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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 A N 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

1 Tuesday, 28 July 2026
 2 (10.00 am)
 3 (Proceedings delayed)
 4 (10.05 am)
 5 THE CHAIRMAN: Yes, Mr Pickford.
 6 Housekeeping
 7 MR PICKFORD: Members of the Tribunal, I have a 15-second
 8 point which I hope is uncontentious.
 9 The Tribunal mentioned yesterday that we needed an
 10 order in relation to the evidence standing in all of
 11 the proceedings.
 12 THE CHAIRMAN: We have got --
 13 MR PICKFORD: The Tribunal was more far-sighted --
 14 THE CHAIRMAN: We have made one, thank you.
 15 Thank you, those behind you, for supplying us with
 16 a copy of the DMA Decision, which we have looked at.
 17 We are somewhat concerned to see from that that
 18 there seem to have been significant changes made to what
 19 has been called the "Remedy box" in March 2024 which we
 20 do not seem to have been told about and we have been
 21 looking at something as if it were today, which it is
 22 not, and gleaning from this potentially quite
 23 substantial changes.
 24 We think, as a first step, Google should disclose,
 25 if they have not already, the report made to

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1 the Commission, which I think sets those out, of
 2 7 March 2024, which is the report referred to in
 3 recital 6.
 4 Is that something you have seen, Mr Jowell? I do
 5 not think any further changes have been made, from what
 6 is said here.
 7 MR PICKFORD: As yet --
 8 THE CHAIRMAN: As yet. But certainly that is the way things
 9 have been for the past two-plus years, and so, in
 10 looking at what is happening, that does seem quite
 11 important.
 12 We also think that you may need more than
 13 the 10 pages that were suggested yesterday, and we think
 14 probably 30 pages each seems more realistic.
 15 MR JOWELL: We are very grateful. We were thinking along
 16 the same lines.
 17 THE CHAIRMAN: Ah, because this is really quite significant.
 18 MR JOWELL: Yes.
 19 THE CHAIRMAN: We also note that the period for Google to
 20 propose its solution is 60 days from the Decision --
 21 MR PICKFORD: Yes.
 22 THE CHAIRMAN: -- in other words, 23 September, and then it
 23 is not necessarily the case the Commission will accept
 24 that and there might be further discussion and it could
 25 go on for some months. So we are a little bit in limbo

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1 at the moment, as far as that is concerned. Maybe we
 2 can only take it step by step, but if you have any
 3 solution you can suggest to us of how we should approach
 4 this, we would be interested to hear it.
 5 MR PICKFORD: So I do have some suggestions on the hoof.
 6 Just to address the point about the changes to
 7 the SERP, the reason why I think those have not come
 8 into play is -- as yet, is because the case that we
 9 understood we were meeting was that what we did as of
 10 2027 -- sorry, 2017 was unlawful because it was
 11 continuing the same problem that there always was and so
 12 what we were judging that by was the reference to
 13 the Remedy box as it then was.
 14 What was not said was, "Well, you have done further
 15 things since and that changes things", and as Mr Jowell
 16 made clear, neither of us relied on that. He said, "We
 17 are not relying on something that they have done
 18 subsequently", and neither is Google. We are having
 19 this fight about what the Remedy box looked like in
 20 2017.
 21 Now, I entirely understand the Tribunal might say,
 22 "Well, that is all very well, but we are the Tribunal,
 23 we are deciding this thing and we would like to know
 24 a lot more about it, we want to know what you are doing
 25 now". So I am not pushing back against the Tribunal's

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1 desire to have that further knowledge, I am simply
 2 trying to explain why we are where we currently are in
 3 relation to that issue.
 4 I think, on the designs, I think it is going to be
 5 slightly more complex than just the 7 March 2024 designs
 6 because of the fact that we, in the UK, are no longer in
 7 the EU, and my understanding -- and I am just going to
 8 double-check this -- is that the UK and the EU sites are
 9 not identical now. Yes. So in this jurisdiction you
 10 have different -- you can see different things on
 11 the page. So if we are going to get into a full
 12 exploration of everything that has changed since 2027,
 13 beyond the points that have been in issue in these
 14 pleadings, that is something, again, we can do, but it
 15 is quite complex and we will probably have to put in
 16 evidence on it and possibly make wider disclosure on it
 17 so that you can have the full picture of the different
 18 jurisdictions.
 19 Now --
 20 THE CHAIRMAN: Because our difficulty is this is not a pure
 21 UK case.
 22 MR PICKFORD: Yes.
 23 THE CHAIRMAN: Because the Kelkoo Claimants, only one is
 24 a UK claimant.
 25 MR PICKFORD: Yes. Yes. No, I understand that.

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1 THE CHAIRMAN: Yes.
 2 MR PICKFORD: I have explained why we are where we are.
 3 I also understand why the Tribunal may say, "We want to
 4 look at more". In my submission, that does have quite
 5 a profound effect on how we could actually sensibly
 6 adjudicate on these issues, because what we could do in
 7 early September is have a purely legal argument
 8 effectively about the DMA Decision and what it does or
 9 does not tell us in law, treating it effectively as if
 10 it was a foreign judgment.
 11 THE CHAIRMAN: Yes.
 12 MR PICKFORD: You know some of my positions on that. That,
 13 I say, could be feasible by early September; it is quite
 14 tight.
 15 What I do not think we can do, certainly fairly to
 16 Google, and I actually do not think it is just going to
 17 be conceivable to do it properly for either of
 18 the parties in the time frame, is have the kind of
 19 hearing that I am anticipating the Tribunal might want
 20 to have where we have got a full new set of disclosure
 21 in relation to new designs, we have got evidence about
 22 those new designs, and we have got everything that goes
 23 along with that, and potentially -- I mean, the logical
 24 conclusion of where it is all going, what we then do by
 25 the end of September in response to the DMA Decision.

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1 So if what the Tribunal wants to have is a full hearing
 2 about everything that that may or may not tell us, we
 3 cannot sensibly, in my submission, have that in
 4 the beginning of September, we would have to have that
 5 some months from now, because it requires disclosure, it
 6 almost certainly requires -- it may even require new
 7 evidence and it is just not going to be feasible to do
 8 it in the time frame.
 9 So that is my -- I realise that that gives
 10 the Tribunal something of a dilemma, but I think that is
 11 where it is. If we are going to do it quick, we have to
 12 do only a pure legal exercise.
 13 THE CHAIRMAN: Well, Mr Jowell, what --
 14 MR JOWELL: May I have a moment to take instructions, in
 15 fact?
 16 THE CHAIRMAN: Yes. I mean, our concern is this. One can
 17 work in a completely unreal world and say we look at
 18 what happened in 2018 with that Remedy box and say: is
 19 that -- does that continue the abuse? But as this claim
 20 is brought on the basis of continuing abuse until today,
 21 as that Remedy box is not the Remedy box that exists
 22 since 2024, that would be a rather unreal exercise,
 23 because we were deciding whether Google is committing
 24 abuse on a basis that it is not doing.
 25 MR JOWELL: Well, I quite see that, and I think my learned

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1 friend perhaps overstated it when saying that neither of
 2 us relied on that. I mean, we did, in our evidence and
 3 in our submissions, mention the existence of the PLACSS
 4 and the product view, because we were aware -- we could
 5 see that those things had developed and we explained why
 6 we considered that those did not cure the abuse,
 7 briefly.
 8 THE CHAIRMAN: Yes.
 9 MR JOWELL: But, of course, we are not au fait with
 10 the details of what is going on in every jurisdiction.
 11 MS ROSE: I suppose the answer could be that Google is not
 12 contending in these proceedings any modifications made
 13 later than 2017 would have cured the Remedy box if
 14 the 2017 iteration was still an abuse --
 15 MR JOWELL: Well, yes.
 16 MS ROSE: -- and on that basis, that might be the shortcut
 17 answer that it would -- you know, you can imagine
 18 a world where Google might have said, "Well, okay, maybe
 19 the abuse continued from 2017, but on any view it ends
 20 in 2024".
 21 MR JOWELL: Yes.
 22 MS ROSE: But they have never said that, and so on that
 23 basis --
 24 MR JOWELL: Yes, and that has essentially been our approach
 25 to date.

