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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

22nd June-31st July 2026

Before:

The Honourable Mr Justice Roth
Dinah Rose KC
Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

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

Claimants

- and -

GOOGLE LLC & OTHERS

Defendants

A P P E A R AN C E S

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

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

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

Thursday, 9 July 2026

(10.34 am)

THE CHAIRMAN: Just a moment. I am not logged in. Just a moment.

(Pause)

Yes, Mr Pickford.

Submissions by MR PICKFORD

MR PICKFORD: We are very grateful to the Tribunal for sitting again this morning, and there are two strands to what I would like to address you on. The first is on the point of law raised last night about the implications of in particular recital 352 of the Decision for section 1 of the Joint Economic Statement, and then secondly, there are some smaller points concerning certain specific parts of the JES that I would also like to raise or clarify. But the main point is on the main point that the Tribunal had raised with us last night.

Just as a preliminary comment, the substance of section 1 of the Joint Economic Statement and the at least theoretical possibility of supplementary evidence, I put it no higher than that, is actually the domain of others in our team, so insofar as we get to that, I will be handing over to them, but what I am going to address you on is the big issue of law that was raised.

THE CHAIRMAN: Yes.

MR PICKFORD: Now, our position is that the economic evidence addressed by the experts concerning traffic analysis is not rendered inadmissible by virtue of recital 352 {BA/2/86} and indeed the following recitals, 353 to 355 {BA/2/87}, of the Decision.

Now, on that point, obviously the Tribunal made its indicative position very clear, and I obviously do not want to try your patience. I can see when I am on something of a losing wicket. But because this has not previously been canvassed and because in effect I say it amounts to the striking out of a part of our defence, it is important that I need to protect my client's position by putting our case on it.

THE CHAIRMAN: You do not have to apologise or explain, we entirely understand.

MR PICKFORD: So we say there are two core principles why recital 352 {BA/2/86} does not render the expert analysis inadmissible. The first is that the expert analysis is answering a different question to that which recital 352 addresses, and I am going to take you through the Decision to make good that submission.

The second is a pure point of law. We say that 352 is in fact inadmissible as a finding of fact as regards the Pre-Decision Period. That is a separate point of

law.

Then thirdly, as I said, I am going to address you on some very specific points.

So, starting then with my first point, if I could please very briefly remind the Tribunal of how the Court of Justice analysed the structure of the Decision. If we could go back, please, to {BA/4/27} and go to paragraph 158.

As I showed the Tribunal in opening, what this paragraph explains is that there are two elements to the deviation from competition on the merits. So the first element is the unjustified difference in treatment, and then the second element is that that unjustified difference in treatment arises in the context of certain specific relevant circumstances. Then the following paragraphs of the judgment go on to set out what those circumstances are. It is the three circumstances, and the core one really that is most relevant to this discussion is the third circumstance, "the impact of diverted traffic". So this assumes that there is diversion, which is established by 1 and 2, and then that the traffic :

"... represented a large proportion of traffic to competing comparison shopping services and that it could not be effectively replaced by other sources, including

by text ads ..."

Etc.

So that is how the matter was approached in the Court of Justice.

If I could then, please, go back to the Commission Decision, and we find that at tab 2 of the same bundle, and if we could start, please, on page 85 {BA/2/85}.

We see at the top of page 85, just above recital 345:

"The way competing comparison shopping services are positioned and displayed in Google's general search results pages."

Then sub-point 1 of that is:

"The way competing comparison shopping services are positioned in Google's general search results pages."

So it is focusing, first, on the positioning aspect rather than the display aspect.

Then, in that context, the Commission goes on to make the finding that it does in relation to Algorithm A at recital 352 {BA/2/86}, where it says that:

"Comparison shopping services are prone to being demoted by [Algorithm A] ... due to the characteristics of those services."

Now, that is a finding, we say, going to the first part of the departure from competition on the merits

analysis. It goes to the discrimination part. It does not purport to be an empirical analysis of the extent or the nature of any effect on traffic either from CSSs or to Google.

Now, we do not dispute that Algorithm A impacted some CSSs some of the time. We say that is true because CSSs were, at least some of the time, not what Google inferred that users wanted to see, at least CSSs -- they did not want to see all CSSs. We strongly dispute the impression that has been given by the Claimants thus far in this case that it somehow led to the wipe out of CSSs pages in Google's results. The analysis that the experts develop shows you that that is far from the case and that the effects of the algorithm are quite nuanced.

MS ROSE: So you do not dispute that Algorithm A impacted some CSSs some of the time?

MR PICKFORD: Yes.

MS ROSE: So that means then that you do not actually dispute 352, that CSSs "are prone to being demoted"?

MR PICKFORD: So it depends --

MS ROSE: That does not talk about all of them and it does not say "wiped out". That is just the same statement in slightly different language.

MR PICKFORD: Well, it depends what one interprets 352 to

mean. One of the difficulties here is that I think each of the different parties, or rather at least the Claimants versus the defendants, interpret "prone to demote" in a somewhat different way. What we accept is that in many cases, as judged by Google -- sorry, in some cases, as judged by Google, not all CSSs were what users wanted to see and therefore some CSSs would have been demoted by Google. I use the word -- we use the word the quality algorithm. That is shorthand really for Google seeking to infer what it thinks users want to see.

THE CHAIRMAN: Well, that is the justification, which may be valid, but this is not saying "some", it is saying the characteristic -- the inherent characteristic of the CSS, which they go on to explain in 353 to 355, means that because of the way the algorithm operates, as they have explained in 350 to 351 and we have had an elaboration really of 350 and 351 in your note, it means that there are characteristics of the CSS which means that they are prone to be, or it tends to, if you like another word, demote a CSS. It does not say "every CSS" and it does not talk about the extent, but it explains why.

Then, of course, it goes on to give examples in the later paragraphs in that section of actually what

happened, and one can see from the graphs not all CSSs were demoted. One can see certainly they were not wiped out and I do not think anyone has said -- and we have had evidence on this -- that Algorithm A wiped them out, the evidence was Panda wiped them out --

MR PICKFORD: Well --

THE CHAIRMAN: -- but we are not talking about Panda.

MR PICKFORD: Yes, and just to make our position clear on that, we do not accept that evidence.

THE CHAIRMAN: Okay, you challenge it, but we heard evidence --

MS ROSE: But Panda is not relevant to the Pre-Decision Period.

MR PICKFORD: No, we are not talking about Panda. I simply wanted to --

THE CHAIRMAN: Yes, okay. But I am just contrasting the position that there was no -- we have not heard evidence even that Algorithm A wiped them out.

MS ROSE: I mean, we have seen that Ciao was --

THE CHAIRMAN: Doing quite well.

MS ROSE: -- getting significant traffic until Panda came in.

THE CHAIRMAN: Yes, (inaudible) these graphs.

MR PICKFORD: So, sir, what I would say is the exchange I have just had with Ms Rose and then the point that you

made, sir, illustrates, if I may say so, the concession that I make as regards the Pre-Decision Period is not necessarily on all fours with certainly, sir, your interpretation of what "prone to demote" means, because I said I am willing to accept as a matter of fact that some CSSs were demoted some of the time, and, sir, you said to me, well, that is not the same thing as "prone to demote", and that makes -- sir, with respect, that makes my point, because we say that -- and this will actually take me to my second point of law -- we say you are not bound by 352 as regards the Pre-Decision Period.

THE CHAIRMAN: Well, but if we are bound by 352 as regards the Decision Period, and unless there is some material change in the algorithm, how can it not apply to the Pre-Decision Period?

MR PICKFORD: Well, this is, sir --

THE CHAIRMAN: Otherwise you have a nonsense.

MR PICKFORD: Sir, with respect, I understand that the Tribunal is not necessarily with me on this, but I would like to come on to develop why I say that is the case.

At the moment -- that actually, that brings me into my second point.

THE CHAIRMAN: Yes.

MR PICKFORD: My first point at the moment is simply to take

you through the Decision to show you the difference between what 352 is going to, which is the discriminatory part of the analysis, and what the economic evidence goes to, which is effectively the analogue of 70 pages that occur later on in the Decision that are entirely separate from 352. There is a large empirical analysis of traffic and what the Commission does not do is say, "We have made the Decision -- we have made the finding we do in 352, that is the end of the game in relation to traffic". It then develops a substantial empirical analysis and there is no such empirical analysis in the Decision obviously for the Pre-Decision Period.

If I may, if I could go on to explain that point, and I will take you through the Decision just to make that good.

So we do challenge in these proceedings the issue that we say the Claimants must prove for the Pre-Decision Period to which Mr Noble and Mr Hunt's evidence goes, namely the three circumstances which were critical to the Commission's Decision on deviation from competition on the merits under the second limb of what they felt they needed to establish and as was upheld by the Court of Justice. Indeed, whilst obviously it is quite permissible to revisit these issues, that is why

the Claimants sought and the Tribunal ordered disclosure at a number of CMCs to allow them to prove their case on this issue and we made all the disclosure that we did in relation to Penaltyserver. I am not saying that that is a bar to the Tribunal making the point that it does now, I am just putting it in context that that is how we got to the situation where we currently are.

THE CHAIRMAN: But this is not -- 352 is not addressing discrimination, it is just looking at the factual characteristics of the algorithm and CSSs.

MR PICKFORD: Well, sir, in my submission, it is the building block for the discrimination point, because what ultimately the Commission is saying is: you applied an algorithm to competing CSSs which -- well, they say -- tended to demote them. I am just going to put to one side for the moment precisely what one can infer from "tended to demote". But that was the finding. What the Tribunal goes on to say -- sorry, I beg your pardon, what the Commission goes on to -- when it brings it together in relation to the discrimination aspect of the case, the point is we did not do that to ourselves because there was a privileged place on the page, and so -- and what they then do is they take those two elements together and they say: the combination of both you promoting yourselves and demoting -- and applying at

least this algorithm that had the potential to demote some CSSs, was unfair, because you were not treating yourselves in exactly the same way as you were treating other CSSs. So, in my submission, this -- whilst this finding is not itself the finding of discrimination, it is the building block for that discrimination aspect of the Decision.

One of the slight difficulties in relation to the whole question of discrimination is that it was developed, if I might say so, and embellished in the courts on appeal. So by the time we got to the Court of Justice, the case is being put more clearly within that framework and that is why I wanted to show you 158. That is also what the Decision does, but it does not jump out from the Decision in quite the same way as it is then interpreted and explained by the Court of Justice in, for example, paragraph 158. So that is the starting point in relation to 352.

If I could now show you the sections that deal with the traffic issue.

THE CHAIRMAN: Yes, but there is a bit on -- a bit here, is there not, also?

MR PICKFORD: I am sorry, sir, I did not catch that? There is a bit here, which is?

THE CHAIRMAN: 359 {BA/2/88}, picking it up after

the reference to footnote 393:

"... the fact that competing [CSSs] are prone to being demoted in Google's general search results by [Algorithm A] and Panda ... is further supported by evidence ... to which those algorithms have been applied ..."

So (i) is Algorithm A, (ii) and (iii) are then going on to Panda.

MR PICKFORD: Yes.

THE CHAIRMAN: Then they go on to cite information about the impact of those two algorithms.

MR PICKFORD: Yes, so that is correct, there is a little bit there. The point I would make in relation to that is, that is a finding in relation to the Decision Period, it is an empirical issue; it is not a finding, for obvious reasons, in relation to the Pre-Decision Period.

THE CHAIRMAN: Well, this is evidence that supports 352, as I understand it. That is what they are doing.

MS ROSE: 360 {BA/2/89} is not limited to the Decision Period, it says "since their rollout", so it is talking about the position since the rollout of Algorithm A.

MR PICKFORD: At that point it is now in conjunction with Panda, so it is actually the joint effect.

MS ROSE: Well, they said they deal with -- no, it is not, it deals with them separately. It says:

"In particular, [Algorithm A] have been applied to 96.19% of the 526 domains ... (... whole domain or partially) ..."

Then it talks about Panda.

MR PICKFORD: Well, that may be so, but that is a global analysis, it is not focusing -- it is -- sorry, two points I would like to make, one just on this. It is not dealing with the -- it is not saying "and we have separately analysed the period between 2006 and 2008 and we come to the same finding", it is dealing with it in generality. There is no -- in relation to empirical analysis, sometimes one -- something can be true in general for a period, and you might have result X --

MS ROSE: But there is no evidence -- there is no factual evidence that Algorithm A changed between 2006 and 2008, and neither is there evidence that the way that it was applied was different between 2006 and 2008. I mean, you could have put that evidence in.

