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IN THE COMPETITION
APPEAL TRIBUNAL

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

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

22nd June-31st July 2026

Before:

The Honourable Mr Justice Roth
Dinah Rose KC
Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

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

Claimants

- and -

GOOGLE LLC & OTHERS

Defendants

A P P E A R A N C E S

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

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

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

1 Monday, 22 June 2026
 2 (10.30 am)
 3 (Proceedings delayed)
 4 (10.35 am)
 5 THE CHAIRMAN: Good morning.
 6 Housekeeping
 7 We start as always with a warning. These
 8 proceedings, like all proceedings in this Tribunal, are
 9 being live streamed. An official recording of
 10 the proceedings is being made and it is strictly
 11 prohibited for anyone to make any unofficial recording
 12 or to take any visual image of the proceedings and to do
 13 so constitutes a contempt of court, so please would
 14 those who are, or may be watching online take heed of
 15 that.
 16 We have, in the mass of materials before
 17 the Tribunal, a fair amount of confidential information.
 18 In fact, there are two levels of confidentiality :
 19 a general confidentiality ring and then an inner
 20 confidentiality ring for particularly sensitive
 21 materials. We trust that counsel, as usual, will be
 22 careful not to read out any confidential matters and
 23 just direct the Tribunal to those passages. If at any
 24 stage in questioning any of the witnesses it will be
 25 necessary to go into details of the confidential

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1 material, then the Tribunal will have to go into camera,
 2 and if that should happen, the live stream will be
 3 turned off. It will be helpful if we could get advance
 4 warning if you know that with a particular witness that
 5 is going to be necessary, and perhaps you can give that
 6 some thought in due course.
 7 I think therefore we should make the usual order
 8 under Rule 102(5), that the fact that confidential
 9 material has been read by the Tribunal or is being
 10 referred to the Tribunal does not remove
 11 the confidentiality and no one may have access to that
 12 material outside the confidentiality ring without
 13 the express permission of the Tribunal. So if that
 14 order could be drawn up in due course.
 15 We will be taking a short break mid—morning and
 16 mid—afternoon, as always, for the benefit of
 17 the transcribers. We have got the benefit of a live
 18 transcript in these proceedings.
 19 We also have, exceptionally, in this Trial
 20 the benefit of a Tribunal appointed expert in
 21 Professor Ounis, a professor at the University of
 22 Glasgow. Professor Ounis is here in court this morning,
 23 sitting in front of me. You have seen the protocol that
 24 has been adopted for use by the Tribunal of our expert.
 25 We have not, as yet, addressed any questions to him. If

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1 we do, they will be circulated to the parties. We will
 2 be careful not to discuss any aspect of the case with
 3 Professor Ounis, even to the extent that we will really
 4 not be able to have lunch with him during
 5 the proceedings and we are very conscious of that.
 6 Thank you to all the parties and the large teams
 7 involved for your written openings, which we have read.
 8 They have been very helpful. I can assure you they are
 9 no less helpful for having been page—limited. If
 10 anything, they are more helpful and easier to digest.
 11 We have read some of the documents that you have
 12 suggested we should read, but I do not think any of us
 13 have managed to read all of them. That would have been
 14 an impossible task for four days.
 15 We have looked at the economists' reports. We do
 16 feel, I have to say, that some of the matters that
 17 the economists are addressing or have been asked to
 18 address really are not matters of economic opinion
 19 evidence at all, but really matters of pure factual
 20 assessment and advocacy even, and we will come back to
 21 that in due course, and so they are really factual
 22 questions for the advocates and then ultimately
 23 for the Tribunal. Clearly there is some economic
 24 opinion evidence that is valuable and their analysis of
 25 some of the data is very valuable.

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1 My one request regarding the economists. If you
 2 could turn to the joint expert statements, which is —
 3 it is bundle I1, if you have hard copy bundle, or if you
 4 are electronic, it is {I1/5/26}. It has come up on my
 5 screen. It may be just me, but even when I enlarge it,
 6 I find it extremely difficult to read what is written in
 7 the coloured boxes, and if someone could arrange for
 8 just a printout, probably an A3 printout, of that page,
 9 maybe that will be easier to read, but we have it
 10 enlarged on the screen, it is not very user—friendly.
 11 So just a small request, please, in due course.
 12 I think, with that, we can proceed to counsels'
 13 opening. If you could identify yourself when you start
 14 speaking for the benefit of the transcript.

15 Opening submissions by MR JOWELL
 16 MR JOWELL: May it please the Tribunal. I am Daniel Jowell
 17 and I appear with Ms Love KC, Mr Whelan and Ms Seglias
 18 for Kelkoo and Ciao Claimants. Mr West appears for
 19 Foundem. Mr Pickford KC, Mr McGurk KC,
 20 Ms Kerr Morrison, Ms Mackenzie, Mr Gregory and
 21 Mr Holder Ross all appear for Google.

22 As the Tribunal will have seen, there are two main
 23 issues as between Kelkoo and Google in these
 24 proceedings. First, whether Google has abused its
 25 dominant position in the post—Decision Period, or, put

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1 another way, whether the Remedy or the Compliance
 2 Mechanism has cured the abuse, and secondly, what is
 3 the appropriate counterfactual for each of the Decision
 4 Period and the post-Decision Period. Mr West will
 5 address you in due course on the further issue specific
 6 to Foundem of whether there was an abuse at a point in
 7 time before the start of the Decision Period, so before
 8 January 2008.

9 Now, I am conscious that the Tribunal will already
 10 be familiar with the Commission Decision, and of course
 11 it has indicated that it has read the opening
 12 submissions carefully and some of the documents.
 13 I apprehend that you will not be much assisted by
 14 a summary or a repetition of that material. What
 15 I suspect you may not have seen in full are
 16 the contemporaneous documents, and sight of those,
 17 I think, should help in deepening the Tribunal's
 18 understanding of some of the important matters relevant
 19 to the issues that it has to decide. Relatedly, I will
 20 also take the Tribunal through some of the visual images
 21 as it is requested of the Google Shopping box from time
 22 to time. My intention is essentially to go through some
 23 of the key documents and those images broadly in
 24 a chronological order, and that will take up the bulk of
 25 my submissions, and then I plan to address you briefly,

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1 in light of that, or relatively briefly on the two key
 2 issues and to seek to mention some of the points that
 3 Google has made in their written opening.

4 Now, before I come to those documents, I should just
 5 briefly outline the factual matters to which
 6 the documents are relevant. They go to three broad
 7 areas. First, the nature of the relevant markets, in
 8 particular the CSS market, at the time the abuse
 9 commenced and Google's commercial imperatives and
 10 incentives at that time. Secondly, what were
 11 the different formats by which Google subsequently
 12 favoured its shopping comparison service in its shopping
 13 box over time, and some of those historic formats are
 14 quite informative as to the appropriate counterfactual.
 15 The third factual area to consider is the documentary
 16 evidence regarding the options that Google considered to
 17 Remedy its abuse and the various formats of
 18 the Compliance Mechanism adopted in response to
 19 the Commission's requests or pressure.

20 Now, in relation to all of those broad subject areas
 21 there are a number of specific matters — factual
 22 matters that are contested between the parties, and so
 23 before I dive into the documents, I thought it might be
 24 helpful if I just identify some of those factual
 25 disputes.

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1 So the first factual dispute is: it is Google's case
 2 that CSSs were no longer serious competition to Google
 3 already before the start of the abuse in January 2008.
 4 You will find that allegation in paragraphs 18 {A2/1/9}
 5 and 59 {A2/1/28} of its opening skeleton. We say that
 6 is factually incorrect. At the beginning of 2008, we
 7 say that CSSs were still perceived by Google as one of
 8 its main competitors in shopping. Now, it is fair to
 9 say that because of the abusive conduct, by the end of
 10 2009, CSSs were starting to fade in the United States,
 11 but even then, right through to 2011, we say that CSSs
 12 were still a serious competitive force in Europe until
 13 they were decimated by the effect of the Panda
 14 algorithm.

15 The second point of dispute is that it is Google's
 16 case, at least as articulated in their skeleton
 17 argument, that Kelkoo and Ciao were low-quality CSSs
 18 that were already on the decline, and indeed there is
 19 some quite serious mud-slinging at Kelkoo, it is alleged
 20 to be a disreputable company without useful content, and
 21 you will see those allegations made in their skeleton at
 22 paragraph 71.5 {A2/1/36}, 71.1(c) {A2/1/34} and
 23 paragraph 82 {A2/1/42} made about both Kelkoo and Ciao.

24 THE CHAIRMAN: Also Foundem.
 25 MR JOWELL: Also Foundem.

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1 Now, the relevance of this is not entirely clear but
 2 it appears to bolster Google's argument that they
 3 therefore deserved their demotion and exclusion from
 4 the SERP, the search engine results page, on quality
 5 grounds. In any event, we completely disagree. Our
 6 case is that at the time the abuse started, it is quite
 7 clear that Kelkoo and Ciao were two of the largest, most
 8 reputable, most high-quality and more successful CSSs on
 9 the European markets. Indeed, they were perceived by
 10 Google as being in the vanguard of competition in
 11 the shopping part of vertical search, and Google
 12 regarded that as a serious competitive threat. So at
 13 the time the abuse commenced, we say that Google in fact
 14 rather coveted the quality of service of the CSSs like
 15 Kelkoo and Ciao, which were at that time technologically
 16 and presentationally superior to Google's own comparison
 17 shopping service.

18 The third point in dispute relates to the nature of
 19 Google's demotion algorithms —

20 THE CHAIRMAN: Just before you go on.

21 MR JOWELL: Yes.

22 THE CHAIRMAN: When you say the start of the period, you
 23 mean this is the Decision Period, as it were, from
 24 January 2008.

25 MR JOWELL: Yes, indeed, yes.

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1 THE CHAIRMAN: I know Mr West will address us regarding
 2 Foundem, but really the point comes here as well. No
 3 doubt he would say the same in, was it, 2006 or
 4 whatever, when the —
 5 MR JOWELL: Certainly. Even more so in 2006. I will show
 6 you some of those documents in that period, in the run
 7 up period from 2006 to — or 2005 indeed to 2008.
 8 So the third point in dispute relates to the nature
 9 of Google's demotion algorithms, the algorithm we are
 10 calling "Algorithm A", and the Panda/Coati algorithm and
 11 how they related to CSSs. Now, it is a binding finding
 12 of fact under the Commission's Decision that both of
 13 those algorithms were prone to demote CSSs by reason of
 14 their inherent characteristics. Google's position,
 15 however, is the application of those demotion algorithms
 16 was always strictly and purely about quality. You find
 17 that in Google's skeleton argument at paragraph 49
 18 {A2/1/23}. Hence, in a sense what they say is, well, to
 19 the extent that they were prone to demote CSSs, they
 20 say, well, that was all just a coincidence. If CSSs
 21 were not of poor quality, they say they would not have
 22 been demoted.
 23 Our position is contrary to that. We say that
 24 the demotion algorithms and their effect on CSSs was not
 25 purely a coincidence, nor was it related largely to

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1 quality. Our case is that Google did not like CSSs
 2 appearing in its SERP and it wanted in principle to
 3 demote them, and the reason that Google wanted to demote
 4 them was commercial. The CSSs were part of a class of
 5 aggregators, vertical or specialised search service
 6 companies, and Google saw them as a serious competitive
 7 threat.
 8 Now, I should make two things clear. First of all,
 9 we do not say that the sole or even the exclusive
 10 purpose of the demotion algorithms was to demote CSSs.
 11 We accept they may also have had in part a legitimate
 12 aspect aimed at improving search quality. Secondly, we
 13 acknowledge that the implementation of these algorithms
 14 was an iterative process. The algorithms were adjusted
 15 on multiple occasions, changes were made. But precisely
 16 because of that, Google could, if it had wanted to, have
 17 made adjustments to its algorithms to protect CSSs and
 18 other vertical search engines from undue demotion, but
 19 because of its commercial antipathy to CSSs, Google had
 20 no interest in doing that. That said, the demotion
 21 process by Google was a gradual one, and again there are
 22 commercial reasons for that. In the early years, before
 23 it had improved its own CSS and integrated it
 24 effectively into the specialised search results in
 25 the shopping box, there were limits on what Google could

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1 get away with in terms of demoting rival CSSs, limits at
 2 least, without seriously compromising user experience
 3 and hence discouraging users from starting their product
 4 searches on Google. As I will come on to, that
 5 commercial imperative of maximising shopping starts was
 6 at least initially Google's main commercial imperative
 7 and that limited its ability to demote.

8 But then, later on, with the shopping box fully in
 9 place and by the time it had instituted the Panda and
 10 the Coati algorithms, it had no inhibitions and it could
 11 demote rival CSSs effectively with impunity.

12 Now, a fourth point of dispute and related to
 13 the previous point is there is an issue between
 14 the parties as to the effect that the demotion
 15 algorithms would have had if they had been applied to
 16 Google's own CSS. Now, Google's position is set out in
 17 paragraph 86 of its written opening {A2/1/44}. What it
 18 says is:

19 "Google does not include results from its CSS in
 20 the organic search results and as such does not have
 21 the same access to this part of the SERP as competing
 22 CSSs. But even if it did, Google's site would not have
 23 been demoted by Algorithm A or Panda because of,
 24 inter alia, its quality signals."

25 We respectfully disagree and our position is that

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1 Google's own internal documents show that it knew full
 2 well that if Google had included its own CSS within
 3 the general search results, which some within Google
 4 were incidentally pushing for, then the effect of
 5 Algorithm A and Panda would indeed have been to demote
 6 its own shopping comparison service.

7 Finally, there is an overarching allegation that
 8 Google makes, namely that the CSS market has declined.
 9 This, it says, is evidence that users just do not value
 10 the CSS service. As to that, we say the CSS market has
 11 not declined, users still very much value a comparison
 12 shopping service. Indeed, we say the CSS market has
 13 actually grown massively. All that has happened is that
 14 the entire CSS market has been captured by Google while
 15 independent rival CSSs have been decimated by its
 16 abusive conduct. Indeed, one can see how much revenue
 17 Google makes from the CSS market in Mr Hunt's report at
 18 figure 9.10, where he sets out Google's revenue from
 19 the Shopping Unit. I will not go to it, it is
 20 confidential, but for your note it is {I2/1/174}.

21 So as for the decline of the independent CSSs, there
 22 is a very clear reason for that. As the Commission
 23 Decision records, at paragraphs 452 to 538
 24 {BA/2/136–178}, the abuse by Google diverted traffic on
 25 Google's SERP from rival CSSs to Google's CSS on

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1 a lasting basis, including because generic results
 2 generate significant traffic to websites.
 3 As the Decision further records, at recitals 539 to
 4 588 {BA/2/178–206}, that diverted traffic accounted for
 5 a large proportion of traffic to competing CSSs which
 6 could not be effectively replaced by other sources of
 7 traffic.

8 So Google wishes to persuade you that the decline of
 9 these rival CSSs was some kind of an inevitability, but
 10 it actually was not at all; it was a result of Google's
 11 abuse. Indeed, even those CSSs that Google now tries,
 12 in paragraph 85 of its written submissions {A2/1/43}, to
 13 hold out as supposed relative success stories, they have
 14 also been massively affected. I mean, most of them are
 15 claiming millions of dollars or euros in damages for
 16 the harm that Google's abuses caused them. Idealo, for
 17 example, which was affected by Google's algorithms but
 18 just not quite to the same extent, at least initially,
 19 in Germany, has recently been awarded half a billion
 20 euros in damages in Germany, by the German court.
 21 Google's abuse devastated, without meaningful exception,
 22 the rival CSSs operating in the various European
 23 national markets.

24 THE CHAIRMAN: Idealo is a CSS —

25 MR JOWELL: It is.

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1 THE CHAIRMAN: — I think Google says is of higher quality,
 2 is it not?

3 MR JOWELL: They claim it is of higher quality, but it too
 4 has been massively affected, massively harmed to
 5 the tune of half a billion euros, according to
 6 the German court.

7 So relatedly, in its written submissions Google
 8 seems to point to documents that suggest a lack of
 9 quality of rival CSSs from evidence that dates to points
 10 in time several years after the abuse has commenced, and
 11 sometimes even after the entire abuse in
 12 the post–Decision Period. We say that sort of evidence
 13 has got no value at all, because after years of abuse,
 14 of course competitor CSSs have been degraded by the lack
 15 of traffic and underinvestment. So in other words, we
 16 say it is a little rich really for Google, first, to rig
 17 the CSS market unlawfully, diverting masses of traffic
 18 from competitor CSSs to its own CSSs, and then it puts
 19 — it blames the victims for their parlous state, in
 20 other words it confuses cause and effect.

21 This raises another, wider issue in resolving
 22 the counterfactual. The Tribunal has got to answer
 23 a very difficult question, a "what if" question: what
 24 would have happened if Google had not acted abusively?
 25 But in answering that question, it is essential to

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1 consider the circumstances as they pertained back when
 2 the abuse commenced. It is not correct to consider
 3 the circumstances after the abuse has had its effect.
 4 Those circumstances were the product of the abuse, and
 5 the shopping comparison market before the abuse, or at
 6 the time just before the abuse started, was very, very
 7 different. As any good historian will tell you, it is
 8 an error to judge the past by the standards or
 9 the assumptions of the present. In the same way, it is
 10 important when you are constructing an appropriate
 11 counterfactual to consider the market as it pertained at
 12 the relevant time when the unlawful conduct started, not
 13 the market as it pertains after it has been decimated by
 14 that same unlawful conduct.

15 This point about historical context is also relevant
 16 when it comes to the next factual area, which is
 17 the format of the shopping box from time to time and
 18 user preferences in relation to that format, because
 19 here, again, we have a point in dispute. At
 20 paragraph 77 {A2/1/39} of its written opening Google
 21 makes an assertion. It asserts that users
 22 overwhelmingly prefer effectively to immediately go to
 23 merchant pages to buy, they do not like, they claim,
 24 interstitial pages, intermediaries, and relatedly it
 25 cites evidence from its factual witnesses to that same

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1 effect.

2 Now, we do not dispute, of course, that, all other
 3 things equal, users prefer a single click to a double
 4 click, but we also say that users are flexible in
 5 relation to that and also in relation to latency, and
 6 they are willing to make trade-offs against improvements
 7 in choice and quality. For many users the priority is
 8 the quality of the shopping experience and the diversity
 9 of the results they have access to, and it is dangerous
 10 to assume, based on the current existence of formats
 11 that users have become habituated to as a result of
 12 the commercial choices that Google has implemented,
 13 users have become conditioned to a particular
 14 presentation of the shopping box as it has been created
 15 by Google, and that presentation involves a click
 16 through to a single product from a single merchant. But
 17 it is wrong to suppose that that reflects some kind of
 18 inherent and immutable preference from users, and one
 19 can see that because if one goes back to the period 2008
 20 to 2012, one can see that both Google and the users
 21 themselves perceived that actually a link to a CSS — it
 22 just happened to be Google's CSS — was preferable for
 23 most users to a link directly to merchant pages.

24 Similarly, when one comes on to the post–Decision
 25 Period and the various possibilities and formats for

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1 the Compliance Mechanism, it is misleading to use that
 2 period in some ways — or can be misleading to use that
 3 as a guide to the counterfactual a decade earlier.
 4 Google in particular relies on experiments conducted in
 5 relation to these so-called CLAs, which are comparison
 6 listing ads, and those experiments have obvious defects
 7 that we will come on to and that have been rather
 8 dramatically exposed in recent disclosure that we have
 9 received. But even that aside, one must not forget that
 10 the CLAs took users to comparison shopping sites that
 11 have been degraded by years of underinvestment. Google
 12 and its favoured PLAs, product listing ads, by contrast,
 13 have benefited from years of improvement and
 14 the advantages occasioned by the abuse, and those
 15 advantages are very hard to unravel, particularly when
 16 you have these network effects by which you get
 17 effectively a virtuous cycle building up your product at
 18 the expense of your competitors.
 19 THE CHAIRMAN: Can you just remind us —
 20 MR JOWELL: Yes.
 21 THE CHAIRMAN: — the post-Decision Period, is it — up to
 22 what point?
 23 MR JOWELL: September — up to September 2017, because it is
 24 all accepted that until the Remedy was —
 25 THE CHAIRMAN: That is when the post-Decision Period starts?

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1 MR JOWELL: Starts, yes.
 2 THE CHAIRMAN: When does it end? Is it today?
 3 MR JOWELL: We say the post-Decision Period is ongoing.
 4 THE CHAIRMAN: So you say it is ongoing.
 5 MR JOWELL: Yes.
 6 Now, can I start then —
 7 THE CHAIRMAN: Because that prompts this reaction to what
 8 you said. I quite see that one has to take account of
 9 the effect of the abuse, you say, so you cannot just
 10 look at that, the position in 2020, disregarding years
 11 of abuse, but equally, there have been other
 12 developments independent of that, and there may be in
 13 user behaviour or attitude to searching in all that
 14 time, this is a fast-changing area, such that to go back
 15 to what people were thinking in 2008 and to apply that
 16 to 2026 may be a bit artificial.
 17 MR JOWELL: Well, it may be, but in our submission, actually
 18 it is a rather useful guide, because you just see —
 19 well, that takes away the abuse and the effect of
 20 the abuse.
 21 THE CHAIRMAN: Yes, well, I see that —
 22 MR JOWELL: They conducted experiments, quantitative
 23 experiments at that time and adjusted their format in
 24 the light of it. I think the mistake is to assume that
 25 somehow things that we have all become accustomed to are

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1 somehow immutable. One sees with it, for example, with
 2 the advent of AI and AI search how things are changing
 3 all the time now, it is just that Google is deciding to
 4 change them and suddenly latency rates have gone up
 5 hugely when you have sort of an AI search, for example.
 6 MS ROSE: (Off microphone — inaudible).
 7 MR JOWELL: Latency rates. You know, the delay, for
 8 example, and indeed the nature of the format has
 9 changed. So we say it is wrong to look at these things
 10 as somehow inherent in the nature of user preference.
 11 User preference responds to — in part to the format
 12 that it is presented with and it becomes habituated to
 13 a particular format over time.
 14 So if I may start at the beginning, as it were, with
 15 what a CSS is and what it does, or at least did before
 16 the abuse started. Here, we do not need to go to any
 17 documents, we have the benefit of the binding recital at
 18 191 — which we cite in paragraph 91 of our skeleton
 19 argument {A1/1/35} — that is in {BA/2/35}.
 20 A comparison shopping service is defined as follows.
 21 They are:
 22 " ... specialised search services that: (i) allow
 23 users to search for products and compare their prices
 24 and characteristics across the offers of several
 25 different online retailers (also referred to as online

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1 merchants) and merchant platforms (also referred to as
 2 online market places); ... (ii) provide links that lead
 3 (directly or via one or more successive intermediary
 4 pages) to the websites of such online retailers or
 5 merchant platforms."
 6 Relatedly, recital 26, which you see in {BA/2/11},
 7 refers to:
 8 "Google's comparison shopping service is one of
 9 Google's specialised search services. In response to
 10 queries, it returns product offers from merchant
 11 websites, enabling users to compare them."
 12 So at the core of any comparison shopping service,
 13 whether it be Kelkoo's or Google, is the provision of
 14 a service that permits users to search for product
 15 offers from merchants and to compare their prices and
 16 their characteristics, and any comparison shopping
 17 service properly starts with the creation of that
 18 service to users.
 19 Now, as the economists explain, CSSs are a two-sided
 20 market. So on the one side you have the users and on
 21 the other side you have the merchants. The website is
 22 only useful for users if the CSS has signed up a good
 23 array of merchants that are prepared to give their feed,
 24 their product feeds, to them. As to how a CSS gains its
 25 revenue, the users typically do not pay for price

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1 comparison services, rather CSSs, at least independent
 2 CSSs, have always obtained their revenue when the
 3 merchant side, who provide their feeds and products and
 4 who then pay for users' traffic or clicks received from
 5 the CSS.

6 Now, that business model was, before the abuse
 7 started, a very successful one, at least for the dozen
 8 or so large CSSs operating in Europe. To give you
 9 a sense of just quite how successful companies like
 10 Kelkoo and Ciao were, you can see evidence of hard
 11 commercial fact in footnote 14 of our opening
 12 submissions {A1/1/12}, where we note that Kelkoo was
 13 sold to Yahoo! for €475 million in 2004 and Ciao was
 14 bought by Microsoft in 2008 for \$486 million. Now,
 15 those considerable valuations were achieved, of course,
 16 in an era when e-commerce was a fraction of what it is
 17 today. As I will show you shortly, at the time
 18 the abuse started, Google itself perceived CSSs as part
 19 of a successful and growing class of competitors that it
 20 called "aggregators".

21 Now, creating and sustaining a good CSS service took
 22 a good deal of skill and effort and major financial
 23 investment, and as is often the case, it all looks very
 24 easy when you go to the website and you simply see
 25 the products and the prices, but there is an awful lot

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1 --- and the images. There is an awful lot that lies
 2 behind that. To produce that convenient format requires
 3 a huge amount of skill and effort, and you can see that
 4 described in Mr Stables' witness statement, who is
 5 Kelkoo's factual witness, and you will also see it
 6 described to an extent in Mr Goodrow's second witness
 7 statement at paragraphs 29 to 45. Now, Mr Goodrow was
 8 part of the Google team who took on the task of trying
 9 to improve Froogle, which was the name for ---

10 the original name for Google's comparison shopping
 11 service, which then morphed into Google Product Search.

12 Now, just to give you an idea of this, it might be
 13 helpful if we go to a convenient diagram that you find
 14 in Mr Stables' witness statement, his second witness
 15 statement, which you will see at {H1A/2/6}. If we could
 16 have that on the screen, please.

17 You can see there the diagram at the top with all
 18 the architecture of the price comparison system. At
 19 the tip of the iceberg, at the top, one has got the user
 20 interface or the "external web pages" containing
 21 the price comparison itself. But then, beneath that,
 22 from the bottom up, you see you have got --- first of
 23 all, you have got the need to establish the commercial
 24 relationships with thousands of merchants, and that
 25 requires persuading those retailers to provide their

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1 feeds of products and also negotiating with them
 2 the terms on which they will pay for the receipt of
 3 clicks. Then, as you see, one has got the numerous
 4 technical layers that must be established, the ingestion
 5 of feeds, processing of those feeds, processing of core
 6 offers, then there is enrichment, which is providing
 7 attractive images and so on, then there is the important
 8 process of categorisation, of deciding into which
 9 category --- product category something should go, should
 10 it go into games or children's toys or clothes, what
 11 have you, and every product has to be categorised in
 12 that way. Then there is "search indexing", the "pricing
 13 mechanism" and the "conversion tracking", the export
 14 distribution, and the provision of reporting information
 15 to merchants, and then "page generation & serving".
 16 Doing well on all of these elements, in particular
 17 getting a comprehensive base of quality merchants and
 18 creating this elaborate technology stack, this is
 19 the key to providing a quality service for users.

20 Now, Google's own comparison shopping service,
 21 called Froogle up until mid-2007, had some in-built
 22 advantages. One of those was that it was provided to
 23 merchants for free, initially. Merchants did not pay
 24 for their clicks with Froogle. They also had
 25 the advantage that there was a specific tab on

23

1 the Google Search which said "shopping", "Google
 2 Shopping", which if you clicked on, you went through to
 3 Froogle; nobody else, just Froogle. So they had those
 4 advantages, but unfortunately for Google no one clicked
 5 on that tab and the quality of the service that Froogle
 6 provided was universally regarded --- to use a technical
 7 phrase --- as rubbish, or as one of the Americans says in
 8 the contemporaneous documents, its results were
 9 frequently "junk", or as recorded in rather more
 10 restrained terms by recital 490 of the Commission
 11 Decision {BA/2/154}, by late 2007, Froogle "had been
 12 unsuccessful in gaining traffic". In short, it had not
 13 kept up with the competition and that is acknowledged
 14 really by Google's witnesses and illustrated by
 15 a multiplicity of contemporaneous documents, some of
 16 which I will show you and some of which are referred to
 17 in paragraph 21 of our opening submissions {A1/1/12}.

