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IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22nd June-31st July 2026

Before:

The Honourable Mr Justice Roth
Dinah Rose KC
Professor Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

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

Claimants

- and -

GOOGLE LLC & OTHERS

Defendants

A P P E A R AN C E S

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 & Alastair Holder Ross (Instructed by Herbert Smith Freehills Kramer LLP and Bristows LLP) on behalf of Google LLC & Others

Monday, 27 July 2026

(10.30 am)

(Proceedings delayed)

(10.35 am)

THE CHAIRMAN: Morning.

Housekeeping

As the Tribunal has not been sitting for some ten days, I will repeat the warning that was given at the outset of the proceedings, namely that these proceedings, like all proceedings in this Tribunal, are being live streamed, an official transcript of the proceedings is being made. It is strictly forbidden for anyone to make any unauthorised recording of the proceedings or take any visual image of the live stream, and to do so is punishable as a contempt of court.

We would like to thank all the parties for their written closings and the clearly enormous amount of work that went into producing them and keeping to the page limits and we are grateful for that.

A few other important points to mention.

One is I have been sent a draft order in settlement of the Foundem proceedings. That seems to me entirely acceptable and I will make the order in the form of the draft that has been provided by Google and Foundem.

I take it that is acceptable ––

MR PICKFORD: Thank you.

THE CHAIRMAN: Secondly, when, some time ago, the Tribunal directed that this trial should be a trial in what were then three actions, Connexity, Foundem and Kelkoo, it is not clear that we ever made an order that the evidence in one shall stand as evidence in the other. Connexity has obviously fallen away, but we did have evidence from Mr and Mrs Raff. Not much reference is made to that now, but there is a little bit. That was clearly the intention and I think everyone has proceeded on that assumption, so it may be appropriate just to make that order unless there is any objection?

Then we will make that order as well.

Next, there is the question of the Commission Decisions under the DMA of last Thursday, and we have had a letter which presumably Kelkoo's representatives have seen.

MR PICKFORD: I have an update on that. It might be helpful to ––

THE CHAIRMAN: Yes, thank you.

MR PICKFORD: So hopefully this will be welcome news from the Tribunal's point of view.

THE CHAIRMAN: Yes.

MR PICKFORD: We obviously fully understand the Tribunal's

keenness to promptly get hold of a copy of the DMA decision because we are now in the week of closing submissions. We just had a bit of a quandary ––

THE CHAIRMAN: No, we understood that.

MR PICKFORD: –– on Friday, but we obviously conscientiously approached the Commission and, unusually speedily, the Commission has responded this morning, I believe only sort of a matter of minutes ago, or sort of half an hour, to say, yes, we have no objection to the disclosure of the Decision, subject to its confidentiality being fully protected, and obviously the Tribunal anticipated that by saying, well, we can put it into the LEO ring, and that is what we would need to do at this stage, pending a version that was less confidential. So that is not an obstacle any more.

Indeed, I also understand that even more recently, we have literally just been served with the official version. We were originally given a sensitive version that we were not allowed to do anything with. We have now got the official version and I understand that we can actually now use that version and provide copies of that. So that is the main issue. That has now gone.

There are just a couple of other qualifications, if I ––

THE CHAIRMAN: Just to follow that up before you go on.

That official version can be provided when?

MR PICKFORD: I think it can be provided certainly today, hopefully by the end of this morning. We obviously have to –– if we are going to put it into the LEO ring, we have to mark it as LEO, we have to –– there has to be a little bit of processing. Indeed, I do not even know –– I am not sure that my legal team has that yet because the Commission deals not with Herbert Smith Freehills but with different lawyers. So there are just a few minor ––

THE CHAIRMAN: But by the end of today?

MR PICKFORD: By the end of today, that ––

THE CHAIRMAN: Yes, well, obviously Mr Jowell has not seen it yet.

MR PICKFORD: No.

THE CHAIRMAN: So they would have to –– presumably it is more than a couple of pages.

MR PICKFORD: Yes. To be totally frank, I have not read it yet. It is 150 pages.

THE CHAIRMAN: Yes.

MR PICKFORD: That in fact is going to –– that is the basis of one of the further things that I would like to say about it.

So the second issue that we had in terms of protections is that obviously we had argued in our

substantive case that the DMA involves different law and its findings of fact are inadmissible. Now, I well understand from the Tribunal's position that the Tribunal position is: well, nonetheless we would like you to disclose it. I am not seeking to argue against that now, because that much is clear, but what we would seek in any order is it to be made clear that the provision of the copies is without prejudice to our substantive arguments that we might wish to make about the relevance and the admissibility of the Decision, because what we do not want to do is to effectively be seen to be giving those up by complying with the request for copies.

THE CHAIRMAN: Yes.

MR PICKFORD: So I hope that that will not be troublesome, but that is a further protection.

THE CHAIRMAN: Well, it is clearly admissible as a finding of law --

MR PICKFORD: Yes, but -- yes.

THE CHAIRMAN: -- and it appears, but you can -- I confirm that from the press release, which is all we have seen. You are quite correct that we are concerned only with the Decision under Article 6, paragraph 5 of the DMA and not the other one.

MR PICKFORD: Yes.

THE CHAIRMAN: That was an error on our part.

It appears to find that the shopping box currently used by Google, what has been called the "remedy box" contravenes Article 5 of the DMA.

MR PICKFORD: Yes.

THE CHAIRMAN: Is that right? That's our understanding of what ...

(Off microphone discussion)

MR PICKFORD: I just asked whether I can respond to that in open court.

THE CHAIRMAN: Yes.

MR PICKFORD: The response I have got is that we -- it has not been read sufficiently to be able to give --

THE CHAIRMAN: A clear answer.

MR PICKFORD: -- a clear answer. I am not saying there is not one.

THE CHAIRMAN: Yes.

MR PICKFORD: But I am not sure I can give an answer to that right this moment.

THE CHAIRMAN: I understand.

MR PICKFORD: But we are not seeking to oppose the order to provide copies, but we are saying that the findings of fact are inadmissible, *Hollington v Hewthorn*, that is our points which the Tribunal may or may not accept in due course, and we say that because it is a different

legal regime, it is ultimately not going to assist this Tribunal. Those are our points, and we simply want to make it clear that we would like to maintain those points substantively. That is all.

THE CHAIRMAN: We understand that, but we have two concerns.

One is, the counterfactual, which is the question being argued here, has to be lawful, and not just lawful under competition law, it has got to be lawful. If there is now a decision by the Commission that this shopping box is unlawful, we do not see how it can be a counterfactual that the Tribunal can endorse. It has been common ground, I think, between the parties that the counterfactual has to be a lawful counterfactual. The fact it is a different regime does not matter, it is still European law and many of certainly Kelkoo's claimants are in the EU and so that is one of our concerns, that is the first one. So it seems to us it goes very relevantly to what we have to decide.

Secondly, we see from, again, the press release that:

"... after a constructive dialogue, Google has proposed and started testing changes to how it presents its own services on Google Search for free services such as shopping ..."

So Google has made proposals to the Commission of,

apparently, changes to the way it is presenting or might present its shopping service. We do not know how long that has been going on, and I do not know if those proposals have been disclosed, but they seem, when we are having significant discussion as to what might work in terms of latency and quality control and all the rest of it, and if there are actual proposals of how the box might be reconfigured or reorganised or restructured, or whatever word one wants to use, that have been made by Google obviously on the basis they could work, they seem very relevant, notwithstanding it is under a different regime, it does not matter.

Have they been disclosed to Kelkoo?

MR PICKFORD: No, sir, they have not. There has been, in my submission, what is almost certainly a privileged dialogue with the Commission about how Google might find some accommodation with the Commission in relation to its concerns. Obviously, to the extent that we now have a decision and to the extent that anything has now become open, then it may be possible to refer to those, but my understanding -- and I have to say, I have not been involved in this particular aspect of Google's issues in relation to shopping for some time, I was tangentially some while ago, but I have not for over a year, so I would need to take instructions. But my

understanding is -- and I can be tugged and told this is wrong -- is that there have been privileged discussions with the Commission.

Could I come back to the first point, because, again, I am not seeking to resist the provision of the copy, but I would just like to respond, which is there is a tiny issue in relation to legality. There were two different periods for determining a counterfactual. What -- so period number one is as between 2008 and 2017, and the DMA was not in force as between 2008 and 2017, so in my submission, that -- whatever is said under the DMA cannot possibly affect the legality of what we did or did not do then, because it simply was not law. As regards the period post the DMA, I can see there is a potential complication, but, of course, we only get into the world of a counterfactual if in fact we have abused dominance under Article 102 and that issue only arises in relation to Article 102.

So there is definitely a world in which the legality of our conduct under the DMA does not affect anything in these proceedings. Indeed, that is the world on our case.

MS ROSE: I see how you can make that argument, but it is quite difficult, is it not, to say that the judgment is

irrelevant given what you have just said? Your submission would be as to why, notwithstanding the judgment, your conduct is still lawful and therefore there is no need for a counterfactual.

MR PICKFORD: Well, that is a submission that I have made without having read it. Obviously, as I said at the outset, we -- we -- I think all of us in this room obviously are slightly handicapped in that we have not read it, we have not digested it and ultimately what we need to do is make submissions on the basis of having seen it, which is what I was proposing to get to in terms of the practical way forward.

But there are certainly aspects of it -- I can say this much, there are aspects that we say are irrelevant, because it concerns a different law, and there are aspects which are inadmissible, and we want to maintain at least those arguments, irrespective of whether -- it is conceivable, once we see it, that there are some other aspects where those arguments do not hold and we can only really judge that when we have seen it and that is why I understand why the Tribunal would like us to provide copies and we will.

THE CHAIRMAN: I think you are right that, as a matter of law, Google's obligations probably only start from the point of designation as a gatekeeper, which I think

was 5 September 2023.

MR PICKFORD: Yes. I think it is six months later, but, yes.

THE CHAIRMAN: Oh, maybe it is six months so ... Before that, you can say it is -- the DMA does not apply to Google.

Once it does apply, if we are looking at a counterfactual, yes, we are looking at it under Article 102, but as I say, the counterfactual still has to be lawful.

MR PICKFORD: Yes.

THE CHAIRMAN: Secondly, there is now significant jurisprudence that in deciding whether there is an abuse, you can also look at whether the party is in breach of other related obligations. I am thinking of the *Meta* judgment in the Court of Justice, where it was partly an abuse because what *Meta* was doing breached data protection rules.

So it would be very relevant even to the question of abuse if what Google was doing after 5 September '23 breached the DMA, and that is even without getting into the fact that the particular provision of the DMA that is here at issue almost mirrors word for word the finding of self-preferencing, which was the abuse found and the abuse alleged post-Decision. So I do not

see that the two can be divorced one from the other in that way.

MR PICKFORD: Well, sir, I do not want to take up lots of time on it. I think we would not -- I would not concede that point. I would not concede that what we have done under the DMA is relevant to whether there is an abuse under Article 102. Our position is firmly that they are different legislation, and without wishing to get too drawn into the detail, a critical difference is that the DMA has a broader test than under competition law. The DMA simply applies Article 6(5) -- I beg your pardon, applies to similar services. So the only thing that needs to be satisfied by the Commission to engage Article 6(5) when it is looking at what we provide on the SERP is whether it is similar to another service. It does not need to demonstrate, as was the basis, in my submission, for the arguments in this case made by -- and is the basis of the arguments made by Kelkoo that it is in the same market. Market definition is not required under Article 6(5) and so there are significant differences between the two.

THE CHAIRMAN: Yes.

MR PICKFORD: But I am obviously not going to develop those, that is just an immediate response, that we do not accept that the two are on all fours in that sense.

I think I probably do not need to say any more, just that there are aspects which we will contend that it is relevant and aspects where we will say it is inadmissible, and as to the rest, well, we can -- you know, we can debate that, and all I am saying is our provision of copies is without prejudice to those points.

THE CHAIRMAN: That is noted. What do you about the -- you say it may be privileged, although if you are testing changes to remedy box, that is perhaps questionable, but the relevance of potentially Google, in the next month or two, changing its remedy box in a way that one might want to consider on the question of the counterfactual?

MR PICKFORD: I would have to take instructions on that --

THE CHAIRMAN: Yes.

MR PICKFORD: -- because I am afraid I do not even know sufficiently what those proposals are and so I am not really able to say. I think it would be unwise of me to try to respond to that at this stage.

MS ROSE: Can I just ask -- and this is really a question for both parties -- do you feel constrained in making submissions without this judgment?

MR PICKFORD: So I was going to make a proposal, because I have discussed this with my learned friend and I was going to -- maybe if I could answer a different

question, which is, in view of the fact of what the Tribunal has said about it, what we were going to propose is that we are -- on Monday morning there is a very large document that no one has digested, but the Tribunal would obviously like to have some submissions from us on this, and so we were going to propose -- and Mr Jowell is happy with the form of this -- that we make written submissions to the Tribunal, that we have simultaneous exchange of those followed by very short replies, that the first round of those would be in mid-September, so in particular Friday, 18 September, and they would be 10 pages, and then we would have five pages of written submissions in response, so that to the extent that there are further things that need to be said about the DMA, they can be aired through that mechanism. That was our constructive proposal on our side for how we might get through it and Mr Jowell, I understand, is happy with that, so ...

THE CHAIRMAN: Well, so that you deal with it in writing, we would have to address the timetable for that.

MR PICKFORD: Yes.

THE CHAIRMAN: Well, you have heard -- I think we should give Mr Jowell a chance to speak.

MR PICKFORD: Yes.

THE CHAIRMAN: You have heard our concerns --

MR JOWELL: Yes.

THE CHAIRMAN: -- and that -- something of a predicament that we feel it creates.

MR JOWELL: No, of course, and we, of course, fully endorse and agree with the points that you have been putting to Mr Pickford that it is highly relevant and important that we see it and that the Tribunal gets a chance to digest it and that we get an opportunity to make submissions on it.

I think there are two -- just in terms of, just before I forget, there are two sort of specific points I should make.

We are content to receive it initially into the LEO ring, but of course that does limit us because it means that we cannot -- there are certain lay people like Mr Stables, for example, who then has no access to it at all and who can give us potentially important instructions on it. So what we would ask is that if it is possible to get a redacted version into the ordinary confidentiality ring. So that is our first -- a suitably redacted version if that is -- at the earliest opportunity. So that is our first point.

The other point I would make is this, is that -- and it relates to the point that the Tribunal brought up about what has been going on between -- really between

Google and the Commission and more generally is that the Decision is likely to have a record of facts. Now, findings of fact are of course inadmissible under *Hollington v Hewthorn*, but a record of facts, you know, of things of that are of -- say, "This document says this", for example, is perfectly admissible, and so it may be that when we see the Decision, we see, for example, that there is reference to underlying documents and we want to see those underlying documents. So obviously we cannot deal with that now, we will need have a chance to digest the Decision, but it may be that we will be requesting the provision of those underlying documents.

THE CHAIRMAN: Yes, it is not clear from the press release whether those documents are encompassed in the proposals and are encompassed in the Decision or whether they followed on the Commission's indication it is going to take this decision that then there was discussion rather like here --

MR JOWELL: Yes.

THE CHAIRMAN: -- and the discussion which followed the Decision.

MR JOWELL: Yes, yes.

THE CHAIRMAN: So we just do not know that, but there might -- and then to what extent, if at all, they are

still privileged.
MR JOWELL: Yes, so we are content with the proposal that my learned friend has made in relation to written submissions initially with a reply round. Of course, we appreciate that it is in the Tribunal's hands and it may be appropriate, after that, for the Tribunal, if it so wishes, to hear oral submissions -- further oral submissions, or there may be further material that needs to be disclosed, further evidence that is required.
I think we just have to -- we cannot be too definitive, I think, at this stage, in our submission.
THE CHAIRMAN: Yes. I mean, as regards the non-confidential version, that will probably depend a bit on the Commission --
MR JOWELL: Yes.
THE CHAIRMAN: -- because it will be -- we do not know how many other parties are involved --
MR JOWELL: Yes.
THE CHAIRMAN: -- and it can take some time --
MR JOWELL: Yes.
THE CHAIRMAN: -- until that is available. Obviously eventually the Commission wants to publish the Decision generally.
MR JOWELL: Yes.
THE CHAIRMAN: But experience tells one that can take rather

long.
We are a bit concerned about the dates, because we have certain constraints in terms of dates and we would really want submissions by the beginning of September.
Is that going to be possible? We appreciate people have holidays booked and things like that.
MR JOWELL: Of course. We will do that.
THE CHAIRMAN: But we would want to be considering this in September; that is when we have got availability.
MR JOWELL: Yes.
THE CHAIRMAN: So rather than what was proposed, I think, the 18th and then a reply, to have it -- rather than setting a date now, I would ask you to confer over the short adjournment and see if we cannot have it really -- well, ideally at the end of the first week in September.
MR JOWELL: Of course.
THE CHAIRMAN: Just a moment.
(Pause)
It concerns us it might be so important that it would be appropriate to have brief oral submissions on this, and the date that we are looking at -- to get the three of us together is quite difficult -- is 11 September, if that is at a date that counsel can do, which means then getting written submissions and reply

submissions sufficiently in advance, and the fact that you are going to get the Decision today, and even with holidays, we would hope that you can work round and towards the date of 11 September.
So we will leave that with you -- do not respond on your feet, as it were -- to consult with those behind you, and, Mr Pickford, similarly to see if you can agree a timetable for written submissions. I think we will take it from there and I think that is all that we can do at the moment as far as that is concerned. If there are issues that arise, or problems, then, if necessary, applications can be made. August is a time when people are not always around, so there may be some delay, but they can be dealt with.
MR JOWELL: Of course. Thank you.
THE CHAIRMAN: Very well. So we will proceed on that basis.
Then it is for you, I think, Mr Jowell, to address us on the closing submissions.

Closing submissions by MR JOWELL

MR JOWELL: Unless the Tribunal prefers otherwise, my intention is to divide my submissions into four parts. First, I want to make some observations about the facts and the evidence you have heard. Then I wish to consider the issue of whether there has been an abuse in the post-Decision Period. Third, I will address you on

the question of law of why we say that for the Decision period you are bound as a matter of law to adopt the double counterfactual of no demotion and no promotions. Then, finally, I will address you on the question of what, in any event, would have been the most realistic of the permissible and lawful counterfactuals.
Obviously I do not intend to slavishly read through our closing submissions, I take it that you will have read them or will have an opportunity to read them. What I wish to do is rather to highlight some particular points in the evidence and to seek to respond to some of the main points that Google has made in their submissions. Obviously the fact that I do not deal with every point should not be taken as any acceptance of them.
So starting then with the facts. You have heard the evidence and read a number of documents and I want to do essentially two things. I want to, first of all, go back to some of the factual disputes that I identified in opening. You may recall, that is some time ago now, but in opening, I identified some of the key factual disputes between Google and ourselves and I want to go back to those, if I may, and see where we have landed up in terms of the evidence.

Secondly, I would like to also go back to some of the points that -- go to some of the points that Google makes on the facts and evidence and respond to those.

Now, before I do, we have got another bundle of hard-copy documents, as we did in opening, which we have provided to my learned friend, just if you want hard copies at all. These are all documents that -- I think they are all documents that I have been to already in cross-examination at one point or another, but some people --

THE CHAIRMAN: No, that would be helpful, yes.

MR JOWELL: So we will pass those up.

(Handed)

So going back then to the points in dispute that I identified in opening, the first that I observed was that there is a dispute between us and Google as to whether, at the time that the abuse started in January 2008, CSSs, independent CSSs, were still a serious competitive force. The second point was whether -- in dispute was whether Kelkoo and Ciao were, as we said, leading businesses in the CSS field, or, as Google said, poor quality or even disreputable companies. I would like to, if I may, deal with those both together.

Now, we say that Google's internal documents that it

say were mainly on the advertising side of the Google business show that CSSs were certainly regarded seriously and indeed as a serious competitive threat. They were perceived as part of a wider class of what were called variously "aggregators" or "specialised search engines" or "vertical search engines", and we say that it is clear that amongst those aggregators in the retail field, CSSs, Kelkoo and Ciao were regularly cited by Google in its internal documents as leading players and indeed were compared favourably, in terms of quality, as compared to its own CSS, Froogle.

I want to take you, if I may, just to five documents on this. I think I took the witnesses to all of them, but I did not show them to you in opening.

Now, one of them, the first one, is from September 2005, so that is shortly before Algorithm A started seriously to affect Kelkoo. The second one is from November 2007, so just before the abuse started. The third is 2009, so a little bit into the abuse. The next one is the end of 2010, so further into the abuse. The final one is 2015, so towards the end of the Decision period.

MS ROSE: Why does this matter?

MR JOWELL: We say the only point that matters is that CSSs were indeed a serious competitive force. We do not

think that the specific quality and all of the details that are gone into does matter, but I do think that we need to rebut this point because they have spent so much time in their submissions on it and it is important, we think, just to set the record straight.

MS ROSE: What issue does it go to?

MR JOWELL: Well, it goes, perhaps, to the issue of counterfactual and what would have happened in the counterfactual, but even there, I think it is tangentially -- of tangential importance.

MS ROSE: How does it go to the counterfactual?

MR JOWELL: Well, I suppose what -- that Google would say, well, if -- I think Google's case is: well, our algorithms were all about quality; these were all poor quality companies, therefore they were demoted on the basis of quality. I think that is the thrust of their submission.

THE CHAIRMAN: But we have findings in the Decision about the effect of the two algorithms --

MR JOWELL: Yes.

THE CHAIRMAN: -- on CSSs. The counterfactual has to be a counterfactual generally.

MR JOWELL: Yes.

THE CHAIRMAN: Whether, in whatever counterfactual one ends up with, Kelkoo and Ciao would have done well or badly,

I mean, take one of the points you made about the algorithms, realistically, it seemed to me, you say, I think towards the end of your closing, well, it may not be a case of just removing Algorithm A and Panda but of modifying them --

MR JOWELL: Yes.

THE CHAIRMAN: -- in a way that --

MR JOWELL: Yes.

THE CHAIRMAN: Well, suppose that is right. Whether modifying them, therefore, in a way that only poor quality CSSs get demoted and the better ones can survive and thrive, that may be so, but whether Kelkoo specifically and Ciao would have done well or badly is not really for this trial, is it?

MR JOWELL: I entirely agree and the point that we were going to make that they do -- I mean, they weave it in in various ways. They do -- for example, they say that the reason why the catalogue view was so popular, they say, was, well, that is because it was Google's CSS, they say. They say, well, if we had had various CSSs, it would not have been the case. So it does somewhat come in on their case. It is not really -- we do not really accept that it is relevant. If it is relevant at all, it is at a very high level, in a very high-level sense, but I do feel the need, if I may, just

to take you to a few -- because we do need to set the record straight. There is so much --

MS ROSE: I can understand why you feel you need to rebut what has been said, because they do make a lot of it, but I am still struggling to see how it is relevant to the two issues that we have to decide, one of which of course only relates to the post-Decision Period --

MR JOWELL: No, well, I --

MS ROSE: -- and the other of which is a purely hypothetical question: what is the lawful and commercially viable counterfactual that Google would have adopted over the period?

MR JOWELL: I agree, I think it comes in hardly at all, but as I -- I think I gave an example of where I think Google --

MS ROSE: Do you concede it comes in at all?

MR JOWELL: No, we do not. I mean, we really do not. But we say, if it does, it is at the most -- it is at a terribly high level, at a very high level. I mean, if it were the case that all of these CSSs, other than Google's, were appalling, you know, then maybe it would be tangentially relevant to some of the counterfactual points, such as, you know, why -- whether the catalogue -- a multi-CSS catalogue view counterfactual would work, our 3A, but other than that,

we do not really see how it comes in.

But I do want to set the record straight, so if you bear with me, it will not take long just to take a whistle-stop tour through some of these documents to remind you of them.

So if we go to {M3/502}.

This is an email from October 2005. So this is not long before Algorithm A is about to hit traffic to Kelkoo quite significantly, and it is an email from Jess Lee regarding a QA plan for Froogle UK and Germany with a new user interface and a new infrastructure. It is forwarding feedback from the UK office and the feedback is dated 27 September 2005 from Mr Andy Ku of Google. So this is someone working within Froogle, and you can see what he says:

"Jess -

"From random discussions with people and from using my own gut, I believe search quality is the most important aspect of any such service (more important than features). Kelkoo, UK's leading service, does a very good job of returning exactly what the user is looking for, even with incomplete info. Kelkoo is still much better at this ..."

Then he proceeds to give five examples of how Kelkoo gives better results.

Just to show you the final one, at point 5, he says:

"One final example on Kelkoo's ability to sniff out what users want based on current trend/popularity."

Now, they are all examples of how Kelkoo is doing better than Froogle.

Now, Mr Ku is not alone in Google in holding that view and there are other aspects of this email trail that are in the bundle. One is at -- I will not take you to it, but it is {M3/542}, for your reference -- where Rupert van Millingen, another member of the Froogle UK team, responded in similar terms to Ms Lee, also comparing Froogle unfavourably to Kelkoo. So that is end of 2005.

Clearly, at that point in time, Kelkoo is perceived by Google's own employees within its Froogle unit, who I would submit are the best people to assess, first of all, that Kelkoo was the UK's leading specialised shopping search aggregator and had exceptional ability to identify what users wanted and was well ahead of Froogle.

Now, you may recall that I put to Mr Cutts, I said to him -- in his evidence, I said to him, well, Froogle was not a thin affiliate, and he accepted that. Then I showed him this email and I said -- effectively I said: look, if Froogle was not a thin affiliate,

a fortiori Kelkoo was not a thin affiliate. I think his response was:

"Well, I don't agree with [what he called my] syllogism."

He did not agree with the validity of the syllogism. Now, that was on {Day7MT1/212-215}. I do not propose to turn it up. Well, we respectfully say that tells one rather more about Mr Cutts than it does about the validity of the syllogism, not least given that, as I showed you and as was put to Mr Cutts, Google instructed its own raters that Kelkoo was not a thin affiliate and it did that specifically from 2006 all the way through to 2012. You will see the references in paragraph 24 of our closing submissions {AA1/1/13}. So that is -- that was the position back when Algorithm A was first taking effect.

The next document is just on the eve of the commencement of the abuse, end of November 2007. That is at {M3/552}.

This is a presentation entitled, "Commerce EMEA GPS", and Mr Goodrow told us that "GPS" stands for Google Product strategy, and it referred to a series of strategic discussions with Google's senior executives. He told us that on {Day9MT1/51}. So we say this can be thought of as a pretty reliable representation of

Google's view at the time since this was being shown to senior executives.

If we go to {M3/552/4}, you see "Business Case" and it says "Traffic":

"Our product search offering is not currently competitive."

That is clearly a reference to Froogle:

"Other players have stepped in to fill the void in our offering.

"These players are dependent on Google for traffic.

"Monetization

"Comparison sites are effectively monetising traffic."

Then:

"Checkout can enhance product search monetization."

Below that:

"These comparison engines are able to monetize the traffic for millions of dollars."

You can see that, third line in:

"The traffic is ours for the taking.

"The business case for enhanced [Product Search] across EMEA.

"Searchers for products generate billions of dollars for Google in EMEA. The Retail and Tech verticals will financial credit for c.30% of Direct revenue in 2007.

"At the moment these searchers have a relatively poor experience on Google.

"Google supplies 30-70% of traffic for leading comparison engines in Europe.

"These comparison sites are experiencing strong growth and healthy monetization."

If one then asks, well, what were these comparison sites which Google had in mind that were "experiencing strong growth and healthy monetisation" and that were also highly dependent on Google for traffic? We go to page {M3/552/6}, please, and you see there "Ciao!" and also you see "yahoo" at the end. Now, Yahoo! at that time -- it refers to -- it says -- you see under -- it says:

"We supply:

"77% of Ciao's traffic.

"84% of démate's traffic.

"36% of Yahoo Shopping's traffic."

Now, at this time, Yahoo! was the owner of Kelkoo and so when it refers to -- and Kelkoo was the European arm, shopping arm of Yahoo!, so Yahoo! is effectively Kelkoo.

One then sees on {M3/552/8} and {M3/552/9}, you see these -- I think we have put these in our closing submissions, they are these documents of how they plan

to:

"Take back our traffic and monetize effectively."

If we can go over to {M3/552/9}.

But for present purposes, if we go to {M3/552/33}, under "Product Search", you see another reference to Ciao:

"Preisvergleich (best-price) and Ciao! are well ahead of other firms on traffic metrics."

We see:

"Google product search is already in place, but it is not a competitive offering."

Third line.

If we then in go to {M3/552/39} we see:

"France: Comparison Sites."

We see "Ciao!" growing extremely rapidly, 48%, with 67% of its traffic from Google. Then we see "LeGuide" and "Kelkoo (yahoo)", so the point I was making earlier, Kelkoo and Yahoo! are as one. Kelkoo has got negative growth at that time, presumably because it is being hit by Algorithm A, but you can still see users per month, 2.5 million, so it is still a force to be reckoned with. So that is the assessment just on the eve of the abuse.

If we then go a year into the abuse, if we can go to {N/302}, here we see a 28 January 2009 internal presentation on "The Aggregator Challenge", and if we go

to {N/302/2}, you can see there is a:

"Reminder on how we define the 'aggregator challenge' and its importance."

If we go over one page {N/302/3}, we see:

"How do we define aggregators?

"... [They] help users search for and obtain the best product/service* for their needs, from a selection of 3rd party sellers."

Below that, you see a description of how they work: they generate traffic; they obtain product data; they help the user find the right product; they help the user choose a seller and link to suppliers.

Then, on {N/302/4}, we see what they say:

"Aggregators are the biggest opportunity/threat we face in our core business of search."

Now, I have to say, it is pretty extraordinary that none of the witnesses called by Google seemed to know that this was the biggest -- this was regarded internally as the biggest opportunity or threat faced by Google. But there we are, this is what the documents say.

You see under -- in the box in the middle, "Aggregators", there is then reference to who those aggregators are:

"([Moneysupermarket], Ciao [and] SkyScanner, plus

'enhanced' aggregators such as Orbitz, Priceline and Expedia)."

Of course none of those have gone on to be enormously successful businesses.

THE CHAIRMAN: It says at the bottom:

"50% of internet users have used a price comparison site ... "

MR JOWELL: Yes, indeed, "in the last month".

If we go to {N/302/5}, they say:

"Aggregators are a challenge across all mature markets and most verticals."

You can see the second column is "Retail", and right at the top there, you see Kelkoo, and then you see below that, you see again mention of Ciao.

Page {N/302/6}, we see:

"Why are aggregators a critical issue for Google?"

They say they are a:

"Major revenue opportunity and [a] threat."

There are:

"Scalable, high margin aggregator models ..."

At the bottom.

Page {N/302/8} deals with the efforts that are underway, and you see reference to an interest in "a more aggressive Google move" and a:

"Renewed focus on product efforts that seek to

address the aggregator challenge."

You can see the second bullet:

"Product Search."

At the bottom:

"Increasing concern across EMEA teams ..."

If one goes to {N/302/14}, please, you see here they say:

"The European aggregator market is large and growing strongly."

You can see at the top of the graph is the representation of retail, so that is the -- this is the chunk that Kelkoo and Ciao are in, and you see that they are -- they see the retail aggregator revenue growing at quite a rate, from 2 billion in 2006 up to 3.6 -- yes, 2 billion in 2006 to 3.6 billion in 2008, which, if I understand the graph correctly, is identifying an annual rate of 34%, you see on the right. So this was not a market sector that Google, even at this time, was looking at as somehow doomed to fail. Not at all, this was a -- these were leading players, Kelkoo and Ciao, in a growing market segment.

Even well into the abuse, Google still continued to regard Kelkoo and Ciao as leading shopping comparison sites. So if I can show you a document from the end of 2010, a couple of years later, this is at {K1/15}, and

this is the response of Google to its second -- to the Commission's second RFI.

If we go to {K1/15/12}, you can see paragraph 37:

"Please explain in detail for each of the web sites mentioned in the previous question which specific elements distinguish it from Foundem's service in terms of quality and in particular in terms of original content."

They say:

"Google has no internal documents reviewing the merits of Foundem relative to other comparison shopping sites. For the purpose of this question, Google has taken the top ten 'Shopping Directories and Guides' identified by Nielsen Netratings and conducted a 'first glance' review of these sites. Elements of these sites suggesting the presence of original content and distinguishing these sites from Foundem are identified in the table included as Annex 37.1."

So basically, if you go back to page 11 {K1/15/11} of this there is a detailed description of how the Nielsen site is itself compiled, but effectively Google seems to regard this as the most reliable source of leading comparison shopping sites and then goes to the sites and identifies the features of those sites.

If we go to annex 37.1, that is in {M1/508}, and

here they -- they say these are:

"Elements of the Top Ten 'Shopping Directories and Guides' (from Nielsen Netratings) Indicating the Presence of Original Content and Distinguishing these Sites from Foundem."

Right at the top, we see "Bing Ciao", because at this time Ciao is owned -- part of Bing, part of Microsoft, and they give a detailed list there of all these impressive features that distinguish them they say, that they were then saying distinguish them from Foundem in terms of quality.

At the bottom, you see "Kelkoo", and if we go over the page {M1/508/2}, again, a very long list of features that they identify for Kelkoo. I do not think I need to read through them all. All of the buying guides, the voucher codes, the cashbacks, and so on and so forth.

So, of course, in these RFIs what Google is trying to do is to unfavourably contrast these high quality CSSs with Foundem as a supposedly low quality CSS. Now, of course, that does not suit them at all; they are seeking to portray Kelkoo and Ciao as the substandard CSSs, but that is not what they told the Commission.

If we go to another RFI, this one from December 2015, so right to the end of the Decision

period, this is at {M2/1093}, and this is December 22 2015, another response.

If we go to {M2/1093/11}, please, you can see they say, three paragraphs down, they say:

"Rather than describing abstract concepts (eg, the SO's proposed distinction between aggregators and merchant platforms), Google presented respondents with concrete examples of actual services that are relevant in the present case."

This is in the context of a survey they were constructing to try and show that Amazon was part of the same market. They say then:

"Kelkoo.co.uk, Idealo.de, and Leguide.com are leading aggregators in the UK, Germany, and France, respectively."

So even in the end of 2015, they are taking Kelkoo as the leading aggregator in the UK.

Now, despite all of this, Google mounts really quite a vicious attack on Kelkoo and Ciao's businesses in their submissions and I certainly do not intend to address all of those points. As the Tribunal has indicated, it is just not what this trial is about, and it is not about what the precise extent of the impact of the algorithms were on Kelkoo or whether Kelkoo had other weaknesses in its business that are -- that might

have contributed to the harm caused by Google's abusive conduct; those are all matters for trial 2. It is certainly no part of this trial whether Kelkoo has engaged in any business practices that are in some way worthy of moral condemnation. It really is to treat this Tribunal as though it is an American jury to suppose that it is interested in --

MS ROSE: Perish the thought!

MR JOWELL: Perish the thought.

So -- but I do want to make -- I want to make a few just general points about these, for obvious reasons.

First of all, this is not the first time that Google has sought to smear as substandard in terms of quality the leading CSSs that claim damages against it. You will recall that on 1 July this year, the *PriceRunner* judgment was handed down, which ordered Google to pay close to €2 billion in damages, and shortly before that, Google's defence in these proceedings was added to the bundle actually by Foundem, I understand, and if I can just show you something from that, it is quite interesting. It is at {O/12/50}.

THE CHAIRMAN: That is not in this --

MR JOWELL: No, this probably will not be in the file, but it should hopefully come up on the screen in front of you.

THE CHAIRMAN: Is it 50 or 15?

MR JOWELL: 50, 5-0.

So this is Google's defence and you see what they say. They say --

THE CHAIRMAN: This is the defence in the Swedish action.

MR JOWELL: In the Swedish action.

They say, 148:

"After the acquisition in 2004, the US owners quickly lost focus on the business and stopped investing in it."

Then they quote.

Then they say:

"Although *PriceRunner* as a company continued to grow, it lived a fading existence."

Then 150:

"Nicklas Storåkers, who was CEO of *PriceRunner* during the period 2016 to 2021, described it himself as *PriceRunner* at the time of the acquisition was a 'heavily dusted and uncut diamond that deserved to be polished properly'. Although *PriceRunner* was profitable, he felt that it was not growing as strongly as the e-commerce market was growing. Nicklas Storåkers also felt that *PriceRunner*'s comparison service was 'very neglected', that it was not good enough for consumers, and that it was relatively outdated."

So it all looks a bit familiar, does it not? It is clearly a favourite part of the Google defence playbook. The point that we would make about this is essentially this, that Google has received a huge amount of -- a huge volume of disclosure from Kelkoo. Most of that was actually given in relation to quantum issues generally, so really for trial 2, and what they have done is to effectively cherry-pick and find embarrassing documents that they can then put to Kelkoo's witnesses in these proceedings.

Now, it is possible, of course, once you have received thousands of internal documents about -- from any business, you can find embarrassing documents, or documents that are highly self-critical, and Google of course makes great play of these and in particular of expressions like "toxic traffic". But the fundamental point is that none of those documents gainsay the only potentially relevant fact for this trial, which is that Google recognised Kelkoo was one of -- and indeed Ciao, was one of Europe's leading shopping comparison businesses and was clearly not a thin affiliate, and yet both sites were hit hard by Google's demotion algorithms and that Google was aware of that.

The other general point I should make is this. At paragraph 112 of its closing submissions {AA2/1/43},

Google makes an allegation that, at least on one reading, it could suggest that Kelkoo supplied fraudulent traffic. Now, it is trite law in this jurisdiction that any allegation of fraud has to be pleaded distinctly and has to be properly particularised. That is a rule of pleading and it is also a rule of professional conduct, and if you need a reference for that, which I am sure you do not, that is in Lord Millett's speech in *Three Rivers v Bank* of England at paragraphs 184 to 186, which is in the bundle at -- for your note is {AB2A/30/58}.

Now, not only has no allegation of fraud been pleaded, but none of the supposed deficiencies in Kelkoo's business practices have been pleaded either, so I fully expect that Mr Pickford, when he stands up, will wish to clarify that he makes no allegation at all of fraud against either Kelkoo or Mr Stables.

The final general point I should make is this, that the overwhelming amount of the evidence that is cited by Google about Kelkoo and Ciao's poor quality -- supposed poor quality, relates to the period well into the abuse period, where of course they have been hit hard, they have been deprived of traffic and there has been underinvestment. Only two paragraphs, actually, of their submissions, paragraphs 95 and 96 {AA2/1/37},

relate to evidence from the pre-abuse period and those refer to just four rather inconclusive documents which have to be read against the background of these other documents that I have shown you of how these were extremely impressive and fast-growing businesses in the pre-abuse period. So we say that actually all of this is also just confusing cause and effect, and of course CSSs were unwilling to invest in circumstances where their businesses had been hobbled by the diversion of traffic that was their life blood.

So going back then to the various other points in dispute that I mentioned in opening, another issue related to the nature of Google's demotion algorithms, Algorithm A and Panda/Coati, and how they related to CSSs.

Now, my learned friend put a shot across my boughs at the end of the evidence to note that we no longer pursue a case for the Pre-Decision Period that Google pursued an intentional or deliberate exclusionary strategy to demote CSSs amounting to a separate abuse, and that is quite true, we don't make and we don't need to make an allegation of a deliberate strategy on the part of Google specifically to target CSSs. But at the same time, the Decision, as interpreted by the European courts, actually goes rather further in

terms of Google's state of knowledge and awareness than Google recognises, as I will come on to in due course.

But at the same time, I should also state that there is an argument that is not open to Google in light of the Decision, and that argument is this. You see Google consistently, throughout its submissions, trying to argue a case that the application of its demotion algorithms was purely a matter of quality. You see that in paragraphs 49 {AA2/1/22}, 81 {AA2/1/33}, 216 {AA2/1/85}, 271 {AA2/1/106}, 310 {AA2/1/120, 311 {AA2/1/121} and so on. They say, "Oh, well, if we -- if -- to the extent that any particular CSSs was demoted", they say, "that is just because they exhibited features of poor quality", and they say, in effect, that the algorithms were entirely innocuous, just a sort of state of the world that would always have existed, they say, and not part of the abusive conduct as such. They put it most crisply, I think it is in paragraph 49 {AA2/1/22}, where they say the algorithms "are instead only part of the backdrop to the Decision" -- "the backdrop to the Decision" -- and therefore they seek to imply that the only conduct that is abusive is the unequal promotion, the demotions are not really part of the abuse, just the backdrop.

We say, with respect, that is just not an argument

that is open to them because it is not what the Decision says and it is not what the European courts have said that it means. Google ran that argument in the European courts and it was rejected, and I will come back to that in the context of the abuse issue, and indeed the counterfactual.

Now, the Decision in the European Court are absolutely clear that the abusive conduct had two conjoined elements of equal importance: the promotions and the demotions acting jointly. In particular, we say the Decision says three things. First of all, Algorithm A and Panda/Coati were prone to demote CSSs by reason of their inherent characteristics as CSSs. You have seen that in recital 352 {BA/2/86} and 358 {BA/2/88}, and of course recitals 353 to 355 {BA/2/86-87} and recitals 359 to 368 {BA/2/88-105} give a detailed explanation of why and how those algorithms did so.

Secondly, it is a binding finding in recital 380 {BA/2/112} that Google's own comparison shopping service exhibits several of the characteristics that make competing comparison shopping services prone to being demoted by Algorithm A and the Panda algorithm.

Importantly, there is another recital that I think maybe Google have overlooked, which is recital 382. If I can just show you that, it is at {BA/2/112}. 382 is

important because what it says is:

"In the second place, Google was aware that its comparison shopping service would not rank highly in Google's general search pages if it were subject to the same ranking mechanisms that apply to competing comparison shopping services."

So it is not just that it was prone, it is that Google were aware that it was prone/would have been prone. You can see in paragraph 382, below that, that they then cite an email from Jack Menzel to Cristos Goodrow of 6 May 2009 to support that proposition. Now, this is an email that I will come back to to show you, it is at {N/267} but we will come on to it.

But the point that I am making for present purposes is this point about awareness, and we say that it is implicit in that that Google was aware of the effect its ranking mechanisms had on its own comparison shopping services, it is implicit in that that it knew about the effect of its ranking mechanisms generally on CSSs, because it cannot have known that its algorithms would demote its own CSS as a CSS without knowing that fact more generally.

Now, we say that consistently with the Decision, therefore, Google was aware of the effect of its

demotion algorithms generally, including the effect they would have had on its own CSS if they had been -- if they had applied to it. Now, there is ample evidence that it was aware of this, and if we go to -- we will come back to the Menzel email that the Commission cites, but one can also see it in documents that we saw in the course of cross-examination.

If we go, for example, to {N/268}.