MR PICKFORD: Well, the evidence that we have put in is the economic evidence which --

THE CHAIRMAN: It said on the application of the algorithm, the nature of the algorithm changes --

MR PICKFORD: (Overspeaking - inaudible).

MS ROSE: I mean, we have asked you in some detail to explain how Algorithm A works --

MR PICKFORD: Yes.

MS ROSE: -- which obviously you had some difficulty dealing with. But you have now produced an account and nowhere in that account does it suggest that the way that Algorithm A worked was different at different dates.

MR PICKFORD: No, my case before you, today, is not based on the proposition: look, Algorithm A changed and therefore you have to take a different Decision because of a change in Algorithm A. I make that very clear. What my case is based on is this proposition, that when one gets, as I will show you, to the part of the Decision which deals with the traffic diversion analysis, that is, firstly, based on the period between 2008 and 2017, so it is about that period; secondly, it is based on the nature of the abuse that the Commission found and that was a combined abuse of both a demotion aspect and a promotion aspect.

THE CHAIRMAN: Well, that obviously does not apply. The finding of abuse -- we are not saying the finding of abuse applies Pre-Decision Period, that is open here, as to whether there was an abuse in the Pre-Decision Period.

MR PICKFORD: Yes.

THE CHAIRMAN: This is not about a question of abuse, it is about a question of whether Algorithm A tended to do

what they found it did tend to do. That is the question. Whether there was an abuse is an entirely separate point and there may be good reasons for it, doing that, or there may be nothing abusive about it. But just the question of whether it tended to reduce traffic to CSSs by nature of what the CSS is, that is the question we are focusing on and that is what the question the experts in that section of their report are dealing with.

MR PICKFORD: Well, sir, what I say the expert is in more precise terms focusing on is the analogue of the section of the Commission Decision which deals with empirical terms with the impact on traffic.

MS ROSE: Why do you not show us that bit?

THE CHAIRMAN: We have got 7.2.3.2, is that it?:

"Impact of the Conduct on generic search traffic from Google's general search results ... to competing [CSSs]."

That is on page {BA/2/139}.

MR PICKFORD: Sir, can I just take it back a little bit and begin at page {BA/2/132}, but we will come to that section as well.

THE CHAIRMAN: Yes:

"... importance of user traffic for [CSSs]."

MR PICKFORD: So this is the very beginning of the three

circumstances analysis, and so this deals with the importance of traffic and there is lots of empirical analysis about the importance of traffic, and the focus of it is naturally for the Decision Period. The bit that I think, sir, you referred me to, was it 462?

THE CHAIRMAN: Well, 132, you say. I mean, you say the focus is on the --

MR PICKFORD: Yes.

THE CHAIRMAN: -- this is:

"... user traffic is important for the ability of a [CSS] to compete ..."

I would have thought that is somewhat obvious, but it is not just the Decision Period.

MR PICKFORD: Yes, and to be clear, as I tried to explain at the beginning of this submission, the bit that is most critical is the third circumstance, because that is where we go on to and we deal with the impact of the traffic. So if --

THE CHAIRMAN: The first is:

"... relevance of a comparison shopping service for users is related to the breadth and freshness of the product offering."

That is 445.

MR PICKFORD: Yes.

THE CHAIRMAN: Second is 446 {BA/2/133}:

"... traffic generates revenue ..."
Third:
"... traffic allows machine learning effects, thereby improving the relevance of the results ... and the usefulness of the service ..."
I would have thought those apply pre-Decision in the Decision, do they not, all of them?
MR PICKFORD: Well, subject, sir, to my second point, which is about how one should actually approach the bindingness or not of the Decision, so --
THE CHAIRMAN: I appreciate you have got a second point that you say this is all inadmissible, but as stated here, it is not particularly related to any period, it is stated in general terms.
MR PICKFORD: Yes.
THE CHAIRMAN: You know, the more traffic increases, the more revenue grows. That is not related to any time limit.
MR PICKFORD: No, so this bit is not specifically conditioned on that. I do say ultimately that was what the Commission was concerned with. But the bit that really matters to our debate is, sir, the bit you rightly referred to. If one goes to page {BA/2/139} that is when we get drawn into the impact of the conduct on generic search traffic from Google's general search

results to competing comparison shopping services.
THE CHAIRMAN: Yes.
MR PICKFORD: So the first point to make about that is that the conduct being considered here is combined conduct of both demotions and promotions, and what the Commission is saying is that the combined conduct of promotions and demotions had the effects on traffic that it then goes on to find in this section. So the first point is that is not the same conduct as being alleged for the Pre-Decision Period because Foundem is not permitted to run a case challenging any promotional aspect of the OneBox.
THE CHAIRMAN: So this is -- it is part of it, but this is more --
MR PICKFORD: Exactly. So the -- one part of this is not even open to the Claimants. What the claimants' pre-Decision claim must rest on exclusively is Algorithm A in isolation, and that is not the traffic -- that is not the basis of the traffic analysis that is contained in this section of the Decision. Because if you remember rightly, this is relevant -- this comes up in the counterfactual point -- there is a debate between us and my learned friends about whether the implicit counterfactual that is used here in looking at issues to do with effects as judged by the Commission is

transferable to the counterfactual for damages, and what, in effect, the Commission was doing was saying, well, let us imagine a world without either of these aspects, and what the Claimants say is, yes, you have to imagine that same world in a damages context, and that is a separate debate.
But the point for my purposes here is that that is the implicit premise by which this question empirically is being analysed. That is the first point. Also it is considering this in relation to the Decision Period, it is not purporting to make a wider point.
Now, if we then go on, please, to page 150 --
THE CHAIRMAN: Well, before we do that, what you call "traffic analysis", it is simply recording what was the effect -- what happened to the traffic. One can argue about why. So one sees on that page recital 465, I appreciate it is not binding, but one sees that they were reaching that conclusion looking at what happened to traffic to CSSs also in the pre-Panda period, so that one sees, indeed, March 2007 I think is before the Decision Period --
MR PICKFORD: It is, so --
THE CHAIRMAN: -- and they are just saying -- they are noting how traffic decreased to various CSSs.
MR PICKFORD: That is --

THE CHAIRMAN: That is a matter of fact.
MR PICKFORD: Yes, that is true. But it is all in the context of ultimately supporting a case about what happened in the Decision Period in the light of the conduct which is said to be abusive.
THE CHAIRMAN: Yes, and 469, if we look at 469 {BA/2/140}, a website had a sudden decrease in 2010, so that is pre-Panda. So it is noting that there were certain dramatic decreases, or decreases over time in the pre-Panda period as well as on Panda --
MR PICKFORD: Yes.
THE CHAIRMAN: -- to various CSSs.
MR PICKFORD: Yes, and there is an implicit counterfactual there, which is they are saying: look what happened in the real world with the two things that we do not like combined. They are saying: in the real world, look what happened, you promoted yourselves, you demoted rival CSSs and look what happened. That is not the case that is being advanced for the Pre-Decision Period. They are not permitted to advance that case.
THE CHAIRMAN: No, we have got that point. We understand that.
MS ROSE: But also, I mean, I do not think Google has disputed the evidence that when Foundem was whitelisted, its traffic significantly increased?

MR PICKFORD: Ah, I do not believe we do.
MS ROSE: Well, that must therefore mean that you accept that the application of Algorithm A to Foundem caused a decrease in its traffic?
MR PICKFORD: Yes, I think in relation to Foundem alone, that is accepted. This is not my part of the case so I am looking to make sure I am not making concessions I should not be, but, yes, that is correct. But that does not satisfy, in my submission, the test that the Commission advanced in relation to a general and long-lasting effect of both, in their case, promotions and demotions together on the CSS market. That is a different point.
Now, we can debate, and indeed in my submission we are probably going to need to come back to in closing, the precise circumstances -- the precise elements of what Foundem needs to make out for its varying ways it puts its case, because it puts its case in a number of subtly different ways, and in our submission, those different versions of its case potentially imply different counterfactuals, different ways of looking at the world and what benchmarks it should be judged against. Those are quite involved and complicated issues, and in my submission, at the moment, all I am struggling to do is to keep in play some evidence that

we say ultimately is capable of elucidating the Tribunal's judgment.
MS ROSE: So that is the finding -- what is the finding of fact that you will be asking the Tribunal to make that this evidence goes to?
MR PICKFORD: The finding of fact is that the three circumstances that were relied upon by the Commission and ultimately upheld by the Court of Justice as the critical factual context in which the unjustified discrimination arose are not satisfied in this case.
THE CHAIRMAN: What specific -- that is a very general answer to a specific question. What specific circumstance as a matter of fact, because this evidence in that part of the joint expert statement is factual evidence, it is a factual analysis of traffic.
MR PICKFORD: Yes.
THE CHAIRMAN: What is the factual finding that you say we should make for which you want that evidence?
MR PICKFORD: I think the best way of addressing that is to pick it up in our skeleton, if I may. That is -- I will just find the note that I -- see if I can find ...
Could we go, please, to {A2/1/77}.
THE CHAIRMAN: Sorry, is this your skeleton?
MR PICKFORD: This is our skeleton, yes.
THE CHAIRMAN: Sorry, I have it separately printed. What

paragraph or page?
MR PICKFORD: I am beginning at paragraph 176, and I am just actually finding it myself, so I am probably a little bit behind, probably, the rest of the Tribunal. Just bear with me a moment so I can see it fully.
So what we say at paragraph 177 and following is that:
"Since Foundem has no standalone promotion claim, the relevant question for Foundem's allegation of self-preferencing is whether the context for the application of Algorithm A alone rendered Google's conduct a departure from competition on the merits. Foundem accordingly must demonstrate that: (i) Algorithm A diverted traffic from CSSs such as Foundem on a lasting basis; (ii) the traffic was diverted to Google's CSS on a lasting basis; and (iii) the diverted traffic accounted for a large proportion of CSS traffic, which could not effectively be replaced by other sources."
We say:
"Mr Hunt's analysis fails on all three fronts."
Then we go on to explain why we say that.
So that is the context in which this point arises as a live issue between the parties.
PROFESSOR SMITH: This is all about traffic to Foundem?

MR PICKFORD: Well, there is a point of debate here, which is the extent to which Foundem can read across from the analysis in the Commission Decision and say: well, because it affected us therefore we have done enough to satisfy effectively a market-wide impact on competition. We say, no, that is not good enough.
Now, I am not asking the Tribunal to decide that either way now, but that is an issue that will ultimately have to be decided in closing submissions as to what Foundem actually needs to prove, because there is a -- something of a divergence between us, I think, on precisely what they say they will need to prove and what we say they need to prove.
THE CHAIRMAN: Is this right, the answer to Ms Rose's question is, this evidence is relevant to the question: did Algorithm A divert traffic from CSSs on a lasting basis, and (ii) was the traffic diverted to Google's CSS on a lasting basis?
MR PICKFORD: Yes, and also the -- we say that (iii) has not been established.
THE CHAIRMAN: Yes, well, I am not sure how far (iii) is ...
MR PICKFORD: So we do advance, through Mr Noble, evidence on the issue of the extent of the reliance of CSSs in this period, because of course the extent to which CSSs did or did not rely on Google is not necessarily

a static matter, and the fact that, in general, it might have been considered there was a certain level of reliance in 2008 to 2017 does not necessarily mean that in the period 2006 to 2008 the reliance was the same.

MS ROSE: But we have not heard any evidence that there were any other significant sources.

MR PICKFORD: Well, this is in part what Mr Noble's evidence goes to.

MS ROSE: This is a question of fact.

THE CHAIRMAN: That is not for an economist. What these CSSs relied on as a source of traffic, there was no cross-examination that I recall Dr Stables saying, "Well, actually the Google SERP was not very important".

MR PICKFORD: Well, there was cross-examination, sir, from Dr Stables on sources of CSS traffic. I canvassed with him the extent to which in fact they relied on publisher traffic rather than Google traffic, and I also canvassed with him the extent to which there was very limited reliance in fact by Kelkoo on Google's traffic. I put to him Kelkoo's own presentations which showed they were at the bottom of the pile in relation to that issue. So we do -- so there is both factual evidence --

THE CHAIRMAN: But that is not in the Pre-Decision Period, is it?