18 Now, if we go back to the period in the run up to
 19 the abuse, for Google, it was a significant commercial
 20 issue that Froogle was being outcompeted by other CSSs.
 21 The problem for Google was wider than just the effect on
 22 Froogle and wider than just CSSs. From Google's
 23 perspective, independent price comparison sites like
 24 Kelkoo and Ciao formed part of a wider class of what are
 25 sometimes called "vertical search" or "specialised

24

1 search competitors" and which Google tended to call
 2 "aggregators", and those vertical search companies were
 3 a significant competitive threat to Google's business.
 4 To understand that, one has to understand Google's basic
 5 business.
 6 THE CHAIRMAN: When you say "Google's business", do you mean
 7 Google's business in general searches or —
 8 MR JOWELL: In general search, yes.
 9 Now, Google also operates in a two-sided market. On
 10 the one side, it is attracting users to its website who
 11 use Google Search for free, and on the other side, it
 12 has got the advertisers on the back of which it makes
 13 almost all of its revenue, and that — that revenue has
 14 been over time increasing and increasing to
 15 extraordinary levels, and it sells advertising aimed at
 16 those users. Now, the success of vertical search
 17 companies in the late '90s and 2000s, including CSSs,
 18 had major implications for Google's business model.
 19 First of all, there was a worry, a concern that instead
 20 of starting their product search on Google, users might
 21 instead search on a vertical, including a CSS, or on
 22 a marketplace like Amazon or eBay, and even more
 23 significantly, even if users started their search on
 24 Google, users might not continue or end their search on
 25 Google, but instead what they would do is proceed to

25

1 another specialised vertical search service to
 2 ultimately search again and find the product or service
 3 they are looking for. If they did that, then
 4 the vertical would be able to garner much or all of that
 5 advertising revenue or click-through revenue that Google
 6 would have liked to have kept for itself.
 7 Now, the other side of these —
 8 THE CHAIRMAN: Just so I understand this —
 9 MR JOWELL: Yes.
 10 THE CHAIRMAN: — sorry to interrupt you.
 11 MR JOWELL: Yes.
 12 THE CHAIRMAN: When you say users would start their search
 13 on the vertical search engine —
 14 MR JOWELL: Yes.
 15 THE CHAIRMAN: — do you mean they would still go to their
 16 general search page but they would put in what I think
 17 is called a navigational search, that they would type
 18 in "Kelkoo" to get to the Kelkoo page, because you have
 19 got to get through — to get to your vertical search
 20 engine, you have got to go through a general search
 21 page, do you not?
 22 MR JOWELL: You do not, actually, because in the server, you
 23 can just put in the precise name of Kelkoo.co.uk, then
 24 you do not go through Google at all. I was envisaging
 25 that when I said that. But I agree that the main

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1 concern is that, exactly as you say, it was those
 2 navigational search queries, that they would just use
 3 Google as a quick conduit through to Kelkoo. I think
 4 that is the — really the concern.
 5 Of course, the other side of these companies being
 6 a threat was that Google also saw them as a significant
 7 opportunity, because they saw them as a possibility that
 8 they, Google, could capture for itself these vertical
 9 markets and then it could capture the revenues, which
 10 were already significant by 2008, that were being made
 11 by these vertical search companies.
 12 To illustrate that, can I show you my first
 13 document. Now, before I come to it, I should say one
 14 thing. It occurred to me last night, I am afraid, only
 15 last night, that the Tribunal might want hard copies of
 16 the documents that I am going to go to,
 17 the contemporaneous documents. We can — we have got
 18 printouts, if the Tribunal wants a bundle of
 19 the documents that I am going to. Yes, I see nodding,
 20 from Ms Rose at least. So let us provide you with
 21 those. I think we have only got one copy, I am afraid,
 22 because it was all rather — for the other side, but we
 23 are going to get more done. It was all rather late
 24 last —
 25 THE CHAIRMAN: Take it electronically for now, if you like,

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1 and it may be useful to have, as is sometimes done in
 2 Trials, a sort of rolling file of documents referred to.
 3 MR JOWELL: Yes, indeed, it struck me that that would be ...
 4 (Handed)
 5 Now, the first document I would like to take you to,
 6 the first one in the bundle, I think, is {N/301}. This
 7 is a presentation by Jonathan Bullock, global strategy
 8 director and the first chief of staff at Google, who
 9 worked there from 2006 to 2014. Now, we do not know
 10 the exact date of this document, but there are some
 11 clues by which we can narrow it down. It must be either
 12 the —
 13 THE CHAIRMAN: Just one moment.
 14 MR JOWELL: Yes.
 15 THE CHAIRMAN: Did you say M?
 16 MR JOWELL: N/301.
 17 MS ROSE: (Off microphone — inaudible).
 18 THE CHAIRMAN: Oh, I see. Thank you.
 19 MR JOWELL: So this has got to be from either the last
 20 quarter of 2007 or early 2008, and you can see that
 21 because, if you go to {N/301/5}, you will see, just at
 22 the top, after "Where advertising spend ends up", you
 23 see Western Europe 2007, so it has the figures for
 24 Western Europe in 2007.
 25 If you go to {N/301/7}, you can see, on the right,

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1 somewhere it says —
 2 THE CHAIRMAN: "Will review in 2008 ...".
 3 MR JOWELL: Yes, that is right. Yes, "Will review in 2008
 4 H1". Yes. So we know that that is in the future.
 5 But then on {N/301/35}, if we can focus on
 6 the footnote, you can see that there is a reference to
 7 an extrapolation of data from January to October 2007.
 8 So we are some time after October 2007 and some time
 9 before the first half of 2008, so pretty much this is
 10 exactly the time that the abuse, at least as found in
 11 the Decision, started. Of course, whenever
 12 I say "the abuse started", I say that without prejudice
 13 to Mr West's submission that it started earlier. I am
 14 just simply referring to the Commission's finding.
 15 If one goes to {N/301/1}, you will see the online
 16 advertising challenge — forgive me, the next page,
 17 I think {N/301/2}, yes, and you see:
 18 "Rise of the Aggregators ..."
 19 If you go to page 2, you can see that this is a —
 20 we see the second bullet under 1:
 21 "The top priority challenge is the 'Rise of
 22 the Aggregators'."
 23 It notes that the largest one is MoneySupermarket.
 24 But that is not the only one. If you go to {N/301/4},
 25 you will see, under the term "Aggregators" in the box on

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1 the right-hand side, the third down, you see:
 2 "Aggregators
 3 "E.g., Ciao; Kelkoo; MoneySupermarket ..."
 4 If you go to {N/301/5}, you then see:
 5 "Where advertising spend ends up (W. Europe '07)."
 6 On the right-hand side, again, you
 7 see "Aggregators", approximately 2.5 billion. So
 8 aggregators are taking in quite a lot of revenue.
 9 If you see at {N/301/6} —
 10 THE CHAIRMAN: Can I just ask you, please, it comes up
 11 a number of times (inaudible) — "Publishers", what does
 12 that actually mean in this context?
 13 MR JOWELL: Publishers are effectively those that publish
 14 a website and it can refer to a range of different
 15 websites, as I understand it.
 16 On {N/301/6}, you see, on the right-hand side,
 17 again, the third box down:
 18 "Aggregators, (e.g. Product Search)."
 19 On page {N/301/7}, you see, at the top:
 20 "Rise of Aggregators."
 21 You see the "Size":
 22 "Revenue opportunity/exposure is of order \$0.5–2B."
 23 THE CHAIRMAN: Very high priority.
 24 MR JOWELL: Yes.
 25 Then {N/301/8}, you see another heading, "Rise of

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1 aggregators".
 2 Then {N/301/9}, you see:
 3 "Main EMEA aggregators."
 4 You see, in the second column, "Retail", and you see
 5 several times there the name Ciao and the name Kelkoo.
 6 Now, on {N/301/10}, you can see an analysis of
 7 the size of the aggregator business models and
 8 the market size, and you can see "Retail" is slightly
 9 smaller than the others, "Finance" and "Travel", is of
 10 the order of 350 million at that time, but it is growing
 11 fast, and you can see that on {N/301/35}, where you can
 12 see — in the far right [sic], you see "Revenues" and in
 13 the far right, you see "Ciao!", and you see its revenue
 14 there going from 2006 to 2007 to 2008 and growing at
 15 a clip of about 50% a year, year on year.
 16 Now, if you go to {N/301/31}, you can see
 17 a definition of the term "Aggregator". That is back to
 18 31, sorry. You see it says:
 19 "For the purposes of our analysis, we have
 20 considered aggregators to be 'vertical-specific' search
 21 engines, which
 22 "Sell leads to direct providers on a CPA or
 23 CPC basis."
 24 That is cost per click, or cost per — the "A" is
 25 for acquisition. Cost per acquisition, yes:

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1 "Collate providers' products and allow consumers to
 2 search and sort them by price and vertical-specific
 3 attributes.
 4 "Do not hold stock/inventory themselves."
 5 So CSS is a sub class of these aggregators.
 6 If you go to {N/301/32}, you can see an interesting
 7 explanation of the "Aggregator virtuous circle/network
 8 effect" and the value to both advertisers and consumers
 9 of this business model. Consumers want the choice and
 10 merchants want the exposure and the more that you get of
 11 each, it builds up, and then, at a certain point, it
 12 becomes difficult to replicate, for others to replicate,
 13 break into.
 14 Then on {N/301/36}, you see the concern —
 15 MS ROSE: "CPL", on page {N/301/32}, "CPA [or] CPL
 16 models" —
 17 MR JOWELL: So that is cost per acquisition. I am not sure
 18 what the "L" is, but I am assuming that that is cost per
 19 click. Someone will tell me what the "L" is. Cost per
 20 lead.
 21 MS ROSE: Cost per lead.
 22 MR JOWELL: If you go to {N/301/36}, you see the concern:
 23 "Aggregators dominate search results."
 24 These are Google Search results, and you see it
 25 gives the example of car insurance and all

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1 the aggregators come up.
 2 Then on {N/301/37}, you see at the bottom
 3 the "Google Implications", and you see the risks to
 4 Google of growth of these aggregators. In particular
 5 you will see:
 6 "As strong aggregator brands grow Google could face
 7 significant ... erosion from our largest advertisers."
 8 And:
 9 "... a decline in paid search market share of total
 10 online ad revenues ..."
 11 So nothing in here that remotely suggests that
 12 Google regarded Kelkoo or Ciao as low-quality,
 13 disreputable companies who were doomed to failure.
 14 Quite to the contrary, Google regarded them as major,
 15 successful, growing companies that posed a distinct
 16 threat to its business.
 17 It is important to appreciate that this concern
 18 about aggregators had been marinating in Google for some
 19 time. If you go, for example, to {M1/5/1}, I think it
 20 is the next document in your bundle, and if we could get
 21 it on the screen, please. Thank you.
 22 We see an email here from Mr Pflieger, dated
 23 2 May 2005, and it is in the middle of the page,
 24 I believe. You will see that he is forwarding something
 25 from Ross Koningstein, who is commenting on Jess Lee's

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1 email. You can see there it says:
 2 "Larry's feedback ..."
 3 Now, that is Larry Page, who was the first — the
 4 founder — one of the founders of Google and one of its
 5 first CEOs — he says his:
 6 "[His] feedback on the CFE vision were that he's
 7 worried we're banking too much on the success of local
 8 shopping and classifieds when this is an unproven
 9 business model. He said we shouldn't underestimate
 10 the online product comparison search engine market, and
 11 what if one day we woke up to find BizRate ..."
 12 That is a CSS that operates in the United States
 13 mainly:
 14 "... worth \$8B and us lagging behind? Basically he
 15 doesn't want us to ignore the importance [of] online
 16 product search."
 17 Then some scepticism is expressed:
 18 "I was really surprised to hear this from Larry,
 19 since his main complaint about Froogle ..."
 20 That is Google's comparison shopping service:
 21 "... has always been that it's too narrowly focused.
 22 I really don't think BizRate is going to be worth \$8B
 23 anytime soon."
 24 But Mr Koningstein then comments:
 25 "I'd rather not argue about different people's

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1 speculations. What are the hard numbers?
 2 "I.e., what is the total traffic level of all
 3 the major shopping portals, even just the ones in
 4 the traditional B2C domain of Froogle? (Including ..."
 5 Then lists a number of shopping comparison services,
 6 including "Yahoo—shopping", which, incidentally, at that
 7 time, Kelkoo was the European arm of "Yahoo—shopping".
 8 Then he goes on:
 9 "Even if BizRate by themselves don't become an \$8B
 10 company, what if the [aggregate] space is worth \$8B? We
 11 can't afford not to play seriously in that space if it
 12 is or soon will be that big. With free listings, if
 13 Google put enough effort into this space, we've got
 14 the potential to own it. (I've thought this for a long
 15 time, but Google hasn't decided to put in the required
 16 effort. Shopping.com has 200+ employees, and for
 17 the most part their service so far has just focused on
 18 the narrow vertical and not broadly internationalized)."
 19 So a real concern internally, as you can see, and
 20 the reference to the "free listings", that is the fact
 21 that Froogle did not charge.
 22 If you then go to the next document, please, which
 23 is —
 24 THE CHAIRMAN: Just a moment.
 25 MR JOWELL: Yes.

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1 (Pause)
 2 THE CHAIRMAN: This is from — the comments are by Ross?
 3 MR JOWELL: Ross Koningstein, I think. Yes, it is difficult
 4 to see —
 5 THE CHAIRMAN: Koningstein. I see, Koningstein. Yes,
 6 I have got it. Thank you.
 7 MR JOWELL: If we can then go to {M3/3.3}.
 8 We see here a document from December 2005, which is
 9 also on vertical search strategy.
 10 If you could go, please, to {M3/3.3/2}.
 11 You see an email from Mr Bill Brougher, dated
 12 12 December 2005, and it is in the context of planning
 13 for a strategy meeting with what is called the EMG,
 14 which is the executive management group of Google. You
 15 see there Mr Brougher summarises rather neatly
 16 the threat — the nature of the threat from aggregators,
 17 and he says — you will see about halfway down, he says:
 18 "What is the real threat if we don't execute on
 19 verticals?
 20 "(a) loss of traffic from Google.com because folks
 21 search elsewhere for some queries.
 22 "(b) related revenue loss for high spend verticals
 23 like travel.
 24 "(c) missing oppty if someone else creates
 25 the platform to build verticals.

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1 "(d) if one of our big competitors builds
 2 a constellation of high quality verticals , we are hurt
 3 badly."
 4 Then he outlines a number of approaches, and I just
 5 draw your attention to the second one at the bottom of
 6 the page, which is:
 7 "Heavy investment in OneBox. If the top verticals
 8 are at the top of the pyramid, use a deliberate OneBox
 9 approach to go after the middle and bottom tiers of
 10 the pyramid using Google and third party OneBoxes,
 11 respectively."
 12 Now, the OneBox was the primitive form of what
 13 became the Product Universal, the shopping box.
 14 Now, the identity of this individual , Mr Brougher,
 15 is —
 16 THE CHAIRMAN: What is meant by "the pyramid", do you know?
 17 MR JOWELL: The pyramid is the, if you like — I assume,
 18 I am interpolating, is the pyramid of verticals , if you
 19 like. So at the top, you have got things like
 20 the finance and the travel verticals , and then lower
 21 down, middle — midway and lower down, you have got
 22 things like retail , which is what we are concerned on —
 23 concerned about.
 24 We will come back to Mr Brougher, because he
 25 features quite a bit. You can see that he is — very

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1 much top of his mind here is the concern about
 2 verticals , and this is someone who is liaising with
 3 senior members of Google executives and has got this
 4 interest in promoting OneBoxes in the SERP to combat
 5 the vertical threat.
 6 Now, although Google had thought in 2005, as you
 7 have seen, that they had the potential, as they put it ,
 8 to own the market using Froogle and its free services to
 9 merchants, things did not work out that way. The weak
 10 position of Froogle was a real concern within Google,
 11 and there were attempts to improve the service it
 12 offered and it was relaunched in mid-2007 as the renamed
 13 Google Product Search. Now, if Google had just done
 14 that, if it had just tried to improve Froogle and
 15 compete on the merits, then of course no one would have
 16 — no other rival CSS would have had a legitimate cause
 17 for complaint. But instead of competing on the merits
 18 and playing by the rules in that way, Google instead
 19 went further and it engaged in the now established
 20 two-pronged abusive strategy or conduct of demoting
 21 comparison shopping sites on its SERP whilst
 22 simultaneously promoting its own via
 23 the Product Universal and subsequently the Shopping
 24 Unit. So Google, in effect , put its thumb on
 25 the scales, or perhaps I should say both thumbs, because

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1 one is going up and the other is going down.
 2 The demotion thumb consisted in the series of
 3 algorithms that you have seen that the Commission
 4 Decision found were prone to demote CSSs, and I just
 5 refer you there to the recitals in that regard, which is
 6 recital 349 to the first sentence of 358 of the Decision
 7 {BA/2/86-88}. I will not take you — in the interests
 8 of time, I will not take you to those, but they set out
 9 in detail how and why the algorithms were indeed prone
 10 to demote CSSs by virtue of their inherent
 11 characteristics .
 12 Now, the first of these, which we call Algorithm A,
 13 was launched before the abuse as found by the Commission
 14 Decision commenced, but it was clearly known within
 15 Google to have had the effect of demoting at least some
 16 CSSs to a significant extent, including Kelkoo. Now, as
 17 I have said, we do not say that that was the only
 18 purpose of Algorithm A in all its aspects or all of its
 19 iterations , but it undoubtedly did have that effect,
 20 Google knew it had that effect and it was very happy
 21 about it. There is, in our submission, a somewhat
 22 bizarre dispute between the experts on whether the data
 23 shows that Kelkoo was affected by Algorithm A in
 24 the Pre-Decision Period or not, and I will leave Mr West
 25 really largely to deal with that. But we say the debate

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1 is bizarre because, at least for the Decision Period,
 2 Google is bound by the finding that Algorithm A was
 3 prone to demote CSSs, and additionally, regardless of
 4 the Decision and the data, the contemporaneous documents
 5 show absolutely clearly that Google was well aware that
 6 it was having a demotion effect on Kelkoo, and there are
 7 numerous documents. Let me just show you a few of them.
 8 Now, the first of these is marked "LEO
 9 Confidential", I am not quite sure why, but it is — so
 10 perhaps we should not take it up on the screen, but it
 11 is in your bundle. It is {K3/1}.
 12 THE CHAIRMAN: I think the only LEO Confidential parts are
 13 the blue highlight on page 3 —
 14 MR JOWELL: Yes, I think that is correct, so I think I can
 15 read this out.
 16 THE CHAIRMAN: I can see there is a bit of yellow highlight.
 17 MR JOWELL: Yes. The bit I want to read out, I think we can
 18 go to, which is — there is an email there from
 19 Mr Brougher again, June 3 2005, to Mr Rosenberg,
 20 Mr Kordestani and Mr Cutts. It says, "RE:
 21 Google/Kelkoo — Bourbon update aftermath":
 22 "Matt, Cody and I spent time on this today and
 23 understand what is going on. Essentially , our ..."
 24 Then there is Algorithm A:
 25 " ... on [20 May] worked as planned on kelkoo.com,

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1 kelkoo.co.uk, dealtime.com, but not on
 2 dealtime.co.uk ... "
 3 Then we will see from the next one what he means
 4 by "worked as planned". If we go to {K3/3/1}. This
 5 document is partially confidential.
 6 I think we can have this up on the screen {K3/3/1}.
 7 Do you see, again — oh, have I got the wrong ...
 8 I think I might. Yes, it is {K3/3/1}.
 9 You will see there is a discussion about Algorithm A
 10 in the yellow about a site that has been taken down, and
 11 it says — Mr Brougher, at the bottom, says:
 12 "I'm pretty sure this is an [Algorithm A] takedown
 13 given all three domains ... are major affiliates."
 14 Then we see from Cody Kwok:
 15 "They're indeed all killed by [Algorithm A]. We're
 16 likely to launch another round before the end of
 17 the quarter, in case we want to resurrect them."
 18 Then above that:
 19 "Under what circumstances would we resurrect them?
 20 Has kelkoo been resurrected?"
 21 Then at the top:
 22 "Kelkoo was 'resurrected' by an algo change back in
 23 July, I didn't do any special tweaks to save them."
 24 Then the third document you can see, {J30/1}, if we
 25 could have that on the screen, please. Again, partially

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1 confidential.
 2 You see at the top, comment from Mr Brougher. He is
 3 referring — having referred to a Kelkoo page, he then
 4 says:
 5 "In general bizrate, nextag, and kelkoo must get
 6 nuked by [Algorithm A] a lot."
 7 So Google's own perception was that Algorithm A had
 8 an effect on Kelkoo, a demoting effect. The effect came
 9 and went in those early years, at least in 2005, and as
 10 I have said, there were limits to what Google could
 11 practically do to demote all comparison shopping sites
 12 before it had fully put in place its promotional limb.
 13 Why was that? That is because users valued CSSs.
 14 They found them useful when they were engaged in product
 15 search. You can see that very clearly because, when
 16 Google introduced another algorithm in the United States
 17 called "Diversity", and Diversity did not, you know,
 18 faff around, this was just directly aimed at comparison
 19 shopping sites. But what happens is, in relation to
 20 Diversity, they implemented, or they experiment with
 21 implementing it, and the person who is delegated to
 22 introduce it, Mr Kalyanpur, finds that whenever he
 23 demotes all the comparison shopping sites, or indeed all
 24 but one of them, users — the raters that Google use,
 25 who are their proxy for users — hate it; they say,

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1 "Well, we want more comparison shopping sites in
 2 the results".
 3 You can see this if we go to {M1/48}, and you see
 4 here an email describing the results of a comparison
 5 shopping site experiment. If you go to {M1/48/2},
 6 please, and if you see at point 3, you see it says:
 7 "In one case [a] ('Samsung ... Printer'), we had
 8 a big loss because according to the rater, we did not
 9 show any price comparison site."
 10 Then it says:
 11 "... we did show kelkoo ..."
 12 But not the right page of Kelkoo.
 13 Then at point 3 — forgive me, you see he says:
 14 "This feedback shows that the user wants to see at
 15 least one comparison shopping site — I attempt to do
 16 that but don't always succeed."
 17 Then you see at point 6:
 18 "My overall impression is that the raters feel
 19 the bizrate/nextag/epinions pages are moderately good
 20 results. They are usually well-formatted, rarely
 21 broken, load quickly and on-topic."
 22 Then you see towards the bottom:
 23 "The biggest concern is [he says] that the raters
 24 (and perhaps our users) seem to like the meta-shopping
 25 site more than a page from an actual retailer."

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1 Now, Mr Kalyanpur keeps experimenting, and if you
 2 see we go to {M1/96/3}, you see he — towards
 3 the bottom, Mr Kalyanpur writes:
 4 "A positive eval at last! This experiment is quite
 5 solidly positive — more so if you include the items from
 6 0.0 to 0.195 ... The rater comments on the wins are
 7 exactly what we'd want to read, and [in my opinion]
 8 the losses aren't too bad ..."
 9 Then he says:
 10 "The changes I made to this experiment were to 'keep
 11 two' comparison shopping results and to demote
 12 off-country results when the query is strongly
 13 commercial. (My proxy for 'strongly commercial' was two
 14 or more comparison shopping results in the top 10)."
 15 So users valued having comparison shopping sites in
 16 the SERP, at least some of them, not for it to be filled
 17 with them, but to have at least a couple, and that
 18 limited —
 19 THE CHAIRMAN: Sorry to interrupt. This email, is this
 20 June 2007?
 21 MR JOWELL: Yes, it is. Yes, it is.
 22 Now —
 23 THE CHAIRMAN: This is, again, regarding the US, yes?
 24 MR JOWELL: Yes.
 25 Now, one of the puzzling features of Google's

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1 conduct is that it did not put Froogle into the organic
2 ten blue links. It did not index or crawl Froogle and
3 they did not feature.

4 Now, the contemporaneous documents show that this
5 was not a choice made for technical reasons. Obviously
6 Google could have included them if it had made
7 the relevant technical adjustments. Rather Google chose
8 for them not to compete with the other CSSs within
9 the ten blue links, and the reason was this, as you will
10 see in a moment from the documents: if Google had put
11 Froogle or Google Shopping Search as it later became,
12 within the ten blue links, they just would not have
13 fared very well. They would typically have been
14 outcompeted by the other independent CSSs. If Google
15 had given Froogle effectively an artificial boost within
16 the ten blue links, well, then they would immediately
17 have been accused of favouring their own product of
18 discrimination and of course sullyng the holy purity of
19 the organic search results, which were meant to be based
20 purely on relevance and not commercial considerations.

21 So instead what they did was, to try and avoid
22 the allegation of discrimination, Google ranked and
23 presented the Froogle results separately. It did so,
24 first of all, haphazardly in the OneBox, and then it did
25 so systematically and constantly in

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1 the Product Universal. But of course, that is just as
2 much — as the Commission has found, just as much an
3 instance of discriminating in favour of Google's own
4 results, it is just less obviously so than if Google had
5 artificially promoted Froogle in the SERP.

6 Now, all of this is absolutely reflected in
7 the contemporaneous documents. If we go to {N/268},
8 please. If we go to {N/268/5}, we see an email from
9 Joel Truher to Ana Ulin, he is the engineering director
10 responsible for Froogle. We see that he notes that —
11 he says:

12 " ... I thought you might be interested in helping us
13 get Froogle fully indexed.

14 "It's surprising, I suppose, that Froogle pages are
15 completely absent from web results — this puts us at
16 a considerable disadvantage compared to our competition
17 in the shopping space, which spend an inordinate amount
18 of time optimizing their inclusion and placement."

19 Then he posts two links.

20 Then above that, on {N/268/6}, you see:

21 "We need to get these pages into the web index!
22 Help us achieve the goal of natural integration between
23 Froogle and Google results. It's what users want, and
24 it will dramatically increase the traffic to Froogle."

25 So he wants to get Froogle into the ten blue links

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1 where a number of CSSs already appear.

2 Then if you go back to {N/268/5}, you see Ms Ulin
3 notes that:

4 " ... Froogle folks have no way to put their URLs
5 into the main index ..."

6 She offers to create a sitemap to do this, and she
7 forwards that on.

8 You see a response on {N/268/4}:

9 "'Keep in mind that, as we discussed, most of the
10 information that is on pages that we create is
11 aggregated from various sources, and those sources often
12 have that material online already. Because of this, the
13 search quality team has some concerns as to if/when
14 the Google—created content will be indexed. And once it
15 is indexed, it is unlikely to appear high in the search
16 results ..."

17 " ..."

18 "Making the Froogle content searchable from the web
19 search interface is indeed a goal, but I don't think
20 Sitemaps is the way to go."

21 Then you see Mr Truher's response:

22 "Well ... The Froogle value—add is not in
23 aggregation, it's in organization: data from many
24 sources on one page.

25 " ... there is no way to compare the merchants to

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1 each other on a per—product basis, except through
2 Froogle, or one of our competitors. These comparison
3 pages are only available currently through Onebox, and
4 I think our users would be better served if these
5 comparison pages were also available as 'normal'
6 results, as many millions of our competitors' pages
7 are."

8 So he is explaining really how CSSs add value
9 through organising data, even if they do not necessarily
10 add additional content, and he wants Froogle to have
11 more than just the OneBox that only appeared
12 sporadically, he wants it to be in the blue links.