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1 MS ROSE: Yes.
 2 MR JOWELL: But, of course, one could also see that from
 3 the point of view of for the Tribunal identifying
 4 the appropriate counterfactual --
 5 MS ROSE: Well --
 6 MR JOWELL: -- it may be informative, to say the least, to
 7 see what they have done or --
 8 MS ROSE: I mean, we have only had the judgment --
 9 the Decision for a short period, but it does raise at
 10 least a question of the extent to which your scenario 3
 11 might still amount to Google favouring its own CSS.
 12 MR JOWELL: I think -- well, I think we would say that,
 13 properly interpreted and applied, our scenario should
 14 not, but that is --
 15 MS ROSE: I mean, that is a question that --
 16 MR JOWELL: Yes.
 17 MS ROSE: -- does need some exploration.
 18 MR JOWELL: Yes, it does. Yes, it does.
 19 MS ROSE: Another question -- and this is a purely factual
 20 point -- is that the Commission seems to be relying on
 21 these shortcut chips as providing filtering from
 22 the SERP for the Remedy box and that is not something we
 23 have heard any evidence about in these proceedings,
 24 the ability to filter results, and indeed Google has
 25 relied in these proceedings on saying that you cannot

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1 filter results on the SERP, so that is of some concern
 2 to us.
 3 MR PICKFORD: Could I address that?
 4 MS ROSE: Yes.
 5 MR PICKFORD: That is totally right, we have not heard
 6 evidence on chips. Chips were never pleaded, and so
 7 there was never something saying: well, okay, maybe in
 8 2017, the designs were okay, but then you introduce
 9 chips and that --
 10 MS ROSE: When were chips introduced?
 11 MR PICKFORD: In 2024.
 12 MS ROSE: So they are a 2024 innovation?
 13 MR PICKFORD: They are a 2024 innovation. In this
 14 jurisdiction, my understanding is they lasted for
 15 three months and then they were withdrawn. That is not
 16 the case in the European Union. Yes.
 17 So -- but --
 18 MS ROSE: Chips are still, at the moment, in the European
 19 Union?
 20 MR PICKFORD: So chips still in the EU, not in the UK.
 21 It was never pleaded: oh, there is an issue here
 22 about chips. So we never had any evidence on chips.
 23 Then what occurred is there was a very fleeting
 24 reference to chips in the skeleton argument for opening
 25 of my learned friend, and then Mr Noble saw that and

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1 said, "Oh, I have got something relatively small to say
 2 about chips".
 3 That is as much as --
 4 MR JOWELL: I think it was the other way round. I think
 5 Mr Noble mentioned it and then we picked it up.
 6 MR PICKFORD: No. No, that is incorrect.
 7 MR JOWELL: Is that incorrect?
 8 MR PICKFORD: That is incorrect. They mention it in their
 9 opening written submissions and, conscientiously,
 10 Mr Noble read all of those and said, "Oh, yes, I see
 11 there is this thing about chips, here is what I have got
 12 to say about chips". But he was not instructed in
 13 relation to chips and we do not have any evidence about
 14 chips, so --
 15 MS ROSE: So chips are not present pre-2024, but
 16 the Commission does not seem to differentiate about
 17 whether a Remedy box is a CSS pre or post
 18 the introduction of chips?
 19 THE CHAIRMAN: Well, they were only in the new Decision --
 20 (Simultaneous speakers - inaudible)
 21 MR PICKFORD: They're only interested in what it looks like
 22 post-2024, because that is the moment, as we discussed
 23 yesterday, the DMA is in effect. So, just legally, what
 24 came before is irrelevant to them.
 25 But this really underscores my point that if

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1 the Tribunal wants to get into a much more involved
 2 analysis of the facts, then we will need further
 3 evidence on these issues, and we cannot be criticised
 4 for not having adduced that, because these points have
 5 not properly been in issue until now. So we are, in my
 6 submission, at something of a fork in the road. We
 7 either continue in the way that we have addressed it,
 8 which is with them saying, "As of 2027, your designs
 9 were insufficient", and us saying, "No, as of
 10 2027 ..." --
 11 MS ROSE: 2017.
 12 MR PICKFORD: I beg your pardon.
 13 "As of 2017, your designs were just continuing
 14 the same problem as always", and us responding, saying,
 15 "No, they fixed it", and that is how both parties have
 16 effectively operated for this hearing.
 17 THE CHAIRMAN: Well, that is something we can clearly do.
 18 MR PICKFORD: Yes.
 19 THE CHAIRMAN: Counterfactuals are a bit more complex. If
 20 we are with you on that, the problem falls away.
 21 MR PICKFORD: Yes.
 22 THE CHAIRMAN: If we are not with you on that and then we
 23 have to think about counterfactuals, then perhaps it is
 24 more complicated.
 25 MR PICKFORD: Yes, well, my -- at the risk of going back to

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1 a hearing which was not a successful hearing for Google,
 2 we were worried back at the beginning of the year, when
 3 we sort of thought about some of these things really
 4 hard, but actually some of the counterfactual issues
 5 might become quite involved and difficult, and at the
 6 time it was said -- what my learned friend was saying
 7 is: it is all the same, it is all the same abuse, it is
 8 all the same counterfactual, you have got nothing to
 9 worry about, we can just proceed.
 10 Now, we are now in a situation where it seems that
 11 perhaps it is being suggested, even by my learned
 12 friend, that maybe the counterfactual is not quite as
 13 straightforward as that and there may be reasons,
 14 possibly -- I am not making any indication here, I am
 15 just trying to think of constructive ways forward --
 16 there might be a reason for the Tribunal to take this in
 17 stages and to say: "Okay, well, we will have legal
 18 argument on the DMA, because we can do that in practical
 19 terms now, we will deal with the factual issues,
 20 effectively certainly in relation to abuse as they have
 21 been pleaded and argued, and then we will kind of take
 22 stock, and if it is the case that we then need to get
 23 drawn into more complex arguments about the DMA, well,
 24 we can then have a further proper hearing in relation to
 25 that and we will set down directions and we will have

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1 disclosure evidence, etc, in relation to it". So that
 2 leaves that opportunity open to the extent the Tribunal
 3 needs it, but it does not seek to programme it now,
 4 because obviously if we do that now, that is going to
 5 make the Tribunal's life very difficult in terms of
 6 actually coming to an initial judgment.
 7 As I say, I have invented that solution on my feet,
 8 I have not actually taken instructions as to whether --
 9 THE CHAIRMAN: We should rise. We will give you 15 minutes,
 10 because obviously it is quite important. If you need
 11 longer, send us a message, but we do not want to take
 12 too long, because otherwise we are in trouble with these
 13 two days.
 14 (10.22 am)
 15 (A short break)
 16 (10.41 am)
 17 THE CHAIRMAN: Yes, you are both on your feet. Who wants to
 18 speak?
 19 MR PICKFORD: Shall I ...?
 20 MR JOWELL: Why do you not. Yes, by all means.
 21 MR PICKFORD: So we have -- our proposal is the proposal
 22 that I made before the Tribunal kindly adjourned to
 23 allow us some time to discuss it, which is that we take
 24 it in stages and that we can have a hearing about
 25 essentially the abuse implications, if any, of the DMA

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1 Decision, as we were previously contemplating.
 2 What we cannot do within that time frame is have any
 3 wider hearing which would involve disclosure or evidence
 4 about the designs more generally and also therefore
 5 the implications of all of that for counterfactuals. If
 6 we were going to be brought into discussion about those
 7 issues because of the Decisions the Tribunal ultimately
 8 takes, then they would have to come and be addressed
 9 later in a full hearing with the usual directions.
 10 I just have two further points just to make in
 11 relation to that.
 12 It was suggested by Mr Jowell that Kelkoo was
 13 unaware, I think -- I think he suggested he was unaware
 14 of the compliance reports, because the Tribunal asked us
 15 to disclose the compliance reports. There are three
 16 non-confidential summaries of compliance reports that
 17 Kelkoo had, one of them is even in the bundle. I can
 18 show it to you. But it certainly is not the case that
 19 Kelkoo has been in the dark about what has been going on
 20 in terms of what Google may or may not have been doing
 21 under the DMA. Indeed, it is referred to in their
 22 openings.
 23 Would it be helpful for the Tribunal just to see
 24 where that document is? It is at {M3/241.1/1}.
 25 THE CHAIRMAN: Well, this is the 7th -- no, this is later.

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1 MR PICKFORD: So this is later. My understanding is that is
 2 because it is non-confidential and it summarises what
 3 had gone on before. I understand that there are three
 4 such non-confidential summaries of (inaudible). Yes,
 5 and what it does is it refers back to the 6 March 2024
 6 report, I am instructed, many times, although I have not
 7 actually read it all yet.
 8 So there is material already in relation to this
 9 issue, factually, and it would be quite -- it is quite
 10 wrong for Kelkoo to give the impression that we have
 11 been sort of hiding anything.
 12 MR JOWELL: Well, forgive me, but if I had been permitted to
 13 open the submissions I would have corrected this point
 14 and that was my intention to do so. I was not
 15 suggesting that anybody was hiding anything and I never
 16 made that submission.
 17 MR PICKFORD: Very good, we have got that clarified.
 18 Sorry, I am just being instructed.
 19 (Off microphone discussion)
 20 I am instructed the way it works is that for each
 21 year of compliance, so in, as we stand now, '24, '25 and
 22 '26, there is a compliance report and then there is
 23 a non-confidential summary that is then published in
 24 relation to each of those, albeit some while later.
 25 (Off microphone discussion)