MR PICKFORD: In the Pre-Decision Period, yes. Indeed --

THE CHAIRMAN: Kelkoo has no claim for the Pre-Decision Period.

MR PICKFORD: Well, sir, you raised with me the issue about Kelkoo.

THE CHAIRMAN: Yes.

MR PICKFORD: The reason why Kelkoo is relevant here is because we do not have a lot of evidence about a lot of CSSs for the Pre-Decision Period, but we do have some evidence about Kelkoo. Mr Jowell has been permitted to cross-examine on and advance a case, at least factually, that touches on that Pre-Decision Period.

THE CHAIRMAN: Yes, well, that is fair enough, but I do not recall a distinction in the questioning between pre-Decision and Decision Period.

MR PICKFORD: So, to be clear, sir, in relation to this particular issue, Dr Stables told us that he could not be a great help in relation to matters before he arrived. He arrived in 2009, so obviously, although I started putting some documents to him that concerned the 2006 to 2008 period, I then stopped doing that once it became clear that he was not going to be able to help in relation to that and the Tribunal was not going to appreciate me continuing to put those documents to him, and Mr Jowell properly made the -- it is probably overstating it to say concession, he will say it was not

a concession, but he indicated he was not going to be taking a point about our ability to rely on that factual evidence just because I did not put it to Dr Stables.

There is factual evidence in relation to Kelkoo in the 2006 to 2008 period. We will have to generally refer to that in closings. We say that is permissible because the only witness that was offered up by Kelkoo could not speak to that and that is legitimate. So on that mini point I say that there is that type of factual evidence.

Also, we say the economists are able to help us with effectively empirical issues. Even if they are factual issues that ultimately the Tribunal says, well, this is a question fact, and I do not necessarily disagree that these are questions of fact, it is not necessarily that everything that the economists cover is a question of economics per se. They also, through their skills in terms of analysing quantitative information, are able to bring together information which goes to these issues.

Now, to be clear, there is a different point here, sir, which I think you have raised with me, which is I think we have moved away just within this micro issue from the bigger question of what the Commission decided versus what we are trying to establish for the Pre-Decision Period and we are now considering

a slightly different question, which is just: is it a question of fact and therefore should the economists per se be able to deal with it? So the point is not at this point: you are shut out from being able to advance this case because of 352. I am responding to a different issue, which is: even if you are allowed to advance this case factually, should you be doing it through the evidence of an economist? What I have to say on that point is that the parties were given permission for evidence, there was a Joint Economic Statement where they said the sorts of things that they would like to provide evidence on, and then the Claimants led their evidence that they said they needed to prove their case in relation to the Pre-Decision Period, and we have responded in-kind through our economist as well.

Now, there is a question, which is quite legitimate for the Tribunal, about how much of what the economists opine on you want to hear -- you want to have in a hot tub and you want to hear cross-examination on. That is a separate issue, in my respectful submission. It might be that you say, "Well, sure, your economist said this, but I do not think we really need to hear the economists debate this particular point, it is basically factual, I do not think the economists are going to take it much

further forward", and that might be legitimate in relation to some of the factual things that they have said.

There are other factual things that they have opined on which, in my submission, it is helpful to hear from the economists on, particularly when what they are doing is taking and analysing quite large amounts of data, because we cannot do that as lawyers ––

THE CHAIRMAN: Mr Pickford, I interrupt you. You are quite right that in competition cases, where there is a lot of data, one of the tasks the experts –– and they are generally economists –– do is that they can analyse and present in, as it were, user-friendly form a large amount of data, and although that may not strictly be economic opinion evidence, that is generally done and it is useful and it is helpful. If we did not have the Decision making findings on the probable effect of Algorithm A on CSSs and we had none of this Decision, that evidence would be admissible, and looking at this part of what they have done, there are other parts, such as when they compare the Remedy to the old OneBox where I do not think they are analysing any data, they are just making a submission, but –– on what we are looking at at the moment.

But our point is not that it is inadmissible because

it is just an analysis of data as opposed to economic opinion, it is that the question that we have to ask is, as it seems to us as a matter of law, whether Algorithm A tends to or is reasonably likely to, when applied to CSSs, distort, to be an abuse, therefore what its effect in various respects is likely to be. We have a finding on that which, subject to your point 2 about admissibility, seems to us pretty clear, and in those circumstances, factual evidence that seeks to contradict that finding seems to us inadmissible. That is the point.

MR PICKFORD: Sir, I understand that, and I understand that the Tribunal –– I have not yet won the Tribunal over.

THE CHAIRMAN: Yes.

MR PICKFORD: But if I may, in what, sir, you said, it is the "therefore" that we take issue with, because what you have said is that what we have to decide is the effect on –– I think the way you put it was the effect of Algorithm A, and you have already got a finding about "prone to demote".

THE CHAIRMAN: Yes.

MR PICKFORD: Putting aside my second point ––

MS ROSE: It is really a question of construction of the Decision.

MR PICKFORD: Yes.

MS ROSE: So that is a matter for us.

MR PICKFORD: It is ultimately a matter for you, obviously subject to, yes, hearing us on it. But the question of the traffic effects is not answered by recital 352, because there are 70 pages in the Commission Decision which go –– which have large amounts of empirical analysis. I do not have the time to take you all through it, but we start at recital 444 {BA/2/132} and then it goes on for the next 70 pages analysing all sorts of empirical data that enable the Commission ultimately to come to the conclusion that it needs about the specific circumstances in which the discrimination arose. I say, and I accept, I understand that you might not be buying this submission, but I say that recital 352 goes to the discrimination part, it is not the basis for the next part, which is the 70 pages of empirical analysis, and we are allowed, in relation to the Pre-Decision Period, to advance our own empirical analysis, where we say, responsively to Mr Hunt, because Mr Hunt comes along and says, "Yes, I have basically –– I have ticked the boxes", and we say, "No, you have not".

THE CHAIRMAN: We are not saying Mr Hunt is admissible either.

MR PICKFORD: No, I understand.

THE CHAIRMAN: It is not a question of why you did it, or who did it first.

MR PICKFORD: Yes, quite, but ... that is not my submission. My submission is it is a proper, live issue in the proceedings for that reason.

If I could ––

THE CHAIRMAN: Your 70 pages, which are the 70 pages?

MR PICKFORD: So it starts –– sir, as I said, there are –– some of it is more pertinent and corresponds more closely to what I call the analogue of the experts' evidence. It starts –– the total part of it starts back at recital 444. As the Tribunal pointed out to me, it is really 462 {BA/2/139} where it gets going on the points that are most relevant in these proceedings, and it goes on, the next sort of marking point, as it were, is ––

THE CHAIRMAN: Sorry, 4-6 –– you say 4-6 ...?

MR PICKFORD: 462.

THE CHAIRMAN: Recital 462, impact on traffic.

MR PICKFORD: That is right. It is the impact on traffic, that is precisely what the experts have locked horns on.

MS ROSE: What do you say about recital 343 and recital 490?

MR PICKFORD: Could you tell me what page they are on, please?

MS ROSE: Yes, 343 is at {BA/2/84}.

MR PICKFORD: Thank you.
(Pause)
THE CHAIRMAN: It seems to me that 343 helps you, because it is saying, on the second question, Google's CSS did not gain traffic .
MS ROSE: That is a binding finding, right?
THE CHAIRMAN: That is a binding finding. That is why the second question is also determined, and that one in our favour.
MS ROSE: If you look at 490 {BA/2/154}, which is also binding, the first sentence.
MR PICKFORD: 154, thank you.
MS ROSE: Yes, 490, first sentence.
MR PICKFORD: Yes.
MS ROSE: So are you saying that those findings are inadmissible for the Pre−Decision Period?
MR PICKFORD: I think that is the logical conclusion of my second submission.
MS ROSE: Are you sure you want to make that submission?
MR PICKFORD: So if I might explain, there is a broader issue here. One of the reasons why we are opposing the position that was put to us is that I do not wish to have been said to have conceded that just because something is in the Decision that it is binding against us for non−Decision periods unless we have demonstrated

a change, because, in my submission, that goes too far and is a potentially problematic position for us to have conceded.
MS ROSE: So your position is that it is open to Foundem in these proceedings to contend that before the Decision Period significant traffic was being diverted to Froogle?
MR PICKFORD: I think so. Can I just −− I am just going to take instructions to check that those behind me are content with that, but I think that is the logical place that we come to.
But as I said, there is a wider issue at play here, and so the Tribunal might think I am being a little bit obstinate in relation to a particular issue where it cuts both ways.
THE CHAIRMAN: No, I think we can understand.
MR PICKFORD: If I may, might I just take instructions?
THE CHAIRMAN: Yes, of course.
(Pause)
MR PICKFORD: Yes, my position is, as the Tribunal has logically pointed out to me, what is sauce for the goose is sauce for the gander and my submission leads to disabling me from making the same point that my learned friends would like to make against me, and as I said, I make that point because there is a point of principle

here which I am not willing to give up in the litigation , even if , on this particular issue , there are some advantages.
Yes, so we are here, just on this recital 489, this is dealing with:
"Impact of the Conduct on traffic to Google's own comparison ... service ."
This is a continuation of the empirical analysis and there is an analogue, again, in the expert evidence.
Then we come −− if we go on to recital 539, which you will find on {BA/2/178}.
THE CHAIRMAN: (Off microphone − inaudible).
MR PICKFORD: Yes, that is right.
THE CHAIRMAN: (Off microphone − inaudible).
MR PICKFORD: Well, in the Decision, yes. Yes. I mean, obviously the corollary of my point is they −−
THE CHAIRMAN: (Off microphone − inaudible).
MR PICKFORD: Yes.
THE CHAIRMAN: (Off microphone − inaudible)
MR PICKFORD: That is right.
THE CHAIRMAN: (Off microphone − inaudible).
MR PICKFORD: Well, sorry, when you say it is not relevant to this point, it is −− that is part of what the economists look at in the joint expert statement. It is at −−

THE CHAIRMAN: (Off microphone − inaudible).
MR PICKFORD: Yes. If I am wrong.
It is being pointed out to me that it might be helpful if whoever is in charge of the microphones could switch your microphone on, not because I cannot hear, but apparently the transcript is not picking up what the Tribunal is saying.
THE CHAIRMAN: We are probably overspeaking a bit.
MR PICKFORD: So then we go on to recital 539, which is on page {BA/2/178}. That is in the section that deals with whether:
"The traffic diverted by the Conduct account[ed] for a large proportion of traffic to competing comparison shopping services ... "
Also whether it:
" ... cannot be effectively replaced by other sources currently available to comparison shopping services."
We say that is, again, an issue which we say is up for grabs in the Pre−Decision Period. It is not determined by recital 352.
Then that analysis −−
THE CHAIRMAN: Is that something in this section of the joint expert statement? Because whether it can be replaced by other sources, I would have thought, is not really a data analysis question.

MR PICKFORD: I think that is right. I will have to, again, check with the person who is more on top of the detail of that. I think the first part of it however, my understanding, is -- is very much addressed by the experts.
THE CHAIRMAN: I mean, they actually agree that it was important with some caveats.
MR PICKFORD: Yes.
THE CHAIRMAN: That is 1.14. So it really does not matter very much, I mean, they actually agree so -- that it was important, but --
MR PICKFORD: Yes, I think that is fair enough on that issue.
THE CHAIRMAN: So we do not -- but I mean, the Commission had to obviously do a detailed analysis to establish that.
MR PICKFORD: Yes.
THE CHAIRMAN: The experts have agreed that it is, so we need not worry about that.
MR PICKFORD: Quite. So obviously the Tribunal is quite entitled to say, well, they agree, we do not need to worry about it very much, but I say that does not undermine my point that it is ultimately a separate empirical issue which the Tribunal should decide on the basis of JES 1.14, not on the basis of recital 352.

THE CHAIRMAN: But, look, these are all different, as you say, building blocks towards the conclusion. This is one of them.
MR PICKFORD: Yes.
THE CHAIRMAN: We are concerned with a different building block, but it is also an important building block, which is the question of the effect of the algorithm on ranking of CSSs. The Commission had to then go through the other building blocks. As Ms Rose pointed out, on the separate building blocks of their Decision, namely diversion to Google's CSS, we have a section on that and a finding on that. Then we have the next building block, namely: was this important? We have a section on that and a finding on that.
MR PICKFORD: Yes.
THE CHAIRMAN: So I do not know how that particularly helps us when we look at the first building block, and the Decision is long because on each building block they do a separate analysis.
MR PICKFORD: My point, sir, is that that first building block actually is not a building block of the empirical analysis, because what the empirical analysis is concerned with is extent of traffic diversion, in a nutshell, and this is where I say there is some ambiguity about what "prone to demote" actually means.