13 Then you see, on page {N/268/3}, Mr Kataria
14 recognises that users might find it useful to have the
15 data aggregated and reorganised, and he says:

16 " ... there are various other efforts in the works
17 ... to allow integration of search across all of our
18 properties. I don't know enough of the details to say
19 whether this will address exactly what you want (i.e.
20 locate product comparison pages) but the point is to
21 have a single search box bring the user to the right
22 answer ..."

23 He explains that you could use sitemaps to submit
24 these pages, but he notes that they might:

25 " ... not get crawled without special treatment ..."

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1 That is the point I was making a moment ago, and it
 2 might not get indexed, and if it gets indexed, page rank
 3 and quality signals are likely to keep it from showing
 4 up high.
 5 So, again, a very clear statement of the effect
 6 the demotion algorithm would have on Froogle.
 7 He then brings in Mr Brougher again, who responds on
 8 page {N/268/2}. If you read what he says, it is very
 9 striking. He says:
 10 "Our algorithms specifically look for pages like
 11 these to either demote or remove from our index ..."
 12 Then he mentions that the results in the OneBox are
 13 often poor, so a clear acknowledgement of the existence
 14 of algorithmic demotions.
 15 Then, further up, you see Mr Truher again —
 16 THE CHAIRMAN: Just one sec.
 17 MR JOWELL: Yes.
 18 (Pause)
 19 THE CHAIRMAN: Yes. Mr Truher.
 20 MR JOWELL: You see Mr Truher and he agrees that the OneBox
 21 results "stink" and he wants to speak to search quality
 22 assistance.
 23 Then he notes that:
 24 "[Part of] our competitors ([like] Pricegrabber,
 25 Bizrate) often appear for commercial queries, e.g. 'nike

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1 shoes' yields a Bizrate result in position 7 'microsoft
 2 mouse' yields a ..."
 3 You see reference to a Kelkoo result, position 7.
 4 So you can see that despite the algorithmic demotions,
 5 the CSSs are still getting through to a degree.
 6 He asks:
 7 "... are these examples of the kind of stuff you
 8 want to exclude from the index? I've been thinking that
 9 Froogle pages should be included, much like these pages
 10 are, but if the strategy is to go the other way, that's
 11 cool."
 12 So Mr — well, it speaks for itself really.
 13 Then he asks about other projects to improve
 14 integration, that is integration into the SERP. He is
 15 only aware of OneBox and Superroot.
 16 Then on {N/268/1}, you see the response, and
 17 Mr Brougher — again from Mr Brougher, at the bottom of
 18 the page. First of all, he mentions two consultants,
 19 Mr Pandu Nayak and Eugene Nudelman, who can help improve
 20 rankings for Froogle.
 21 Then he states:
 22 "On the PriceGrabber, BizRate, Kelkoo question, yes
 23 these are the types of pages we don't like. We have
 24 algorithmic methods to demote pages like these ..."
 25 Then he says:

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1 "Solving the integration question is ongoing.
 2 The short answer is that you are right — OneBox is
 3 the near term way to do this and Universal Search is
 4 the long term way."
 5 He replies, and then at the top of the page, we see
 6 he refers him to David Bailey, who is running
 7 a Universal Search project.
 8 It is absolutely clear from this that one of
 9 the purposes initially of the OneBox and of Universal
 10 Search was to integrate Froogle up into the search
 11 results while at the same time its shopping comparison
 12 competitors, like BizRate, Kelkoo and the like, would
 13 continue to be deliberately demoted by Google's
 14 algorithms, and as Froogle became more integrated on
 15 the SERP, so it would become safe to demote
 16 the competing CSSs more and more intensely, without
 17 risking a scenario in which users got upset and took
 18 their shopping queries somewhere else.
 19 MS ROSE: What was Bill Brougher's role? What was his job?
 20 MR JOWELL: He was a senior product manager in search.
 21 Of course, that is exactly what happened. It was
 22 a very successful strategy, it has yielded Google many,
 23 many billions in profit. It is just that, as we now
 24 know, it was unlawful.
 25 Now, Google knew that it was using its search

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1 monopoly to crush the competition, but it found reasons
 2 to justify its conduct. Again, you can see this if you
 3 go to {M1/97}.
 4 If you go to {M1/97/2}, please, you can see an email
 5 from 19 June 2007, so just six months from — before
 6 the start of the Decision Period, and the email is from
 7 Mr Frumkin to Mr Cutts. One can see from the emails
 8 below, which I do not think you need to go to, that
 9 the context was a complaint from a comparison shopping
 10 service called thefind.com that had found itself
 11 demoted, suddenly demoted in the SERP.
 12 You see what Mr Frumkin says, he says:
 13 "I'm not trying to get us to change anything
 14 regarding this site in particular. I also agree that
 15 there are plenty of queries where it's not very good.
 16 I'm just a little concerned about our evaluation
 17 criteria because I do find this site useful when I'm
 18 doing commercial searches and having representative
 19 images is important. The fact that ... link to off-site
 20 pages seems like a strange argument against them, since
 21 without seeing the images I wouldn't know whether to
 22 click to the page or not.
 23 "In my opinion the actual image is a lot more
 24 important for initial product selection than reviews, or
 25 stars. I think we don't do a very good job on many

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1 commercial queries because we don't point at enough
 2 places with lots of representative images. Maybe we
 3 should think about testing whether or not boosting these
 4 types of sites in commercial situation increases
 5 happiness. The best thing to do would be to do this
 6 with Froogle, then we could be sure that it's unbiased.
 7 Unfortunately I don't think Froogle is in a very good
 8 state right now."
 9 Then if you go to the top of the page, the top of
 10 page 1 {M1/97/1}, there is a response from Mr Lipkowitz
 11 with interspersed comments from Mr Frumkin. Again, I am
 12 afraid it is one of those ones where it is difficult, a
 13 little, to know who is saying who [sic], but one can
 14 guess.
 15 Lipkowitz says, I think:
 16 "I think our current policy is consistent and
 17 somehow easy, to explain i.e. our users would like us to
 18 send them to pages that contain direct information about
 19 the stuff they were searching and not send them to
 20 intermediary that don't provide value. The latter is
 21 obviously subjective, but I like Matt's
 22 'definition' ..."
 23 That is Matt Cutts:
 24 "... i.e. anything that is automatically generated
 25 can't provide any value."

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1 Then Mr Frumkin, I think, comments:
 2 "I'm not sure I like 'automatically generated ==
 3 doesn't add value' idea. I will grant that this is more
 4 often true than not, but our results are also
 5 auto-generated :) I understand that a search result
 6 pointing to another search result is not a good thing,
 7 but when the presentation is completely different (and
 8 more useful to the task at hand) I still think these
 9 sorts of results can be useful. It would be nice if we
 10 just could solve this problem with more aggressive
 11 Froogle presentation, but only if we are certain that
 12 the query is commercial.
 13 "Also, including a couple of product images (or
 14 a hint that people can browse images after following
 15 the link) on the result pages in these cases seems
 16 a much better use of real-estate than the checkout
 17 pills. People want to see 'what' they can buy much more
 18 than the payment method they can use."
 19 Then Mr Frumkin takes over:
 20 "Right now I see two problems:
 21 "1) We aren't consistent in our enforcement of the
 22 policy, and I hate manual solutions as they become too
 23 subjective, so [Algorithm A] ..."
 24 If I can replace that with:
 25 "... is a good answer. But it's clearly allowing

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1 shopping.com and their like to stay in the index.
 2 "I am curious. What about the algorithm affects our
 3 similar sites but let's shopping.com and NexTag stay?
 4 They are much less useful to me than the site we just
 5 demoted.
 6 "2) Our UI ..."
 7 Our user interface:
 8 "... for product search result is poor and we do no
 9 clustering — that's your main point."
 10 Then Mr Frumkin responds:
 11 "Yes, I think Froogle is almost there. With
 12 a little work on the data cleaning and clustering issues
 13 we could point people to a grid—view Froogle result in
 14 these cases."
 15 Then Mr Lipkowitz says:
 16 "Jen is working on (2) ..."
 17 That is the grid view results:
 18 "... and I do have some ethical issues with the fact
 19 we will be perceived as a monopoly that tries to crush
 20 the competition. But given that product search isn't
 21 going to be monetizing clicks on search results like
 22 the rest of the folks in this space, gives us the more
 23 high ground in my opinion."
 24 In other words, he is saying: we are a monopolist
 25 crushing the competition, but actually the saving grace

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1 is that we are not charging the merchants or the clicks,
 2 so therefore we are the good guys, effectively, whereas
 3 our competitors are making money out of this.
 4 Then we see a result — an answer to that, which is:
 5 "Go Jen! I don't think the ethics are a problem for
 6 the reason you state and also because all merchants
 7 large and small can put their products into Froogle for
 8 free."
 9 Basically the same point.
 10 So as you can see, this document shows that Google
 11 knew perfectly well they were crushing the competition.
 12 This element of free supply was an important source of
 13 pride and also competitive advantage at that time.
 14 The service did remain free in Europe for the first
 15 four years of the abuse found by the Commission, from
 16 2008 to the end of 2012, and that is a point I will come
 17 to, because it is very hard to square with Google's
 18 proposed counterfactual.
 19 That then, I think, brings us more to
 20 the promotion —
 21 THE CHAIRMAN: Would that then be a convenient moment to
 22 take a break?
 23 MR JOWELL: Yes.
 24 THE CHAIRMAN: So we will come back at 10 past 12.
 25 (12.02 pm)

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1 (A short break)
2 (12.18 pm)
3 THE CHAIRMAN: Yes, Mr Jowell.
4 MR JOWELL: That brings me to the Product Universal, and if
5 I can show you that, it is at {A1/3/1}.
6 This is the first of the images, and you can see
7 this is a rather rudimentary, early version of
8 the Product Universal. It got better. You can see
9 the product search box is —
10 THE CHAIRMAN: Sorry, just one second.
11 MR JOWELL: Oh, certainly.
12 Oh, this is the Product OneBox, yes.
13 MS ROSE: What date is this?
14 MR JOWELL: This is the OneBox, I believe.
15 THE CHAIRMAN: It has been provided by Google solicitors.
16 MR JOWELL: Yes.
17 MS ROSE: (Off microphone — inaudible).
18 THE CHAIRMAN: This is the image, I think, that was in
19 the judgment of the General Court, is it not? Is that
20 not right, this is the image that was in
21 the General Court judgment?
22 MR JOWELL: I believe that is correct.
23 THE CHAIRMAN: I wonder if they give the date. It is at
24 {BA/3/5}.
25 About 2005/6, I think, by the looks of it.

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1 MR JOWELL: I am very grateful.
2 THE CHAIRMAN: Looking at — I am just reading
3 the paragraph 8 of the —
4 MR JOWELL: Yes.
5 THE CHAIRMAN: — General Court's judgment.
6 MS ROSE: So this is before the ...
7 MR JOWELL: This is before. Forgive me, yes.
8 If one goes to {A1/3/2}, if we go to the next page
9 in this — sorry, forgive me, one more {A1/3/3}, here
10 you start to see the more sophisticated
11 Product Universal.
12 MS ROSE: So this is during the infringement?
13 MR JOWELL: This is during the infringement period.
14 Now, what was the commercial imperative driving
15 the presence of this Product Universal? Well,
16 Mr Goodrow explains in his evidence that it was
17 a priority for Google to win on what he calls "shopping
18 starts", so in other words searches that were searches
19 with a view to purchasing a product. If Google lost in
20 shopping starts, then it would lose users and so it
21 would lose associated text advertising revenue.
22 So if one goes back to the OneBox on {A1/3/1}, one
23 sees — you can see, on the right, "Sponsored Links", so
24 those are the text ads, and also above, absolutely,
25 the two above, "Sponsored Link", "Sponsored Link". So

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1 those are the text ads and that is how Google, at that
2 time, was making its money, people clicking on those.
3 MS ROSE: But the top two results —
4 MR JOWELL: Yes.
5 MS ROSE: — on this page are both CSSs, the sponsored
6 links? One is BizRate and one is —
7 MR JOWELL: Yes, they must have placed — that is right,
8 yes, that is advertising, exactly.
9 MS ROSE: Yes. So in fact, the CSSs are getting the top
10 spot in the search by paying for advertising.
11 MR JOWELL: By paying for advertising. But they also
12 appeared in the organic blue links as well.
13 MS ROSE: Yes, yes. But on this — if you look at that
14 screen —
15 MR JOWELL: Yes.
16 MS ROSE: — so the first thing is, this is quite a specific
17 search for a specific model of camera.
18 MR JOWELL: It is.
19 MS ROSE: So somebody who knows what they want to buy, and
20 it is a piece of electronics.
21 MR JOWELL: That is absolutely right.
22 MS ROSE: If they want a comparison site, it is easily
23 available to them at the top of the page.
24 MR JOWELL: Well, because it is being paid for.
25 MS ROSE: Yes, but I mean, that does not seem unreasonable.

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1 MR JOWELL: Well, the Commission finding is that you could
2 not replace the organic traffic with — by —
3 MS ROSE: But this is pre-infringement.
4 MR JOWELL: This is pre-infringement —
5 MS ROSE: Yes.
6 MR JOWELL: — yes. But, in principle, they could not
7 replace the organic traffic that they got.
8 MS ROSE: But then if you go to {A1/3/3} —
9 MR JOWELL: Yes, and this is — I just — yes —
10 MS ROSE: — so this is a very general search for teak
11 furniture.
12 MR JOWELL: That is absolutely right.
13 MS ROSE: So it is not really comparable to the first page
14 which is a very specific search for a product.
15 MR JOWELL: Yes, I see that.
16 MS ROSE: So what you are getting here are some rather
17 generic examples of teak furniture.
18 MR JOWELL: Yes. Yes, indeed.
19 MS ROSE: But we do not have any kind of sense here of what
20 the actual SERP looks like.
21 MR JOWELL: No, we do not, and that is why I went back to
22 the other, because what you would see around this would
23 be text ads, basically, as well as — below this, you
24 would see the organic results, the ten blue links, and
25 then around it, particularly on the right-hand side,

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1 sometimes above it, sometimes below it, you then see
 2 the sponsored links, which are the ads, the text ads,
 3 and that is how Google made its money, indeed still
 4 makes most of its money, is from those surrounding
 5 advertisements. So, from Google's perspective, what it
 6 is doing is it is saying: here are some — we know you
 7 have got a product query, here are comparison results
 8 for you. That lures you to their site, because it is —
 9 they are good — these are good, but in the meantime,
 10 somebody says, "Oh well, look, I can see on
 11 the right—hand side there is a direct link through
 12 a text ad so I am going to click on that", and that is
 13 how Google makes its money basically. Google did not,
 14 at this stage, in the first four years, make its money
 15 through the clicks on the specific — on the clicks
 16 within the shopping box.
 17 MS ROSE: You mean the ones under the images here?
 18 MR JOWELL: Correct.
 19 MS ROSE: So if somebody clicks on one of these, under
 20 the image, Google does not make money?
 21 MR JOWELL: Does not make money at this point in time.
 22 MS ROSE: Only from the text ads?
 23 MR JOWELL: Only from the text ads.
 24 MS ROSE: But why would someone click on the text and not on
 25 the image? I mean, the image is much more instantly

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1 appealing, is it not?
 2 MR JOWELL: Well, they did, and — I think they saw
 3 something that they wanted, I presume, on the text ads.
 4 So they would go for — you know, they would say
 5 a specific: "Oh, that is the one I am looking for,
 6 I know that is really good" or "That's the shop". So
 7 that is what they would do, and Google was making huge
 8 amounts from, and continues of course to make enormous
 9 amounts from those text ads. For the first four years,
 10 they did not charge when you clicked through on these.
 11 Now, that did have a — that had a commercial —
 12 THE CHAIRMAN: Just pausing there —
 13 MR JOWELL: Yes.
 14 THE CHAIRMAN: — to make sure I have understood. If we go
 15 back to {A1/3/1}.
 16 MR JOWELL: Yes.
 17 THE CHAIRMAN: The Nikon Coolpix search. So you get — your
 18 top two results are paid for —
 19 MR JOWELL: Yes.
 20 THE CHAIRMAN: — links, which have been paid for by ...
 21 MR JOWELL: Correct.
 22 THE CHAIRMAN: So they get the advertising revenue there.
 23 MR JOWELL: Yes.
 24 THE CHAIRMAN: Then you have got the OneBox.
 25 MR JOWELL: That is right.

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1 THE CHAIRMAN: Where again you can click, which will take
 2 you to — to — you have got three merchants.
 3 MR JOWELL: That is right. They do not make money there.
 4 THE CHAIRMAN: They would not get money on the clicks. Or
 5 it says "try Froogle".
 6 MR JOWELL: Yes.
 7 THE CHAIRMAN: So then, that is, you would go to their CSS.
 8 MR JOWELL: Yes.
 9 THE CHAIRMAN: Full CSS.
 10 MR JOWELL: Yes, and again, they did not charge at this time
 11 for Froogle. If you click —
 12 THE CHAIRMAN: For a search through Froogle?
 13 MR JOWELL: No, no.
 14 THE CHAIRMAN: Then we have got two organic results.
 15 MR JOWELL: That is right, and on the right—hand side, you
 16 have got more text ads.
 17 THE CHAIRMAN: More text ads, for which they charge.
 18 MR JOWELL: Yes.
 19 So there was a downside for this free product,
 20 the free OneBox, or Product Universal as it became
 21 known, which Google referred to as "cannibalisation",
 22 which is to say, instead of making the money from
 23 the text ads, they —
 24 MS ROSE: They click on the picture.
 25 MR JOWELL: Exactly. And that meant that, for every

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1 impression, basically, for every user that used
 2 the site, they got a bit less money than they would have
 3 done without the presence of the box. But that still
 4 made commercial sense for Google, because their
 5 overwhelming priority was to increase shopping starts,
 6 in other words have more people actually searching for
 7 products on Google. As we will come on to, you will see
 8 they calculated that they would make — that it would
 9 easily compensate for the lower per impression revenue
 10 that they would have more impressions, basically. At
 11 a certain point, it seems that that calculus switched
 12 because they could calculate that they could charge
 13 essentially because there were no CSS competitors that
 14 were serious competitors by that stage in 2013.
 15 THE CHAIRMAN: They wanted shopping starts; is that right?
 16 MR JOWELL: They wanted shopping starts.
 17 THE CHAIRMAN: Because then you would see —
 18 MR JOWELL: Exactly, that is right, because you want more
 19 people — more impressions, basically get more users,
 20 more impressions, and that compensates for the loss —
 21 the slight reduction in per impression, which is
 22 the cannibalisation.
 23 Now, the next important point to note is that — how
 24 the Product Universal, the format of that evolved. What
 25 happened is it developed two formats, what is called

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1 an "offer format", which you have seen already, that is
 2 on {A1/3/3}, and also then it developed what is called
 3 a "catalogue format", sometimes, called the product —
 4 sometimes, rather confusingly, called the "product
 5 format". So we see here the offer format, that we are
 6 familiar with, it clicks straight through to merchants.
 7 You see, at the top, the "Shopping results for teak
 8 furniture", that would also take you through to
 9 the Froogle successor, the link to the product search
 10 page, as they say.
 11 MS ROSE: Hang on the product search page, is that Froogle?
 12 MR JOWELL: That is Froogle, or renamed Froogle, yes. Yes,
 13 it is called Google Product Search by now, yes. But
 14 very, very few people typically, we find — although we
 15 do not actually have the data here, but you will see
 16 from other material that that is not — people typically
 17 do not go with the clicking on the heading like that,
 18 what they tend to do is to click on the image.
 19 So that is format number one, which is the one you
 20 are familiar with.
 21 Now the other format that emerged in late 2008 is
 22 what is called the "catalogue format" and that is on
 23 the next page {A1/3/4}. If we could see that, please.
 24 Here, what they did was, everything here goes through to
 25 Google Product Search. So it does not go through to

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1 the merchant, it goes through instead to
 2 the interstitial page of Google Product Search, and
 3 there on Google Product Search, they are then shown
 4 a fuller range of products which — and from there,
 5 users would then click through to merchants.
 6 MS ROSE: So are these variants different over time, or
 7 would they be possible at the same time depending on
 8 the nature of the search?
 9 MR JOWELL: The latter. So essentially, the catalogue
 10 version comes in, I think, we will see from
 11 the documents, from late 2008, and then you have the two
 12 — you have both —
 13 MS ROSE: Side by side. So what determined —
 14 MR JOWELL: Not literally at the same time —
 15 MS ROSE: No, no, but what decides which variant you get?
 16 MR JOWELL: That I am not entirely sure about, but I think
 17 it would depend upon the particular nature of
 18 the search. But how they did it, I confess, I am not
 19 sure. We will make enquiries as to whether there is
 20 anything in the material that tells us that.
 21 But what is important — and this is very
 22 interesting from our present perspective — is that
 23 Google considered that the catalogue view was typically
 24 more valued by users than the offer view and that is
 25 because users wanted to have the choice, the full

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1 variety of a virtual store displayed to them before they
 2 purchased. They did not just want five offers, they
 3 wanted the full panoply, mostly. You can see this, this
 4 was their analysis at the time.

5 If one goes to {M1/207}, please, which I think
 6 should be in your pack, you will see a document from
 7 Mr Goodrow, dated 31 October 2008. If we go to
 8 {M1/207/2} — no, forgive me, {M1/207/1}, you see it
 9 states:

10 "Well, we launched search over catalogues on
 11 the Product Search property in September, and indeed it
 12 is slower! Now we want to do a blended catalogue—offer
 13 search for the Onebox traffic, in order to improve
 14 the Onebox results and eliminate quality differences
 15 between the Onebox and the Property."

16 Just pausing there. They use the term "OneBox",
 17 they — people kept using the term "OneBox" even when it
 18 was officially Product Universal, but you can see from
 19 the date that this would have been the
 20 Product Universal.

21 THE CHAIRMAN: Sorry, "the Property" is the ...?

22 MR JOWELL: That is the full — that is Froogle, if I can
 23 just use that term, Google Product Search.

24 THE CHAIRMAN: That is the Google CSS?

25 MR JOWELL: Yes, exactly, the full CSS, the full Monty.

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1 Then you see the next sentence:

2 "catalogue results make users MUCH happier according
 3 to nearly all of our metrics, and searching over them
 4 means that we can find them more often and show them to
 5 users, which should be a good thing."

6 Now, they then — this being Google, of course,
 7 there were quantitative experiments in relation to
 8 the design and user interface of the Product Universal.
 9 Those included experiments with images, the presence or
 10 absence of images, but also, for present purposes, they
 11 undertook experiments in which what they did was they
 12 disabled the individual links within
 13 the Product Universal. So they stopped them linking to
 14 merchants, and that is what is called "de-linking", that
 15 goes by the expression "de-linking". So in other words,
 16 we are going to prevent you from going direct to
 17 the merchant and instead you are just going to go
 18 through to Google Product Search. They do experiments
 19 side by side with raters to see which format is
 20 preferred.

21 Now, you can see an early version of this de-linking
 22 experiment —

23 MS ROSE: What is "CTR"?

24 MR JOWELL: Click through rate.

25 You can see an early version of this de-linking at

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1 {A1/3/2} in our images.
 2 MS ROSE: What is "Long [click through rate] ..."?
 3 {M1/207/1}
 4 MR JOWELL: That means you are staying longer on the page
 5 that you clicked through to.
 6 So this was the — one of the early experiments.
 7 THE CHAIRMAN: You were going to {A1/3} ...?
 8 MR JOWELL: {A1/3/2}. So this is what one of these — the
 9 two — this was the side by side for these two
 10 experiments. One of them gives you — they both give
 11 you shopping results for a bagel toaster. You can see
 12 from the underlining that the top one, the links — you
 13 could click through on the links through to
 14 the merchant; the bottom one, you cannot, it is
 15 de-linked, and instead you just go through to
 16 the Google Product Search. So this was the de-linking
 17 experiment. This was one of the very early ones.
 18 THE CHAIRMAN: Because in the top one, that is a hyperlink
 19 for a website?
 20 MR JOWELL: That is right. Exactly, and it then takes you
 21 direct through to the merchant, if you click.
 22 MS ROSE: I see.
 23 MR JOWELL: The other one is de-linked.
 24 They send these to the raters, the Google internal
 25 raters, and say: well, which is better, which one do you

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1 prefer, linked or de-linked?
 2 If you go to {M1/240}, you see the results, you see:
 3 "This is a [User Interface] change for
 4 Product Universal. Today Product Universal has a top
 5 link ... and then 3 sublinks for ... results. In a real
 6 world scenario, it is hard to imagine users clicking on
 7 individual offers and make purchases based on just the 3
 8 results ... This change will de-link the 3 sub links and
 9 convert them into text and the title link will
 10 become '... Google Product Search'. This change will
 11 then force users to click on the Product Onebox to see
 12 the Google Product results, which should lead to
 13 increased long-click rate and reduced short-click rate
 14 on the OneBox according to previous analysis."
 15 Now, you will see — just in the interests of time,
 16 I will not take you through the whole document, it is
 17 quite a long document — the results are positive,
 18 highly positive. The users prefer — the quantity of
 19 results suggests that users prefer the de-linked
 20 results.
 21 If you go to {M1/388}, you can see here
 22 a presentation on "Product Search Eng[inneering] Review".
 23 Now, just a word of warning about terminology. If you
 24 go to {M1/388/7} on this, you see, at the top, it says:
 25 "Most gains came from

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1 "catalogueues (a.k.a. products)."
 2 So in other words — now, the reason I take you to
 3 this straight away is that it is important, when they
 4 talk about — I mentioned the two variants, catalogueue
 5 variant and offer variant, but the catalogueue variant
 6 is sometimes called the "product variant" and it is in
 7 this document.
 8 If you go back to {M1/388/3} —
 9 MS ROSE: So the catalogueue here is basically what used to
 10 be Froogle?
 11 MR JOWELL: Yes. Yes, correct.
 12 MS ROSE: So they have somehow got that to be a bit better?
 13 MR JOWELL: Yes, they have. They have improved Froogle by
 14 this stage.
 15 MS ROSE: So they put more investment into it to make it —
 16 MR JOWELL: Correct.
 17 MS ROSE: — you would say, more closely comparable to
 18 the service that your clients were already providing?
 19 MR JOWELL: Correct. Correct.
 20 MS ROSE: But then they have squeezed you out of
 21 the results.
 22 MR JOWELL: That is right, squeezed us out.
 23 You can see on page three here, "Products vs.
 24 Offers". So that's basically catalogueue versus offers:
 25 "Positive metrics in response to Products."