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1 Oh, I am sorry, published simultaneously. So --
 2 okay, so the reason why this one -- I beg your pardon.
 3 So this one is a year after the one it refers back to.
 4 THE CHAIRMAN: Well, never mind, we have got it.
 5 MR PICKFORD: Yes.
 6 THE CHAIRMAN: We can see that, and we are --
 7 MR PICKFORD: So you can see that.
 8 The other point to make is to anticipate
 9 a submission that we will be making later today and that
 10 Mr Jowell can respond to tomorrow, which is, on
 11 jurisdiction, our response is going to be that you do
 12 not have jurisdiction in relation to EU Article 102
 13 abuse post-IP completion day and therefore all of
 14 the points on that in relation to law from then fall
 15 away. So in fact, the legal aspects of a lot of this
 16 are going to fall away because we are not being required
 17 in the UK to comply with the DMA, it is not applicable,
 18 and in the EU, the Tribunal is not going to have
 19 the jurisdiction to decide on abuse questions
 20 post-IP completion.
 21 THE CHAIRMAN: You say abuse questions?
 22 MR PICKFORD: Yes.
 23 THE CHAIRMAN: I mean, are you saying that the -- I mean,
 24 I do not know, because that is a sort of strike out
 25 point, that all the Kelkoo Claimants, the non-UK

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1 Claimants have no claim beyond IP completion date?
 2 MR PICKFORD: That is right.
 3 THE CHAIRMAN: Therefore there is a strike out defence of
 4 the entire claim?
 5 MR PICKFORD: Yes, I mean, we have not raised it as a strike
 6 out. We had I think understood that because of
 7 the issues that were agreed for this trial, that was
 8 effectively something that we were going to be grappling
 9 with at Trial 2. Now, the Tribunal reasonably said, as
 10 I understood, to Mr Jowell, "Well, can you tell us about
 11 what your position is on jurisdiction", and the penny
 12 dropped, I have to say, for me at that point, that was
 13 because the Tribunal was concerned, even though it was
 14 not one of the list of issues for this hearing: well,
 15 when it makes its ruling, how far does that ruling go?
 16 Mr Jowell has addressed on you that and we will address
 17 you on it, and I want to make sure we address you on it
 18 today -- it is not a very long point, but so that
 19 Mr Jowell hears what we say responsively on it.
 20 It was difficult for us to address it at the same
 21 time, because we did not know what his position was on
 22 jurisdiction, but having seen what he is now saying on
 23 it, we can respond to it.
 24 THE CHAIRMAN: Is there anything in your opening saying
 25 that --

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1 MR PICKFORD: There is not, no, because, I have to say, this
 2 was not in the list of issues for this trial. We are
 3 obviously happy, as we have --
 4 THE CHAIRMAN: Yes.
 5 MR PICKFORD: -- improvised in relation to other things, to
 6 respond to questions that have come up, but neither of
 7 the parties put it as one of the issues to be grappled
 8 with, so I am afraid we did not grapple with it. But we
 9 do plead -- to be clear, we do plead the point in our
 10 defences, so it is not that we do not have a pleaded
 11 case on this, it is just that we have not developed it
 12 so far, just as Mr Jowell did not develop it in
 13 openings, and we are now addressing it in closings
 14 because the Tribunal asked us to do so.
 15 THE CHAIRMAN: Can you help me, where is it pleaded?
 16 MR PICKFORD: It is at, I am instructed, {C1/4/69}, and it
 17 is paragraph 80A.2.
 18 THE CHAIRMAN: That just says "trade between Member States
 19 or between the [UK] and [EU] is irrelevant".
 20 MR PICKFORD: Then it goes on in paragraph 82, which is on
 21 {C1/4/73}. It may be better if Mr McGurk stands up to
 22 address you on this, because he is actually going to be
 23 making submissions on this and not me, so he can
 24 probably assist you far better than I can.
 25 THE CHAIRMAN: Yes. Just a minute.

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1 (Pause)
 2 MS ROSE: (Off microphone) Did they plead a reply?
 3 MR PICKFORD: I think so, but --
 4 THE CHAIRMAN: What is said is that there is no claim for
 5 breach of Article 102 after 1 January 2021.
 6 MR PICKFORD: Yes.
 7 THE CHAIRMAN: But it is not said that the second to tenth
 8 Claimants have no claim thereafter.
 9 MR PICKFORD: I would submit that that is implicit in
 10 the plea that we have made. If they cannot plead
 11 thereafter for those losses, if they cannot claim for
 12 them, then that applies to all of them.
 13 Now, insofar as the UK claimant is concerned, it
 14 might be said by Kelkoo, "Well, so what, you told us we
 15 cannot claim for breach of EU law, that does not get you
 16 very far because we will just claim under section 18
 17 instead".
 18 THE CHAIRMAN: Yes.
 19 MR PICKFORD: But that does still hold for the EU
 20 defendants. So in my submission, we are just
 21 over-inclusive there and they have a response in
 22 relation to the UK.
 23 THE CHAIRMAN: Yes.
 24 MR PICKFORD: I can give you the reference for the reply
 25 pleading if that is helpful.

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1 THE CHAIRMAN: No, I think that is fine. Yes, thank you.
 2 Mr Jowell.
 3 MR JOWELL: Yes. May I just clarify. I think we had
 4 reached an agreement on taking it in stages.
 5 THE CHAIRMAN: Yes.
 6 MR JOWELL: But I think we should just be clear about what
 7 we understand each stage to consist of, or at least
 8 the initial stage to consist of. There may be no later
 9 stage, we will have to see.
 10 But we think that on -- our understanding was that
 11 on 11 September we will have a hearing about
 12 the implications for the current proceedings of the DMA
 13 Decision. We did not understand that to be limited to
 14 abuse, we understand that also to extend to
 15 the submissions on the appropriate counterfactual, but
 16 we do accept that that would be limited to the facts
 17 that are recorded in the DMA Decision. We think that
 18 that is a sensible approach for the Tribunal to take,
 19 and then if the Tribunal, in light of those submissions,
 20 considers that it needs further evidence, then that can
 21 be decided thereafter. But other than that, we think
 22 that is a sensible approach.
 23 We did not understand ourselves to be sort of
 24 confined to using the Decision in relation to abuse,
 25 which would seem to be artificial, if that is what was

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1 being proposed.
 2 MR PICKFORD: I am very grateful for that clarification from
 3 my learned friend because what that shows is there is
 4 something between us on this.
 5 The reason why I put it in the way that I did is
 6 because, in my submission, what we cannot sensibly do on
 7 11 September is have a half-baked hearing where we look
 8 at some facts, insofar as they are facts that are within
 9 the scope of the DMA Decision, on questions of
 10 counterfactual, because we would obviously want to
 11 contextualise what is said about the facts in that
 12 Decision because it is not a final Decision. So where
 13 there might be discussion about a particular model that
 14 was put forward -- and I have to say, I am speculating
 15 here, but I am assuming that there is some discussion
 16 about some sort of solution that we were proposing and
 17 the Tribunal -- sorry, the Commission makes comments
 18 about it, and it might make comments about, "Well, we
 19 think that this is feasible", or, "That is not
 20 feasible", or "We reject what Google says in relation to
 21 that", say.
 22 This Tribunal cannot take that as gospel in relation
 23 to the factual situation as at 11 September, because
 24 we -- if what we are going to be doing is bringing into
 25 play lots of things about, say, chips, etc, we need to

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1 be able to provide evidence on those. It might be,
 2 again, that the DMA Decision has something to say about
 3 chips, and we might have something to say about chips in
 4 evidence, or in further disclosure, and we cannot --
 5 that then brings us back into a world where we are
 6 arguing on the facts about what we have done
 7 post-Decision -- sorry, post -- yes, post
 8 the implementation of the DMA.
 9 So that is why I drew the line in the place that
 10 I did, where we simply have effectively a legal debate
 11 as if the Decision were another judgment about what it
 12 tells us in law about the abuse, because we can do that,
 13 I say, fairly. What we cannot do is then allow it to be
 14 the stepping off point for making determinations about
 15 facts when, to do that properly, we need to be able to
 16 present our case fully on that.
 17 MS ROSE: Could not the September hearing on the same basis,
 18 i.e. just looking at it as a judgment, could not
 19 submissions include submissions on the extent to which
 20 that judgment as a judgment informs the parties'
 21 positions in relation to the counterfactual, just as it
 22 informs their positions in relation to abuse?
 23 MR PICKFORD: Well, my difficulty with that is that we are
 24 then doing it in an incomplete way, because at
 25 the moment, what we did for this trial is we focused our

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1 evidence, our disclosure and our submissions on what
 2 the Remedy box looked like in 2017.
 3 MS ROSE: Yes.
 4 MR PICKFORD: What we are now contemplating is saying, okay,
 5 well, let us have a sneak, let us have a bit of a look
 6 at what has happened post-2017 and we can get some
 7 information about that from this very useful DMA
 8 Decision, and it has got the Commission's discussions
 9 about that and what it thinks we could and could not
 10 have done. My problem with that is that that is not
 11 a complete picture. That is the Commission's assessment
 12 of what we have done under the DMA, and, whilst that
 13 might be relevant, it is not the evidence that we would
 14 like to present on what we have done post the DMA.
 15 MS ROSE: Why would that evidence now be relevant? I mean,
 16 you made a choice, which was not to put that evidence
 17 in --
 18 MR PICKFORD: Yes.
 19 MS ROSE: -- you were not suggesting that anything you had
 20 done since 2017 cured the abuse.
 21 MR PICKFORD: Yes.
 22 MS ROSE: So, I mean, the key -- one of the key things that
 23 the Commission says here is: well, Google has got
 24 a binary choice, either you remove the box or you give
 25 equal access to other CSSs; you choose. I mean, that is