This is the series of exchanges with Mr Truher, you may recall, who was the manager of Froogle who was asking -- he asked -- you will recall that he asked for Froogle to be indexed and ranked.

If you go to {N/268/4}, we see he is told by Mr Kataria, at the bottom, he says:

"This is a similar conversation ... we've had with the Local team as well. This is the response [that] I sent ... them after some internal discussions:

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

So that is the first time it is said.

It is then repeated, if you go to {N/268/2}, by Mr Brougher, at the bottom of the page. He says:

"Hi Joel, Mickey is right. Our algorithms specifically look for pages like these to either demote or remove from our index ... there are active projects to improve the integration into web search."

So, again, a clear statement that they are aware that there are algorithms that demote pages like the Froogle pages, in other words CSSs.

Then you see at the top of the page -- page 1, forgive me {N/268/1}, he says, in rather cruder terms, in the second paragraph up from the bottom:

"On the pricegrabber, bizrate, kelkoo question, yes these are the types of pages we don't like. We have algorithmic methods to demote pages like these ..."

So a clear recognition that Google was aware, just as the Commission said in recital 382, that its algorithms were prone to demote CSSs, including -- and would be prone to demote its own CSS as a result.

Now, of course, then one adds the effect of the Product Universal, promotion, and one can see how the Commission looks at that, if we go back to the Decision {BA/2/113} --

MS ROSE: Just before you move on to that --

MR JOWELL: Yes.

MS ROSE: -- again, what is the relevance of the fact that Google was aware that its algorithms were prone to demote CSSs?

MR JOWELL: Well, it goes -- I think it does go -- I think it goes to the -- it really goes to understanding why the Commission and the court took the view that you have to look at both of these two limbs, the demotion limb and the promotion limb, as one. You cannot, as it were -- you cannot -- you cannot have the one limb counterfactual that Google is proposing.

Now, I will say, when I come on to it, that you are bound by that in any event, but it goes to understanding why they reached that view, in my submission.

MS ROSE: But I mean, there is a bit of a difference between a situation in which Google says, "Right, these CSSs are our main competitive threat, we think they are high quality but we are going to nuke them with an algorithm to get them out of the search results". That is --

MR JOWELL: Yes.

MS ROSE: -- hypothesis A.

MR JOWELL: Yes.

MS ROSE: Hypothesis B is: Google is aware that CSSs are a competitive threat.

MR JOWELL: Yes.

MS ROSE: Google is concerned primarily with the user experience in terms of its organic results.
MR JOWELL: Yes.
MS ROSE: Google is concerned with original content and has a view that a search result that lands on another search result is not a desirable user experience, and Google, in that context, develops algorithms that are prone to demote sites that do not have original content and that are aggregators and Google understands that to be the position.

Now, if the second is closer to what the Commission has found and what the evidence shows, then where does that really take you? It explains why Google's algorithms that are focused on user experience and quality are prone to demote CSSs, it explains why that aligns with Google's --
MR JOWELL: Yes.
MS ROSE: -- strategic objectives, but it is not kind of an anti-competitive motivation and there is certainly no finding by the Commission of any anti-competitive motivation in the operation of the algorithm. That being so, does this matter?
MR JOWELL: Well, it does matter to a degree, because my submission -- it goes really just to explaining why, as I said, the Commission and the courts take this view

that you have to regard the two -- it is not just part of the backdrop, that it is -- they are actually an integrated abuse.

(Simultaneous speakers - inaudible)
THE CHAIRMAN: I see why it is not part of the backdrop -- part of the abuse, but the abuse was all about discrimination and self-preferencing.
MR JOWELL: Yes. Yes, it was.
THE CHAIRMAN: It is not about unreasonable terms of supply. You can have a case with abuse in terms of unreasonable terms of supply --
MR JOWELL: Yes.
THE CHAIRMAN: -- but that is not this case. The problem with the algorithms was not that they demoted CSSs, it is that Google's CSS was not treated in the same way. That was the problem.
MR JOWELL: I think that is right, but --
THE CHAIRMAN: So the fact -- I mean, if there was no OneBox --
MR JOWELL: Yes.
THE CHAIRMAN: -- at all, or its different incarnations, and even if Google had put Froogle or Google Shopping on as a blue link, subject to the same algorithms demoting them, there would be no -- this abuse would not be made out.

MR JOWELL: But I think that the point that is underlying all of this is that Google would not have done that, because -- and there the evidence is very clear, because they knew that users did want to see a price comparison shopping experience, they did want to have that in the organic links, and therefore that actually was never that -- the idea of maintaining the demotions whilst not having the promotion was actually -- was a complete non-starter, actually, for Google, as I think Mr Friedman accepted later on. That is really why I think that, Ms Rose, when you described those two scenarios, I would say that actually, when you read the Decision and the European Court's judgments more closely, actually they are rather closer to the -- they do not say -- it is true, they do not say there was a deliberate strategy to target CSSs and nuke them as such as competitors. That they do not say. I accept that. What they are saying is: there was an awareness on the part of Google that there was this overt discrimination between the way it treated its own CSS and the way that it demoted these other CSSs, and that distorted competition, and it was perfectly aware that it was distorting competition, and when one -- we come to the General Court, they say that is why this is actually an intentional abuse, we say.

So there is more awareness than Google want you to accept of this -- it is discrimination in both limbs.
MS ROSE: Yes, and of course, I mean, it is understandable why both limbs matter.
MR JOWELL: Yes.
MS ROSE: Because without the demotion algorithm, let us say Kelkoo or a similarly high quality search comparator would have featured as number one in the organic results --
MR JOWELL: Yes.
MS ROSE: -- for cheapest digital camera.
MR JOWELL: Yes.
MS ROSE: Now, if that were so, then the impact on traffic of there being a shopping box with Google's site at the top of the page one might anticipate would have been much, much, much smaller, because a lot of users of Google are likely to go and look first at the blue links -- because they perceive those, rightly, as organic and not advertising -- for their first port of call, and if Kelkoo was at the top of the page on the blue links, Kelkoo would get a lot of traffic, so the demotion is really important.
MR JOWELL: Yes.
MS ROSE: But the only reason it is important as an act of discrimination is because it is in combination with

the self-preferencing of Google's own CSS in the box, because if you take the box out of the picture --
MR JOWELL: Yes.
MS ROSE: -- and you apply the demotion algorithm --
MR JOWELL: Yes.
MS ROSE: -- then either it is applied to both Kelkoo and Froogle and they both get demoted, in which case there is no shopping comparison --
MR JOWELL: Yes.
MS ROSE: -- or it is modified --
THE CHAIRMAN: No discrimination.
MS ROSE: Yes, so there is no discrimination.
So the Commission is right to say that it is both in comparison that constitute the discrimination that has the effect on competition, because even though having a box on its own might technically have been a difference in treatment, its impact on traffic would have been likely to have been much, much less without the demotion. But if you take the actual element of discrimination is the self-preferencing --
MR JOWELL: Yes.
MS ROSE: -- and if you take that out of the picture --
MR JOWELL: Yes.
MS ROSE: -- completely --
MR JOWELL: Yes.

MS ROSE: -- and you have equal treatment --
MR JOWELL: Yes.
MS ROSE: -- then it does not matter if Google knows that its demotion algorithm is demoting CSSs, because either it is demoting its own CSS to the same extent or its own CSS does not appear in the results at all because, as we know, it was not getting crawled.
MR JOWELL: Yes.
MS ROSE: So without the box, there is not a case.
MR JOWELL: I accept that. But there is also, if you like, the reality, right? Which is this, which is that Google needed -- Google wanted to encourage people to go to its site for product queries, and Google also, to do that, it needed to have some kind of price comparison shopping service on its site, and therefore the scenario in which you do not have the box and you keep the demotions is an entirely arbitrary one, and that is what the --
MS ROSE: That is really -- I mean, this is when you come to the counterfactual --
MR JOWELL: Counterfactual, exactly.
MS ROSE: -- and you are asking commercially --
MR JOWELL: Yes.
MS ROSE: Because clearly Google has a number of commercial imperatives, which include maximising shopping starts and monetising its SERP, and we have seen in the

evidence that different weights get attached to those at different times and different strategies are adopted to meet those objectives, and clearly, somehow, Google, in the counterfactual situation, would have been looking to have some kind of comparison shopping in a way that does not discriminate.
MR JOWELL: Yes, that is right.
MS ROSE: That is the question.
MR JOWELL: Yes.
MS ROSE: So I am not sure any of this really matters.
MR JOWELL: I want to -- again, it may not. It may not ultimately matter, but I think it -- I still think it is of importance just to see how -- if I may, just show you how the Commission looked at it. Because, for example, you mentioned, madam, you mentioned the idea that somehow, if -- that if you had not had the -- if you had -- if you had the box but there had not been the demotions, that it would have lessened the effect.
MS ROSE: Or it might have done.
MR JOWELL: It might have done. But one does also --
MS ROSE: Well, putting it another way, the demotions massively increase --
MR JOWELL: Increase, yes. I think that is fair. But I think the point that they are -- the way the Commission approached it is: look, Google engaged in

this two-pronged course of conduct, it had a combined effect and they could foresee that it had this combined effect, or could or should have foreseen, which is why they call it an intentional abuse, they -- and that is -- and so you do need to look at both, both elements had causal efficacy and Google was aware of the effect of both combined, and even if it did not start off as a sort of strategy, deliberate strategy, that is the effect that it had and it was a foreseeable effect. You will see that when we come to the General Court and its finding of intentional abuse.
But if we go on just --
THE CHAIRMAN: Would that be a suitable moment?
MR JOWELL: Oh, yes. Yes, it would.
THE CHAIRMAN: Thank you.
We will come back at 12.10.
(11.59 am)
(A short break)
(12.13 pm)
MR JOWELL: I think, before the adjournment, I was just about to show you the other aspect of the abuse, the Product Universal and its effects, from the Commission Decision. If we just -- quickly, if I just remind you of that. I am sure you are very familiar with it. {BA/2/113}, one sees recital 385:

"Second, since the launch of the Product Universal until today, Google has positioned results from its own comparison shopping service on its first general search results page either ... above all generic search results; or (ii) within or at the level of the first generic search results. These results have always taken up a significant part of the space above the 'fold' ..."

We see:

"The rationale for such positioning is, in the words of Google, to 'dramatically increase traffic' by leveraging 'universal search initiatives' to 'drive the bulk of the increase in traffic' to Google's comparison shopping service."

You may remember that I asked Mr Goodrow a bit about this. Just to remind you, if we go to {Day4MT1/84} -- sorry, {Day9MT1/84}.

You see, picking it up on line 5:

"Question: All right.

"But, broadly speaking, it is fair to say that the effect of the OneBox was that Google Product Search was growing much faster in the United States compared to other comparison shopping sites, was it not?

"Answer: I think that's fair to say, yes.

"Question: Actually, most of the growth that you were getting for Product Search was probably down to

the fact that you had the Product Search box integrated in the form of the OneBox, was it not?

"Answer: I suspect that's probably true, yes.

"Question: Thank you.

"Now if we could go to {N/181} ..."

If we go to {Day9MTQ/84:22}, yes, we see the -- you will remember the Pac-man drawing, I am sure, the image:

"Question: ...:

"'Most of our traffic comes from OneBox.'

"There is a Pac-man."

Then if we go over the page {Day9MTQ/84-85}:

"Question: 'The OneBox sends twice as much traffic to merchants than the hompage.'

"So just to understand that, what that is saying is that merchants get much more of their traffic from the clicks that go through from the OneBox than they do than they get from the Google Product Search standalone website?

"Answer: Yes, I think that's what this is meant to represent."

So it is clear that it was the presence of the Product Universal that gave Google Product Search, the new Froogle, this tremendous advantage over competing shopping comparison sites. It was driving two-thirds of the traffic that it got.

MS ROSE: Is that to the standalone website?

MR JOWELL: Compared -- yes, yes.

MS ROSE: The Google website --

MR JOWELL: Oh --

MS ROSE: -- when you say --

MR JOWELL: That is a good question. I will need to check whether that is to the standalone or to -- I will need to check --

MS ROSE: To the merchants.

MR JOWELL: We will need to check -- or to the merchants.

But I think the broader point I am making is that that is what is fuelling the success of their overall comparison shopping offering. It is the presence of this box at the top of the page.

Of course, that is why, when Mr Goodrow comes in, he can effectively take the position: well, we are going to be better than -- we are going to overtake all the CSS competitors within the next year or two. He does focus, largely, from that point on, on Amazon, although it is also fair to say that the documents show that, in Europe, it was really only after Panda that Google accelerates far ahead of the other CSS competition. For your note, that is M1/3-8 --

MS ROSE: When you say "Google accelerates" ...?

MR JOWELL: Yes, well, Google's Product Search offering.

MS ROSE: What do you mean by that?

MR JOWELL: What I mean is that -- forgive me, I am told the answer to the previous question that it is to merchants. The document in question, the Pac-man document is at {N/181/3}, if we can show you that.

You see at the bottom:

"The onebox sends twice as much traffic to merchants than the homepage."

So that is --

MS ROSE: That is important.

MR JOWELL: Yes. I think that is the answer to your question.

So one has these -- so, from 2008, you have these two elements working in combination, the demotion and this very strong promotion, and Google is aware that it is self-preferencing. If I can show you that, we can -- I mentioned --

MS ROSE: So the point -- sorry, I am just --

MR JOWELL: Yes, go ahead.

MS ROSE: -- trying to make sense of this.

MR JOWELL: Yes.

MS ROSE: So the point is that when you say that the Product Universal is driving the traffic --

MR JOWELL: Yes.

MS ROSE: -- to Google --

MR JOWELL: Yes.
MS ROSE: -- or driving the traffic to merchants --
MR JOWELL: Yes.
MS ROSE: -- the point is that what is racing ahead is not simply Google's standalone CSS website --
MR JOWELL: Yes.
MS ROSE: -- it is the CSS service --
MR JOWELL: Yes.
MS ROSE: -- that Google provides --
MR JOWELL: Correct.
MS ROSE: -- which includes both the website --
MR JOWELL: Yes.
MS ROSE: -- and the box --
MR JOWELL: Yes.
MS ROSE: -- that is displayed on the SERP --
MR JOWELL: Correct.
MS ROSE: -- and both of these are vehicles for Google obtaining a much larger market share in Product Search.
MR JOWELL: That is exactly correct.
MS ROSE: Right.
MR JOWELL: They are both -- they are two different user interfaces --
MS ROSE: Exactly.
MR JOWELL: -- for a single service.
MS ROSE: Exactly.

MR JOWELL: Yes.
Google is aware of what it is doing, according to the General Court. If I can show you that, it is {BA/3/122}.
One sees at paragraph 616:
"Having regard to the above, it appears that, since it was aware of its dominant position in the markets for general search services in the EEA and favoured its own comparison shopping service over its competitors in its general results pages, conduct which represented a certain form of abnormality, as has been established in paragraph 179 above, and since it was aware also of the importance of those pages as a source of traffic for comparison shopping services, Google must have known that its conduct undermined equality of opportunity between the various economic operators, the guarantor of a system of undistorted competition ... and that that conduct was capable of foreclosing its competitors or restricting competition on their part on certain markets for specialised product search services in the EEA. Google thus intentionally engaged in conduct that was anticompetitive ..."
That is the General Court.
If one goes to {BA/3/134}, one sees 680:
"In the present case, as is apparent from

paragraph 616 above, Google intentionally engaged in the impugned conduct, knowing that it could lead to competitors being driven out and competition being restricted."
So this was not innocent abuse, at least that is what the General Court found.
Now, another point in dispute that I identified in oral opening related to user preferences. Now, Google continues to take the position that users prefer to go, almost invariably, immediately to merchant pages to buy the product and they do not like intermediaries, they do not like what they called "interstitial" pages. Now, we say the evidence did not substantiate their case. Particularly the evidence of Mr Goodrow and Mr Kalyanpur was firmly against it.
Mr Goodrow's view was that users' preference was to see a wider selection of product than you would see in the Product Universal, in the box, even if that meant an interstitial page. So if I could take you to that, if we go to {Day9MT1/125}, we see at line -- I am quoting him, line 14:
"Question: ...:
"'Re: a list of 10. Lets do it. But lets link them.'
You say:

'Linking them leads to a poor shopping experience, as demonstrated by the de-linking experiment, sessions analysis, user observations, and other evidence. I don't understand why you would suggest that at this point.'
"So you are saying that there is a multiplicity of evidence that supports not linking them directly to the merchants, right?"
He says:
"Answer: Yes."
Then over the page {Day9MT1/126}:
"Question: Now, we have seen the de-linking experiment, yes? What were the 'sessions analysis'? Can you recall?
"Answer: I think that ... might have been referring to that analysis that we saw.
"Question: Okay, and the 'user observations', 'other evidence'? Maybe you ...
"Answer: I can't recall. It's been a --"
"While", I think he said:
"Question: Anyway, you were convinced that there was a lot of evidence that sending results to the shopping property was superior from a user perspective to sending them to specific merchants; correct?"

He says, "Yes".
Then he says:
"Answer: In particular, I think it's -- it would be better if you allowed -- if they allowed search results in the search results for producty queries so that users could see a list of products, yes."
Forgive me, if we go over to {Day9MT1/131}, you will see that. You see that on line 3. Perhaps if we ... yes.
Then if we go over to {Day9MT1/132}, I say -- I quote him:
"Question: You say ..."
This was in the slide presentation:
"'Or, provocative, interstitial pages are good.'
"So that reflected the fact that the property was an interstitial page? It is -- it meant this the user went through not direct to the merchant, but instead went through [to] an intermediary page before then getting to the merchant; correct?"
He replies:
"Answer: Yes, I mean, I was intentionally calling this out because, in general, interstitial pages are not good, it's a little bit frustrating, you have to click through a bunch of things, but in this case, when you can get to a page that shows you more information or

that allows you to compare a bunch of products, that's better than having a -- you know, just a small number in a -- in a universal result on Google.com."
So -- and then I say:
"Question: We saw from your blog -- I do not know what we should call it, your reflections, that that applied also to good comparison sites, like NexTag, as well and you thought that would also be good for users?"
He replies:
"Answer: I thought that anything that sent you to a list of products where you could see a lot of them would be a good idea, including, in that case, NexTag."
I just remind you of that evidence. So he was clearly -- and the documents reflect that, that he was in favour of showing a wide variety, even at the price of an interstitial page.
Mr Kalyanpur's evidence, who obviously was asked to do the specific Diversity algorithm that was proposed to demote CSSs, he found, as you may recall, that trying to demote CSSs did not -- it took him -- he did an awful lot of experiments, if you look at all the documents, and all of them keep showing, no, the raters who were supposed to be Google's proxy for users actually liked having some CSSs in the product results, and that is why, at the end of the day, you could only get to

demoting up to leaving -- get a situation where you left at least two CSSs in the results, and you will see that in our summary of his evidence at paragraphs 37 to 38 {AA1/1/19-20}.
Perhaps even more important --
THE CHAIRMAN: At the same time, I think he said users do not like a results page which is full of --
MR JOWELL: Full of --
THE CHAIRMAN: -- so that some demotion is necessary.
MR JOWELL: Yes. That is fair. But at least -- but he could not get it to work unless there were at least two -- two CSSs, which I think does disprove the notion --
THE CHAIRMAN: Yes.
MR JOWELL: -- that, at the time, Google's internal assessment was that interstitial pages were generally bad.
MS ROSE: Can you remind us the date of those experiments?
MR JOWELL: Those were 2007 through to 2008. I think the algorithm, I think -- 2006 to 2008, I think, so immediately prior to the ...
MS ROSE: Then we have the catalogue view.
MR JOWELL: Yes, indeed.
MS ROSE: I am slightly confused as to how the de-linking experiment relates to the catalogue view.

MR JOWELL: I think --
MS ROSE: Perhaps this is my fault.
MR JOWELL: Yes -- no, no, it is not your fault.
I think the de-linking experiment was grist to the mill, if you like, of those who wanted to promote the catalogue view.
MS ROSE: Ah right. So -- oh, I see. So de-linking is the same as the catalogue view, is it?
MR JOWELL: Not -- well, the de-linking was an experiment that they conducted in order to test whether people might want something like a catalogue view.
MS ROSE: Was there a catalogue view before the de-linking experiment?
MR JOWELL: No, there was not. The de-linking experiment -- the catalogue view comes in, I believe, in early 2009. I think it is --
MS ROSE: So was it an output of the de-linking experiment?
MR JOWELL: I think it was a -- it could be said to be -- yes, I mean, in the sense that I think they were looking at -- as you saw from Mr Goodrow, he was looking at a wide variety of evidence, but amongst the evidence that he was considering to justify the catalogue view was the -- was the --
MS ROSE: What we then get is a mixture of --
MR JOWELL: Yes.

MS ROSE: -- PLAs, or they are not paid for at that are they --
MR JOWELL: Yes.
MS ROSE: -- product -- product boxes --
MR JOWELL: Offer boxes.
MS ROSE: -- offer boxes --
MR JOWELL: Yes.
MS ROSE: -- and catalogue view boxes.
MR JOWELL: Yes, and what the statistics show you, Google's own statistics show you is that -- well, they are indicative, but there seems to be a drift towards the catalogue view, or at least what the statistics show is that there is a drift towards more -- over that period '09 to 2012, there is a drift towards people going more often to the webpage rather than direct to the merchant.
MS ROSE: So you say this is some of the most important evidence about what is the right counterfactual for that period?
MR JOWELL: Yes, correct. Indeed. So that, by 2012, you have seen they are directing 60% -- more than 60%, I think even arguably 70%, to their interstitial page, and I think Google's only real answer to that is: ah, but it was our interstitial page, we are special. That is just simply contrary to all the evidence that you

have seen that, actually, their interstitial page was, if anything, certainly up to 2008, rather inferior and certainly no better than many of the other interstitial pages after that.

What changed things was when Google decided to monetise, and they did that mainly to gain revenue, and, as Mr Friedman recognised, that was accompanied potentially by a diminution in quality for users.

Now, Google, of course, disputes that. It says -- in their closing submissions, we are told that the evidence shows, they assert, that users overwhelmingly want to go direct to merchant pages and not via intermediates like CSSs. Intermediation, they say, produces friction in the route to purchase and the desire to link consumers directly to merchants was the raison d'etre, they say, of PLAs. But actually, Mr Friedman, in his evidence, could not -- in his oral evidence at least, could not recall what was the motivation for the move to PLAs, or at least the move to put PLAs in the box, the unification. You may recall that. I do not think we need to take you to it, but it is {Day10MT1/69:1-18}. As I have indicated, what the actual contemporaneous evidence shows about that move to PLAs is that it was not motivated by some sort of altruistic desire, as they put it, to somehow

link directly consumers and merchants for their own good, it was simply that they wanted to increase their revenue at that time.
MS ROSE: Could they have monetised the catalogue view?
MR JOWELL: In theory, I think they could have. They could have done if they had introduced other CSSs, yes.
MS ROSE: But I mean, just leaving other CSSs out of it for a moment, if we remain in the --
MR JOWELL: Yes.
MS ROSE: -- world of self-preferencing --
MR JOWELL: Yes.
MS ROSE: -- could Google have adopted a monetised model which led to Google's comparison site, rather -- a catalogue-based --
MR JOWELL: Yes, so I think what you are proposing is that the user would obtain the catalogue view, would then click through to the website --
MS ROSE: Yes.
MR JOWELL: -- and then, once it clicked through from the website to a merchant, they would then charge.
MS ROSE: They would pay.
MR JOWELL: Yes, they could have done that. They chose not to do that. The way they monetised was through advertising.
MS ROSE: Yes. So they must have had a reason for thinking

that advertising the PLAs on the SERP would be more lucrative than monetising the catalogue view, if the motivation was to make money, and if they thought the catalogue view was so much more attractive than the PLA view, might they have taken a different approach?
MR JOWELL: Well, it might be more lucrative without being better for users.
MS ROSE: Well, there is always a trade-off, though, is there not? Because if users stop using it, then it ceases to be more lucrative because they all go off to Amazon, which of course is exactly what happened.
MR JOWELL: Yes, but they -- I think what we hypothesise is that by that point in time, what changed was that they had gained -- well, first of all, they were more dominant in search by that point, general search, and they were, I mean, ultra -- super-dominant, as the Chairman put it, and also they had seen off, effectively, the rival comparison shopping services.
MS ROSE: But they had not seen off Amazon.
MR JOWELL: They had not seen off Amazon, but Amazon, as I will come on to, is in a separate market. So, yes, there is competitive --
MS ROSE: I know it is a separate market, but I am not sure it --

MR JOWELL: No.
MS ROSE: -- that is -- I mean --
MR JOWELL: Well, they could -- effectively, they could monopolise the comparison shopping market. Yes, they still had competition from the adjacent market of Amazon, but -- and --
MS ROSE: It may be that the road they chose to go down in relation to this market, in which they were now very, very dominant, might have disadvantaged them in relation to the number of shopping starts, because Amazon became relatively more attractive.
MR JOWELL: It might have done. Although, as I will come on to --
MS ROSE: It is possible.
MR JOWELL: -- it is -- clearly, they would have worked out what was best for them, one might think, but, yes.
What I am -- the point I am just on at the moment is the suggestion that one sees in, for example, paragraph 82 of Google's closing submissions {AA2/1/33}, where they say -- and perhaps I -- I think it is actually highlighted in -- I should not read it out to you, but perhaps if we can just -- you can see there is a statement that starts:
"Google's experience ..."
Maybe if you could just read it to yourselves.

(Pause)
When you look to the footnote, you see footnote 34, all you see is a solitary reference, not to any documents, but just to Mr Braendle's evidence, paragraph 119 of his witness statement {H3A/3/32}. The problem with that is, of course, that Mr Braendle only joined Google in 2016, he had no prior experience at all with CSSs, he said he had not even heard of the specific term, and the limits of his subsequent role were really just putting the remedy in place. As to the experiments, well, you have seen the experiments of Mr Goodrow and the experiments of Mr Kalyanpur, which show the opposite. The only experiment that Mr Braendle mentions is the unfortunate experiment with CLAs in 2022, which we -- for all the reasons we say in our paragraphs 114 to 118 of our closing submissions {AA1/1/58-61}, was just effectively a lobbying exercise and a hopelessly skewed exercise.
So if I may then just turn to a few of the other points -- factual points that are made in Google's closing submissions that I should address you on.
Another one of the points where Google is -- I think I have already addressed you on the general point, that they say, well, CSSs were demoted purely because of their relatively low quality and that is simply

irreconcilable with the findings in the Commission Decision, that CSSs, as a group, were prone to be demoted by reason of their inherent characteristics, but there is also a constant point made about the one exception of Idealo Germany. We are told in paragraph 81 {AA2/1/33} that Idealo succeeded, they say, because it was high quality and that is actually not correct.
First of all, all of Idealo's websites bar its German website were heavily hit by Panda. Only its German website partially escaped. Its German website was then hit by Coati, the subsequent algorithm, the subsequent format of Panda. You will see this in our written closings at paragraph 77 {AA1/1/40}. The underlying document -- again, I do not think I need to take you to it but you will see that is at {M3/538/3}.
More generally, there are binding findings, for example recital 539 {BA/2/178}, that the traffic was diverted by the infringing conduct and that that traffic accounts for a large proportion of the traffic to competing CSSs. So the notion that Google can continue to assert that the effect of Panda was mild is simply completely contrary to the Commission Decision, and there are binding findings that show that it was strong

and that it got stronger and stronger. You can see that in recital 362, with the graphs, at {BA/2/96} and the graphs 9 and 10 on the following page {BA/2/97}. These are not graphs showing a mild decline. It is a significant decline in visibility, and the Commission correlates to traffic, which you can see from paragraph 363 on page {BA/2/98}, where it is stated:
"... the visibility trends for the competing comparison shopping services in Google's general search results pages closely match the evolution of generic search traffic from Google's general search results pages, indicating that the lower their visibility in Google's general search results pages, the less traffic competing comparison shopping sites get."
You see more of that -- well, I do not need to take you through it, but you see --
THE CHAIRMAN: I think we have got that point.
MR JOWELL: You have got the point.
It is also in the General Court, paragraphs 184 to 185 {BA/3/32}, where they state their conclusions on the point and they talk about a very significant decline. Paragraph 680 of the General Court {BA/3/134} also notes that it appears that certain CSSs "lost a very substantial amount of traffic" from Google's general results pages. Paragraph 184 to 185 {BA/3/32}

talk about rendering them "virtually invisible". So we simply do not understand how it can continually -- they can continue to assert consistent with the Decision and the judgments that these demotions were mild. It is just simply an attempt to re-litigate the Decision.

Another attempt to re-litigate the Decision is made when it comes to Amazon. Now, we are told at paragraph 76 {AA2/1/31} that, "Amazon is the elephant in the room on Kelkoo's case", and again and again in their closing submissions they rely on the supposed direct competition between Amazon and Google and, paragraphs 83 and 84 {AA2/1/33}, site survey evidence that was cited to the EC Commission. But the difficulty is that the Commission considered that evidence and it rejected it, and it reached the conclusion that Amazon and Google operated in separate markets. There is a binding finding on market definition which was specifically upheld in the preliminary issues judgment at paragraph 37 {E/2/15}. Now, I do not think I need to take you to that, because you will be familiar with it, but if we go to page 40 of the Commission Decision {BA/2/40}, you can see recitals 216 and following:

"Contrary to what Google claims, there is also limited substitutability between comparison shopping services and merchant platforms, such as Amazon

Marketplace ..."

If we go to {BA/2/45}, you can see that the Commission is citing a number of internal documents indicating that Google and Amazon are "business partners in a vertical relationship, not competitors".

If we go to page {BA/2/48}, you can see binding recitals 221 to 223. Perhaps if I could just invite you to read those.

(Pause).

Go over the page {BA/2/49}.

PROFESSOR SMITH: The court does not rule out that -- the possibility that part of the population of consumers, you know, have a preference for going on something that looks like a comparison shopping site and start their search that way and there might be others that prefer to go to Amazon. So even if the two are in separate markets, the consumer behaviour might be nudged/changed by the behaviour of the different players in the two markets and that that might be -- you know, that Google might have quite strong concerns about how consumers' behaviour might shift between those two patterns, even though they are in separate markets.

MR JOWELL: I fully accept that. I fully accept that, but what I -- I simply say that what one cannot have is an attempt to reopen these kind of binding findings, which

is exactly what they do, and they are trying to use the same evidence that they relied on before the Commission and the courts to do so to you. So if we go, for example, to page 51 {BA/2/51}, recital 227 -- sorry, it must be {BA/2/52}, you see:

"The Commission's conclusions regarding the limited demand side and supply side substitutability between [CSSs] and merchant platforms are not called into question by Google's claims ..."

Then in (a) you see a reference to the very same surveys that Google is now relying on in paragraphs 83 and 84 of its closing submission {AA2/1/33}. If we go over the page {BA/2/52}, you see:

"... user survey conducted by Google and ..."

If we go over the page {BA/2/53}.

... from third parties ..."

If you go to paragraph -- if we go to paragraph 229, over the page {BA/2/54}, you see the:

"Second [says the Commission], none of the user surveys conducted by Google and by third parties support Google's claim that the product search and comparison function of merchant platforms and comparison shopping services are substitutable from the perspective of users."

It is a binding recital and it is simply not open to

Google to invite this Tribunal to reach a different conclusion.

I do not think I need to take you, but if you go through to recitals 235 to 239 {BA/2/55}, the Commission gives a number of cogent and binding reasons as to why Google was wrong. If we go to recital 246, please -- forgive me, I do not have the page number {BA/2/60} -- there we are -- we see:

"The Commission thus concludes that comparison shopping services constitute a distinct relevant product market, which does not include merchant platforms."

So this whole approach is just inadmissible.

So we say that -- those, I think, are the only points on facts that I would like to point out to you.

If I can make a start, perhaps, before the short adjournment on the first issue, which is abuse. Now, there are two points, we say, that really ought to be, but perhaps are not, common ground. The first is the definition of a CSS, and we say that this is straightforwardly to be found in recital 191 of the Commission Decision {BA/2/35}. The second point that we think should be common ground by now at least is that Google's Product Universal and shopping unit, at least prior to the end of the Decision period, were each part of, or a form of, or a manifestation of Google's

CSS. That has been the subject of an express finding by the General Court and by the Tribunal in the preliminary issue trial.

Now, as far as the definition of a CSS is concerned, that was not previously disputed by Google, that it was indeed defined in recital 191 {BA/2/35}, but in his oral openings my learned friend sought to suggest that it was not a definition, or perhaps that it was a definition with the central elements missing, and he has described it, I think, as just providing a very broad description of effectively what comparison shopping services enable you to do and he suggested that, actually, the definition of a CSS is perhaps found elsewhere in the Commission Decision, 167 to 176 in particular {BA/2/31}, and he said that a CSS has to have filtering or sorting capacity, it has to have a standalone website, and at one point he even seemed to suggest it had to have product guides or some kind of additional information.

Well, the starting point is that the General Court thought that the definition of a CSS is to be found in recital 191, and if I can show you that, it is at {BA/3/58}. You see in 328:

"However, comparison shopping services are defined in recital 191 of the contested decision as being

specialised search services that (i) allow internet users to search for products and compare their prices and their characteristics across the offers of several different online sellers and merchant platforms, and (ii) provide links that lead (directly or via one or more successive intermediary pages) to the websites of such online sellers or merchant platforms. That definition is not disputed by Google."

Then it goes on:

"Consequently, recitals 26 to 35 of the contested decision must be considered to provide sufficient grounds for concluding that Google's [CSS] has taken several forms, that is to say, a specialised page, most recently called Google Shopping, grouped product results, which evolved into the Product Universal, and product ads, which evolved into the Shopping Unit."

330:

"In those circumstances, the specialised pages Froogle, Google Product Search and Google Shopping as well as grouped product results, notably Product Universals, and product ads, notably Shopping Units, must be considered to form part of the comparison shopping service which Google offered to internet users."

Paragraph 409 of the General Court's --

PROFESSOR SMITH: Sorry, before we leave this --

MR JOWELL: Yes.

PROFESSOR SMITH: -- can I just get you to -- ask you if you agree that paragraph 328, which you say is what the court says is a comparison shopping service, that describes comparative shopping services, not what organisations or parts of organisations are called CSSs.

MR JOWELL: Yes.

PROFESSOR SMITH: I think it is helpful sometimes to be clear about the distinction between the two. This is about services which may be delivered by organisations that only do this, or by organisations that do this and other things, or that deliver services by a combination of different parts of organisations.

MR JOWELL: Yes.

PROFESSOR SMITH: What is behind my question is sometimes, "Is this a CSS", might be better phrased as, "Is this an organisation in the business of delivering comparison shopping services"? It is a different -- slightly different question.

MR JOWELL: I think that is fair, but I think one takes two things from this. One is that the definition of what comparison shopping services are is found in 191, and also one sees a very clear statement that the Product Universal and the shopping unit were part

of/forms of/manifestations of Google's CSS. If one goes to paragraph 409 {BA/3/76} of this, it puts it even more succinctly:

"First, as has already been indicated in paragraphs 328 and 339 above, recitals 26 to 35 and 414 to 421 of the contested decision provide sufficient grounds to support the conclusion that Google's comparison shopping service has taken several forms, that is to say, the specialised page, most recently called Google Shopping, grouped product results, which evolved into the Product Universal, and product ads, which evolved into the Shopping Unit."

The Tribunal's own judgment in the preliminary issues trial agrees with that approach at paragraph 52 to 54 {E/2/19} and it held in terms that Google's CSS service included the shopping unit and the Product Universal, and we say respectfully that finding is not up for grabs, Google did not appeal it.

THE CHAIRMAN: We refer to this part of the General Court's judgment.

MR JOWELL: Yes, indeed. Indeed.

Which brings me to the new and rather, respectfully, somewhat bizarre to us argument that Google leads off with in its written closing submissions to the effect that none of the evidence that you have heard in these

proceedings matter -- apparently matters. Why? Because it is suggested we have somehow conceded away our case by somehow agreeing that the abuse in the post-Decision Period was the same abuse as that in the Decision period, or because that somehow follows from the Tribunal's ruling in relation to Algorithm A.

Now, let me just be clear. First of all, the only concession, if it can be called that, that we made was that the type of abuse alleged in the Decision period, self-preferencing, was the same type of abuse that we alleged in the post-Decision Period. That was what we made clear at the prior hearing, no more, no less.

As regards the Tribunal's ruling on the effect of Algorithm A, we say that that has got no bearing on this whatsoever.

Let me also put one other thing to rest. We do not say, and we never have, that Google's CSS is in itself the shopping box, or ever has been. Obviously it is not the totality of Google's CSS service. Now, the claimants quote me in one instance in opening in which I said that in substance the shopping box was Google's CSS. Well, I made that submission in the context -- in the specific context of explaining the significance of the box for users, and we do say that the shopping box is a form of/a manifestation of

Google's success. In technical terms, I think probably the best way to put it would be to say it is one of the user interfaces of Google's CSS. But it is not as the claimants have sought to portray it, as some sort of remote satellite link to Google's CSS, or an advertisement for its CSS, as I think it was suggested in opening. It is part of the CSS.

So the fallacy at the heart of Google's argument really is that it relies on a false premise, which is -- and that false premise is that the CSS is always and invariably to be uniquely and necessarily identified with its standalone website and nowhere does the Commission Decision say that. Indeed, to say that the website page just is Google's CSS would be in contradiction with the findings of the European Court that you have seen, and of this Tribunal, that Google's CSS takes various forms and has various parts, including the Product Universal and the shopping unit. What the Decision says is that the Google CSS can manifest in these various forms simultaneously.

THE CHAIRMAN: Well, I think, given that we have taken a decision on this very point --

MR JOWELL: Yes.

THE CHAIRMAN: -- which, as you say, or you have submitted is binding --

MR JOWELL: Yes.

THE CHAIRMAN: -- I think you can leave that until after we have heard from Mr Pickford.

MR JOWELL: Well, I am grateful.

So perhaps I -- perhaps that would be a good point then --

THE CHAIRMAN: Yes, we will come back at 1.55.

(12.57 pm)

(The short adjournment)

(1.55 pm)

(Proceedings delayed)

(1.59 pm)

MR JOWELL: I should -- before I leave abuse, I should make a few further points, but hopefully not before I get on to the question of the counterfactuals.

One is, I should briefly mention Google's further argument, which is that there is some distinction to be drawn on the one hand between search -- comparison search services and comparison search results, and in particular it relies on recital 23{BA/2/10}.

Now, we say that this is a sort of false dichotomy between results and the service. Obviously, if you have comparison shopping results displayed, it has to follow that there is an underlying service that creates those results, and the service that creates those results,

the engine room, if you like, that creates those results is the process of ingesting feeds, indexing, ranking and displaying. The notion there is some distinction in the Decision between the comparison shopping search results, which appear on -- and the underlying service, it does not exist, we say, in the Decision itself. On the contrary, it regards those two things as, if not interchangeable, as inextricably interrelated. The fact that results may appear on a general search results page does not mean that they are therefore an emanation of the general search service, it simply means they appear on that particular page; they are still an emanation -- a manifestation of the underlying specialised search service.

So we say that once one accepts, as the Tribunal has, that the Product Universal and the shopping unit were manifestations or user interfaces of Google's specialised search service, CSS, then the question really is: what has changed in the post-Decision Period? Is the remedy box no longer displaying results from Google's CSS?

One can approach that, in a way, from two different angles. First, one can look at it from a user perspective, from the front of house, if you like, and the other is one can look at it from the back of house,

from what is actually being generated and by whom, the service itself.

Now, for users, from the front, visually and functionally, the compliance mechanism unit is very closely comparable to the shopping unit. Users can compare products in prices in the same way, they can and do click to merchants in the same way, and the visual differences are exceedingly minor, just simply the removal of the links to Google Shopping at the top and the inclusion of the "By [the particular CSS]" at the bottom, or the "See more" at the very, very far right-hand side, and we know that those are clicked on by less than 1% of users.

So the front office, from the front office, it looks and operates the same, and indeed Google's witnesses and expert did not seriously contest that the box still permits users to compare products and compare prices, and indeed the survey evidence that you will have seen from the *PriceRunner* proceedings corroborates that. You will see the references to that in our closing submissions.

THE CHAIRMAN: Is that survey admissible?

MR JOWELL: We say it is admissible, yes. I will hear from my learned friend, but, yes.

THE CHAIRMAN: Yes.

MR JOWELL: It is an underlying document, it is not a finding.

THE CHAIRMAN: Is it in evidence, the document?

MR JOWELL: Well, we have admitted it to evidence and it has been disclosed --

THE CHAIRMAN: It has been disclosed?

MR JOWELL: It has been disclosed, yes.

THE CHAIRMAN: So it is somewhere in --

MR JOWELL: Yes, it is at AA --

Do we have a reference?

We are finding the particular reference.

MR PICKFORD: Kelkoo disclosed it, not Google.

THE CHAIRMAN: Yes.

MR JOWELL: Well, we sought it from --

THE CHAIRMAN: Yes. That does not matter. So it is somewhere in front of us, yes.

MR JOWELL: So -- but regardless of that survey, the point is actually obvious, that from a user's point of view, it still functions in the same way as the shopping unit functioned in the sense of enabling users to compare products and prices and click through direct to merchants.

So we say it is clearly part of a CSS. The only serious question is: is it Google's CSS still, is it part of Google's CSS, or is it some kind of collectively

supplied CSS?

To answer that question, one needs to look at the back office, at the service, who is providing the service underlying the provision of the results. Again, when one looks at that, one sees that nothing of real significance has changed, because it is still Google that controls the triggering, the ranking and the presentation, and of course Google also captures the majority of the value.

Now, I put -- you may recall that in Mr Friedman's cross-examination, at the outset --

MS ROSE: Can we just pause there for a second?

MR JOWELL: Yes.

MS ROSE: Because this is obviously absolutely crucial.

THE CHAIRMAN: Yes.

MR JOWELL: Yes.

MS ROSE: So you -- the way you put it is you say the box is a manifestation --

MR JOWELL: Yes.

MS ROSE: -- of a comparison shopping service because it has the features at paragraph 191 --

MR JOWELL: Yes.

MS ROSE: -- and it is from the user perspective no different from the earlier shopping boxes that were similarly found to be --

MR JOWELL: Correct.

MS ROSE: -- manifestations of the CSS.

MR JOWELL: Yes.

MS ROSE: So then you say the question is whether it is Google's CSS.

MR JOWELL: Still --

MS ROSE: Yes. So you envisage, I think by implication, that there could be a situation in which there is a box on the SERP which is a CSS --

MR JOWELL: Yes.

MS ROSE: -- because pretty much any grouping -- any grouping of product results on the SERP is going to be a CSS --

MR JOWELL: Yes.

MS ROSE: -- on this definition --

MR JOWELL: Yes.