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1 So catalogueues:
 2 "CTR [is] up ...
 3 "Abandonment [is] down ...
 4 "Conclusion:
 5 "Users like Products more than Offers.
 6 "Or, provocatively, interstitial pages are good."
 7 MS ROSE: Sorry, what page are you on?
 8 MR JOWELL: {M1/388/3}.
 9 THE CHAIRMAN: You made the point product is the catalogueue
 10 variant?
 11 MR JOWELL: Yes.
 12 MS ROSE: The date of this?
 13 MR JOWELL: This document is dated 2009. May 2009.
 14 So the quantitative results show that
 15 the catalogueue version is favoured. One can see also,
 16 from a qualitative point of view, that there is an
 17 assessment within Google that this is — the reasons for
 18 this. This is an interesting document. It is at
 19 {M1/257}. We are not 100% sure who the author is, but
 20 we think it is probably Mr Goodrow, and it is a sort of
 21 diary almost of his reflections. It is worth reading
 22 the whole thing, but time will not permit me to do so,
 23 but let me just read you at the bottom of — let me read
 24 you a little bit.
 25 THE CHAIRMAN: Would you like us to read the section for

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1 ourselves?
 2 MR JOWELL: Yes, perhaps if you read it. I think it bears
 3 — if you read the first page and a half, I think.
 4 THE CHAIRMAN: Yes.
 5 MR JOWELL: It is very revealing.
 6 (Pause)
 7 THE CHAIRMAN: You want us to read down to April 7th?
 8 MR JOWELL: Yes.
 9 THE CHAIRMAN: Stop there?
 10 MR JOWELL: You do not even need the last paragraph.
 11 THE CHAIRMAN: Sorry?
 12 MR JOWELL: I think you do not even need the last —
 13 the final paragraph, but I think — well, maybe you do.
 14 Just down to April 7th, please. Yes, down to April 7th.
 15 So, a number of things —
 16 THE CHAIRMAN: Nextag, is that a — that is an American
 17 comparison shopping site?
 18 MR JOWELL: Indeed.
 19 So a few things emerge from this, that Google had
 20 a strong policy against vertical search results
 21 appearing within its general search, and that extended
 22 to demoting CSSs algorithmically, where possible, and
 23 Google worked hard to enforce that. Secondly, that some
 24 CSSs still slipped through the net. Thirdly, that, at
 25 least in the view of this employee, users did not

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1 benefit from that exclusionary policy, and users
 2 benefited from having websites that showed them a wide
 3 variety of products to choose from with information
 4 about those products, and that was more valuable and
 5 more useful to users than just a handful of offers, and
 6 also that the catalogueue — for that same reason,
 7 the catalogueue view was preferable to the offer view.
 8 What happens is that, over the period 2008 to 2012,
 9 you see a steady increase from Google's own data in
 10 the amount of clicks from the Product Universal that go
 11 through to the Froogle successor, through to
 12 the website, such that by the time you get to 2012, 60%
 13 of clicks are going through to the Froogle successor, to
 14 Google Product Search. Now, we do not know whether all
 15 of those clicks, that all 60% is from the catalogueue
 16 view, it could be some people clicking on the header
 17 link of the offer view. But it does not matter, either
 18 way it shows a preference from users and/or from Google
 19 to shift to those — to that viewpoint, to
 20 the interstitial page viewpoint for most users.
 21 You can see the figures are recorded in Mr Hunt's
 22 report at {I2/1/71}, paragraph 155. I do not think we
 23 need to go to them. It is also actually reflected in
 24 a binding recital, 411, of the Commission Decision,
 25 which is at {BA/2/120}, which notes that the majority of

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1 clicks in four countries, the UK, France and Germany and
 2 Netherlands, went to Google's Product Search website by
 3 2012. So this is significant, of course, when it comes
 4 to the counterfactual, because Google says: oh, well,
 5 no one likes interstitial pages, no one wants
 6 a catalogueue view. That certainly was not
 7 the experience in this four-year period when people
 8 actually had a meaningful choice. They typically
 9 preferred to be taken to a broader CSS, in other words
 10 to an interstitial page.
 11 Now, I mentioned the phenomenon of cannibalisation
 12 of Google's revenue, and one can see that recorded in
 13 one of the documents. It is at {M1/380}. You see there
 14 are numerous authors to this. If we could go, please,
 15 to slide 56 {M1/380/56} and we see here:
 16 "Monetization — current state."
 17 You see the identification in the red box of
 18 the product, Product Universal, and the explanation on
 19 — it is a little obscured, but on the side you can see
 20 it says that Google Shopping results are free listings.
 21 You see the mention —
 22 THE CHAIRMAN: Just ...
 23 (Pause).
 24 MR JOWELL: You see the little — underneath the blue box,
 25 you see:

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1 "Google Shopping results (free listings)."
 2 So that is —
 3 THE CHAIRMAN: I see, yes.
 4 MR JOWELL: Then at the bottom of the page, the last bullet:
 5 "Product Universal cannibalises \$250M/yr."
 6 But that is people, instead of clicking on the text
 7 ads, they click on Product Universal and they do not get
 8 any money from it.
 9 If we go to slide 57, you see a breakdown showing
 10 the Product Universal. You see the text, towards
 11 the bottom, on the left-hand side:
 12 "Product Universal cannibalization [they say] would
 13 be negated if 0.1% incremental traffic is captured due
 14 to a better shopping experience on Google."
 15 That is the shopping starts point, that, yes, it
 16 cannibalises, but it is — and you see an explanation —
 17 you can see an explanation there of how the revenue per
 18 mil, which is the RPM, which means the revenue per
 19 thousand impressions, if there was no Product Universal,
 20 would have been \$125, but you see, with
 21 the Product Universal, it is only \$116. Then you see an
 22 estimate, in dollar terms, of how much
 23 the cannibalisation is. Then underneath you see, well,
 24 why do they tolerate it? Well, because they want more.
 25 THE CHAIRMAN: "RPM" is revenue per impression?

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1 MR JOWELL: Per thousand impressions.
 2 Then at {M1/380/73}, if we could go to that, you
 3 see:
 4 "Winning in Commerce."
 5 Then it depends, they say, on being:
 6 "... good at 'What to Buy' ..."
 7 As well as where to buy it. We see that they say
 8 the "what to buy" stage is regarded as where:
 9 "Most value is created, [and] critical for users to
 10 start at Google."
 11 So for the Product Universal to be most effective to
 12 enable an experience that allows you users to compare
 13 types of product, and also the same product, a broad
 14 shopping comparison experience. You see this
 15 distinction between what to buy and where to buy also in
 16 the factual evidence, when you come to it. Mr Stables,
 17 and I think some of the Google witnesses, also talk
 18 about a "funnel" where, at the top of the funnel, you
 19 have sort of got questions like: well, what should I buy
 20 my friend for their birthday, a coffee maker or a vase?
 21 Then you have got sort of the middle of the funnel where
 22 you say: well, I know I have decided on a coffee maker,
 23 but what type of coffee maker? Then at the end of
 24 the funnel you have got: well, I want a Bialetti coffee
 25 maker, and where can I get that for the cheapest or most

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1 quickly, with the best reviews.
 2 Now, by this stage, of course, you are starting to
 3 have — very soon after this, or during this period
 4 2011, you have Panda, and I do not need to take you to
 5 it, but you can see from the Commission Decision —
 6 THE CHAIRMAN: This document, just pausing a moment, the one
 7 we have been — the "Commerce Review" —
 8 MR JOWELL: Yes.
 9 THE CHAIRMAN: — that is —
 10 MR JOWELL: That is 20 — we think it is 2010 or 2011, we
 11 are not sure. But in any event, in the middle of 2011,
 12 you get, the Panda algorithm comes into effect, and
 13 I will not take you to it but you will be able to see
 14 from the Commission Decision the kind of devastating
 15 effect. The graphs in the Decision show very clearly
 16 the devastating effect that that has on comparison
 17 shopping services and their appearance in the SERP.
 18 Once, by the end of 2012, Panda has taken full
 19 effect and Google is sufficiently dominating the CSS
 20 market, it is then able to switch to a paid model, and
 21 in the meantime, conveniently, Google had developed
 22 a new ad format called the "PLA", product listing ad,
 23 which used merchant feeds and had images, and what
 24 Google did was to move all of the product listing ads
 25 into the shopping box and that is when it creates

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1 the Shopping Unit.
 2 MS ROSE: So what is Panda doing that is different from
 3 Algorithm A?
 4 MR JOWELL: It is just a more severe demotion, suddenly.
 5 You can see it from the graphs — whereas Algorithm A is
 6 a moderate demotion affecting some comparison shopping
 7 sites more than others, Panda, you see, it just
 8 basically nukes everyone. I think the only exception to
 9 that is Idealo in Germany, but then Idealo also then
 10 gets nuked by the Coati variant of Panda in 2013.
 11 MS ROSE: But it is nuking CSSs, but is it nuking other
 12 types of sites like, say, MoneySuperMarket.com, that
 13 sort of thing?
 14 MR JOWELL: I am not sure about MoneySuperMarket. I would
 15 need to check. We would will need to think about
 16 whether that would have been affected, but it is —
 17 MS ROSE: I mean is it affecting financial services and —
 18 MR JOWELL: In theory, yes. I do not think it is specific
 19 to — the Panda algorithm is not — it is not like
 20 Diversity in the sense that it is directly affecting
 21 CSSs, it is affecting a range of sites, and it does
 22 certainly have a quality component, but what happens is
 23 is that Panda does affect — massively affect CSSs and
 24 Google do not do anything about it.
 25 MS ROSE: Is that because of the features that CSSs have?

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1 MR JOWELL: Yes. Yes, it is.
 2 MS ROSE: Specifically the fact that they are aggregating
 3 content —
 4 MR JOWELL: Indeed.
 5 MS ROSE: — from merchants?
 6 MR JOWELL: Yes, indeed, and that they do not have
 7 a sufficient original content, as they put it. What
 8 they do not do, Google, is they do not introduce any
 9 adjustments to protect CSSs, which of course — which
 10 they could have done, we say. You will see that in
 11 recital 357, dealt with by my learned junior.
 12 We then — if we could see an example of
 13 the Shopping Unit, it is at {A1/3/5}. Now, you will see
 14 that the contemporaneous evidence you have seen suggests
 15 that this was probably a worse experience for users, but
 16 it certainly made a lot more money for Google, because
 17 merchants now paid every time there was a click on
 18 the PLAs in the Shopping Unit. So what we see is a —
 19 basically, you get around completely the cannibalisation
 20 problem.
 21 PROFESSOR SMITH: Do I understand it right that although
 22 the content of the Shopping Unit and the appearance of
 23 the Shopping Unit here in this slide is rather similar
 24 to what we have seen before, the process that gets
 25 products in here is completely different?

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1 MR JOWELL: Yes, that is absolutely correct, yes.
 2 PROFESSOR SMITH: Before 2012, Google's algorithm decided
 3 which were the optimal products to go into the shopping
 4 box and money had nothing to — well, money was not
 5 directly affected, whereas these are paid ads?
 6 MR JOWELL: Yes, that is absolutely correct, and thank you
 7 for picking me up on that, I should have mentioned it.
 8 So that is absolutely right, they come through product
 9 feeds from the merchants, they are paid ads and — well,
 10 I say paid ads, they are paid ads, but they are ranked
 11 according to a fairly complex process, which involves an
 12 auction, a second price auction, which is a clever way
 13 of extracting the maximum bid, and then it is quality
 14 adjusted, basically, by Google, and that is what then
 15 determines what appears.
 16 MS ROSE: (Off microphone) So it is not just the house
 17 (inaudible)?
 18 MR JOWELL: It is not just the house. No, it is not just.
 19 It is not just.
 20 MS ROSE: But so —
 21 THE CHAIRMAN: (Off microphone) So it is a carousel, further
 22 on(?)?
 23 MR JOWELL: I think it became a carousel later. I think
 24 it —
 25 THE CHAIRMAN: (Off microphone) It looks like here there is

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1 sort of (inaudible).
 2 MR JOWELL: Yes, I think that is right in this one. I think
 3 it certainly became a carousel at some point, or became
 4 possible to see more maybe.
 5 MS ROSE: (Off microphone) Top five (inaudible).
 6 MR JOWELL: Top five, yes, that is right.
 7 MS ROSE: (Off microphone) And if you want the full CSS, you
 8 have to click on the red link?
 9 MR JOWELL: Yes, the little — the tiny little link at
 10 the top there.
 11 MS ROSE: (Off microphone) Or, sorry, where it says "Shop
 12 for Canon ..." —
 13 MR JOWELL: Yes, that is right, shop.
 14 MS ROSE: — (off microphone — inaudible).
 15 MR JOWELL: Yes, or the shopping tab at the back.
 16 THE CHAIRMAN: (Off microphone) The shopping tab.
 17 MR JOWELL: Yes, but no one does that.
 18 MS ROSE: So actually, the "Shop for Canon 70d on Google" is
 19 very non-prominent compared with the box?
 20 MR JOWELL: Yes.
 21 MS ROSE: So this looks like a radical change of strategy
 22 away from the virtual store to just five featured
 23 products.
 24 MR JOWELL: Yes.
 25 MS ROSE: So there must have been something that has decided

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1 them to go — it is a very different direction, is it
 2 not?
 3 MR JOWELL: It is a very different direction. I think there
 4 were a number of factors. I mean, one is they are
 5 getting rid of the cannibalisation problem. They do not
 6 have to worry about CSSs any more, they have been nuked.
 7 The other factor was that they had introduced this
 8 new ad format called Product Listing Ads, which involved
 9 images and which involved feeds, and they were being
 10 horribly cannibalised by the box, and so what they said
 11 — and also there was kind of confusion on the page,
 12 because you would see these product listing ads and then
 13 you would see the box, so they unify it all and they
 14 tidy up, if you like, the appearance as well. But like
 15 all things in Google, I am sure it is driven by
 16 commercial considerations, so it is —
 17 MS ROSE: But if consumers prefer the virtual store formats
 18 to the individual products, does this not open Google up
 19 to competition from Amazon?
 20 MR JOWELL: Yes, I suppose, in a sense, it does, but they
 21 are prepared to take the hit at this point. But it is
 22 — but, I mean, Amazon has got — I guess has got more
 23 variety, if you think about it, than this, but they
 24 decided at this stage to — they are just going to
 25 maximise their income from these product listing ads.

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1 THE CHAIRMAN: With this format, if we look at the Canon 70,
 2 what we see — so the first one, Camera Express,
 3 the form of retailer, presumably, would pay to get their
 4 image and name into this box?
 5 MR JOWELL: I think it is if someone clicks on it, then they
 6 pay a certain amount.
 7 THE CHAIRMAN: Only if someone clicks on it, not to go in
 8 the box?
 9 MR JOWELL: I believe that is correct, yes. So you bid in
 10 the auction. You say, "I am prepared to pay a cost per
 11 click of X".
 12 MS ROSE: I see.
 13 THE CHAIRMAN: I see. The bidding is what you would pay on
 14 cost per click?
 15 MR JOWELL: That is right.
 16 THE CHAIRMAN: Ah, yes.
 17 MR JOWELL: We say that this was actually a user quality
 18 hit. You can see that at {M1/414}.
 19 (Pause)
 20 Oh, we have got a slow ... It is in your file
 21 anyway. If you go to page {M1/414/4} of that, one sees
 22 — just you can see the heading:
 23 "The initial user quality hit is less than
 24 expected."
 25 Now, but —

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1 THE CHAIRMAN: Just a minute.
 2 MR JOWELL: Yes.
 3 (Pause)
 4 If you go to {M1/414/2}, you can see what matters —
 5 in the middle, about a third of the way down the page on
 6 page 2 you see an email from Sundar Pichai no less,
 7 the CEO. He says:
 8 "The revenue growth chart is stunning especially
 9 the inflection point."
 10 MS ROSE: Sorry, where are you looking?
 11 MR JOWELL: Page 2. About a third down the page, you see an
 12 email from Mr Pichai:
 13 "The revenue growth chart is stunning ..."
 14 MS ROSE: On page {M1/414/4}, what do they mean when they
 15 say:
 16 "... we've have made 119 launches ..."
 17 What are the launches?
 18 MR JOWELL: I confess, I am not sure. We would have to ask
 19 one of the relevant witnesses, I think. But you see on
 20 page {M1/414/2} what matters is the revenue growth. So
 21 there is a hit to user experience, but the revenue
 22 growth is enormous.
 23 MS ROSE: I am not quite sure what they mean by "quality
 24 hit". What do they mean by "quality hit"?
 25 MR JOWELL: Well, I think they mean a hit to the quality in

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1 user experience, but we can see.
 2 THE CHAIRMAN: I think what they say in the next sentence
 3 {M1/414/4}:
 4 "With this transition we expected initial hits to
 5 quality ..."
 6 MR JOWELL: Yes.
 7 THE CHAIRMAN: A quality hit, a hit to quality.
 8 MS ROSE: But what does that mean?
 9 MR JOWELL: A reduction in —
 10 THE CHAIRMAN: A reduction —
 11 MR JOWELL: — users' quality of experience, which reflects
 12 the fact that users benefited from the catalogueue view
 13 and so on.
 14 MS ROSE: But they seem to be saying that the launches,
 15 which seems to be software changes, "rewrites of our
 16 serving and ranking systems", have avoided the hits to
 17 quality.
 18 MR JOWELL: Yes, I think ...
 19 THE CHAIRMAN: The last sentence, is it not?
 20 MR JOWELL: Yes, that is there, but they were certainly
 21 anticipating a hit.
 22 MS ROSE: But it does not seem to have happened, because
 23 they managed to upgrade their —
 24 MR JOWELL: Well, they say in the last sentence —
 25 MS ROSE: — code.

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1 MR JOWELL: —:
 2 "We have taken a hit in click through rate ..."
 3 MS ROSE: "... but other recent launches have given us
 4 increases in quality."
 5 MR JOWELL: Increase, well, yes. If you read the document
 6 as a whole — I am afraid I do not have a chance to go
 7 through it — you do see that what the overwhelming
 8 driver here is you see that the revenue is just shooting
 9 up and that is what is driving this.
 10 Now, if we — the Commission opened an investigation
 11 into Google's conduct in 2012, and eventually Google
 12 sought to offer commitments to get rid of
 13 the investigation without an infringement finding.
 14 There were several sets of commitments that were offered
 15 — oh, forgive me, I see the time.
 16 THE CHAIRMAN: I thought the Commission opened
 17 the investigation in 2010, did it not?
 18 MR JOWELL: I think the complaint came in 2010, I think it
 19 formally opened the investigation in 2012.
 20 My Lord, I see the time. Forgive me, it is five
 21 past. I am running a bit behind time. I do not know if
 22 it is possible to try and —
 23 THE CHAIRMAN: We can take a slightly shorter lunch —
 24 MR JOWELL: I would be very grateful.
 25 THE CHAIRMAN: — but we obviously do need to stop. If we

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1 go to 1.15 —
 2 MR JOWELL: (Overspeaking — inaudible).
 3 THE CHAIRMAN: — I think we can sit — to avoid sitting
 4 later.
 5 MR JOWELL: Let me keep going then.
 6 THE CHAIRMAN: I may be wrong, I thought it was
 7 30 November 2010 that they initiated the proceedings,
 8 but —
 9 MR JOWELL: You may be correct. I think there may be
 10 a difference between the initiation of the proceedings
 11 and the formal investigation. We can double-check that.
 12 No, that is absolutely right. In November 2010, it
 13 initiated — there was the initiation of proceedings.
 14 In any event, if one goes to {A1/3/6}, you can see
 15 the last iteration of the commitment, and what they
 16 proposed was to split the shopping box in half.
 17 THE CHAIRMAN: This was the — was this the final —
 18 MR JOWELL: The final one, yes.
 19 THE CHAIRMAN: — one of the commitments, which was the —
 20 MR JOWELL: 2014.
 21 THE CHAIRMAN: — 2014 one, yes.
 22 MR JOWELL: The one half would have been the normal PLAs,
 23 and the other half, on the right-hand side, would have
 24 been a selection of rival comparison shopping services.
 25 Now, the links from the rival comparison shopping

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1 services here would not have gone direct to a merchant,
 2 but they were prepared to countenance the links going
 3 through to interstitial pages. You can see also in
 4 these versions the comparison shopping services are able
 5 to put in that very important information, which is
 6 the lowest price.
 7 MS ROSE: So this would have been better, you would say,
 8 than the actual —
 9 MR JOWELL: Yes.
 10 MS ROSE: — Remedy box?
 11 MR JOWELL: Yes.
 12 Now the Commission rejected the proposal, and we say
 13 understandably so, because Google is still hogging half
 14 the box for its own truncated CSS, so there is scarcely
 15 equal treatment. But the ultimate result, as you say,
 16 Madam, has been worse. If we go to {A1/3/7}, we see
 17 the Shopping Unit following the Compliance Mechanism.
 18 The shopping box is materially unchanged from its
 19 appearance before the Decision. You can compare it to
 20 slide 5, if you wish {A1/3/5}, it looks very similar.
 21 The selection {A1/3/7} of offers to populate the box and
 22 the presentation of each product offer remains chosen by
 23 Google, and the destination of the clicks is all to
 24 the merchant offer page, just as it had been since 2013.
 25 The only change is the addition of the small

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1 blue "By Google" or "By Producthero" below each product
 2 and image. Now, it was known in advance by Google that
 3 only a tiny fraction of viewers would click on those
 4 small blue links. I will just give you the reference
 5 for that because I am running short of time, it is
 6 {M2/936}, and they knew full well that less than 1% of
 7 people would actually click on that.
 8 Now, the other change is that under the Compliance
 9 Mechanisms, CSSs intermediate to an extent between
 10 the merchants and Google. Now, the extent of
 11 the intermediation depends on the particular model that
 12 the merchant adopts. You will see there are two types
 13 of model, the managed model and the self—service model.
 14 They are described by Mr Stables in his second statement
 15 and by Mr Hunt at paragraph 199 of his first report
 16 {I2/1/92}. At least as far as Kelkoo's data is
 17 concerned, nearly all of the merchants are on
 18 the self—service model, and Google has told us it does
 19 not have any other data, rather surprisingly, but it
 20 says it does not have any other data about the split
 21 between the models. But in any event, these two
 22 models — both models have got one thing in common and
 23 that is that the role of the CSS is effectively limited
 24 to being an advertising intermediary. They are, at
 25 most, assisting merchants with their bidding to Google

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1 and in many cases just simply acting as a pure cipher,
 2 and CSSs do not carry out any of the services that are
 3 core to operating a price comparison service. They do
 4 not rank or index or categorise or select offers, they
 5 do not control the display of offers, all of that is
 6 done by Google; they are just merely intermediaries, and
 7 the remuneration they receive, the limit is a tiny
 8 margin and that just simply reflects the nature of
 9 the service that they are providing.
 10 Of course, I should show you the — I should mention
 11 that a number of people within Google recognised that
 12 there was this problem with the Remedy, that the CSSs
 13 were relegated to mere intermediaries. Again, for your
 14 note, to save time, one example of that is {K1/25/2}.
 15 Fairly soon, it is pretty clear that the Commission
 16 realised that they had been sold a pup, and they started
 17 to put pressure on Google to introduce further changes,
 18 including formats that linked not direct to merchants
 19 but instead that linked to rival CSSs. In response to
 20 the Commission's request, Google did, in the course of
 21 2019, put on its SERP what it called a "CLA",
 22 a comparison listing ad, which had links not to
 23 merchants but to CSSs.
 24 Regrettably, the CLAs were presented in such a way
 25 to ensure that they were sabotaged from the outset.

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1 I will show you how. If you go to {A1/3/9}. Start with
 2 9.
 3 Now, here is an image. You see here how
 4 the CLA is — forgive me, no, this is — yes, so this is
 5 how — if you see slide 9, and then if you go to
 6 {A1/3/10}, this is a search for a Bialetti — no,
 7 forgive me, go back to slide {A1/3/9}, I think I might
 8 have a bad reference.
 9 THE CHAIRMAN: Slide 9 is Google CSS, is it not?
 10 MR JOWELL: Yes, forgive me, I must have a bad reference.
 11 If we can go back one slide, I am guessing.
 12 THE CHAIRMAN: Which still exists —
 13 MR JOWELL: Yes.
 14 THE CHAIRMAN: — does it not?
 15 MS ROSE: Do you mean {A1/3/8}?
 16 MR JOWELL: It must be 8.
 17 Oh, forgive me, yes. {A1/3/11}. Ah, that is
 18 the confusion, it is that the slides are on different
 19 pages from the page numbers.
 20 So, here, you have got — this gives you an idea of
 21 how the CLA appears.
 22 MS ROSE: Right, I see.
 23 MR JOWELL: Basically what you see is it does not appear.
 24 THE CHAIRMAN: Sorry —
 25 MS ROSE: Page 11.

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1 MR JOWELL: Page 11.
 2 THE CHAIRMAN: Yes.
 3 MR JOWELL: Because the way that it appears is, do you see
 4 in the grey behind the products, just under "Shop for
 5 coffee makers", you see a little grey link
 6 there, "Comparison sites", and it is a bit like that —
 7 you know, it is a bit like that children's book "Where's
 8 Wally", where you have to find where Wally is, and you
 9 have to find where the comparison sites are, because
 10 they are hidden in plain sight, they are tucked away
 11 behind the products tab which always appears as
 12 the default, and it is only if you actively take a step
 13 to click on that tab that you get through to the CLA,
 14 which I think is the next page {A1/3/12}.
 15 That might be a convenient moment just to stop.
 16 THE CHAIRMAN: So this is the default?
 17 MR JOWELL: This is the default, yes. Slide 9 is indeed
 18 the default, {A1/3/11}.
 19 THE CHAIRMAN: Is this the current — what is operating
 20 currently?
 21 MR JOWELL: Yes, with a few additional things that I will
 22 have to come on to that appear occasionally.
 23 THE CHAIRMAN: Yes. It might be, when we look at
 24 the current one, one can arrange that we actually all
 25 have it so that rather than looking at a screenshot we

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1 can actually operate it.
 2 MR JOWELL: Yes.
 3 THE CHAIRMAN: That might be more useful.
 4 Very well, we will return at 2 o'clock.
 5 MR JOWELL: Thank you.
 6 THE CHAIRMAN: We can sit a little bit late.
 7 (1.16 pm)
 8 (The short adjournment)
 9 (2.04 pm)
 10 THE CHAIRMAN: Mr Jowell, we can sit until 5 o'clock today.
 11 MR JOWELL: Oh, I am very grateful.
 12 THE CHAIRMAN: We do not want to rush you.
 13 MR JOWELL: That is extremely kind. Thank you.
 14 THE CHAIRMAN: We do not want to make a practice of it, it
 15 is not that we will do this every day, but we are trying
 16 to be flexible.
 17 MR JOWELL: I am very grateful. I will have to hand over to
 18 Mr West at some point, probably around 3.15 or 3.30 on
 19 that basis.
 20 THE CHAIRMAN: Yes.
 21 MR JOWELL: Thank you very much.
 22 THE CHAIRMAN: I think you all know that I think it is
 23 1 July when we have to actually rise at 4.15. I think
 24 you have been told that.
 25 MR JOWELL: Yes, I think that is in the timetable.

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1 THE CHAIRMAN: I am speaking at a conference.
 2 Yes.
 3 MR JOWELL: I was on the CLAs and I showed you how they are
 4 hidden effectively because they are a default tab.
 5 The problems with CLAs do not stop there. If you look
 6 at one of them, you can see the image at {A1/3/12}, in
 7 the annex — the images annex. You can see there that
 8 the images are quite small, there is no indication of
 9 pricing, minimum pricing, there is no information about
 10 number of stores and so on, and it is very bland
 11 content. Of course, the important point to note is
 12 this, product listing ads have had years and years of
 13 data which gives them the opportunity to then improve
 14 their features and iterate and get better and better,
 15 and they have. CLAs, of course, have not —
 16 THE CHAIRMAN: Product listing ads.
 17 MR JOWELL: Product listing ads, yes.
 18 THE CHAIRMAN: Yes, have had years.
 19 MR JOWELL: The CLAs have not because they are behind
 20 a hidden tab, they are denuded of key information and
 21 attractiveness and they have just never been given
 22 a chance to get off the ground. We say that
 23 the experiments that Google claims it carried out in
 24 2022 do not show anything at all, and in fact the recent
 25 batch of disclosure has been extremely revealing, as we

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1 will come on to it no doubt in due course in these
 2 proceedings. But not to put too fine a point upon it,
 3 the experiment was effectively rigged. I mean, the dice
 4 was loaded from the start, we say.
 5 Now, another development, other than these —
 6 THE CHAIRMAN: Just —
 7 MR JOWELL: Yes.
 8 THE CHAIRMAN: — pause a minute so we can just take this
 9 in.
 10 (Pause)
 11 So under this module, would the CSS then be paying
 12 to be included in this presentation?
 13 MR JOWELL: Under the CLAs, I believe they do — there is an
 14 auction for CLAs, yes.
 15 THE CHAIRMAN: Yes, so the CSS is also bidding?
 16 MR JOWELL: Yes.
 17 THE CHAIRMAN: Then you get in and then you have got
 18 a carousel which will include how the many get through?
 19 MR JOWELL: Yes. But as you can see there, images are tiny,
 20 no pricing, no number of stores, nothing really.
 21 THE CHAIRMAN: Yes.
 22 MS ROSE: Presumably Google Shopping could be on this?
 23 MR JOWELL: Yes, they have chosen not to include
 24 Google Shopping.
 25 THE CHAIRMAN: Yes, that was my next question.