23

1 the sort of -- where they come out right at the end.
 2 I mean, I can see why that is something that Kelkoo
 3 might want to rely on as just something in the judgment,
 4 but it is not clear why that gives rise to questions of
 5 disclosure.
 6 MR PICKFORD: I think -- well, I have not reflected on it
 7 fully enough to guarantee that it does not give rise to
 8 questions of disclosure. I can certainly see there is
 9 an argument that that point alone might not. However,
 10 I equally say that, for example, if there is going to be
 11 a debate about whether chips are or are not filtering by
 12 another name, which --
 13 MS ROSE: But why does it matter? I mean, so what? Because
 14 nobody has relied on chips in this hearing, so --
 15 MR PICKFORD: Well, this --
 16 MS ROSE: -- why does it matter?
 17 MR PICKFORD: My concern is a fairness point, that as soon
 18 as the DMA is effectively at large and we are debating
 19 what Google has done or not done post-2024, then that
 20 potentially raises questions of fact that we might want
 21 to have evidence on. There may be some legal points
 22 that can be extracted from it without doing that.
 23 MS ROSE: Yes, and those could go to the counterfactual just
 24 as much they could go to abuse.
 25 MR PICKFORD: If they were pure legal points, then that is

24

1 probably true.
 2 MS ROSE: Okay, so I am not sure there is anything between
 3 you and Mr Jowell.
 4 MR PICKFORD: Well, so I fear that there might be, because
 5 I fear that he is going to -- he may say things like,
 6 "Well, look at what you did, therefore that shows what
 7 you could have done", or something, or, "Look at what
 8 you did and look at what the Commission say about that,
 9 if we believe the Commission on that, then that says
 10 something about what you could have done", and I cannot
 11 be in a position where we have just accepted that
 12 the Commission's views on that in the DMA Decision are
 13 the last word.
 14 Also because any findings -- I am going to continue
 15 to make the submission that any findings by
 16 the Commission fall foul of *Hollington v Hewthorn*. So I
 17 say there is actually relatively little that can
 18 ultimately be extracted from the DMA Decision without
 19 ruling out that there might be something.
 20 MS ROSE: That does suggest that we could have a hearing of
 21 the scope Mr Jowell is putting forward, at which you will
 22 say *Hollington v Hewthorn* and these are the only legal
 23 points you can extract in relation to abuse and you cannot
 24 get anything useful on the counterfactual --
 25 MR PICKFORD: Yes.

25

1 MS ROSE: -- and he will say whatever he wants to say on
 2 those points.
 3 MR PICKFORD: Yes, as --
 4 MS ROSE: Then there may or may not -- depending on what
 5 the Tribunal rules after that, there may or may not be
 6 a need for another hearing.
 7 MR PICKFORD: Yes, well, I think if we went into it on that
 8 basis, it would have to be open to me to say in that
 9 hearing, "In relation to this particular point that
 10 Mr Jowell now wishes to rely on, the Tribunal cannot
 11 fairly decide this issue because we could put in
 12 evidence on that". Just as I said the Tribunal cannot
 13 fairly make findings about an anti-competitive strategy
 14 because we could have put in evidence on that. He has
 15 still just got his pleaded case as it was, and there may
 16 be areas where he is tempted to stray into saying, "Oh,
 17 well, look at this", and -- this new thing, and I want
 18 to say, "That is not fair, we cannot go into that".
 19 As long as it is very clear that I am entitled to
 20 make that submission, the Tribunal is entitled to reject
 21 it, but that I reserve my rights in that regard, then
 22 maybe we do not need to draw a very careful box around
 23 the hearing right now, because we can continue to argue
 24 about what the hearing can and cannot fairly decide.
 25 But I say there will be things that it would not be fair

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1 for it to do.
 2 MS ROSE: It would be useful for the Tribunal to have
 3 the parties' positions on what we can extract from this
 4 judgment.
 5 MR PICKFORD: Yes.
 6 MS ROSE: As soon as possible.
 7 MR PICKFORD: Well, I mean, can I just take instructions?
 8 I can hear someone is whispering behind me 'Meredith'.
 9 (Off microphone discussion)
 10 I am instructed that a further point that concerns
 11 my clients is that we ultimately have to comply with
 12 the Decision by the end of September. It is actually,
 13 I think, two months from when we were served, so it is
 14 not from last week, but this week. We contend that it
 15 would be unfair for us to have to make submissions about
 16 what we may or may not ultimately be doing for
 17 compliance ahead of the date when we have had to comply,
 18 because what you will have seen from what happened with
 19 the European Commission, we had 90 days in -- sorry, for
 20 the Decision that we are arguing about, we had 90 days
 21 in that context, and we went through a very, very rapid
 22 process of saying, okay, well, maybe this version, maybe
 23 that version, we then tested some things with
 24 the Commission, there was then some push back and
 25 ultimately we got to something within 90 days. But that

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1 was not the same thing precisely as we had at
 2 the beginning of the 90 days, and indeed it changed as
 3 a result of dialogue with the Commission and the same
 4 may well happen here.
 5 So I think there is a difficulty for us there and
 6 I am just laying down the marker that we cannot fairly
 7 have a hearing that trespasses on that until there has
 8 been actually the requirement for us to comply, at which
 9 point obviously it is then public, we are then doing it
 10 and then we could have a hearing about it.
 11 Now, I am not seeking to backtrack on the proposals
 12 for the split version of the hearing, because
 13 I suggested that and we can do it, but there are quite
 14 a lot of complications to it and things that we are not
 15 going to be able to trespass on. It may be that when
 16 one takes those all together, the Tribunal says, "Well,
 17 actually, maybe we will just have a hearing
 18 post-30 September, once those things are concrete", and
 19 then things will be less complicated. I am not
 20 positively advancing that here, because that is not what
 21 we currently agreed. But it is very difficult because,
 22 from no one's fault, we have just been served with a --
 23 you know, an important Decision the day after we put in
 24 our written closing submissions and that is quite
 25 a procedural headache for everyone.

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1 MR JOWELL: Well, of course, we say it is their fault, they
 2 should stop self-preferencing, but there we are.
 3 I think, in our submission, we are very keen to keep
 4 this going. My clients have waited a very long time
 5 indeed for substantive justice and so we would be keen
 6 to at least have the hearing on 11 September along
 7 the lines that Ms Rose has proposed. Of course, it
 8 should not be simply restricted to abuse, it should
 9 encompass counterfactual and my learned friend can make
 10 points, if he wishes, in response to our submissions
 11 saying, "Well, we disagree with the Commission but that
 12 is what we did", or whatever it may be.
 13 MS ROSE: One of the submissions the parties -- or one of
 14 the parties could make would be as to whether there was
 15 a need for more evidence or disclosure --
 16 MR JOWELL: Of course.
 17 MS ROSE: -- and the Tribunal might or might not think that
 18 was necessary.
 19 MR JOWELL: Indeed.
 20 THE CHAIRMAN: Give us just a moment.
 21 (Pause)
 22 Yes, well, we think there should be nothing that
 23 should really delay us coming to a final Decision on
 24 the abuse question, subject to hearing submissions on
 25 the legal implications of the DMA Decision and that that

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1 can be addressed -- and I think the parties are in
 2 agreement on that -- on 11 September.
 3 As regards the counterfactual, we think it is
 4 difficult to reach a concluded view as to
 5 the significance of the Decision at the moment, but we
 6 think the parties should be able to address us on
 7 11 September on what, if anything, are the implications
 8 of the Decision for the counterfactuals and whether it
 9 is necessary to fix a further hearing with evidence, in
 10 that case, 2027, after the Remedy under the DMA has been
 11 agreed with the Commission. So in other words, you can
 12 address on 11 September what are the implications for
 13 the counterfactual and whether we need a further hearing
 14 or not, and that will give you time to reflect on it, to
 15 see what is happening with the Commission and to do it
 16 in a more considered way. So we will have a hearing on
 17 11 September.
 18 MR PICKFORD: Thank you, sir. That seems a sensible way
 19 forward.
 20 THE CHAIRMAN: We will give you 30 pages each as ...
 21 We would probably ask you to consider overnight
 22 a timetable for directions for those submissions for
 23 the 11 September.
 24 MR JOWELL: We have made a proposal and I think we are
 25 waiting to hear back.