MS ROSE: -- but in which it is genuinely a joint CSS or a CSS that different CSSs have the opportunity to provide? I mean, how do you put it? What is the dividing line between the counterfactual permissible box --

MR JOWELL: Yes.

MS ROSE: -- and the factual, on your case, impermissible box?

MR JOWELL: So the crucial difference, if you think of our

scenario 3b, for example, is -- which we say would be a manifestation of a CSS but would not be Google's CSS, or would not be invariably Google's CSS, because Google's CSS could have --

MS ROSE: It is a CSS to which any CSS provider --

MR JOWELL: Yes, exactly.

MS ROSE: -- has an opportunity to contribute.

MR JOWELL: That is right.

The key difference is who does the indexing and ranking, because that is the core function. Who is deciding what -- how these are to be ordered and how they are to be displayed.

MS ROSE: So who decides which products are in the box?

MR JOWELL: Essentially, yes. It is about -- and who matches the products to the queries. So ...

Now, in the --

THE CHAIRMAN: But, pause a moment.

MR JOWELL: Yes.

THE CHAIRMAN: You said Google controls the triggering, ranking and indexing, I think you said.

MR JOWELL: Yes.

THE CHAIRMAN: So by "the triggering", what do you mean?

MR JOWELL: Well, it is Google that ingests the feeds into its hardware and software, it is Google that then indexes, and it is Google that then ranks and it is

Google that then displays. So at the present time, effectively all of the internal functions of the engine, if you like, that supplies the CSS are all -- the CSS manifestation are all controlled by Google.

THE CHAIRMAN: You are talking about the --

MR JOWELL: The remedy.

THE CHAIRMAN: -- PLA module?

MR JOWELL: Yes.

THE CHAIRMAN: Because I want to ask you about the CLA module.

MR JOWELL: Yes. So, yes, I am talking about the PLA --

THE CHAIRMAN: Perhaps you can come on to that in a moment.

MR JOWELL: Yes, yes.

But the critical bit, I would say, is the ranking. It is who decides what products show in response to the user query, and that is --

MS ROSE: Can you just talk us through how that works with your option 3a?

MR JOWELL: So 3a is actually something rather different. So 3a actually is not a CSS on the page -- I keep saying -- I am going to be taken by my learned friend every time I say it is a -- a manifestation of a CSS on the page, user interface of a CSS on the page.

3a is not that. 3a is essentially a -- it is something different, which is, it is a collection of

links to CSSs.

MS ROSE: So it is basically an enhanced CLA?

MR JOWELL: Yes, that is right. It is an enhanced CLA or an enhanced catalogue view, depending on how you want to look at it. So that is not a -- it is not -- the 3a option is not ranking products.

THE CHAIRMAN: You are not clicking through to merchants --

MR JOWELL: No, you are not clicking --

MS ROSE: It is just it is giving you -- it is a search result giving you search results.

MR JOWELL: Correct. Access to comparison shopping services.

MS ROSE: 3b gives you -- well, it could be boxes -- individual tiles within a box, or a whole box --

MR JOWELL: Yes.

MS ROSE: -- where either the individual tile is rented by the CSS or the whole box is rented by the CSS.

MR JOWELL: Well, in our 3b it is the whole box.

MS ROSE: But it does not have to be the whole box, does it? Or does it? Does it have to be the whole box?

MR JOWELL: Can I come back to that, because it is complicated? That is the mixed mode option that we discussed. It is conceivable that a mixed mode option might work, but there are various reasons why we suggest it is not --

MS ROSE: So your 3b envisages that a CSS bids for the whole box --

MR JOWELL: For the whole box.

MS ROSE: -- and populates the box --

MR JOWELL: Yes.

MS ROSE: -- with their own results.

MR JOWELL: Yes, with their own results, and then they choose, depending on the query, to populate it with links back through to their website.

MS ROSE: Or with CLAs.

MR JOWELL: Or with individual products.

THE CHAIRMAN: So it could be like -- sorry to interrupt you.

Just to be clear, it could be like the Google PLA --

MR JOWELL: Yes.

THE CHAIRMAN: -- compliance mechanism, except it would not always be Google, it would be depending which provider --

MR JOWELL: Correct.

THE CHAIRMAN: -- which CSS wins the auction --

MR JOWELL: Correct.

THE CHAIRMAN: -- and gets --

MR JOWELL: They have equal opportunity, which is a key concept in the Decision.

MS ROSE: The question of who wins the auction would be

decided algorithmically --
MR JOWELL: One imagines, yes.
MS ROSE: -- and could be a combination of price and quality indicators?
MR JOWELL: Yes, we accept that.
MS ROSE: So that, from Google's perspective, if another CSS won the auction for the box --
MR JOWELL: Yes.
MS ROSE: -- Google would have no control over what displayed on the SERP, it would be a black box from Google's perspective?
MR JOWELL: Well, not entirely, because we accept that Google is entitled to have, if you like --
MS ROSE: Parameters.
MR JOWELL: -- parameters.
MS ROSE: Indeed, by the operation of the algorithm that decides who wins the auction, in fact Google would have significant control prospectively --
MR JOWELL: Correct.
MS ROSE: -- over what is in the box.
MR JOWELL: Yes --
THE CHAIRMAN: The algorithms, you accept, could be set by Google as long as they are --
MR JOWELL: Objective.
THE CHAIRMAN: -- objective and --

MR JOWELL: Yes, and do not self-preference.
MS ROSE: But, I mean, could it not then be said that that is still Google's CSS because Google is still deciding who gets into the box and setting the parameters for what displays in the box?
MR JOWELL: We say, look, to some degree it is a question of degree, we accept that. But ultimately, if all Google is doing is applying objective criteria and setting reasonable objective parameters for inclusion, then it cannot be said at that point to be Google's CSS, provided that the rival CSSs are getting a meaningful ability to rank and choose how they -- choose what they display and how they display it.
THE CHAIRMAN: Because the selection of products in the box would then be made by the CSS --
MR JOWELL: Correct.
THE CHAIRMAN: -- not by Google --
MR JOWELL: Correct.
THE CHAIRMAN: -- and the star rating, or whatever, similarly.
MR JOWELL: Yes. Correct, the information --
MS ROSE: So the distinguishing feature, the key distinguishing feature from your perspective is that other CSSs have a meaningful ability to rank and choose what they display and how they display it?

MR JOWELL: Yes, or put another way, that they have a meaningful ability to actually provide and compete with their CSS services, for the core of their CSS services, on the SERP, because --
MS ROSE: Would that be satisfied by a situation where the CSSs were providing a feed to Google daily? I mean, these mechanisms to mitigate --
MR JOWELL: Yes.
MS ROSE: -- privacy and latency concerns?
MR JOWELL: Yes, we accept that, in principle, the sandbox approach --
MS ROSE: The API/sandbox approach.
MR JOWELL: Yes, yes.
MS ROSE: Even though that would mean that Google would have a more dynamic feed?
MR JOWELL: Well, I think Google could not -- Google could not put --
MS ROSE: (Overspeaking - inaudible) couldn't self-preference (inaudible).
So Google would have to subject itself to the same discipline?
MR JOWELL: Yes, it would, in order for there to be equal opportunity and --
MS ROSE: So, in other words, treat Google Shopping --
MR JOWELL: Yes.

MS ROSE: -- as a wholly separate entity for this purpose?
MR JOWELL: Yes. Yes.
MS ROSE: So it could not take advantage of its vertical integration?
MR JOWELL: No.
PROFESSOR SMITH: Can I go back to your description of the existing remedy box --
MR JOWELL: Yes.
PROFESSOR SMITH: -- which you said Google makes choices, Google does the indexing. I did not understand what you meant by Google does all the indexing. The remedy box displays PLAs.
MR JOWELL: Yes.
PROFESSOR SMITH: Google -- so how does Google do indexing?
MR JOWELL: So Google has feeds which it ingests from the merchants and, under the current arrangement, CSSs are sort of nominally intermediaries, but in practice the feeds are just coming into Google. Google then has a process of indexing and categorising all of the various product offers, so it is putting things into a huge index, a database, effectively, and cataloging and putting these into different boxes of different categories, and then ranking them, and it is really -- the crucial stage really is the -- it is the ranking that is -- that is so important, and then its ability to

control how those are displayed. So it entirely, you know, controls the display of those offers as well. So it is the ingestion, categorisation, indexing, ranking and display. Those are the key internal steps by which the CSS service is provided and they are all done by Google in the current arrangement, and the only role of the rival CSSs, as you have heard, is not a meaningful one: they are simply advertising, acting effectively as advertising agents on the managed model, that is the best one can -- the highest one can put it, or simply really just as a badge under the self-service model. But they have --

PROFESSOR SMITH: So when Google gets PLAs performed by other CSSs --

MR JOWELL: Yes.

PROFESSOR SMITH: -- for the auction for the remedy box, it is Google that goes back through Google Search to index those products --

MR JOWELL: Yes.

PROFESSOR SMITH: -- that go into the PLA?

MR JOWELL: That is it. It is Google's specialised search service, we would say, effectively that it is doing -- its algorithm -- its specialised search algorithms, not the general search algorithms, the specialised search algorithms that -- and software, all of that is still

devoted to that process of then ranking and ordering the --

MS ROSE: Google's algorithm is deciding which products display based on a combination of the price they are paying and quality indicators and relevance indicators?

MR JOWELL: Correct. Yes, correct.

THE CHAIRMAN: But these are different algorithms from the general algorithms --

(Simultaneous speakers - inaudible)

MS ROSE: This is the whole --

PROFESSOR SMITH: The index -- sorry, please go ahead.

MS ROSE: Sorry, go on.

PROFESSOR SMITH: When you say indexing, this is not the indexing that Google does of whole web for its Google Search --

MR JOWELL: No.

PROFESSOR SMITH: -- this is a different --

MR JOWELL: A separate thing, exactly.

PROFESSOR SMITH: -- sense of things?

MR JOWELL: Exactly, this is important. So, for the web, what they are doing is scraping. So they are going -- they are scraping the web and then they present the general search results based on scraping. But what distinguishes specialised search is that you get a feed, a specific feed. So what they do is they take all these

specific feeds from the merchants, then they have a special set of software and hardware to then index, catalogue and rank and display and that is a separate service, of course.

MS ROSE: Can I ask you a question about --

THE CHAIRMAN: Which is presumably what the CSS does --

MR JOWELL: Yes.

THE CHAIRMAN: -- and what Kelkoo does --

MR JOWELL: Exactly.

THE CHAIRMAN: -- on its own website? It will have feeds from the merchants --

MR JOWELL: Exactly.

THE CHAIRMAN: -- it will have an algorithmic --

MR JOWELL: Yes, exactly.

THE CHAIRMAN: -- assortment of its own?

MR JOWELL: What is quite interesting is, if you -- forgive me, I do not have the precise paragraph numbers to take you to, but if you go back to Mr Stables' witness statement, he provides this description. You may remember, in opening, I took to you that diagram of the sort of pyramid where he describes all these processes.

If you go to Mr Goodrow's statement, he describes how they improved Google Product Search in his day, when they -- and he describes many of the same processes,

you know, of ranking and cataloging and indexing and so on, and this is the engine, if you like, in both cases of a comparison shopping service.

The critical point is that it is all done by Google in the current arrangement.

THE CHAIRMAN: I think your other point, is this right, that I have picked up, you talk about also getting the data of who -- of the behaviour of users for searching?

MR JOWELL: Yes, that is absolutely right.

THE CHAIRMAN: Which is a further point, is it not?

MR JOWELL: Yes, indeed.

THE CHAIRMAN: Which are then used to improve the operation?

MR JOWELL: Yes. Yes, correct.

THE CHAIRMAN: That goes only to Google and not to the --

MR JOWELL: The CSSs get very limited data.

MS ROSE: Can I ask you another question about 3a?

MR JOWELL: Yes.

MS ROSE: So 3a, the enhanced catalogue view or enhanced CLA.

MR JOWELL: Yes.

MS ROSE: So what we are envisaging is a series of tiles, each of which gives you a link to a CSS --

MR JOWELL: Yes.

MS ROSE: -- and in the tile there is maybe three or four pictures of cameras and a range of prices and it says 15

merchants or something.
MR JOWELL: Yes.
MS ROSE: Now, that box might or might not be the box that most closely meets the desire of a user typing in a query.
MR JOWELL: Yes.
MS ROSE: A user might want those kinds of results ––
MR JOWELL: Yes.
MS ROSE: –– or they might want PLAs.
MR JOWELL: Yes.
MS ROSE: Depending on where they are in their shopping journey ––
MR JOWELL: Correct.
MS ROSE: –– they may have already decided exactly what model they want so they just want to compare prices.
MR JOWELL: Yes.
MS ROSE: Or they may want to look at a range of different models and therefore want to look at different products.
MR JOWELL: Agreed.
MS ROSE: Now, the way that would be determined would again be algorithmically, looking at the nature of the query and whatever other behavioural factors the magic of Google operates to decide whether what would display would be a series of PLAs or your enhanced CLA/catalogue view; is that right?

MR JOWELL: So ––
MS ROSE: Because that is the whole –– that is the way the whole page auction works.
MR JOWELL: It is a very good question. So it could envisage that scenario of effectively 3a competing with 3b, but ––
MS ROSE: Or 3a just competing with merchants.
MR JOWELL: Well, then that becomes difficult, because if it is competing with merchants, then it is competing –– it could be competing with Google's comparison shopping service on the page, if you see what I mean. But the beauty of 3b, if one thinks about it, is this, is that the CSSs, including Google's CSS, can decide in response to a query: is the user best –– do they want individual products that they can click through to merchants, or do they want a CLA-like arrangement, or do they want a mixture? Each CSS can then choose, in response to the query, how to respond, so –– and the market can then decide –– I say "the market", Google's algorithms reflecting the market and the amount people are willing to pay and so on ––
MS ROSE: Who is doing that job best.
MR JOWELL: Who is doing the job best. So if Google were right, well, actually what users want these days is always just a list of products, they do not want to see

anything ––
MS ROSE: Then that is what the CSS will show them.
MR JOWELL: That is what the CSS will show them, and a CSS like Google's CSS or Google's manifestation of Google's CSS that shows that would then win out. If they want a wider, then those CSSs that say, "No, come back to our website and we will show you 200 results", they will win out.
MS ROSE: What do you say to the merchant who says, "I want the opportunity to advertise my products prominently on Google's SERP. I do not want to be paying money to an intermediary for clicks, I just want to buy advertising space on the SERP, so I want placed PLAs", and if someone is searching for Nikon cameras and I sell 20 different Nikon cameras, why should I not be able to advertise my cameras on the –– on ––
MR JOWELL: We say they can get that through 3b.
MS ROSE: Well, no, only if they go via a CSS. Maybe they do not want ––
MR JOWELL: Well, we say they go via a CSS right now, it is just that the CSS is Google's CSS, always Google's CSS. Actually, you heard from Mr Hunt that, in fact, with the differentiation and so on over time, they could be better served by multiple CSSs and maybe more cheaply served by multiple CSSs.

THE CHAIRMAN: Are those still AdWords ads ––
MR JOWELL: Yes, and of course they are always still the text ads. They can always ––
THE CHAIRMAN: They can still take an advertisement if they want to.
MR JOWELL: Yes.
MS ROSE: So that is the text ads?
MR JOWELL: Yes, those are text ads, yes.
MS ROSE: Of course, they might feature prominently in the organic search.
MR JOWELL: Yes.
MS ROSE: But you are saying if they want to be in a box, they have got to go via a CSS now.
MR JOWELL: Yes.
MS ROSE: So there is no disadvantage to that.
MR JOWELL: No disadvantage.
MS ROSE: In fact, what you are offering them is greater choice ––
MR JOWELL: Correct.
MS ROSE: –– because they have the choice of a range of competing CSSs.
MR JOWELL: Correct.
But the one thing I would emphasise is this. Obviously this Tribunal is not –– you are not the Commission, you are not the regulator deciding what

will happen in the future, as it were, and the regulator has got a difficult question, in a way an even more difficult decision, which is: well, this is all very well, but there could be some real transition issues, as these -- because we accept that CSSs have been downgraded in quality somewhat as a result of all the underinvestment over the years. So there could be transition issues and also users have got used to particular formats, merchants have got used to particular formats, so we accept that for the regulator, in a way, they have a difficult decision and that is what they are wrestling with really under the DMA. But for you, you simply have to say -- well, I say "simply", but more easily, you simply ask yourselves: well, what would have happened in 2008?

MS ROSE: That is not simple at all.

MR JOWELL: It is not simple at all, but it is perhaps less --

MS ROSE: How much detail -- but how much detail -- how specific do we have to be? I mean, I found it very relatable -- I cannot remember where it was -- that the task of a counterfactual is arbitrary and impossible.

MR JOWELL: Yes, yes.

MS ROSE: I mean, how specific --

MR JOWELL: I think the answer is that really this Tribunal cannot -- we accept that it is in your discretion as to precisely how granular you feel comfortable going, and it may be that some elements need to be reserved over to trial 2, where they may or may not need actually to be decided, because ultimately what this is going to all go to is going to feed into a damages calculation which will say: how many clicks would have come to these CSSs? It may be that it actually does not matter terribly whether it is 3a or 3b or ... you know. But it may matter. So it may well matter, and so if you -- I think what you need to do is to be as granular as you reasonably can without -- but we accept that there may be limits. For example, when it comes to, say, the precise charging mechanism.

THE CHAIRMAN: Because you say what we have to do is to decide what on the balance of probabilities Google would have done --

MR JOWELL: Yes.

THE CHAIRMAN: -- had it behaved lawfully --

MR JOWELL: Yes.

THE CHAIRMAN: -- from 2008 onwards, and whether that is in fact the immediate remedy that the regulator might impose may be different.

MR JOWELL: It may well be different, yes, indeed. One

reason it may well be different is the point that I am about to address you on, which is this question of, on the law, whether you are obliged to take both demotion and promotion out --

THE CHAIRMAN: Yes.

MR JOWELL: -- in the counterfactual.

But I think, if I may just -- I think you have probably heard enough from me on abuse, but just to -- briefly just to wrap up, we do say that really what has happened in the remedy is that CSSs have been given effectively a sort of meaningless role which is actually very closely analogous to the sort of role that they could have previously and that was rejected by the General Court. So you may recall that before the General Court, Google sought to argue CSSs could participate in the shopping unit by acting as intermediaries for placing merchants' paid product results in the shopping unit, and the Decision rejected that, at recital 439, saying, well, they should not have to change their business model, and the General Court agreed.

If I can just remind of you that, if we go to {BA/3/61}, you see paragraph 348. They note that:

"... competing comparison shopping services were not, as such, eligible to appear in the Shopping Units.

As Google confirms in the application, they can be included only if they change their business model by adding a 'buy' button or ..."

This is the important bit:

"... if they act as intermediaries to submit products to Google on behalf of online sellers."

Then if we go over the page, please, {BA/3/62} to 351, they say, therefore:

"... the alternative offered to competing comparison shopping services in order for them to appear in Shopping Units, namely to act as intermediaries, also requires them to change their business model in that their role then involves placing products on Google's comparison shopping service as a seller would do, and no longer to compare products. Accordingly, in order to access Shopping Units, competing comparison shopping services would have to become customers of Google's comparison shopping service and stop being its direct competitors."

We say really that is precisely what has happened under the remedy. They have become mere intermediaries. Of course, we know that all of the value continues to go to Google. You then could say that is an essential point, part of the argument, but it is a very strong indicia that nothing has changed and that this continues

to be a manifestation of Google's CSS.

So those are the points I would like to make on abuse.

If I can then turn to the question of the counterfactual and law, which is an area we have not really traversed yet, but is quite an important issue.

We say that, for the Decision period, this Tribunal is bound to take as its counterfactual that which was adopted by the Decision as interpreted by the European Court, and that is the removal of both limbs of the abuse, the demotion and the unequal promotion. For this, I am afraid I am going to have to go into quite a detailed forensic examination of the Decision and the judgments of the European courts and also to take you to the consideration of the Court of Appeal's judgment in *Merricks* as well, so you will have to bear with me a bit.

If we start with the Commission Decision, go to {BA/2/136}, one can see, starting in paragraph heading 7.2.3, this decides that the abusive practice is diverted traffic from the CSSs and diverted traffic to Google, and you see that in 452 and 453. The basis for that conclusion is found in section 7.2.3.2, which, if we go to page {BA/2/139}, please, and you see -- 462, we see:

"The Conduct has led to a decrease in generic search traffic from Google's general search results pages on a lasting basis to almost all competing comparison shopping services in each of the thirteen EEA countries in which the Conduct takes place."

Now, that was an essential step in the finding of a causal link between the conduct and its potential anti-competitive effects. Before I show you that, one needs to briefly look at the counter-arguments that Google raised, which are at {BA/2/170}, if we could go to 170. You see in recital 502 that Google -- and following, that:

"... Google essentially relies on five arguments to contest the fact that the Conduct decreases traffic from Google's general search results pages to competing [CSSs] and increases traffic [to its own] ..."

One of the matters that it relies on -- this is the fourth matter, which we can see over the page at {BA/2/171} at paragraph 506, and perhaps if I could ask you to read 506 to 509.

(Pause)

So what Google was doing in those experiments was effectively seeking to strip out the effect of the demotion so that one just had the effect of the promotions of the Product Universal and the shopping

unit on generic traffic to CSSs, so it is trying to isolate the effect just of the boxes. Now, implicit in that was an assumption that the appropriate counterfactual was indeed that one takes away the Product Universal or the shopping unit but you leave in place the demoting algorithms. As you will see, the Commission did not accept that submission or that counterfactual.

If we go to page {BA/2/172}, please, and perhaps if I could invite you to read recitals 512 to 514.

(Pause)

If one then goes to page {BA/2/174}, and if you could read 519 to 520. I do not think you need 521. But then 522 to 523.

(Pause)

So the Commission there rejects Google's premise, the premise of its experiments, that it is appropriate only to take out one limb, the promotion limb, of the impugned conduct when you are assessing its causal effects.

MS ROSE: Can I just ask about recitals 512 and 514.

MR JOWELL: Yes, if we can go back.

MS ROSE: It is {BA/2/172}.

MR JOWELL: Yes.

MS ROSE: So the foundation of the reasoning that

the Commission is adopting here --

MR JOWELL: Yes.

MS ROSE: -- is that it says:

"... the Conduct consists not only of the positioning and display of the Product Universal ... but also ... unlike competing comparison shopping services, Google's own comparison shopping service is not prone to being demoted by [Algorithm A] ..."

They say the same thing at 514:

"By contrast, Google's [CSS] has never been demoted by ... Panda ..."

MR JOWELL: Yes.

MS ROSE: Now, there is a sleight of hand there, is there not, because the implication of that is that there are two types of discrimination. The first type of discrimination is the promotion of Google in the box, and the second type of discrimination is the demotion of other CSSs but not the demotion of Google and it says that there.

MR JOWELL: Yes.

MS ROSE: It says they are not. But what we know is in fact the reason Google is not demoted by the algorithm is that it is not scraped or crawled by the -- it is not crawled by the algorithm, so it is not ranked at all.

MR JOWELL: Yes.

MS ROSE: So Google is below the bottom of the search results, it does not appear in the search results. So if there is no box, Google's CSS is not anywhere on the page.

Now --

MR JOWELL: I think I would say that it is an omission, if you look, it is not a complete -- I would not call it a "sleight of hand".

MS ROSE: But it actually makes the whole of the reasoning here incoherent, does it not?

THE CHAIRMAN: I think they are saying, are they not, that Google's comparison shopping service is manifested in the box and therefore it is not subject to demotion because the box is --

MS ROSE: Well, that -- (overspeaking) --

THE CHAIRMAN: -- (inaudible).

MS ROSE: Well, that makes sense.

THE CHAIRMAN: That is what they are saying --

MS ROSE: That makes --

THE CHAIRMAN: -- and I understand that.

MS ROSE: That makes complete sense. The problem is, when they come on later, in the passages you have just shown us, to say that if you remove the box and then do an experiment showing it does not mean that more traffic goes to other CSSs, that experiment is not a good

experiment because you have not removed the demotion, that reasoning is fallacious, because without the box there is no discrimination in favour of Google anywhere. Google is not on the page. Google's CSS is not on the page?

MR JOWELL: I think -- I can see that as a matter, if you like, of a formal logic, but I think that what they were --

MS ROSE: (Overspeaking - inaudible).

MR JOWELL: -- what they are -- the way they look at it -- the way, I think, that they are looking at it is as a single integrated course of conduct in which they have done this: they have pushed them up and they have pushed them down.

MS ROSE: Yes, well, that makes sense. That makes complete sense, of course, because what you have done is give a massive boost to your own service and a massive push down to the competitors.

MR JOWELL: Yes.

MS ROSE: So one understands why those two together --

MR JOWELL: Yes.

MS ROSE: -- mean that you have a significant diversion of traffic and it is not normal competition.

MR JOWELL: Yes.

MS ROSE: Because that is what you have done with those two

courses of conduct.

MR JOWELL: Yes.

MS ROSE: But the impact of your conduct is increased by the demotion.

MR JOWELL: Yes.

MS ROSE: But if you take out the box completely --

MR JOWELL: Yes.

MS ROSE: -- there is no advantage to Google, because if you take the box out completely --

MR JOWELL: Yes.

MS ROSE: -- Google's CSS is nowhere, so Google is not self-preferencing at all.

MR JOWELL: I understand that as a matter of theory, but I think what they are saying is, in the real world, that -- I think, reading between the lines, they do not -- obviously, they do not spell this out, but in the real world, that would never have happened, because in the real world where you took away the box, they would have had to get their CSS in there some way and everybody would have not been demoted and that is why --

MS ROSE: Well, that makes sense.

MR JOWELL: Yes.

MS ROSE: What you have just said makes sense.

MR JOWELL: Yes.

MS ROSE: But I do not think it is what the Commission says.

MR JOWELL: It is not precisely how they reason it. But the point that I would make is simply this is what they said and we will see --

MS ROSE: So you say we are bound by it --

MR JOWELL: You are bound.

MS ROSE: -- even if it does not make any sense as a matter of logic?

MR JOWELL: Yes.

MS ROSE: Okay. I mean, if that is the submission, that is fine. That is fine. I mean, that is --

MR JOWELL: It is not a minor point. I mean, it is --

MS ROSE: No, it is a coherent submission --

MR JOWELL: It is -- I say that -- what I say is that, even if you find the specific reasoning unconvincing as a matter of logic, there is an alternative route by which one gets to the same --

MS ROSE: But the problem --

MR JOWELL: -- outcome, which makes perfect sense.

MS ROSE: But, I mean, the thing is, what we are actually considering in reality is not -- and I think you are right, the idea that if the box was removed, they would just demote themselves, they would have no Google Shopping, is unrealistic commercially.

MR JOWELL: Yes.

MS ROSE: But what we are considering is the flip side of

that --
MR JOWELL: Yes.
MS ROSE: -- which is an equal opportunity box --
MR JOWELL: Yes.
MS ROSE: -- and if you have an equal access box, say your 3b option --
MR JOWELL: Yes.
MS ROSE: -- then it becomes -- well, first of all, it is likely to be irrelevant whether there is demotion or not --
MR JOWELL: Yes.
MS ROSE: -- to the diversion of traffic, but secondly, where is the -- why is it unlawful or abusive to have Algorithm A and Panda demoting CSSs in the organic results when Google does not appear in the organic results at all and where everybody has equal access to the box?
MR JOWELL: No, and I accept that for the post-Decision Period, but I do say --
MS ROSE: So you say we are bound --
MR JOWELL: You are bound.
MS ROSE: -- to rule that out --
MR JOWELL: Yes.
MS ROSE: -- even though it does not make logical sense?
MR JOWELL: Well, even though you may find that the specific

reasoning by which they arrived at that outcome --
MS ROSE: Indefensible.
MR JOWELL: -- does not make logical sense, nevertheless you are bound by it and there are very good reasons to support it --
THE CHAIRMAN: I am not sure this whole analysis here is dealing with discrimination at all. I think it is just dealing with the question of what causes decrease in traffic to competing CSSs, and dealing with Google's argument, because that is the context of the discussion, does what Google did cause a decrease in traffic to competing CSSs, and they are looking at the -- they say the experiment only isolates the -- only removes the boxes.
MR JOWELL: That is right.
THE CHAIRMAN: But there is still a great decrease in traffic through the algorithms. I do not think this is going to discrimination at all, it is going to the factual question --
MR JOWELL: Yes, of effect.
THE CHAIRMAN: -- of whether --
MR JOWELL: Yes.
THE CHAIRMAN: -- what has happened has caused a decrease in traffic. The discrimination question seems to me a different question.

MR JOWELL: That is -- I think that is fair, but I think that Google's argument was: well, if you -- in looking at cause and effect, you have to strip out the discriminatory element. If you strip out the box, they say, well, then you strip out the discriminatory element, therefore, causally, you then look at that as a counterfactual, and one can see they reject that, and you can see that the -- one then comes on to the -- that is a basis for them rejecting the notion that the conduct has not caused the diversion of traffic.
Then one comes on to the potential anti-competitive effects, which are analysed in section 7.3.1, which starts on {BA/2/206}. You see there 591 and 592.
(Pause)
If one then goes to {BA/2/209}, if you then could read 605 to 607.
(Pause)
So what this part of the analysis was was a finding of an actual causal link, not just a potential effect. It is an actual causal link on traffic, and that, you see, is confirmed in recital 607, where they say:
"... the Commission has demonstrated by 'tangible evidence' that the Conduct decreases traffic to competing comparison shopping services ..."
Now, that actual link of decreasing traffic was not

the actual potential anti-competitive effect. That is a stage later on, which is, well, does that decrease in traffic itself cause, say, CSSs to go out of business and so on, does it cause foreclosure, and that was potential. But this is a step before that, which is the causal link leading to the -- leading to that potential effect, so it is an essential step in the reasoning.
Google comes back to this point before the General Court, and if we go to {BA/3/63}, one can see paragraph 358.
Perhaps if you can just read paragraphs -- it is a bit of a long section, I am afraid, but 358 to 364 {BA/3/63-65}.
(Pause)
THE CHAIRMAN: Yes, 364 {BA/3/65}. So that is all Google's argument?
MR JOWELL: That is all Google's argument, and you have seen what they say: you have got to show a causal link from the abusive conduct, that means showing a link to a material decrease in traffic to CSSs. They say that whether you have shown that causal link requires a counterfactual, a proper counterfactual, and they say the proper counterfactual is removing both limbs -- sorry, is not removing both limbs, but just removing

the promotion limb. They say, why? They say, well, because the demotion then was effectively innocent, just part of the background, and the abuse only starts when the promotion starts. Based on that, they say, if you look at our difference-in-difference in analysis in our ablation experiment, that shows what happens if you just remove the promotion. If you do that, then the evidence, they say, is you do not see a material increase in traffic to CSSs. So therefore, they say, you have not proved the causal link, there is a step in the reasoning leading to the finding of a potential effect that is flawed because it is based on an incorrect counterfactual. So that is their argument.

Then you see the General Court's response, which is at {BA/3/66}, and you see, if one starts at 368 through to 376, and again, I am sorry to trouble you with this, but again, it bears -- I think it is worth reading the response, 368 to 376 {BA/3/66-67}.

(Pause)

I think you can skip over 377 {BA/3/68}, because that contains a paragraph that the Court of Justice did not endorse, it regarded it as ineffective, but ...

Then, at 379, you see:

"In order to challenge the Commission's assessment of the potential effects of a practice on the market, or

its actual effects if these are determined by the Commission, the relevant undertaking can certainly put forward a counterfactual analysis. However, that analysis must then enable the effects of the impugned practice as a whole to be established, rather than the partial effects."

Then if we go to {BA/3/71}, we see 391:

"Google also claims that the Commission failed to take account of broader industry developments and shifting user preferences, in particular the growing popularity of merchant platforms, including for making comparison shopping searches. Google states in that regard, in essence, that those platforms have improved the quality of their services, unlike comparison shopping services, and that is why they are preferred by users, which has given them better rankings than those ... However, even if that is a possible explanation, it is closely linked to the functioning of Google's algorithms ranking generic results, which is, as is noted in paragraph 373 above, one component of the practices at issue."

{BA/3/72}:

"Consequently, since Google has been unable to distinguish what, in the changes in the respective ranking of merchant platforms and of comparison shopping

services, would be covered solely by the improvement in the quality of service of the merchant platforms compared to the quality of comparison shopping services, all things being equal, and what would be covered by the changes made to its algorithms, notably the introduction of the Panda algorithm, that explanation does not enable the causal link which the Commission identified between the practices at issue and the decrease in traffic from Google's general results pages to competing comparison shopping services - even partly - to be called into question."

So -- and if one goes on to page {BA/3/78}, one sees at 419:

"The challenge to that causal link also encompasses the argument, put forward by Google in the reply and mentioned in paragraph 397 above, that the development of traffic to its comparison shopping service was unchanged after the launch of the Panda algorithm. However, while that is indeed the case, the argument in that respect also comes up against the fact that the practices at issue are a combination of practices that concern not only the generic results adjustment algorithms, including Panda, but also the way in which the specialised product results are presented."

So the General Court very clear that it is

the combination of the practices that is abusive and any acceptable counterfactual must remove both elements, and the analysis of the effects has got to take into account both promotion and demotion.

If we then go to the Grand Chamber of the Court of Justice --

MS ROSE: But does that not assume that you have both of those in play? I mean, if your counterfactual does not include any more favourable treatment of Google at all, then it is very clear from this passage that the General Court is endorsing and emphasising the fact that the Commission is not objecting to algorithms per se, it is objecting to the more favourable display of Google and the less favourable demotion of other --

MR JOWELL: Yes, but it is also saying --

MS ROSE: But if --

MR JOWELL: Forgive me.

MS ROSE: One can understand if what you are trying to do is identify the effects of the abuse in terms of identifying an abuse of dominance by saying there is an effect on traffic, then you look at what actually happened and say: well, would they have had more traffic if those two things had not happened?

MR JOWELL: Yes.

MS ROSE: The answer is, yes, if those two things, promotion

and demotion, had not happened, they would have had more traffic.
MR JOWELL: Yes.
MS ROSE: But that is a different question from asking what could Google lawfully and plausibly have done over the period had it been acting non-abusively and what would have been the development of the businesses of its competitors in that scenario, which is the question for damages. Is that not a different question?
MR JOWELL: I do not think it is a different question. I think this is a part of the analysis of the existence of the abuse, and one cannot have a -- one cannot assess damages differently based on an assumption, a counterfactual assumption that differs from that which formed the basis of the abuse finding --
MS ROSE: But --
MR JOWELL: -- because that runs counter to the abuse finding.
THE CHAIRMAN: I mean, does it not proceed more in stages? The potential category of abuse being considered here is discrimination by self-preferencing.
MR JOWELL: Yes.
THE CHAIRMAN: That is the only abuse being asserted.
MR JOWELL: Yes.
THE CHAIRMAN: Then one has to ask: well, if there is

discrimination by self-preferencing, does it lead -- is it a failure of competition on the merits, does it lead to significant diversion of traffic as a matter of fact? There are two elements to the self-preferencing, the demotion and promotion. They then look, does it lead to significant diversion of traffic from the factual questions and it finds that it does, both logically, because users only look at the first three items on the SERP and there is evidence that the rival CSSs were pushed down into oblivion and so on. Then the third stage is: is there a potential effect on competition, which is a separate stage, and then they say, well, yes, there is, because it foreclosed CSSs from the market and discouraged innovation and so on.
So this is the middle stage where they are looking at: does this have an effect of diverting traffic?
MR JOWELL: Yes.
THE CHAIRMAN: But it is all in the context of an abuse of self-preferencing and discrimination.
MR JOWELL: Yes.
THE CHAIRMAN: If we are asking in this trial what is the counterfactual, namely lawful conduct by Google, non-abusive conduct, and if there is no self-preferencing, no discrimination in that sense, we do not even, it seems to me, get to the later questions.

That is how I understand this very structured analysis that the Commission and then the court has carried out. Where I struggle on the algorithms is, if the box ceases to be Google's CSS, assume I am with you on all of that --
MR JOWELL: Yes, yes.
THE CHAIRMAN: -- it has got to be radically changed so that it is not Google's CSS, then you have got no promotion of Google's CSS --
MR JOWELL: Yes.
THE CHAIRMAN: -- all you have is ranking algorithms which treat CSSs, by nature of their being CSSs, very poorly --
MR JOWELL: Yes.
THE CHAIRMAN: -- and if Google's self-standing CSS were included in the rankings, were crawled as well, it would also be treated very poorly.
MR JOWELL: Yes.
THE CHAIRMAN: So the discrimination has been removed.
MR JOWELL: Yes, I see that, but I also see that this is a -- this was a decision that has -- in our submission, has an essential step in the reasoning, the existence of a causal link between the conduct and the diversion of traffic, and that is an essential step leading to the subsequent finding --

MS ROSE: But there was -- I mean, but there is -- there is a causal link, because the conduct that actually happened is an act of discriminatory self-preferencing, placing themselves at the top --
MR JOWELL: Yes.
MS ROSE: -- aggravated by the demotion, which means everyone else is in oblivion.
MR JOWELL: Yes.
MS ROSE: The effect of those two pieces of conduct together --
MR JOWELL: Yes.
MS ROSE: -- is a very significant decrease in traffic. If you only had one of those pieces, i.e. they self-preferenced themselves in the box but they did not demote, they have a much smaller diversion of traffic, because the CSSs would still be on page one, or might still be on page one.
So it is completely correct that when you are asking what is the causal link between the conduct and traffic, you have to look at the entirety of the conduct, because that tells you what impact that conduct is actually having. But if you are asking a different question, which is what loss have these people suffered as a result of the conduct and for that purpose you are asking what would the market have looked like, how would

it have developed, what would Google have done if it had been behaving lawfully, then if Google is able to behave lawfully in a non-discriminatory way whilst still having demotion algorithms, why is that a problem?

MR JOWELL: I think the problem would arise if, say, one gets to trial 2 and Google seek to say -- to rerun the arguments that they ran before the General Court and the Court of Justice, and they say, well, in a world where you take away -- it is only about the box, we isolate the conduct to the effect of the box and there is not much of an effect, therefore there has not been much of an effect of diversion of traffic on you either. We say that that outcome certainly cannot be right. One cannot have a situation where you are assessing damages on the basis of a lesser diversion of traffic than the Decision is based on, because that would be undermining the basis of the Decision. The Decision finds the existence of a causally significant diversion of traffic, so on any view -- so maybe one can reach the same, if you like, answer by a different route, but what has to be made clear on any view is there is not some lower amount of diversion of traffic in the damages counterfactual than there is on the abuse counterfactual, because otherwise you are running counter to the underlying basis on which the Decision is

made.

If I can just show you briefly the Court of Justice, because they also deal with this question {BA/3/78} -- forgive me {BA/4/5}. You see paragraph 22, they note that in the -- you see a summary of the Decision:

"... the Commission found that Google had at different times dating back [to] January 2008, abused [its] dominant position ... by decreasing traffic from its general results pages to competing comparison shopping services and increasing traffic to its comparison shopping service, which was capable of having, or was likely to have had, anticompetitive effects ..."

An interesting way to characterise the Decision.

If we then go to {BA/4/33}, we see paragraph 202, and they say:

"By the second part of the third ground of appeal, [Google submit] that ... the General Court erred in law [in finding] that a counterfactual scenario for an abuse that consists in the combination of two lawful practices required the removal of both practices."

Go to paragraph -- page {BA/4/35}, please.

We can see paragraph 219, we see at the bottom:

"... it must be observed that recital 426 of the Decision ... is set out in Section 7.2 ... relating to

the conduct at issue and concerns the analysis of the impact of that conduct on traffic generated by Google's general results ... to competing comparison shopping services, carried out by the Commission in Section 7.2.3.2 of that decision. The Commission found there that there was a decrease in that traffic in each of the 13 EEA countries in which those practices had been implemented."

If we go over the page, please, {BA/4/36}.

Perhaps if you could read just down to paragraph 222 -- 220 to 222.

(Pause)

THE CHAIRMAN: Yes.

MR JOWELL: So they are confirming that the finding of a decrease in traffic to competing CSSs is not a finding of an actual anti -- actual competitive effect, but a step in the reasoning towards the finding of a potential anti-competitive effect. But they are not saying that the diversion of traffic from CSSs to Google's CSS was not actual, on the contrary, they are saying it was actual.

MS ROSE: It potentially forecloses.

MR JOWELL: Yes, indeed.

Then if one looks at paragraph 244 {BA/4/39}, you see that it confirms that it is for the Commission to

establish a causal link between --

MS ROSE: Hang on. 244, did you --

MR JOWELL: Sorry, 224 {BA/4/36}, forgive me. It accepts that it is for the Commission to establish a causal link between the conduct and its effect. It says that is an essential constituent element of an infringement, so an essential step in the reasoning.

Then if we look at 225 to 240 {BA/4/39-39}, I will not read them out, but there, the Commission says, well -- the Commission used a range of evidence to ascertain the existence of a causal link and it was not required to use a specific counterfactual, but at the same time, it was obliged to consider the counterfactual that was put forward by Google. The key part of the reasoning is in paragraph 235, which you see on {BA/4/38}, please.

You see there, starting three lines down, you see -- sorry, I have lost it now.

235, sorry, could you go up a bit? Thank you.

You see it says -- it refers to the combination of the two practices, then it says:

"According to the appellants, by holding that, in such a situation, a counterfactual scenario must take into account the effects of the two practices at issue, namely both the effects of the promotion ... through

[the] boxes and the effects of the application of [the] adjustment algorithms and ... the demotion of competing [CSSs] ..."

They say that therefore they "erred in law". So Google is re-running its argument.

One then sees at 236:

"... the appellants claim that, in so far as each of those ... practices is ... in itself lawful, a counterfactual scenario which removes one of those practices, in particular the display of boxes, constitutes an appropriate scenario, since it creates a situation without the combination of the two practices and, consequently, without the alleged abuse. By contrast, the removal of the two practices ... favoured by the General Court ... goes beyond what is necessary to create a situation without the allegedly abusive combination and confuses the effects of lawful and unlawful conduct."

So that is precisely the same argument effectively that they are making in these proceedings.

Then you see 237, they criticise the General Court for not envisaging a "realistic" or "plausible" or "likely" scenario, and it refers to the studies, the differences-in-differences and the ablation experiment, which they say:

"... showed that traffic to competing comparison shopping services did not materially change if the boxes were removed ..."

Which wrongly demonstrates, they say, that the decrease in traffic was properly attributable to the conduct at issue.

Then we see the court -- one sees the court addresses the argument at 244, which is on {BA/4/39}, please.

Perhaps if I could just invite you to read 244 to 248 {BA/4/39-40}.

(Pause)

THE CHAIRMAN: Yes.