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1 MR JOWELL: But of course, if it was a default tab, things
 2 might — if it was a default tab, things might well
 3 change.
 4 Now, another development which I should mention
 5 which has been motivated, we think, by Google's attempt
 6 to comply with the prohibition on self-preferencing in
 7 the Digital Markets Act has been the introduction of
 8 something called a PLACSS, which came in in March 2024.
 9 Now, under this version, rival CSSs can, for the first
 10 time, bid on their own behalf in the Google auction with
 11 the main link going to their own CSS website and not to
 12 a merchant. If you look at that, you see — we can see
 13 that on page {A1/3/13} of this document, and this is
 14 a version of the PLACSS, and you see, I think it is
 15 the — this is — if you go to — yes, so this is one
 16 version. Then if we go to the next page {A1/3/14}, you
 17 see we have highlighted it in blue. That is the CSS
 18 there appearing. So this is the first time that
 19 the CSSs can appear in the PLA.
 20 Now, in reality, they are not highlighted in blue,
 21 it is all undifferentiated.
 22 THE CHAIRMAN: Sorry, just one moment.
 23 MR JOWELL: Yes.
 24 (Pause)
 25 THE CHAIRMAN: So in other words, no direct link, if you

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1 choose on that, the one that has been highlighted in
 2 blue —
 3 MR JOWELL: Yes.
 4 THE CHAIRMAN: — for our purposes, you will not go to
 5 the merchant, you will go to the —
 6 MR JOWELL: Go to the CSS.
 7 MS ROSE: That is why it says "10+ more offers".
 8 MR JOWELL: Yes.
 9 You see here, unlike in the CLA, you do have pricing
 10 and you do have number of offers at least.
 11 But the fundamental —
 12 MS ROSE: No stars.
 13 MR JOWELL: No stars, yes.
 14 We say — I mean, we will need to get into this,
 15 into detail no doubt in closing, but we say that this is
 16 still inadequate, and the reason it is still inadequate,
 17 fundamentally, is that you have still got a CSS placed
 18 as a small component of Google's CSS, which is the whole
 19 thing. You can see it is still effectively Google —
 20 you are going in — it is basically Google is placing
 21 the Shopping Unit, its manifestation of its CSS, and it
 22 is giving consumers immediate access to a range of
 23 merchant offers that it has ranked with the images and
 24 the prices in this format, as you can see, and that
 25 enables them to do comparison shopping. Any CSS that

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1 places a PLACSS tile, as it is called, one of these
 2 units is sometimes called a tile, is effectively
 3 competing against part of Google's CSS, and so by
 4 the time a consumer clicks on a PLACSS, on the PLA tile,
 5 they have already been presented with Google's CSS,
 6 effectively. So in other words, Google obtains first
 7 exposure to the consumer before any rival CSS has got an
 8 opportunity to engage them.
 9 There are other defects with this as well, is
 10 that — the PLACSS tile is not permitted to link to
 11 a full comparison shopping service of the CSS to a range
 12 of products, it can only link to the single product
 13 page. It is also — there is also a fundamental
 14 asymmetry here, because it has to bid in an auction
 15 against merchants, which makes it difficult for it to
 16 compete on equal terms. Now, the economists will
 17 explain to you why that is so.
 18 MS ROSE: So the link does not take you to a Kelkoo page
 19 comparing different Sony TVs, it only takes you to that
 20 one model?
 21 MR JOWELL: Well, yes, in comparison on that model,
 22 effectively.
 23 MS ROSE: So that model across merchants?
 24 MR JOWELL: Yes, exactly. Exactly.
 25 PROFESSOR SMITH: So Kelkoo has participated in the —

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1 essentially, the same second price up auction process —
 2 MR JOWELL: Yes.
 3 PROFESSOR SMITH: — that would take place without
 4 the PLACSS option —
 5 MR JOWELL: Yes.
 6 PROFESSOR SMITH: So the CSS is acting as an agent, or
 7 whatever the right term is, for merchants in submitting
 8 bids, and it is now submitting a —
 9 MR JOWELL: I guess — yes, yes.
 10 PROFESSOR SMITH: — bid — it is participating in the same
 11 option in the same auction, but offering a different
 12 consumer option —
 13 MR JOWELL: Yes.
 14 PROFESSOR SMITH: — of options —
 15 MR JOWELL: Yes, that is right, yes. Yes, absolutely right.
 16 Now, there was one other development, which was
 17 there is a product viewer that has come in. This is
 18 a free service that you sometimes see appear. You will
 19 see it referred to in Mr Hunt's first report at
 20 paragraphs 210 to 214. I do not think we need to spend
 21 too much time on that. It is located way down the SERP,
 22 basically. It is sort of in the middle lower of
 23 the SERP, and it features only very rarely.
 24 THE CHAIRMAN: Sorry, I did not fully take that in.
 25 MR JOWELL: Sorry, let me say that again.

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1 So there is another format, which is called
 2 the product viewer and product site boxes. That was
 3 introduced in March 2024. You will find that described
 4 in Mr Hunt's —
 5 THE CHAIRMAN: At the same time as this?
 6 MR JOWELL: Yes, I believe so. This provides free links to
 7 a mixture of merchants and CSSs, but it is located way
 8 down the SERP and it only appears rarely.
 9 Now, it is important to appreciate that
 10 the Commission has never reached a definitive position,
 11 one way or another, on whether the Compliance Mechanism
 12 introduced by Google from time to time satisfies
 13 the requirements of the Commission Decision and
 14 therefore it is quite galling for us to find in Google's
 15 submissions that they continue to flog this dead horse
 16 of saying: oh, well, if the Commission would have acted
 17 — we wrote to the Commission and we received an
 18 absolutely definitive response saying they had never
 19 made a Decision. That is in the bundle at {M3/241}.
 20 If anything, the facts strongly suggest that
 21 the Commission does not agree with Google's approach and
 22 it is completely understandable why they have not acted.
 23 The DMA came into force before the appeals were
 24 finished, or anything alike finished, in Europe from
 25 the Commission Decision, and they have opened an

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1 investigation under the DMA, where you have effectively
 2 the same provision without the need to establish
 3 dominance of no self-preferencing, and they have
 4 actually, we understand, already come to a provisional
 5 view that they are — that Google are in violation of
 6 the self-preferencing provision. We will have to wait
 7 and see whether we get, in time, a final Decision, and
 8 if we do, of course we will provide that to the Tribunal
 9 for its consideration. But we say that the Compliance
 10 Mechanism is clearly inadequate and that is why
 11 the abuse continues.
 12 Now, one thing Google does say is it says in its
 13 opening submissions that if it could not have its Remedy
 14 box, it would simply choose to have no shopping box at
 15 all. Of course, in theory, it could do that, but you
 16 should take that submission with a huge pinch of salt.
 17 If one looks, for example, at {M1/538}. This is one of
 18 the early documents in which Google sets out some of
 19 the options that it was considering for the Remedy.
 20 There are a number of variants of these documents in
 21 the Trial bundle. One thing they all have in common, at
 22 least all the ones I have seen, is that the option of
 23 getting rid of the Shopping Unit is Google's very last
 24 preference. If you go to {M/538/16} of this document —
 25 THE CHAIRMAN: So this is dated?

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1 MR JOWELL: This is a July 2007 — sorry, 2017, forgive me,
 2 internal document. You see what it is called:
 3 " ... Product Change Proposals for Remedy
 4 Compliance."
 5 We know it is after 30 July 2017, but we do not know
 6 when exactly. It is one of the early ones, we believe.
 7 THE CHAIRMAN: It is presumably August 2017?
 8 MR JOWELL: Yes, could — yes, you are —
 9 THE CHAIRMAN: Because they have got until 29 August to
 10 submit proposals and they are considering what to do; is
 11 that right?
 12 MR JOWELL: I think that is right, yes.
 13 THE CHAIRMAN: Thank you.
 14 MR JOWELL: Oh, I am told it is 4 July. No, it cannot be.
 15 Maybe an earlier version was 4 July, I do not know. It
 16 is round about that time in any event.
 17 THE CHAIRMAN: Yes.
 18 MR JOWELL: If we go to page 16 {M1/538/16}, you just see —
 19 you see this is "Greg's notes on the proposed ordering
 20 of preferability ...", and that is Mr Friedman, that is
 21 Greg Friedman who will be a witness in these
 22 proceedings, and you see at the very bottom, there is
 23 a whole series of different options, and then you see at
 24 the very bottom, 11 is:
 25 "Remove [the] Shopping subdomain."

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1 That is remove the successor to Froogle.
 2 Then the very last one —
 3 THE CHAIRMAN: Just one moment. The transcript feed has
 4 stopped.
 5 MR JOWELL: I think it should be in your bundle.
 6 THE CHAIRMAN: No, the transcript feed.
 7 MR JOWELL: Oh, the transcript feed?
 8 THE CHAIRMAN: Has yours stopped?
 9 MS ROSE: Yes.
 10 THE CHAIRMAN: Can we restore that?
 11 (Pause)
 12 Refreshing at the top left, yes.
 13 No, I do not think so.
 14 (Pause)
 15 Can you just repeat the page number in this
 16 document?
 17 MR JOWELL: Certainly. It is at page 16 {M1/538/16}.
 18 THE CHAIRMAN: 16. We will just look at it while it is
 19 being sorted.
 20 MR JOWELL: If you look at page 15, you will see
 21 the estimate of the revenue effect of getting rid of
 22 the SCU, the Shopping Unit: over half a billion dollars
 23 annually.
 24 (Pause)
 25 THE CHAIRMAN: Hopefully, if you just press on.

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1 MR JOWELL: Thank you very much.
 2 Now, we say you should take with a huge pinch of
 3 salt the suggestion that they would get rid of their
 4 shopping box. They have played this particular tune
 5 before. If you go to {M1/522/3}.
 6 THE CHAIRMAN: Just a second.
 7 (Pause)
 8 MR JOWELL: This is, we understand, a presentation to
 9 Sundar Pichai, made, — or similar senior management,
 10 perhaps, made on 13 July 2017, and if you go to page
 11 {M1/522/3}, you can see there are three main options
 12 presented. Option A is turning off the Google Shopping
 13 subdomain, that is getting rid of the website page, and
 14 it is noted below, interestingly, it says:
 15 "This offer relies on some confused language in
 16 the EC Decision which allows [Google] to argue that
 17 having a separate property is the problem ..."
 18 Interesting to note that Google were still trying to
 19 use that confused language to make a similar argument at
 20 the Preliminary Issues Hearing, of course.
 21 Then we see Google also recognises that:
 22 "This has a low chance of success because
 23 the EC wants to us change the units but the fact of
 24 making the offer and the EC rejecting or saying nothing
 25 will be helpful on appeal."

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1 So it is clear that Google was well aware that
 2 option 1 of removing the shopping subdomain would not
 3 satisfy the EU.
 4 MS ROSE: Is there a separate property? They are
 5 referring to their own price comparison website?
 6 MR JOWELL: Website, that is right. Exactly. They knew it
 7 would not satisfy the EU precisely because the problem
 8 was that the CSS was also contained in the Shopping
 9 Unit.
 10 Then we have two further options: B, which is
 11 the removal of the whole Shopping Unit, and then C,
 12 "some form of approved aggregator access".
 13 Then if we — interesting that they are still using
 14 the term "aggregator".
 15 Then if you go to page 4 {M1/522/4}, you see
 16 the assessment of the three options. Reading along
 17 the top you can see that turning off just the subdomain
 18 would mean retaining most of Google's revenue but would
 19 be "unlikely to be accepted". They say turning off
 20 the unit would be compliant. Now you see it is now
 21 estimated to cost a massive \$1.68 billion in lost
 22 revenue just in 2017, and that is probably quite a lot
 23 of money even for Google.
 24 THE CHAIRMAN: By "the subdomain"?
 25 MR JOWELL: That is the website. That is Froogle's

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1 successor.
 2 THE CHAIRMAN: Various called "the property".
 3 MR JOWELL: The property, yes, exactly.
 4 Then you have the unit, turning that off, that is
 5 1.68 billion in lost revenue in 2017 alone, and that
 6 would also, they say potentially lose 2.9% of shopping
 7 queries to Google and would mean disruption for
 8 merchants. I suggest that was pretty clearly
 9 a non-starter, commercially.
 10 PROFESSOR SMITH: So all that would remain then would be
 11 the straightforward Google Search results?
 12 MR JOWELL: Yes, and of course all the advertising, yes.
 13 If you see page 5, go to page {M1/522/5}, please —
 14 THE CHAIRMAN: Just one minute.
 15 (Pause).
 16 Yes.
 17 MR JOWELL: They say that:
 18 "[The] recommendation is to apply pressure on the EC
 19 [the European Commission] now by offering to [turn off]
 20 the shopping domain only."
 21 That is the website, or the property. As they say:
 22 "We'll then let them know that the most likely
 23 outcome is that we now have to turn off this service in
 24 Europe."
 25 Even though, as you have seen, that was actually

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1 their second—last preference.
 2 Then you see on page 8 {M1/522/8}, we have the "Next
 3 Steps"
 4 "Send [a] letter [on]... subdomain shut—down."
 5 In the meantime, 2, Google would scope out
 6 the option C alternatives, and 3:
 7 "Generate letters of support from retailers for
 8 Google Shopping."
 9 MS ROSE: Sorry, where are you?
 10 MR JOWELL: This is on page 8 {M1/522/8}.
 11 So it seems to us that this was a bluff and no doubt
 12 Google calculated that it would scare the Commission, or
 13 at least soften it up, and at the same time Google had
 14 plans to —
 15 MS ROSE: This was not that they were going to not have
 16 the shopping box?
 17 MR JOWELL: No, they were not —
 18 MS ROSE: It was that — no, what they — hang on. I think
 19 when they say "this service", do they not mean the sub
 20 domain?
 21 MR JOWELL: Yes, they do. They do.
 22 MS ROSE: So what they mean is there will still be the box
 23 but it will link to merchants only and not to the price
 24 comparison?
 25 MR JOWELL: Yes. Yes, and they —

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1 MS ROSE: But that is not the same point.
 2 MR JOWELL: You are quite right, Madam, it is not quite
 3 the same thing, but it is the same playbook, in
 4 the sense that what they are saying is, "We are going to
 5 turn it off" to scare them, basically. Now they are
 6 saying more, they are saying, "Oh, we will turn off
 7 the whole unit". Well, really? The whole unit?
 8 1.6 billion in 2017? I do not think so, respectfully.
 9 But with the Commission, what they were doing was
 10 a two-pronged thing, because they were saying, on
 11 the one hand we will shutdown the property. They knew
 12 that that was not going to cut ice, but they thought —
 13 even legally, because they knew that was not going to
 14 bring them into compliance, and yet they thought, "We
 15 will do that, that is our gambit", and it would also of
 16 course damage consumers in Europe if we were to do that,
 17 and so that is how they operate.
 18 In parallel, Google continued to develop a more
 19 realistic option, and if you go to {M1/540}, one does
 20 not need to go through the detail, but we see they start
 21 to develop a number of different options, and one of
 22 them, if we go to {M1/540/8}.
 23 THE CHAIRMAN: Just a moment. This is — so we get a sense
 24 of chronology, we have — so it is still in the period
 25 of internal discussion, probably in July and August.

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1 MR JOWELL: Yes. That is right.
 2 THE CHAIRMAN: But it comes after the document you have just
 3 shown us.
 4 MR JOWELL: Yes, I think so. I think so. At least
 5 according to the dates we have been given.
 6 MS ROSE: Is this another iteration of the document at
 7 {M1/538}?
 8 MR JOWELL: Yes, I believe it is.
 9 MS ROSE: So which is the earlier version?
 10 MR JOWELL: I think the earlier one is the previous one.
 11 MS ROSE: Okay.
 12 MR JOWELL: I am pretty sure, because here we start to see
 13 more developed options.
 14 If you go to {M1/540/8}, you can see an option
 15 called "Shopping API (aka Query—Time Callout Approach)".
 16 Now, I do not have time, and I am sure you would not
 17 want me, to take you through all of it, but it goes on
 18 for several pages, from {M1/540/8—11}, but what it
 19 involves is something which is very close to what is our
 20 counterfactual 3b, which is giving CSSs a chance to
 21 populate the shopping box with their own — with their
 22 offers, or their offers from their merchants that they
 23 have selected and ranked, and Google discusses this
 24 possibility. It discusses that there may be latency
 25 issues, there may be quality issues, but in our

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1 submission, there is not much that suggests that those
 2 issues are actually insurmountable. Challenging
 3 perhaps, but not insurmountable. Maybe insurmountable
 4 within the 90-day period that they were given by the EU,
 5 but not ultimately — not possible, and indeed it
 6 beggars belief that a company of Google's technological
 7 sophistication could not have put that into place.
 8 So that brings me to the end of —
 9 THE CHAIRMAN: Sorry, an "SCU" is ...?
 10 MR PICKFORD: That is the shopping commercial unit.
 11 THE CHAIRMAN: Shopping commercial unit.
 12 MR JOWELL: Which is the shopping box.
 13 MS ROSE: So where do they say what the problems are?
 14 MR JOWELL: You will see them — there is lots of discussion
 15 in the comments, but — and we will have to go through
 16 this no doubt in evidence, but broadly speaking, you can
 17 see, if you look at, for example, the large comment on
 18 the right-hand side, they say, you know, this would be
 19 terrific, it would be:
 20 "... a great idea, assuming we can solve
 21 the technical problems!"
 22 It seems a bit surprising that Google could not
 23 solve the technical problems.
 24 Now, if I may then briefly give you my submissions
 25 on the two issues that the Tribunal has to decide after

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1 that rather long tour through some of the documents.
 2 The first is: is the abuse — has the Compliance
 3 Mechanism cured the abuse? Now, the abuse is one of
 4 self-preferencing, it is defined in Article 1 of
 5 the Commission Decision and it comprised {BA/2/241}:
 6 "... positioning and displaying more favourably, in
 7 [Google's] general search results pages, [Google's] own
 8 comparison shopping service compared to competing
 9 comparison shopping services."
 10 So the touchstone of the abuse is whether
 11 a particular — the question of whether a particular
 12 counterfactual would be lawful must always be to
 13 consider whether Google is continuing to position or
 14 display more favourably its own comparison shopping
 15 service, or part of that service, compared to competing
 16 third-party comparison services on the general results
 17 page. That assessment, we maintain, must be
 18 a substantive assessment; it cannot be that Google can
 19 in substance continue to favour its own CSS even if
 20 formally there is a superficial appearance of equal
 21 treatment.
 22 Now, Google makes a number of rather expansive
 23 declarations of its inalienable rights as a tech
 24 monopolist to its supposed full editorial and
 25 operational control of its specialised search results in

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1 its skeleton argument. I am sure you will have read
 2 those at paragraph 118 {A2/1/54} and 109 {A2/1/51}. We
 3 respectfully suggest that the tenor of those
 4 declarations suggests that Google has not fully taken on
 5 board the import of the Commission Decision.
 6 The Decision distinguishes between two markets: general
 7 search results, where Google is in a dominant position,
 8 and specialised search results, specifically specialised
 9 shopping results. Now, Google can choose whether or not
 10 it displays specialised search results. It can choose
 11 not to display them at all. As we have seen, that would
 12 be an enormous hit on its annual revenue. The effect of
 13 the Decision is that, in light of Google's dominance in
 14 general search and the special responsibility that comes
 15 with that, if Google does choose to display specialised
 16 search results on its SERP, then it cannot favour its
 17 own CSS, it must give substantive equal prominence and
 18 equal positioning and equal display to other rival CSSs.
 19 I am sorry to give Google bad news, but that is
 20 a serious constraint on its editorial and operational
 21 control of its SERP.

22 Now, the Tribunal will recall that Google's original
 23 stance was to maintain that its comparison shopping
 24 service comprised only what it called its "shopping
 25 property", and on that basis it said: well, all we need

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1 to do in order to remain in compliance is remove
 2 the links to those web pages to the shopping property.
 3 That stance was maintained right up to the witness
 4 evidence, where you will see that Mr Goodrow was
 5 instructed to consider a counterfactual on that basis.
 6 Now, that stance has been abandoned, inevitably so, we
 7 say, in the light of the Tribunal's correct findings, if
 8 I may say so, in the Preliminary Issue Trial at
 9 paragraph 43 to 62. The Product Universal and
 10 the Shopping Unit were, as the General Court also found,
 11 part of Google's CSS. As the General Court put it at
 12 paragraph 330, these grouped product results, are part
 13 of Google's CSS.

14 Now, Google makes the point that the Tribunal is not
 15 strictly bound by that finding as regards
 16 the post-Decision Period, and that is accepted as far as
 17 it goes. But for the same underlying reasons that it
 18 was the correct approach in the Decision Period, we say
 19 it is also the correct approach in the post-Decision
 20 Period. Google's Shopping Unit, whether in the era of
 21 the Product Universal or in the era of the Shopping Unit
 22 or in the era of the Compliance Mechanism and Shopping
 23 Unit has always been and continues to be in substance
 24 a shopping comparison service provided by Google.

25 Now, Google's contrary position is they say — they

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1 set it out in paragraph 153 and what they say is
 2 the Remedy, they say, does not allow anybody — anybody,
 3 including Google, to provide their own CSS services
 4 directly on Google's SERP. They say that is what their
 5 standalone site is for. The Remedy box is simply
 6 a space for all CSSs to place product ads and to promote
 7 their brand in the process. But the position that
 8 the shopping box was a CSS before the Compliance
 9 Mechanism changes but is not after simply cannot be
 10 squared with reality. One can see that visually if you
 11 simply compare the before and after. If one goes to
 12 slide 8 again {A1/3/10}, I think it is page 10 — oh,
 13 page 8 {A1/3/8}, here you see the CMU, this is
 14 the Compliance Mechanism unit, in response to a query
 15 for a Bialetti coffee maker. Now, if you then go — so
 16 that is what it looks like on the SERP.

17 If you go to the next page {A1/3/9}, you see what it
 18 looks like on Google's shopping property.

19 If you go on to the next page {A1/3/10} —

20 THE CHAIRMAN: Just a minute.

21 (Pause)

22 So {A1/3/8} is what Google calls "Remedy box", and
 23 {A1/3/9} is going into Google Shopping, which is the —
 24 what Google accepts is its CSS.

25 MR JOWELL: Yes, indeed, and {A1/3/10} is Kelkoo's CSS.

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1 Now from the users' point of view, they each serve
 2 the same function as the former Shopping Unit, and we
 3 say it looks like a comparison shopping service, it
 4 operates like a comparison shopping service and it
 5 obtains income from merchants for operating as
 6 a comparison shopping service. Just like if it looks
 7 like a duck and it walks like a duck and it quacks like
 8 a duck, it is probably a duck, so it is probably
 9 a comparison shopping service.

10 As we say in paragraph 105 of our written skeleton
 11 {A1/1/39}:

12 " ... it is Google, the operator of the [unit], who
 13 designs and runs the display of the box; Google who
 14 decides where the ads link to; Google who sets the rules
 15 and runs the auction for [the] ads; Google who [uses]
 16 the user-behaviour data [that it gets]; and
 17 (vitally) ... "

18 Most importantly of all:

19 " ... Google who decides which product offers appear
 20 in response to user queries, in what order, and how
 21 those offers are presented."

22 To paraphrase recital 191 of the Decision {BA/2/35},
 23 if one asks which entity on Google's SERP is allowing
 24 internet users to search for products and compare their
 25 prices and their characteristics, the answer is

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1 clear: it is Google and no rival CSS plays any part in
 2 any of that. What is clear beyond measure is that rival
 3 comparison shopping services certainly do not provide
 4 comparison shopping services on Google's SERP. Yes,
 5 the name Kelkoo or Pricerunner may appear from time to
 6 time in these tiny links, "By Kelkoo" or the obscure
 7 "more from" which you only get to if you click way along
 8 the line, but virtually everyone, 99%, clicks on
 9 the picture of the product, which then takes you to
 10 the merchant site, and the mere appearance of the CSS
 11 name at the bottom is pure window dressing.
 12 PROFESSOR SMITH: And that is true of Google Shopping as
 13 well as the other CSSs?
 14 MR JOWELL: Yes, it is.
 15 PROFESSOR SMITH: So the 99% — so all the CSSs, including
 16 Google Shopping, get 1% of the clicks —
 17 MR JOWELL: 1%, correct.
 18 PROFESSOR SMITH: — from what's shown on {A1/3/8}.
 19 MR JOWELL: Correct. Correct. Google Shopping Europe, yes.
 20 The role, as I think I have already discussed,
 21 the role of the CSSs is just purely as intermediaries,
 22 as agents for the merchants.
 23 THE CHAIRMAN: That is pretty much the conclusion that
 24 the Berlin court came to.
 25 MR JOWELL: That is absolutely right, yes. Indeed, let us

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1 come on to that now, actually, I think. But the
 2 position really is also analogous to the situation
 3 recognised by the General Court in the Decision when
 4 Google sought to argue that CSSs could participate in
 5 the Shopping Unit by adding a direct purchase
 6 functionality or acting as intermediaries for placing
 7 merchants' paid product results in the Shopping Unit,
 8 and the Decision just rejected that argument on
 9 the basis that CSSs should not have to change their
 10 business model in order to participate.
 11 So let me show the German court —
 12 THE CHAIRMAN: The General Court, have you got
 13 the reference?
 14 MR JOWELL: Oh, forgive me. That is General Court,
 15 paragraph 348 to 351, which is in {BA/3/61–62}. You
 16 also see it in recital 439, which is at {BA/2/131}.
 17 THE CHAIRMAN: The recital in the Decision? Recital of
 18 the Decision?
 19 MR JOWELL: Recital of the Decision. Oh, 439.
 20 THE CHAIRMAN: Just a minute.
 21 MR JOWELL: Now, the German court, as you said, in
 22 the Idealo Producto reached the same conclusion, that
 23 the Compliance Mechanism did not change Google's
 24 self-preferencing. I am sure you have read that in
 25 full, but I will just show you one page of it. It is at

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1 {P/2/40}. You see —
 2 THE CHAIRMAN: I should say, I have not read it in full.
 3 MR JOWELL: Oh, forgive me.
 4 THE CHAIRMAN: I have dipped into it. A lot of it is on
 5 points that are either irrelevant or on damages
 6 inadmissible.
 7 MR JOWELL: Yes ...
 8 THE CHAIRMAN: Yes, page 40.
 9 MR JOWELL: Oh, yes, at the top:
 10 "The remedial measures submitted by the Defendants
 11 do not meet these requirements. Google's comparison
 12 service continues to be preferentially positioned and
 13 presented on the general results pages while at the same
 14 time downgrading the results of competing comparison
 15 [shopping] services.
 16 "Google continued to present its comparison service
 17 in its general results page in Shopping Units even in
 18 the period from 28 September 2017. Neither
 19 the positioning of the alleged remedial measure, clearly
 20 visible in the upper part of the general results page,
 21 nor its presentation in an enriched format has changed
 22 compared to the simple presentation of the other
 23 results.
 24 "The Shopping Units continue to be perceived by
 25 users to the Chamber's conviction as a form of

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1 presentation of Google's comparison service. According
 2 to the relevant definition, comparison services are
 3 specialised search services that, on the one hand,
 4 enable Internet users to search for products in
 5 the offers of a large number of online sellers and
 6 dealer platforms and to compare their prices and
 7 features, and, on the other ... provide links that lead
 8 to the websites of [those] dealers or platforms ...
 9 The Grouped product results presented in the Shopping
 10 Units Remedy this task in terms of content and
 11 function ..."
 12 I think "Remedy" is probably the wrong — we believe
 13 is probably the wrong word there. It may be "fulfil":
 14 "... this task in terms of the content and function
 15 directly on the general results page of Google.
 16 The Shopping Units still show the user the images of
 17 various products, contain information on the price and
 18 the shipping costs (see the corresponding displays
 19 in ... "
 20 And so on:
 21 "... and lead via links to the websites of
 22 the product providers. It is not apparent that from
 23 the user's point of view the responsibility for
 24 the 'box', i.e. the Shopping Unit as such, would be
 25 attributed not to Google, but to the product providers

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1 or the advertising customers. Users are on a Google
2 website and the functions of the algorithms and
3 the design of the 'boxes' are based on the general
4 results page ... according to the expectations of
5 the users — on Decisions by Google. The organisational
6 separation of Google Shopping Europe has no influence on
7 this perception."