30

1 THE CHAIRMAN: Yes, well, see if you can agree on
 2 a timeslot.
 3 MR JOWELL: Yes, we will see what we can do.
 4 THE CHAIRMAN: On that basis, we can hand over to you and
 5 your closings. You have obviously lost a certain
 6 amount --
 7 MR JOWELL: I have.
 8 THE CHAIRMAN: -- of time, but we will see if we can make
 9 that up.
 10 MR JOWELL: Well, I am grateful.
 11 THE CHAIRMAN: We will consider if we can sit a bit later
 12 today.
 13 MR JOWELL: You asked a question, sir, on one of our
 14 footnotes and Ms Love has very kindly offered to make
 15 the submissions to respond on that, so ...
 16 Closing submissions by MS LOVE
 17 THE CHAIRMAN: Yes, let me just find it. This is
 18 on page 52, is it, of your --
 19 MS LOVE: Yes.
 20 THE CHAIRMAN: -- internal page 52. I have not got the --
 21 have you got the Opus reference?
 22 MS LOVE: You referred to paragraph 111 of our written
 23 submissions, which is on {AA1/1/56} of the bundle.
 24 THE CHAIRMAN: Yes, thank you.
 25 MS LOVE: Chairman, I believe that your concern was about

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1 the discrepancy in the numbers between footnotes 122 and
 2 124 about the frequency with which the CLA --
 3 THE CHAIRMAN: Yes, I got rather confused.
 4 MS LOVE: It is going to take -- I will be as quick as
 5 I can, but this is an exciting mixture of human error
 6 and different data sources so we are going to have to
 7 just go through it carefully.
 8 There are three different things that need to happen
 9 obviously for a user to end up on a CSS' webpage from
 10 the SERP in a world of a CLA tab. The first thing is
 11 that the CLA unit has to trigger, in other words that
 12 there has to be the option of clicking on the little
 13 toggle to see it. Then a user has to click on that so
 14 that they can see the tab of the CLA offerings and
 15 then --
 16 THE CHAIRMAN: Sorry, first it -- it is always visible,
 17 is it not?
 18 MS LOVE: It triggers --
 19 THE CHAIRMAN: If there are three CSSs --
 20 MS LOVE: In the majority of those cases -- so, sir,
 21 the letter that Google wrote to the Commission from
 22 20 May 2019 documented what the trigger rates were in
 23 some countries at the time, admittedly when it had not
 24 been in force or introduced for a very long time, and
 25 they ranged between 0.02% and 11.62%. The main reason,

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1 sir, as you rightly note, for the toggle not triggering
 2 was there being no or insufficient CLA campaigns, but
 3 there was another instance -- I think it is
 4 called "threshold not reached", but we can see that at
 5 {M1/494/2}.

6 Yes:

7 "... the CLAs do not meet the requisite minimum
 8 thresholds."

9 If you go back to {M1/494/1} of that letter, you see
 10 the results for various Member States. So that is stage
 11 one of there being the ability to click on a CLA tab at
 12 all.

13 THE CHAIRMAN: By "trigger", you mean it has got to appear?
 14 The word "trigger" --

15 MS LOVE: Yes.

16 THE CHAIRMAN: -- means that it actually appears at all?

17 MS LOVE: The toggle to be clicked on appears at all.
 18 In terms of the next stage, which is a user clicking
 19 on it, there was annexed to this May 2019 letter
 20 a dataset from Google, and that can be found at
 21 {M1/556}. I am afraid it is a native format spreadsheet
 22 that needs to be downloaded.

23 THE CHAIRMAN: Yes.

24 MS LOVE: If we go to the "Q3" tab at the bottom there --
 25 thank you -- you can see that what we have, and it seems

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1 to be a sort of regular weekly snapshot of the different
 2 Member States, is column (f) tells us the number of
 3 queries for which the tab with the CSU was displayed, so
 4 that is the stage one: is it triggered? Column (g)
 5 tells us the number of clicks on the tab, which is
 6 the number of occasions on which -- no, sorry, it is
 7 columns H and I, it is the ones with the numbers (f) and
 8 (g), but ... thank you -- and (g) tells us the numbers
 9 of occasions on which the tab was clicked to bring up
 10 the unit.

11 That is the origin of the figure in our footnote 122
 12 {AA1/1/56}, and this -- and I apologise for this, this
 13 is where the human error has come in, because as you
 14 will see if you eyeball this very roughly, on those
 15 occasions where the unit triggers in the sense of being
 16 available, it is a roughly thousand-fold drop off for
 17 the number of times it is clicked on. So -- I am sorry,
 18 I am told this is confidential, but if you look at
 19 the first instance, the figure beginning with a 6 --

20 THE CHAIRMAN: Well, the bit in your closing is not shown as
 21 confidential.

22 MS LOVE: Ah, right, okay.

23 THE CHAIRMAN: That bit I think. If that is the -- is this
 24 the May --

25 MS LOVE: Yes.

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1 THE CHAIRMAN: -- is this the May 2019 dataset? It is.
 2 Yes, it is.

3 MS LOVE: It is non-confidential.

4 THE CHAIRMAN: Yes.

5 MS LOVE: So, for instance, if we look at the German figure
 6 from April 2019, we can see that there were about just
 7 under 6.5 million occasions when the CSU tab was
 8 available, about 6.5 it was clicked on. So I am afraid
 9 that the figures in our footnote 122, the 1 to 2%, seems
 10 to have been out by an order of magnitude in Google's
 11 favour, because it is actually generally between 0.1 and
 12 0.2%. There are some occasions when it is lower and
 13 I think there may be one or two where it is higher
 14 still, but it is still a fraction of a per cent.

15 THE CHAIRMAN: Yes.

16 MS LOVE: The 0.06% figure in footnote 124 --

17 PROFESSOR SMITH: Before we (inaudible), if I continue to
 18 look at the German row, the number in (a) is ten times
 19 the number in (f). How does that correspond to
 20 the frequency with which the CLA tab appears? I thought
 21 that was way below 1% and here it looks like 10%.

22 MS LOVE: Oh, no, those are the figures, sir, in the letter
 23 you saw at {M1/494/2}, and those generally are in
 24 the order of -- they range between less than 1% and
 25 about 12%. So the tab triggers more often. The tab, as

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1 that suggests, in Germany in that week triggered about
 2 10% of the time. It is simply the case that, of those
 3 occasions when it triggered, it was only clicked on in
 4 a fraction of a percent of cases -- oh, no, I am sorry,
 5 it is actually daily numbers, is it not, so this will be
 6 the date for 29 April, and then there will be another
 7 for the 30 April, which will be in row 34, and it is
 8 a similar picture.

9 THE CHAIRMAN: Then?

10 MS LOVE: Then in our footnote 124, those figures were taken
 11 from Kelkoo's data and they quote from a presentation
 12 which can be found at {J1A/90/4}.

13 This is a -- sorry, it needs a bit of enlarging.
 14 This is a presentation that Kelkoo made to
 15 the Commission and this is dated November 2019, and
 16 Kelkoo again broke the journey down into these three
 17 stages, which is the tab being available, triggering at
 18 all, the tab being clicked on and someone then going on
 19 to click through on an individual CSS tile.

20 Our data are obviously slightly different, because
 21 we only have data in relation to CLAs where Kelkoo
 22 appears or where a Kelkoo tile is clicked, I understand,
 23 and also we do not have Kelkoo data on the triggering of
 24 it at all, but our 0.06% is roughly in line, it is
 25 a similar order of magnitude now to what you get for

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1 the Google data.
 2 I should add that for the stage one --
 3 THE CHAIRMAN: 0.06.
 4 MS LOVE: Yes.
 5 THE CHAIRMAN: So that is -- yes.
 6 Then Dr Stables says in this that once the unit is
 7 produced, 4.1% of people click through to a particular
 8 product to make a purchase.
 9 MS LOVE: Yes, so once the unit has been triggered and has
 10 been clicked on, about 4%, and he says sometimes up to
 11 8%, of people do actually then click on a tile, so that
 12 at that point the numbers are more reasonable. But the
 13 percentage of occasions on which anyone actually brings
 14 up this tab, whether on Kelkoo's numbers or Google's,
 15 are in the fractions of a percent.
 16 THE CHAIRMAN: Yes. So footnote -- if we go back to
 17 footnote 122, page 52 of your --
 18 MS LOVE: (Off microphone -- inaudible).
 19 THE CHAIRMAN: On page -- the page before, I think
 20 {AA/1/56}. Yes. So the sentence -- the second sentence
 21 of paragraph 111:
 22 "This means that, even when a CLA on the SERP is
 23 triggered at all (which is not always) ..."
 24 But 122, that percentage, is not the percentage of
 25 number of times the CLA on the SERP is triggered, that

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1 is the percentage of clicks on the tab once it has been
 2 triggered; is that right?
 3 MS LOVE: So the percentage is incorrect --
 4 THE CHAIRMAN: It should be nought-point --
 5 MS LOVE: 0.2, but it is -- you are correct, sir, it is also
 6 -- it is the percentage of the minority of occasions
 7 when a tab is triggered that it is then clicked on so
 8 that the CLA's tiles are displayed.
 9 THE CHAIRMAN: Yes, so it does not go with the next sentence
 10 of footnote 122, it is really -- it really goes with
 11 1 ...
 12 MS LOVE: 123.
 13 THE CHAIRMAN: Yes, with 123. Yes.
 14 MS ROSE: So it triggers up to 12% of the time?
 15 MS LOVE: Well, according to --
 16 MS ROSE: Depending on the country.
 17 MS LOVE: Well, it triggers a minority of occasions
 18 generally, as the Chairman said, because there are not
 19 enough CLA campaigns; there have to be at least three.
 20 What we have is Google's data from 20 May 2019 which
 21 ranged between 0.02 and just under 12%.
 22 So it seems to trigger somewhere, in general, in
 23 the low single digit percentages of the time.
 24 MS ROSE: Depending on location?
 25 MS LOVE: But the main fall-off is the number of people who