But my submission is that the "prone to demote" finding really is simply -- or is at least principally concerned with looking at the nature of the algorithm itself, and what it is saying is, well, look -- and it relates to some of the sorts of evidence that we have been hearing in this Tribunal, which is, let us suppose that we take, you know, features that we might consider of a CSS, how do they marry up against whether this algorithm is prone or not to demote them? We say that all that "prone to demote" means in that context is that, at least insofar as a CSS does not have the sort of attributes that Google considers are ones that indicate a user wants to see it, then it may get demoted.
But when one then goes to the question of extent of any impact on traffic, that is dealt with as an empirical matter, not -- looking at very different sorts of data and all the kind of graphs of what happened in the market, and not only is that a separate issue, as I said, importantly, it is analysed as a separate issue in the context of the theory of harm that was being considered by the Tribunal -- sorry, by the Commission, and that is why it is, for instance, ultimately held to be legitimate for the Commission just to say, "Okay, well, let us just look at what happened; taking account of both the promotion aspect of your behaviour and

the demotional aspect of your behaviour, what did we see happen?", and they see a correlation and they draw from that certain conclusions. We say that you cannot just read that across to the earlier period for a different theory of harm.
Sir, if that is a convenient moment, there is then my second point of law, but I see what the time is. It might be --
THE CHAIRMAN: Convenient to take a short break, yes.
So we will come back at ten to 12.
(11.39 am)
(A short break)
(11.59 am)
THE CHAIRMAN: Yes, Mr Pickford.
MR PICKFORD: Thank you, sir.
So the second question is a pure point of law.
THE CHAIRMAN: Yes, before you get to the second question.
MR PICKFORD: Yes.
THE CHAIRMAN: I think I probably should have directed you, given the submissions you make, to recital 504, which is {BA/2/170}.
Recital 504:
"Second ..."
This is Google's arguments, this section.
MR PICKFORD: Yes.

THE CHAIRMAN: "... Google claims that [Algorithm A] has not led to any decrease in the generic search traffic from Google's general search pages to competing [CSSs]."

And go on saying:

"In fact, general search traffic ... has increased since 2004, the year that Google introduced ... [Algorithm A] ..."

So that was your argument, that is specifically about Algorithm A, not about the conduct, it is about Algorithm A.

MR PICKFORD: Yes.

THE CHAIRMAN: The Commission responded to that at 511 on {BA/2/172}:

"For the reasons set out below, each of these claims is unfounded."

Then 513:

"Second ... [Algorithm A] has contributed to a decrease in [general] search traffic from Google's general search results ... to competing [CSSs] ..."

That is binding. So that is a finding about decrease in traffic.

MR PICKFORD: Yes, I have to concede that that is. It is not a finding about the extent of the ––

THE CHAIRMAN: No, it does not say "to the extent", but obviously non-trivial, and I have not looked at all

the underlying analysis that has led to that, but that is a finding rejecting the argument and that is the point we are on, is it not?

MR PICKFORD: Well, sir, in my submission, we are on something that goes slightly beyond that. We are on the three circumstances, which is obviously related to that point, but ultimately that finding –– my submission is that finding by itself would not be sufficient to establish the three circumstances that we address in our skeleton argument at paragraph 170.

THE CHAIRMAN: Well, we are not saying it is a finding of abuse at all, we are saying it is a finding of the effect of Algorithm A on CSSs in general linked to their earlier finding about the nature of Algorithm A and what it is likely to do.

MS ROSE: And the importance of traffic.

THE CHAIRMAN: And the importance of traffic –– well, the importance of traffic, which we have got elsewhere in the Decision where you are not concerned with the experts anyway because they agree.

So, I mean, that is the point we are dealing with, and do we therefore –– is it admissible to have a lot of expert analysis as to whether Algorithm A causes a decrease in traffic from the SERP to CSSs?

MR PICKFORD: In my submission, on the issue of extent, yes,

because we do not dispute that it has some effect. I mean, we cannot dispute that we see that it had some effect on Foundem. But the extent of the effect is ultimately what the evidence that we are seeking to keep in play goes to and that is what underpins the analysis of the three circumstances, in particular the third one, and that is, we say, something that has not been decided by the Decision.

THE CHAIRMAN: Although they are rejecting your ––

MR PICKFORD: Yes, not.

THE CHAIRMAN: Your proposition in 504 was about the algorithm generally and not just the Decision Period. Indeed, your submission went back to 2004, I think.

MR PICKFORD: I would also need to parse 7.2.1.1 to see exactly what they are saying there, but ––

THE CHAIRMAN: Well, that was the section –– it was the section we looked at in 352.

MR PICKFORD: Yes, but in terms of the particular point. But that is not my principal response. My principal response is, notwithstanding that finding, that does not rule out the points that we have put evidence on being in play, because they go to extent. It is an empirical analysis of extent. It is not saying Algorithm A never affected CSSs. That would be silly of us to make that

submission. We do not. We are saying, if you analyse the extent, it does not satisfy the same criteria that the Commission considered it was able to satisfy when it –– when it said the reason why this is abuse –– sorry, I beg your pardon, the reason why this is a deviation from competition on the merits is this twofold analysis: firstly, unjustified discrimination, and secondly, it happened in this particular factual context where the extent of the effect is a critical part of the analysis.

If I might say, the reason why that is what the Court of Justice says is what the Commission did is because the Court of Justice needed to find constraining factors for a discrimination abuse, because it was conceded, there is a paragraph that I took you to in opening and it was accepted by the Court of Justice, that discrimination per se is not a problem. That is not enough. It is not enough for a claimant to come and say, "You discriminated against me", because actually, in vertically integrated contexts, that happens quite a lot of the time. An example of such discrimination is when you say, "I have got a certain asset and I am keeping my asset and I am not sharing it with you"; that is a type of discrimination.

So what the Commission did and what the Court of

Justice was keen to emphasise was that it was not just about discrimination, because we were saying -- the submission that Google was making or I was making was, basically, you have just massively broadened the whole concept of discrimination in a way that cannot be contained, and the response to that was to say no: no, it is contained, here is how it is contained, it depends on these specific circumstances. So in this context you have got to overcome those specific circumstances. So we are not saying that discrimination generally is enough, you have got to grapple with this second part. We had further submissions about that, but, you know, ultimately we lost all of those points. That is why this is a critical issue. It is why there are those 70 pages in the Decision. Even if there are odd recitals where you say, well, possibly some of this has been canvassed to some extent, we say that is not what overall that Decision is doing. It does not establish enough in relation to the prior period.

I do not really have a better way of putting it than that. That is my submission and the Tribunal may well reject it, but that is our case on that.

THE CHAIRMAN: Yes.

MR PICKFORD: Just for your note, I do not want to take you to it, but just for your note, the paragraph of

the Court of Justice Decision I was referring to was 186 and it is {BA/4/31}.

So, sir, may I go on then to --

THE CHAIRMAN: Move to your second point.

MR PICKFORD: -- to the second point. Thank you.

This is a pure question of law, it does not depend on an analysis of the Decision. What we say is that the Commission Decision is not binding outside its temporal scope, it is only binding for the temporal -- and indeed, in brackets, geographic scope, of the Decision. Indeed, I would go so far as to say it is even inadmissible outside that context. I do not need to go that far for the first part of this submission, but it comes in two flavours, it comes in a weak flavour and a strong flavour.

Now, I would like, if I may, to grapple at the outset before -- what I am going to do in a moment is take you to three authorities that I say support my proposition. But before I go to them, I would just like to grapple with what the Tribunal has reasonably raised with me is a difficulty here. Because, sir, you quite reasonably said, well, if we are going to be effectively -- you know, we would like to be consistent and if there is finding X in relation to period Y, and that is not inherently dependent on anything to do with that period,

then surely we must make the same finding elsewhere?

Now, obviously the first part of my submissions was to say, actually these are different findings and so you can.

But this submission, I am saying, actually, what the law does here is seek to balance two effectively sets of competing interests. So on one hand there is the consistency point, and the way that that is given effect is through the obligation not to make findings which are strictly inconsistent with the Decision, I say, in the context of that Decision. So obviously that is the basis of the Preliminary Issues Judgment that we had where we went through and worked out what was binding. That is the way that the legal framework addresses the consistency issue and it says, well, you cannot do anything with regards that Decision that would basically, for the period and for the geography and for any other constraining factor, simply be inconsistent, because ultimately those points have been decided once and for all for those periods.

That does not mean that that necessarily extends to other periods, and the reason for that is there is also a competing principle here, which is effectively: rights of defence. What we say is that ultimately, once you are outside the scope of a follow-on action and you are

within the realms of a standalone action, which is what we are concerned with for the Pre-Decision Period, then we are allowed our full rights of defence again under national law, and that means that the Tribunal has to make the factual findings itself as to all of the elements of the abuse.

Now, obviously it goes without saying, the Tribunal might well be convinced in the same way as the Commission was convinced by some point of fact and so it may well align itself entirely with the Commission, and obviously that is wholly legitimate and my submission does not seek to suggest otherwise. There is the possibility, on my -- on the submission that I am going to be making by reference to the authorities I am going to take you to, that in an extreme case, it might be that the Tribunal found on the facts before it, applying its domestic law procedures in relation to those facts, that it did not agree with something that was found in relation to a different period that is binding for the Decision. So I accept that there is a possibility of that tension and I say that is necessary to give effect to our rights of defence in a standalone claim.

So that is how -- that is my response, sir, to the point that you reasonably put to me.

If I could then develop my submission by reference to the authorities, can we ––
THE CHAIRMAN: Just to be clear, this would apply, Pre-Decision Period and the Post-Decision Period?
MR PICKFORD: That is correct, yes.
We say that the fact that the findings in a Decision are strictly limited to the time frame of the infringement is confirmed by the Court of Appeal's Decision in –– on *Pergan* protection in *Air Cargo*. So could we go to that, please. It is to be found, the section that I would like, in authorities bundle 2A, tab 29, and I would like to pick it up, please, at page 11 {AB2A/29/11}.
So, in this case, the airlines were seeking protection against disclosure of findings or allusions to infringement in the Decision which fell outside the temporal or geographic scope of the Commission's findings. So that was the context.
If we could pick it up, please, at paragraph 20 of the judgment, which you will find towards the bottom of page 11. The court ––
THE CHAIRMAN: Was it a disclosure argument, are you saying, or ...?
MR PICKFORD: Yes, it was a disclosure argument, yes. Yes, it was about disclosure of the unredacted version of

the Decision.
If we pick it up, please, at paragraph 20, the court cites:
"As to the presumption of innocence, the Court of First Instance held that, at paragraphs 76 to 77."
Then it is citing –– so that is the *Pergan* case.
Could I ask you –– in fact, I will just read it because I do not want that much:
"The court also observes ..."
THE CHAIRMAN: Well, shall we read it to ourselves?
MR PICKFORD: Please do, yes.
So I only need until where it says paragraph 106 on the next page {AB2A/29/11-12}, but ...
THE CHAIRMAN: Yes:
"As to the presumption of innocence ..."
That bit?
MR PICKFORD: Correct.
(Pause)
THE CHAIRMAN: You want us to read 21 as well?
MR PICKFORD: No, in fact you can stop there. You actually only needed to read the first part of 20.
If we could then go to paragraph 26 {AB2A/29/14}, you see where this gets picked up and where the dividing line begins to be drawn by the court.
If I could ask the Tribunal, please, to read

the whole of paragraph 26.
(Pause)
THE CHAIRMAN: Yes.
MR PICKFORD: Thank you.
So the context here then is that there is a question about whether the defendants in that case were entitled to limit disclosure of the confidential version of the Decision so that it did not cover any allusions to infringement outside of the infringement period. What we will see is the court agreed with that and said that even to allude to findings of infringement that are not within the infringement period was effectively compromising the rights of defence of the defendants.
So if you then go on to paragraph 102, which is at {AB2A/29/49}, we see the conclusions of the court.
(Pause)
So ––
MS ROSE: This is not a final Decision of the Commission, it is a provisional Decision, so there has not been a finding of infringement: "provisional confidential version". Or is it ––
THE CHAIRMAN: No, I think it is just their provisional ––
MS ROSE: Provisional confidentiality.
MR PICKFORD: Yes. But ultimately the point does not turn on the provisionality or otherwise –– I may have made up

a word there.
MS ROSE: But what it is saying is, because of the presumption of innocence ––
MR PICKFORD: Yes.
MS ROSE: –– where the Commission has made a finding of infringement, either against somebody who was not an addressee or in relation to a period where there was not a finding of infringement, then it is prejudicial for that to be disclosed.
MR PICKFORD: Yes, well, where they have made an allusion. Because obviously ––
MS ROSE: Yes, it is obviously not a finding.
MR PICKFORD: –– there cannot be a finding.
MS ROSE: Yes, so they did not get an opportunity to defend themselves in front of the Commission, because they were not an addressee.
MR PICKFORD: Or they did not get an opportunity to defend themselves in front of the Commission –– sorry, well, they did not get an opportunity to appeal ––
MS ROSE: Because there was no ––
MR PICKFORD: Because supposing –– to put it in our context, suppose we had gone off to the General Court and said those paragraphs that, sir, you showed me alluding to things that happened in the Pre-Decision Period, well, they are wrong, we do not like that. I can guarantee

100% that Nicholas Khan would have made the submission, and it would have been accepted, that that is ineffective, that is inadmissible, because you are not entitled to challenge anything that is not in -- that relates to the binding findings in relation to the period of the Decision itself.