8 And so on.

9 Now, incidentally, it is not — there is much more
10 detailed reasoning that follows as well.

11 Now, incidentally, it is not correct that the French
12 judgments have reached a different view on
13 the post-Decision Period, it is just that nobody alleged
14 a Post-Decision abuse in those cases so the point did
15 not arise.

16 Now, the economic expert instructed by
17 the Claimants, Mr Hunt, addressed this issue in, as you
18 would expect, a somewhat more structured way and his
19 economics framework starts, rightly, in our submission,
20 with the concept of competition on the merits and
21 non-discriminatory access. He identifies in his first
22 report, based on an understanding of what a CSS consists
23 of and what services it provides, he identifies three
24 conditions that must be satisfied for there to be
25 competition on the merits from an economic perspective,

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1 which is non-discriminatory access to users,
2 a non-discriminatory ability to display their functional
3 capabilities to users and non-discriminatory access to
4 economically viable traffic. We summarise, in
5 paragraph 111 of our opening submissions {A1/1/41},
6 why he concludes, in summary why those conditions are
7 not met. You can also see it simply intuitively as well
8 for yourselves from the images and from the points that
9 I have been making.

10 Now, what does Google say in response? Well, its
11 main argument appears to be a comparison with text ads,
12 which you see in paragraph 145 {A2/1/63} of its written
13 opening, and it claims that all the points that we make
14 apply equally to text ads. To be clear, we do not
15 contend that text ads are part of Google's CSS. But in
16 any event, Google have presented a table in their
17 skeleton argument purportedly comparing the features of
18 text ads, the Remedy and a CSS. Now, many of the rows
19 in that table focus on things that are essentially — on
20 features that are not core to a CSS service. Others of
21 the entry are inaccurate. For example, row 10 claims
22 that the "Remedy Box Ads", as they put it, "Provides
23 specific price comparison functionality". We are just
24 baffled by that. I mean, clearly that is wrong. As you
25 can see in light of the images that I have shown you, it

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1 is providing a CSS functionality.

2 Now, Google — as I have said, we do not maintain
3 that text ads are part of Google's CSS and that is for
4 the simple reason that text ads are not offers grouped
5 so as to enable — specifically to enable the comparison
6 of similar products and their prices. There are
7 typically no images in text ads, there may not be
8 pricing, there is certainly no systematic laying out of
9 text ads for the same or similar products side by side
10 for the purpose of comparison. By contrast, the Remedy
11 shopping box does fulfil the function to users of
12 enabling them to compare grouped products and their
13 prices.

14 Now, Google also makes a distinction in
15 paragraph 147 {A2/1/64} between specialised shopping
16 results provided by a general search engine and
17 comparison shopping services. I am afraid we simply do
18 not follow this part of the argument. We will have to
19 hear what Mr Pickford has to say about it. But if it is
20 suggested that Google can somehow sidestep
21 the Commission's Decision by the device of renaming its
22 CSS the provision of specialised shopping results by
23 a general search engine, then obviously we must
24 disagree. That is just a sleight of hand based on
25 a false assumption. What must matter is what is

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1 the substance of the service provided. So we say that
2 it is clear from every perspective that the abuse
3 remains ongoing and the Compliance Mechanism has not
4 cured it. Google continues to favour its own CSS on its
5 SERP.

6 That brings me then to issue 2, which is
7 the appropriate counterfactual. Now, openings are not
8 the traditional place for detailed submissions on
9 the law, and in any event I do not think time would
10 permit me to go into those. But let me — we do set out
11 in paragraphs 120 to 122 of our opening submissions
12 {A1/1/45–46} certain, we would submit, uncontroversial
13 propositions on the role of counterfactuals in
14 competition claims and indeed more generally. We say,
15 first, that the counterfactual in a damages claim
16 requires an assessment of what would have happened in
17 a hypothetical case where the tort was not committed and
18 purged not only of the abusive conduct and its
19 consequences, but also of any other illegal behaviour.

20 Secondly, we submit that the assumptions as to what
21 would have happened in the counterfactual world must be
22 realistic, and when you are choosing between a number of
23 scenarios, the Tribunal should select — adopt the most
24 reasonable or most realistic scenario.

25 Thirdly, we say that in tort cases,

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1 the counterfactual is not to be assessed on
 2 the assumption that the defendant would have performed
 3 its obligation in a manner most beneficial or least
 4 burdensome to itself. We respectfully say that that
 5 last proposition is not —
 6 MS ROSE: If it is —
 7 MR JOWELL: Yes.
 8 MS ROSE: — lawful —
 9 MR JOWELL: Yes.
 10 MS ROSE: — why would it not do the thing that is most
 11 beneficial to itself?
 12 MR JOWELL: Well, it might — well, you have to look at what
 13 it would be most likely to do, and that might well be
 14 the most — that might be the most beneficial for
 15 itself, in many cases, I accept that. But what you do
 16 not do, certainly, is you do not say, "Well, what is it
 17 — what would it have done in order to minimise
 18 the award of damages to the claimant". In the case like
 19 that, that is a very, very big difference, because, as
 20 you have seen, for example, if they say, "Well, we would
 21 have taken away the Shopping Unit", well, that would
 22 have caused \$1.6 billion in harm to Google. So they
 23 would not in fact have done that and they cannot pretend
 24 that they would have done, in our submission.
 25 MS ROSE: So in fact you are just saying that is not

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1 necessarily the most beneficial thing for them?
 2 MR JOWELL: Well, that is fair, yes, indeed. In the case of
 3 a commercial organisation, I accept that it would have
 4 — most of the time, it will operate in its own
 5 long-term, commercial strategic interests. I accept
 6 that. But that is not the same as saying it would have
 7 operated in such a manner as to minimise the payment
 8 that it must make to the particular claimant, because
 9 there are wider commercial considerations.
 10 PROFESSOR SMITH: What is the difference between the second
 11 and third point? I am not following. Among the lawful
 12 counterfactuals —
 13 MR JOWELL: Yes.
 14 PROFESSOR SMITH: — is it not most realistic to assume that
 15 the least harmful would be chosen?
 16 MR JOWELL: It may be, in the long run, in terms of their
 17 long-term commercial interests, I accept that, yes.
 18 I do accept that. But the point that I take aim at is
 19 the suggestion that — what I do not accept is somehow
 20 the suggestion that they would have done that which
 21 somehow just happens to minimise the damages award,
 22 effectively.
 23 MS ROSE: That is really a different point, is it not —
 24 MR JOWELL: It is.
 25 MS ROSE: — that you are saying that is not necessarily

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1 the most beneficial thing for them?
 2 MR JOWELL: I accept that. I accept that.
 3 THE CHAIRMAN: It is really a subset, as it were, or
 4 sub—point of your second consideration.
 5 MR JOWELL: It is. Yes, it is.
 6 Now, we may have to have a debate about
 7 Lord Leggatt's statement in the *Rukhadze* judgment,
 8 paragraph 163 {AB2A/23/60}, in which he says that one
 9 must:
 10 " ... construct a hypothetical scenario in which
 11 the defendant's conduct is changed to the minimum extent
 12 necessary to achieve compliance with the duty."
 13 Now, we accept that proposition, but it must be
 14 properly understood. What it means is that in
 15 constructing the hypothetical, one does not expect
 16 the defendant to go beyond what is required by the duty
 17 in question. So in the present case, we would accept,
 18 for example, that, yes, Google was required to do that
 19 which established equality of treatment between its CSS
 20 and rivals. It was not required to, say, favour rivals
 21 over its own. But what he does not say, Lord Leggatt, in
 22 the *Rukhadze* case, is that where the counterfactual
 23 consists in a range of different possible outcomes,
 24 the defendant is to be assumed to have performed its
 25 obligations in the manner most likely to minimise its

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1 own damages.
 2 Now, in determining the question of what would be
 3 most realistic for Google to have done, we have to look
 4 at Google's financial incentives and also their actual
 5 behaviour and I will come on to that briefly. But
 6 before I do, the other legal issue I should just
 7 identify for you — and this, again, will be a question
 8 for submission, I think in closing submissions — is
 9 whether the Tribunal should take the counterfactual that
 10 is contained in the Decision and in the European courts
 11 for present purposes. We say it is obliged to do so in
 12 law, because otherwise one would risk a Decision that
 13 would run counter to the Commission Decision contrary to
 14 article 16 of Regulation 1/2003, and we submit that
 15 the identification of the counterfactual is a finding
 16 implicit in the Commission's Decision as interpreted by
 17 the European courts. Capability to affect competition
 18 is an essential ingredient in a finding of abuse of
 19 dominance, and the Decision, as interpreted by
 20 the European courts, used a counterfactual which removed
 21 both limbs of the abuse to ascertain the existence of
 22 such effect, and the European courts expressly rejected
 23 the contention that the appropriate counterfactual was
 24 one in which only one limb of the two inextricably
 25 linked elements of the abuse was removed. So we say an

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1 outcome that rejected that counterfactual would
2 contravene article 16(1), because it would undermine and
3 run counter to the relevant Commission Decision.

4 Now, our primary case, of course, in relation to
5 Google's proposed counterfactual is simply, well, the —
6 is that if the abuse is unlawful, then of course it
7 would have been unlawful for the Compliance Mechanism to
8 have been applied from 2008, and therefore the two
9 issues therefore in a sense come together at that point.
10 Of course, the Tribunal must adopt a counterfactual that
11 is lawful, and so we say, our primary case is, it should
12 adopt a counterfactual in which both limbs of the abuse,
13 the demotion and the promotion, are stripped out. That
14 was the approach of the French courts in the Wolfson
15 judgment — forgive me, the Dutch courts in the Wolfson
16 judgment, which I will not take you to in the interests
17 of time, but it is at {P/1/8–10}.

18 Now, part of Google's written opening appeared to be
19 an attempt to re-litigate arguments that it has already
20 lost decisively in front of the European courts, and we
21 say that that is not legitimate, and in any event we say
22 that the European courts were right to find that the two
23 aspects of the abuse, the demotion and the promotion,
24 were indeed inextricably interlinked. The abuse was
25 a pincer movement by Google and it is artificial to

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1 suppose that Google would have done one without
2 the other. If it had not promoted itself, it would not
3 have demoted the others as it did. If it had not
4 demoted the others as it did, it still could not have
5 promoted itself in the unequal way that it did.

6 Now, even if we are wrong about that point of law,
7 we say that the Tribunal cannot and should not adapt
8 the counterfactual proposed by Google for two main
9 reasons, each of which are independently sufficient —
10 or further independent reasons sufficiently to reject
11 it. The first is the one I have already mentioned,
12 which is that that counterfactual is unlawful. But even
13 if we are wrong about that, the Compliance Mechanism
14 counterfactual is actually not realistic as at least
15 something that Google could or would have done in 2008,
16 and there are two aspects to that.

17 First of all, it is not realistic because
18 the Compliance Mechanism is, by its very nature, a paid
19 inclusion model, it is an auction model: merchants have
20 to pay to be included in the shopping box. So under
21 the Remedy counterfactual that Google has been putting
22 forward in these proceedings, at least since
23 December 2025, a paid inclusion model would have to have
24 existed from 2008, right from the outset of the abuse.
25 The reality, of course, the actual, is that Google gave

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1 away its slots for free in the Product Universal, and
2 that persisted for the first four years of the abuse.
3 It is only in 2013, as you have seen, that it moved to
4 the paid model. Indeed, product listing ads were not
5 I think even invented by Google until about 2010.

6 Now, the fact that the clicks from Google Product
7 Search and the Product Universal were free for merchants
8 was not an oversight on the part of Google. They were
9 not sort of missing out on this revenue source that they
10 could have had. It was an important comparative
11 advantage at that time in incentivising many merchants
12 to sign up and provide their feeds to Froogle and then
13 Google Product Search. It was a point of comparative
14 advantage between them and rival CSSs. So you have seen
15 that rival CSSs had gained a significant march on Google
16 in the comparison shopping area; they had signed up very
17 comprehensively large numbers of merchants. Google had
18 to now go to those same merchants and persuade them to
19 come to its — Froogle or its successor, and the way
20 they did that was by enticing them with, "Well, you do
21 not have to pay for any clicks with us". But of course,
22 once they had got as many merchants as possible, once
23 they had demoted its rivals on the SERP, it could then
24 move, four years later, to the paid model.

25 Now, we say it is implausible to suppose that

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1 the Remedy would have been adopted in 2008, because it
2 would have been a paid service.

3 Now, Google's response to this is to be found in
4 paragraph 216 {A2/1/91}, and what it says is that
5 the logic underpinning free, then paid, is that the free
6 service builds a client base via merchants for yourself
7 and not for your competitors. They say that logic
8 entirely breaks down once rivals must be given access to
9 valuable resource instead. Well, that is superficially
10 appealing until you think about what the Compliance
11 Mechanism actually does, because under the Compliance
12 Mechanism, it is not really CSSs that gain access to
13 the SERP, it is certainly not the CSSs that ultimately
14 pay the auction fee, it is the merchants that appear and
15 the merchants that pay; the CSSs are just conduits. So
16 if Google had sought to impose its Remedy in 2008 and
17 charge via an auction, then it is the merchants that
18 would have been charged, and many merchants may well
19 have chosen not to pay for such traffic at all and that
20 would have diminished the attraction of Google for
21 shopping starts.

22 But even supposing the merchants were prepared to
23 pay back in 2008, the question would then be: well,
24 where would that leave Google Product Search? Where
25 would it have left that successor to Froogle,

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1 the separate website or the property, whatever name we
 2 call it? Because absent — if you imagine — if we go
 3 back and we imagine we are in 2008, and now Google is
 4 complying, it is compliant, and it — how would
 5 Google Product Search, starting as it was from scratch
 6 out of the phoenix Froogle in 2007, how would it have
 7 succeeded if it could not provide any free service and
 8 had lost its preferential access to the SERP, on
 9 Google's theory? So Google Product Search would have
 10 been compelled to also charge merchants, just as all
 11 the other CSSs were doing, but no doubt a situation
 12 where it was free for Google Product Search but the CSSs
 13 were being charged. So we say, if they were right that
 14 there would have been a charging mechanism back in 2008,
 15 Google Product Search would never have succeeded in
 16 capturing any meaningful market share and effectively
 17 merchants would all have used rival CSSs as a means to
 18 access the shopping box. Not all, the vast majority.
 19 MS ROSE: Does that not mean it is to your advantage to
 20 adopt Google's counterfactual?
 21 MR JOWELL: Not entirely. But it may be that, actually, if
 22 they were right that the Remedy cured the abuse in that
 23 sense, which we maintain it does not and that is not in
 24 our interests to accept, that it is not, in our
 25 submission, right, but if they were right, then

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1 actually, if they had started charging, Google Product
 2 Search would certainly have been nowhere, and that might
 3 actually be to our advantage than as compared to a free
 4 service. I mean, we have not run the numbers. But the
 5 bottom line is that Google must make its choice. They
 6 either have to accept that they would not have charged,
 7 or they have to accept that, if they had charged,
 8 Google Product Search would have got nowhere. So we
 9 look forward to hearing what their choice is.
 10 Now, the second objection to the Compliance
 11 Mechanism is that it assumes that Google would have
 12 exclusively used product listing ads in its
 13 shopping box. But in reality, as you have seen, in that
 14 period 2008 to 2012, Google actually sent over half of
 15 its users to CSSs and it used — it was very keen on
 16 the catalogueue version. Google addresses this point in
 17 its skeleton at paragraph 217 {A2/1/91}. If I could
 18 just read it out, because it is so remarkable in a way.
 19 They say:
 20 "The Claimants rely on the fact that: (i)
 21 a so-called 'de-linking' experiment in late 2008/early
 22 2009 showed users had a good experience (relative to an
 23 early, very basic version of the PU) when Google sent
 24 them to its CSS page; (ii) Google introduced
 25 the catalogueue variant in 2009; and (iii) in the PU

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1 era, 40%–60% of clicks went to Google's CSS (as opposed
 2 to merchants)."
 3 They say this:
 4 "This only shows that users liked Google's CSS to an
 5 extent that warranted them linking to it around half
 6 the time. But the contemporaneous evidence shows
 7 that: (i) rival CSS (including the Claimants) had;
 8 enormous problems with their website quality; (ii) users
 9 complained to Google about rival CSS results on
 10 the SERP; and (iii) many rival CSS fell foul of Google's
 11 quality algorithms indicating a poor user experience ...
 12 would have been directly contrary to Google's aims of
 13 improving user experience to send users to rival CSSs."
 14 Then they say:
 15 "Evidence of the ... poor performance of CLAs during
 16 the Post–Decision Period ..."
 17 Post–Decision Period, note:
 18 "... confirms this overall picture ..."
 19 We say that is, with respect, the absolute height of
 20 unjustified vanity on the part of Google. As regards
 21 the last sentence, it is wholly uninformative to
 22 consider the comparative performance in 2022 of CLAs
 23 going to CSSs that have been degraded by well over
 24 a decade of underinvestment caused by the diversion of
 25 traffic caused by the abuse, and what

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1 the contemporaneous evidence shows is that at the time
 2 when the abuse started, Google itself regarded many of
 3 the larger CSSs as better quality, certainly at least as
 4 good quality as its own comparison shopping service.
 5 There is therefore no basis for supposing that users
 6 would have rejected a catalogueue view box that was
 7 linked to rival CSSs and not just to Google's own. Of
 8 course, you would have a selection based on an objective
 9 ranking mechanism, you would have some quality controls,
 10 but there is no reason to suppose that users would have
 11 preferred — somehow innately preferred Google's
 12 comparison shopping service at that time.
 13 So we say, in fact, that if you think about it,
 14 instead of giving users a link just to Google's full
 15 comparison shopping service, it would have been better
 16 to give users a link to a choice of the best CSSs on
 17 the market. What could be better than that, than
 18 a catalogueue view where you have a choice of CSSs,
 19 the top CSSs? So we say that even if the Remedy were
 20 lawful as a counterfactual, which we obviously say it is
 21 not, it would inevitably have taken a very different
 22 form back in 2008, it would have either been a free box
 23 without an auction, or if there had been a paid box
 24 based on an auction, one can anticipate that Google
 25 Product Search would have had a tiny share of the market

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1 and the box would have been populated almost entirely
 2 with rival CSSs.
 3 Secondly, for the majority of the time, the Shopping
 4 Unit would not have contained boxes with links to
 5 merchants, but would instead have contained boxes akin
 6 to the catalogue view boxes, but with links to
 7 a selection of CSSs. Rather —
 8 MS ROSE: Do you say that is unlawful, I mean, what you have
 9 just described?
 10 MR JOWELL: Well, yes, you are quite right. You are right,
 11 I should correct that. If they had in fact had
 12 effectively a catalogue view, a proper catalogue
 13 view for all CSSs, then —
 14 MS ROSE: Or quality control systems.
 15 MR JOWELL: Or with quality controls, that, we accept, would
 16 have been lawful, and that indeed is our
 17 counterfactual 3a. Forgive me, you are absolutely
 18 right.
 19 I think, against that, let me briefly come to
 20 outline the various alternative counterfactuals that we
 21 contend for. Our primary counterfactuals, 1 and 2, you
 22 will see set out in paragraph 144 of our skeleton
 23 argument {A1/1/55}, and there, that involves stripping
 24 out both demotion and promotion. Effectively,
 25 the difference between 1 and 2 is that counterfactual 2

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1 includes enhanced display formats, so they would have
 2 had some pictures in the organic search and some
 3 highlighting and so on.
 4 Now, a visual representation of scenario 1 is at —
 5 you can see it is in Mr Hunt's report. It is at
 6 {I2/1/205}. If we could focus it there. Thank you.
 7 So you would simply have had the CSSs featuring in
 8 the blue links.
 9 Then if one goes to —
 10 THE CHAIRMAN: Just a minute.
 11 MR JOWELL: Yes.
 12 THE CHAIRMAN: 205.
 13 (Pause)
 14 So this is figure 11.1 and these are all just blue
 15 links to CSSs —
 16 MR JOWELL: Well, and to other things as well but —
 17 THE CHAIRMAN: — or other things, like eBay.
 18 MR JOWELL: Yes, or information sites. That is the sort of
 19 simplest version.
 20 Scenario 2 you see in our visual annex, which is in
 21 {A1/3/15}. You can see, again, you have got — you can
 22 see there that the enhanced features with photographs
 23 and information and so on, rather like the shopping box,
 24 are based solely there on relevance.
 25 MS ROSE: It is quite hard to read this.

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1 MR JOWELL: Yes.
 2 MS ROSE: Are these — the top box, are those links to
 3 merchants' sites or to CSSs?
 4 MR JOWELL: I think they are links to whoever would have
 5 come top in the relevance results of a general search.
 6 THE CHAIRMAN: But whoever among CSSs?
 7 MS ROSE: Is it the product or is it the CSS?
 8 MR JOWELL: Yes, I think it is, yes — oh, yes, it says:
 9 "Comparison Shopping for digital camera."
 10 So, yes, it would have been, yes.
 11 MS ROSE: What?
 12 MR JOWELL: It would have been CSSs, you are absolutely
 13 right.
 14 MS ROSE: So the horizontal box, where it says, "Based
 15 Solely on Relevance" —
 16 MR JOWELL: Yes.
 17 MS ROSE: — each of those links is to a CSS, not to
 18 a merchant website; is that right?
 19 MR JOWELL: Yes, I believe so, yes.
 20 MS ROSE: Because that is why it says "Comparison Shopping
 21 for digital cameras".
 22 MR JOWELL: Yes, you are absolutely right, yes.
 23 MS ROSE: So you have a box called "Comparison Shopping".
 24 MR JOWELL: That is right.
 25 MS ROSE: And then under that, you have individual products

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1 in the vertical search results?
 2 MR JOWELL: Yes.
 3 MS ROSE: Is that right?
 4 MR JOWELL: Yes, that is correct. Well, in the vertical
 5 search result —
 6 MS ROSE: They are all generic, they are not individual
 7 products.
 8 MR JOWELL: Yes. Yes.
 9 There is a further version, if you look at the next
 10 page — sorry, the next page {A1/3/16}. You see there,
 11 here is another version of it.
 12 MS ROSE: Sorry, where are you now?
 13 MR JOWELL: It is on the screen. It is page 16.
 14 MS ROSE: Page 16?
 15 MR JOWELL: Yes.
 16 Here, this is another version of it, where you have
 17 just got basically the ten blue links but with enhanced
 18 — with some additional imagery, and information.
 19 MS ROSE: So there is no box here at all?
 20 MR JOWELL: There is no box here at all.
 21 MS ROSE: Is the difference simply that, in the first one,
 22 the top five search results by relevance are put into
 23 a box?
 24 MR JOWELL: (Overspeaking — inaudible) — yes — well,
 25 I think it is — yes, I think it is the top five

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1 comparison shopping searches.
 2 MS ROSE: Top five CSSs by relevance are put into a box?
 3 MR JOWELL: Yes.
 4 MS ROSE: The second one, the top five CSSs are just
 5 vertically listed?
 6 MR JOWELL: In the SERP, but with enhanced features, yes,
 7 exactly.
 8 MS ROSE: But do they all still take precedence over
 9 individual product adverts?
 10 MR JOWELL: No, and indeed they do not — they just
 11 simply — it may be that individual products will
 12 sometimes come first in the blue links, if they happen
 13 to be the most relevant.
 14 MS ROSE: But is that so under both of these variants or
 15 only page 16?
 16 MR JOWELL: I think it is only 16. It seems as though,
 17 I think in variant 15, you are quite right —
 18 MS ROSE: So variant 15 always preferences the CSS?
 19 MR JOWELL: It does.
 20 MS ROSE: Variant 16 is just whatever is the most relevant
 21 search result for digital camera?
 22 MR JOWELL: Yes, that is correct.
 23 MR PICKFORD: Sorry, I do apologise for rising, it is simply
 24 in relation to a technical issue. The presentation that
 25 we had in relation to what everyone can see has changed.

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1 We used to be able to see the precise reference for what
 2 page was being shown. Something has gone a bit wrong
 3 with that now.
 4 MS ROSE: Are you talking about the transcript?
 5 MR PICKFORD: No, no, on the screen. So we have an evidence
 6 display, and the evidence display used to set out —
 7 used to be a different display where you could actually
 8 see the reference to the evidence about five minutes
 9 ago, and now it has changed.
 10 Oh, there we go, we are back again. Thank you.
 11 MS ROSE: Hurrah!
 12 THE CHAIRMAN: (Off microphone) I am just seeking to
 13 understand it. 15 —
 14 MR JOWELL: Yes.
 15 THE CHAIRMAN: (Off microphone) — you put in "digital
 16 cameras" as your search, you get a box. The box is, as
 17 it says, "Comparison Shopping".
 18 MR JOWELL: Yes.
 19 THE CHAIRMAN: (Off microphone) There, along a carousel, are
 20 all comparison shopping sites or equivalent in order of
 21 relevance?
 22 MR JOWELL: Yes, the Google general search algorithm.
 23 THE CHAIRMAN: (Off microphone — inaudible).
 24 MR JOWELL: It does, it does. But it is a collection of
 25 algorithms.

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1 THE CHAIRMAN: (Off microphone — inaudible).
 2 MR JOWELL: Yes, indeed, well, they would have got rid of
 3 that, because they have to have people — they want to
 4 have people shopping. Well, they want to have people
 5 who are coming for product searches onto Google.
 6 THE CHAIRMAN: (Off microphone) They could devise an
 7 algorithm which could objectively put — (off microphone
 8 — inaudible).
 9 MR JOWELL: Yes, indeed.
 10 THE CHAIRMAN: (Off microphone) Then the — then 16 — there
 11 is no box at all.
 12 MR JOWELL: That is right.
 13 THE CHAIRMAN: (Off microphone — inaudible) — you get an
 14 image or not, is that related to whether you are a CSS
 15 or just anyone? How does ...
 16 MR JOWELL: Well, I think it — one has to accept that, on
 17 this scenario, it would be Google that would choose and
 18 it seems likely that it would have — you know, we
 19 accept that Google has got editorial control to this
 20 extent, that Google would have chosen images or not
 21 images based upon what it thought would bring — be most
 22 useful for users. So presumably they would have chosen
 23 to have — on this scenario, they probably would have
 24 chosen to have photographs of the CSSs, possibly also
 25 for individual merchants.