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1 do anything with the tab at all.
 2 THE CHAIRMAN: Yes, well, thank you. You can perhaps
 3 understand why I was a bit confused.
 4 MS LOVE: We apologise for the error.
 5 THE CHAIRMAN: Yes.
 6 Closing submissions by MR JOWELL (continued)
 7 MR JOWELL: So I think I was about to come in earnest to our
 8 scenarios 3a and 3b, although we had already touched on
 9 them earlier in my submissions.
 10 One point that I should flag before I get into each
 11 of them is that whilst our position is that those
 12 scenarios are not strictly contingent on whether
 13 the demotion limb is addressed, they can also work
 14 equally well on a scenario where there is no demotion,
 15 so in other words where the algorithms are adjusted to
 16 remove their effect on CSSs or good quality CSSs.
 17 Indeed, we say that it may well be that Google would
 18 have preferred to have had Google Product Search rank in
 19 the organic results and hence adjust the demotion
 20 algorithms to achieve that, and also then, either at
 21 that time or perhaps subsequently, then introduce some
 22 form of a box with equal access.
 23 If you are with us on our primary argument that
 24 Algorithm A would have been adjusted from 2008 and Panda
 25 would not have been introduced in the form that it was,

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1 then indeed it does not seem realistic to say that such
 2 demotions would later have been reintroduced in
 3 the Post-Decision Period, or indeed during the Decision
 4 Period -- later in the Decision Period.
 5 So then turning to the substance of scenario 3a, you
 6 have seen that this is a box with links to CSSs. One
 7 can see it essentially as a variant of the popular
 8 catalogue box that existed under the Product Universal
 9 except for the fact that the catalogue boxes here would
 10 link to rival CSSs as well as to Google's. Another way
 11 of looking at it is to look at it as a much improved
 12 version of the later CLAs that Google introduced, one
 13 with better images and with prices and other --
 14 substantial other information.
 15 MS ROSE: So what is the information you say is minimum for
 16 this to work?
 17 MR JOWELL: Well, I think, minimum are they must be lowest
 18 prices. That is first of all. Secondly, they should
 19 have the ability to put in information about stock
 20 availability and reviews, you know, stars, and such
 21 other information as can reasonably be included in these
 22 boxes and that CSSs should be given effectively an
 23 ability to choose what they -- what information they put
 24 in, subject of course to Google setting reasonable
 25 parameters. But one can see --

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1 MS ROSE: So CLA plus?
 2 MR JOWELL: CLA plus. One saw in the one document that is
 3 referred to actually in the context of the CLA
 4 experiment that Kelkoo made submissions to
 5 the Commission as -- not to the Commission, to Google,
 6 as to what -- how those -- the CLAs could be improved
 7 and there is no suggestion that Google could not
 8 technically have improved them in those ways.
 9 Now --
 10 MS ROSE: No one is suggesting this causes technical or
 11 privacy problems?
 12 MR JOWELL: No. No, and I am going to come onto that. No,
 13 there is no suggestion of that.
 14 Now, I asked Mr Goodrow about this and he accepted
 15 it was a possibility. If we can see that, it is
 16 {Day9MT1/145}.
 17 I say -- at the bottom, I say:
 18 "Question: Well, another possibility would have
 19 been -- would it not, would have been to have kept
 20 the OneBox, but then within the OneBox, you would have
 21 had links not just to Google Product Search, but also to
 22 rival CSSs; correct?"
 23 He said:
 24 "Answer: Perhaps."
 25 He says:

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1 "Answer: I don't know how that makes the page look
 2 more like Amazon, but, you know, that's a possibility."
 3 He says.
 4 Now, the Tribunal will be familiar with the mock-up
 5 image of how that looks. That is at slide 15 of our
 6 images annex at {A1/3/17}. Indeed --
 7 MS ROSE: Hang on, so this is A1 ...?
 8 MR JOWELL: It should come up on your screen, madam.
 9 One can see there we have included it with images
 10 and price ranges and the number of results and shops.
 11 MS ROSE: So what -- are there issues with privacy concerns
 12 with this?
 13 MR JOWELL: No. Not as far as we can see, no.
 14 The --
 15 MS ROSE: Would the clicking through take you to
 16 the relevant results, or just to the homepage of
 17 the CSS?
 18 MR JOWELL: I think it would -- it should take you through
 19 to the relevant results, or to the homepage, if that is
 20 what the CSS so chose.
 21 MS ROSE: But I mean, we are told one of the problems with
 22 the current CLA --
 23 MR JOWELL: Yes.
 24 MS ROSE: -- is that in 35% of cases it takes you to
 25 the homepage, not to the relevant results, and that that

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1 is because of the concern that the search query is so
 2 niche that there could be a data protection breach. So
 3 would not that apply to this -- that problem apply to
 4 this just as well?
 5 MR JOWELL: It is an interesting question. Can I take
 6 instructions on that and come back to you? I think that
 7 the same sandboxing type of arrangement would probably
 8 apply, but I will need to take -- I need to double-check
 9 that.
 10 MS ROSE: I think we will need a more precise answer on
 11 this --
 12 MR JOWELL: Yes.
 13 MS ROSE: -- because, I mean, this is really where we are
 14 kind of in the nitty gritty --
 15 MR JOWELL: Yes. No, I see that.
 16 MS ROSE: -- and we are -- we do really need help on exactly
 17 what it is you are suggesting --
 18 MR JOWELL: Yes.
 19 MS ROSE: -- and how it overcomes the various issues that
 20 Google have raised.
 21 MR JOWELL: Yes. Yes. I will -- I mean, there has not been
 22 a suggestion that this is not doable. You saw
 23 Mr Goodrow, and I also put this to Mr Friedman --
 24 MR PICKFORD: I am sorry, but we do not accept that this is
 25 doable in the terms that Mr Jowell says.

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1 MR JOWELL: Well, you can see the transcript references for
 2 Mr Friedman's evidence, which is found at paragraph 308
 3 of our written submissions {AA1/1/134}, and we say that
 4 actually the feasibility of this scenario is also
 5 supported by Google's commitments offer that it made to
 6 the Commission. I can show you that, it is {A1/3/6}.
 7 You can see there, on the right-hand side -- this is
 8 annex 2 to Google's commitment proposal back from
 9 31 January 2014. If you see, what they proposed was to
 10 have a split box, and on the left-hand side they
 11 effectively kept their existing PLA as it is, and on
 12 the right-hand side, you see it then
 13 says "Alternatives", and you see it gives three CSSs,
 14 and underneath it says -- it provides information on
 15 price:
 16 "Best stock of gas grills from £150."
 17 And so on.
 18 THE CHAIRMAN: This is a split box.
 19 MR JOWELL: This is a split box.
 20 MS ROSE: So half of the box is Google Shopping --
 21 MR JOWELL: Yes, yes.
 22 MS ROSE: -- and half is other CSSs?
 23 MR JOWELL: Yes. You can see that certainly it must have
 24 been technically possible for them to include price
 25 information from other CSSs, because otherwise they

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1 would not have been proposing that to
 2 the European Commission.
 3 MS ROSE: Do you say this would be compliant, and if not,
 4 why not?
 5 MR JOWELL: No, we say this would not be compliant because
 6 of the left-hand side of the box.
 7 MS ROSE: Because it is still self-preferencing?
 8 MR JOWELL: Yes. Yes, correct, and no doubt that is why
 9 the European Commission rejected it as well, because
 10 half of the box is still a manifestation of Google's
 11 CSS.
 12 MS ROSE: What if the box looked like this but instead of
 13 the left-hand side being Google Shopping results it was
 14 PLAs bid for directly by merchants?
 15 MR JOWELL: Well, I think that comes to the same thing,
 16 effectively, as Google Shopping results, because
 17 the PLAs are all going to be ranked by
 18 Google Shopping --
 19 MS ROSE: So you say there is no difference --
 20 MR JOWELL: No.
 21 MS ROSE: -- between a Google Shopping box --
 22 MR JOWELL: Yes.
 23 MS ROSE: -- and a PLA?
 24 MR JOWELL: Yes, correct, because the PLAs are ranked by
 25 Google. It would be different if they gave an

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1 opportunity for other CSSs to rank those PLAs.
 2 MS ROSE: So that effectively means that Google cannot
 3 display product adverts on its SERP?
 4 MR JOWELL: Not in a grouped -- not in a grouped way that
 5 enables product comparison --
 6 MS ROSE: I mean, any time you have more than one product
 7 ad, they can be compared.
 8 MR JOWELL: Well, that may be, yes. Certainly more than one
 9 or two.
 10 MS ROSE: So they cannot advertise more than one product on
 11 their homepage?
 12 MR JOWELL: Well, no, they can do that by way of text ads
 13 and so on, but what --
 14 THE CHAIRMAN: They can have AdWords --
 15 MR JOWELL: They can have -- that is right.
 16 THE CHAIRMAN: -- on at the side?
 17 MR JOWELL: But what they cannot do --
 18 THE CHAIRMAN: As here, on the side here?
 19 MR JOWELL: Yes.
 20 MS ROSE: So why is that not also a CSS, if you have got,
 21 like, four text ads?
 22 MR JOWELL: Because it does not enable -- well, first of
 23 all, it has never been alleged to be -- to amount to
 24 a CSS, the issue has never --
 25 MS ROSE: Yes, but why is it not?