What was being said here --

MS ROSE: But where there is a finding of infringement in a particular period --

MR PICKFORD: Yes.

MS ROSE: -- and those findings of fact are made about the addressee --

MR PICKFORD: Yes.

MS ROSE: -- in the period of infringement and could have been appealed and were appealed but were upheld --

MR PICKFORD: Yes.

MS ROSE: -- then there is no breach of the presumption of innocence if the national court says, "Well, those findings are made in relation to the period 2008 to 2010 and we are entitled to have regard to them in relation to the earlier period to see if they apply to that period as well, and if there is no difference in the conduct in that period, we are entitled to have regard to that". There is no problem in relation to presumption of innocence there.

MR PICKFORD: Well, my submission in relation to that is -- I will come and -- I say that conflicts with --

MS ROSE: With what?

MR PICKFORD: -- with the *Hollington v Hewthorn* rule.

THE CHAIRMAN: Well, that is a separate -- that is a separate point --

MS ROSE: So that is your admissibility argument.

THE CHAIRMAN: This is not about *Hollington v Hewthorn* at all.

MR PICKFORD: No, that is correct.

THE CHAIRMAN: It is about the prejudice of something being allowed in which you had no opportunity to -- or the airlines had no opportunity to appeal and which is prejudicial. But we are talking about findings which were for the Decision Period of the effect of Algorithm A, which you did have the opportunity to appeal --

MR PICKFORD: Yes.

THE CHAIRMAN: -- you could have challenged -- maybe you did, but anyway they were not set aside, and we are saying, well, that should be admissible for the -- therefore there is no problem about presumption of innocence, therefore it is admissible, and unless there is a change in circumstances or difference in circumstances in the Pre-Decision Period, to go against them would be contradicting the Decision.

MR PICKFORD: Well --

THE CHAIRMAN: That is, it seems to me, very different from what Mr Justice Peter Smith did in the *Air Cargo* ruling.

MR PICKFORD: Well, I am not saying that -- I draw -- I draw parallels. I am not saying it is directly on point. That obviously is not my submission.

THE CHAIRMAN: Yes.

MR PICKFORD: I do say that in relation to -- to say, well, there was this finding for period X and therefore unless you now can show that something changed in relation to period Y, that reverses the burden because now it is being said that the burden is not on the claimant to establish their case for an earlier period, a different period not covered by the Decision, the burden is now on us to persuade the Tribunal that it should not adopt the same facts, and my submission --

MS ROSE: It is not a legal burden, it is just an evidential -- it is just the evidential reality that that finding exists for 2008. So if you cannot show that anything was different in 2006, on the balance of the probabilities, it is pretty -- it would be pretty odd for the court to make a different Decision. That is not reversing the burden, that is just there is very powerful evidence and you have not shown why it should not be applied.

MR PICKFORD: Well, I have got two responses to that. One will be my point on *Hollington v Hewthorn. But* putting that to one side, because I have not got there yet, my other response is ... (Pause)

What prompted all of this discussion was whether those points were binding against us, subject to us being able to demonstrate that we could not -- that something had changed in relation to --

MS ROSE: I do not think we are saying that. I think -- I do not want to speak for the Chair, but I think what the Tribunal is floating is that those findings are binding for the Decision Period and it therefore will follow that, unless you can show something was different in the earlier period, they are going to be applied.

MR PICKFORD: Well, in my submission --

MS ROSE: Unless you can show something different.

MR PICKFORD: Yes, and, in my submission, we are actually entitled to start afresh. Now, I understand the Tribunal says: no, it is now incumbent on you, Google, to demonstrate that something was different. I say that the law does not go that far.

MS ROSE: So do you say that you are entitled, in relation to the Pre-Decision Period, for example, to say that Algorithm A has no application to CSSs? Would you be entitled to do that?

MR PICKFORD: We would be entitled to do that. I mean, it would be obviously forensically a very difficult submission for us to get off the ground and I do not deny that there is obvious forensic force behind saying, well ––
MS ROSE: So you –– but that would inevitably –– so if you were saying –– so you accept that Algorithm A is unchanged for the whole period?
MR PICKFORD: Yes.
MS ROSE: There is a finding ––
MR PICKFORD: At least materially. It did develop, but, yes.
MS ROSE: So you accept Algorithm A is the same for the whole period and you accept that you are bound by a finding that, from 2008 onwards, it tends to demote CSSs?
MR PICKFORD: Yes.
MS ROSE: But you say that you are entitled to come to the Tribunal and say the same algorithm applied to the same CSSs does not tend to demote them?
MR PICKFORD: I would be entitled to do that. I would not get very far on the premises you have given me.
MS ROSE: Yes, but the only way that the Tribunal could make that finding would be by reaching conclusions about the operation of Algorithm A that were directly

inconsistent with the findings of the Commission that are binding ones.
MR PICKFORD: Yes, binding for –– I say binding for the Decision Period. I say you would be entitled –– so ––
MS ROSE: But you could not make that finding without saying: actually, the Commission got this all wrong.
MR PICKFORD: Yes, in this part of the analysis. Obviously ––
MS ROSE: Yes, I am just talking about this part of the analysis.
MR PICKFORD: Yes, yes. So in this part of the analysis, I have to accept, and indeed I positively aver, that we are ––
MS ROSE: That you are entitled to say the Commission got it wrong?
MR PICKFORD: Yes.
MS ROSE: So you do not have to rely on any difference in circumstances in the earlier period ––
MR PICKFORD: Yes.
MS ROSE: –– you are entitled to say the Commission's analysis post–2008 was flawed and I am entitled to make that argument for the pre–2008 ––
MR PICKFORD: That is what I say. I say I am entitled to. The –– and that is because of the dividing line between

the precise scope of the Decision and what is follow–on and what is standalone.
For follow–on, I am disabled from that submission. I cannot make –– you know, it might be wrong, but it is just tough. I might be able to convince the Tribunal that the Commission actually did something that was just wrong, they overlooked something, it did not get picked up ––
MS ROSE: But then you have appealed it all the way to the CJEU and failed?
MR PICKFORD: Well, it is possible. I mean, just to test my argument, it is certainly conceivable that they are ––
MS ROSE: So you are able to re–litigate those same facts in the national court?
MR PICKFORD: As regards ––
MS ROSE: The earlier period.
MR PICKFORD: –– things that were not decided by the Decision. So it is not the same facts.
MS ROSE: Well, it is the same facts, because the premise of this is that nothing has changed.
MR PICKFORD: It is –– so ––
MS ROSE: It is the same facts in a different time period.
MR PICKFORD: In my submission, what –– well, quite, and therein lies the core point, because what is really being said, what is implicitly being said in a Decision

about a certain time period is that, even if the point logically has wider applicability, it is being asserted for that time period, and therefore, if that point happens to be wrong in relation to an earlier time period, it would not be –– I mean, I would not be able to get anywhere ––
MS ROSE: But there are other reasons –– there may be other reasons why there is no finding of infringement in the earlier time period, and we looked at one just before the break, that the Commission said: well, until you brought in Universal Search, Froogle was not diverting traffic. Now, that is quite an important point and may be a reason why there is no infringement in the Pre–Decision Period. You know, that is a different point.
But, I mean, I can see why you would be able to say there is some difference in the way the market works before the infringement which means that this does not have a significant effect on competition, or there is some difference in our conduct that means it does not have a significant effect on competition.
MR PICKFORD: Yes.
MS ROSE: But if you are not saying either of those things, you are saying that the Tribunal can simply say the Commission got some of these facts wrong even though

these facts are binding on us for the following.
MR PICKFORD: That is what I am saying.
MS ROSE: Okay.
MR PICKFORD: Yes.
MS ROSE: Okay.
MR PICKFORD: That is -- accepted or not accepted, but that is my submission.
MS ROSE: Yes, okay.
MR PICKFORD: Could I go to the next case, please, which is *Air Canada* in the General Court and it is to be found at tab 23 {AB2B/23/1}.
So this concerned an inconsistency between the operative part of the -- of a Commission Decision and certain recitals. If I could pick it up, please, at paragraph 39, which is on {AB2B/23/14}.
Actually, it might be helpful to pick it up at 38, because that gives the introduction, which is:
"In accordance with art. 16(1) of Regulation 1/2003 ..."
Which is obviously the legal basis for the requirement of consistency.
So could I ask the Tribunal please to read 38 and 39.
(Pause)
So my submission is that that again supports my

position that a Decision is -- the bindingness of a Decision is cabined by both its geographic and its temporal scope and that there is a line there, and that, in an extreme case, could technically -- I accept the logic of my submission is that could technically lead to the Tribunal saying: well, actually, on this particular issue, we do not come to the same conclusion as the Commission, here is the evidence that we heard, here is why we actually come to a different conclusion for a different -- either geographic or temporal. So equally, there might be a finding where something -- you know, there is something that happened in Germany, and, logically, you would say, well, if it happened in Germany, also it happened in England and Wales, but this Tribunal is considering whether it happened in England and Wales and it comes to the view it did not, and I say that it is entitled to do that.
MS ROSE: Absolutely. No one would dispute that. But here -- I mean, so one of the things that is being said here is that:
"... a national court would take a Decision contrary to that adopted by the Commission ..."
Then they say:
"... if its Decision differed from that of the Commission as regards the ... liability or

non-liability of persons investigated in relation to the conduct at issue and whose liability was examined in the Commission's Decision."
Now, in the circumstances that we hypothesise, where there is no difference in the market and there is no difference in the conduct, then surely what you are saying is this, it would be open to this Tribunal to make an internally inconsistent judgment that said: Google's conduct was an abuse of dominance in the year 2008 because of these effects on the market and Google's conduct for the year 2007, which was the same and which had the same effects on the market, was not an abuse?
MR PICKFORD: Yes. I mean, it would obviously -- it could only be legitimate if it was explained on the basis that it was bound in relation to a certain period.
MS ROSE: But the fact of the matter is that you are necessarily envisaging that this Tribunal would make a Decision that differs from that of the Commission in relation to the liability of that person.
MR PICKFORD: Under this submission, yes.
MS ROSE: Yes.
MR PICKFORD: Obviously, overall, I am not, because I say actually it is all very -- it is all different.
THE CHAIRMAN: It is difficult on the language of