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1 MS ROSE: Is the difference between your scenario 1 and
 2 the alternative scenario 2 at page {A1/3/16} simply
 3 the fact that there are photographs?
 4 MR JOWELL: Effectively. Photographs and maybe some
 5 colouring, some —
 6 MS ROSE: Right.
 7 MR JOWELL: — additional information.
 8 MS ROSE: Because scenario 1 is just general search?
 9 MR JOWELL: That is right.
 10 MS ROSE: But you are not pushing that?
 11 MR JOWELL: No, we are not pushing that.
 12 Now, if you are against us in terms of there having
 13 to be both elements of the abuse removed and one assumes
 14 that the demotion would have continued, then we are into
 15 the realms of an equal shopping box, and here we propose
 16 two scenarios, two possible lawful forms. The first is
 17 our 3a, an example of which you can see at {A1/3/17},
 18 the next page. Essentially, 3a is a variant — it is
 19 what we were discussing earlier, which is a variant of
 20 the catalogue version, but which was perceived, as you
 21 saw, to be very popular with users, but it is for all
 22 comparison sites, not just going to Google, Google's
 23 shopping page.
 24 Now, the catalogue view is also similar in
 25 a certain respect to the subsequent CLAs that you have

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1 seen.
2 THE CHAIRMAN: Sorry, I am being slow. The one on
3 {A1/3/17}, it is hard to compare because of course it is
4 a different product search question, but how does that
5 differ from the one on page {A1/3/15}?
6 MR JOWELL: Oh, yes, well, it differs in the sense that you
7 do not have the removal — obviously there is
8 a resemblance, but on this — on our version, you do not
9 have the removal of the demotions in 3a on page
10 {A1/3/17}.
11 PROFESSOR SMITH: So page 17 might include boxes from sites
12 that otherwise would have been demoted and not appeared?
13 MR JOWELL: Yes. Yes.
14 PROFESSOR SMITH: So the boxes on {A1/3/15} have been
15 subject to quality control or demotion, whatever you
16 want to call it, and the boxes on {A1/3/17}, slide 15,
17 have not been subject to —
18 MR JOWELL: No, they can both be subject to quality control,
19 but the difference is really in the rest of the search
20 results page. So the organic — in 15, one is removing
21 demotion and one is removing — and one is effectively
22 changing — removing promotion of Google's
23 comparison shopping site. But in 15, if you imagine
24 there were — sorry, on {A1/3/17} — I am getting
25 confused between ... — on page 17, if you imagine that

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1 there were below this, where you would have your ten
2 organic links, they would have been subject to all of
3 the algorithms that Google had in the actual, whereas on
4 the two pages earlier {A1/3/15}, the demotion algorithms
5 would have gone.
6 THE CHAIRMAN: But the demotion algorithms become a bit
7 irrelevant if they are all — all the sites in the box.
8 MR JOWELL: Indeed so, which is in a way why we say, whether
9 it is {A1/3/17} or {A1/3/15} is not going to make much
10 economic difference, you still get the same kind of
11 click through.
12 MS ROSE: So if there is a demotion algorithm operating
13 effectively to push you right out the bottom of
14 the general search, what are the criteria based on which
15 you get ranked in the box on page {A1/3/17}? You are
16 saying it is not paid for, right?
17 MR JOWELL: Well, we have actually left that open.
18 MS ROSE: I thought your case was that it would have to be
19 free?
20 MR JOWELL: Well, no, we have said that — actually, Mr West
21 may have a slightly different take on this, but our
22 position is — primary position is that it would either
23 be based on relevance or, if there was some form of
24 payment, it would have to be based on objective criteria
25 that did not have the same effect of favouring Google.

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1 But we do not exclude the possibility that you might
2 have had a version of 3a in which the CSSs had to pay.
3 THE CHAIRMAN: (Off microphone — inaudible) — a user clicks
4 on (off microphone — inaudible).
5 MR JOWELL: Yes.
6 THE CHAIRMAN: (Off microphone — inaudible).
7 MR JOWELL: Google gets no payment from its organic results.
8 All it gets is payment from the text ads or from
9 the shopping box.
10 So the answer is our primary case is in
11 the counterfactual, if we go back to {A1/3/17}, we say
12 one has to grapple with this question of, well, what
13 would have happened in 2008 to 2012. We say, well, it
14 is likely, actually, that you would have had something
15 like this kind of catalogue version for everyone and
16 that there would not have been — there would not at
17 least have been a payment for the first four years, as
18 there was not in the actual. What would have happened
19 after that is more difficult to ascertain, but we do not
20 exclude — but we do not say it would be unlawful if
21 the payment mechanism was objective and did not have, as
22 I said, the same effect as favouring Google. We do not
23 say that would necessarily have been unlawful. But they
24 are two different questions: what would have been
25 lawful; and what would Google actually have done? We

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1 certainly say that for the first four years it is
2 unlikely they would have charged.
3 PROFESSOR SMITH: There would have needed to have been some
4 kind of competition for getting places in this carousel
5 in both pictures and that would involve some assessment
6 by Google of the quality of what is being offered and
7 the likelihood of it generating clicks and so on.
8 MR JOWELL: I entirely accept that. I entirely accept that.
9 And of course that was always the case also in
10 the general SERP, because they were assessing.
11 Now, the other counterfactual —
12 THE CHAIRMAN: (Off microphone) I am sorry, before you
13 proceed, it is quite important.
14 MR JOWELL: No, it is.
15 THE CHAIRMAN: (Off microphone) On page {A1/3/17}, the order
16 in which they appear (inaudible) —
17 MR JOWELL: Yes.
18 THE CHAIRMAN: (Off microphone) — would that be done by —
19 MR JOWELL: Well, that is exactly the point we were just on.
20 We say that it would have — we accept that it could
21 have — that in principle, bidding — a form of bidding
22 could have been lawful, but we also say that it is
23 unlikely that in those first four years there would
24 actually have been payment, because they were trying
25 to —

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1 THE CHAIRMAN: (Off microphone — inaudible).
 2 MR JOWELL: Yes. But we accept that in principle — and
 3 Mr West may take a different position on this, but we
 4 accept that in principle, provided it did not have
 5 the effect of favouring preferencing Google indirectly,
 6 you could have had some form of bidding.
 7 MS ROSE: (Off microphone) The effect of that would have
 8 been that Google Shopping (inaudible).
 9 MR JOWELL: Correct. Correct. As a result — also that —
 10 MS ROSE: On the other hand, they would have got a share
 11 from all the clicks through to the other CSSs?
 12 MR JOWELL: That is correct, but with CSSs in a situation
 13 where they were not reduced to mere ciphers, CSSs would
 14 have had some market power, particularly the large ones,
 15 and they would have been able to properly differentiate
 16 themselves and invest in their services and so on.
 17 THE CHAIRMAN: (Off microphone — inaudible).
 18 MR JOWELL: Yes, they could have a go.
 19 THE CHAIRMAN: (Off microphone — inaudible) — in the way
 20 they have in the end, under their Remedy they also then
 21 bid for inclusion —
 22 MR JOWELL: Yes.
 23 THE CHAIRMAN: — in your —
 24 MR JOWELL: Yes.
 25 THE CHAIRMAN: — in your (inaudible).

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1 MR JOWELL: Yes, provided they were not favouritised in any
 2 way.
 3 THE CHAIRMAN: Yes.
 4 MR JOWELL: But we say they would have got — likely really
 5 struggled, as Froogle struggled without —
 6 THE CHAIRMAN: Why do you say that? Because?
 7 MR JOWELL: Well, because you have to imagine that —
 8 I mean, in the actual, of course, they got a huge boost
 9 by being immediately promoted into the shopping box and
 10 being the only ones whilst all their rivals were
 11 excluded, right? So here now you have got a situation
 12 where you are in 2008, the incumbents, as it were, are
 13 all of these large CSSs, NexTag, BizRate, Kelkoo, Ciao
 14 and so on, and Google is desperately trying to play
 15 catch-up and it does not have the merchants. Now,
 16 the way — it does not have — it has not signed on
 17 the merchants in the same way that it does not have
 18 those merchant relationships that the other CSSs had
 19 already obtained, it also does not quite have
 20 the quality of service. But if you then — now, one of
 21 the ways that Google got those versions was, well, it is
 22 for free on our service, whereas everybody else has to
 23 pay. Now you are in a world where either nobody is
 24 paying, effectively — well, no, either it is — you are
 25 in a world where effectively everyone is paying if you

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1 have got an auction and they are going to — and Google
 2 Product Search is then really going to struggle.
 3 MS ROSE: Because they are not offering a free service and
 4 they are not getting privileged position in the
 5 shopping box?
 6 MR JOWELL: Exactly. Exactly.
 7 MS ROSE: So the real difference ultimately between what you
 8 say is lawful and what you say is unlawful is whether
 9 the shopping box clicks through to a CSS or to
 10 the merchant site, that is the determining factor?
 11 Because you are not saying that payment or non-payment
 12 is critical, and of course, it goes without saying,
 13 provided there is not a discriminatory algorithm keeping
 14 you out of the box.
 15 MR JOWELL: Subject to this, which is our other lawful
 16 alternative, which is 3b, which is another way that it
 17 could work in an equal way —
 18 MS ROSE: But that is the key point on 3a?
 19 MR JOWELL: Yes.
 20 MS ROSE: So 3a is basically the Remedy box but clicking
 21 through to a CSS not to an individual merchant?
 22 MR JOWELL: Effectively, yes.
 23 3b would have involved basically deciding who gets
 24 the whole box, effectively, which CSS gets the whole
 25 box. So you would have had delegated control of

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1 the contents of the box to the winning CSS, and the CSS
 2 populating the box could have selected and displayed
 3 the offers and content that it considered most relevant,
 4 and it could have chosen whether to deliver the user to
 5 either a page on its own website or direct to a merchant
 6 page. One can see an illustration of what that would
 7 look like at {A1/3/18–20}. You can see it also in
 8 further iterations, mobile and so on, in the next couple
 9 of slides.
 10 MS ROSE: But what you have got here are icons for each of
 11 the CSSs.
 12 MR JOWELL: Tabs.
 13 MS ROSE: Yes, tabs for each CSS.
 14 MR JOWELL: Tabs, exactly.
 15 MS ROSE: So they have all bid for their own box?
 16 MR JOWELL: Well, you have got different — yes, that is
 17 correct. But, presumably, you would have one default
 18 box who would be a winner.
 19 MS ROSE: So I think here, on this idea, Idealo would be
 20 the default box?
 21 MR JOWELL: That is it. Is this Idealo? I cannot see it.
 22 Yes, yes, that is right. Then you could click — on
 23 this version, you could click directly through to
 24 a particular merchant, but the point is that, on this
 25 version, it is the CSS that controls the ranking,

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1 the selection and the display and so on.
 2 THE CHAIRMAN: But is this not — {A1/3/18}, this is a view
 3 of the screen?
 4 MS ROSE: Page 18, yes.
 5 MR JOWELL: Yes.
 6 THE CHAIRMAN: So you would see on your screen —
 7 MR JOWELL: This is on a mobile phone, remember.
 8 THE CHAIRMAN: Yes, so the search is for the iPhone 15 Pro
 9 Max, and then you come up with three CSS — three tiles,
 10 I think they are called, on the screen.
 11 PROFESSOR SMITH: No, I think these are three
 12 alternatives —
 13 MS ROSE: These are three alternatives —
 14 (Simultaneous speakers — inaudible)
 15 THE CHAIRMAN: Right.
 16 MS ROSE: So on this, the Idealo one is going to be worth 20
 17 times more than the next one along, because it is
 18 the default?
 19 MR JOWELL: Yes.
 20 PROFESSOR SMITH: To go back to the beginning of this
 21 discussion, because I have lost track of whether there
 22 are demotion algorithms operating in some or all of
 23 those scenarios.
 24 MR JOWELL: Yes, we say that in 3a and 3b, they could — we
 25 are imagining Google keeps its demotion algorithms for

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1 the purposes of the ten organic results —
 2 MS ROSE: It does not matter.
 3 MR JOWELL: — because it does not matter, correct.
 4 MS ROSE: But the real difference between 3a and 3b is
 5 aesthetic?
 6 MR JOWELL: No, it is more than that because —
 7 MS ROSE: Well, no, you are right, because 3b is giving
 8 a much greater competitive advantage to the CSS that
 9 bids most in the auction.
 10 MR JOWELL: Well, it is a different way of looking at it.
 11 So you could — so I would say that in 3a, as you
 12 rightly said, Madam, we say you only have clicks —
 13 clicks only go through to the CSS's website.
 14 MS ROSE: I see.
 15 MR JOWELL: The CSS is presenting products where you can
 16 then click —
 17 MS ROSE: It gives more autonomy to the CSS.
 18 MR JOWELL: Correct, correct, and it allows the user, if
 19 they choose to do so, to then click through direct to
 20 a merchant to avoid the interstitial page.
 21 MS ROSE: Yes.
 22 PROFESSOR SMITH: You are saying, whatever version of
 23 Google Shopping was alive at this point would have been
 24 uncompetitive for these slots even if there had been
 25 a demotion algorithm applied to some of the rival CSSs?

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1 MR JOWELL: Yes —
 2 PROFESSOR SMITH: So Google was sufficiently weak that
 3 a demotion algorithm would not have pushed it up into
 4 the rankings?
 5 MR JOWELL: Well, it is possible, I suppose, that — well,
 6 one has to bear in mind that Google — Google Product
 7 Search never featured in the organic results, as you —
 8 you saw the reasons for that. So one is assuming that
 9 the organic results would demote all CSSs, because they
 10 would have Panda algorithm and so on, and also that
 11 Google Product Search would not feature because Google
 12 Product Search would not choose to be in — would choose
 13 not to be in those results. If that changed and Google
 14 Product Search chose to be in the results and somehow
 15 got turbo boosted up, then that would be discriminatory.
 16 Either it did not appear or, if it did appear, it was
 17 demoted just as much as other CSSs.
 18 THE CHAIRMAN: You are talking about the organic results.
 19 MR JOWELL: I am.
 20 THE CHAIRMAN: But in the Remedy box —
 21 MR JOWELL: Yes.
 22 THE CHAIRMAN: — your proposed Remedy box —
 23 MR JOWELL: Yes.
 24 THE CHAIRMAN: — you say Google Search would not appear.
 25 MR JOWELL: Yes.

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1 THE CHAIRMAN: Because it would not have achieved
 2 the quality because of —
 3 MR JOWELL: (Overspeaking — inaudible).
 4 (Simultaneous speakers — inaudible)
 5 THE CHAIRMAN: Sorry, just a second. It would be entitled
 6 to appear.
 7 MR JOWELL: It would be entitled to appear.
 8 THE CHAIRMAN: Do we need, for the purposes of this
 9 counterfactual, to decide whether it would appear or
 10 not —
 11 MR JOWELL: No, you do not —
 12 THE CHAIRMAN: — because it may be relevant to damages —
 13 MR JOWELL: Yes.
 14 THE CHAIRMAN: — but it is not relevant, is it, to
 15 the counterfactual?
 16 MR JOWELL: No, you are absolutely right. The only reason
 17 I mention it is that I just — I say to Google you have
 18 to take the rough with the smooth. But if you are going
 19 to say there is going to be an auction, what is that
 20 going to do to Google Product Search's market share?
 21 When you have the double whammy of not getting any
 22 promotion and also not getting the competitive advantage
 23 of being able to offer merchants —
 24 MS ROSE: Organic search becomes irrelevant on your
 25 scenarios 3a and b?

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1 MR JOWELL: That is exactly right.
 2 So we say the Tribunal should opt for one of these
 3 counterfactuals, 1, 2 or 3a or 3b, all of which would be
 4 lawful as well as perfectly possible, we say, for
 5 Google, and they are grounded in the contemporaneous
 6 documents of either what Google did or what Google
 7 contemplated doing, as one can see.
 8 Unless there are any further questions —
 9 THE CHAIRMAN: One question.
 10 MR JOWELL: Yes.
 11 THE CHAIRMAN: Having reviewed the documents you took us to,
 12 the small selection where Google internally was
 13 considering alternative remedies to put forward —
 14 MR JOWELL: Yes.
 15 THE CHAIRMAN: — were any of these actually considered
 16 internally by Google?
 17 MR JOWELL: Well, this latter one, the 3b, we say is very
 18 similar, if not identical to the call out which I showed
 19 you earlier. Effectively what they are doing is they
 20 are calling out in real-time to the CSSs to then
 21 populate the box for themselves. Now, Google say: oh,
 22 it would have been completely impossible, terrible
 23 latency issues, terrible quality issues. We say, well,
 24 you were very seriously considering it and it is
 25 perfectly possible, and if it is not, well then one

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1 defaults to one of the other counterfactuals, to 3a or
 2 to 1 or 2. 3a, as you have seen, in a sense, it is
 3 similar to CLA, which Google has actually put in place,
 4 but with a number of key differences: CLAs are hidden;
 5 they do not have prices; they have got tiny images; they
 6 have got no information on number of offers and so on.
 7 So those are my submissions.
 8 THE CHAIRMAN: Thank you.
 9 Well, that is a sensible point for us to take
 10 a break.
 11 (3.44 pm)
 12 (A short break)
 13 (4.00 pm)
 14 THE CHAIRMAN: Yes, Mr West.
 15 Opening submissions by MR WEST
 16 MR WEST: Good afternoon.
 17 I propose to address in opening the Foundem-specific
 18 points mainly, and this afternoon in any event that will
 19 concern the Pre-Decision Period. I may have something
 20 to say later on tomorrow about the other penalties
 21 claim. To the extent I have anything to add to what
 22 Kelkoo have said on the common issues, I also propose to
 23 deal with that tomorrow, and I will take instructions
 24 overnight on whether Foundem has a different position on
 25 the counterfactual question.

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1 So can I turn then to the Pre-Decision Period.
 2 THE CHAIRMAN: Can I just interrupt you, sorry, Mr West, to
 3 ask you, this extra documents bundle, that was purely
 4 a Kelkoo document?
 5 MR WEST: It was, yes.
 6 THE CHAIRMAN: So we can put that away?
 7 MR WEST: Yes.
 8 THE CHAIRMAN: Okay. Thank you.
 9 MR WEST: Foundem's claim in the Pre-Decision Period arises
 10 from the fact that it was subject to a demotion
 11 algorithm which excluded it from Google's search
 12 results. Foundem puts its case in this respect in two
 13 main ways. Firstly, on the basis of discrimination, and
 14 secondly, on the basis that Foundem's exclusion was
 15 without objective justification. The discrimination
 16 claim itself has two limbs: first, we rely upon
 17 discrimination as compared with Google's own CSS; and
 18 secondly, we rely upon discrimination as compared with
 19 other CSSs which were not penalised or were less
 20 penalised at the time.
 21 Now, the algorithm in question over this period —
 22 I should say the Pre-Decision Period is a short period
 23 of 18 months running from mid-2006 to the beginning of
 24 2008. The discrimination algorithm in question is
 25 the one we have been referring to in these proceedings

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1 as "Algorithm A", which was one of the algorithms
 2 the Commission specifically considered and made findings
 3 about, and Foundem's case in the Pre-Decision Period
 4 builds upon those findings. Could we look, for example,
 5 at recital 349, which is in {BA/2/86}. 349 at the top
 6 is not confidential. I see there are some confidential
 7 paragraphs further down the page, so I am not — does
 8 that mean that the page should be removed from
 9 the display?
 10 THE CHAIRMAN: Just a moment.
 11 Is this a common display? Because if it is, it is
 12 showing confidential material and I think it is better
 13 it should be removed. Thank you.
 14 Yes, Mr Pickford, I am not sure how this is being
 15 managed in terms of documents, because obviously
 16 documents will be coming up on screen that contain
 17 confidential material.
 18 MR PICKFORD: Yes.
 19 THE CHAIRMAN: It may be that those within the ring need to
 20 see them.
 21 MR PICKFORD: Exactly.
 22 THE CHAIRMAN: I imagine that, unlike the Decision, where
 23 there is a non-confidential version, there is not
 24 obviously for all the other documents.
 25 MR PICKFORD: That is right.

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1 THE CHAIRMAN: So has any thought been given to how that is
 2 going to be managed?
 3 MR PICKFORD: I think, certainly for my part, and I believe
 4 for my learned friend as well, we are using
 5 the electronic bundle.
 6 THE CHAIRMAN: Yes.
 7 MR PICKFORD: I do not have a hard copy bundle, so I do need
 8 to be able to see the documents on screen.
 9 THE CHAIRMAN: Yes.
 10 MR PICKFORD: Our understanding and our hope had been that
 11 we would be able to have the courtroom arranged in such
 12 a way that we would be able to see the material but that
 13 the public, if they were not in the ring, would not be
 14 able to see that material. I think, in reality, that is
 15 the only way that we can sensibly actually make
 16 the hearing work —
 17 THE CHAIRMAN: Yes.
 18 MR PICKFORD: — because otherwise it is going to be
 19 impossible to use the Opus system properly and that is
 20 the basis —
 21 THE CHAIRMAN: That is the way it normally works.
 22 MR PICKFORD: Yes. So I mean, our concern is not with
 23 things coming up on the screen. They should come up on
 24 the screen, our concern is just that those that are not
 25 in the relevant rings must make sure that they do not

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1 sit somewhere where they can peer into someone's screen.
 2 I think that is the critical point.
 3 (Pause)
 4 It has just been pointed out to me that we do have
 5 some visibility screens on row 4, I think, but they have
 6 got their visibility screens. I have one myself.
 7 THE CHAIRMAN: I think that is the only way to deal with
 8 that. But my other concern is, when the documents come
 9 up on screen, are they visible beyond anyone in
 10 the room?
 11 No, they are not. So they are — right, so —
 12 MR PICKFORD: My understanding is obviously one logs into
 13 one's own machine, or you log into —
 14 THE CHAIRMAN: To the Opus system.
 15 MR PICKFORD: — so you can only see what you are entitled
 16 to see in relation to what is in front of you.
 17 THE CHAIRMAN: Yes.
 18 MR PICKFORD: I think we will have to operate on that basis.
 19 THE CHAIRMAN: Yes, and they do not come up on the big
 20 screens? No. Well, I think it is then just a case of
 21 checking on the seating in the room to make sure that,
 22 as you say, people cannot peer over.
 23 MR PICKFORD: Yes.
 24 THE CHAIRMAN: Yes, very well. Thank you.
 25 So I think we can have it back on our screen on that

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1 basis {BA/2/86}. It was —
 2 MR WEST: Recital 349 on page 86.
 3 THE CHAIRMAN: Yes.
 4 MR WEST: Which sets out that:
 5 "Competing [CSSs] in the EEA are prone to be demoted
 6 by ... two dedicated algorithms ..."
 7 The one named in yellow there is the one we are
 8 calling "Algorithm A":
 9 "... and 'Panda' ..."
 10 351 then sets out the criteria which triggered
 11 Algorithm A, and 352 then explains that:
 12 "Comparison shopping services are prone to being
 13 demoted by [Algorithm A] due to the characteristics of
 14 those services.
 15 "First, because [CSSs] enable users to compare
 16 product offers across the internet, they contain
 17 a significant amount of 'non-original' content from
 18 third party sites, such as product descriptions, and
 19 prices."
 20 Then we can see in 354 {BA/2/87}, reference is made
 21 to certain types of user behaviour on sites, which are
 22 also said to be typical of CSSs.
 23 Then at 355, certain patterns of outward traffic
 24 from CSSs, which are also typical of CSSs and which
 25 tended as a result to make them prone to being demoted

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1 by Algorithm A.
 2 We can see that most of these recitals, with
 3 the exception of evidence set out in 353, are
 4 underlined, and that underlining means that the Tribunal
 5 has found those recitals to be binding in its
 6 Preliminary Issue Judgment.
 7 We say this takes Foundem a long way towards its
 8 allegation that Algorithm A tended to demote CSSs like
 9 Foundem simply for being CSSs, which we rely on both for
 10 our finding of demotion without objective justification
 11 and discriminatory demotion, because, of course,
 12 Algorithm A did not apply to Google's CSS.
 13 There are two differences, in my submission, between
 14 the Decision Period and the Pre-Decision Period which
 15 the Tribunal should bear in mind. The first is that, as
 16 I have already mentioned, in the Pre-Decision Period,
 17 Foundem does not limit itself to alleging discrimination
 18 between penalised CSSs on the one hand and Google on
 19 the other, but also between penalised and non-penalised
 20 CSSs. In this respect, as has been mentioned earlier
 21 today, the position under Algorithm A was rather
 22 different to the later position following
 23 the introduction of the Panda algorithm. Algorithm A
 24 had a much more uneven effect on the market compared to
 25 the Panda algorithm, which effectively decimated all

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1 CSSs.
 2 My friend explained earlier that Algorithm A had
 3 a much less severe effect, and that is what I took him
 4 to mean, a less severe effect on the market as a whole.
 5 For any site which was penalised by Algorithm A,
 6 the effect of Algorithm A on that site was very severe
 7 being equivalent to a 90% reduction in its relevance
 8 scores. As concerns the uneven effect of Algorithm A,
 9 that does not appear to be really disputed between
 10 the parties and Google's skeleton at paragraph 49
 11 {A2/1/49} points out that many CSSs were not demoted by
 12 Algorithm A, at least at the whole domain level. There
 13 is no argument before you from Google, for example, to
 14 say that there was no discrimination because all CSSs
 15 were affected to the same extent as Algorithm A.
 16 Google does suggest that there is a tension in
 17 Foundem's case between saying, as the Commission does,
 18 that Algorithm A tended to demote CSSs and on the other
 19 hand saying as part of its discrimination case that not
 20 all CSSs were demoted by Algorithm A, but in my
 21 submission, there is not any such tension. Finding that
 22 CSSs were prone to being demoted by Algorithm A is not
 23 the same thing as saying that all such sites were in
 24 fact demoted by Algorithm A and it has never been
 25 suggested that Algorithm A operated in that way.

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1 As to why some CSSs were not demoted by Algorithm A,
 2 there is an indication of why that may be in
 3 the Algorithm A design document, which we have at
 4 {J3M/8}. This is the design document for Algorithm A
 5 created by Mr Kwok, who created the algorithm, and as
 6 you can see, it is highly confidential, so I will not
 7 read the relevant parts out. But if you turn to page
 8 {J3M/8/4} of the design document, there are three
 9 headings all numbered 1, but it is the second number 1
 10 that I am interested in. One can see there that if
 11 a site enjoyed a certain type of inward traffic, then it
 12 was not penalised by the algorithm.
 13 THE CHAIRMAN: Sorry, you are ...
 14 (Pause)
 15 You are under which heading here, in the middle one
 16 or the top one?
 17 MR WEST: It is the middle one. I will not read it out
 18 because it is highlighted.
 19 THE CHAIRMAN: No, right.
 20 MR WEST: So CSSs which were able to satisfy that criterion
 21 were exempted, but clearly Foundem did not qualify under
 22 that exemption.
 23 I will not go to the authorities now, but
 24 discrimination by a dominant firm between
 25 the third-party players in a downstream market is

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1 a recognised form of abuse, even if that dominant firm
 2 is not an active player in the downstream market, and we
 3 set out the authorities on this point at paragraphs 99
 4 to 100 {A1/2/28}. This case is something of a hybrid
 5 because, of course, Google was itself also active in
 6 the downstream market, hence Foundem puts its case in
 7 both ways, both discrimination leveraging in favour of
 8 Google and discrimination against Foundem compared with
 9 other CSSs.

10 The second difference between the Decision Period
 11 and the Pre-Decision Period is that in the Pre-Decision
 12 Period, Foundem cannot rely on the promotional effects
 13 of the relevant boxes. As we have heard today,
 14 the boxes over that period took the form of
 15 the OneBoxes. In fact, the promotional effect of
 16 the OneBoxes was much more limited than of the later
 17 iterations of the box, and again, we have seen that
 18 today, we looked at an example OneBox and they did not
 19 have the eye catching features, like images and so on,
 20 which were a feature of the later iterations, like
 21 the Product Universal. But in any case, the fact that
 22 Foundem cannot rely on the promotional effects of
 23 the OneBoxes does not, in my submission, detract from
 24 its case in relation to this period. Clearly,
 25 the promotional elements of the OneBoxes are not

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1 relevant to Foundem's case of discrimination between
 2 different third party CSSs, because none of them had
 3 access to the OneBoxes, only Google did.