MR JOWELL: The Advocate General, who they quote with approval, is at paragraphs 179 to 180. You will find that in {K1/100/33}.

You see in paragraph 179, she says, Advocate General Kokott:

"As is apparent from the General Court's findings ... which are not contested ... the alleged conduct comprises two inextricably combined elements, that is to say ..."

The promotion and demotion:

"Those two elements operate together to support Google's self-preferencing. For it is only in

combination that their influence on user behaviour is such as to cause data traffic to be redirected to this extent to Google's own comparison shopping service."

180:

"Contrary to the appellants' submission, that unbreakable link cannot be severed for the purposes of a counterfactual analysis of the causal link between the alleged practices and their (factual or potential) effects. Such an approach would not take into account the combined technical and economic effects of the two elements. It would ... disregard their joint influence on user behaviour."

And so on.

She says:

"The split counterfactual analysis favoured by the appellants would therefore be neither plausible nor realistic but, rather, arbitrary."

So the position one finds oneself in is that you have a decision of a -- based on a finding of a causal link between the conduct and the diversion of traffic away from CSSs and towards Google, so a finding of an actual effect, it is a key plank in the reasoning in why the conduct was capable of having an anti-competitive effect. We say if you break that causal link, you break the Decision, at least potentially, and that causal link

is based on reasoning that expressly rejects a split counterfactual analysis. So we say that, when it comes to damages, this Tribunal cannot properly adopt a different counterfactual, because that would be counter to Article 16(1).

MS ROSE: Is it -- I am trying to understand what the principle is --

MR JOWELL: Yes.

MS ROSE: -- as to why it is the right approach.

MR JOWELL: Yes.

MS ROSE: Is it perhaps because what the court is saying is Google in fact acted in this way through this combination of practices and in fact that combination of practices caused this very significant diversion of traffic and permanent damage --

MR JOWELL: Yes.

MS ROSE: -- to these businesses --

MR JOWELL: Yes.

MS ROSE: -- in that situation, Google cannot be heard to say, "We could have behaved in a way that still damaged your business, a bit less badly than we did damage your business, but in a way that would have been lawful"? Is that the point? They are saying: because you did act in that way and you did do this damage, it does not lie in your mouth to say you could have done something a bit

less damaging?
MR JOWELL: Yes, and I think one might, reading between the lines, go a little further and say what they are saying, particularly if one finds that the finding of potential abuse that I showed you in the General Court's judgment, they are saying that Google was aware that it was, or should have been aware, but it was adopting a --
MS ROSE: I do not think that advances it, because I think it is purely a question of causal link.
MR JOWELL: Yes.
MS ROSE: Is it not?
MR JOWELL: Well, at least it was foreseeable and therefore that you cannot -- that may be why it does not lie in your mouth --
MS ROSE: Well, but simply this is what they did.
MR JOWELL: This is what they did.
MS ROSE: They did abuse their dominance --
MR JOWELL: They did, yes.
MS ROSE: -- in these two ways in combination --
MR JOWELL: Yes.
MS ROSE: -- and that caused the diversion of this much traffic.
MR JOWELL: Yes. This is what the breach of duty consisted in, and --
MS ROSE: If you cut somebody's leg off, you cannot be heard

to say, "Well, I could have just cut your toe off and it would have been fine", but actually the law does allow you to say that.
MR JOWELL: Well --
MS ROSE: I mean, that -- is that not --
MR JOWELL: -- yes --
MS ROSE: I mean, this is why I am struggling with this.
MR JOWELL: Yes. No, I understand, and I think -- but I think that -- I think what one is left with in any event, however one rationalises it, is -- another way, of course, is to say, as we do say in the -- which I will come on to, is it was actually never realistic for them just to get rid of the box, because -- for all the commercial reasons that --
MS ROSE: No, true, that is why we have been looking at it as an equal opportunity --
MR JOWELL: That is right.
So, as it so happens, maybe -- you know, I think Judge Wendell Holmes says, I think, famously indeed, that the life of the law is not logic but experience, and perhaps experience, in a way, in this case shows that, well, these ablation experiments were wholly artificial, because it was never realistic for them to keep the demotion algorithms and have no box.
MS ROSE: It may be -- I mean, interesting as this legal

point is, it may not make a great deal of difference, because if the answer is, say, 3b, then whether there is a demotion algorithm or not may make no practical difference to anybody's damages.
MR JOWELL: It may not, or it may, and I will be seeking to persuade you as our primary argument, on the facts, that actually removing or adjusting the demotion algorithm would be the most obvious counterfactual as well in a moment.
But before I do, I should show you very rapidly a Court of Appeal judgment, because I think it -- which is on this point. It is the *Merricks v Mastercard* judgment that related to the CPO, and Mr Chairman, you will be familiar with this because you were Chairman of the panel that wrote the judgment that was under appeal that was then upheld. We will show you. I am just going to go to the Court of Appeal judgment. It is the one that was upheld, and that is not a matter of tact, it is the one we need. It is {AB2A/21}, and the relevant part of the judgment is in the judgment of the Chancellor, Sir Julian Flaux, of whom the --
THE CHAIRMAN: If we just look at the headnote for a minute to get the context.
MR JOWELL: Yes.
(Pause)

THE CHAIRMAN: It is the third ground, is it?
MR JOWELL: Yes. The exemptibility issue.
THE CHAIRMAN: Yes.
MS ROSE: Right.
MR JOWELL: The judgment of the Chancellor starts at {AB2A/21/5}, but I think if we can pick it up at {AB2A/21/19}. One sees a summary of the CAT's judgment under the heading, "The exemptibility issue" -- I am not sure there is a heading, but anyway it is on the exemptibility issue, from paragraph 44 to 46, if you just quickly cast your eye over that.
(Pause)
THE CHAIRMAN: Yes.
MR JOWELL: If one goes over the page {AB2A/21/20}, one sees paragraph 48 quotes the judgment of the Supreme Court in *Sainsburys v Mastercard.*
Then paragraph 49 to 52 {AB2A/21/20-21}, perhaps if you could read those.
(Pause)
After that, if we could go to page {AB2A/21/22}, and we can see paragraph 55 quoting -- again quoting the CAT at paragraphs 139 to 140.
(Pause)
THE CHAIRMAN: Yes.
MR JOWELL: Then the judgment of the Court of Appeal, page

{AB2A/21/48}, is dealt with quite briefly, you can see, in paragraphs 159 to 162.

(Pause)

THE CHAIRMAN: Yes.

MR JOWELL: So we say that, just as in that case, in the present case the defendant here, Google, there *Mastercard*, sought to argue for a different counterfactual on which the Decision was based, and -- or implicitly based, and the Tribunal and the Court of Appeal rightly rejected the attempt to adopt a counterfactual that would run counter to that decision. We say that the Tribunal is invited to follow the same approach.

MS ROSE: But in the *Mastercard* case, the issue was that *Mastercard*, before the Commission, had not argued that MIFs could be exemptible at a lower level.

MR JOWELL: Yes.

MS ROSE: It had simply said the MIF per se is justifiable.

MR JOWELL: Yes.

MS ROSE: It could have been said: okay, even if our MIFs are too high, we can justify a lower MIF, and indeed Visa did say that.

MR JOWELL: Yes.

MS ROSE: But it did not -- it chose not to say that.

MR JOWELL: Yes.

MS ROSE: So the Decision of the Commission was globally the MIFs were not exempt.

MR JOWELL: Yes.

MS ROSE: In that situation, *Mastercard* could not then turn around in the domestic proceedings and say: a-ha, the right counterfactual is a lower level MIF. So they were, as the court -- and I think this is the ratio of the Decision, the court is saying you cannot run an argument in the national court which is inconsistent with the argument that you chose to run in the Commission.

MR JOWELL: And was rejected.

MS ROSE: That was rejected.

MR JOWELL: I say that this is an a fortiori case, because I say that, in the present case, they argued precisely this point about -- that you should have a one-limbed counterfactual. That was --

THE CHAIRMAN: So you say *Mastercard* is a case where they did not run the argument at all.

MR JOWELL: Yes.

THE CHAIRMAN: This is a case where they did run the argument, but it was firmly rejected --

MR JOWELL: Rejected, correct.

THE CHAIRMAN: -- and therefore in both cases the construction we should place on the Decision is

the same?

MR JOWELL: Yes. I make a further point, which is this, which is that I anticipate that my learned friend might make a point which is to say, well, the counterfactual that we were advancing before the General Court was one where there was no box at all, but now we do not say that, now we say, ah, well, there would be a remedy box, a box like the remedy, or perhaps it may be he may say 3b, I do not know if that is --

MS ROSE: I think he says Turkey.

MR JOWELL: I think he says Turkey. Well, that is no box. Turkey is no box at all, so that is exactly what they were arguing. If he now says it is the remedy box, that is very close -- that is really on all fours with what *Mastercard* was doing, because it is saying I am arguing for, okay, a slightly more attenuated version of what I could have argued for but did not and which was rejected before the General Court.

MS ROSE: I mean, is the distinction -- is there a distinction in that there is a finding by the Commission in our case that the mere application of ranking algorithms or demoting algorithms is not abusive and that the whole premise of the Decision is based on discrimination, i.e. more favourable treatment of Google? Is that a distinction that ...? You are not

talking about a lesser interference with competition that might be exemptible. You are talking about a situation which, on the logic of the Commission's own judgment, you know, without undermining it, entirely on the basis of the judgment, would not be anti-competitive.

MR JOWELL: The trouble is they argued precisely that in front of the General Court --

MS ROSE: Yes, well, I see that.

MR JOWELL: -- and they did not bite.

So what one has to say is, if one is looking at this in terms of English law and one asks, well, what is the duty that has been breached in Lord Leggatt's formulation in *Rukhadze*, the duty is effectively not to do either of these things -- not to do these two things combined in that way and therefore you must -- and you must -- therefore you must --

MS ROSE: Exactly. Exactly, that is the problem with that.

MR JOWELL: Ah, but then you must take -- and therefore you must -- in the counterfactual, we are told you must take them both away.

The short point is we are bound, and one can rationalise it in various ways, as we discussed, but the short answer is we are bound. This would undermine an essential plank of the Decision.

That leads me, though, also to a segue, if I may, into perhaps more -- I apologise that I have taken so long to get there, but into the question of what is the appropriate counterfactual, setting aside the legal point.

THE CHAIRMAN: Yes.

MR JOWELL: We say that actually the most realistic and likely counterfactual is also one where you take away the -- both limbs.

We have explained this in our closing submissions, but we say that whatever happens -- well, first of all, I should say, obviously we say the Tribunal cannot and should not adopt the compliance mechanism, the remedy, for all the reasons that we have said that that would be unlawful.

But if we start -- if we ask ourselves, well, what would have happened in a lawful -- with a lawful alternative? One has to step back into the position of the world in 1 January 2008, knowing what we know now about Google's commercial priorities, its incentives and what it was doing and talking about in the real world, and decide: well, what would it realistically have done? So let us just consider Google's commercial position back in 2008.

Now, the contemporaneous evidence and Mr Goodrow's

evidence was very clear that Google had a single overriding imperative back in 2008 and that was to increase shopping starts on Google Search. He explained clearly that that was one of the main focuses of his manager also, Jen Fitzpatrick, and it was his priority. You will see that in {Day9MT1/42} through to {Day9MT1/43}.

Now, Mr Goodrow, understandably, because he was a former Amazon employee, saw it largely through the prism of competing with Amazon, but actually one can put it in broader terms than that. If you -- basically, if you increase shopping starts on Google, then that has got obvious commercial benefits for Google. It is not just about getting more users for the sake of it, it is about monetising Google's search because more shopping starts means more users liable to click on the text advertising and that means more revenue for Google, and one has seen the evidence and one knows from the public domain the enormously lucrative business that that is for Google.

You will recall from an economic point of view, Mr Noble, in the hot tub, referring to this as pushing out the demand curve. In other words, you push out the demand for product searches on Google, and that of course is critical for them because that then leads to

more text revenue.

Now, one can see the -- one can see this also from the contemporaneous documents. If I could just remind you of {M1/197}, which is the document that Mr Hunt referred to, and you can see the "Summary":

"The Product ... onebox is a critical component of the strategy to increase Google's revenue by bringing more product queries to google.com. Reducing the coverage of the Product Search onebox would lead to an overall decrease in revenue.

"If Product Search adds only one new product query on google.com for every 12 impressions of Product Search onebox, then the impact on google.com ad revenue is neutral. The [Revenue Per Mil] for product queries ... is $107, while the [Revenue Per Mil] for product queries where the Product Search onebox is not shown is ... $9, ie, $116 ... Consequently, Google foregoes an estimated $9 for every 1,000 product queries ..."

Then he says:

"Bringing new product queries to google.com is tremendously lucrative. We can infer the density ..."

And so on.

So -- and if we go on to {M1/197/3}, you see under the "Tie-in to Google's revenue model", we see:

"Product Search aims to grow product queries by

offering users a better experience than our competitors. Our user goal is to make google.com the best place to start shopping for anything on the web; and eventually, off the web as well. We are competing for product queries not so much with comparison shopping engines (Product Search is now the leading shopping engine in the US in terms of pageviews ...) but with Amazon, eBay and other merchant sites."

So this incentive was a strong one and it did not in any sense abate later on. You may recall that I took Mr Goodrow to documents from 2011 and maybe I can just pick that up in the cross-examination.

{Day9MT1/111}, please.

Oh, I am reminded, maybe after this we should have a transcriber break, if that is convenient.

But you see at page 111, line 13, one can see:

"Question: If we go [over we see] {M1/380 ...}, we see a further breakdown of that ...:

"'Breaking even, and turning profitable.'.

"We see the 'Product Universal Break[down]'. Effectively, one sees ... three down ...:

"'Google.com RPM ...'

" ...

"Would be $125, but ... [it] is $116 ...?"

"Answer: Yes, I see that."

Then I say:

"Question: That is reflecting the fact that there is this cannibalisation, this leakage of people who would click on the ads, but instead are clicking on the free Product Universal links?

"Answer: Yes, that's correct."

Then I quote the fact that the cannibalisation would be negated by a 0.1 incremental traffic, and I say to him:

"Question: So what you are saying there is that if you can -- that is why it is so important to win on shopping starts, is it not, because even just a tiny 0.1% increment will compensate for the fact that per user impression, you are going to receive a lower amount from the ads, you are [effectively] getting more user impressions ...?

"Answer: That's right."

The Tribunal will recall Mr Noble, on {Day15MT1/156} and following, agreeing that there is no reason to think that the scale of that incentive would be any different in the counterfactual.

So that is point one: they are desperate to get more increases on shopping starts, just more and more shopping starts.

The other element of this is Froogle.

THE CHAIRMAN: Would that be ...

MR JOWELL: That would be a convenient moment.

THE CHAIRMAN: Yes, before we get to the other element.

MR JOWELL: I do not know how late we can sit tonight?

THE CHAIRMAN: Well ... we can sit until 4.30, but --

MR JOWELL: 4.30.

THE CHAIRMAN: I know we have interrupted you quite a bit and we had the late start of closings --

MR JOWELL: Yes.

THE CHAIRMAN: -- because of the Decision, but you are making good progress?

MR JOWELL: I think I should be done by certainly the middle of the morning tomorrow, at the latest.

THE CHAIRMAN: Middle of the morning, yes.

You are going to deal with the foreign judgment at some point?

MR JOWELL: I was not actually proposing to --

THE CHAIRMAN: You are not.

MR JOWELL: -- because you have seen them --

THE CHAIRMAN: Yes.

MR JOWELL: -- and I think you have made some reference to it.

THE CHAIRMAN: Very well.

(3.45 pm)

(A short break)

(4.00 pm)

MR JOWELL: So Froogle. Now, Froogle, of course, did not feature in the organic results at all. That was a policy decision on the part of Google not to rank or index it. But we do know that those that ran Froogle from time to time were often quite keen for it to be ranked and indexed, and one can see that in the email exchange at {N/268} between Mr Truher and Mr Brougher and others, and I just remind you how that exchange -- I showed you earlier some bits of that exchange. I just remind you how it started on {N/268/6}, if we could go to page 6, please.

You see:

"We need to get these pages ..." --

THE CHAIRMAN: Just a second. {N/268}, yes.

MR JOWELL: Yes.

Right at the end, Mr Joel Truher says:

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

"What do you think?"

Now -- and Mr Truher continued in that throughout the exchange.

But what one sees through that exchange is he is

told two things. First of all, he is told that the existing algorithms meant that it would be unlikely that, if it were indexed that it would rank highly in the product results. I have shown you Mr Kataria's email and Mr Brougher's two emails to that effect. But he is also told on {N/268/1} effectively: do not worry, we have got plans to integrate Froogle into the SERP in other ways via -- as Mr Brougher says via the OneBox and ultimately via Universal Search, what became the Product Universal. So we have to imagine a world in which, if you like, on 1 January, someone says to Google: "Sorry, you cannot have Product Universal any more".

Now, Google -- now, between the date of this email, which is in 2006, and 1 January 2008, there is another important development which is that Google ploughs a lot of investment into Froogle to try and improve it and it renames it Google Product Search. So you can see that in paragraph 61 to 62 of its closing submissions {AA2/1/26}, Google make great play of the fact that they have made, you know, significant quality improvements to Froogle from early 2007.

Now, of course, it was not those quality improvements that principally led to Google Product Search becoming the leading CSS in the United States.

We have seen that that was because of the Product Universal and the self-preferencing and indeed there are binding findings to that effect, and Mr Goodrow indeed did not really seek to deny that. But the question then becomes, if you like: well, in light of the fact that Mr Truher was asking to be integrated into the SERP, in light of the fact that they have put all this investment into Froogle, how are they -- what would Google have done in circumstances where they are told, "I am afraid you cannot have the Product Universal unless you open it up to others in an equal and fair way"?

Now, one clue that we have is what one sees in an interesting exchange between Mr Goodrow and Mr Menzel from 2009. That is at {N/267}.

Here, one can see, at the bottom, the email from Mr Menzel and this formed the basis -- well, not formed the basis, but it is the evidence that is cited by the Commission for that recital that I showed you earlier, where it said that they were aware that their own comparison shopping site would not be -- would not rank highly. You can see that Mr Menzel says, at the bottom of this page, he says:

"SPS Notes

"From a principal perspective it would be good if we

could actually just crawl our product pages and then have [them] rank organically.

"Problem is that today if we crawl it will never rank."

Now, I think that Mr Goodrow suggested that somehow that was a reference to the "do not rank", you know, statement, but it is clearly not and the Commission did not interpret it in that way either. It is clearly a reference to the effect of the demotion algorithms. The point that we make is, again, that this is again an expression of a desire on the part of Google that Froogle should be -- or it was Google Product Search at this stage -- featuring in the organic results.

If one looks up at Mr Goodrow's email, you see that he makes a reference there to something that he calls the "shopping mode", and he says:

"Product Pages - crawl them and get them to rank, make sure that the url for the product page shouldn't look like a search results page ...

"Eg. Google News ...

"End goal: No onebox, product pages crawled and ranked, search results pages should be a shopping mode."

Now, I asked him about this, and if I can show you that, it is on {Day9MT1/138}.

You see line 2, he says:

"Answer: Yes ... what I'm basically arguing for is that when we know that the query is a product query, if we could determine that, we would have the Google results just be a shopping mode and we would bring all the product pages and everything to Google.com and then there would be no need for a OneBox, because the Google.com page would itself look like a shopping page."

I asked:

"Question: So you would effectively have organic results which would be rich results with some images, presumably?"

He says:

"Answer: Yes, we would want a whole list of producty, shopping-looking results, all of which would have images, and if they would all have images, then the one with the image wouldn't stand out and get less clicks.

"Question: Presumably, on that scenario, you would also have rival comparison shopping sites appearing there in those web search results?"

He says:

"Answer: We could maybe crawl their product pages ... or maybe they could submit their product pages."

I ask:

"Question: It would all go into the main feed, so you would have just an integrated single feed of the Google.com results?"

He says:

"Answer: That was the idea of a shopping mode."

Now, Mr Goodrow went on to discuss some of the technical issues with an enriched format, meaning a format with images, I think, and what he called an "H product markup language", and he said that -- he indicated that that required a certain level of technical sophistication. Now, we say that this is essentially an indication of what we call scenario 2, which is a -- that what this shopping mode is is rather what we call our scenario 2, which is organically including shopping results within the general search results page without a OneBox, without a specific OneBox, and including also some visual enhancements, images.

MS ROSE: I am not clear, when he says "product pages" --

MR JOWELL: Yes.

MS ROSE: -- is he just referring to Google Product Search, pages from Google Product Search?

MR JOWELL: No, I do not think so. No, I think he is -- well, I think he is referring -- he is referring to, yes, pages from Google Product Search, but everything

else that could be product related.
MS ROSE: Well, I am not sure that is right, because he is replying to Mr Menzel, right?
MR JOWELL: Yes.
MS ROSE: So Mr Menzel said {N/267}:
"From a principal perspective it would be good if we could actually just crawl our product pages and then have [them] rank organically."
MR JOWELL: Yes.
MS ROSE: That is definitely talking about Google Product Search.
MR JOWELL: That is correct, yes.
MS ROSE: "Problem is ... if we crawl it [it] will never rank."
MR JOWELL: Yes.
MS ROSE: So then he is replying: okay, so do crawl our product pages, get them to rank --
MR JOWELL: Yes.
MS ROSE: -- and then have an equivalent of Google News, or I guess Google Images, but as Google Shopping, so that you have got a ranked page, but I think he is only talking about Google here.
MR JOWELL: Well, perhaps, but I then mentioned to him -- I said you could -- I then ask him about this and I say -- I said to him here {Day9MT1/138:15}:

"Question: Presumably, on that scenario, you would also have rival comparison shopping sites appearing there in those web search results?"
He says:
"Answer: We could maybe crawl their product pages ... or maybe they could submit their product pages."
MS ROSE: I mean, crawling their product pages raises problems, does it not --
MR JOWELL: No, that is --
MS ROSE: -- in terms of latency?
MR JOWELL: Well, the -- crawling them is what happens when they feature in the organic results. That is how they feature in the organic results is they are crawled and then they feature in the organic results because they are crawled. So they -- so -- but effectively what he seems to be envisaging is not a specific box but just an enhanced organic search there, and that would be effectively --
MS ROSE: But he also distinguishes between product pages and linking to offers. Product pages is, if you like, the catalogue view.
MR JOWELL: Yes.
MS ROSE: Linking to offers is products.
MR JOWELL: Products, that is right.
MS ROSE: But he seems to be envisaging here linking to

product pages, not to individual offers.
MR JOWELL: Yes, and that is consistent with his view that that is what users generally wanted to see.
MS ROSE: Yes.
MR JOWELL: So --
PROFESSOR SMITH: Significantly different from the box, because you have got a box that is filled with six or seven pictures -- picture-based images --
MR JOWELL: Yes.
PROFESSOR SMITH: -- or you have got a list of organic results, which, if the engine is working well, will all be products with, according to Mr Goodrow, pictures.
MR JOWELL: Yes.
PROFESSOR SMITH: So is there much difference between them?
MR JOWELL: I think the difference is that the -- if you have the box, then they come in via a specific -- they come in from specific feeds, whereas this -- whereas the organic results, as I said, are crawled, and so this is -- this would be effectively, rather like if one goes back, say, to pre-2004, so before one has Algorithm A, there you have no OneBox and you simply have CSSs and other product-related entities popping up in the organic results. That was clearly very satisfactory for CSSs, you saw them growing, and satisfactory, we would say, for users as well.

Effectively, I think what he is envisaging here is we have an improved version of the organic results where we have images and so on, they include Google Product Search's results, it would crawl them and rank them as well, and it is all somewhat enhanced with imagery.
So this is what we say, looking at the documents, looking at their incentives, looking at what he is saying at the time, that seems to be a natural evolution rather than --
MS ROSE: So this is your scenario 2?
MR JOWELL: This is our scenario 2.
Now, one of the issues with this is that it is said that, in the real world, the Product Universal did not have images until mid-2008 when it introduced the picture of a product along with a series of results instead of just an icon, and it was not until November 2009 when Google introduced a new design under which each result had its own image.
Let me just show you that, because it may be important.
If we go to {J2B/44}.
This is Google's own report on its technologies, dated 9 September 2017.
If we go to {J2B/44/25}, one sees paragraph 100, we see it notes:

"In mid-2008, Google introduced a format that showed a product image, instead of an icon, alongside the product results."

You see there the picture of the bagel toaster.

Then if we go to paragraph 104 {J2B/44/26}, this is page 26, we see:

"In November 2009, Google introduced a new design for Product Universals in the [United States]. This design listed five results, each with its own image. Google's goal was to 'better capture ...'"

And so on. So you can see how.

Now, I just show that as -- you know, just to show you how the technology actually progressed. So it started with one image, then it went to multiple images in 2009. So we do not say that one would have had scenario 2 immediately on 1 January 2008. What we suggest is that, if they had been told that they cannot have unfair Product Universal, they would probably have started with scenario 1 and then swiftly moved, by 2009, to enhanced images and our scenario 2.

Now --

MS ROSE: So the only difference between scenario 1 and scenario 2 is presentation?

MR JOWELL: Yes, it is just the enriched -- it is the enriched -- use of enriched text and images.

MS ROSE: Is that something that the Tribunal would need even to dictate? I mean, would not the Tribunal -- would it not be sufficient for the Tribunal to say that, for the sake of argument, the appropriate counterfactual would be as envisaged in this evidence we have just been looking at --

MR JOWELL: Yes.

MS ROSE: -- for commercial shopping-type queries identified by the algorithm, you would have organically ranked and, I guess, clustered product pages from Google or from other CSSs?

MR JOWELL: Yes, I think that would be sufficient. I mean, you might wish to go into more detail and say that it is likely that they would have enhanced them with visual imagery at some point.

MS ROSE: But I mean, and simply say that, given the strength of their incentive to maximise the number of shopping starts --

MR JOWELL: Yes.

MS ROSE: -- you could expect that they would do all that they could to make these results appear as attractive and eye-catching on the page as possible.

MR JOWELL: Yes.

MS ROSE: But the question of the date and the exact format --

MR JOWELL: I agree. I agree, I do not think it is necessary, but I just show it really largely because one of the points that Mr Goodrow made in answer to my cross-examination was he said, "Oh, well, we could not have done this product mode because it would be too difficult to get the images", and my answer to that is, well, the evidence shows that the technology did develop so that, at least by 2009, the images were available. It would have been possible to integrate images.

MS ROSE: I mean, will it be sufficient just to note the fact that Google has a strong -- a very strong commercial incentive to maximise shopping starts --

MR JOWELL: Yes.

MS ROSE: -- and from the perspective of trying to assess damages --

MR JOWELL: Yes.

MS ROSE: -- you would have to make assumptions about how attractive Google would have made its page and what impact that would have had on the number of shopping starts. That may be more appropriate than trying to micro-manage what are, after all, completely hypothetical --

MR JOWELL: No, I quite agree.

MS ROSE: -- acts.

MR JOWELL: I quite agree.

MS ROSE: You know, this is a complete hypothetical scenario.

MR JOWELL: No, I can see that. I can see that. I am not going to push back on that, I can totally see that.

PROFESSOR SMITH: But we know that Product Universal had a big impact on Google's search.

MR JOWELL: Yes.

PROFESSOR SMITH: It brought them a lot of extra traffic.

MR JOWELL: Yes.

PROFESSOR SMITH: Is it really plausible that they would have set up instead a version of Product Universal that was beneficial to all their competitors as well as themselves?

MR JOWELL: Well, that is the -- what I do say is -- that -- I mean, that is another reason why you might say that this version where they are simply allowing the organic results to feature is more plausible, because they would not have chosen to have to share their box. But this is not sharing their box, this is simply showing the organic results, including their own organic results from their own, from Google Product --

MS ROSE: You are assuming no box?

MR JOWELL: Yes, no box, exactly. Therefore this does become plausible. It is what they were doing effectively before they started demoting and introducing

the OneBox and so on. They --
MS ROSE: They did have Froogle before that.
MR JOWELL: They did, and Froogle was not very successful. So now --
MS ROSE: But they have already got the concept of Google's own shopping results at the top of the page.
MR JOWELL: Yes, somewhat, in these OneBoxes that popped up occasionally, quite occasionally, but it is the systematic integration of the Product Universal that starts to have a major impact. So it does seem to us that there is at least a strong -- I mean, of course one cannot be sure. It is one of these very difficult questions: what if? But we do say there are serious indications here that somebody wanted to rank Froogle, right, and they wanted to integrate them. The only way Froogle could actually show up is if you remove or -- remove or just --
MS ROSE: Modify.
MR JOWELL: -- modify the demotion algorithms. So we say that is a very strong case for saying that is what they would have done. Somebody would have said, "Okay, Mr Truher ...", or, "Okay, Mr Goodrow, we will modify these algorithms now and Google Product Search can appear".
MS ROSE: But looking at it in a different way, if Google

has got these -- first of all, the strong incentive to maximise shopping starts, secondly, the strong incentive to monetise its page, which obviously goes very closely the first one --
MR JOWELL: Yes.
MS ROSE: -- and thirdly, an incentive to try and do all it can to increase its own market share --
MR JOWELL: Yes.
MS ROSE: -- without being abusive in the situation --
MR JOWELL: Yes.
MS ROSE: -- so it is kind of being pulled in different directions --
MR JOWELL: Yes.
MS ROSE: -- in terms of whether it is prepared to have a box and let other people in, or whether it will stick with organic results, I mean, the problem it may face if it goes with your scenario 2 is that that might just not be attractive enough to compete with Amazon.
MR JOWELL: That is possible. That is possible, and I will come on to that. So there is an argument -- you know, I cannot deny it, there are arguments and counter-arguments, and it depends on whether you think -- how important one perceives the box to be for Google's sort of strategy of shopping starts. But one does see this -- that is why I do say that email with

the exchange between Mr Menzel and Mr Goodrow is quite important, because it does indicate, at the time, they did not actually love it, they wanted to move beyond it to a sort of integrated single shopping mode like that.
MS ROSE: I mean, one problem is that of course lots of people in Google say lots of things and they do not always say the same thing.
MR JOWELL: No.
MS ROSE: But also, none of this actually happened, and we do not have -- we do not really have very much evidence about which of these options would have been more commercially attractive to Google.
MR JOWELL: No, and we tried with the witnesses, and some of them -- I mean, Mr Goodrow, I think, at the end of day, his evidence was really rather muddled on it, I can see that. He said it was too hard, I think, at one point, and if it is too hard for him --
MS ROSE: What are we to do then?
MR JOWELL: Well, I think one has -- you have to go with the best -- what your best intuitions are. I am proposing that 1, followed shortly by 2, is the most likely, but I will come on to 3a and 3b in a moment, because we also recognise that there is an argument for them.
Let me, though, briefly deal with the objections

that Google has to scenarios 1 and 2. So Google say, well -- they, say: well, no, no, we would never have changed the demotions; if that was the case, we would have done a Turkey, they say. Now, you have already got my point that the Turkey counterfactual is not pleaded, and Mr Pickford was very clear at the January CMC that he had no alternative counterfactual to the remedy box. The fact that we happened to mention in passing Turkey in the context of investment in AdWords in our opening submissions does not, with respect, give him a proper basis to suddenly bring in an alternative counterfactual that has not been pleaded and in respect of which we have not had procedure disclosure.
But in any event, it takes only brief consideration of this option to see that it would be completely implausible, because it would be inconsistent with Google's imperative to maximise shopping starts. It amounts to saying that Google would have had, from 2008, a general search results page that was stripped of anything that would regularly have given users with shopping queries access to a comparison shopping experience. Yes, there would have been individual merchants showing up from time to time, or buying text ads, but that is not the shopping experience that Mr Goodrow and his team believed users wanted. Yes, of

course CSSs did win some AdWords auctions, it is also true that CSSs did, at least in the days before Panda, sometimes manage to get through on the general search, but there are binding findings in the Decision concerning the fact that merchants and users perceive AdWords traffic as different and it is just not plausible to suggest that they would have left things without anything to make the pages more attractive. Turkey is obviously a much smaller market, and it may be that Turkey is there pour encourager les autres, so we do not know. We simply do not know.

If any reinforcement of that were needed, then you will remember the evidence of Mr Friedman on {Day10MT1/128-129} where he mentioned that it was the bottom of his list. Maybe I will just show you that. If we go to {Day10MT1/128:7}, you see I asked:

"Question: But the critical thing that made this a complete non-starter is that you are going to lose $1.6 billion annually, and that is not even counting the lost queries on Google, the lost product queries?

"Answer: Yeah, I mean, it's expensive. I think if we were to be held in non-compliance, I think that would be more expensive, right?

"Question: There was not -- but you did not seem to assess that this would have -- lead to. You say this is

your 'best chance of' --

"Answer: Right, but I'm saying compared to the alternatives, right? So, in other words, if we're weighing the risk of non-compliance and the associated fines, right, and damages, and all that kind of stuff, and then you look at, okay, well, what is our best chance of complying, right, and how much does that cost, right, so you have to kind of weigh those, and there was consideration given to turning off the unit, with the idea that, like, okay, that will give us the best chance at complying and maybe it's worth it not to risk all the -- all the potential fines and damages and all that stuff. But -- but that was -- we ended up not making that decision, right, and again, part of the reason was EC ..."

I said:

"Question: That was a non-starter, come on.

"Answer: It was -- yeah, it seemed like it was a non-starter for them, as far as I could tell.

"Question: For Mr Pichai it was a non-starter, surely?

"Answer: I mean, what I can say is I don't remember him, like, looking and saying 'Oh, well, we clearly can't do that, like, let's just forget that'. I do not remember anything like that.

"Question: Okay, well, it was number 10 on your list, was it not? We saw, just a moment ago, it was the very bottom of your list?

"Answer: Yeah, it was the bottom of my list. I worked on that thing."

So I think it was pretty clear that that was a non-starter, and it would have been a non-starter also in --

MS ROSE: That is talking about 2017.

MR JOWELL: 2017, but we say it would have been --

MS ROSE: The shopping unit has been there.

MR JOWELL: Yes, I accept that, but I say --

MS ROSE: He is saying it is generating lots of revenue, we are not going to turn it off.

MR JOWELL: Yes. I accept that, but they still had the same incentives, back in 2008, to promote those shopping starts, as we saw from Mr Goodrow. That was their main objective. That is why the Product Universal came in to begin with.

Now, the second -- the other points that Google mentions are they say, well, the algorithms are not unlawful in themselves. That is kind of beside the point. The point is, if they wanted Froogle to rank, or Google Product Search to rank, they would have needed to adjust the algorithms and we can see that. Of

course, we do not suggest that they would have just dispensed with these algorithms all together, we say they would have adjusted them, and you heard the evidence of Mr Kim and Mr Kalyanpur that made it very clear that adjustments could have been made, that a classifier could have been developed that would have --

MS ROSE: Again, so obviously, we could not get into the question of exactly what adjustments would be made to the algorithm, clearly.

MR JOWELL: No, I accept that, yes.

MS ROSE: So what do you say we should find in relation to adjustments to the algorithm? What are the adjustments that you say are the minimum and that are plausible -- the minimum lawful and also plausible?

MR JOWELL: Well, they would have made adjustments to the algorithms such that CSSs would not have been demoted by reason of their inherent characteristics.

MS ROSE: What does that mean, because there are lots of different CSSs and they do not all have the same --

MR JOWELL: Well, what it would mean in practical terms is that, in calculating the damages to these CSSs, it would be necessary to seek to strip out the effect on them, the demoting effect of Algorithm A and Panda, and no doubt we will have a technical argument about how do you

that in trial 2.
THE CHAIRMAN: Then you are effectively saying they would be exempted from the two algorithms?
MR JOWELL: Well, yes, I think that is right, yes. I mean, an alternative is to say that they would have been exempted save to the extent that they exhibited spam characteristics that were not tied to their nature as a CSS, but that -- I mean, but it would -- not necessary for to you seek to adjust the algorithms, it is simply to say they would have --
THE CHAIRMAN: Clearly we cannot do that --
MR JOWELL: Yes, yes.
THE CHAIRMAN: -- but it is a question of how far we would need to go to give guidance to the --
MR JOWELL: Yes.
THE CHAIRMAN: -- next stage of then working out --
MR JOWELL: Yes.
THE CHAIRMAN: -- what would have happened to Kelkoo --
MR JOWELL: Yes.
THE CHAIRMAN: -- in this hypothetical world, and if we just say they would have adjusted the algorithms to lessen their impact on CSSs --
MR JOWELL: Well, yes, to --
THE CHAIRMAN: -- then another possibility is they would have done the Diversity algorithm --

MR JOWELL: Yes.
THE CHAIRMAN: -- to just select two CSSs to go on the results page --
MR JOWELL: Yes.
THE CHAIRMAN: -- and then there is a question of whether Kelkoo would have been successful.
MR JOWELL: Yes, I see that. I mean, I think it is a difficult question. I think, though, that is how these trials have been divided up, and I think it is -- I think you need to do the best you can do, but I do not think the fact that it is difficult to know how far to go should deter you from doing that, if that is the correct -- if that is the most plausible counterfactual.
MS ROSE: Well, we do need assistance as to how far we should go.
MR JOWELL: Yes, well, we say that effectively -- that it -- yes, that -- that -- well, that it would be limited to the legitimate -- any effect would be limited to the legitimate effect of those algorithms.
MS ROSE: What does that mean? What is the legitimate --
MR JOWELL: Well, the legitimate -- well, the stated -- the stated intent of the algorithm, as Mr Cutts put it, was just to get rid of what he called spam, affiliate spam.

MS ROSE: Or thin affiliates.
MR JOWELL: Thin affiliates, and you have seen that Kelkoo was not definitively --
MS ROSE: Or content farms in the case of Panda.
MR JOWELL: Yes, that is right. So there would have been --
THE CHAIRMAN: You may say it is enough if we say that that should be the adjustment, and that there is a basis for saying in the evidence that Google did not consider Kelkoo to be a thin affiliate --
MR JOWELL: Yes.
THE CHAIRMAN: -- that as we are only dealing with Kelkoo --
MR JOWELL: Yes.
THE CHAIRMAN: -- that that is sufficient and we do not need --
MR JOWELL: (Overspeaking - inaudible) -- yes.
THE CHAIRMAN: -- we do not need to go --
MS ROSE: Further.
THE CHAIRMAN: -- further --
MR JOWELL: Yes, that may be --
THE CHAIRMAN: -- for this purpose --
MR JOWELL: Yes.
THE CHAIRMAN: -- and as far as Panda is concerned --
MR JOWELL: Yes.
THE CHAIRMAN: -- its focus was content farming and --
MR JOWELL: Yes.

THE CHAIRMAN: -- that is not, as I understand it, what a CSS is, or what --
MR JOWELL: I mean, I think there is evidence as to how broadly they would have done this from Mr Kim and Mr Kalyanpur, and they would have -- there would have been a classifier for CSSs, which we know was available, and that would have been used to ensure that they were not affected by this algorithm.
MS ROSE: At least for good CSSs.
MR JOWELL: At least for good CSSs, and that Kelkoo and Ciao were categorised by Google itself as being leading CSSs, not thin affiliates and so on, as I have shown you.
Now, a third -- maybe I will just get through this point before I sit down, because I know it is past -- but I should just deal with Google's final argument which they make in response to scenario 2, and they say: well, we would not have given away attractive space on the SERP for free. We say, well, that actually just ignores Google's entire business model, because it already gives away, effectively, attractive space on the SERP for free. All of its organic results, its links, are and always have been for free, and that is despite the fact that many parties that appear in those results benefit financially from their presence in those results. Google, of course, lives in that situation

very happily, because those free results attract users to the page and then it monetises them, enormously successful, with its ads around the edges, or within them.

MS ROSE: If you look at forms of specialised search on Google, like news --

MR JOWELL: Yes.

MS ROSE: -- or images --

MR JOWELL: Yes.

MS ROSE: -- those are not monetised.

MR JOWELL: No, many are not. Weather and so on, indeed. So, actually, the strongest argument that can be articulated against scenarios 1 and 2 is a different one. It is the one that is articulated by Mr Goodrow, and that is they would have -- might have seen, in 2008, it to be a step backwards for Google to abandon a box format, and he says that on {Day9MT1/145}. I do not think I need to take you to it. If you that is right, if you believe that that is the case, that they would cleave to the box format, then we come on to scenarios 3a and 3b, which, unless you wish to sit longer, I will take you to tomorrow.

Housekeeping

THE CHAIRMAN: Yes, I think we will not sit longer today, as I have indicated.

Can I just mention that you have not talked much about the CLA tab, but I take it that is because you say they are of little practical benefit because people do not go to it.

MR JOWELL: Indeed, indeed.

THE CHAIRMAN: I did get a bit confused in the way you discuss that in paragraph 111 of your closing --

MR JOWELL: Yes.

THE CHAIRMAN: -- as between the different percentages and figures that are given in the first few sentences there {AA1/1/56}, the second sentence in particular and the footnote. If you just look at that overnight and you might then clarify it in the morning. There is --

MR JOWELL: Yes, of course.

THE CHAIRMAN: There is a question of there are various different percentages given there which I could not quite reconcile.

MR JOWELL: We will take a close look at those.

THE CHAIRMAN: So if you want to do that.

Can I just ask, are we on track to get the Decision this evening? Is that ...

MR PICKFORD: (Off microphone - inaudible).

THE CHAIRMAN: Yes.

Is there any reason for to us start earlier tomorrow?

MR JOWELL: It might be sensible if we could sit at 10 --

THE CHAIRMAN: If we start at 10.

MR JOWELL: -- that would be -- thank you.

THE CHAIRMAN: Yes, very well, we will sit at 10 tomorrow morning.

