yes.
 15 (Pause).
 16 Well, you see the point. We are not expressing any
 17 view.
 18 MR JOWELL: I hear the point but I do not see the point.
 19 THE CHAIRMAN: Well, you hear what is being said.
 20 MR JOWELL: The case is always brought under Article 102 and
 21 the question of what is the lawful counterfactual is
 22 a matter that exists under Article 102, not under each
 23 respective national law. So we do not understand --
 24 I am afraid I do not --
 25 THE CHAIRMAN: I think that is disputed by Google, so

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1 I think it probably would merit a bit of consideration
 2 and to be dealt with in writing. Google can make its
 3 points about the counterfactual in writing and you can
 4 make your points about the transfer and respond to
 5 Google in writing. I do not think it materially affects
 6 the judgment we are going to deliver, but we will
 7 probably get your submissions before you get the
 8 judgment anyway.
 9 I think that is what we will do. If we rise for 10
 10 minutes, do you think -- or 15 maybe -- you can agree
 11 a sort of timetable in which you will put in your
 12 submissions on this point? 10 minutes. We do not want
 13 an extended timetable because we would like to take it
 14 into account for the purposes of this judgment, but just
 15 basically, do you want five days or a week to put in
 16 your --
 17 MR JOWELL: We have made a proposal, I think, to Google
 18 already.
 19 THE CHAIRMAN: If you can agree something that is probably
 20 quicker than us having it discussed in open court.
 21 MR JOWELL: We had, I think, agreed two rounds of
 22 simultaneous submissions, but we could -- if it is to be
 23 sequential there should, I think, be a right of reply.
 24 THE CHAIRMAN: Yes.
 25 MR JOWELL: So one could do it either way.

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1 THE CHAIRMAN: Yes. Well, just 10 minutes.
 2 (2.56 pm)
 3 (A short break)
 4 (3.08 pm)
 5 THE CHAIRMAN: We should say that we have been reflecting on
 6 what Mr Pickford just said. We understand what he is
 7 seeking to submit and we think that it would not be
 8 right for Google simply to say the foreign law on
 9 counterfactual in one of these relevant countries may be
 10 different and thus require more evidence or different
 11 evidence, more evidence really, and to sort of say there
 12 is a potential unfairness. Google would need to specify
 13 how the foreign law counterfactual is different and why
 14 that difference could justify more evidence, because
 15 otherwise foreign law is presumed to be the same as
 16 English law unless it is specified to be otherwise.
 17 It may well be that the foreign law counterfactual,
 18 it not being a particularly unusual position that
 19 English law takes, is exactly the same, in which case
 20 there is no unfairness, you just have to check.
 21 MR PICKFORD: I can understand why from a pragmatic point,
 22 sir, you say that. Of course, our primary position
 23 is that these foreign laws have not yet been put in
 24 issue. If the Tribunal says, well, given the unfairness
 25 point we want to know what your answer is on that then

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1 I can take instructions. But certainly that is going to
 2 entirely throw out, without a doubt, the timetable that
 3 we have just agreed because what we have just agreed is
 4 a short timetable for making submissions based on the
 5 arguments up until now, and if what we are being asked
 6 to do is to provide our statement of case on the extent
 7 to which any of the -- I think we are into double
 8 figures of national laws that are put in issue. If any
 9 of those are different as regards counterfactual then
 10 that is a much, much bigger enterprise.
 11 THE CHAIRMAN: I understand that. It may be that we do it
 12 in two goes, that we deal with the jurisdiction point
 13 first.
 14 MR PICKFORD: Yes.
 15 THE CHAIRMAN: Because it would be -- as I say, foreign law
 16 is presumed to be the same as English law unless alleged
 17 otherwise. So if this were pleaded you would not
 18 expect -- unless the claimants wish to rely on a foreign
 19 law counterfactual, they would not plead it, it would be
 20 Google that pleads it. Just as you have reserved your
 21 right, I think in your defence, to plead a foreign law
 22 of limitation, you have already reserved that right --
 23 MR PICKFORD: In my submission that is the only sensible way
 24 forward because otherwise we are going to have to go to
 25 an enormous amount of effort to prove a point that may

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1 be entirely hypothetical, because if the Tribunal
 2 decides that I am right on jurisdiction then we would
 3 have wasted huge amounts of time on --
 4 THE CHAIRMAN: That makes sense. So you give us your time
 5 limit. We say that is submissions on the jurisdiction
 6 and jurisdictional way forward if it is suggested there
 7 should be some (overspeaking) and leave aside the
 8 unfairness point to be dealt with separately. We know
 9 that Google is making that point.
 10 MR JOWELL: So on that basis we have agreed, in a rare
 11 moment of agreement, that we should have an initial
 12 simultaneous exchange on the 25th of 15 pages and
 13 a further --
 14 MS ROSE: That is 25 September?
 15 MR JOWELL: Yes, 25 September, and a further round, two
 16 weeks later, on 9 October of up to 10 pages. I have got
 17 that right?
 18 MR PICKFORD: Yes.
 19 THE CHAIRMAN: Yes, that seems very sensible. That will be
 20 on jurisdiction, including potential transfer or not.
 21 MR PICKFORD: Yes.
 22 MR JOWELL: Presumably on the assumption that we are
 23 otherwise permitted our amendment.
 24 THE CHAIRMAN: Yes. Then we can rule on that. That is
 25 subject to then the question of whether the amendment

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1 should be allowed, which brings in your fairness
2 arguments, which we will want, if we get to that point,
3 to consider on a proper basis rather than just a spectre
4 that, well, it might be unfair. Very well.

5 Is there anything else to deal with now?

6 MR JOWELL: I do not think so.

7 MR PICKFORD: No.

8 THE CHAIRMAN: Thank you very much for dealing with that
9 clearly and efficiently and for your written
10 submissions, which were very helpful. Obviously, it
11 feeds into the judgment on which we have already started
12 work.

13 MS ROSE: Happy New Year!

14 (3.14 pm)

15 (The hearing concluded)

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17 Submissions by MR JOWELL 2

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18 Reply submissions by MR JOWELL 88

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19 Submissions by MR PICKFORD 100

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