4 But, secondly, so far as Google is concerned, it has
 5 always been Foundem's case that Foundem was penalised by
 6 Algorithm A, whereas Google was not, because Algorithm A
 7 only applies to the organic results and Google's CSS did
 8 not appear there, it instead appeared on the SERP by
 9 other means which were not subject to Algorithm A in
 10 the form of the OneBox. We say that difference in
 11 treatment was discriminatory in that, as the Commission
 12 found, those CSSs who were demoted by this algorithm
 13 were demoted simply for being CSSs or, to put it another
 14 way, for having characteristics typical of CSSs. Where
 15 a CSS was penalised by Algorithm A, that would, by its
 16 very nature, affect the competitive position of that
 17 site in a very serious way since an Algorithm A penalty
 18 effectively excluded the site from Google's index, or
 19 certainly that part of the index towards the top of
 20 the results, which is the only part of the index users
 21 tend to look at, and an Algorithm A penalty would be
 22 particularly severe where, as in the case of Foundem, it
 23 applied to the whole site and also, as in the case of
 24 Foundem, it applied for the entirety of the period under
 25 consideration, here being the Pre-Decision Period.

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1 The main argument pursued by Google in its skeleton
 2 argument in relation to the Pre—Decision Period is that
 3 Algorithm A did not demote CSSs for being CSSs but
 4 rather on grounds of quality. However, those grounds of
 5 quality include the very same grounds that
 6 the Commission identified as the characteristics of
 7 CSSs, which tended to lead to them being demoted by
 8 the algorithm. We can see that in Google's skeleton,
 9 paragraph 162, which is {A2/1/71}.

10 THE CHAIRMAN: Do you want to give us a paragraph number?
 11 MR WEST: Paragraph 162.

12 THE CHAIRMAN: Paragraph 162 {A2/1/72}.

13 (Pause)

14 MR WEST: So one sees there Google identifying as grounds of
 15 a lack of quality in a CSS the very characteristics
 16 which were identified by the Commission as
 17 characteristics of CSSs which led to them being demoted
 18 by Algorithm A. In my submission, that argument is
 19 simply incoherent or self—contradictory: if a feature is
 20 typical of a CSS, it cannot also be said to be an
 21 indicator of a lack of quality in that one and the same
 22 CSS. These points were also points, the quality points,
 23 which Google raised before the Commission. We can see
 24 that, for example, in Google's response to Foundem's
 25 complaint, which is {J2A/19}.

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1 THE CHAIRMAN: I think we need to go to M2.
 2 MR WEST: Yes, sorry, I am told that has been moved to
 3 {M2/1095}.

4 THE CHAIRMAN: This is 3 May 2010.

5 MR WEST: Yes.

6 If one looks, for example, at paragraphs 16 to 17
 7 {M2/1095/11}, one sees there the quality arguments being
 8 set out. Similarly, at 19, if I could ask the Tribunal
 9 to read that.

10 (Pause)

11 Then 20 to 21 specifically consider Algorithm A
 12 {M2/1095/12}.

13 THE CHAIRMAN: If we can have the next page. Thank you.

14 (Pause)

15 MR WEST: As I have already shown you, the Commission held
 16 in fact that CSSs tended to be demoted by Algorithm A
 17 for having characteristics of CSSs, but the quality
 18 arguments were also specifically rejected as claims for
 19 objective justification, as we can see, going back to
 20 the Commission Decision at {BA/2/225}. One can see at
 21 recitals 654 to 656, these same arguments being relied
 22 upon as objective justifications, quality arguments, but
 23 they were rejected, as we see at 660 and following on
 24 the same page.

25 (Pause)

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1 So these arguments were all raised and rejected.
 2 There is one other quality argument raised by Google
 3 in its skeleton argument for this Trial which concerns
 4 the fact that Foundem's CSS contained certain textual
 5 errors. Now, that is paragraph 71 of the skeleton
 6 {A2/1/32}. We do not need to go there, but I can show
 7 you what is meant by this if we look at J2B —

8 THE CHAIRMAN: Just pausing there.

9 MR WEST: Yes.

10 THE CHAIRMAN: The part of the Decision you have taken us to
 11 {BA/2/225} is not really saying that there is a defect
 12 in terms of discrimination or views in Algorithm A
 13 catching CSSs. Is it not saying that the only point
 14 that the Commission is making is: well, but you were not
 15 applying this to Google's CSS?

16 MR WEST: Yes.

17 THE CHAIRMAN: You are not saying that the fact that
 18 Algorithm A catches CSSs because of their inherent
 19 qualities is in itself something to be condemned?

20 MR WEST: No, it is the discrimination aspect.

21 THE CHAIRMAN: It is the discrimination point.

22 MR WEST: But we say that same aspect was present in
 23 the Pre—Decision Period.

24 THE CHAIRMAN: Yes, the discrimination point.

25 MR WEST: Yes.

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1 THE CHAIRMAN: But I am not sure it then helps you on
 2 the discrimination as between Foundem and other CSSs,
 3 which you say results from something inherent in
 4 the design of Algorithm A to which you took us in
 5 the confidential description.

6 MR WEST: That is a slightly different form of abuse, but it
 7 is a recognised form of abuse.

8 THE CHAIRMAN: Yes.

9 MR WEST: I rely on the same point, that the Commission has
 10 looked at why it was that those CSSs who were demoted by
 11 Algorithm A were so demoted.

12 THE CHAIRMAN: But it does not seem to object to that as
 13 such. The problem is the Commission's analysis that
 14 Google's CSS was just not included in the assessment.

15 MR WEST: Yes, that was the specific abuse found there, yes,
 16 I accept that.

17 THE CHAIRMAN: Yes. So what I am getting at is, the design
 18 element of Algorithm A to which you took us in
 19 the confidential — highly confidential document
 20 {J3M/8/4}, which meant that it impacted particularly on
 21 Foundem, was not something that seems to have been
 22 considered by the Commission.

23 MR WEST: That is correct, yes.

24 Just to address this final point about quality which
 25 is raised by Google {A2/1/32} concerning textual errors

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1 on the site, we can see what is meant by this at
 2 {J2B/7}. This was a point which was raised by Google in
 3 the process of Foundem seeking whitelisting from this
 4 algorithm penalty. We can see, in fact, if one goes
 5 over the page to {J2B/7/2}, about a third of the way
 6 down, Mr Cutts sets out a "snippet", and you will see
 7 that instead of an apostrophe, there is a different
 8 character, an upside down question mark and another
 9 symbol, and this was raised as an objection to
 10 the quality of Foundem's site at the time. So that is
 11 what Google is getting at when it talks about textual
 12 errors or wrongly escaped characters.

13 Do you see that? It says:
 14 "Snippet ..."
 15 Then:
 16 "... you won...t have to leave any tunes
 17 behind ..."

18 But the apostrophe is wrongly escaped.
 19 Foundem explained, as we can see in this
 20 contemporaneous document on the previous page {J2B/7/1},
 21 this is an email from Foundem to Google, where Mrs Raff
 22 says:
 23 "I took a few minutes to try to verify your
 24 assumption that other leading price comparison sites are
 25 more effective at tackling this issue. Please find

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1 attached a few screenshots of strikingly similar issues
 2 on Kelkoo, PriceRunner and Google's own Product Search
 3 that amply demonstrate that this is not the case."
 4 Then the snippets are set out with again
 5 the apostrophe being replaced by a question mark or, in
 6 the PriceRunner case, the — a currency sign again being
 7 wrongly escaped.

8 As Foundem explain, the reason these errors appear
 9 on CSSs is that they originate on the merchant sites and
 10 CSSs simply copy the content, such as the product
 11 descriptions. But the point I am making currently is
 12 one which is, again, based on Google's response to
 13 Foundem's complaint. So if we can go back to that
 14 {M2/1095/20}, which is a discussion of precisely
 15 the point we have been looking at in the email I showed
 16 you a second ago. This is in the second bullet point:
 17 "In response to the call, Ms. Raff on October 16 ...
 18 sent Mr Cutts examples of formatting and editing
 19 problems on other product comparison sites. Rather than
 20 seeking to address the problem on its site, Ms. Raff was
 21 trying to deflect the issue. However, as Mr. Cutts had
 22 explained on their call, while isolated editing issues
 23 can never be excluded, such problems were pervasive on
 24 Foundem."
 25 Then this sentence:

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1 "Google's demotion algorithms will not be triggered
 2 in cases of isolated formatting problems, but will
 3 identify sites that systematically suffer from [a] lack
 4 of original content, consisting of little or nothing
 5 more than duplicate or auto-generated content."
 6 The point we take from this is that Google are here
 7 admitting that these textual errors have nothing to do
 8 with why Algorithm A penalised Foundem's site, and in
 9 fact there is no evidence or suggestion before
 10 the Tribunal now that formatting problems, such as those
 11 we have been looking at, would trigger Algorithm A and
 12 indeed the Tribunal can look at the Algorithm A design
 13 document for itself, if it wishes.

14 So this Trial, we say, is about abuse, and the abuse
 15 alleged is that Foundem was demoted by Algorithm A, and
 16 in my submission, therefore, any complaints about a lack
 17 of quality in Foundem's site are only relevant
 18 insofar as those are the grounds upon which that site
 19 was demoted by Algorithm A and these textual errors, as
 20 I say, are not the grounds upon which Foundem's site was
 21 demoted. If Google wishes to say at Trial 2 that
 22 although Foundem's site should not have been demoted by
 23 Algorithm A, assuming we are successful at Trial 1,
 24 nevertheless it would not have been a successful site
 25 because it had some textual errors on it, those are

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1 matters that can be raised in Trial 2, but in my
 2 submission they are not relevant to the abuse issues in
 3 Trial 1. As I have said, the other suggestions of
 4 a lack of quality which Google raise are matters like,
 5 for example, a lack of original content. As we have
 6 seen, the Commission found that that was
 7 a characteristic of CSSs. The Tribunal has already
 8 seen, today, the internal Google document where
 9 Mr Truher, of Froogle at that time, explains to Google's
 10 quality evaluation team why it is that Froogle provides
 11 value, and it is not in its original content but it is
 12 in the way that it organises content from elsewhere.

13 Another individual within Google recognised the same
 14 point in connection with Foundem's site, which we can
 15 see at {J2B/19}. This is, as I say, an internal Google
 16 document sent by Dave, who I believe is Dave Williams,
 17 although it is not stated here on the document. But he
 18 says:
 19 "Hi Kerry,
 20 "I wanted to resubmit this advertiser's site once
 21 more for possible whitelisting. This is a different
 22 ticket, but I've quoted your previous response ...
 23 "... the ads and keywords in this advertiser's
 24 campaign could not possibly be more specific and
 25 relevant. Here is a typical example. A search for ..."

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1 Then there is a product code, it gives the following
 2 ad:
 3 " ... and takes you to [the] landing page ..."
 4 Which is then set out in a link:
 5 " ... which has 9 listings of the exact model
 6 searched for and mentioned in the advertisement. Each
 7 listing has a price that accurately represents the price
 8 you find when you look through to the shop. In
 9 addition, the page includes the cost of shipping
 10 the item from the website, or just '+ shipping' if they
 11 do not have exact information on the shipping cost. The
 12 landing page even has information on a promotional offer
 13 from one of the sites, how much money you could ..."
 14 I think that should probably say "save":
 15 " ... how to access the promotion, and even the date
 16 the promotion ends. If that is not relevant and useful,
 17 NOTHING is."
 18 Then he goes on to explain the value of the site and
 19 how he could save money purchasing flights.
 20 Then the last substantive paragraph:
 21 " ... wouldn't all comparison shopping sites be
 22 affiliate sites of one type or another? Does that
 23 really mean that they fit the bill of a 'low quality'
 24 site that does not add any value ... To my mind ...
 25 www.foundem.com is a useful site, and users would not

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1 have a bad experience if they clicked on an ad like
 2 the one above. In fact, they would be able to purchase
 3 the TV they wanted and save about £150."
 4 So someone within Google recognised that the value
 5 of the site was not in providing original content but in
 6 organising offers from elsewhere on the web that enabled
 7 users to find what they wanted and to save money.
 8 THE CHAIRMAN: Do we know who the Dave is that sent this,
 9 or ...?
 10 MR WEST: He was an individual within the AdWords part of
 11 Google, so he dealt with the AdWords service.
 12 Similarly, we say simply having a certain type of
 13 outwards traffic patterns is not indicative, we say, of
 14 a lack of quality in a CSS.
 15 MS ROSE: (Off microphone — inaudible).
 16 MR WEST: It is eventually. This concerns — there was
 17 a separate AdWords penalty applied to Foundem, which it
 18 appealed, and that penalty was — Foundem was
 19 whitelisted from that penalty in 2007, so it was
 20 eventually accepted in 2007 that Foundem should not have
 21 been — or rather that the penalty was lifted at that
 22 stage.
 23 THE CHAIRMAN: Is that the whitelist?
 24 MR WEST: That was the whitelisting from the AdWords penalty
 25 that Foundem suffered from. There was previously an

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1 allegation of abuse in relation to the AdWords penalty
 2 that was applied to Foundem between 2006 and 2007. That
 3 is not proceeded with.
 4 MS ROSE: So is Dave's email about the AdWords penalty?
 5 MR WEST: It is about the AdWords penalty, that is right,
 6 but it is the same site he is considering in looking at
 7 whether it should be whitelisted.
 8 THE CHAIRMAN: I think you say the same — exactly the same
 9 considerations apply whether it is an AdWords penalty or
 10 Algorithm A.
 11 MR WEST: It is exactly the same, yes. The value of
 12 the site is nothing to do with providing original
 13 content, it is obtaining content from elsewhere and
 14 organising it in a way that enables users to choose
 15 between the different authors, decide what they wish to
 16 buy and hopefully save some money, or buy the best
 17 product.
 18 So a lack of original content, we say, is simply not
 19 a valid criticism. It is not a valid objection to
 20 the quality of CSS.
 21 So we say these arguments have all been gone through
 22 in front of the Commission, whether these were grounds
 23 of quality or not, and must be, we say, taken to have
 24 been rejected, and my clients were, in
 25 the circumstances, rather disappointed to see, when we

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1 received Google's evidence, last October, all of
 2 the same points being raised again as had been litigated
 3 for many, many years in front of the Commission and then
 4 on appeal from the Commission. In my submission, there
 5 has to come a point where these arguments are taken to
 6 have been determined, and as I say, the binding finding
 7 of the Commission, which is concerning this specific
 8 algorithm, is that it tended to demote CSSs for being
 9 CSSs and not for being poor quality CSSs.
 10 Just before we leave this point, it is worth looking
 11 at one or two other Commission documents where they
 12 considered this very point again. As I say, one is
 13 Google's RFI to the Commission, which is {K1/15/12},
 14 request 37, and this request concerns the relative
 15 quality of Foundem compared to other leading CSSs and
 16 the Commission says:
 17 "Please explain in detail for each of the web sites
 18 mentioned in the previous question which specific
 19 elements distinguish it from Foundem's service in terms
 20 of quality and in particular in terms of original
 21 content."
 22 One sees there the answer:
 23 "Google has no internal documents reviewing
 24 the merits of Foundem relative to other [CSSs]."
 25 So it is not the case that Google ever carried out

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1 an evaluation of whether Foundem was better or worse in
2 respect of these quality issues than other CSSs.

3 One has a similar point emerging from the document
4 at {N/257}. This is on the first page. The Commission
5 says:

6 "... you state that certain types of editorial
7 issues 'were pervasive throughout the rest of Foundem's
8 site'.

9 "Please provide a more quantitative estimate of
10 the occurrence of those editorial issues in Foundem's
11 site. Did Google perform an assessment, qualitative or
12 quantitative, of the frequency of such errors in
13 Foundem's site? If so, how did Foundem's site compare
14 with Google's own product search service and sites such
15 as Amazon or eBay, with respect to each ... issue?
16 Please provide supporting documents."

17 Answer:

18 "The editorial issues described in Google's response
19 to Foundem's complaint were noted by the Head of
20 Google's Webspam Team, Matt Cutts, when he reviewed
21 the site ... Mr Cutts conducted qualitative, not
22 quantitative, analysis ... to verify whether Google's
23 [Algorithm A] had properly classified that site as
24 a thin affiliate."

25 If we turn to the next page {N/257/2}:

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1 "Foundem's site was demoted by [Algorithm A] based
2 on the signals described in response to Question 26
3 above ..."

4 I will not read those out, but we have seen them
5 before:

6 "The editorial issues identified by Mr. Cutts during
7 his review ... represented one factor that served to
8 confirm to Mr. Cutts that Foundem's site was properly
9 classified as a thin affiliate. In Google's experience,
10 a lack of minimal editorial care is a strong indicator
11 that the site's primary purpose is [as follows] ...
12 rather than providing users added value to its own."

13 What is notable about that is, of course, there is
14 no reference to any evaluative exercise, or comparative
15 exercise between Foundem and any other CSS.

16 MS ROSE: Was not the algorithm carrying out that
17 comparative exercise, though? I mean, if you leave
18 aside the different position of Google, was that not
19 exactly what the algorithm was doing?

20 MR WEST: Well, that begs the question, in my submission,
21 whether the features of CSSs, which it identified, were
22 quality features or not. Google's position is that they
23 were, but my argument is that they were not.

24 MS ROSE: But if you are looking at CSS versus CSS, so some
25 CSSs get a higher ranking because they contain more

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1 original content, maybe it is reviews, or some editorial
2 commentary on the product, whatever it might be, and
3 others, like Foundem, do not, is not that something that
4 Google is entitled to take into account when ranking
5 sites?

6 MR WEST: Well, it is not just ranking. The effect of
7 the penalty was that Foundem was excluded from Google's
8 index.

9 MS ROSE: Well, leaving that aside, I mean, obviously
10 the ultimate ranking is you get pushed off the bottom of
11 the ladder, but in reality, if you are not on the first
12 page, you might as well be off the bottom of the ladder.
13 So if the reason is that Algorithm A has conducted
14 automatically a comparison and decided that other CSSs,
15 which are also, of course, collating information from
16 other — from retailers but have higher quality, then
17 why is that not justified?

18 MR WEST: Well, for a couple of reasons. The first is, as
19 I have been trying to explain, these are not in fact
20 the characteristics of a lack of quality in a CSS, and
21 in fact all CSSs, in my submission, would qualify for
22 demotion if those were the criteria. But as I have
23 explained, some CSSs were not in fact demoted by
24 Algorithm A over this period because they had the other
25 confidential characteristic which we have been

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1 discussing.

2 MS ROSE: Well, I mean, but why is that characteristic not
3 a legitimate basis for them having a higher ranking?

4 MR WEST: Well, I am not sure I can answer that question in
5 open court.

6 MS ROSE: Okay.

7 THE CHAIRMAN: Yes, I see that difficulty. But I think
8 the point of Ms Rose's question is that if — leave
9 aside the discrimination against Google, vis-à-vis
10 Google, that Google had a CSS and it was not caught by
11 Algorithm A at all, I think that is a straightforward
12 point in some ways, but once you are looking at
13 the application of Algorithm A, you say that it catches
14 comparison sites by reason of characteristics which are
15 inherent in a CSS?

16 MR WEST: Yes.

17 THE CHAIRMAN: If that is so, that, you say, comes within
18 your second head of exclusion without justification, it
19 is not a discrimination point then, is it?

20 MR WEST: Well, it is also a discrimination point in
21 the sense that the grounds relied upon by Google for
22 demoting Foundem's site are not valid grounds for
23 distinguishing between better and worse CSSs, in my
24 submission. In fact, they apply to all CSSs in general.

25 MS ROSE: But clearly they did not apply to all CSSs,

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1 because some CSSs are not demoted by Algorithm A.
 2 MR WEST: Those characteristics, in my submission, apply to
 3 all CSSs, but some CSSs have additional characteristics
 4 which save them from Algorithm A.
 5 MS ROSE: But why is that not a legitimate Decision by
 6 Google?
 7 MR WEST: It is not legitimate to demote CSSs for being
 8 CSSs, that is the point I am making, and the fact that
 9 some were saved, in my submission, does not make that
 10 a legitimate Decision either.
 11 MS ROSE: But it is not demoting them from being CSSs, it is
 12 demoting them for not giving value to consumers, and it
 13 is identifying various proxies for value to consumers.
 14 The CSSs that have the characteristics of CSSs but can
 15 nevertheless show that they have value for consumers do
 16 not get demoted.
 17 MR WEST: In my submission, that is not right, because
 18 the characteristics, such as a lack of original content,
 19 do not distinguish between those CSSs that provide value
 20 for consumers and those that do not, because CSSs are
 21 not there to provide the original content. That is a
 22 perfectly valid —
 23 MS ROSE: That is not the point, though, is it? The point
 24 is that a CSS that can show by other means, by other
 25 proxies, including the confidential one that we looked

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1 at, that is a fairly good indicator that a CSS is
 2 providing value to consumers.
 3 MR WEST: In my submission, it is not, and the way that it
 4 operates is discriminatory, but I am not sure I can
 5 address it in open court without giving away what
 6 the characteristic is.
 7 THE CHAIRMAN: You say what is included in the operation and
 8 design of Algorithm A as being a characteristic of
 9 the CSS will, in certain circumstances, apply more to
 10 one CSS than to another CSS in a way that is not
 11 restricted to and cannot, on any sensible view, be
 12 related to quality.
 13 MR WEST: Exactly.
 14 THE CHAIRMAN: I think that is your point, is it not?
 15 MR WEST: Yes. It was excluded from Google's index for
 16 three and a half years, and the reason that was
 17 ultimately given was: well, you did not have any
 18 original content, for example. In my submission, that
 19 is not a valid reason for excluding a CSS from Google's
 20 index.
 21 THE CHAIRMAN: Though others may have been saved through
 22 having some other features, there should not have been
 23 that baseline to start with?
 24 MR WEST: Indeed. A lack of original content is a perfectly
 25 valid indicator of quality in, for example, a magazine,

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1 or a blog, or some other site which is purporting to
 2 provide content to readers. That is not what a CSS is
 3 doing, and by penalising CSSs on this ground, as we have
 4 heard earlier, of course, Google was also able to
 5 improve its own competitive position against them,
 6 because they were competing against it, of course, in
 7 vertical search.
 8 THE CHAIRMAN: Well, that is discrimination vis-à-vis
 9 Google, but I think we are focusing on discrimination as
 10 between CSSs. I think I can see your point in relation
 11 to the criterion that we are not allowed to mention in
 12 open court. As regards lack of original content, if one
 13 is saying, well, some had even less original content
 14 than others, I am not sure that is necessarily unlawful
 15 discrimination. If one CSS has, say, a lot of reviews,
 16 or gives stars to a product and another one does not,
 17 that could be perceived reasonably as a quality
 18 difference.
 19 MR WEST: Yes, that is why I just took you to the RFI to
 20 the Commission where the Commission said to
 21 Google: please provide us with the qualitative
 22 evaluation you undertook which showed that Foundem was
 23 worse than the other CSSs who were not demoted.
 24 Google's answer was: we never did one.
 25 THE CHAIRMAN: No, but they say it is inherent in

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1 the algorithm. They did not do a specific exercise on
 2 Foundem, it was just the operation of the algorithm.
 3 MR WEST: In my submission, that is circular. It says: if
 4 you are demoted by our algorithm, then you deserve to be
 5 demoted by our algorithm. But our submission is that
 6 Foundem should not have been demoted on the grounds that
 7 were given.
 8 THE CHAIRMAN: Well, if it comes to original content, is
 9 that not a reasonable — it does not have to be correct,
 10 as long as it is not unlawful — basis on which you
 11 could discriminate between CSSs and say a CSS which has
 12 more original content, such as reviews, has higher
 13 quality, or it is a reasonable basis for Google to
 14 operate? There is no absolute standard, but there is
 15 nothing unlawful about saying: well, we will regard
 16 that, and we will program our algorithm therefore, to
 17 reflect that as being of higher quality, and therefore
 18 application of that algorithm meant that Foundem scored
 19 worse than another CSS; we did not conduct any specific
 20 assessment of Foundem, that is just in the design of
 21 the algorithm and what is wrong with that.
 22 MR WEST: But that is not what happened. Foundem was not
 23 demoted for having less original content than other
 24 CSSs.
 25 THE CHAIRMAN: Right. So it really — the focus has to be

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1 on those aspects of the algorithm which did lead Foundem
 2 to being demoted further than other CSSs, and you have
 3 pointed to one, which we have noted, and you may say
 4 that one operates in a — is not really properly
 5 treating equal cases equally.
 6 MR WEST: Exactly.
 7 THE CHAIRMAN: But is there more than — I mean, Google does
 8 now say, I think, in its evidence that the reason
 9 Foundem was affected more than others was because
 10 Foundem had less original content than others.
 11 MR WEST: But as we have seen, that is not an evaluation
 12 they undertook at the time, that is simply —
 13 THE CHAIRMAN: No, but that is how the algorithm works.
 14 MR WEST: But it is not. Foundem was not demoted for having
 15 less original content than competing CSSs.
 16 THE CHAIRMAN: We know that, do we? How do we know that?
 17 MR WEST: As I have said, CSSs in general do not have
 18 substantial original content, and that is true of CSSs
 19 in general because that is — the Commission has said
 20 that.
 21 THE CHAIRMAN: Yes, but some may have more than others.
 22 Even though the general baseline is they are mostly not
 23 original content, but some might have no original
 24 content and others may have some, and —
 25 MR WEST: Yes.

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1 THE CHAIRMAN: — I think that is, from the little bits
 2 I have read, one of the things Google is saying, and one
 3 example of original content that a CSS may have is
 4 reviews, and therefore, for the algorithm to rank higher
 5 a CSS which has reviews than one that does not, what is
 6 wrong with that?
 7 MR WEST: Well, in fact, Foundem did have reviews. Foundem
 8 was not completely lacking in original content, whereas
 9 Google's site did not have reviews, and we will come on
 10 to the comparative —
 11 THE CHAIRMAN: You have to leave the Google site out of it,
 12 because that is the other point. That is discrimination
 13 vis-à-vis Google's site.
 14 MR WEST: Would that be an appropriate moment? I appreciate
 15 we are five minutes early, but I have been passed a lot
 16 of notes from behind, so it may be I will be able to
 17 assist you more tomorrow morning.
 18 THE CHAIRMAN: Yes. Just one moment.
 19 (Pause).
 20 We will start at 10.15 tomorrow, if that does not
 21 cause inconvenience to anyone, counsel and those behind
 22 you.
 23 I guess part of the difficulty on that aspect of
 24 the discrimination case, not the vis-à-vis Google one,
 25 is that actually one may not know precisely what it is

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1 in Algorithm A that impacted on Foundem more severely
 2 than on other sites, because Algorithm A involves
 3 various criteria, one of which you pointed to and you
 4 say that is unfair in the way that caught Foundem, but
 5 there are other criteria there that apply equally where
 6 Foundem is in no worse position as such, objectively
 7 viewed, and that may be part of the problem, but I just
 8 throw that out to you to think about.
 9 MR WEST: I will consider it overnight. It may be sensible
 10 to sit briefly in camera just to address this
 11 confidential point.
 12 THE CHAIRMAN: Yes, we can do that, but we will start in
 13 open court at 10.15.
 14 (4.57 pm)
 15 (The Court adjourned until 10.15 am on Tuesday,
 16 23 June 2026)
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