Article 16, which of course applies to Article 102 as well as 101 of the Treaty, so applies to abuse of dominance, say, if you are saying that the Decision of the Commission was wrong, but we have to apply it for the Decision Period but we are not applying it for the Pre-Decision Period, just saying the Decision -- we are giving a judgment saying that the Decision is wrong, is that not running counter to the Decision?
MR PICKFORD: Well, I --
THE CHAIRMAN: It is hard to think of anything more --
MR PICKFORD: So I would not be asking for a finding that the Commission was wrong. Let me put it this way. Supposing that I was seeking some sort of negative declaratory relief, not -- more common, in my experience, in the FRAND context than here.
THE CHAIRMAN: Yes.
MR PICKFORD: But I would not be entitled to a finding that the Commission was wrong, because that really would run counter to the Decision.
What I would be entitled to do is to say to the Tribunal, actually, if you look at the facts carefully, for this different period that runs outside the strict bounds of the Decision, you are entitled, if you want, to come to a different determination. Now, I do not deny that the Tribunal might be disinclined to

do that, but I say that you are entitled −− you are not prohibited by Article 16 of regulation 1 of 2003 from that course in an −− in such an extreme case, albeit this is not such an extreme case.
THE CHAIRMAN: But you would say we are entitled to come to a different conclusion regarding Algorithm A −−
MR PICKFORD: For that period.
THE CHAIRMAN: −− to that set out in recital 352 for an earlier period. But the only basis on which we could come to a different conclusion is not that the algorithm was different in the earlier period, or that the characteristic of the CSS was different in the earlier period, it is that they were wrong in their conclusion.
MR PICKFORD: So it would be implicit, I accept that, and I accept −−
THE CHAIRMAN: But that is not counter to their Decision?
MR PICKFORD: Well, it is not −−
THE CHAIRMAN: Okay, we have got the submission.
PROFESSOR SMITH: Can I ask whether statistical evidence would play any role in this? Suppose you had statistical evidence that had the same message in the Pre−Decision Period and the Post−Decision Period, would that affect whether you would take a −− make a Decision −− you think the Tribunal could make

a Decision in relation to the Pre−Decision Period that was counter to the Commission's Decision where the statistical evidence was telling the same story in both periods?
MR PICKFORD: I think if the statistical evidence told the same story, then I am finding it difficult to −− and suppose the statistical evidence were determinative, I do not see how the hypothetical situation that I am being tested on by the other members of the Tribunal would arise, because I think, in those circumstances, if it all came down to the stats and the stats were the same, then there would not be the scope for this possible finding of a different answer in an earlier period.
Can I make just my final −− take the Tribunal to my final case −−
THE CHAIRMAN: Yes.
MR PICKFORD: −− on this issue?
That is *Evans v Barclays* which is at tab 27 of the same bundle that we have been in {AB2A/27/1}.
Amongst other matters that this judgment of the Supreme Court deals with, it deals with the application of *Hollington v Hewthorn* in the Tribunal.
Could we pick it up, please, at paragraph 144, which

we will find on {AB2A/27/37}.
Could I ask the Tribunal, please, to read 144 and 145 {AB2A/27/37−38}.
(Pause)
Has the −−
THE CHAIRMAN: Yes.
MS ROSE: Just to be clear, are we talking about different parties here?
MR PICKFORD: So this concerned −−
THE CHAIRMAN: Yes, different.
MR PICKFORD: Yes.
THE CHAIRMAN: It was the *Sterling Lads* Decision, which did not involve these respondents −−
MS ROSE: So the key point −−
THE CHAIRMAN: −− and the Court of Appeal had relied on the *Sterling Lads* Decision.
MS ROSE: So the key point here is that somebody who was not a party to the earlier proceedings is having findings that were made against a third party relied on against them.
MR PICKFORD: Yes. But what the court −− what the Supreme Court explains here is actually there is a strong and a weak version of the principle of inadmissibility and the strong version is, if you are not even a party, then basically the entire thing is off

limits. If you are a party, there are means by which you might be prevented from re−litigating an issue, ie if there is issue estoppel or abuse of process.
But, if I could then go on, please, to paragraph 156, what in the judgment the court said here −−
MS ROSE: Hang on. 156?
MR PICKFORD: 146, I beg your pardon. I am sorry.
MS ROSE: 146.
MR PICKFORD: 146, yes. Could I ask you to read −−
MS ROSE: Let us just read that {AB2A/27/38}.
(Pause)
THE CHAIRMAN: 147 is quite informative.
MS ROSE: 146 is dealing with someone who was not a party to the earlier proceedings?
MR PICKFORD: No, in my submission, although that is the context there, the point of law goes more broadly, because it is saying −− because otherwise the exceptions of issue estoppel or abuse of process would not make sense, because there could not be −−
MS ROSE: They say:
"In this judgment we are addressing the different question whether the findings set out in the *Sterling* Lads decisions are admissible in evidence against the defendants in proceedings following on from the

Three Way Banana Split and *Essex Express* decisions."

In other words different parties:

"In such circumstances, where the follow-on jurisdiction is not in issue and there is no question of issue estoppel or abuse of process, the defendants are entitled ..."

So what they are saying is, where you have got different parties, there is no issue about -- there is no question of follow-on and there is no question of issue estoppel or abuse of process, then you have got to make findings, but that is in the context of a different party.

MR PICKFORD: Well, in my submission --

MS ROSE: It is not saying when you have got a finding that is binding on this defendant and binding on the Tribunal from a Decision of the Commission, that is not admissible in the same proceedings as an admissible finding of weight to be taken into account. It is certainly not saying it is inadmissible.

MR PICKFORD: What I say is that actually, implicit in this paragraph --

MS ROSE: Okay. So this is the paragraph you are relying on?

MR PICKFORD: This is a core paragraph, yes. Implicit in it is this principle, that save for where you are in

a follow-on context, or save where there is a question of issue estoppel or abuse of process, defendants are entitled to challenge correctness of findings by other Decision-makers, and it goes on to explain that those other Decision-makers include not just courts, but also regulators, and it also implies in the Tribunal.

MS ROSE: This is not considering -- this is simply not considering a position of a defendant where there is already a Decision binding on that defendant and binding on this Tribunal of the Commission, because if you look at the quote that they set out here, they say:

"... unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous Decision. Which means ...[] ... the previous Decision ... cannot be relied [on]."

We know what weight we have to attach to the previous Decision, because we know that specific findings in that Decision are binding on us, so they are determinative. That is the weight we have to attach to them.

Now, how we apply those findings to the same party outside the Decision Period is a matter for the Tribunal's Decision, but to say that we do not know what weight to place on those findings just is not

applicable here. The Supreme Court here is not considering the circumstances where Article 16 is in play.

THE CHAIRMAN: It is explained by the issue they are addressing, which is just above, if we go back to paragraph 142 {AB2A/27/37}, the previous page:

"Issue 4: did the Court of Appeal err in [the] use of the *Sterling Lads* ordinary Decision?"

Skipping the first two sentences -- well, they say the Court of Appeal relied on *Sterling Lads*, and then in the fourth -- the fifth line:

"This was inappropriate given that the *Sterling Lads* ordinary Decision (1) was not part of the material available to the Tribunal as it was issued after the judgment of the Tribunal was handed down ..."

A separate point:

"... (2) was addressed to a third party (Credit Suisse), and (3) considered a different infringement from the infringements on which the claim considered by the Tribunal was based."

That is the headline which is then elaborated upon in the discussion that follows.

MR PICKFORD: So I quite accept that the ratio concerns different facts from ours and it is distinguishable. What I say is that there was a principle also

articulated there in 146 which explains basically that one starts with the principle that you ignore what other Decision-makers decide. There are then certain incursions into that principle. Incursion number 1 is follow-on. So insofar as it is within the scope of a follow-on action, that is an incursion, you are stuck with that.

MS ROSE: I think we have the point.

MR PICKFORD: Yes, thank you.

I -- on those core points, I have no further submissions. There were some small issues which do not actually go to these points of law that I have been canvassing in relation to very specific points that were raised by the Tribunal yesterday.

THE CHAIRMAN: Yes.

MR PICKFORD: Shall I go on to address those now?

THE CHAIRMAN: You might be able to do those before lunch.

MR PICKFORD: Yes.

So it may be that some of these have been actually picked up in the discussions we have had, so I am going to have to just remind myself of what the points were.

In the comments, sir, that you very helpfully made, yesterday afternoon, setting out the Tribunal's preliminary view --

THE CHAIRMAN: Yes.

MR PICKFORD: −− as we understood it, there were two further objections that were made to the evidence under issue 1 in the JES, and one was that there was already evidence that clearly showed that Foundem was affected by Algorithm A, and the question, I think, broadly speaking, is how it was put it was that what was in −− what was in issue was their quality and the economists cannot opine on quality.

Now, I accept and agree with the proposition that Foundem was affected and I also agree with the proposition that the economists cannot comment directly certainly on Foundem's quality.

What they are able to do is provide some insight into the question which is in issue between the parties, which is where Foundem says, well, Algorithm A was unfairly targeting CSSs, and what we say is, actually, Algorithm A, if you look at the data, had a highly heterogeneous impact and that that is indicative of the algorithm seeking to differentiate between CSSs, and then we go on to make −− we then go on to make −− we fill in the gap through our other evidence and we say: yes, and the way it was differentiating between CSSs was on the basis of what Google considered to be proxies for what users want to see. So that is −−

MS ROSE: I completely see why you want to make that

argument, but do you need this evidence for that? I mean, you already have the graph that shows that Algorithm A had different impacts on different CSSs, and we have heard significant factual evidence about the criteria on which it was applied and the reasons why Mr Cutts thought that Foundem was a thin affiliate, so, I mean, what does this add? It is just massively detailed data that illustrates what we already have in the graph showing different effects on different CSSs.

MR PICKFORD: I am not sure I know exactly which graph we are referring to, but −−

MS ROSE: The one that −−

THE CHAIRMAN: The one that was blown up but which we could not see very well and it was then increased. Maybe that is from the experts. Is that from an expert's report? I think there was a graph in one of the witness statements.

MS ROSE: There was, yes.

(Off microphone discussion)

MR MCGURK: Mr Raff's third statement. I think it was figure 143 or something.

THE CHAIRMAN: Well, that is then evidence from Foundem then.

MR PICKFORD: Well, yes, but we −− so that is apparently in support −−

THE CHAIRMAN: You can make submissions on the implications of that graph.

MS ROSE: I mean, we have already seen that, you know, Ciao was not −− they had lots of traffic. We know that not every CSS was demoted −−

MR PICKFORD: Well, the point −−

MS ROSE: Well, the factual evidence that we have seen, the documents we have seen say some CSSs are not being impacted by Algorithm A.

MR PICKFORD: Yes, so I think what the Tribunal is putting to me is there is additional factual evidence out there which means that −−

MS ROSE: But what is this adding?

THE CHAIRMAN: It might help me if −− sorry to interrupt you, but which bit of the −− if we go to the joint experts' statement, which bit of it are you now addressing?

MR PICKFORD: I think this is 1.12, but I am going to have to check that.

THE CHAIRMAN: It might help us if we could actually look at it {I1/4/22}. 1.12, well, that is not actually something that Mr Hunt addresses at all.

MR PICKFORD: Let me just −−

THE CHAIRMAN: Mr Noble says {I1/4/23}:

"The evidence does not show a pattern of Algorithm A

systematically ... "

Well, he is commenting on the evidence that we have seen, which is not for him to do anyway.

MR PICKFORD: He is not just doing that, sir, in my submission. I am just going to −− I need to get it up.

(Pause)

THE CHAIRMAN: Maybe that is unfair. Maybe he is commenting on his own evidence.

MR PICKFORD: Yes.

THE CHAIRMAN: Yes, I am sorry.

MR PICKFORD: So if I might, what he has done is engaged in an empirical analysis which shows something that we say is very helpful to our case. What it shows is that Algorithm A, far from having the sweeping effect that you are being led to believe it had, did not have that effect at all, it had a very nuanced effect here and there. In my submission, that is something that we are fairly allowed to advance to this Tribunal and we do not have to be constrained just to the way that Mr Raff would like to put it. Our evidence is our evidence on that.

THE CHAIRMAN: Well, he is relying on his figure 4.6, is it?

MS ROSE: Your point is the relatively differentiated and granular impact of Algorithm A?