(4.36 pm)

(The Court adjourned until 10.00 am on 28 July 2026)

INDEX

Housekeeping 1
Closing submissions by MR JOWELL 19
Housekeeping 181

A

aa (1) 90:9
aa1113 (1) 28:14
aa111920 (1) 67:4
aa1140 (1) 75:14
aa1156 (1) 182:11
aa115861 (1) 74:17
aa21106 (1) 43:10
aa21120 (1) 43:10
aa21121 (1) 43:11
aa2122 (2) 43:9,19
aa2126 (1) 156:20
aa2131 (1) 77:8
aa2133 (5) 43:9 73:19 75:6 77:12 79:12
aa2137 (1) 41:25
aa2143 (1) 40:25
aa2185 (1) 43:10
ab2a21 (1) 143:19
ab2a2119 (1) 144:7
ab2a2120 (1) 144:14
ab2a212021 (1) 144:17
ab2a2122 (1) 144:20
ab2a2148 (1) 145:1
ab2a215 (1) 144:6
ab2a3058 (1) 41:11
abandon (1) 181:16
abate (1) 152:10
ability (6) 27:2,18 98:12,24 99:2 100:25
ablation (3) 125:6 137:24 142:22
able (5) 6:13 13:18 29:17 107:15 133:2
abnormality (1) 62:11
above (8) 57:4,7 62:6,12 63:1 84:5 126:20 127:16
absolutely (3) 44:8 91:14 104:9
abstract (1) 37:5
abuse (52) 11:14,17,20,24,25 12:6 19:24 21:17 22:18,19,21 28:18 31:22,23 34:22 41:21 42:20 43:24 44:5 50:3,6,6,10,24 51:25 56:4,11,21 63:5 80:16 85:3,4,9,10 87:13 111:8 113:3,11 125:3 128:19,20 129:12,15,17,20,23 130:18 133:23 134:19 137:13 141:5,17
abused (2) 9:17 134:7
abusive (11) 38:1 43:17,22 44:8 113:20 121:13 124:20 128:1 137:16 147:22 170:9
accelerates (2) 59:22,24
accept (22) 6:24 12:25 24:23 51:17 52:2 54:10 78:23,23 97:5,12,22 98:7 99:10 109:5,10 110:2,13 115:7 121:18 175:12,15 176:11
acceptable (3) 1:24 2:1 128:2
acceptance (1) 20:15
accepted (2) 27:23 51:10
accepts (2) 88:15 136:3
access (6) 15:16 95:11 112:16 121:5,16 172:21
accommodation (1) 8:17
accompanied (1) 70:7
according (3) 62:2 136:22 163:12
accordingly (1) 112:15
account (4) 126:9 128:3 136:24 139:9
accounts (1) 75:21
achieve (1) 155:19
acquisition (2) 39:8,18
across (5) 29:22 33:10 34:5 42:16 82:3
acted (1) 140:12
acting (4) 44:10 101:8 111:16 129:6
action (2) 39:5,6
actions (1) 2:5
active (1) 47:6
acts (1) 167:24
actual (14) 8:7 37:8 53:19 70:23 123:19,20,25 124:1 126:1 135:16,16,20,21 139:22
actually (49) 3:21 38:19 40:6 41:24 42:6,25 50:2 51:6,8,9,12,14,25 57:24 66:23 70:1,16 73:21 75:7 81:12 89:1 90:18 94:19,20 99:2 106:24 107:22 110:5,9 111:11 117:9 120:19 128:21 132:2,21 142:2,12 143:7 149:7 150:10 154:17 158:1 161:7 165:13 169:16 171:3,9 180:18 181:12
ad (1) 151:13
added (1) 38:18
adding (1) 112:3
additional (1) 81:18
address (8) 14:20 19:17,25 20:4 34:1 37:21 74:21 111:2
addressed (1) 74:23
addresses (1) 138:8
adds (2) 47:21 151:11
adjacent (1) 73:5
adjourned (1) 183:7
adjournment (4) 18:14 56:20 80:16 87:9
adjust (2) 175:25 177:9
adjusted (2) 176:3 177:21
adjusting (1) 143:7
adjustment (3) 127:22 137:2 179:7
adjustments (5) 176:5,9,13,13,16
admissibility (1) 5:10
admissible (4) 5:17 16:6 89:22,23
admitted (1) 90:4
adopt (4) 20:2 140:3 145:10 149:13
adopted (4) 25:11 55:2 71:12 113:9
adopting (2) 116:1 141:7
ads (11) 82:16,21 84:11 108:1,3,7,8 153:4,15 172:24 181:3
advance (1) 19:1
advances (1) 141:8
advancing (1) 147:5
advantage (3) 58:23 100:3 119:8
advertise (2) 107:10,16
advertisement (2) 86:6 108:4
advertising (8) 22:1 52:19 71:24 72:1 101:8,9 107:12 150:17
advocate (2) 138:14,18
adwords (4) 108:1 172:9 173:1,6
affect (3) 9:12,21 22:17
affected (1) 180:8
affiliate (7) 27:23,25 28:1,12 40:21 178:24 179:9
affiliates (3) 179:1,2 180:12
afraid (4) 13:16 113:12 124:13 157:10
after (12) 7:21 11:20 17:6 39:8 46:17 59:21 70:4 87:2 127:18 144:20 152:14 167:21
again (19) 7:19 9:5 33:14 36:13 47:8 48:2 55:11 75:15 77:9,9 91:5 105:20 125:16,17 144:21 158:10,10 174:14 176:8
against (7) 5:6 38:14 41:17 42:3 63:15 127:20 181:13
agents (1) 101:9
aggravated (1) 132:6
aggregated (1) 46:20
aggregator (8) 27:18 31:25 32:2 33:20 34:1,8,13 37:17
aggregators (12) 22:5,7 32:5,14,23,24 33:1,10,16 37:6,14 49:9
aggressive (1) 33:24
ago (5) 2:3 3:8 8:24 20:22 175:2
agree (11) 15:5 19:7 24:15 25:13 28:3,5 83:4 167:1,1,23,25
agreed (2) 105:19 111:21
agreeing (2) 85:3 153:19
agrees (1) 84:14
ah (4) 68:7 69:23 147:7 148:19
aha (1) 146:5
ahead (6) 27:19 31:8 59:22 60:19 61:4 102:11
aims (1) 151:25
aired (1) 14:15
algorithm (38) 22:16 24:4 26:8 28:15 31:20 42:14 44:11,22,22 48:18 49:21 52:6 53:4 54:4 66:18 67:20 75:12 85:6,14 97:16 101:23 102:3 116:8,22,24 121:14 127:6,18 143:3,7 163:20 166:9 176:10,13,24 177:25 178:23 180:8
algorithmic (2) 47:16 103:13
algorithmically (2) 97:1 105:21
algorithms (52) 23:14,19 24:2 37:24 40:22 42:13 43:8,15,19 44:17 45:21 46:1 47:4,9,19 48:3 49:7,14 50:14,23 97:22 101:23,24,25 102:7,8 106:19 115:6 122:17 126:19 127:5,23 128:12 131:3,11 133:4 137:2 142:24 147:22,22 156:2 158:9 169:19,23 175:21,25 176:2,17 177:3,9,21 178:20
aligns (1) 49:16
allegation (5) 41:1,4,12,16 42:22
alleged (6) 11:25 85:9,11 137:13 138:20 139:8
allegedly (1) 137:16
allow (2) 82:1 142:2
allowed (3) 3:19 65:4,4
allowing (1) 168:16
allows (1) 66:1
almost (4) 8:15 11:23 63:10 114:3
alone (1) 27:6
along (1) 164:15
alongside (1) 165:2
already (9) 21:8 31:10 46:21 74:23 84:4 105:14 169:5 172:4 180:20
also (53) 3:16 11:14 21:1 27:12 30:10,12 39:23 41:7 42:7 43:3 46:6 54:10,13 55:20 59:20 62:12 66:7,8 72:18 75:4 76:19,23 77:23 83:24 85:16 91:8 104:7 109:8 112:11 113:15 116:6 126:8 127:14,20,23 128:15 131:17,20 134:3 149:1,8 150:5 151:2 156:6 159:20 160:17 162:2,19 171:9,23 173:1 175:7 176:15
alternative (6) 112:9 120:15 149:18 172:7,11 177:5
alternatives (1) 174:3
although (5) 13:9 39:13,20 59:19 73:12
altruistic (1) 70:25
always (12) 19:13 43:16 57:6 72:9 86:10 96:17 106:25 107:21 108:2,3 171:7 180:22
amazon (19) 37:11 59:19 72:12,20,21,21 73:6,10 77:7,8,11,15,25 78:4,16 150:9,10 152:7 170:18
american (1) 38:6
amongst (2) 22:7 68:21
amount (7) 1:18 40:4 41:19 76:24 106:20 133:22 153:14
amounting (1) 42:20
amounts (1) 172:18
ample (1) 46:3
analogous (1) 111:12
analysed (1) 123:12
analysis (15) 64:3,13,16 122:6 123:18 125:5 126:3,4 128:3 129:11 131:1 135:1 139:7,15 140:2
andy (1) 26:13
angles (1) 88:23
annex (2) 35:18,25
annual (1) 34:17
annually (1) 173:19
another (21) 12:15 21:4,9 27:10 31:5 36:24 37:2 42:12 44:23 49:5 55:21 63:7 74:22 77:6 97:6 99:1 104:16 142:10 156:15 168:15 177:24
answer (37) 6:14,15,18 13:25 57:23 58:3,19 60:3,11 64:10,15,19 65:3,21 66:10 69:23 91:2 110:1 128:25 133:20 143:2 148:24 152:25 153:6,17 159:1,14,23 160:5 162:5 167:3,6 173:21 174:2,18,22 175:4
anti (1) 135:16
anticipate (2) 52:15 147:3
anticipated (1) 3:12
anticompetitive (10) 49:19,20 62:22 114:8 123:11 124:1 134:12 135:18 139:23 148:6
anybodys (1) 143:4
anyone (1) 1:13
anything (10) 3:19 8:19 9:21 66:10 70:2 107:1 152:3 172:20 173:8 174:25
anyway (2) 64:21 144:9
anywhere (2) 117:3 118:3
apisandbox (1) 99:12
apologise (1) 149:2
appalling (1) 25:21
apparent (2) 62:25 138:19
apparently (2) 8:1 85:1
appeal (7) 84:18 134:17 143:11,15,17 144:25 145:10
appeals (1) 113:16
appear (12) 46:24 54:6 88:5,9,11 111:25 112:10 117:2 121:15 166:21 169:24 180:23
appearing (2) 159:20 162:2
appears (4) 5:20 6:2 62:6 76:23
appellants (4) 136:22 137:7 139:5,16
application (4) 43:7 112:1 137:1 147:21
applications (1) 19:12
applied (3) 46:3 53:6 66:7
applies (2) 12:11,12
apply (4) 11:5,7 45:5 53:4
applying (1) 98:8
appreciate (2) 17:5 18:5
approach (9) 72:6 80:12 84:14 88:22 99:11,12 139:9 140:9 145:13
approached (2) 3:6 55:25
appropriate (9) 2:12 17:6 18:21 115:3,17 137:11 149:4 166:4 167:20
approval (1) 138:15
arbitrary (3) 54:17 109:22 139:17
area (1) 113:5
arguably (1) 69:22
argue (4) 5:5 43:7 111:15 145:7
argued (6) 4:25 7:7 145:15 146:15 147:17 148:7
arguing (3) 147:13,15 159:1
argument (30) 9:24 43:4,5,25 44:3 84:23 86:8 87:17 112:24 122:10 123:2 124:17,18 125:13 127:15,19 137:5,19 138:8 143:6 146:9,10,19,22 166:4 170:20 171:23 176:25 180:15 181:12
arguments (8) 5:9 10:17,19 12:17,18 114:13 133:7 170:21
arise (2) 19:11 133:5
arises (1) 9:18
arm (2) 30:21,21
around (3) 19:13 146:5 181:3
arrangement (4) 100:16 101:6 104:5 106:16
arrived (1) 122:1
article (10) 5:23 6:4 9:18,19 11:9 12:7,11,14,20 140:5
articulated (2) 181:13,14
artificial (1) 142:23
ascertain (1) 136:11
aside (1) 149:4
ask (15) 13:20 15:18 18:13 83:3 94:9 103:5 104:16 109:14 114:19 115:21 129:25 149:16 159:25 161:24 182:20
asked (8) 6:9 46:11,11 57:14 66:17 158:23 159:9 173:16
asking (8) 46:11 54:21 129:4 130:21 132:18,22,25 157:6
asks (2) 30:7 148:12
aspect (3) 8:22 26:19 56:21
aspects (7) 10:13,14,16,19 13:2,3 27:7
assert (3) 70:11 75:23 77:3
asserted (1) 129:23
assess (4) 27:16 129:12 167:14 173:25
assessing (2) 115:19 133:14
assessment (3) 31:22 67:16 125:24
assist (1) 7:1
assistance (1) 178:15
associated (1) 174:4
assortment (1) 103:15
assume (2) 128:7 131:4
assuming (1) 168:22
assumption (4) 2:12 115:3 129:13,14
assumptions (1) 167:17
attached (1) 55:1
attack (1) 37:19
attempt (4) 77:5,6 78:25 145:10
attenuated (1) 147:16
attract (1) 181:1
attractive (9) 72:4 73:11 166:21 167:18 170:18 171:12 173:8 180:17,20
attributable (1) 138:5
auction (6) 96:20,25 97:7,17 101:16 106:3
auctions (1) 173:1
august (1) 19:12
autres (1) 173:10
availability (1) 18:9
available (3) 17:21 167:8 180:6
aware (19) 40:23 45:2,8,17,25 46:4 47:8,17 48:3,23 51:22 56:6 60:15 62:2,7,12 141:6,7 157:20
awareness (4) 43:1 45:16 51:18 52:1
away (10) 2:8 85:2 115:4 119:18 133:9 139:21 148:21 149:8 180:17,20
awful (1) 66:20

B

b (1) 48:23
ba210 (1) 87:20
ba2112 (2) 44:19,25
ba2113 (2) 47:24 56:25
ba2136 (1) 113:19
ba2139 (1) 113:24
ba2170 (1) 114:10
ba2171 (1) 114:19
ba2172 (2) 115:9,23
ba2174 (1) 115:12
ba2178 (1) 75:19
ba2206 (1) 123:13
ba2209 (1) 123:15
ba231 (1) 81:15
ba235 (2) 80:21 81:6
ba240 (1) 77:22
ba245 (1) 78:2
ba248 (1) 78:6
ba249 (1) 78:10
ba251 (1) 79:4
ba252 (2) 79:5,13
ba253 (1) 79:15
ba254 (1) 79:18
ba255 (1) 80:4
ba260 (1) 80:7
ba286 (1) 44:14
ba28687 (1) 44:15
ba288 (1) 44:14
ba288105 (1) 44:16
ba296 (1) 76:2
ba297 (1) 76:3
ba298 (1) 76:7
ba3122 (1) 62:4
ba3134 (2) 62:24 76:22
ba332 (2) 76:20,25
ba358 (1) 81:23
ba361 (1) 111:23
ba362 (1) 112:7
ba363 (1) 124:10
ba36365 (1) 124:14
ba365 (1) 124:16
ba366 (1) 125:15
ba36667 (1) 125:18
ba368 (1) 125:20
ba371 (1) 126:7
ba372 (1) 126:22
ba376 (1) 84:2
ba378 (2) 127:12 134:3
ba433 (1) 134:15
ba435 (1) 134:22
ba436 (2) 135:9 136:3
ba438 (1) 136:16
ba439 (2) 135:24 138:8
ba43939 (1) 136:8
ba43940 (1) 138:11
ba45 (1) 134:4
back (32) 9:4 20:20,24 21:1,14 28:15 31:2 35:19 42:11 44:4 45:13 46:5 47:23 56:16 87:7 88:25 91:3 95:21 96:9 100:6 101:17 103:18 107:6 115:22 124:9 134:7 149:18,24 150:2 163:20 168:4 175:16
backdrop (5) 43:20,21,24 50:2,5
background (2) 42:3 125:3
backwards (1) 181:16
bad (1) 67:17
badge (1) 101:11
badly (3) 23:25 24:13 140:21
bagel (1) 165:4
balance (1) 110:17
bank (1) 41:9
bar (1) 75:9
based (12) 27:3 102:4,23 125:4,12 129:13 133:16 139:19 140:1 145:8,9 147:23
basically (4) 35:19 95:2 150:11 159:1
basis (19) 4:21 8:10 10:10 12:16,18 19:16 23:16 113:22 114:3 123:9 129:15 133:15,17,25 148:5 157:17,18 172:11 179:7
bear (2) 26:3 113:17
bearing (1) 85:14
bears (1) 125:17
beauty (1) 106:12
became (2) 73:10 156:9
become (4) 8:20 112:17,21 168:24
becomes (3) 106:8 121:8 157:5
becoming (1) 156:25
before (32) 3:25 11:4 15:11 21:4 22:16,18 26:8 38:17 47:25 56:20 65:18 68:12 79:2 80:15 83:1 87:13,14 111:14 114:8 124:5,9 133:7 143:10 145:15 147:5,18 154:3 163:20 168:25 169:2 173:2 180:14
beg (1) 12:11
begin (1) 175:19
beginning (1) 18:4
behalf (1) 112:6
behave (1) 133:2
behaved (2) 110:20 140:20
behaving (1) 133:2
behaviour (6) 78:17,18,21 104:8 139:1,12
behavioural (1) 105:22
behind (2) 19:6 83:16
being (23) 1:11,12 3:11 7:7 29:1 31:19 44:21 49:22 52:14 63:3,3 72:7 81:25 89:1 112:18 116:8 127:4 129:20,23 131:12 170:9,11 180:11
believe (4) 3:7 26:18 68:15 181:19
believed (1) 172:25
below (5) 29:16 32:9 33:13 45:9 117:1
beneficial (1) 168:12
benefit (2) 180:24 182:3
benefits (1) 150:13
beside (1) 175:22
best (15) 27:16 32:7 73:16 86:2 101:10 106:14,22,23 152:2 171:20,20 174:1,6,10 178:10
bestprice (1) 31:7
better (14) 24:11 26:23,25 27:5 59:17 65:4 66:2 70:3 72:8 83:17 107:24 126:16 152:1 165:10
between (40) 7:12 9:10,11 12:21 15:25,25 20:23 21:16 37:6 48:15 51:20 62:16 77:11,24 78:21 79:7 83:10 87:18,22 88:4 92:20 114:7 119:15 127:8 131:23 132:19 136:1,5 139:7,20 141:2 155:8,19 156:14 157:14 162:19 163:14 165:22 171:1 182:9
beyond (2) 137:15 171:3
bids (1) 96:1
big (1) 168:6
biggest (3) 32:14,18,19
billion (5) 34:14,15,15 38:17 173:19
billions (1) 29:23
binding (11) 44:18 75:18,25 77:16 78:6,25 79:25 80:5 86:25 157:3 173:4
bing (2) 36:6,7
bit (19) 2:10 3:3 4:6 17:13 18:2 22:19 40:1 48:15 57:14 65:23 94:14 112:4

113:17 124:13 136:19 140:21,25 154:7 182:6
bite (1) 148:10
bits (1) 155:10
bizarre (1) 84:23
bizrate (1) 47:14
black (1) 97:10
blog (1) 66:5
blood (1) 42:10
blue (3) 50:23 52:17,21
booked (1) 18:6
boost (1) 118:17
both (29) 13:21 21:24 40:22 48:8 52:2,4 53:6,7,13 56:5,5,7 61:11,17,21 104:2 111:3 113:10 124:24,25 128:2,4,7 130:7 134:21 136:25 146:24 148:21 149:9
bottom (16) 33:5,21 34:4 36:12 46:14 47:3,13 60:6 89:11 117:1 134:23 157:16,23 173:15 175:3,4
boughs (1) 42:16
bound (10) 20:2 48:13 113:8 120:4,5 121:20,21 122:4 148:22,24
box (90) 6:2,3 7:10 8:7 13:10,12 32:22 52:14 53:1,2,16 54:9,16 55:17 58:1 59:14 61:13 63:18 70:20 85:18,21,24,25 88:20 89:16 91:17 92:8,21,24 93:13 95:14,14,17,18,19,20 96:2,3,4 97:7,10,20 98:4,5,14 100:7,11 101:16 105:3,3 108:12 116:16 117:3,13,14,23 118:2 119:6,9,18 120:21 121:3,5,17 123:4 131:3 132:14 133:9,10 142:13,24 147:6,7,8,11,12,13 162:16 163:6,7,16 168:18,19,22,23 170:15,23 172:7 181:16,20
boxes (12) 69:4,5,6,8 91:24 95:13 100:22 115:2 122:14 137:1,10 138:2
braendle (2) 74:6,13
braendles (1) 74:4
breach (2) 11:15 141:23
breached (3) 11:17,21 148:13
break (5) 56:18 139:24,24 152:15 154:25
breakdown (2) 152:18,20
breaking (1) 152:19
brief (2) 18:21 172:14
briefly (6) 87:16 111:9 114:9 134:2 145:1 171:25
bring (2) 159:4 172:11
bringing (2) 151:7,20
brings (1) 84:22
broad (1) 81:10
broader (4) 12:10 59:11 126:9 150:11
broadly (2) 57:19 180:4
brougher (3) 47:3 155:8 156:8
broughers (1) 156:5
brought (2) 15:24 168:8
bulk (1) 57:12
bullet (1) 34:2
bunch (2) 65:24 66:1
bundle (4) 21:4 27:8 38:19 41:10
business (19) 22:2 29:3,21 32:15 37:25 38:4 39:9 40:13 41:14 78:4 83:18 111:20 112:2,12 124:3 140:21,22 150:19 180:19
businesses (8) 21:21 33:4 37:19 40:21 42:5,9 129:7 140:17
button (1) 112:3
buy (3) 63:10 107:12 112:3
buying (2) 36:15 172:23

C

c30 (1) 29:25
calculating (1) 176:22
calculation (1) 110:7
call (6) 52:20 56:4 66:6 117:7 160:12,14
called (13) 6:3 22:5 28:3 32:17 63:12 79:8 82:14 83:7 84:10 85:8 127:11 160:8 178:24
calling (1) 65:21
calls (1) 158:15
came (1) 175:18
camera (1) 52:11
cameras (4) 104:25 107:14,15,16
cannibalisation (2) 153:3,7
cannot (30) 9:12 15:15 16:10 17:10 18:14 45:21 48:9,10,10 78:24 98:10 109:21 110:2 129:12,12 133:13,14 139:6 140:3,19 141:13,25 146:8 149:12 156:12 157:10 165:17 169:12 170:21 177:11
cant (2) 64:19 174:24
capable (3) 62:18 134:11 139:23
capacity (1) 81:16
capture (1) 165:10
captures (1) 91:8
carried (2) 131:2 135:4
cases (2) 104:2 146:24
cashbacks (1) 36:16
cast (1) 144:11
cat (1) 144:21
cataloging (2) 100:21 104:1
catalogue (21) 24:18 25:24,24 67:22,25 68:6,8,11,12,15,22 69:8,12 71:4,16 72:2,4 95:4 103:3 104:18 162:21
cataloguebased (1) 71:14
categories (1) 100:23
categorisation (1) 101:3
categorised (1) 180:11
categorising (1) 100:19
category (1) 129:20
cats (1) 144:7
causal (22) 56:6 114:7 115:19 123:19,20 124:6,19,22 125:10 127:7,14 131:23 132:2,19 136:1,4,11 139:7,19,24,25 141:9
causally (2) 123:6 133:18
cause (6) 42:7 122:11 123:3 124:3,4 139:2
caused (5) 38:1 122:23 123:10 140:14 141:21
causes (1) 122:8
ceases (2) 72:11 131:3
central (1) 81:9
ceo (1) 39:16
certain (6) 15:15 18:3 62:11,19 76:23 160:10
chairman (179) 1:5 2:3,21,24 3:4,25 4:11,13,16,20 5:14,17,20 6:1,6,11,14,17,20 7:5 10:23 11:4,12 12:22 13:8,15 14:19,22,25 15:2 16:14,21,24 17:12,16,19,21,25 18:8,11,18 19:16 21:11 23:18,21,24 24:7,9 33:5 38:22 39:1,5 50:5,9,13,18,21 53:11 56:13,15 67:6,9,14 72:18 76:17 84:19 86:21,24 87:2,7 89:22,25 90:3,6,8,13,15 91:15 93:17,19,22 94:5,7,9,12 95:7 96:12,16,20,22 97:22,25 98:14,17,19 102:7 103:6,8,10,13,15 104:6,10,12,14 108:1,4 110:16,20,22 111:5 117:11,16,18,20 122:6,16,21,23 124:16 129:19,23,25 130:18,21 131:7,11,15,19 135:13 138:13 143:13,14,22 144:1,3,13,24 145:4 146:18,21,24 149:6 154:1,3,5,7,10,14,18,20,23 155:15 177:2,11,13,16,18,20,24 178:2,5 179:6,11,13,16,18,20,22,24 180:1 181:24 182:6,9,15,19,23 183:2,4
challenge (6) 31:25 32:3 33:10 34:1 125:24 127:14
chamber (1) 128:5
chance (6) 14:23 15:7 16:11 174:1,7,10
chancellor (2) 143:21 144:5
change (4) 111:20 112:2,12 138:2
changed (7) 70:5 72:14 88:19 91:6 112:25 131:7 172:3
changes (5) 7:22 8:1 13:10 126:24 127:5
changing (1) 13:12
characterise (1) 134:14
characteristics (6) 44:13,20 75:3 82:3 176:18 177:7
charge (1) 71:20
charging (1) 110:15
cheapest (1) 52:11
cheaply (1) 107:24
check (3) 59:6,8,10
checkout (1) 29:15
cherrypick (1) 40:8
choice (2) 108:18,20
choices (1) 100:9
choose (6) 32:12 96:8 98:12,12,24 106:17
chose (4) 71:22 73:7 145:24 146:10
chosen (1) 168:18
chunk (1) 34:12
ciao (18) 21:20 22:8 23:25 24:13 30:11 31:6,7,15 32:25 33:14 34:12,21,23 36:6,7,22 40:19 180:10
ciaos (3) 30:16 37:19 41:20
circumstances (3) 42:8 82:18 157:9
cite (1) 45:10
cited (4) 22:9 41:19 77:12 157:18
cites (1) 46:5
citing (1) 78:3
cla (5) 94:9 95:2,3 104:19 182:2
clacatalogue (1) 105:24
claimants (3) 7:16 85:20 86:4
claims (3) 77:23 79:9 126:8
clalike (1) 106:16
clarify (2) 41:16 182:13
clas (2) 74:14 96:10
class (1) 22:4
classifier (2) 176:6 180:6
clear (26) 2:6 5:6,7 6:14,15 7:3 16:14 22:7 44:8 47:8,17 51:3 58:21 83:10,24 85:7,12 96:14 127:25 128:10 133:21 150:1 160:19 172:6 175:6 176:5
clearly (19) 1:18 2:10 5:17 27:14 29:7 40:2,21 54:23 55:3 66:14 73:15 90:23 150:4 158:7,8 163:23 174:23 176:10 177:11
cleave (1) 181:20
click (7) 65:23 71:17 89:7 90:21 106:15 150:16 153:4
clicked (2) 71:19 89:12
clicking (3) 95:7,8 153:4
clicks (4) 58:16 107:12 110:8 159:18
close (3) 38:17 147:14 182:18
closely (7) 51:14 76:10 89:5 105:4 111:12 126:18 170:3
closer (2) 49:11 51:14
closing (20) 3:3 19:18,19 20:9 24:3 28:14 30:24 40:25 70:10 73:19 74:16,21 77:10 79:12 84:24 89:20 149:10 156:19 182:7 184:4
closings (3) 1:18 75:14 154:8
clue (1) 157:13
clustered (1) 166:10
cmc (1) 172:6
coati (1) 75:12
codes (1) 36:16
cogent (1) 80:5
coherent (1) 120:12
collection (1) 94:25
collectively (1) 90:25
column (1) 33:12
combination (15) 52:25 60:14 83:14 97:3 102:4 127:21 128:1 134:20 136:20 137:12,17 139:1 140:13,13 141:19
combined (6) 56:1,2,7 138:21 139:10 148:16
come (28) 9:4 24:22 38:24 43:2 44:4 45:12,13 46:5 48:12 51:23 54:18 56:10,16 72:22 73:12 87:7 94:12 95:21 107:6 110:8 117:22 142:12 163:16,17 170:20 171:22 174:17 181:20
comes (13) 25:13,16 26:1 58:9 59:15 68:15 77:7 110:14 123:8,11 124:9 127:20 140:2
comfortable (1) 110:3
coming (1) 100:18
commencement (1) 28:18
commerce (1) 28:20
commercial (7) 54:23 142:14 149:20,23 150:13 166:8 167:12
commercially (4) 25:10 54:21 120:23 171:12
commission (64) 2:15 3:6,7 4:8 7:9,25 8:16,17 9:3 12:13 16:1 17:14,22 36:23 46:5 47:18,23 48:7 49:11,20,25 53:13 55:14,25 56:22 75:1,24 76:5 77:13,14,21 78:3 79:3,19 80:4,9,21 81:14 86:13 108:25 113:18 115:7,16 116:1 119:25 123:22 126:2,8 127:8 128:12 131:2 134:6 135:4,5,25 136:4,9,10 145:15 146:1,11 147:21 157:19 158:7
commissions (5) 16:17 35:2 79:6 125:24 148:3
common (3) 7:12 80:18,22
companies (2) 21:23 23:15
company (1) 39:13
comparable (1) 89:5
comparative (1) 83:6
comparator (1) 52:7
compare (8) 66:1 82:2 89:6,17,17 90:20 105:15 112:15
compared (6) 22:10,11 57:21 59:2 127:3 174:2
comparing (1) 27:12
comparison (81) 29:12,17 30:4,5,7 31:14 33:6 34:23 35:11,23 39:23 40:20 44:19,21 45:3,6,18 51:4 53:8,14 54:14 55:5 57:3,13,22 58:24 59:13 62:9,14 66:7 71:13 72:19 73:4 76:9,14 77:24 78:14 79:21,22 80:9 81:11,24 82:22 83:5,18,23 84:8 87:18,19,23 88:4 91:20 95:11 104:3 106:10 111:24 112:9,14,16,18 114:3 116:6,7 117:12 123:24 126:12,14,25 127:3,10,17 134:9,11 135:3 138:1 139:3 152:5 157:21 159:20 162:2 172:21
compensate (1) 153:13
compete (2) 99:2 170:18
competing (29) 44:21 45:5 58:24 75:22 76:8,14 106:5,7,9,9,10 108:21 111:24 112:9,16 114:3,15 116:6 122:9,12 123:24 127:10 134:9 135:3,15 137:3 138:1 150:10 152:4
competition (15) 7:8 12:10 51:22,23 53:15 59:22 62:17,19 63:3 73:5 77:11 118:23 130:2,12 148:1
competitive (9) 21:19 22:3,25 29:6 31:11 48:17,24 72:23 135:16
competitors (11) 51:17 59:18 62:9,18 63:3 78:5 112:19 118:18 129:8 152:1 168:12
compiled (1) 35:21
complete (6) 51:8 117:7,21 118:15 168:1 173:18
completely (7) 53:24 75:24 119:6,9 132:18 167:21 172:15
compliance (3) 89:4 96:16 149:13
complicated (1) 95:22
complication (1) 9:15
complying (3) 5:12 174:7,11
component (2) 126:20 151:6
comprises (1) 138:21
concede (3) 12:4,5 25:16
conceded (1) 85:2
conceivable (2) 10:18 95:23
concept (2) 96:24 169:5
concepts (1) 37:5
concern (2) 34:5 127:22
concerned (7) 5:22 18:2 19:10 49:1,4 81:4 179:22
concerning (1) 173:5
concerns (10) 7:5,17 8:18 10:15 14:25 18:20 46:22 78:20 99:9 135:1
concession (1) 85:8
concludes (1) 80:9
concluding (1) 82:12
conclusion (4) 77:15 80:2 84:7 113:23
conclusions (2) 76:20 79:6
concrete (1) 37:8
condemnation (1) 38:5
conduct (44) 9:21 10:3 38:2 41:7 43:17,22 44:8 56:1 62:10,15,18,21 63:2 75:20 114:1,5,7,14 115:19 116:4 118:12 119:1,3 123:10,23 124:20 130:22,23 131:23 132:2,9,19,20,21,24 133:10 135:1,2 136:5 137:18 138:6,20 139:20,23
conducted (4) 35:14 68:10 79:14,20
confer (1) 18:13
confidential (1) 3:15
confidentiality (2) 3:11 15:20
confirm (1) 5:20
confirmed (1) 123:21
confirming (1) 135:14
confirms (2) 112:1 135:25
confused (2) 67:24 182:6
confuses (1) 137:17
confusing (1) 42:7
conjoined (1) 44:9
connexity (2) 2:5,7
conscientiously (1) 3:5
consequently (4) 82:10 126:23 137:13 151:17
consider (5) 13:13 19:24 136:13 149:23 179:8
consideration (3) 113:15 172:14 174:9
considered (4) 77:14 82:11,22 129:20
considering (4) 18:8 68:22 120:20,25
consisted (1) 141:23
consistent (2) 77:3 163:2
consistently (2) 43:6 45:24
consists (2) 116:4 134:20
constant (1) 75:4
constituent (1) 136:6
constitute (2) 53:14 80:10
constitutes (1) 137:11
constrained (1) 13:21
constraints (1) 18:3
constructing (1) 37:11
construction (1) 146:25
constructive (2) 7:21 14:16
consult (1) 19:6
consumer (1) 78:17
consumers (5) 39:25 70:15 71:1 78:13,21
contains (1) 125:21
contemporaneous (3) 70:23 149:25 151:3
contempt (1) 1:15
contend (1) 13:2
content (10) 15:13 17:2 35:8,16 36:4 46:23 49:4,8 179:4,24
contest (2) 89:16 114:14
contested (4) 81:25 82:10 84:6 138:20
context (9) 37:10 44:5 49:7 85:23,23 122:10 130:18 143:23 172:9
continually (1) 77:2
continue (2) 75:22 77:3
continued (3) 34:22 39:13 155:23
continues (3) 63:9 112:22,25
contradiction (1) 86:15
contrary (6) 69:25 75:24 77:23 88:7 135:20 139:5
contrast (3) 36:19 116:10 137:14
contravenes (1) 6:4
contribute (1) 93:7
contributed (1) 38:1
control (4) 8:6 97:9,18 101:1
controlled (1) 94:4
controls (3) 91:7 93:19 101:2
convenient (2) 152:15 154:2
conversation (1) 46:15
convinced (1) 64:21
copies (7) 3:21 5:8,13 6:22 10:22 13:6 21:7
copy (2) 3:1 9:6
core (3) 32:15 93:10 99:3
correct (27) 5:22 61:10,16,19 64:25 65:19 69:20 75:8 92:1 95:11 96:19,21 97:19 98:16,18,21 102:6,6 104:13 105:13 108:19,22 132:18 146:23 153:6 161:12 178:13
correctly (1) 34:16
correlates (1) 76:6
corroborates (1) 89:19
cost (1) 174:7
couldnt (1) 99:18
counsel (1) 18:24
counter (4) 129:17 133:25 140:5 145:11
counterarguments (2) 114:9 170:22
counterfactual (69) 7:6,11,13,13 9:9,17 10:4 11:8,9 13:13 20:3 23:8,9,11,21,22,24 25:11,22,25 44:6 48:11 54:19,20 55:4 69:18 92:20 109:22 111:6 113:5,8 115:4,8 123:7 124:23,23,24 125:13 126:3 128:2,8 129:14 130:22 133:23,24 134:19 136:12,14,23 137:9 139:7,15 140:2,4 143:8 145:8,11 146:6,17 147:4 148:20 149:4,8 153:21 166:4 172:5,7,11 178:14
counterfactuals (2) 20:7 87:15
counting (1) 173:19
countries (2) 114:4 135:7
couple (3) 3:23 4:17 34:25
course (45) 6:25 9:16 15:4,4,14 16:3 17:4 18:7,17 19:15 25:7 33:3 36:18,21 40:11,15 41:22 42:8 43:2 44:15 46:7 47:21 52:3 56:1 59:15 70:9 72:12 74:6 91:8 103:4 108:2,9 112:22 118:12,16 142:11 150:25 155:2 156:23 169:11 171:5 173:1 176:1 180:25 182:14
courses (1) 119:1
courts (12) 42:25 44:2,4 49:25 51:13 79:3 82:25 84:19 113:14 125:14 138:19 141:5
coverage (1) 151:9
covered (2) 127:1,4
cpo (1) 143:13
crawl (9) 158:1,3,17 159:23 161:7,13,16 162:5 164:4
crawled (8) 54:7 116:23,24 131:16 158:21 162:13,15 163:18
crawling (2) 162:7,11
create (2) 46:19 137:16
creates (5) 15:3 87:24,25 88:1 137:11
credit (1) 29:25
crisply (1) 43:18
cristos (1) 45:11
criteria (1) 98:8
critical (7) 12:9 33:16 94:14 104:4 150:25 151:6 173:17
criticise (1) 137:21
crossexamination (5) 21:9 46:7 91:11 152:12 167:4
crucial (3) 91:14 92:25 100:24
cruder (1) 47:12
css (102) 21:21 22:11 24:20 36:20 45:22,22 46:2 47:20 50:15 51:20 53:1 54:5,6 59:17,22 61:5,7 80:19 81:1,4,13,15,21 82:12 83:17 84:1,15 85:17,19,22 86:3,5,6,7,10,14,17,19 88:18,21 89:10 90:23,24,25 91:1 92:2,5,9,13,17,18 93:2,2,3,4,5,5 94:3,3,20,22,23 95:17,17 96:1,20 97:6 98:3,10,15 99:3,3 101:5 103:6 104:22 106:13,17 107:2,3,3,4,5,18,20,21,21,21 108:13 113:1 116:10 117:3 118:4 119:11,19 131:4,8,9,15 135:20 156:25 177:8 180:2

csss (97) 21:18,18 22:2,8,24 23:21 24:11,21 25:20 36:20,23 38:14 42:8,15,20,23 43:12 44:12,13 45:20 47:10,19 48:4,16,23 49:15 50:14 51:16,21 54:4 66:19,20,24 67:2,12 70:13 71:6,7 74:8,24 75:2,22 76:23 79:8 83:7 92:18 95:1 98:11,24 99:6 100:16 101:7,14 104:15 106:13 107:6,24,25 108:21 109:5 110:8 111:10,15 113:21 114:16 115:1 116:18 117:25 121:14 122:9,12 124:3,21 125:9 130:10,13 131:12,12 132:16 135:15,19 137:3 139:21 163:21,23 166:11 173:1,2 176:17,20,22 177:22 178:2 180:6,9,10,11

current (4) 27:3 100:16 101:6 104:5

currently (2) 6:2 29:5

curve (1) 150:23

customers (1) 112:17

cut (2) 141:25 142:1

cutts (4) 27:21 28:8,10 178:23

D

daily (1) 99:6

damage (3) 140:15,21,24

damaged (1) 140:20

damages (13) 38:14,17 110:7 129:9,13 133:14,22 140:3 143:4 167:15 174:5,12 176:22

damaging (1) 141:1

data (5) 11:18 32:10 104:7,15 139:2

database (1) 100:21

date (7) 18:13,22,24 19:4 67:18 156:14 166:24

dated (2) 26:13 164:23

dates (2) 18:2,3

dating (1) 134:7

day (3) 66:25 103:24 171:14

day10mt1128129 (1) 173:14

day10mt11287 (1) 173:16

day10mt169118 (1) 70:22

day15mt1156 (1) 153:18

day4mt184 (1) 57:15

day7mt1212215 (1) 28:6

day9mt1111 (1) 152:13

day9mt1125 (1) 63:20

day9mt1126 (1) 64:11

day9mt1131 (1) 65:7

day9mt1132 (1) 65:10

day9mt1138 (1) 158:24

day9mt113815 (1) 161:25

day9mt1145 (1) 181:17

day9mt142 (1) 150:6

day9mt143 (1) 150:7

day9mt151 (1) 28:24

day9mt184 (1) 57:16

day9mtq8422 (1) 58:6

day9mtq8485 (1) 58:11

days (3) 1:8 106:24 173:2

deal (9) 14:19 16:10 20:14 21:23 134:3 143:1 154:15 171:25 180:15

dealing (4) 122:7,8,9 179:11

deals (2) 4:8 33:22

dealt (2) 19:14 145:1

debate (1) 13:5

december (2) 36:25 37:2

decide (7) 7:18 25:6 105:23 106:13,19 110:17 149:22

decided (4) 70:5 97:1 105:14 110:6

decides (4) 93:13 94:15 97:17 113:20

deciding (5) 11:13 93:11 98:3 102:3 108:25

decision (79) 3:2,10 5:10,23 7:9 8:19 16:2,7,11,16,18,22 17:22 19:2 20:1 22:22 23:18 36:25 42:24 43:5,20,21 44:1,7,11 45:24 47:24 51:13 56:23 75:2,24 77:3,5,6,21 80:21,24 81:14,25 82:11 84:6 85:4,9 86:13,19,22 88:4,6 96:24 109:3,11 111:18 113:7,9,14,18 131:21 133:16,17,17,25 134:5,14,25 135:5 139:19,25 145:8,12 146:1,8,25 147:23 148:25 154:10 155:4 173:4 174:14 182:20

decisions (1) 2:16

decline (3) 76:4,5,22

decrease (13) 114:1 122:8,11,16,23 124:2,21 127:9 132:12 135:6,15 138:5 151:10

decreases (2) 114:14 123:23

decreasing (2) 123:25 134:8

defendant (1) 145:6

deficiencies (1) 41:13

define (2) 32:2,5

defined (2) 81:6,24

definitely (2) 9:20 161:10

definition (11) 12:19 77:17 80:19 81:4,8,8,13,21 82:8 83:22 92:15

definitive (1) 17:10

definitively (1) 179:3

degree (3) 49:23 98:6,7

delay (1) 19:13

delayed (2) 1:3 87:11

deliberate (4) 42:19,22 51:16 56:8

delinking (9) 64:2,12 67:24 68:4,7,9,12,14,17

deliver (1) 83:13

delivered (1) 83:11

delivering (1) 83:18

demand (3) 79:7 150:23,24

demonstrate (1) 12:16

demonstrated (2) 64:2 123:22

demonstrates (1) 138:4

demote (15) 42:20 44:12 45:22 47:5,9,16,19,20 48:4 49:8,15 66:19,20 120:22 132:15

demoted (14) 23:15 24:11 43:13 44:22 50:14 51:21 53:7 74:24 75:3 116:8,10,22 119:20 176:18

demoting (9) 50:23 54:4,5 67:1 115:6 121:14 147:22 168:25 176:24

demotion (36) 20:3 40:22 42:13 43:7 46:1 48:8 52:6,22 53:4,19 54:4 60:14 67:9 111:3 113:11 114:24 116:17,18 117:13 118:1 119:4 121:9 125:2 128:4,14 129:1 130:5 132:6 133:4 137:2 138:23 142:24 143:3,7 158:9 169:19