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1 MR JOWELL: It is not because it does not enable price and
 2 product comparison in the same way --
 3 MS ROSE: Well, I mean, the only difference is that it has
 4 not got a picture, right?
 5 MR JOWELL: Well, it is also not ranked in the same way.
 6 THE CHAIRMAN: (Overspeaking -- inaudible).
 7 MR JOWELL: So the critical point is that Google is ranking
 8 by way of similar products and setting out -- and
 9 similar prices and setting these out in such a way as to
 10 enable price and product comparison, which it does not
 11 do for text ads.
 12 MS ROSE: It is just the layout?
 13 MR JOWELL: It is the layout, yes. It is a matter of
 14 degree, but it is important nonetheless. I mean, that
 15 is often the case when something turns into a different
 16 service at a certain point, when the features
 17 conglomerate in a certain way to produce a certain
 18 effect for users, and that is what has happened here.
 19 It is when you get a certain number and the critical
 20 mass is probably over -- I would say probably over two
 21 of these, and they are being ranked in a particular way
 22 and presented in a way to facilitate product and price
 23 comparison.
 24 PROFESSOR SMITH: Your question and answer with Mr Goodrow
 25 that you quoted referred to the OneBox, presumably

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1 Product Universal, so --
 2 MR JOWELL: Yes.
 3 PROFESSOR SMITH: -- this -- and clearly this screenshot
 4 here is a post-PLA screenshot.
 5 MR JOWELL: That is correct.
 6 PROFESSOR SMITH: So you are describing your scenarios as
 7 being applicable, with appropriate changes, both in
 8 the first part of the period and the post-PLA period?
 9 MR JOWELL: Yes, indeed, and I am going to come on, if
 10 I may, to deal with the question of charging separately,
 11 because that gets quite complicated.
 12 But, yes, so we say that really this answers
 13 the question of feasibility, certainly of putting in
 14 prices. I mean, it is unanswerable. If the Commission
 15 was proposing this -- if Google was proposing this to
 16 the Commission, of course it had to be feasible and
 17 realistic, technically.
 18 So really the objections to this can only be about
 19 commercial plausibility. They say essentially: it is
 20 not a realistic option because, well, we, Google, would
 21 always have preferred to link to merchants. The problem
 22 with that is that it actually is not borne out by
 23 the contemporaneous evidence in the earlier period,
 24 because Mr Goodrow's evidence suggests that at least
 25 from 2008 to 2011 implementing a catalogue-style box

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1 linking to rival CSSs would have been aligned with
 2 Google's views at the time of what most users wanted and
 3 it would have fit well in with that assessment as well
 4 as with the fundamental imperative of Google of
 5 increasing shopping starts on Google.com.
 6 Of course, the other advantage of scenario 3a for
 7 Google is it would have enabled it to get at least some
 8 clicks to the webpage of the revamped Google Product
 9 Search, which it had invested in heavily and was trying
 10 to build up at that time.
 11 Now, Google's answer in its closing submissions is
 12 to say: well, you cannot rely on all of that
 13 contemporaneous evidence and the witness evidence to
 14 tell us what Decision-makers' preferences were. Instead
 15 one has to look at what they call "Google's revealed
 16 preferences" from what they actually did in 2013 and
 17 indeed in 2017. But we say, actually, its commercial
 18 incentives had evolved by -- certainly by 2017 and what
 19 you have to look at is what they did in the Decision
 20 Period, and it did develop the catalogue view in 2008
 21 and 2009, it deployed it and it recognised that users
 22 liked being taken to a range of different comparison
 23 shopping sites. Of course, as we have also seen, Google
 24 did offer to link to competing CSSs in its commitments
 25 offer in 2014. Now, of course, the commitments were

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1 never implemented because the Commission rejected them,
 2 but it does show us that that is something that Google
 3 was willing to do, even in 2014, and we say that is very
 4 hard to square with Google's position in these
 5 proceedings that this would have just been an
 6 unmitigated commercial disaster, it is something it
 7 would never have done. We say what one sees from
 8 the commitments is also a revealed preference.
 9 Now, there are three other points that Google make
 10 about this. One is about the CLAs introduced in 2019
 11 and the other is the CLA experiment in 2022.
 12 Now, you have heard a lot about why we say CLAs
 13 failed and it is really just simply down to the flaws in
 14 the format and the fact that it is a hidden tab. It is
 15 not about innate user preferences. It may be, as I will
 16 come on to, about how users have been educated, but it
 17 is not about their innate preferences.
 18 Now, the 2022 CLA experiment is covered in some
 19 detail in paragraphs 114 to 118 of our closing
 20 submission {AA1/1/58-61} and I have already mentioned
 21 that that was hopelessly skewed. Kelkoo's suggestions
 22 for improvement of the format were comprehensively
 23 ignored, Mr Friedman accepted that the images were by no
 24 means equivalent between the PLAs and the CLAs, there is
 25 no information on prices or stock, and even Mr Braendle

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1 accepted that the CSSs should have been told about this
 2 experiment in advance and they weren't. Of course, one
 3 also has the fact that, for mysterious privilege
 4 reasons, the experiment was not conducted in the country
 5 where it would have been most promising, Germany. So we
 6 say you get absolutely nothing at all of value from that
 7 experiment.
 8 But there is also a wider point, which is that even
 9 if the CLA experiment had been a gold standard
 10 experiment, still one has to take into account the fact
 11 that there were developments in online shopping between
 12 2008 and 2022 which did not take place in a vacuum, they
 13 were themselves shaped by Google's conduct and by
 14 Google's abuse.
 15 Now, the effect on preference has been referred to
 16 in these proceedings as a learned effect or an
 17 endogenous effect, and Google knew about that. You may
 18 recall that I took Mr Friedman to a document,
 19 {M1/528/4} -- if we just have a look back at that, if we
 20 may -- which is a 2015 document in which Google noted
 21 that the results of certain experiments it had conducted
 22 about user behaviour. You can see that they noted at
 23 the bottom, Google:
 24 "PLAs lead to PLA-sightedness."
 25 That is explained as:

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1 "Showing PLAs leads to more clicks on PLAs
 2 themselves."
 3 Now, you may recall that Ms Love put to Mr Noble
 4 that this learned effect may well have accounted,
 5 together with the experimental design flaws and
 6 the issues with the CLA format, for the disparity in
 7 the number of clicks in that experiment, and Mr Noble
 8 conceded that he did not have any statistics or data
 9 points on which he based his conclusion that it did not.
 10 So that is another important factor that one has to bear
 11 in mind.
 12 MS ROSE: Could I ask a question about your 3a?
 13 MR JOWELL: Yes.
 14 MS ROSE: So your 3a envisages that the CSSs, whether it is
 15 charged for or not, let us assume for a minute
 16 a charging model --
 17 MR JOWELL: Yes.
 18 MS ROSE: -- the CSSs bid for a tile in the box --
 19 MR JOWELL: Yes.
 20 MS ROSE: -- and the format is like the catalogue view,
 21 showing lowest price, number of stockists, number of
 22 stars, whatever. Would it be compatible with that
 23 option that if the CSSs concluded that they got better
 24 click-through rates if they showed a single product on
 25 their tile and not, as it were, a mini comparison view,

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1 if they concluded they got a better click-through rate
 2 if they said, you know, Nike whatever, X pounds,
 3 effectively a PLA placed by the CSS on behalf of an
 4 individual merchant in their tile, would that be within
 5 the scope of your 3a? Do you see what I mean? So that
 6 if it turned out that consumers over time did drift
 7 towards preferring PLAs to CLAs --
 8 MR JOWELL: Yes.
 9 MS ROSE: -- would that be something that competition could
 10 address in the way that the individual tiles bid for by
 11 the CSS is displayed on the SERP?
 12 MR JOWELL: Well, we think that that is a sort of --
 13 I suppose that is a mixed mode, which I am going to --
 14 effectively, where people could choose. It is also
 15 similar to the PLACSS. I think the answer is -- one has
 16 to be a bit vague about this because I think -- as
 17 Mr Hunt was, I think, in response to your questions as
 18 well, which is I think potentially that could be
 19 possible, but it is -- but there are difficulties with
 20 that solution which are that it can drift into a reality
 21 where effectively it becomes, again, Google's CSS on
 22 the page, which is why we think the --
 23 MS ROSE: Even if the individual CSSs are choosing which
 24 view to display and also which product to display?
 25 MR JOWELL: I think there is less difficulty in that

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1 scenario, but still, there is still a -- it still
 2 becomes problematic that then effectively it can become
 3 Google's -- effectively it becomes Google's CSS, because
 4 Google is ranking products, effectively, for users.
 5 THE CHAIRMAN: Your example at {A1/3/17}, your image 15 --
 6 MR JOWELL: Yes.
 7 THE CHAIRMAN: -- has got one of the CSSs showing just two
 8 shoes as opposed to -- this query is "basket adidas", as
 9 opposed to the greater variety shown by the others --
 10 MR JOWELL: Yes.
 11 THE CHAIRMAN: -- but it is still a price range and number
 12 of shops and so on.
 13 MR JOWELL: Yes. No, I think that is not problematic.
 14 I think it is -- as long as the -- as long as it goes
 15 through to the CSS, it probably is not -- it is not
 16 a problem.
 17 MS ROSE: Well, a CSS can choose to display a single shoe.
 18 MR JOWELL: Yes, I think that is fair, yes. I think ...
 19 yes.
 20 MS ROSE: It is just it is quite troubling, the idea that
 21 the market can only be permitted to develop in one way.
 22 MR JOWELL: Well, that is with 3a. That is why we proposed
 23 3b, because 3b allows the market to move -- effectively
 24 to choose direct click throughs to merchants and that is
 25 why the 3b solution addresses that.