MR PICKFORD: That is right, and I have picked up 1.12. It

is being pointed out to me by my learned junior that it is pretty well 1.3 through to 1.7 also that canvass similar issues.
PROFESSOR SMITH: Although that evidence does not include any evidence of the qualities of different CSSs.
MR PICKFORD: No, quite. Quite.
PROFESSOR SMITH: It is purely evidence over time of the application to different CSSs.
MR PICKFORD: Exactly. So what we seek to do is marry it up. So we say: look, here is what it is actually doing in the real world, let us look at what happened. Actually, it is not the case that is being suggested; it had very nuanced, quite limited effects. Let us look at the people who it affected. Well, who got wiped out? Foundem maybe found itself coming a cropper of Algorithm A for a sustained period. Why do we say that? Well, we say Foundem just was not very good. Look at what happened to other people. Idealo did not even get touched, and then it had a nuanced effect on different CSSs.
PROFESSOR SMITH: But Mr Noble's evidence does not speak to that, to the difference between the CSSs to whom it was ––
MR PICKFORD: No, because obviously he cannot. That would be overstepping what he, as someone who is expert in

data analysis, can do for us. But he can provide one part of the picture, and then our evidence ––
MS ROSE: Is about quality triggers.
MR PICKFORD: –– provides another part of the picture.
THE CHAIRMAN: Well, we will look at that over lunch. Do you want to –– if you give us all your small issues and then we can ...
MR PICKFORD: I think the only other point is on –– I think it is –– I am just trying to interpret what I do not need to cover because we have got drawn into it. I think on section 2.F, if we may ––
MS ROSE: 2 what?
MR PICKFORD: 2.F.
MS ROSE: 2.F?
MR PICKFORD: 2.F, yes, foxtrot.
MS ROSE: Do you have the page?
MR PICKFORD: Yes, page 44. So could we go to 2.13 {I1/4/44}.
THE CHAIRMAN: This is the Post-Decision Period?
MR PICKFORD: This is now the post Decision Period, yes. This may be a relatively small point, but, sir, I think yesterday you said: well, we just do not need to have any evidence on this because –– for essentially the reasons that you had already said, that it was subject to binding findings, and we say ––

MS ROSE: This is your point about publishers?
MR PICKFORD: Yes.
MS ROSE: But I mean, we have already had evidence about that.
MR PICKFORD: Yes, and this marries up with that evidence in the same way. We are seeking to make good our case from a number of angles.
THE CHAIRMAN: But on 2.F, which –– I mean, 2.13 is just a comment on the evidence, I think, is it not?
MR PICKFORD: I would just need to check, sir, whether there is further empirical support behind that.
MS ROSE: Because if not, then what they think about this is not really ––
MR PICKFORD: Yes, I agree. If not, then it is not going to take matters any further forward, if that is all it is.
MS ROSE: So, I mean, you would say that if the markets changed after the Decision Period so that the SERP is no longer overwhelmingly important, that is something you are entitled to put forward?
MR PICKFORD: Yes.
MS ROSE: Similarly, you could say, well, everybody is going direct to Amazon.
MR PICKFORD: Exactly.
MS ROSE: So those are points that are open to you outside the Decision Period.

MR PICKFORD: Yes. The reason why I say it is quite a minor point is because I think even yesterday it was accepted that we can point to differences, but this was given as an example of something, I think, where it was assumed there was not any difference and I was just pointing out ––
MS ROSE: Right.
MR PICKFORD: –– that we do say there is a difference here.
MS ROSE: Yes.
THE CHAIRMAN: Yes, I understand.
MR PICKFORD: My understanding is that there is empirical support behind what he says there, he is not simply referring back to evidence that the Tribunal could just ––
THE CHAIRMAN: 2.F in fact, just looking through it, it is only when we get to 2.18 {I1/4/48}, where we are talking now about the Remedy, that the experts disagree.
MR PICKFORD: I think that is probably broadly right, and of course, I think as, sir, you pointed out yesterday, much of the disagreement in those sections comes back to the fundamental disagreement in the earlier section about basically what is –– is the box on the page a CSS.
MS ROSE: Yes, that is clearly a big ––
(Simultaneous speakers – inaudible)
MR PICKFORD: We accept that obviously they are highly

interrelated, but insofar as they are permissible areas of economic evidence, it might be that these do not take it much further, but they are implicitly also permissible, because they relate back to the same issues.

Can I just turn behind ––

THE CHAIRMAN: Sure.

MR PICKFORD: –– just to check that there is nothing else that anyone would like me to say?

I am very grateful to the Tribunal. Those are my submissions.

THE CHAIRMAN: Well, we will come back at 2 o'clock.

(1.03 pm)

(The short adjournment)

(2.02 pm)

THE CHAIRMAN: Thank you.

Is it Mr West?

Mr West, we would like to hear you on Mr Pickford's first of his two grounds. You need not address us on the second ground.

MR WEST: Was the second inadmissibility?

THE CHAIRMAN: Yes.

Submissions by MR WEST

MR WEST: On the first ground, I largely adopt the points the Tribunal made in its discussions with Mr Pickford.

As we have seen, recital 352 holds that Algorithm A tended to demote CSSs due to their characteristics as such. The question is as to the status of that recital in relation to a period outside the infringement period. If I am not addressing you on issue 2, I take it that the Tribunal has found that that finding is at the very least admissible.

The key point, in my submission, is that Google has not in fact contended that the algorithm operated any differently in the Pre-Decision Period. It has not said the signals underlying it were different. On the contrary, Google's case, as set out in its various supplemental notes, is based on the design document and is in all material respects consistent with the Commission's findings. Neither is there any suggestion from Google that comparison shopping services operated differently in the Pre-Decision Period, for example in relation to their levels of original content or the other confidential signals.

In my submission, it must follow that the recital is binding at least as a practical matter in the absence of any contrary evidence. As the Tribunal has said itself, the only way for the Tribunal to disagree with that conclusion would be to hold that the Commission was wrong, which would be contrary to the Tribunal's

obligation of consistency.

The expert evidence which Google seeks to address on this point goes to the precise level of penalisation in the market at the time, or, as Mr Pickford said, the extent of such effects, the precise extent to which penalties applied to CSSs at the domain or subdomain level suppressed traffic to those CSSs, and in my submission, that evidence is not necessary or indeed relevant. Google do not dispute that at least some CSSs which were subject to penalties suffered a loss of traffic, so even if the question for the Tribunal were the actual effects of the penalties, which in my submission it is not, there is no dispute that there were such actual effects and indeed Google accepts that Foundem suffered a significant loss of traffic as is apparent from the effects of whitelisting, and indeed Foundem is the only party with a claim in relation to the Pre-Decision Period.

It was suggested to you that Google is in some sense responding to a case put by my clients that Algorithm A wiped out CSSs from the market, but that has never been Foundem's case. To the contrary, Foundem's case in the Pre-Decision Period includes a case that Google discriminated against Foundem as compared with its rival comparison shopping services and it is an essential

element of that case that discrimination did not have the same effect on comparison shopping services across the board.

My friend seemed to suggest that Foundem needs to go beyond the effect on itself and potentially on Kelkoo and demonstrate a substantial effect from penalties on traffic to other comparison shopping providers. Can I just remind the Tribunal –– this is a point in my skeleton argument which has not so far ever been answered, but can I remind the Tribunal of what my friend said at the CMC last July –– that is at {G/21/111} –– when the Tribunal was hearing an application for disclosure by Google of penalty data concerning other comparison shopping services in the Pre-Decision Period.

My Lord Mr Justice Roth said ––

THE CHAIRMAN: This was on a disclosure of penalty data pre-Decision?

MR WEST: Relating to other CSSs as, as I understand it, data concerning the Claimants had already been provided.

My Lord, you said:

"... I am conscious of the burden of producing these files. I have ordered that you do ..."

THE CHAIRMAN: Just to be clear, you were asking –– who was asking for disclosure? It would have been ––

MR WEST: The Claimants.
THE CHAIRMAN: -- Foundem or --
MR WEST: The Claimants together. I think we were jointly represented. I was not there, but ...
THE CHAIRMAN: Yes, and of course there was another claimant, probably, at that time as well.
MR WEST: Yes.
THE CHAIRMAN: Yes.
MR WEST: You my Lord said:
"I have ordered that you do it for the claimant's domains ... I am not sympathetic in doing it for a lot of others as comparators, but that's on the assumption that the way that for the Pre-Decision Period Foundem and Kelkoo were subject to demotions was no different in principle from others of the same kind. And I have made it clear that if Google will seek to argue, 'No, this was just what we did to those two, because we think they were particularly terrible" or whatever, then you need to disclose what you did to others, and if you want to resist that one's got to accept that these are fairly typical."
Mr Pickford {G/21/112}:
"That's understood. My position is that there is not a good case made out for this disclosure, and it's disproportionate. And I've heard what the Tribunal has

said.
"THE CHAIR: Yes."
Just to make it clear, you then went on:
"... the implication of what I might -- denying the disclosure is that, one has to treat the -- it's not then open to Google to say, this was confined to these two CSS operators, and nobody else was being affected in that way, because if you're going to say that, you've ... got to produce the material."
Mr Pickford:
"Understood."
But that appears to be precisely what he is now saying.
Can I just briefly address the three circumstances. Again, this is addressed in my skeleton argument, {A1/2/36}, starting at paragraph 129.
THE CHAIRMAN: Just one moment.
(Pause)
Yes, paragraph 129.
MR WEST: Well, if we start at 128, it identifies the three circumstances:
"Mr Noble sets out in his Report a further ground for disputing that there was any departure from competition on the merits ... He has been instructed that, as a matter of law, there will only be such a

departure if three ... circumstances are present. These are ..."
One:
"Traffic generated by Google's general search engine was important for CSSs."
Two:
"Users typically concentrated on the first three to five search results and paid little attention to the remaining results, particularly those below the part of the screen that was immediately visible; and ..."
Three:
"Traffic was diverted to Google's CSS from rival CSSs which represented a large proportion of the traffic to those competing CSSs and could not be effectively replaced by other sources, including text ads, mobile application ..."
Etc.
We go on to say:
"The 'Three Circumstances' ... are drawn from paragraphs 158-161 of the Judgment of the Court of Justice ... The first and second ... are largely uncontroversial."
Because:
"Whether or not [they were] legal requirements, they were features of the market over the Decision Period (as

the Commission found) and, so Foundem says, the Pre-Decision Period. Mr Noble appears to agree.
"The third circumstance ... is contentious. The wording of this circumstance as set out in Mr Noble's instructions does not accurately track that of the relevant paragraph of the Court of Justice Judgment. Specifically, the Judgment refers only to the impact of 'diverted traffic'. The wording in Mr Noble's instructions ... specifies that such traffic must be diverted 'to Google's CSS', words which do not appear in the corresponding paragraph of the Judgment (or the corresponding paragraphs in the Decision) and [therefore] set[s] a ... higher bar for a departure from competition on the merits ..."
Then finally at 131:
"... Foundem's plea of discrimination in the Pre-Decision Period has always included a complaint of discrimination as between Foundem's CSS and other unpenalised (or less penalised) rival CSSs, as well as between Foundem's CSS and Google's CSS specifically. However, Mr Noble's instructions effectively require him to assume as a matter of law that discrimination by a dominant firm can only arise insofar as it involves discrimination directly in favour of that firm's own downstream operation."

So we addressed this in our skeleton argument and the point which Google seems to be wishing to argue, namely that only a diversion to Google's own CSS can found a finding of abuse, is something which is not based on the Decision and in fact requires that additional words have been added to the relevant paragraphs of the judgment on which it purports to be based.

MS ROSE: What do you say about recital 343 and 490? 343 is at {BA/2/84}, and 490 at {BA/2/154}.

In particular, 490 saying that before October 2007:

"... Google's comparison shopping service had been unsuccessful in gaining traffic."

MR WEST: I do not believe that we dispute the recitals as such. At least there will be scope for saying that more traffic went to Froogle than would have been in a counterfactual. There appear to be findings saying that the traffic to Froogle was not increasing at the time, and there may be scope for argument about whether matters were different immediately following January '08 to the previous period. But I think, consistently with my submissions, I would have to accept that that is certainly evidence and evidence that the Tribunal is likely to follow absent contrary evidence. Mr Hunt, the claimants' expert, does not actually address this

point himself.

Then briefly just my friend's particular points. He said that he would like to be able to adduce evidence from his expert because it was relevant to the question of which CSSs were affected by penalties and whether there was some correlation between that and quality.

Now, we can see the range of the dispute between the experts on this point in the JES at pages 18 to 19 {I1/4/18-19}.

Mr Hunt's analysis of this is on the left-hand side in the little table, and in particular his analysis of full domain penalties is the middle line, and his analysis is that 40% of domains were subject to a full domain penalty over the period and that, if one then looks at column B, they were so subject for just less than 40% of the time. If one multiplies those together, that means that on any one day, 15.7% of them were subject to a full domain penalty. Whereas Mr Noble, if one goes over the page to 19, on the right-hand side, towards the bottom, has a figure -- a corresponding figure of 11.3%, that is if one excludes from the sample any CSSs which obtained no traffic over the relevant period, and if one excludes CSSs which obtained -- sorry, if one includes CSSs which obtained no traffic, it falls to 6.7, so -- and if one excludes them, it is

11.3. So one sees the range there between the two, and that is before getting into the even more complicated question of the effect of subdomain penalties. But in my submission, it is wholly unclear why the Tribunal should be required to resolve these issues, whether it is 11.3 or 6.7 or 15.7, it is not relevant in my submission to any issue the Tribunal actually has to decide.