demotions (8) 43:23 44:10 51:7 54:16 55:18,21 77:4 172:3

density (1) 151:21

deny (2) 157:4 170:21

depend (1) 17:13

dependent (2) 29:10 30:10

depending (4) 95:4 96:8,17 105:11

depends (1) 170:22

deprived (1) 41:23

described (3) 39:17 51:11 81:9

describes (4) 83:6 103:21,23,25

describing (1) 37:5

description (5) 32:9 35:20 81:10 100:6 103:19

deserved (1) 39:19

design (3) 164:17 165:7,9

designation (1) 10:25

desirable (1) 49:6

desire (4) 70:15,25 105:4 158:11

desperate (1) 153:22

despite (2) 37:18 180:23

detail (5) 12:9 35:4 109:19,19 166:13

detailed (4) 35:20 36:8 44:16 113:13

details (1) 23:1

deter (1) 178:12

determine (1) 159:3

determined (2) 105:20 126:1

determining (1) 9:8

detre (1) 70:16

develop (2) 12:23 167:7

developed (2) 133:1 176:6

development (3) 127:16 129:7 156:16

developments (1) 126:9

develops (1) 49:7

devoted (1) 102:1

diagram (1) 103:20

dialogue (2) 7:21 8:16

diamond (1) 39:19

dichotomy (1) 87:21

dictate (1) 166:2

difference (10) 12:9 48:15 53:17 92:25 93:9 143:1,4 163:14,15 165:22

differenceindifference (1) 125:5

differences (2) 12:21 89:8

differencesindifferences (1) 137:24

different (54) 4:9 5:1 6:25 7:14 8:11 9:8 10:15 12:8 13:25 50:21 55:1,2,2 61:21 72:5 78:18 80:1 82:4 83:14,19,20 88:22 91:24 92:18 94:19,25 100:22,22 102:7,17 105:17,18 107:15 110:24,25 111:1 122:25 129:4,9,10 132:22 133:20 134:7 140:4 145:7 153:20 163:6 169:25 170:11 173:6 176:20 181:13 182:9,16

differentiation (1) 107:23

differently (1) 129:13

differs (1) 129:14

difficult (10) 9:25 18:23 106:8 109:2,3,11 167:6 169:12 178:8,11

difficulty (1) 77:13

digest (2) 15:8 16:11

digested (2) 10:9 14:4

digital (1) 52:11

diminution (1) 70:8

direct (7) 29:25 65:17 69:15 70:12 77:10 90:21 112:18

directed (1) 2:4

directing (1) 69:21

directions (1) 170:12

directly (4) 64:7 70:15 71:1 82:5

directories (2) 35:13 36:2

disadvantage (2) 108:15,16

disadvantaged (1) 73:9

discipline (1) 99:21

disclose (1) 5:5

disclosed (7) 8:4,13 17:9 90:5,6,7,12

disclosure (3) 3:10 40:5 172:13

discouraged (1) 130:14

discretion (1) 110:2

discriminate (1) 55:6

discrimination (21) 50:7 51:20 52:2,25 53:11,12,14,20 116:15,16,17 118:3 122:7,18,24 129:21 130:1,19,24 131:19 147:24

discriminatory (3) 123:4,5 132:3

discuss (2) 160:6 182:7

discussed (4) 13:24 46:18 95:23 148:23

discussion (5) 6:8 8:5 16:18,21 122:10

discussions (4) 9:2 26:17 28:23 46:17

dispensed (1) 176:2

display (12) 98:13,13,25,25 101:2,4 102:4 103:3 105:23 116:5 128:13 137:10

displayed (5) 61:15 87:23 93:12 97:10 101:1

displaying (2) 88:3,20

displays (3) 94:1 98:5 100:12

disprove (1) 67:12

dispute (5) 21:14,16,20 42:12 63:7

disputed (2) 81:5 82:8

disputes (3) 20:20,23 70:9

disregard (1) 139:11

disreputable (1) 21:22

distinct (1) 80:10

distinction (7) 37:6 83:10 87:17 88:3 147:19,20,25

distinctly (1) 41:5

distinguish (4) 35:6 36:9,10 126:24

distinguishes (2) 102:24 162:19

distinguishing (4) 35:17 36:4 98:22,23

distorted (1) 51:22

distorting (1) 51:23

diversion (16) 42:9 118:22 121:12 123:10 130:3,6 131:23 132:15 133:12,15,18,22 135:19 139:20 140:14 141:21

diversity (2) 66:18 177:25

diverted (3) 75:20 113:21,21

diverting (1) 130:16

divide (1) 19:21

divided (1) 178:9

dividing (1) 92:20

divorced (1) 12:1

dma (17) 2:16 3:2 5:1,23 6:4 9:10,12,15,21 11:5,21,22 12:6,10,11 14:15 109:12

dmates (1) 30:17

document (10) 14:4 16:5 28:17 34:24 60:4,5 75:15 90:1,3 151:4

documents (31) 16:8,9,13,15 20:18 21:5,7,8,25 22:9,12 26:4 30:25 32:20 35:10 40:9,12,13,14,17 42:2,4 46:6 59:20 66:14,21 74:4 78:3 151:3 152:11 164:6

does (76) 7:14 8:12 9:21 11:5,7 12:16 15:14 22:23 23:2,6,11 24:21 25:18 26:20 28:8 36:21 40:1 48:5 49:12,22,23 54:3,6 55:5,20 59:18 67:12 78:11 80:11 86:12 88:5,10 90:15 93:9 95:19,19,20,20 100:10,11,14 102:14 103:6,8 110:9 117:2,10,24 120:6 121:15,24 122:3,11 124:2,4 127:7 128:7,8 129:19 130:1,2,5,7,16 140:24 141:13 142:2 162:8 168:23 169:10 170:25 171:2 172:10 174:7 176:19 178:21

doing (14) 11:17,20 27:4 62:2 98:8 101:22 102:21 106:22,23 114:22 147:15 149:21 168:24 178:12

dollars (2) 29:18,23

domain (1) 150:19

domestic (1) 146:5

dominance (3) 9:17 128:20 141:17

dominant (4) 62:7 72:16 73:9 134:8

done (27) 12:5 23:25 24:13 40:8 51:2 55:19,20 71:6,22 73:12 101:6 104:4 110:18 118:13,16,25 129:5 133:1 140:25 149:22 154:12 157:9 167:5 169:21 172:4 177:25 180:4

dont (6) 28:3 42:21,21 47:15 64:4 174:22

doomed (1) 34:19

double (1) 20:3

doubt (1) 176:25

down (11) 37:4 38:16 57:25 73:7 118:14,18 130:10 135:10 136:17 152:21 180:14

downgraded (1) 109:6

draft (2) 1:22,25

dramatically (2) 57:10 155:21

drawing (1) 58:7

drawn (2) 12:9 87:18

drift (3) 69:11,13,14

drive (1) 57:11

driven (1) 63:3

driving (3) 58:24 60:23 61:2

due (2) 6:25 43:2

during (1) 39:17

dusted (1) 39:19

duty (3) 141:23 148:13,14

dynamic (1) 99:15

E

e215 (1) 77:19

e219 (1) 84:15

earlier (5) 31:17 91:24 155:10 157:20 182:24

earliest (1) 15:22

early (2) 68:15 156:22

easily (1) 109:14

ebay (1) 152:7

ec (2) 77:13 174:15

ecommerce (1) 39:22

economic (3) 62:16 139:10 150:21

edges (1) 181:3

eea (4) 62:8,20 114:4 135:7

effect (48) 23:19 28:16 42:7 43:14 45:17,20,25 46:1 47:21 53:15 55:18 56:2,3,6,9,9 57:20 75:23 84:24 85:13 114:23,24 115:2 122:20 123:3,19 124:1,7 125:12 128:21 130:11,16 132:9 133:10,11,12 135:16,18 136:5 139:22,24 156:5 157:3 158:9 176:23,24 178:19,20

effectively (34) 5:11 27:24 29:12 30:21 31:2 35:21 40:8 59:16 72:19 73:3 74:17 81:11 94:2 100:21 101:9,22 106:5 111:11 114:23 125:2 137:19 148:14 152:21 153:15 156:6 159:10 162:15,18 163:19 164:1 168:25 177:2 178:17 180:20

effects (17) 56:22 114:8 115:20 123:12 125:25 126:1,4,6 128:3,19 134:13 136:24,25 137:1,17 139:9,10

efficacy (1) 56:6

efforts (2) 33:22,25

eg (2) 37:5 158:20

either (10) 41:14,17 47:5 53:6 54:4 57:4 95:16 133:12 148:15 158:8

element (6) 53:19 123:4,6 136:6 153:25 154:3

elements (13) 35:6,15 36:2 44:9 56:5 60:14 81:9 110:4 128:2 130:4 138:21,24 139:11

elephant (1) 77:8

eligible (1) 111:25

else (2) 132:7 161:1

elsewhere (1) 81:13

email (13) 26:7,9 27:7,24 45:10,12 46:5 155:7 156:5,14 157:16 158:14 170:25

emails (1) 156:5

emanation (2) 88:10,12

embarrassing (2) 40:8,13

emea (4) 28:21 29:22,24 34:5

emphasise (1) 108:23

emphasising (1) 128:11

employee (1) 150:9

employees (1) 27:15

enable (3) 81:11 126:4 127:7

enabling (1) 90:20

encompassed (2) 16:15,16

encompasses (1) 127:14

encourage (1) 54:12

encourager (1) 173:10

end (19) 4:3,11,12 18:15 22:20,21 24:3 27:13 28:18 30:12 34:24 36:25 37:16 42:17 66:25 80:24 155:17 158:21 171:14

ended (1) 174:13

endorse (3) 7:11 15:4 125:22

endorsing (1) 128:11

ends (1) 23:24

engage (1) 12:13

engaged (4) 38:4 55:25 62:21 63:1

engine (5) 88:1 94:2 104:2 152:6 163:11

engines (5) 22:6,6 29:17 30:4 152:5

england (1) 41:10

english (1) 148:12

enhance (1) 29:15

enhanced (12) 29:21 33:1 95:2,3,4 104:18,18 105:24 162:17 164:5 165:20 166:14

enhancements (1) 160:17

enormous (1) 1:18

enormously (3) 33:4 150:19 181:2

enough (4) 39:24 111:8 170:18 179:6

enriched (4) 160:7 165:24,25,25

ensure (1) 180:7

entire (1) 180:19

entirely (7) 1:23 24:15 43:15 54:17 97:12 101:1 148:4

entirety (1) 132:20

entities (1) 163:22

entitled (2) 28:20 97:13

entity (1) 100:1

envisage (2) 92:7 106:5

envisaged (1) 166:5

envisages (1) 96:1

envisaging (5) 104:21 137:22 162:16,25 164:1

equal (10) 44:9 54:1 96:23 99:22 121:3,5,16 127:4 142:16 157:11

equality (1) 62:15

equivalent (1) 161:19

erred (2) 134:18 137:4

error (1) 6:1

escaped (1) 75:11

essence (1) 126:13

essential (8) 112:23 114:6 124:7 131:22,24 136:6,7 148:25

essentially (6) 20:19 40:3 93:14 94:24 114:13 160:12

establish (2) 136:1,4

established (2) 62:11 126:5

estimated (1) 151:17

eu (1) 7:16

europe (2) 30:4 59:21

european (11) 7:15 30:20 34:8 42:25 44:2,3,7 51:13 86:15 113:10,14

europes (1) 40:20

eve (2) 28:17 31:22

even (38) 3:16 4:6 11:19,21 13:16 19:2 21:22 23:9 26:22 34:18,22 37:16 50:22 53:15 56:7 63:18 66:15 67:5 69:22 74:8 78:16,22 81:17 84:2 99:14 109:2 120:6,13 121:24,25 126:17 127:11 130:25 145:20 152:19 153:12 166:2 173:19

evening (1) 182:21

event (4) 20:5 48:13 142:10 172:14

eventually (2) 17:22 152:3

ever (2) 2:6 85:18

every (4) 20:15 94:21 151:12,18

everybody (2) 119:20 121:16

everyone (2) 2:11 132:7

everything (2) 159:5 160:25

evidence (58) 2:6,7,8 17:9 19:23 20:12,18,25 21:3 27:22 41:19 42:1,17 46:3 49:12 51:3 55:1 63:13,14 64:3,7,18,22 66:13,17 67:3 68:21,21 69:18,25 70:11,17,18,23 74:4 77:12,14 79:2 84:25 89:18 90:3,4 123:23 125:8 130:9 136:10 149:25 150:1,18 157:18 166:5 167:7 171:10,15 173:13 176:4 179:8 180:3

evolution (2) 76:10 164:8

evolved (4) 82:15,16 84:11,12

exact (1) 166:24

exactly (19) 26:21 54:20 61:19,23,25 72:12 79:1 93:6 102:18,20 103:9,12,14 105:14 147:12 148:18,18 168:23 176:9

examination (1) 113:13

example (13) 15:16 16:6,8 24:17 25:14 27:2 46:8 55:14 73:18 75:19 79:4 93:1 110:14

examples (3) 26:24 27:4 37:8

exceedingly (1) 89:8

except (1) 96:16

exception (1) 75:5

exceptional (1) 27:18

exchange (8) 14:9 155:8,9,10,24,25 157:14 171:1

exchanges (1) 46:9

exclusionary (1) 42:19

executives (2) 28:23 29:2

exempt (1) 146:2

exempted (2) 177:3,6

exemptibility (3) 144:2,8,10

exemptible (2) 145:16 148:2

exercise (2) 74:17,18

exhibited (2) 43:13 177:6

exhibits (1) 44:20

exist (1) 88:6

existed (1) 43:16

existence (5) 39:14 129:11 131:22 133:18 136:11

existing (2) 100:7 156:2

expect (2) 41:15 166:20

expedia (1) 33:2

expensive (2) 173:21,23
experience (14) 17:25 30:2 49:2,6,14 51:5 64:1 73:24 74:7 142:20,21 152:1 172:22,24
experiencing (2) 30:5,8
experiment (16) 64:2,13 67:25 68:4,9,13,14,17 74:13,14 117:24,25 118:1 122:13 125:6 137:25
experiments (8) 66:21 67:18 74:11,11,12 114:22 115:17 142:22
expert (1) 89:16
explain (1) 35:4
explained (2) 149:10 150:3
explaining (2) 49:24 85:23
explains (2) 49:13,15
explanation (3) 44:16 126:17 127:7
express (1) 81:1
expression (1) 158:11
expressions (1) 40:16
expressly (1) 140:1
extent (9) 8:18,19 14:14 16:25 37:23 43:12 54:5 139:3 177:6
extra (1) 168:8
extraordinary (1) 32:16
extremely (2) 31:15 42:5
eye (1) 144:11
eyecatching (1) 166:22

F

face (2) 32:15 170:16
faced (1) 32:19
factors (1) 105:22
factual (7) 20:20,23 74:20 92:23 122:19 130:7 139:8
fading (1) 39:14
fail (1) 34:19
failed (1) 126:8
failure (1) 130:2
fair (8) 55:23 57:19,23 59:20 67:10 83:21 123:1 157:11
fallacious (1) 118:2
fallacy (1) 86:8
fallen (1) 2:8
false (3) 86:9,10 87:21
familiar (4) 40:1 56:24 77:20 143:14
famously (1) 142:19
far (10) 19:10 59:22 81:4 89:11 137:7 174:19 177:13 178:11,15 179:22
farming (1) 179:24
farms (1) 179:4
faster (1) 57:21
fastgrowing (1) 42:5
fault (2) 68:2,3
favour (2) 66:15 118:3
favourable (4) 128:9,13,14 147:24
favourably (1) 22:10
favoured (3) 62:8 137:14 139:15
favourite (1) 40:2
feature (8) 98:22,23 108:9 155:3 162:12,13,14 168:17
featured (1) 52:8
features (6) 26:20 35:24 36:9,13 43:14 91:21
featuring (1) 158:13
feed (7) 99:6,15 102:24,25 110:7 160:1,2
feedback (2) 26:12,13
feeds (7) 88:2 93:23 100:15,18 103:1,10 163:17
feel (5) 13:21 15:3 24:25 25:3 110:3
feet (1) 19:6
felt (2) 39:21,23
few (7) 1:21 4:9 25:1 38:10 74:19 87:14 182:10
field (2) 21:21 22:8
figures (1) 182:10
file (1) 38:23
fill (1) 29:8
filled (1) 163:7
filtering (1) 81:15
final (5) 22:21 27:1,2 41:18 180:15
finally (1) 20:4
financial (1) 29:25
financially (1) 180:24
find (9) 6:2 8:16 32:11 40:8,13 120:14 121:25 138:15 176:12
finding (24) 5:17 11:24 44:18 49:20 56:11 77:17 81:1 84:18 90:2,11 114:6 123:18 125:11 129:15,18 131:25 134:19 135:14,15,17 139:19,21 141:4 147:20
findings (12) 5:2 6:22 16:3 23:18 75:1,18,25 78:25 86:15 138:19 157:3 173:4
finds (4) 130:7 133:17 139:18 141:4
fine (3) 120:10,10 142:2
fines (2) 174:5,12
firmly (3) 12:7 63:15 146:22
firms (1) 31:8
first (36) 7:17 9:4 14:10 15:20,22 18:15 19:22 20:19 21:15 22:15 27:16 28:16 35:15 38:12,12 44:11 47:1 52:17,19 57:3,5 72:15 75:9 80:16,18 84:4 85:7 88:23 116:15 121:8 130:8 149:11 156:1 170:1,4 182:10
fitzpatrick (1) 150:5
five (5) 14:12 22:12 26:24 114:13 165:9
flaux (1) 143:21
flawed (1) 125:12
flip (1) 120:25
focus (4) 33:25 39:9 59:18 179:24
focused (1) 49:14
focuses (1) 150:4
fold (1) 57:7
follow (3) 3:25 87:23 145:12
followed (4) 14:9 16:17,21 171:21
following (4) 76:3 77:22 114:12 153:19
follows (1) 85:5
footnote (3) 74:2,2 182:12
forbidden (1) 1:12
force (4) 9:10 21:19 22:25 31:21
foreclosed (1) 130:13
forecloses (1) 135:22
foreclosing (1) 62:18
foreclosure (1) 124:4
foregoes (1) 151:17
foreign (1) 154:15
forensic (1) 113:13
foresee (1) 56:2
foreseeable (2) 56:9 141:12
foreseen (1) 56:3
forget (2) 15:11 174:24
forgive (8) 47:12 60:2 65:7 80:7 103:16 128:17 134:4 136:3
form (7) 1:24 14:7 58:2 62:11 80:25 82:22 85:25
formal (1) 118:7
format (7) 75:13 160:7,8 165:1 166:25 181:17,20
formats (2) 109:9,10
formed (3) 129:15 157:17,17
former (1) 150:9
forms (5) 82:13 84:8 86:17,20 181:5
formulation (1) 148:14
forth (1) 36:17
fortiori (2) 28:1 146:14
forward (4) 10:12 126:3 127:15 136:14
forwarding (1) 26:12
found (13) 11:25 49:12 63:6 66:19 80:20 81:13,21 83:23 91:25 109:20 113:23 134:6 135:5
foundation (1) 115:25
foundem (9) 1:23,25 2:5 35:11,17 36:5,11,20 38:19
foundems (1) 35:6
four (3) 19:21 42:2 104:24
fours (2) 12:25 147:14
fourth (1) 114:18
france (2) 31:14 37:14
frank (1) 4:18
fraud (3) 41:4,12,17
fraudulent (1) 41:3
free (6) 7:23 153:5 180:18,21,22 181:1
freehills (1) 4:8
friction (1) 70:14
friday (2) 3:5 14:11
friedman (4) 51:10 70:7,17 173:13
friedmans (1) 91:10
front (7) 38:24 88:24 89:3,14,14 90:16 148:8
froogle (34) 22:11 26:10,14 27:5,11,12,15,20,22,25 29:7 46:10,12 47:10 50:22 53:7 58:23 82:19 153:25 155:2,2,5,20,21 156:7,17,22 157:8 158:12 169:2,3,14,16 175:23
frustrating (1) 65:23
fuelling (1) 59:12
full (2) 67:7,8
fully (6) 2:25 3:11 15:4 41:15 78:23,23
function (2) 79:22 93:10
functionally (1) 89:4
functioned (1) 90:20
functioning (1) 126:18
functions (2) 90:19 94:2
fundamental (1) 40:16
further (16) 4:22 5:16 14:14 17:7,8,9 22:20 42:25 87:14,16 104:10 141:3 147:2 152:18 179:17,18
future (1) 109:1

G

gain (1) 70:6
gained (1) 72:15
gainsay (1) 40:17
gatekeeper (1) 10:25
gave (2) 25:14 58:22
general (56) 38:11 40:24 41:18 45:4 51:24 56:10 57:3 62:3,8,10,23 63:6 65:22 72:16 74:23 76:9,11,13,19,22,25 81:2,20 82:25 84:19 88:9,11 101:24 102:8,23 111:14,15,20 114:2,15 124:10 125:14 127:9,25 128:11 133:7 134:9,18 135:3 137:15,21 138:14,18,19 141:5 147:5,18 148:8 160:15 172:19 173:3
generally (10) 16:1 17:23 23:22 40:7 45:20,23 46:1 67:16 75:18 163:3
generate (2) 29:23 32:10
generated (2) 89:1 135:2
generating (1) 175:13
generic (7) 57:4,6 76:10 114:1 115:1 126:19 127:22
genuinely (1) 92:17
german (3) 75:10,11,11
germany (3) 26:10 37:14 75:5
get (46) 3:1 9:16 10:11 12:8 14:17 15:8,19 18:22 19:2 24:11 48:19 52:21 53:7 55:1 58:15,17 65:25 66:25 67:1,11 68:24 76:14 83:3 87:14 102:24 104:15 107:17 119:19 130:25 142:13 143:23 149:3 153:22 154:3 155:14,18 158:17 159:17 161:17 167:6 173:3 176:8 178:24 180:13 182:6,20
gets (6) 15:7 96:22 98:4 101:13 120:16 133:6
getting (9) 11:21 18:25 54:7 57:25 65:18 98:11 104:7 150:14 153:15
give (11) 6:13,18 14:23 15:17 26:24 36:8 44:16 118:16 172:10 174:10 177:14
given (14) 1:8 3:18 10:1 28:9 40:6 86:21 111:10 126:16 166:16 172:20 174:9 180:17 182:10,16
gives (5) 26:25 80:5 95:13 104:22 180:20
giving (3) 5:12 95:9,10
glance (1) 35:15
globally (1) 146:1
goal (4) 152:2 155:19 158:21 165:10
goes (24) 7:18 23:7 34:6 35:23 42:25 48:5,6,6,13 49:24 62:24 82:9 84:1 101:17 104:14 115:12 117:25 123:15 127:12 137:15 144:14 163:20 170:3,17
going (36) 4:4,21 7:1 8:3 12:23 13:23,25 14:2,6 15:25 16:17 18:5 19:2 21:14 24:16 42:11 48:18 59:16,17 69:15 78:13 92:12 94:21 102:21 110:3,6,7 113:12 122:18,18 143:17 153:14 154:15 168:4 173:18 175:14
gone (3) 3:22 23:2 33:3
good (18) 26:21 39:24 59:6 65:14,23 66:7,8,12 71:2 87:5 106:4 117:25 122:4 154:11 157:25 161:6 180:9,10
goodrow (21) 28:21 45:11 57:14 59:15 63:14 68:20 74:12 150:8 152:11 157:4,14 158:5 160:6 163:12 167:3 169:22 171:1,14 172:25 175:17 181:14
goodrows (4) 63:16 103:23 149:25 158:14
google (272) 1:25 6:3 7:21,23,25 8:10,16 11:6,20 13:11 16:1 20:13,23 21:2,16,22 22:1,9 23:12 25:11,15 26:14 27:6 28:10,22 29:10,24 30:2,3,8,10 31:10,16 32:17,20 33:16,24 34:18,22 35:1,10,13,22 36:18 37:7,18 38:12,16 40:2,4,14,19,23 41:1,20 42:18,23 43:2,4,5 44:3,24 45:2,8,17,25 47:17 48:3,11,16,23 49:1,4,6,9 50:22,22 51:2,9,19 52:1,17 54:3,11,12,13,23 55:3,25 56:6 57:2,10,20 58:17,22 59:3,21,24 60:15,25 61:9,17 62:2,14,21 63:1,8 70:5,9 71:12 74:7,22 75:22 77:11,15,23 78:4,20 79:11,14,20 80:1,6 81:5 82:8,14,19,19,23 84:10,18,23 86:19 89:9 90:12 91:7,8 93:19,23,24,25 94:1,4 96:14,17 97:9,13,17,23 98:3,7,17 99:6,14,16,16,20,24 100:9,10,11,14,14,15,18,18 101:6,13,17,17 102:14,15 103:24 104:4,14 105:23 106:23 110:17 111:15 112:1,6,23 113:22 114:10,11,13,22 116:16,18,22 117:1 118:3,4 119:8,11 120:23 121:15 122:11 124:9 126:8,12,23 127:15 128:9,14 129:5 130:22 133:1,2,6 134:6,18 136:14 137:5 139:21 140:12,19 141:6 145:6 147:25 150:1,3,12,13,17,20,24 151:17 155:4,20 156:12,14,16,18,20,24 157:9 158:11,12,20 159:3 160:21,22,25 161:10,19,20,20,22 164:3,17 165:1,7 166:10 167:11,18 168:21 169:23,25 171:6,12 172:1,1,18 173:20 175:20,24 179:8 180:11,25 181:6,16
googlecom (10) 66:3 151:8,12,13,20 152:2,22 159:5,7 160:3
googlecreated (1) 46:23
googles (118) 8:22 10:24 21:25 23:13 24:19 25:21 27:15 28:23 29:1 38:1,18 39:3 40:22 42:13 43:1 44:19 45:4 49:13,16 50:15 52:14 53:1 57:12 59:25 61:5 66:23 67:15 69:9,23 71:13 73:19,24 74:20 76:9,11,13,24 79:9,21 80:23,25 82:12 84:1,7,15 85:17,19,22 86:1,3,5,8,14,16 87:16 88:17,21 89:15 90:24,25 92:5 93:2,3,4 97:6,11 98:3,10 101:21 102:3 106:10,13,19 107:4,4,4,11,21,21 112:13,17 113:1 114:2,15 115:16 116:7,10 117:3,12 118:4 119:11 122:9 123:2 124:16,18 126:18 127:9 131:4,8,9,15 135:3,20 138:25 139:3 149:20,23 150:15 151:7,24 164:22 165:10 168:6 169:5 170:24 172:17 180:15,19
gps (2) 28:21,21
grabs (1) 84:18
grand (1) 128:5
granular (2) 110:3,12
graph (2) 34:10,16
graphs (3) 76:2,3,4
grateful (2) 1:20 87:4
great (4) 40:15 122:16 143:1 156:20
greater (1) 108:17
grist (1) 68:4
ground (5) 7:12 80:18,22 134:17 144:1
grounds (2) 82:12 84:7
group (1) 75:2
grouped (3) 82:14,20 84:10
grouping (2) 92:11,12
grow (2) 39:14 151:25
growing (9) 31:15 34:8,14,21 39:21,22 57:21 126:10 163:24
growth (4) 30:6,9 31:19 57:24
guarantor (1) 62:16
guess (2) 161:20 166:10
guidance (1) 177:14
guides (4) 35:14 36:3,15 81:18
gut (1) 26:18

H

h (1) 160:9
h3a332 (1) 74:5
half (1) 3:8
hand (3) 87:18 116:13 117:8
handed (2) 21:13 38:16
handicapped (1) 10:8
hands (1) 17:5
hang (1) 136:2
happen (1) 109:1
happened (15) 23:8 72:12 109:15 111:10 112:20 119:17 122:23 128:22,23 129:1 132:3 149:17 171:9 172:8 177:18
happens (4) 125:6 142:18 149:11 162:11
happily (1) 181:1
happy (2) 14:7,18
hard (5) 21:6 40:22 41:22 171:16,17
hardcopy (1) 21:5
hardly (1) 25:13
hardware (2) 93:24 103:2
harm (1) 38:1
having (12) 8:5 10:6,10 51:8 53:15 62:6 66:2,24 132:22 133:3 134:12 139:23
heading (3) 113:19 144:8,9
headnote (1) 143:22
healthy (2) 30:6,9
hear (2) 17:7 89:23
heard (13) 14:22,25 19:23 20:17 74:8 84:25 87:3 101:7 107:22 111:8 140:19 141:25 176:3
hearing (1) 85:12
heart (1) 86:8
heavily (2) 39:19 75:10
held (2) 84:15 173:22
help (4) 32:6,11,11 155:19
helpful (3) 2:19 21:11 83:9
herbert (1) 4:8
here (17) 7:7 11:23 16:19 31:24 34:6 36:1 116:1 117:10 122:6 129:20 145:6 157:16 161:22,25 162:25 164:1 169:14
hewthorn (2) 6:23 16:4
hi (1) 47:4
high (10) 24:24 25:19,19 33:20 36:19 46:24 48:17 52:7 75:7 145:21
highest (1) 101:10
highlevel (1) 24:25
highlight (1) 20:11
highlighted (1) 73:21
highly (6) 15:6 30:10 40:14 45:3 156:3 157:22
himself (1) 39:17
hit (6) 26:8 31:19 40:22 41:22 75:10,12
hobbled (1) 42:9
hold (2) 3:1 10:19
holding (2) 27:6 136:22
holidays (2) 18:6 19:3
hollington (2) 6:23 16:4
holmes (1) 142:19
homepage (1) 60:8
hompage (1) 58:13
hope (2) 5:15 19:3
hopefully (4) 2:22 4:3 38:24 87:14
hopelessly (1) 74:18
hour (1) 3:9
house (2) 88:24,25
housekeeping (4) 1:6 181:23 184:3,5
however (5) 81:24 126:3,17 127:19 142:10
huge (3) 40:4,5 100:21
hunt (2) 107:22 151:4
hypothesis (2) 48:21,23
hypothesise (1) 72:13
hypothetical (4) 25:9 167:22 168:1 177:20

I

icon (2) 164:16 165:2
idea (6) 51:7 55:15 66:12 120:21 160:5 174:10
ideally (1) 18:15
idealo (2) 75:5,6
idealode (1) 37:13
idealos (1) 75:9
identified (9) 20:21,22 21:15 35:14,18 63:7 86:11 127:8 166:8
identifies (1) 35:24
identify (3) 27:19 36:14 128:19
identifying (2) 34:17 128:20
ie (3) 132:13 147:24 151:17
ifwhen (1) 46:22
ignores (1) 180:19
ii (2) 57:5 82:5
im (2) 159:1 174:2
image (7) 1:14 58:7 159:17 164:18 165:2,9,14
imagery (2) 164:5 166:15
images (16) 159:11,16,16 160:8,18 161:20 163:8 164:3,14 165:14,20,25 167:6,8,9 181:8
imagine (1) 156:10
imagines (1) 97:2
immediate (2) 12:24 110:23
immediately (3) 63:10 67:21 165:16
impact (11) 37:23 52:13 53:17 119:3 132:21 135:2 151:13 167:19 168:6 169:10 177:22
imperative (2) 150:2 172:17
imperatives (1) 54:24
impermissible (1) 92:23
implausible (1) 172:16
implemented (1) 135:8
implication (2) 92:7 116:14
implicit (3) 45:17,19 115:2
implicitly (1) 145:9
imply (1) 43:22
importance (5) 23:10 32:3 44:9 55:13 62:13
important (22) 1:21 15:6,17 18:20 23:4 26:19,19 45:1 52:22,24 60:10 67:5 69:17 100:25 102:20 112:4 113:6 153:11 156:16 164:20 170:23 171:2
importantly (1) 44:23
impose (1) 110:24
impossible (1) 109:23
impression (1) 153:14
impressions (2) 151:12 153:16
impressive (2) 36:9 42:5
improve (3) 47:7 104:12 156:17
improved (3) 103:24 126:13 164:2
improvement (1) 127:1
improvements (2) 156:21,24
impugned (3) 63:2 115:19 126:4
inadmissible (6) 5:2 6:23 10:16 13:4 16:3 80:12
inaudible (8) 50:4 99:18,19 102:9 117:16 118:9 179:15 182:22
incarnations (1) 50:21
incentive (7) 152:9 153:20 166:17 167:12 170:1,2,6
incentives (3) 149:20 164:7 175:16
include (4) 54:24 80:11 128:9 164:3

included (4) 35:18 84:16 112:2 131:16
includes (1) 61:11
including (10) 46:1 47:19 66:12 86:17 106:13 126:11 127:23 160:15,17 168:20
inclusion (2) 89:10 98:9
incoherent (1) 117:10
incomplete (1) 26:22
inconclusive (1) 42:2
inconsistent (2) 146:9 172:16
incorrect (1) 125:13
increase (11) 55:22,23 57:10,12 71:2 125:9 150:3,12 151:7 155:21 170:7
increased (1) 119:3
increases (2) 114:16 153:23
increasing (2) 34:5 134:10
increment (1) 153:13
incremental (1) 153:8
indefensible (1) 122:2
independent (1) 21:18
index (8) 47:6 100:21 101:17 102:11 103:2 155:5,18 184:1
indexed (5) 46:12,23,24 155:7 156:3
indexes (1) 93:25
indexing (11) 88:2 93:9,20 100:10,11,14,19 101:3 102:13,14 104:1
indicate (1) 171:2
indicated (5) 37:22 70:22 84:4 160:10 181:25
indicating (3) 36:3 76:12 78:4
indication (2) 16:17 160:12
indications (1) 169:14
indicative (1) 69:11
indicators (3) 97:4 102:5,5
indicia (1) 112:25
individual (6) 95:14,16 96:11 106:14 163:1 172:22
industry (1) 126:9
ineffective (1) 125:22
inextricably (2) 88:8 138:21
infer (1) 151:21
inferior (1) 70:2
influence (2) 139:1,11
info (1) 26:22
information (4) 46:19 65:25 81:19 98:21
infrastructure (1) 26:11
infringement (1) 136:6
infringing (1) 75:20
ingesting (1) 88:2
ingestion (1) 101:3
ingests (2) 93:23 100:15
inherent (3) 44:13 75:3 176:18
initially (2) 15:13 17:4
initiatives (1) 57:11
innocent (2) 63:5 125:2
innocuous (1) 43:15
innovation (1) 130:14
instance (1) 85:20
instead (6) 43:19 65:17 153:4 164:16 165:2 168:11
instructed (1) 28:11
instructions (3) 8:25 13:14 15:18
integrate (3) 156:7 167:9 169:15
integrated (6) 50:3 58:1 118:12 157:6 160:2 171:4
integration (4) 47:7 100:4 155:19 169:9
intend (2) 20:8 37:20
intent (1) 178:23
intention (2) 2:11 19:21
intentional (4) 42:19 51:25 56:4,11
intentionally (3) 62:21 63:1 65:21
interchangeable (1) 88:8
interest (1) 33:23
interested (1) 38:7
interesting (5) 38:21 103:16 134:14 142:25 157:14
interface (2) 26:11 94:23
interfaces (3) 61:22 86:3 88:17
interference (1) 148:1
intermediaries (6) 63:11 100:17 111:17 112:5,11,21
intermediary (3) 65:18 82:6 107:12
intermediates (1) 70:13
intermediation (1) 70:13
internal (10) 21:25 22:9 31:24 35:10 40:12 46:17 67:15 78:3 94:2 101:4
internally (1) 32:19
internet (3) 33:6 82:1,23
interpret (1) 158:8
interpreted (2) 42:24 113:9
interrelated (1) 88:8
interrupt (1) 96:12
interrupted (1) 154:7
interstitial (11) 63:12,19 65:14,16,22 66:16 67:16 69:22,24 70:1,3
into (45) 1:19 3:13 4:4 9:16 11:21 12:9 15:13,19 19:21 22:19,20 23:2 31:23 34:22 41:21 47:7 79:8 82:15,16 84:11,12 93:23 98:4 100:18,20,22 101:20 110:7 113:13 127:11 128:3 130:10 136:24 139:9 149:2,3,18 155:18 156:7,17 157:7,8 160:1 166:13 176:8
introduced (5) 71:6 164:14,17 165:1,7
introducing (1) 168:25
introduction (1) 127:6
intuitions (1) 171:20
invariably (3) 63:10 86:11 93:3
invest (1) 42:8
investing (1) 39:9
investment (3) 156:17 157:8 172:9
invisible (1) 77:1
invite (4) 78:7 80:1 115:10 138:10
invited (1) 145:12
involved (2) 8:22 17:17
involves (2) 5:1 112:13
irreconcilable (1) 75:1
irrelevant (3) 10:1,14 121:9
irrespective (1) 10:17
isolate (2) 115:2 133:10
isolates (1) 122:13
issues (10) 8:23 19:11 25:6 40:6 77:18 84:14 109:4,8 160:7 164:12
items (1) 130:9
its (97) 3:10 5:2 7:23 8:2,18 13:12 22:9,11 27:15 28:11 31:16 32:3 35:1 37:25 40:25 43:6,7 45:2,17,18,20,21,22,25 46:2 47:18,20 48:3 49:2 50:21 51:20 53:16,17 54:4,5,5,12,15,25 56:11,22 57:2,3 62:7,8,9,9,15,18 64:19 65:3,23 75:9,10,11 79:12 84:24 86:6,12 93:24 100:3,25 101:23,23 102:14 103:10,15 112:18 113:8 114:7,16 115:17,19 126:1 127:5,17 129:7 134:8,9,10 136:5 137:5 149:20 155:20 156:19 164:18,22 165:9 167:18 170:3,7 173:21 174:11 179:24 180:21,21 181:3
itself (9) 35:21 85:17 88:6 89:2 99:20 124:3 137:8 159:7 180:11

J

j2b44 (1) 164:21
j2b4425 (1) 164:24
j2b4426 (1) 165:5
jack (1) 45:10
january (8) 21:18 31:24 134:7 149:19 156:11,15 165:16 172:6
jen (1) 150:5
jess (2) 26:10,16
job (3) 26:21 106:22,23
joel (2) 47:4 155:17
joined (1) 74:7
joint (2) 92:17 139:11
jointly (1) 44:10
journey (1) 105:12
jowell (443) 4:13 14:7,17,23 15:1,4 16:20,23 17:2,15,18,20,24 18:7,10,17 19:15,17,19,20 21:12 22:24 23:7,12,20,23 24:6,8,15 25:8,13,17 33:8 38:9,23 39:2,6 48:1,5,20,22,25 49:3,17,23 50:8,12,17,20 51:1 52:5,10,12,23 53:3,5,9,21,23,25 54:2,8,10,20,22 55:7,9,11,20,23 56:14,20 59:2,4,6,10,25 60:2,11,19,21,24 61:1,3,6,8,10,12,14,16,19,21,24 62:1 67:8,10,15,19,23 68:1,3,9,14,18,25 69:3,5,7,9,20 71:5,9,11,15,19,22 72:7,13,21 73:1,3,12,15 76:18 78:23 83:2,8,15,21 84:21 86:23 87:1,4,13 89:23 90:1,4,7,9,14,17 91:13,16,19,22 92:1,3,6,10,14,16,22,25 93:6,8,14,18,21,23 94:6,8,11,13,19 95:3,8,11,15,18,21 96:3,5,7,11,15,19,21,23 97:2,5,8,12,15,19,21,24 98:1,6,16,18,21 99:1,8,10,13,16,22,25 100:2,5,8,13,15 101:15,19,21 102:6,16,18,20 103:7,9,12,14,16 104:9,11,13,15,17,20,23 105:2,6,8,10,13,16,19 106:1,4,8,23 107:3,17,20 108:2,6,8,11,14,16,19,22 109:17,24 110:1,19,21,25 111:6 115:22,24 116:2,12,20,25 117:6 118:6,10,19,21,24 119:2,5,7,10,13,22,24 120:1,5,8,11,13,18,24 121:2,4,7,11,18,21,23,25 122:3,15,20,22 123:1 124:18 128:15,17,24 129:3,10,17,22,24 130:17,20 131:6,10,14,18,20 132:5,8,11 133:5 135:14,23 136:3 138:14 140:8,10,16,18 141:2,10,12,16,18,20,23 142:4,6,8,17 143:5,24 144:2,5,14,25 145:5,17,19,23,25 146:3,12,14,20,23 147:2,11 148:7,10,19 149:7 154:2,4,6,9,12,17,19,21 155:2,16 160:20,23 161:4,9,12,15,18,23 162:9,11,22,24 163:2,5,9,13,15 164:11 165:24 166:7,12,19,23 167:1,13,16,23,25 168:3,7,9,14,23 169:3,7,19 170:5,8,10,13,19 171:8,13,19 175:10,12,15 176:11,16,21 177:4,12,15,17,19,23 178:1,4,7,17,22 179:2,5,10,12,15,19,21,23,25 180:3,10 181:7,9,11 182:5,8,14,18 183:1,3 184:4
judge (2) 10:20 142:19
judgment (23) 9:25 10:3 11:16 13:22 38:16 77:18 84:13,20 113:16 141:6 143:11,13,15,17,20,20 144:5,7,15,25 148:4,5 154:15
judgments (3) 51:13 77:4 113:14
julian (1) 143:21
july (3) 1:1 38:15 183:7
jurisdiction (1) 41:4
jurisprudence (1) 11:13
jury (1) 38:6
justifiable (1) 145:18
justify (2) 68:22 145:21

K

k110033 (1) 138:16
k115 (1) 34:25
k11511 (1) 35:19
k11512 (1) 35:3
kalyanpur (4) 63:14 74:12 176:4 180:5
kalyanpurs (1) 66:17
kataria (1) 46:14
katarias (1) 156:4
keen (1) 155:6
keenness (1) 3:1
keep (5) 46:18 54:16 66:22 94:20 142:24
keeping (1) 1:19
kelkoo (54) 2:5 8:13 12:18 21:20 22:8,17 23:25 24:12 26:9,20,22,24 27:4,12,14,17 28:1,11 30:19,20,22 31:17,18,18 33:13 34:12,21,23 36:12,14,22 37:16,19,24,24 38:3 40:5,19 41:2,17,20 47:14 52:7,20,21 53:6 90:12 103:8 177:18 178:6 179:2,9,11 180:10
kelkoocouk (1) 37:13
kelkoos (6) 2:17 7:15 27:2 40:9 41:14 77:9
key (7) 20:23 93:9 96:23 98:22 101:4 136:15 139:22
kim (2) 176:4 180:4
kind (10) 49:18 54:14 55:5 78:25 81:18 90:25 170:11 174:5,8 175:22
kinds (1) 105:7
knew (2) 45:19 51:4
know (42) 4:6 8:2,3 13:5,16 16:4,24 17:16 25:21,23 32:17 54:7 66:2,5 72:24 78:13,19 89:12 101:2 104:1 110:10 112:22 116:21 142:18 147:9 148:4 149:19 154:4,7 155:5 156:21 158:6 159:2 165:12 168:1,5 170:20 173:11,11 178:11 180:6,14
knowing (3) 45:22 63:2 149:19
knowledge (1) 43:1
known (2) 45:21 62:14
knows (2) 54:3 150:18
kokott (1) 138:18
ku (2) 26:13 27:6

L

landed (1) 20:25
lands (1) 49:5
language (1) 160:9
large (3) 14:4 34:8 75:21
largely (3) 59:19 150:9 167:2
larger (1) 61:18
last (2) 2:16 33:8
lasting (1) 114:3
late (2) 154:4,8
latency (3) 8:6 99:9 162:10
later (7) 11:2 34:25 51:10 117:22 124:2 130:25 152:10
latest (1) 154:13
launch (2) 57:1 127:18
lawful (16) 7:7,7,8,13 10:3 11:10 20:6 25:10 130:22 134:20 137:8,17 140:22 149:17,17 176:15
lawfully (4) 110:20 129:5 133:2,3
lawyers (1) 4:9
lay (1) 15:15
lead (7) 63:2 82:5 130:1,3,6 151:9 173:25
leading (19) 21:21 22:9 26:20 27:17 30:3 34:20,23 35:23 37:14,17 38:14 40:20 124:6,6 125:11 131:24 152:6 156:25 180:11
leads (4) 64:1 84:23 149:1 150:25
leakage (1) 153:3
learned (8) 13:24 17:3 21:6 42:16 81:7 89:24 94:21 147:3
least (19) 10:17 28:9 41:1 63:5 67:2,10,11 69:12 70:18,19 80:22,24 139:25 141:12 167:8 169:11 173:2 180:9,10
leave (5) 19:5 83:1 87:2,13 115:5
leaving (2) 67:1 71:7
led (3) 71:13 114:1 156:24
lee (2) 26:10 27:12
left (3) 67:1 142:9 173:7
leg (1) 141:25
legal (4) 4:7 7:1 142:25 149:4
legality (3) 9:7,13,20
leggatts (1) 148:13
legislation (1) 12:8
legitimate (4) 178:19,20,21,22
leguide (1) 31:16
leguidecom (1) 37:13
leo (4) 3:13 4:4,5 15:13
les (1) 173:10
less (10) 3:14 53:18 76:13 85:12 89:13 109:18 128:14 140:21 141:1 159:17
lessen (1) 177:21
lessened (1) 55:18
lesser (2) 133:15 148:1
let (7) 52:6 85:7,16 149:23 164:19 170:15 171:25
lets (3) 63:23,23 174:24
letter (1) 2:17
level (7) 24:24 25:19,19 57:5 145:16 146:6 160:10
leveraging (1) 57:11
liable (1) 150:16
lie (2) 140:24 141:13
life (2) 42:10 142:20
light (3) 43:4 157:5,7
like (54) 1:10,17 4:22 5:5 7:3 9:6 10:21 14:5 15:15 16:19 18:6 21:1,23 40:16 47:5,9,15,16 54:10 63:11,12 66:7 67:7 68:5,11 70:13 78:14 80:14 88:1,24 94:3 96:12,14 97:13 104:2 107:4 113:2 118:7 132:25 133:20 147:8 156:11 157:5 158:19 159:7 162:20 163:19 171:4 174:10,18,23,24,25 181:6
liked (1) 66:23
likely (9) 16:2 52:17 53:18 121:9 134:12 137:23 149:8 166:14 171:22
limb (6) 48:8,9,10 115:18,18 125:1
limbs (7) 48:8 52:2,4 113:11 124:24,25 149:9
limit (1) 15:14
limited (5) 77:24 79:6 104:15 178:18,19
limits (3) 1:20 74:9 110:14
line (9) 29:19 31:12 57:17 63:20,21 65:8 92:20 152:16 158:25
lines (3) 119:15 136:17 141:3
link (30) 32:12 50:23 63:23 70:15 71:1 86:5 104:22 114:7 123:19,20,25 124:6,19,20,22 125:10 127:7,14 131:23 132:2,19 136:1,4,11 139:6,7,20,24,25 141:9
linked (1) 126:18
linking (5) 64:1,7 162:20,23,25
links (9) 51:6 52:18,21 82:5 89:9 95:1 96:9 153:5 180:22
list (12) 36:8,13 63:23 65:6 66:11 106:25 159:14 163:10 173:15 175:2,3,4
listed (1) 165:9
literally (1) 3:17
little (6) 2:10 4:6 22:19 65:23 141:3 182:3
live (2) 1:11,14
lived (1) 39:14
lives (1) 180:25
lobbying (1) 74:17
local (1) 46:16
logic (5) 118:7 120:7,15 142:20 148:3
logical (2) 121:24 122:3
logically (1) 130:8
long (8) 8:2 18:1 26:3,8 36:13 97:23 124:13 149:3
longer (5) 42:17 88:20 112:15 181:21,24
look (33) 11:14 27:25 47:5 48:8 52:17 55:25 56:5 66:21 74:2 88:23,25 91:2 95:5 98:6 105:17,18 114:9 117:7 118:10 123:6 125:5 128:21 130:5,8 132:20 136:8 143:22 158:19 159:7 174:6 181:5 182:12,18
looked (2) 55:14 132:25
looking (22) 11:7,8 12:14 18:22 26:22 34:19 55:4 68:19,20 105:21 118:11 122:12 123:2 130:15 142:15 148:11 164:6,7,7 166:6 169:25 174:23
looks (7) 40:1 47:23 78:14 89:14 91:5 135:24 158:14
lose (1) 173:18
loss (1) 132:23
lost (5) 39:9 76:23 136:18 173:20,20
lot (8) 25:4 52:16,21 64:22 66:11,21 156:16 168:8
lots (5) 12:3 171:5,6 175:13 176:19
love (1) 171:3
low (2) 36:20 74:25
lower (6) 76:12 133:22 145:16,21 146:6 153:14
lucrative (5) 72:2,7,11 150:19 151:21

M

m1197 (1) 151:4
m11973 (1) 151:23
m138 (1) 59:23
m1380 (1) 152:17
m1508 (1) 35:25
m15082 (1) 36:13
m21093 (1) 37:1
m2109311 (1) 37:3
m3502 (1) 26:6
m35383 (1) 75:17
m3542 (1) 27:9
m3552 (1) 28:19
m355233 (1) 31:4
m355239 (1) 31:13
m35524 (1) 29:3
m35526 (1) 30:11
m35528 (1) 30:23
m35529 (2) 30:23 31:3
madam (1) 55:15
magic (1) 105:22
main (6) 3:22 20:13 48:17 150:4 160:1 175:17
mainly (2) 22:1 70:6
maintain (2) 7:3 10:16
maintaining (1) 51:7
major (2) 33:18 169:10
majority (1) 91:9
makes (15) 21:3 40:15 41:1,16 100:9 117:9,17,19,21 118:15,15 119:21,23 120:18 158:15
making (8) 13:21 31:17 45:15 59:11 126:11 137:20 154:11 174:13
manage (1) 173:3
managed (1) 101:9
manager (2) 46:10 150:5
manifest (1) 86:19
manifestation (9) 80:25 85:25 88:13 91:18 93:2 94:4,22 107:4 113:1
manifestations (2) 88:17 92:2
manifested (1) 117:12
many (7) 7:15 17:17 70:3 103:25 110:8 180:23 181:11
margin (1) 33:20
mark (1) 4:5
market (23) 12:19,19 34:8,18,21 37:12 39:22 61:18 72:22,24 73:4,5,8 77:17 80:11 106:18,19,20 125:25 130:14 132:25 170:7 173:9
marketplace (1) 78:1
markets (7) 33:11 62:7,19 77:16 78:17,19,22
markup (1) 160:9
massive (2) 118:17,17
massively (1) 55:22
mastercard (8) 143:12 144:16 145:7,14,15 146:4,18 147:15
match (1) 76:10
matches (1) 93:15
material (4) 17:8 46:21 124:21 125:8
materially (1) 138:2
matter (25) 3:8 7:14 8:12 10:23 20:2 22:23 23:2 43:8 49:22,23 52:4 54:3 55:12 85:1 90:15 110:9,11,11 114:18 118:6 119:13 120:6,15 130:3 143:18
matters (5) 22:24 38:2 55:10 85:1 114:17
mature (1) 33:10
maximise (4) 166:17 167:12 170:2 172:17
maximising (1) 54:24
maybe (20) 11:4 13:25 25:21 44:24 64:18 73:25 104:24 107:18,24 133:19 142:18

152:11,14 159:23,24 162:5,6 173:15 174:11 180:13
mean (57) 17:12 24:1,16 25:17,19 48:15 50:18 52:3 54:18 60:1,2 65:21 68:19 71:7 72:17 73:2 88:10 92:19 93:22 98:2 99:6,14 106:11 109:20,25 117:24 118:22 120:9,10,11,19 128:8 129:19 132:1 142:5,7,25 147:19 162:7 166:2,12,16 167:10 168:15 169:11 170:16 171:5,14 173:21 174:22 176:19,21 177:4,8 178:7,21 180:3
meaning (1) 160:7
meaningful (4) 98:11,24 99:2 101:8
meaningless (1) 111:11
means (8) 15:14 18:25 44:3 88:11 124:20 132:6 150:16,17
meant (5) 58:19 63:18 65:16 100:11 156:2
mechanism (5) 14:16 89:4 96:16 110:15 149:13
mechanisms (4) 45:5,18,20 99:7
meet (1) 55:3
meets (1) 105:4
member (1) 27:10
mention (5) 1:21 33:14 87:16 172:8 182:1
mentioned (8) 35:5 42:12 55:15,15 60:17 127:16 161:23 173:14
mentions (2) 74:14 175:21
menzel (8) 45:10 46:5 157:14,17,22 161:3,5 171:1
merchant (18) 37:7 63:10 65:17,19 69:16 70:12 71:20 77:25 79:8,22 80:11 82:4,7 107:9 126:11,25 127:2 152:8
merchants (25) 58:13,15 59:9,10 60:4,7 61:2 64:8,24 70:15 71:1 89:7 90:22 95:7 100:16 103:1,11 105:1 106:7,9,15 109:9 111:17 172:23 173:5
mere (2) 112:21 147:21
merits (2) 35:11 130:2
merricks (2) 113:16 143:12
meta (2) 11:16,17
methods (1) 47:16
metrics (1) 31:8
mickey (1) 47:4
micromanage (1) 167:21
microphone (2) 6:8 182:22
microsoft (1) 36:8
mid2008 (2) 164:14 165:1
middle (4) 32:22 130:15 154:12,14
midseptember (1) 14:11
mif (3) 145:18,21 146:6
mifs (3) 145:16,20 146:2
might (45) 2:19 5:9 8:1,5,8,16 13:12 14:17 16:25 18:20 37:25 52:15 53:16 55:19,20 64:15 68:11 72:5,7 73:9,12,16 78:15,17,19,20,21 83:17 95:24 105:3,3,7,9 108:9 110:23 132:16 141:2 147:3 148:2 166:13 168:15 170:17 181:15 182:13 183:1
mil (2) 151:14,15
mild (3) 75:23 76:4 77:4
mill (1) 68:5
milletts (1) 41:9
millingen (1) 27:10
million (1) 31:21
millions (1) 29:18
mind (2) 30:8 46:18
minimum (2) 176:14,15
minor (3) 4:10 89:8 120:11
minute (1) 143:22
minutes (1) 3:8
mirrors (1) 11:23
missing (1) 81:9
mitigate (1) 99:7
mixed (2) 95:22,23
mixture (2) 68:24 106:17
mode (9) 95:22,23 158:16,22 159:4 160:5,13 167:5 171:4
model (9) 71:12 101:9,12 105:15 111:20 112:2,12 151:24 180:19
models (2) 33:20 105:18
modified (1) 53:10
modify (3) 169:18,19,22
modifying (2) 24:5,10
module (2) 94:7,10
moment (13) 6:19 18:18 19:10 30:1 56:13 71:8 73:17 93:17 94:12 143:9 154:2 171:22 175:2
monday (2) 1:1 14:3
monetisation (1) 30:9
monetise (2) 70:6 170:3
monetised (4) 71:4,12,23 181:10
monetises (1) 181:2
monetising (4) 29:12 54:25 72:2 150:15
monetization (3) 29:11,15 30:6
monetize (2) 29:17 31:2
money (2) 72:3 107:11
moneysupermarket (1) 32:25
monopolise (1) 73:4
month (3) 13:11 31:20 33:8
months (2) 11:2,4
moral (1) 38:5
more (59) 3:15,16 4:17 13:1 16:1 26:19 28:8 33:24 45:23 51:13 52:1 58:15 65:25 67:5 69:13,15,21 72:1,4,7,11,15 73:11 75:18 76:15 82:6 84:2 85:12 89:11 99:15 107:24 109:2,14 117:24 128:9,13,22 129:1,19 147:16,24 149:2 150:14,15,16,17 151:1,8 153:15,22,23,23 156:13 166:13 167:20 168:17 171:11 173:8,23
morning (8) 1:5 3:7 4:3 14:3 154:13,14 182:13 183:5
most (18) 20:6 25:18 26:18 33:11 35:22 40:5 43:18 46:18 57:24 58:9 69:17 82:13 84:9 105:4 143:8 149:7 171:21 178:13
motivated (1) 70:24
motivation (4) 49:19,21 70:19 72:3
mounts (1) 37:18
mouth (2) 140:25 141:14
move (6) 33:24 47:25 70:19,20,24 171:3
moved (1) 165:19
ms (292) 9:24 13:20 22:23 23:6,11 25:3,9,16 27:12 38:8 47:25 48:2,15,21,23 49:1,4,18 51:11 52:3,6,11,13,24 53:4,6,10,12,22,24 54:1,3,9,18,21,23 55:8,10,19,21 59:1,3,5,9,24 60:1,10,18,20,22,25 61:2,4,7,9,11,13,15,17,20,23,25 67:18,22,24 68:2,7,12,17,24 69:1,4,6,8,17 71:4,7,10,12,18,21,25 72:9,20,24 73:2,7,14 91:12,14,17,20,23 92:2,4,7,11,15,17,23 93:5,7,13 94:17 95:2,9,13,16,19 96:1,4,6,10,25 97:3,6,9,14,16,20 98:2,22 99:5,9,12,14,18,24 100:1,3 102:3,10,12 103:5 104:16,18,21,24 105:3,7,9,11,14,17,20 106:2,7,22 107:2,9,18 108:7,9,12,15,17,20 109:16,19,25 115:21,23,25 116:3,13,21 117:1,9,15,17,19,21 118:9,15,20,22,25 119:3,6,8,11,21,23,25 120:4,6,9,12,17,19,25 121:3,5,8,12,20,22,24 122:2 128:7,16,18,25 129:4,16 132:1,6,9,12 135:22 136:2 140:6,9,11,17,19 141:8,11,15,17,19,21,25 142:5,7,15,25 144:4 145:14,18,20,24 146:1,4,13 147:10,19 148:9,18 160:19,21 161:2,5,10,13,16,19 162:7,10,19,23,25 163:4 164:10 165:22 166:1,8,16,20,24 167:10,14,17,24 168:1,22 169:2,5,18,25 170:6,9,11,14 171:5,9,18 175:9,11,13 176:8,12,19 178:15,21 179:1,4,17 180:9 181:5,8,10
much (30) 2:9 5:6 10:14 23:3 25:2 26:23 52:16,16,16 53:18,18 57:21 58:12,15 60:7 61:18 72:4 92:11 109:19,19 132:15 133:11,12 141:21 152:5 163:14 171:10 173:9 174:7 182:1
muddled (1) 171:15
multicss (1) 25:24
multiple (3) 107:24,25 165:14
multiplicity (1) 64:6
must (15) 62:14 71:25 79:5 82:11,22 126:4 128:2 134:24 136:23 148:16,17,17,19,20,20

N

n181 (1) 58:5
n1813 (1) 60:5
n267 (3) 45:13 157:15 161:5
n268 (3) 46:8 155:8,15
n2681 (2) 47:12 156:6
n2682 (1) 47:2
n2684 (1) 46:13
n2686 (1) 155:11
n302 (1) 31:24
n30214 (1) 34:6
n3022 (1) 32:1
n3023 (1) 32:4
n3024 (1) 32:13
n3025 (1) 33:9
n3026 (1) 33:15
n3028 (1) 33:22
namely (4) 1:9 112:11 130:22 136:25
national (1) 146:9
natural (2) 155:19 164:8
nature (4) 42:13 105:21 131:12 177:7
necessarily (1) 86:11
necessary (6) 19:11 67:9 137:15 167:2 176:23 177:8
need (39) 3:13 8:25 10:4,10 12:16 13:1 14:14 16:10 23:3 24:25 25:1,3 36:14 41:7 42:21 56:5 59:6,7,10 70:21 75:15 76:15 77:19 80:3 110:4,5,12 115:13 143:19 155:14,18 159:6 166:1 177:14 178:10,15 179:14,16 181:18
needed (4) 54:12,14 173:12 175:25
needs (5) 12:13 17:8 32:7 91:2 114:9
negated (1) 153:8
negative (1) 31:18
neglected (1) 39:24
neither (1) 139:16
netratings (2) 35:14 36:3
neutral (1) 151:14
never (9) 51:6 85:17 116:10 119:17 142:12,23 158:3 161:13 172:2
nevertheless (1) 122:3
news (4) 2:22 158:20 161:19 181:6
next (6) 2:15 13:11 22:20 28:17 59:18 177:16
nextag (2) 66:7,12
nicklas (2) 39:16,22
nielsen (3) 35:14,21 36:3
nikon (2) 107:14,15
noble (2) 150:22 153:18
nominally (1) 100:17
nonabusive (1) 130:23
nonabusively (1) 129:6
noncompliance (2) 173:22 174:4
nonconfidential (1) 17:12
nondiscriminatory (1) 133:3
none (7) 32:17 33:3 40:17 41:13 79:19 84:25 171:9
nonetheless (1) 5:4
nonstarter (7) 51:9 173:18 174:17,19,20 175:7,7
nor (1) 139:16
normal (1) 118:23
notably (3) 82:20,21 127:5
note (6) 41:11 42:17 59:23 111:23 134:4 167:10
noted (2) 13:8 126:20
notes (3) 76:23 157:24 164:25
nothing (2) 91:5 112:25
notion (4) 67:13 75:22 88:3 123:9
notwithstanding (2) 8:11 10:2
november (4) 22:18 28:18 164:17 165:7
nowhere (2) 86:12 119:11
nudgedchanged (1) 78:18
nuke (2) 48:18 51:16
number (12) 9:9 20:18 52:8 54:23 66:2 73:10 78:3 80:5,7 166:17 167:19 175:1
numbers (1) 103:17

O

o1250 (1) 38:21
objecting (2) 128:12,13
objection (2) 2:13 3:9
objections (1) 171:25
objective (5) 97:24,25 98:8,9 175:18
objectives (2) 49:18 55:3
obligations (2) 10:24 11:15
obliged (2) 111:3 136:13
oblivion (2) 130:10 132:7
observations (3) 19:22 64:3,17
observed (2) 21:15 134:24
obstacle (1) 3:15
obtain (3) 32:6,10 71:16
obtaining (1) 61:18
obvious (4) 38:11 90:18 143:8 150:13
obviously (27) 2:8,25 3:5,11 4:3,13,25 8:10,18 10:6,8 12:23 14:5 16:10 17:21 20:8,14 66:17 85:18 87:22 91:14 108:24 119:16 149:12 170:3 173:9 176:8
occasionally (2) 169:8,8
october (1) 26:7
ofa (1) 85:25
offer (2) 69:5,6
offered (2) 82:23 112:9
offering (7) 29:5,9 31:11 59:13,25 108:17 152:1
offers (6) 82:3 100:20 101:2 162:20,23 163:1
office (4) 26:12 89:14,14 91:3
official (4) 1:11 3:17,20 4:1
offorms (1) 84:1
ofmanifestations (1) 84:1
often (3) 46:20 69:15 155:6
oh (8) 11:4 43:11 56:14 59:4 68:7 152:14 167:4 174:23
okay (10) 64:17 120:9 145:20 147:16 161:16 169:21,22 174:6,10 175:1
omission (1) 117:6
once (6) 10:18 11:7 40:11 46:23 71:19 88:15
onebox (18) 50:19 57:20 58:2,9,12,16 60:7 151:6,9,13,16 156:8 158:21 159:6 160:16,17 163:21 169:1
oneboxes (1) 169:7
onelimbed (1) 146:16
ones (1) 24:11
oneself (1) 139:18
online (4) 46:21 82:4,7 112:6
onwards (1) 110:22
open (6) 6:10 8:20 43:4 44:1 79:25 157:11
opening (11) 20:21,22 21:5,15 22:14 42:12 63:8 85:20 86:7 103:20 172:9
openings (1) 81:7
operate (1) 138:24
operated (1) 77:16
operates (2) 89:15 105:23
operation (3) 49:21 97:16 104:12
operators (1) 62:16
opportunity (13) 15:8,22 20:10 32:19 33:18 62:15 92:18 93:7 96:23 99:23 107:10 121:3 142:16
opportunitythreat (1) 32:14
oppose (1) 6:21
opposite (1) 74:13
option (6) 94:18 95:6,22,23 121:6 172:15
options (1) 171:11
oral (6) 17:7,7 18:21 63:8 70:17 81:6
orbitz (1) 33:1
order (12) 1:22,24 2:6,13,14 5:7 6:21 68:10 99:22 112:10,15 125:24
ordered (2) 38:16 93:11
ordering (1) 102:1
ordinary (1) 15:19
organic (23) 49:2 51:6 52:8,19 108:10 121:14,15 155:3 158:13 159:10 162:12,13,14,17 163:10,18,22 164:2 168:16,20,20 170:16 180:21
organically (4) 158:2 160:14 161:8 166:9
organisation (1) 83:18
organisations (5) 83:7,7,11,12,14
original (5) 35:7,16 36:4 49:4,8
originally (1) 3:18
others (3) 78:15 155:9 157:11
otherwise (2) 19:20 133:24
ought (1) 80:17
ours (1) 29:20
ourselves (2) 20:23 149:16
outcome (3) 120:18 122:1 133:13
outdated (1) 39:25
output (1) 68:17
outset (3) 1:9 10:7 91:11
over (30) 8:24 18:13 25:11 31:3 32:4 36:12 58:11,23 62:9 64:11 65:7,10 69:13 78:10 79:13,15,18 97:9,20 107:23 109:7 110:4 112:7 114:18 125:20 129:5 135:9 144:11,14 152:17
overall (2) 59:12 151:10
overlooked (1) 44:24
overnight (1) 182:12
overriding (1) 150:2
overspeaking (4) 99:18 117:15 118:9 179:15
overt (1) 51:19
overtake (1) 59:17
overwhelming (1) 41:19
overwhelmingly (1) 70:12
own (37) 7:23 22:11 26:18 27:15 28:11 44:19 45:18,22 46:2 47:20 51:20 53:1,16 54:5,5 57:2 62:8 69:10 71:1 84:13 96:6,7 103:10,15 114:16 116:7 118:17 139:3 148:3 157:21 164:18,22 165:9 168:20,21 169:6 170:7
owned (1) 36:7
owner (1) 30:19
owners (1) 39:8

P

pacman (3) 58:7,10 60:4
pages (52) 4:17,19 14:12,13 45:4 46:19 47:5,9,10,15,16 62:10,13 63:10,12 65:14,22 67:16 70:4,12 76:10,12,13,25 82:6,18 114:2,15 127:10 134:9 155:14,18 158:1,17,21,22 159:5,23,24 160:19,22,25 161:7,17 162:5,6,7,19,20 163:1 166:10 173:8
pageviews (1) 152:7
paid (2) 69:1 111:17
panda (15) 24:4 44:22 59:21 75:10,13,23 116:11 121:14 127:6,18,23 173:2 176:24 179:4,22
pandacoati (2) 42:14 44:12
panel (1) 143:15
paragraph (50) 5:23 28:14 35:3 40:25 43:18 45:9 47:13 62:5,12 63:1 73:19 74:5 75:6,14 76:7,22,25 77:8,19 79:17,17 82:25 83:4 84:2,14 91:21 103:17 111:23 113:19 114:19 124:11 125:21 126:20 127:16 134:4,15,22,23 135:10,24 136:15 138:17 144:10,15,17,21 156:19 164:24 165:5 182:7
paragraphs (15) 37:4 41:10,24,25 43:9 67:3 74:16 76:19 77:11 79:11 84:5 124:12 138:15 144:22 145:2
parameters (4) 97:14,15 98:4,9
pardon (1) 12:12
part (35) 6:1 22:4 36:7,7 37:11 38:3 40:2 42:23 43:17,20,23 50:1,5,6 51:19 57:7 62:19 78:12 80:25 82:22 83:25 84:19 86:7 90:23,25 112:24 123:18 125:3 129:11 134:17 136:15 143:20 155:4 158:11 174:14
partial (1) 126:6
partially (1) 75:11
participate (1) 111:16
particular (19) 8:22 11:22 14:11 20:11 35:7 40:15 43:12 44:10 65:3 81:14 87:20 88:12 89:10 90:11 109:9,10 126:10 137:10 182:11
particularised (1) 41:6
particularly (2) 63:14 141:4
parties (7) 1:17 7:12 13:21 17:17 79:16,20 180:23
partly (2) 11:17 127:11
partners (1) 78:4
parts (4) 19:21 83:7,14 86:17
party (2) 11:14 32:8
pass (1) 21:12
passage (1) 128:10
passages (1) 117:22
passing (1) 172:8
past (1) 180:14
patterns (1) 78:22
pause (19) 18:19 74:1 78:9 91:12 93:17 114:21 115:11,15 123:14,17 124:15 125:19 135:12 138:12 143:25 144:12,19,23 145:3
pay (3) 38:16 71:21 106:21
paying (2) 102:5 107:11
pending (1) 3:14
people (15) 15:15 18:5 19:12 21:10 26:17 27:16 54:12 68:10 69:14 106:20 132:23 153:3 170:15 171:6 182:3
per (6) 31:20 128:13 145:18 151:14,15 153:13
perceive (2) 52:18 173:5
perceived (2) 22:4 27:14
perceives (1) 170:23
percentages (2) 182:9,16
perfect (1) 120:18
perfectly (2) 16:6 51:22
performed (1) 101:13
perhaps (27) 13:10 23:7 65:8 67:5 68:2 73:20,22 78:7 80:15,18 81:8,13 87:5,5 94:12 109:17 114:19 115:9 124:12 135:10 138:10 140:11 142:21 144:17 147:8 149:2 161:23
period (25) 9:9,14 19:25 20:2 22:22 25:7,12 37:1 39:17 41:21,22 42:1,6,18 69:14,19 80:24 85:4,5,9,11 88:19 113:7 121:19 129:6
periods (1) 9:8
perish (2) 38:8,9
permanent (1) 140:15
permissible (2) 20:6 92:20
permits (1) 89:17
perspective (10) 64:24 79:23 88:24 91:23 97:6,11 98:23 157:25 161:6 167:14
persuade (1) 143:6
phrased (1) 83:17
pichai (1) 174:20
pick (2) 144:6 152:12
picked (1) 104:7
pickford (37) 2:2,19,22,25 3:5 4:2,12,15,18,21 5:15,19,25 6:5,9,12,15,18,21 8:14 10:5 11:2,11 12:3,23 13:14,16,23 14:21,24 15:6 19:7 41:15 87:3 90:12 172:6 182:22
picking (1) 57:17
picture (4) 53:2,22 164:15 165:4
picturebased (1) 163:8
pictures (3) 104:25 163:8,12
pieces (2) 132:9,13

pla (5) 72:5 94:7,11 96:14 101:20
place (7) 31:10 45:2 74:10 114:5 115:6 146:25 152:2
placed (1) 107:13
placing (3) 111:17 112:13 132:4
plan (2) 26:10 30:25
plank (2) 139:22 148:25
plans (1) 156:7
plas (11) 69:1 70:16,19,20,24 72:1 100:12 101:13 105:9,24 107:13
platforms (11) 37:7 77:25 79:8,22 80:11 82:4,7 126:11,13,25 127:2
plausible (9) 137:22 139:16 168:10,17,24 173:7 176:14,15 178:13
plausibly (1) 129:5
play (3) 40:15 128:8 156:20
playbook (1) 40:2
players (5) 22:10 29:8,10 34:20 78:18
pleaded (5) 41:5,13,14 172:5,12
pleading (1) 41:6
please (15) 30:11 34:6 35:4 37:3 80:6 102:11 112:7 113:24 115:9 134:22 135:9 136:16 138:9 152:13 155:12
ploughs (1) 156:16
plus (1) 32:25
pm (7) 56:19 87:8,10,12 154:24 155:1 183:6
points (26) 1:21 6:24 7:2,4 13:7 15:5,11 20:12,13 21:2,2,14 24:1 25:23 37:21 38:11 42:11 74:20,20,22 80:14,17 87:14 113:2 167:3 175:20
policy (1) 155:4
polished (1) 39:20
poor (8) 21:22 23:14 24:10 30:2 41:20,21 43:14 64:1
poorly (2) 131:13,17
popped (1) 169:7
popping (1) 163:22
popular (1) 24:18
popularity (1) 126:11
populate (1) 96:8
populates (1) 96:4
population (1) 78:12
port (1) 52:19
portray (2) 36:22 86:4
position (12) 5:3,4 12:7 28:15 49:10 59:16 62:7 63:9 134:8 139:18 149:18,23
positioned (1) 57:2
positioning (2) 57:9 116:5
possibility (2) 78:12 177:24
possible (10) 8:20 15:19 18:5 40:11 73:14 126:17 166:22 167:9 170:19,19
possibly (1) 9:12
post (1) 9:14
postdecision (7) 11:25 19:25 25:7 85:3,11 88:19 121:18
potential (15) 9:15 114:7 123:11,19 124:1,5,7 125:11,25 129:20 130:11 135:18 139:8 141:5 174:12
potentially (6) 13:11 15:17 40:18 70:8 135:22 139:25
pour (1) 173:10
practical (4) 10:12 143:3 176:21 182:3
practice (4) 100:17 113:20 125:25 126:5
practices (19) 38:4 41:14 126:21 127:8,21,21 128:1 134:20,21 135:7 136:21,24 137:8,10,12,14 139:8 140:13,14
pre2004 (1) 163:20
preabuse (2) 42:1,6
precise (3) 37:23 103:17 110:15
precisely (6) 110:3 112:20 120:1 137:19 146:15 148:7
predecision (1) 42:18
predicament (1) 15:2
prefer (2) 63:9 78:16
preference (2) 63:16 78:13
preferences (2) 63:8 126:10
preferred (1) 126:15
prefers (1) 19:20
preisvergleich (1) 31:7
prejudice (2) 5:8 13:6
preliminary (3) 77:18 81:2 84:13
premise (5) 86:9,10 115:16,17 147:23
prepared (1) 170:14
presence (5) 35:16 36:4 58:21 59:13 180:24
present (9) 8:2 31:4 37:9 45:15 62:25 94:1 102:22 145:6 146:15
presentation (5) 28:20 31:25 65:13 91:8 165:23
presented (2) 37:7 127:24
presenting (1) 8:1
presents (1) 7:22
press (3) 5:21 7:19 16:14
presumably (7) 2:17 4:16 31:19 103:6 159:12,19 162:1
pretty (4) 28:25 32:16 92:11 175:6
previous (2) 35:5 60:3
previously (2) 81:5 111:13
price (6) 33:6 51:4 54:14 66:15 97:3 102:4
pricegrabber (1) 47:14
priceline (1) 33:1
pricerunner (6) 38:15 39:13,16,18,20 89:19
pricerunners (1) 39:23
prices (6) 82:2 89:6,17 90:21 104:25 105:15
primarily (1) 49:1
primary (1) 143:6
principal (2) 157:25 161:6
principally (1) 156:24
principle (2) 99:10 140:7
prior (4) 67:21 74:7 80:24 85:12
priorities (1) 149:20
priority (1) 150:5
prism (1) 150:10
privacy (1) 99:9
privileged (4) 8:15 9:2 13:9 17:1
probabilities (1) 110:17
probably (9) 10:24 13:1 17:13 38:23 57:25 58:3 86:1 111:8 165:18
problem (12) 50:13,16 74:6 117:21 120:17 133:4,5 148:18 158:3 161:13 170:16 171:5
problems (2) 19:11 162:8
procedure (1) 172:13
proceed (2) 19:16 129:19
proceeded (1) 2:11
proceedings (15) 1:3,9,10,10,12,14,23 9:22 38:18 40:10 85:1 87:11 89:19 137:20 146:5
proceeds (1) 26:24
process (3) 88:2 100:19 102:1
processes (2) 103:22,25
processing (1) 4:6
produces (1) 70:14
producing (1) 1:19
product (122) 28:22 29:5,15,21 31:5,10 32:10,11 33:25 34:3 47:22 54:13 56:22 57:1,20,25 58:1,17,22,22 59:25 60:23 61:18 62:20 63:11,17,18 66:24 69:4,4 79:21 80:10,23 81:18 82:14,15,16,19,20,21,21 83:25 84:10,11,11,17 86:18 88:16 92:12 100:20 103:24 111:17 114:25 115:5 116:5 127:24 150:24 151:6,8,9,11,11,12,14,15,16,18,20 152:4,6,20 153:5 156:4,10,12,18,24 157:2,10 158:1,12,17,18,21 159:2,5,23,24 160:9,19,21,22,25 161:1,7,10,17 162:5,6,7,19,20 163:1 164:3,13,15 165:2,3,8,18 166:10 167:5 168:5,11,21 169:9,23 173:20 175:18,24
productrelated (1) 163:22
products (26) 29:23 65:6 66:1,11 82:2 89:6,17 90:21 93:13,15 94:15 95:6 96:11 98:14 101:18 102:3 105:18 106:15,25 107:10 112:6,13,15 162:23,24 163:12
productservice (1) 32:7
producty (2) 65:5 159:15
professional (1) 41:7
professor (21) 78:11 83:1,3,9,16 100:6,9,14 101:13,16,20 102:11,13,17,19 163:6,10,14 168:5,8,10
profitable (2) 39:21 152:19
progress (1) 154:11
progressed (1) 165:13
projects (1) 47:6
prominently (2) 107:10 108:9
promote (2) 68:5 175:16
promotion (18) 43:23 47:22 48:9 51:8 60:15 111:4 113:12 115:18 116:16 125:1,4,7 128:4,25 130:5 131:8 136:25 138:23
promotions (3) 20:4 44:9 114:25
promptly (1) 3:1
prone (11) 44:12,21 45:7,9 47:19,20 48:3 49:7,15 75:2 116:8
pronewould (1) 45:8
proper (3) 124:23,24 172:10
properly (4) 39:20 41:5 138:5 140:3
property (2) 64:23 65:15
proportion (1) 75:21
proposal (3) 13:23 14:16 17:2
proposals (5) 7:25 8:4,7 13:17 16:15
propose (3) 14:3,6 28:6
proposed (4) 7:22 18:11 37:6 66:18
proposing (5) 10:11 48:11 71:15 154:17 171:21
proposition (1) 45:12
prospectively (1) 97:18
protected (1) 3:11
protection (2) 5:16 11:18
protections (1) 4:25
proved (1) 125:10
provide (9) 3:21 6:22 10:22 12:14 82:5,11 84:6 92:19 99:2
provided (6) 1:25 4:1,2 21:6 98:11 101:5
provider (2) 93:5 96:18
provides (2) 61:9 103:19
providing (3) 81:10 91:3 99:6
provision (6) 5:8 9:5 11:22 13:6 16:12 91:4
provocative (1) 65:14
proxy (1) 66:23
public (1) 150:18
publish (1) 17:22
pulled (1) 170:11
punishable (1) 1:15
purchase (1) 70:14
purely (4) 25:9 43:8 74:24 141:9
purpose (4) 35:12 100:1 132:24 179:20
purposes (3) 31:4 45:15 139:6
pursue (1) 42:18
pursued (1) 42:19
push (3) 118:17 150:23 168:4
pushed (3) 118:13,13 130:10
pushing (1) 150:22
puts (1) 84:2
putting (5) 15:5 55:21 74:10 100:20,22
pyramid (1) 103:21

Q

qa (1) 26:10
qualifications (1) 3:23
quality (33) 8:6 21:22 22:11 23:1,14,15,16 24:11 26:18 35:7 36:11,19,20 38:13 41:20,21 43:8,14 46:22 48:18 49:15 52:7 70:8 74:25 75:7 97:3 102:5 109:6 126:14 127:2,3 156:21,23
quandary (1) 3:3
quantum (1) 40:6
queries (14) 54:13 65:5 93:15 151:8,14,15,18,20,25 152:5 166:8 172:21 173:20,20
query (9) 94:16 96:8 105:5,21 106:14,18 151:11 159:2,2
question (76) 2:15 7:6 11:19 13:13,20 14:1 20:1,5 25:10 35:5,12 47:14 55:8 57:18,24 58:4,8,12 59:6 60:3,4,12 63:22 64:12,17,21 65:12 66:5 79:9 83:16,20 87:15 88:18 90:24 91:2 92:4 96:25 98:6 103:5 104:16 106:4 109:2 111:2 113:4 122:8,19,24,25 127:11 129:4,8,9,10 132:22 134:3 141:9 149:3 152:17 153:2,10 157:5 159:10,19 160:1 162:1 166:24 173:17,24 174:17,20 175:1 176:9 177:13 178:5,8 182:15
questionable (1) 13:10
questions (3) 130:7,25 169:13
quickly (3) 39:9 56:23 144:11
quite (20) 5:22 9:25 18:23 26:9 34:14 37:18 38:20 42:21 78:20 103:16 113:6,13 145:1 154:7 155:6 167:23,25 169:8 171:1 182:17
quote (5) 39:11 65:11 85:20 138:14 153:7
quotes (1) 144:15
quoting (3) 63:20 144:21,21

R

racing (1) 61:4
radically (1) 131:7
raff (1) 2:9
raised (1) 114:10
raises (1) 162:7
raison (1) 70:16
ran (3) 44:3 133:7 155:5
random (1) 26:17
range (4) 104:25 105:17 108:20 136:10
rank (18) 45:3 98:12,24 103:3 155:4 156:3 157:22 158:2,4,6,17 161:8,14,17 164:4 169:14 175:24,24
ranked (6) 46:12 116:24 155:7 158:22 161:21 166:9
ranking (18) 45:5,18,20 88:2 91:7 93:10,20 94:14 95:6 100:23,24 101:4 102:1 104:1 126:19,25 131:11 147:22
rankings (2) 126:16 131:16
ranks (1) 93:25
rapidly (2) 31:15 143:10
rate (2) 34:14,17
raters (2) 28:11 66:22
rather (22) 16:18 17:25 18:11,12 20:11 28:8 37:5 42:2,25 47:12 51:14 69:15 70:2 71:13 84:22 94:19 126:5 139:17 160:13 163:19 164:9 171:15
rating (1) 98:19
ratio (1) 146:7
rationale (1) 57:9
rationalise (1) 148:23
rationalises (1) 142:10
re (1) 63:23
reach (2) 80:1 133:19
reached (2) 48:14 77:15
read (23) 4:18 6:13 10:6,9 20:8,10,10,18 36:15 42:3 51:12 73:21,25 78:8 114:20 115:10,13 123:16 124:12 135:10 136:9 138:10 144:18
reading (4) 41:2 119:15 125:17 141:2
real (8) 69:23 91:6 109:4 119:14,17,18 149:21 164:13
realistic (6) 20:6 137:22 139:17 142:12,23 149:7
realistically (2) 24:2 149:22
reality (2) 54:11 120:20
really (41) 10:20 13:18,20 15:25 18:4,15 24:14,22,23 25:17 26:1 37:18 38:5 40:7 43:23 48:6 49:13,24 51:10 52:22 54:18 55:10 59:21 74:10 80:17 86:9 88:19 100:23,24 101:11 109:12 110:1 111:9 112:20 113:6 147:14 157:4 167:2 168:10 171:10,15
reason (13) 24:18 44:12 52:24 71:25 75:3 111:1 116:22 120:1 153:19 168:15 174:14 176:18 182:24
reasonable (1) 98:9
reasonably (1) 110:13
reasoning (13) 115:25 117:9 118:2 120:14 122:1 124:8 125:11 131:22 135:17 136:7,15 139:22 140:1
reasons (7) 38:11 74:15 80:5 95:24 122:4 142:14 149:14
rebut (2) 23:3 25:3
recall (15) 20:21 27:21 38:15 46:10,11 64:14,19 66:19 70:18,21 91:10 111:14 150:21 152:10 153:18
receive (2) 15:13 153:14
received (2) 40:4,12
recently (3) 3:16 82:14 84:9
recital (21) 44:14,18,23,24 47:18 56:25 75:19 76:2 79:4,25 80:6,20 81:6,22,25 87:20 111:19 114:11 123:21 134:24 157:19
recitals (9) 44:15,15 77:22 78:7 80:4 82:10 84:5 115:10,21
reckoned (1) 31:21
recognise (1) 171:23
recognised (2) 40:19 70:7
recognises (1) 43:2
recognition (1) 47:17
reconcile (1) 182:17
reconfigured (1) 8:8
record (5) 16:2,4 23:5 25:2 26:2
recording (1) 1:13
redacted (2) 15:19,21
redirected (1) 139:2
reducing (1) 151:8
refer (3) 8:20 42:2 84:19
reference (16) 2:9 16:8 27:9 29:7 31:5 32:23 33:23 41:8 74:3 79:10 90:10,11 154:21 158:6,9,15
references (2) 28:13 89:20
referred (2) 28:22 151:5
referring (5) 64:15 150:22 160:21,24,24
refers (4) 30:13,20 136:20 137:23
reflect (1) 66:14
reflected (1) 65:15
reflecting (2) 106:20 153:2
reflections (1) 66:6
regard (5) 34:23 35:22 50:1 62:6 126:13
regarded (3) 22:2 32:18 125:22
regarding (2) 26:10 79:6
regardless (1) 90:17
regards (4) 9:14 17:12 85:13 88:7
regime (3) 7:1,14 8:12
regularly (2) 22:8 172:20
regulator (4) 108:25 109:1,10 110:23
reinforcement (1) 173:12
reject (1) 123:7
rejected (10) 44:4 77:14 111:13,18 145:10 146:12,13,22,23 147:18
rejecting (1) 123:9
rejects (2) 115:16 140:1
relatable (1) 109:21
relate (1) 42:1
related (6) 11:15 42:13,14 63:8 143:13 161:1
relates (4) 15:24 25:7 41:21 67:25
relating (1) 134:25
relation (10) 8:17,23 9:7,18 17:3 40:6 73:8,9 85:6 176:12
relationship (1) 78:5
relative (1) 35:11
relatively (4) 30:1 39:25 73:11 74:25
release (3) 5:21 7:19 16:14
relevance (4) 5:10 13:11 48:2 102:5
relevant (14) 8:11 11:19 12:6 13:3 15:6 24:23,24 25:5,22 37:8 40:18 80:10 126:2 143:20
relevantly (1) 7:18
reliable (2) 28:25 35:22
relied (1) 79:2
relies (4) 86:9 87:20 114:13,17
relitigate (2) 77:5,6
rely (1) 77:10
relying (1) 79:11
remain (1) 71:8
remedy (17) 6:3 13:10,12 74:10 88:20 94:6 100:7,11 101:16 110:23 111:10 112:21 147:7,8,13 149:13 172:7
remember (7) 57:14 58:7 103:20 109:21 173:13 174:22,25
remind (9) 26:5 56:23 57:15 66:13 67:18 111:22 151:3 155:9,11
reminded (1) 152:14
reminder (1) 32:2
remote (1) 86:5
removal (4) 89:9 113:10 134:21 137:14
remove (6) 47:6 117:23 125:7 128:2 169:16,17
removed (4) 118:1 120:21 131:19 138:3
removes (2) 122:13 137:9
removing (5) 24:4 124:24,25,25 143:7
renames (1) 156:18
rendering (1) 77:1
renewed (1) 33:25
rented (2) 95:16,17
reopen (1) 78:25
reorganised (1) 8:8
repeat (1) 1:8
repeated (1) 47:2
replies (3) 14:10 65:20 66:9
reply (4) 17:4 18:12,25 127:15
replying (2) 161:3,16
report (1) 164:22
represent (1) 58:20
representation (2) 28:25 34:11
representatives (1) 2:17
represented (1) 62:10
request (1) 5:12
requesting (1) 16:12
required (5) 12:20 17:9 134:21 136:12 160:10
requires (2) 112:12 124:22
rerun (1) 133:6
rerunning (1) 137:5
reserved (1) 110:4
resist (1) 9:5
respect (4) 43:25 127:20 172:10,12
respectfully (3) 28:7 84:17,22
respective (1) 126:24
respectively (1) 37:15
respond (7) 6:9 9:6 13:19 19:5 20:12 21:3 106:18
responded (2) 3:7 27:11
respondents (1) 37:7
response (13) 6:12 12:24 14:13 28:2 35:1 37:2 46:16 94:15 106:13,17 125:14,18 180:16
rest (3) 8:6 13:4 85:16
restricted (1) 63:4
restricting (1) 62:19
restructured (1) 8:8
result (8) 47:20 49:5,6 66:3 95:10 109:6 132:24 164:18
results (94) 26:25 46:25 48:19 49:2 52:9 54:6 57:2,4,5,6,6 62:10 64:22 65:4,5 66:24 67:2,7 76:10,11,13,25 82:15,20 84:10 87:19,22,23,25,25 88:1,4,9,9,20 91:4 92:12 95:10 96:6,7 102:23 105:7 107:7 111:18 114:2,15 117:2,2 121:15,16 126:19 127:10,22,24 134:9 135:3 155:3,20 156:4 158:13,19,22 159:4,11,11,15,21 160:3,15,16 162:3,12,13,14 163:11,18,23 164:2,4,15 165:3,9 166:21 168:17,20,20 169:6 170:16 172:19 178:3 180:21,24,25 181:1

retail (5) 22:8 29:24 33:12 34:11,13
returning (1) 26:21
revenue (14) 29:25 33:18 34:13 70:6 71:3 150:17 151:1,7,10,13,14,15,24 175:13
review (1) 35:15
reviewing (1) 35:10
rfi (2) 35:2 36:24
rfis (1) 36:18
rich (1) 159:11
rid (2) 142:13 178:24
righthand (1) 89:12
rightly (2) 52:18 145:10
ring (4) 3:13 4:4 15:14,20
risk (2) 174:4,11
rival (6) 72:19 98:11 101:7 130:9 159:20 162:2
rivers (1) 41:9
road (1) 73:7
role (5) 74:9 101:7 111:11,12 112:13
room (3) 10:7 77:9 88:1
rose (291) 9:24 13:20 22:23 23:6,11 25:3,9,16 38:8 47:25 48:2,15,21,23 49:1,4,18 51:11 52:3,6,11,13,24 53:4,6,10,12,22,24 54:1,3,9,18,21,23 55:8,10,19,21 59:1,3,5,9,24 60:1,10,18,20,22,25 61:2,4,7,9,11,13,15,17,20,23,25 67:18,22,24 68:2,7,12,17,24 69:1,4,6,8,17 71:4,7,10,12,18,21,25 72:9,20,24 73:2,7,14 91:12,14,17,20,23 92:2,4,7,11,15,17,23 93:5,7,13 94:17 95:2,9,13,16,19 96:1,4,6,10,25 97:3,6,9,14,16,20 98:2,22 99:5,9,12,14,18,24 100:1,3 102:3,10,12 103:5 104:16,18,21,24 105:3,7,9,11,14,17,20 106:2,7,22 107:2,9,18 108:7,9,12,15,17,20 109:16,19,25 115:21,23,25 116:3,13,21 117:1,9,15,17,19,21 118:9,15,20,22,25 119:3,6,8,11,21,23,25 120:4,6,9,12,17,19,25 121:3,5,8,12,20,22,24 122:2 128:7,16,18,25 129:4,16 132:1,6,9,12 135:22 136:2 140:6,9,11,17,19 141:8,11,15,17,19,21,25 142:5,7,15,25 144:4 145:14,18,20,24 146:1,4,13 147:10,19 148:9,18 160:19,21 161:2,5,10,13,16,19 162:7,10,19,23,25 163:4 164:10 165:22 166:1,8,16,20,24 167:10,14,17,24 168:1,22 169:2,5,18,25 170:6,9,11,14 171:5,9,18 175:9,11,13 176:8,12,19 178:15,21 179:1,4,17 180:9 181:5,8,10
round (3) 14:10 17:4 19:3
route (3) 70:14 120:15 133:20
rpm (1) 152:22
rukhadze (1) 148:14
rules (1) 11:18
ruling (2) 85:6,13
run (5) 145:11 146:8,10,19,21
running (1) 133:24
runs (1) 129:17
rupert (1) 27:10