MS ROSE: It is also hard to see how this helps us on deciding whether Algorithm A is a quality targeted algorithm.

MR WEST: Indeed, without some correlation between --

MS ROSE: Exactly, with individual --

MR WEST: -- who was affected --

MS ROSE: Exactly.

MR WEST: -- and the quality of those sites.

Then, unless there are any other points, I think the final he mentioned was whether the market changed following 2007 in connection with the reliance of CSSs on traffic from Google, which is a point, again, on which he said he would like to be able to adduce evidence from his expert.

But in my submission, the problem with that evidence is it is all bootstraps. It is hardly surprising that in 2017 and thereafter CSSs got very little of their

traffic from Google's SERP because their whole complaint is that Panda put an end to such traffic and that the Remedy did not reinstate it, so that is very uninformative, in my submission.

So unless there are further specific points I can address, that was all I was proposing to say.

THE CHAIRMAN: Yes.

Mr Jowell, do you wish to add anything?

MR JOWELL: No, I do not wish to add anything, thank you.

THE CHAIRMAN: Mr Pickford, do you want to reply briefly?

Reply submissions by MR PICKFORD

MR PICKFORD: Thank you, sir.

So on the point about disclosure, this is a totally different issue, this has got nothing to do with the point that the Tribunal raised about bindingness or otherwise, and what happened in that context is there was a debate -- putting my mind back a little bit because I am having to respond on the hoof -- there was a debate about the extent to which there should be further disclosure of Penaltyserver data in the context where there was already data that went to the breadth of the market, because what the Commission had done is engaged in what I think was called the "traffic light analysis". This is not part of the case that I focused on, but my understanding is that that was what

the Commission had engaged in and that is the data that the experts have ultimately tended to focus on for their market-wide analysis of CSSs, and we already had that data. There was then a question of that being supplemented by Penaltyserver data, and we were saying we do not need any more on this issue, and there was then the remarks, sir, of you, as Chair of the Tribunal, who said: well, you can have this for Foundem, you can have it for Kelkoo, I am not going to -- I do not want you to tell me that they are the only people that were affected, and I was willing to accept I am not saying that they are the only people that are affected, we accept that others are affected. I did not make a concession -- certainly did not make a concession -- did not intend to make a concession there, that we were going to say we were thereby precluded from saying: but Algorithm A is quality-based, and therefore if you happen to be affected by it, it is probably because you are not very good quality.

MS ROSE: But that argument is, of course, open to you and does not seem to be something that the expert evidence we are looking at really bears on, because it does not correlate the penalties to the quality of the particular CSSs.

MR PICKFORD: What it does go to, madam, is a perspective on

that issue. It cannot, it is true, go to a full correlation. I do not think it would be really appropriate for the economists to sort of rank --

MS ROSE: Indeed.

MR PICKFORD: -- and do a correlation like that. But what they do say is: let us examine the precise ways in which Algorithm A actually affected CSSs in the real world, and, from that, we are going to draw some inferences as to whether, on the one hand, it appears to be an algorithm that targets CSSs as a class, or on the other hand, it is something that highly differentiates.

Now, the problem with Mr West's case is it keeps changing. He has different incarnations and, depending on which point is most helpful to him, he emphasises different aspects of it. So, at the moment, he is, I think, not dealing with the issue that our evidence is going to, which is to say, look, this is actually quite heterogeneous, because he has lots of different versions. One is to say: yes, we were impacted differently. Another part of his case is to say: no, the problem with Algorithm A is it hit CSSs generally. One of the things our evidence is trying to do is to box him in and to say, actually, it is heterogeneous and it is -- and from that, combined with what we can tell you about the signals and combined with the small amount of

evidence, admittedly a relatively small sample that we have of who got hit and who did not get hit, we can give the Tribunal some understanding of the way in which the algorithm worked and that is supportive of our case as to the legitimacy of the algorithm.

So that is my response on that. It is --

THE CHAIRMAN: I am not sure this evidence gives us any indication of how the algorithm worked, it just shows how many domains of CSSs were hit by it. But how it worked, in other words why --

MR PICKFORD: No, so --

THE CHAIRMAN: -- does not help us at all.

MR PICKFORD: -- I did not mean to suggest that it explained the why. The why is effectively Mr Cutts' evidence.

THE CHAIRMAN: Yes.

MS ROSE: Yes, exactly.

MR PICKFORD: But this is the -- this is the how, or the what, as to what was the impact, how did it play out --

THE CHAIRMAN: Yes, what was the impact.

MR PICKFORD: -- in the real world, and in my submission that is a relevant issue in this case, particularly because you have been often given the impression by the Claimants that both Algorithm A and Panda had an effect that we do not accept, and we are --

MS ROSE: Well, we have this, right?

MR PICKFORD: Is that the Raff graph?

THE CHAIRMAN: Yes.

MS ROSE: Yes.

THE CHAIRMAN: So that is what they say in effect.

MR PICKFORD: That is what they say.

MS ROSE: Yes, but this shows the sort of drop-off point being Panda, not Algorithm A.

MR PICKFORD: As assessed by Mr Raff, yes.

THE CHAIRMAN: Well, it is based on. It is just drawing on the data from Google, is it not?

MS ROSE: But for your current purposes, if you are looking at the Pre-Decision Period --

MR PICKFORD: Yes.

MS ROSE: -- this shows you that some CSSs are getting significant traffic increases, particularly Ciao.

MR PICKFORD: Yes, well, I mean, I think what is being put to me is that we are already doing -- that the Tribunal already thinks that there is some evidence to support the points that we are seeking to make through economic evidence.

THE CHAIRMAN: Well, we are saying we have got evidence on certain aspects, to which you say, "Oh, the economic evidence is critical", so there is -- it is not as though we are without evidence, and if the economic

evidence is −− which is seeking to go beyond, as it seems to us, what the Commission have said in those two recitals that we have spent so much time looking at, then we say that goes too far.

MR PICKFORD: Well, my submission is −− I do not think my submission is −− goes to criticality. I am not really −− I think I would actually have to ask Mr McGurk to address you on the degree of criticality. But my submission goes to whether it is relevant and legitimate, and I say that it is relevant evidence going to that issue, notwithstanding that the Tribunal might have other evidence such as Mr Raff's graphs, that we are entitled to put in our own evidence on these issues and not be constrained to the way that the evidence is adduced by the Claimants on these issues, and that it is not inadmissible because it is not contrary to a binding finding in the Decision because, for the reasons that I gave before, 352 does not form the basis of the empirical analysis in the Decision in the 70−odd pages that I showed you that cover traffic analysis.

So I think that is as far as −− that is as high as I need to put it in order for this to be something that we rely on and are entitled to rely on.

THE CHAIRMAN: Yes.

MR PICKFORD: I think that is really at the heart of it.

THE CHAIRMAN: Yes. Thank you. Well, we will withdraw and consider our Decision. Unless that is demanded, we are not proposing to produce a full judgment on this but rather to address it in the final judgment but just announce our Decision.

MR PICKFORD: Yes, I think that will be satisfactory. The point −− on the entirely hypothetical assumption that it were to go against my clients −−

THE CHAIRMAN: Yes.

MR PICKFORD: −− the only point that I have in mind −− and I think this is consistent with what you have told me, but I just want to make sure that this does not go unsaid −− is that if there were to be any time for us to make an application for permission to appeal to the Tribunal, that time would run from the time of the Tribunal's final judgment, ie that we do not have to do something precipitously. Obviously we do not necessarily even want to, it is just that we would want to know that −−

THE CHAIRMAN: Yes, well, that makes sense.

MR PICKFORD: −− that time does not begin to run until then.

THE CHAIRMAN: No, it would not run, that is absolutely −−

MR PICKFORD: Notwithstanding that we might have a −− my point is I think we might get a ruling now that implies something but −−

(Simultaneous speakers − inaudible)

MS ROSE: But you wouldn't have reasons so you would not know what the grounds are.

MR PICKFORD: No. No, I am grateful.

THE CHAIRMAN: The only reason for you wanting a judgment now −−

MR PICKFORD: Yes.

THE CHAIRMAN: −− is if you wish to go next week to the Court of Appeal.

MR PICKFORD: No, that −−

THE CHAIRMAN: If it were against you.

MR PICKFORD: −− I can say we are not proposing to do that.

THE CHAIRMAN: Right. Thank you.

We will be back by 3 o'clock.

(2.28 pm)

(A short break)

(3.04 pm)

Decision

THE CHAIRMAN: Following indications given by the Tribunal at the end of the hearing yesterday, regarding admissibility of part of the expert evidence as reflected in the joint expert statement, today, at Google's request, we heard arguments as to whether in particular section 1 of the joint expert statement and

the expert evidence which that reflects concerning the Pre−Decision Period is excluded.

The issue arises because of recitals in the Commission Decision which the Tribunal has held to be binding and in particular recitals 352 and 513. It is true, as Mr Pickford pointed out, that those are, or can be described as building blocks to the Decision, but that is precisely why we held in the Preliminary Issues Judgment that those recitals are binding.

Mr Pickford essentially made two points, and although it was his second point, logically the question of admissibility comes first. We reject his submission on behalf of Google that those recitals are inadmissible, or at least not binding as regards the Pre−Decision Period. We find that they are in effect binding regarding the Pre−Decision Period as well as the Decision Period unless there is evidence indicating that there was a material difference in circumstances regarding either the operation of Algorithm A or the circumstances in the market. As Mr Pickford accepted, there was no such evidence. If there were, then the burden of proof would fall on Foundem to argue that the findings in those recitals should still apply, but as I have just said, that does not arise.

Regarding Mr Pickford's first point, we find that evidence which counters the findings in those recitals is not admissible and we add that the same principle applies to other recitals which may be relevant to issues that we have to decide. In our view, this applies to the whole of section 1 of the joint expert statement, including section 1.12 and the bar chart at figure 4.6 of Mr Noble's first report, which is referenced in paragraph 1.12. Accordingly, we rule that this evidence is excluded.

To make clear, we are not saying that this means that we are bound to find that Algorithm A applied equally, or indeed at all, to every comparison shopping site, but in any event, as we understand it, that is not Foundem's case.

I should add that we, of course, indicated yesterday that there were certain other aspects in the joint expert statement where we thought they went to matters of fact or law that are not for the experts to deal with. We have heard no argument about that and I think that you can pick them up from the transcript.

MR PICKFORD: Yes, save that the only argument was in relation to section 2.F, where I made some very limited submissions.

THE CHAIRMAN: Yes, and I think we said that is all right.

Housekeeping

In the light of this, we will have the experts in a hot tub on Monday. Do we need, following this ruling, the full four days for expert evidence?

MR PICKFORD: We can certainly reflect on that. I mean, I -- the points that I was going to be addressing are still live.

THE CHAIRMAN: Yes.

MR PICKFORD: I do have some substantial cross-examination that I would like to make in relation to them.

THE CHAIRMAN: Yes. I mean, there are the various counterfactuals.

MR PICKFORD: Yes. Certainly I think our position would be this at the moment, that if we could, for the time being, not actually lose the days in terms of them being recommitted to something else. Obviously, we will, as always, endeavour to be efficient and we will take account of, as I am sure my learned friends will, the hot tub in trying to streamline things. But I think it is very likely we will need still three, and I do not want to give up the fourth entirely yet, just in case.

THE CHAIRMAN: When you say "for something else", the only something else would be you would have more time to do your written closings, presumably.

MR PICKFORD: Yes, yes, I appreciate that. Well, indeed,

there may be others who wish to --

THE CHAIRMAN: We will not vacate the fourth day.

MR PICKFORD: Thank you.

THE CHAIRMAN: But you will see where we get to.

Is there anything else for us to address now from anyone? No.

Very well, so we reconvene at 10.30 on -- just one moment.

(Off microphone discussion)

Yes, we want to start at 11 on Monday, please.

(3.10 pm)

(The Court adjourned until 11.00 am on Monday, 13 July 2026)

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