S

sainsburys (1) 144:16
sake (2) 150:14 166:4
same (30) 12:19 37:12 42:24 43:3 45:5 50:15,23 54:5 67:6 68:8 79:2,10 85:4,10 89:6,7,15 90:19 99:20 103:25 116:9 120:16 133:20 136:13 137:19 145:13 147:1 171:7 175:15 176:20
sandbox (1) 99:10
satellite (1) 86:5
satisfactory (2) 163:23,24
satisfied (2) 12:13 99:5
save (1) 177:6
saw (8) 46:6 64:16 66:5 68:20 150:9 163:24 175:2,17
saying (33) 3:12 6:15,22 13:5 36:10 51:18 58:14 64:6 94:20 108:12 111:19 117:11,18 119:14 128:15,20 135:19,21 140:11,23 141:4,6 146:8 147:15 153:10 164:8 169:20 172:18 174:2,23 175:13 177:2 179:8
scalable (1) 33:20
scale (1) 153:20
scenario (23) 54:15 93:1 106:5 129:8 134:19 136:23 137:9,11,23 159:19 160:12,14 162:1 164:10,11 165:16,19,20,22,23 168:2 170:17 180:16
scenarios (4) 51:12 172:1 181:13,20
scraped (1) 116:23
scraping (3) 102:21,22,23
screen (1) 38:24
se (2) 128:13 145:18
search (100) 7:23 22:6,6 26:18 27:18 29:5,15,21 31:5,10 32:6,15 34:3 45:4 46:22,25 47:7 48:19 49:5,5 52:7 57:3,4,6,11,20,25 58:1,17,22 59:25 61:18 62:8,20 65:4,5 72:16,16 76:9,11,11,13 78:15 79:21 82:1,2,19 87:18,19,19 88:4,9,11,13,18 95:9,10 101:17,21,23,24,24 102:15,23,24 103:24 108:10 114:1,2,15 117:1,2 150:3,15 151:9,11,12,16,25 152:6 156:9,18,25 158:12,19,22 159:21 160:15,21,22,25 161:11 162:3,17 168:6 169:23 172:19 173:3 175:24 181:5
searchers (2) 29:23 30:1
searches (2) 126:12 150:24
searching (2) 104:8 107:14
searchs (1) 164:4
second (19) 4:24 21:19 22:17 33:12 34:2 35:1,2 45:2 47:13 49:11 57:1 79:19 80:21 91:12 116:17 134:17 155:15 175:20 182:11
secondly (7) 2:3 7:19 11:12 21:1 44:18 121:12 170:2
section (5) 113:23 123:12 124:13 134:25 135:5
sector (1) 34:18
see (169) 7:10,19 9:15,24 10:18 12:1 15:7 16:7,7,9 18:14 19:7 20:24 25:5 26:1,15 28:13 29:3,19 30:11,12,13,23 31:5,9,13,15,16,20,24 32:1,4,9,13,22 33:12,13,13,14,15,23 34:2,6,10,12,13,17 35:3 36:6,12 37:3 39:3 43:5,8 45:9 46:6,13 47:11,22 50:5 51:4 55:13 56:10 57:8,17 58:6 60:6 63:17,17,20 65:6,8,8 66:11 67:2 68:7 73:22 74:2,3 75:13,16 76:1,6,15,16 77:22 78:2,6 79:5,10,13,18 80:8 81:23 89:11,20 106:11,25 111:23 113:19,22,24,25 114:11,18 115:6 118:6 120:3 123:7,8,13,21 124:11 125:8,14,15,23 126:7 131:20,20 134:4,5,15,23,23 135:25 136:16,17,17,20 137:21 138:7,17 144:21 145:1 148:9 150:6 151:2,2,5,23,24 152:16,16,17,18,20,25 155:7,13 156:18 157:16,22 158:14,25 163:3 164:25 165:4,6,11 168:3,3,4 170:25 171:15 172:15 173:16 175:25 178:7
seek (8) 5:7 20:12 33:25 43:22 133:6 157:4 176:23 177:9
seeking (6) 5:5 6:21 9:5 36:22 114:23 143:5
seem (4) 8:4,10 169:10 173:24
seemed (4) 24:2 32:17 81:17 174:18
seems (9) 1:23 7:17 35:22 69:11 122:24 130:25 162:16,25 164:8
seen (23) 2:18 4:13 5:12,21 10:11,20 44:13 54:25 64:12 69:21 70:1 72:18,20,21 74:11 86:16 89:18 124:18 150:18 154:19 157:1 179:2 181:15
sees (16) 30:23 56:25 62:5,24 73:18 83:24 91:5 127:12 137:6 138:7 144:7,14 152:21 155:25 157:13 164:24
segment (1) 34:21
segue (1) 149:1
select (1) 178:2
selection (3) 32:8 63:17 98:14
selfcritical (1) 40:14
selfpreference (2) 98:1 99:19
selfpreferenced (1) 132:14
selfpreferencing (16) 11:24 50:7 53:1,20 60:16 71:10 85:10 119:12 129:21 130:1,4,19,24 132:3 138:25 157:2
selfservice (1) 101:11
selfstanding (1) 131:15
sell (1) 107:14
seller (2) 32:12 112:14
sellers (4) 32:8 82:4,7 112:6
sending (2) 64:22,24
sends (2) 58:12 60:7
senior (2) 28:23 29:2
sense (18) 12:25 24:25 60:20 68:19 90:20 102:19 117:17,21 118:15,16 119:21,23 120:6,18 121:24 122:3 130:24 152:10
sensible (1) 183:1
sensitive (1) 3:18
sent (3) 1:22 46:17 66:10
sentence (1) 182:11
sentences (1) 182:10
separate (10) 42:20 72:22,24 77:16 78:17,22 100:1 102:18 103:3 130:12
september (11) 11:1,20 14:11 18:4,9,16,24 19:4 22:16 26:13 164:23
series (5) 28:22 46:9 104:21 105:24 164:15
serious (5) 21:19 22:3,25 90:24 169:13
seriously (3) 22:3,17 89:16
serp (15) 12:15 54:25 61:15 72:1 92:9,12 97:10 99:4 107:11,13 130:9 156:7 157:7 180:18,21
served (3) 3:17 107:24,25
service (44) 8:2 12:15 26:19,20 35:6 39:23 44:19 45:3 54:15 57:3,13 61:7,24 62:9 82:23 83:5 84:8,16 85:19 87:22,24,25 88:5,11,14,18 89:2 91:3,4,20 101:5,22 103:4 104:3 106:11 112:14,18 116:7 117:12 118:17 127:2,17 134:11 139:3
services (41) 7:23,23 12:12 37:8 44:21 45:6,19 62:8,14,20 72:19 76:9 77:25 79:23 80:10 81:11,24 82:1 83:6,11,13,19,23 87:19 95:12 99:3,4 111:24 112:10,17 114:4 116:7 123:24 126:14,15 127:1,3,10 134:10 135:4 138:2
sessions (2) 64:2,13
set (7) 23:5 25:1 26:2 97:22 103:2 134:25 168:11
setting (4) 18:13 98:4,8 149:4
settlement (1) 1:22
seven (1) 163:8
several (4) 44:20 82:3,13 84:8
severed (1) 139:6
shall (1) 2:7
share (3) 61:18 168:18 170:7
sharing (1) 168:19
shift (1) 78:21
shifting (1) 126:10
shopping (139) 6:2 7:10,24 8:2,23 27:18 30:21 34:23 35:12,13,23 36:2 40:20 44:19,21 45:3,6,18 50:22 51:5 52:14 53:8 54:14,24 55:5 57:3,13,22 58:24 59:13 62:9,14 64:1,23 72:19 73:4,10 76:9,14 77:24 78:14 79:22 80:10,23 81:11,24 82:14,16,19,21,23 83:5,6,19,23,25 84:8,10,12,16 85:18,21,25 86:18 87:23 88:4,16 89:5,9 90:19 91:20,24 95:11 99:24 104:3 105:11 106:10 111:16,18,24,25 112:10,11,14,16,16,18 114:4,25 115:5 116:6,7 117:12 120:23 123:24 126:12,15,25 127:3,10,17 134:10,11 135:4 138:2 139:3 150:3,12,15 152:3,5,6 153:12,23,24 157:21 158:16,22 159:4,7,20 160:5,13,15 161:20 162:2 166:18 167:12,19 169:6 170:2,24 171:4 172:17,21,21,24 175:11,16
shoppinglooking (1) 159:15
shoppings (1) 30:18
shoppingtype (1) 166:8
short (8) 14:9 18:14 56:18 80:15 87:9 148:22,24 154:25
shortly (3) 22:16 38:17 171:21
shot (1) 42:16
should (33) 2:4 14:22 15:12 20:15 38:24 40:24 41:18 43:3 56:3 66:6 73:21 74:21 80:22 87:13,13,16 107:15 111:19 141:7 143:10 146:16,25 149:12,13 152:14 154:12 158:12,22 176:12 178:12,16 179:7 180:15
shouldnt (1) 158:18
show (36) 22:2,14 27:1 34:24 37:11 38:20 44:25 45:13 55:13 56:21 59:20 60:5,16 62:3 69:9,10,12 74:13 75:25 81:22 94:15 107:2,3,7 114:8 124:19 134:2 143:10,16 158:23 164:19 165:12,12 167:2 169:16 173:15
showed (7) 27:24 28:10 138:1 141:5 155:10 157:19 165:1
showing (7) 66:15,22 76:4 117:24 124:20 168:19 172:23
shown (7) 29:1 42:4 117:22 124:22 151:16 156:4 180:12
shows (8) 49:12 65:25 70:11,23 107:5 125:6 142:21 167:7
side (6) 14:17 22:1 79:7,7 89:12 120:25
significance (2) 85:24 91:6
significant (14) 8:5 11:12 12:20 57:7 76:5,21 97:18 118:22 130:3,6 132:12 133:18 140:14 156:21
significantly (2) 26:9 163:6
similar (4) 12:12,15 27:11 46:15
similarly (4) 19:7 52:7 91:25 98:20
simple (2) 109:16,17
simultaneous (3) 14:9 50:4 102:9
simultaneously (1) 86:20
since (6) 29:1 57:1 62:6,12 126:23 137:11
single (5) 61:24 118:12 150:1 160:2 171:4
sir (3) 8:14 12:3 143:21
sit (7) 154:4,5 180:14 181:21,24 183:1,4
site (9) 33:7 35:21 52:14 54:13,15 71:13 77:12 78:14 157:21
sites (23) 29:12 30:5,8 31:14 34:24 35:4,12,15,16,17,23,24,24 36:5 40:22 49:8 57:22 58:24 66:7 76:14 152:8 159:20 162:2
sitting (1) 1:7
situation (14) 48:16 55:4 67:1 92:8 99:5 133:14 136:23 137:12,16 140:19 146:4 148:3 170:9 180:25
six (3) 11:2,4 163:7
skewed (1) 74:18
skip (1) 125:20
skyscanner (1) 32:25
slavishly (1) 20:8
sleight (2) 116:13 117:8
slide (1) 65:13
slightly (4) 10:8 67:24 83:19 147:16
small (1) 66:2
smaller (3) 52:16 132:15 173:9
smear (1) 38:13
smith (22) 4:8 78:11 83:1,3,9,16 100:6,9,14 101:13,16,20 102:11,13,17,19 163:6,10,14 168:5,8,10
sniff (1) 27:2
software (3) 93:24 101:25 103:2
solely (1) 127:1
solitary (1) 74:3
somebody (2) 169:14,21
somebodys (1) 141:25
somehow (8) 34:19 55:3,16 70:25 85:2,3,5 158:5
someone (3) 26:14 107:14 156:11
something (10) 15:2 38:20 68:11 78:14 94:19,25 105:1 140:25 158:15 166:1
sometimes (3) 83:9,16 173:3
somewhat (5) 24:22 84:23 109:6 164:5 169:7
somewhere (2) 90:8,16
sophistication (1) 160:11
sort (14) 3:8,8 15:11 43:15 56:8 70:25 86:4 87:21 100:17 103:21 111:11,12 170:24 171:4
sorting (1) 81:16
sos (1) 37:6
sought (6) 38:13 81:7 86:4 90:14 111:15 145:7
source (2) 35:22 62:13
sources (2) 46:20,20
space (4) 57:7 107:13 180:17,20
spam (3) 177:6 178:24,25
speak (1) 14:23
speakers (2) 50:4 102:9
speaking (1) 57:19
special (2) 69:24 103:2
specialised (15) 22:5 27:17 62:20 82:1,13,18 84:9 88:13,18 101:21,23,24 102:24 127:24 181:5
specific (18) 15:11 23:1 35:5 64:24 66:18 74:9 85:23 102:25 103:1 109:20,25 120:14 121:25 136:12 160:16 162:16 163:16,17
specifically (5) 24:13 28:12 42:23 47:5 77:17
speech (1) 41:9
speedily (1) 3:6
spell (1) 119:16
spent (1) 23:3
split (2) 139:15 140:1
sps (1) 157:24
stables (3) 15:16 41:17 103:18
stage (10) 3:14 13:19 17:11 100:24 124:2 130:11,12,15 158:13 177:16
stages (1) 129:19
stand (2) 2:7 159:17
standalone (6) 58:17 59:1,7 61:5 81:16 86:12
stands (2) 28:21 41:15
star (1) 98:19
start (10) 10:24 56:7 78:15 80:15 113:18 149:16 152:3 154:8 182:24 183:2
started (8) 7:22 21:17 22:17,18 155:11 165:14,19 168:25
starting (4) 20:17 81:20 113:19 136:17
starts (22) 54:24 73:10,23 123:13 125:3,4,15 144:5 150:3,12,16 153:12,23,24 166:18 167:12,20 169:10 170:2,24 172:17 175:17
stated (3) 76:7 178:22,23
statement (7) 47:8 73:23 74:5 83:24 103:19,23 158:7
states (4) 57:21 126:12 156:25 165:8
statistics (3) 69:9,10,12
step (10) 114:6 124:5,7 125:10 131:22,24 135:17 136:7 149:18 181:16
stepped (1) 29:8
steps (1) 101:4
stick (1) 170:15
still (30) 7:15 10:3 11:9 17:1 21:18 25:5 26:22 31:20,21 34:22 55:12 73:5 88:12 89:16 90:19,24 91:6 92:6 98:3,3 101:25 108:1,2,4 122:16 132:16,17 133:3 140:20 175:15
stop (2) 72:10 112:18
stopped (1) 39:9
storkers (2) 39:16,22
straight (3) 23:5 25:2 26:2
straightforwardly (1) 80:20
strategic (2) 28:23 49:18
strategies (1) 55:2
strategy (8) 28:22 42:20,22 51:16 56:8,8 151:7 170:24
stream (1) 1:15
streamed (1) 1:11
strength (1) 166:17
strictly (1) 1:12
strip (5) 114:23 123:3,4,5 176:23
stripped (1) 172:19
strong (13) 30:5,9 60:15 75:25 78:20 112:24 152:9 167:11,11 169:11,20 170:1,2
stronger (2) 76:1,1
strongest (1) 181:12
strongly (2) 34:9 39:21
structured (1) 131:1
struggle (1) 131:3
struggling (2) 25:5 142:7
studies (1) 137:23
stuff (2) 174:5,13
subject (6) 3:10 45:4 50:23 81:1 99:20 117:13
submit (5) 27:16 112:5 134:18 159:24 162:6
submitted (1) 86:24
subsequent (4) 74:9 75:12,13 131:25
substance (1) 85:21
substandard (2) 36:22 38:13
substantial (1) 76:24
substantiate (1) 63:13
substantive (2) 5:1,9
substantively (1) 7:4
substitutability (2) 77:24 79:7
substitutable (1) 79:23
succeeded (1) 75:6
success (2) 59:12 86:1
successful (4) 33:4 169:3 178:6 181:3
successive (1) 82:6
succinctly (1) 84:3
suddenly (1) 172:11
suffered (1) 132:23
sufficient (6) 82:11 84:6 166:3,12 167:10 179:13
sufficiently (3) 6:13 13:17 19:1
suggest (8) 41:2 64:4 81:7,17 95:24 165:17 173:7 176:1
suggested (4) 81:12 85:2 86:6 158:5
suggesting (1) 35:16
suggestion (1) 73:18
suit (1) 36:21
suitable (1) 56:13
suitably (1) 15:21
summary (4) 67:3 134:5 144:7 151:5
superdominant (1) 72:17
superior (1) 64:23
supplied (2) 41:2 91:1
suppliers (1) 32:12

supplies (2) 30:3 94:3
supply (4) 30:15 50:9,11 79:7
support (5) 45:11 79:20 84:7 122:5 138:24
supports (1) 64:7
suppose (3) 23:12 24:9 38:7
supposed (4) 41:13,20 66:23 77:10
supposedly (1) 36:20
supreme (1) 144:15
sure (12) 4:7 6:18 41:8 55:10 56:24 58:7 72:24 122:6 144:9 158:18 161:2 169:12
surely (1) 174:21
survey (6) 37:10 77:12 79:14 89:18,22 90:17
surveys (2) 79:11,20
survive (1) 24:11
suspect (1) 58:3
swedish (2) 39:5,6
swiftly (1) 165:19
syllogism (3) 28:4,5,9
system (1) 62:17
systematic (1) 169:9

T

tab (1) 182:2
table (1) 35:18
tact (1) 143:19
taken (9) 20:15 35:13 57:6 72:5 82:12 84:8 86:21 94:21 149:2
takes (5) 83:21 86:17 114:5 115:4 172:14
taking (3) 28:16 29:20 37:16
talk (4) 76:21 77:1 94:17 104:7
talked (1) 182:1
talking (8) 94:5,11 148:1,2 149:21 161:10,22 175:9
tangential (1) 23:10
tangentially (3) 8:24 23:10 25:22
tangible (1) 123:22
target (2) 42:23 51:16
task (1) 109:22
team (5) 4:7 27:11 46:16,22 172:25
teams (1) 34:5
tech (1) 29:24
technical (5) 86:1 139:10 160:7,11 176:25
technically (1) 53:16
technologies (1) 164:22
technology (2) 165:13 167:7
tells (3) 17:25 28:7 132:21
ten (3) 1:8 35:13 36:2
term (1) 74:9
terms (27) 4:24 8:6 10:12 15:10 18:3 20:25 22:10 27:11 35:6,7 36:11 38:13 43:1 47:12 49:2 50:9,10,11 84:15 86:1 128:19 148:12 150:11 152:7 162:10 170:14 176:21
terribly (2) 25:19 110:9
test (2) 12:10 68:10
testing (2) 7:22 13:9
text (7) 108:3,7,8 150:16 151:1 165:25 172:23
thank (8) 1:17 2:2,21 19:15 56:15 58:4 136:19 183:3
thats (7) 6:6 57:23 58:3,19 66:1 153:6,17
themselves (5) 120:22 132:4,14 168:13 175:22
theory (2) 71:5 119:13
therefore (22) 10:3 23:15 24:10 43:21 45:25 51:6 54:15 88:10 105:18 112:8 117:13 123:6 125:9 133:11 137:4 139:16 141:12 146:24 148:16,17,19 168:23
thin (9) 27:23,25 28:1,11 40:21 179:1,2,9 180:12
thing (9) 12:12 85:16 102:18 108:23 116:9 120:19 171:7 173:17 175:5
thinking (2) 11:15 71:25
thinks (1) 106:12
third (10) 19:25 22:19 29:19 31:12 79:16,20 130:11 134:17 144:1 180:13
thirdly (1) 170:6
thirteen (1) 114:4
though (10) 38:6 53:15 72:9 78:22 99:14 121:24,25 149:1 171:25 178:8
thought (7) 28:25 38:8,9 66:8,10 72:3 81:21
thousands (1) 40:12
threat (5) 22:3 32:19 33:18 48:17,24
three (9) 2:5 18:23 37:4 41:9 44:11 104:24 130:8 136:17 152:21
thrive (1) 24:12
through (32) 14:15,17 20:8 26:4 28:13 36:15 58:16 65:17,18,24 67:19 71:17,19,23 76:16 80:4 90:21 94:17 95:7 96:9 101:17 106:15 107:17 122:17 125:15 136:25 140:12 150:6,9 155:25 173:3 180:13
throughout (2) 43:6 155:23
thrust (1) 23:16
thursday (1) 2:16
thus (2) 62:21 80:9
tied (1) 177:7
tiein (1) 151:24
tile (2) 95:16 104:24
tiles (2) 95:14 104:21
time (34) 2:3 8:23 12:4 17:19 19:12 20:22 21:17 23:4 27:14 29:1 30:13,19 31:19 34:19 36:7 38:12 39:18 42:24 43:3 47:1 67:6,15 71:3 72:14 94:1,22 107:23 136:13 155:6,6 164:8 171:2 172:23,23
times (2) 55:2 134:7
timetable (2) 14:20 19:8
tiny (2) 9:7 153:12
toaster (1) 165:4
today (7) 4:2,11,12 19:2 57:2 158:3 181:24
toe (1) 142:1
together (6) 18:23 21:24 118:20 132:10 138:24 176:2
told (15) 9:1 28:21,24 36:23 46:13 60:2 70:10 75:5 77:7 148:20 156:1,1,6 157:10 165:17
tomorrow (4) 154:13 181:22 182:25 183:4
tonight (1) 154:4
too (6) 12:8 17:10 145:21 167:5 171:16,17
took (6) 22:13 48:7 66:20 103:20 119:18 152:10
totality (1) 85:19
totally (2) 4:18 168:4
tour (1) 26:4
towards (8) 19:4 22:21 24:3 69:11,13,14 135:17 139:21
toxic (1) 40:16
track (1) 182:20
tradeoff (1) 72:9
traffic (91) 26:8 29:4,10,13,18,20 30:3,10,16,17,18 31:2,8,16 32:10 40:16 41:3,23 42:10 52:13,21 53:17 57:10,12 58:9,12,15,25 60:7,23 61:2 62:13 75:19,20,21 76:6,11,13,24 113:21,21 114:2,14,16 115:1 117:24 118:23 121:12 122:9,11,17,24 123:10,20,23,25 124:3,21 125:9 127:9,17 128:21,22 129:2 130:3,6,16 131:24 132:12,15,19 133:12,15,19,22 134:8,10 135:2,6,15,19 138:1,5 139:2,20 140:15 141:22 153:8 155:21 168:8 173:6
trail (1) 27:7
transcriber (1) 152:15
transcript (1) 1:11
transition (2) 109:4,8
traversed (1) 113:6
treat (3) 38:5 99:24 131:12
treated (3) 50:15 51:20 131:17
treatment (4) 53:17 54:1 128:9 147:24
tremendous (1) 58:23
tremendously (1) 151:21
trendpopularity (1) 27:3
trends (1) 76:8
trial (14) 2:4,4 24:14 37:22 38:2,3 40:7,18 81:3 84:14 110:5 130:21 133:6 177:1
trials (1) 178:9
tribunal (33) 1:7,10 2:3 3:12 5:4 6:24 7:2,11 10:21 14:2,5,8 15:7,24 17:6 19:20 37:21 38:6 80:1 81:2 86:16 88:15 108:24 110:1 113:7 140:3 145:9,12 149:12 153:18 166:1,2,3
tribunals (7) 2:23,25 5:3 17:5 84:13 85:6,13
tried (1) 171:13
triggering (3) 91:7 93:19,22
trite (1) 41:3
trouble (2) 125:16 148:7
troublesome (1) 5:15
true (5) 42:21 51:15 58:3 142:15 173:2
truher (6) 46:9 155:8,17,23 157:6 169:22
try (4) 13:19 37:11 156:17 170:6
trying (10) 36:18 43:6 60:20 66:19 79:1 115:1 128:18 140:6 167:14,20
tub (1) 150:22
tugged (1) 9:1
turkey (8) 147:10,11,12 172:4,5,8 173:9,10
turn (5) 28:7 74:19 113:4 146:4 175:14
turning (2) 152:19 174:9
twice (2) 58:12 60:7
twopronged (1) 56:1
twothirds (1) 58:25
type (4) 85:9,10 116:15,17
types (2) 47:15 116:15
typing (1) 105:4

U

uk (5) 26:10,12 27:11 37:14,17
uks (2) 26:20 27:17
ultimately (6) 7:1 10:9 55:12 98:7 110:6 156:9
ultra (1) 72:17
unable (1) 126:23
unauthorised (1) 1:13
unbreakable (1) 139:6
unchanged (1) 127:18
unconvincing (1) 120:14
uncut (1) 39:19
underinvestment (2) 41:24 109:7
underlying (11) 16:8,9,12 51:1 75:15 87:24 88:5,13 90:1 91:4 133:25
undermine (1) 148:24
undermined (1) 62:15
undermining (2) 133:16 148:4
understand (22) 2:25 3:16,20 5:3 6:20 7:5 10:21 14:18 25:3 34:16 38:19 58:14 64:4 77:2 100:10 117:20 119:13 128:18 131:1 140:6 142:8 180:1
understandable (1) 52:3
understandably (1) 150:8
understanding (5) 6:6 8:21 9:1 48:6,13
understands (2) 49:9 118:20
understood (1) 3:4
undertaking (1) 126:2
underway (1) 33:23
undistorted (1) 62:17
unequal (2) 43:23 113:11
unfair (1) 165:18
unfavourably (2) 27:12 36:19
unfortunate (1) 74:14
unification (1) 70:20
uniquely (1) 86:11
unit (17) 27:15 80:23 82:16 83:25 84:12,16 86:18 88:16 89:4,5 90:19 111:16,18 115:1,5 174:9 175:11
united (3) 57:21 156:25 165:8
units (4) 82:22 111:25 112:11,16
universal (31) 47:22 56:22 57:1,11 58:22 60:23 63:18 66:3 80:23 82:15 83:25 84:11,17 86:18 88:16 114:25 115:5 116:5 152:20 153:5 156:9,10,12 157:2,10 164:13 165:18 168:5,11 169:9 175:18
universals (2) 82:21 165:8
unless (5) 2:13 19:20 67:11 157:11 181:21
unlike (2) 116:6 126:14
unlikely (2) 46:24 156:2
unrealistic (1) 120:23
unreasonable (2) 50:9,10
until (7) 17:21 57:2 87:2 154:5 164:14,16 183:7
unusually (1) 3:6
unwilling (1) 42:8
unwise (1) 13:18
update (1) 2:19
upheld (3) 77:18 143:16,18
url (1) 158:18
used (7) 6:3 33:6 104:12 109:8,9 136:10 180:7
user (31) 26:11,21 32:11,11 49:1,6,14 61:21 63:8 64:3,17,23 65:16 71:16 79:14,19 86:3 88:17,23 91:23 94:16,23 105:4,7 106:14 126:10 139:1,12 152:2 153:14,15
users (42) 27:3,19 31:20 32:6 33:6 51:4 52:16 63:9,16 65:5 66:8,23 67:6 70:8,11 72:8,10 79:24 82:2,24 85:24 89:3,5,13,17 90:18,20 104:8 106:24 109:8 126:16 130:8 150:14,16 152:1 155:20 163:3,25 172:20,25 173:5 181:1
using (2) 26:17 72:10

V

v (5) 6:23 16:4 41:9 143:12 144:16
validity (2) 28:5,9
value (2) 91:9 112:22
van (1) 27:10
variety (2) 66:15 68:21
various (12) 24:17,20 42:11 46:20 62:16 86:17,17,20 95:24 100:20 148:23 182:15
variously (1) 22:5
vehicles (1) 61:17
version (13) 3:14,18,18,20,21 4:1 15:19,21 17:13 147:16 164:2 168:11,16
vertical (3) 22:6 78:5 100:3
verticals (2) 29:24 33:11
via (9) 70:13 82:5 107:18,20 108:13 156:8,8,9 163:16
viable (1) 25:10
vicious (1) 37:19
virtually (1) 77:1
visa (1) 145:22
visibility (3) 76:5,8,12
visual (4) 1:14 89:7 160:17 166:14
visually (1) 89:3
void (1) 29:8
volume (1) 40:5
voucher (1) 36:16

W

wants (2) 8:9 17:22
warning (1) 1:8
way (45) 8:1 10:12 12:2 13:12 24:7,10 28:13 38:4 50:15 51:20,21 55:5,21,24 71:23 78:15 86:2 88:22 89:6,7 90:19 91:17 99:1 105:20 106:2 109:2,11 118:10,11 119:19 127:23 133:3 134:14 140:12,20,22,24 142:10,21 148:16 157:12 158:8 169:15,25 182:6
ways (4) 24:17 141:19 148:23 156:8
weaknesses (1) 37:25
weather (1) 181:11
weave (1) 24:16
web (10) 35:4 47:7 102:14,20,22 152:3,4 155:18 159:21 162:3
webpage (1) 69:15
website (16) 58:18 59:1,3 61:5,11 71:17,20 75:10,11,11 81:17 86:12,14 96:9 103:10 107:7
websites (2) 75:9 82:6
week (2) 3:2 18:15
weigh (1) 174:8
weighing (1) 174:4
weights (1) 55:1
welcome (1) 2:22
wendell (1) 142:19
went (5) 1:19 65:16,17 160:6 165:14
weve (1) 46:15
whatever (6) 8:9 9:12 23:24 98:19 105:22 149:11
whatsoever (1) 85:15
whereas (2) 163:17,17
whilst (2) 51:7 133:3
whistlestop (1) 26:4
whole (17) 80:12 95:14,17,18,19,20 96:1,3 102:10,14 106:2,3 117:9 122:6 126:5 147:23 159:14
wholly (2) 100:1 142:22
whom (2) 89:1 143:21
wide (2) 66:15 68:21
wider (3) 22:4 63:17 107:6
willing (1) 106:20
win (4) 107:5,7 153:11 173:1
wins (3) 96:20,25 97:17
wish (6) 5:9 19:23 20:11 41:16 166:13 181:21
wishes (1) 17:7
wishing (1) 12:8
witness (2) 74:5 103:18
witnesses (5) 22:13 32:17 40:9 89:15 171:13
won (1) 97:7
work (8) 1:18 8:5,10 19:3 25:25 32:9 67:11 95:24
worked (2) 73:15 175:5
working (4) 26:14 60:14 163:11 177:16
works (2) 94:17 106:3
world (14) 9:16,20,22 43:16 71:10 119:14,17,18 133:8 149:19,21 156:10 164:13 177:20
worry (1) 156:6
worth (2) 125:17 174:11
worthy (1) 38:5
wouldnt (1) 159:17
wrap (1) 111:9
wrestling (1) 109:12
writing (1) 14:19
written (8) 1:18 14:8,13 17:3 18:25 19:8 75:14 84:24
wrong (2) 9:2 80:6
wrongly (1) 138:4
wrote (1) 143:15

Y

yahoo (8) 30:12,12,18,19,21,21 31:17,18
yeah (3) 173:21 174:18 175:4
year (4) 8:25 31:23 38:15 59:18
years (2) 34:25 109:7
yet (5) 4:7,14,19 40:21 113:6
yourselves (2) 73:25 109:14

0

01 (2) 153:8,13
09 (1) 69:14

1

1 (13) 38:15 47:11 89:13 149:19 156:11,15 165:16,19,22 171:21 172:1 181:13 184:3
10 (7) 14:12 63:23 76:3 175:1 183:1,2,4
100 (1) 164:24
1000 (2) 151:18 183:7
102 (4) 9:18,19 11:9 12:7
1030 (1) 1:2
1035 (1) 1:4
104 (1) 165:5
107 (1) 151:15
11 (3) 18:24 19:4 35:19
111 (2) 152:16 182:7
112 (1) 40:25
114 (1) 74:16
1159 (1) 56:17
116 (2) 151:17 152:24
118 (1) 74:16
119 (1) 74:5
12 (1) 151:12
1210 (1) 56:16
1213 (1) 56:19
125 (1) 152:24
1257 (1) 87:8
13 (2) 135:7 152:16
139 (1) 144:22
14 (1) 63:21
140 (1) 144:22
148 (1) 39:7
15 (2) 39:1 104:25
150 (2) 4:19 39:15
155 (2) 87:7,10
159 (2) 87:12 145:2
16 (1) 173:19
161 (1) 140:5
162 (1) 145:2
167 (1) 81:14
170 (1) 114:11
176 (1) 81:14
179 (3) 62:12 138:15,17
18 (1) 14:11
180 (2) 138:15 139:4
181 (1) 184:5
184 (3) 41:10 76:19,25
185 (2) 76:20,25
186 (1) 41:10
18th (1) 18:12
19 (1) 184:4
191 (6) 80:20 81:6,22,25 83:23 91:21

2

2 (21) 34:14,15 38:2,17 40:7 110:5 133:6 158:25 160:12,14 164:10,11 165:16,20,23 170:17 171:21 172:1 177:1 180:16 181:13
20 (1) 107:14
200 (1) 107:7
2004 (1) 39:8
2005 (4) 22:16 26:7,13 27:13
2006 (5) 28:12 34:14,15 67:20 156:15
2007 (5) 22:18 28:18 29:25 67:19 156:22
2008 (19) 9:10,11 21:18 34:15 60:13 67:19,20 70:2 109:15 110:22 134:7 149:19,24 150:2 156:15 165:16 172:18 175:16 181:15
2009 (10) 22:19 31:24 45:11 68:15 157:15 164:17 165:7,15,19 167:8
2010 (2) 22:20 34:25
2011 (1) 152:11
2012 (3) 28:13 69:14,20
2015 (4) 22:21 36:25 37:2,16
2016 (2) 39:17 74:7
2017 (5) 9:10,11 164:23 175:9,10
202 (1) 134:15
2021 (1) 39:17
2022 (1) 74:15
2023 (1) 11:1
2026 (2) 1:1 183:7
216 (2) 43:9 77:22
219 (1) 134:23
22 (2) 37:2 134:4
220 (1) 135:11
221 (1) 78:7
222 (2) 135:10,11
223 (1) 78:7
224 (1) 136:3
225 (1) 136:8
227 (1) 79:4
229 (1) 79:17
23 (2) 11:20 87:20
235 (3) 80:4 136:15,19
236 (1) 137:6
237 (1) 137:21
239 (1) 80:4
24 (1) 28:14
240 (1) 136:8
244 (4) 135:24 136:2 138:8,10
246 (1) 80:6
248 (1) 138:11
25 (1) 31:21
26 (3) 82:10 84:5 165:6
27 (2) 1:1 26:13
271 (1) 43:10
28 (2) 31:24 183:7

3

3 (1) 65:8
3070 (1) 30:3
310 (1) 43:10
311 (1) 43:10
328 (3) 81:23 83:4 84:5
330 (1) 82:17
339 (1) 84:5
34 (2) 34:17 74:2
345 (1) 154:24
348 (1) 111:23
35 (2) 82:10 84:5

351 (1) 112:8
352 (1) 44:14
353 (1) 44:15
355 (1) 44:15
358 (3) 44:14 124:11,13
359 (1) 44:15
36 (3) 30:18 34:15,15
362 (1) 76:2
363 (1) 76:7
364 (2) 124:13,16
368 (3) 44:16 125:15,18
37 (3) 35:3 67:3 77:19
371 (2) 35:18,25
373 (1) 126:20
376 (2) 125:16,18
377 (1) 125:20
379 (1) 125:23
38 (1) 67:3
380 (1) 44:18
382 (4) 44:24,25 45:9 47:18
385 (1) 56:25
391 (1) 126:7
397 (1) 127:16
3a (14) 25:25 94:18,19,20,24,24 95:6 104:16,18 106:5,7 110:10 171:22 181:21
3b (13) 93:1 95:13,18 96:1 106:6,12 107:17 110:10 121:6 143:2 147:9 171:22 181:21
3rd (1) 32:8

4

40 (1) 77:21
400 (1) 155:1
409 (2) 82:25 84:2
414 (1) 84:5
419 (1) 127:13
421 (1) 84:6
426 (1) 134:24
430 (2) 154:5,6
436 (1) 183:6
439 (1) 111:19
44 (1) 144:10
452 (1) 113:22
453 (1) 113:22
46 (1) 144:10
462 (1) 113:24
48 (2) 31:15 144:15
49 (3) 43:9,18 144:17

5

5 (6) 5:23 6:4 11:1,20 27:1 57:17
50 (4) 33:6 39:1,2,2
502 (1) 114:11
506 (2) 114:19,20
509 (1) 114:20
51 (1) 79:4
512 (2) 115:10,21
514 (3) 115:10,21 116:9
519 (1) 115:13
52 (2) 84:14 144:17
520 (1) 115:13
521 (1) 115:13
522 (1) 115:14
523 (1) 115:14
539 (1) 75:19
54 (1) 84:15
55 (1) 144:21
591 (1) 123:13
592 (1) 123:13

6

6 (3) 5:23 45:11 155:12
60 (2) 69:21,21
605 (1) 123:16
607 (2) 123:16,21
61 (1) 156:19
616 (2) 62:5 63:1
62 (1) 156:19
65 (3) 12:11,14,20
67 (1) 31:16
680 (2) 62:24 76:22

7

70 (1) 69:22
72 (1) 134:25
723 (1) 113:20
7232 (2) 113:23 135:5
731 (1) 123:12
76 (1) 77:8
77 (2) 30:16 75:14

8

81 (2) 43:9 75:6
82 (1) 73:19
83 (2) 77:11 79:11
84 (3) 30:17 77:12 79:12

9

9 (4) 76:3 151:16,18 164:23
95 (1) 41:25
96 (1) 41:25