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1 MS ROSE: But that is on the basis that the CSS bids for
 2 the whole --
 3 MR JOWELL: Yes.
 4 MS ROSE: -- box?
 5 MR JOWELL: Yes, but bids against, in fair competition, also
 6 with Google's CSS for the whole box, but that -- but
 7 that does solve that problem for you, because one does
 8 then -- if it is right that users prefer in some
 9 instances, or in most instances potentially, to go
 10 direct through to the merchant, then that is what CSSs
 11 will then display when they take over the box, and if no
 12 other CSSs other than Google's CSS does that, then
 13 Google's CSS would ultimately win out. So if that is
 14 what the market wants, then that will be what the market
 15 gets.
 16 MS ROSE: Does that logic require them to bid for the whole
 17 box?
 18 MR JOWELL: Yes, it does. Yes, it does.
 19 MS ROSE: Because otherwise it just becomes Google's CSS --
 20 MR JOWELL: Yes, correct, otherwise it becomes Google's CSS,
 21 and --
 22 PROFESSOR SMITH: But before we leave 3a --
 23 MR JOWELL: Yes.
 24 PROFESSOR SMITH: -- if 3a has been bid for by a CSS, so in
 25 3a the entries are CSSs bidding --

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1 MR JOWELL: Yes, yes.
 2 PROFESSOR SMITH: -- and they have to bid for them in
 3 the same -- in an auction.
 4 MR JOWELL: Yes, potentially. I am going to come on to when
 5 we would say that, but we do not have an objection in
 6 principle with the CSSs bidding, but it is a question
 7 of, we think -- when there is a question of the when in
 8 practice Google would have introduced --
 9 THE CHAIRMAN: Yes, when it would have started --
 10 MR JOWELL: When it would have started to -- to --
 11 THE CHAIRMAN: -- to monetise.
 12 MR JOWELL: Yes, indeed.
 13 PROFESSOR SMITH: But one of your objections to the Remedy
 14 box is that the auction means that almost all
 15 the revenue associated with sales goes to Google rather
 16 than to the CSSs who have placed the PLAs -- who enter
 17 the PLA auction.
 18 MR JOWELL: Yes.
 19 PROFESSOR SMITH: The same, presumably, could happen with
 20 option 3a, where competition between CSSs for slots in
 21 the box could mean most of the revenue goes to Google?
 22 MR JOWELL: Well, that is a factual question really for
 23 Trial 2, but we say that it would not, because if one
 24 looks, for example, at other circumstances, say one
 25 takes the AdWords auction, where you did have CSSs

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1 bidding to appear in the AdWords, the text -- the text
 2 ads on the side of Google, one saw that, nevertheless,
 3 CSSs were able to retain a good deal of the margin and
 4 make good margins out of those -- out of the clicks that
 5 came through from those advertisements, and that is
 6 because CSSs were not effectively being displaced by
 7 Google, by Google putting its CSS right up for users in
 8 the front of the page and CSSs were able to
 9 differentiate themselves and add value, real value for
 10 merchants and for users, whereas they cannot on
 11 the present scenario. So it is that ability to
 12 differentiate and be taking away the advantage to Google
 13 then, we say, will definitely mean that there is
 14 a much different division between the margin. We do not
 15 say that Google would not get any, but it certainly
 16 would not get the 99% that it gets now.
 17 So, now, another objection that Google makes is that
 18 they say, well, the catalogue -- the catalogue-type box
 19 would not have been commercially rational because it
 20 would have consistently lost the whole page auction, in
 21 other words the catalogue box, the 3a would just never
 22 -- it would never pop up, they say, because there is
 23 a free -- a whole page auction. Now, the difficulty
 24 with that is, as I put it to Mr Friedman in
 25 cross-examination on Day 11, which is, first of all,

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1 there was not a whole page auction back in 2008. So, at
 2 most, this is an objection that might have some force
 3 from around 2013, which is when I think something like
 4 a whole page auction started to be introduced.
 5 But also --
 6 MS ROSE: Is this before, where it is not monetised?
 7 MR JOWELL: Yes.
 8 But it is also wrong for another reason that I also
 9 explored in cross-examination with Mr Friedman, which is
 10 that if you had a situation where you simply did not
 11 have any box, you simply had no ability to access
 12 comparison shopping on the page, or only very rarely,
 13 that would itself mean that there would be a diminution
 14 in shopping starts, and so what Google would do would be
 15 to factor into its assessment the fact that having that
 16 box on the page would have a value in terms of
 17 increasing shopping starts and therefore you would get
 18 more revenue from text ads in the longer term if you
 19 showed it. I do not think I need to take you to it, but
 20 I took that -- I made that point to Mr Friedman, and he
 21 did not disagree, on {Day11MT1/96-102}. He conceded
 22 that Google might have factored into the assessment
 23 the commercial value of having the box on the page,
 24 albeit he said that he would not be the Decision-maker
 25 in that scenario. But we say that it makes perfect

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1 sense for them to factor that into their assessment.
 2 The only other point that Google makes about 3a in
 3 its written submissions is it says: oh, well, we would
 4 never have linked to CSSs because all of those CSSs were
 5 just very low quality, thin affiliates and we would not
 6 have wanted to send users there. We just say, well,
 7 that is just simply contrary to all the evidence that
 8 you have heard to the effect that actually many of these
 9 CSSs were better quality than Google's own CSS to which
 10 it was very happy to send users in increasing numbers
 11 between 2008 and 2012.
 12 So that brings --
 13 MS ROSE: On that last point --
 14 MR JOWELL: Yes.
 15 MS ROSE: -- we have heard that the auction is partly about
 16 price --
 17 MR JOWELL: Yes.
 18 MS ROSE: -- but it is also about quality indicators and
 19 relevance indicators --
 20 MR JOWELL: Yes.
 21 MS ROSE: -- user behaviour.
 22 MR JOWELL: Yes.
 23 MS ROSE: So would you accept that when -- if we assume an
 24 auction --
 25 MR JOWELL: Yes.

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1 MS ROSE: -- or indeed if you are just looking at organic
 2 search --
 3 MR JOWELL: Yes.
 4 MS ROSE: -- that it would be legitimate for Google to apply
 5 quality-based filters, based, for example, on user
 6 behaviour, in order to differentiate between good and
 7 bad quality CSSs?
 8 MR JOWELL: Yes, we do, albeit that those would have to be
 9 objective and could not favour its own CSS in an unfair
 10 way.
 11 MS ROSE: I mean, clearly not discriminatory.
 12 MR JOWELL: Yes.
 13 MS ROSE: But if they are not self-preferencing, not
 14 discriminatory --
 15 MR JOWELL: Yes.
 16 MS ROSE: -- then provided Google adopts a reasonable
 17 methodology --
 18 MR JOWELL: Yes.
 19 MS ROSE: -- and we have heard in the confidential sessions
 20 about various indicators of user behaviour that are
 21 proxies for quality, a quality user experience --
 22 MR JOWELL: Yes.
 23 MS ROSE: -- then that would defeat Google's objection to
 24 this, would it not, because if Google was right and all
 25 the other CSSs were so bad that they were just spam --

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1 MR JOWELL: Yes.
 2 MS ROSE: -- then this box would be populated entirely by
 3 Google Shopping?
 4 MR JOWELL: Yes, yes. Yes, indeed. But of course -- yes,
 5 indeed, and we have no problem with quality controls and
 6 one would expect that there should be quality controls.
 7 I mean, of course.
 8 So I come back to -- I have been given a note on how
 9 to address the privacy issue for 3a, but I would like to
 10 read it first, before I read it back to you.
 11 THE CHAIRMAN: In any event, given that the first view is
 12 five tiles, effectively, and then you have got to scroll
 13 along the carousel to see more --
 14 MR JOWELL: Yes.
 15 THE CHAIRMAN: -- there is a ranking of tiles in the -- in
 16 3a --
 17 MR JOWELL: Yes, there is.
 18 THE CHAIRMAN: -- and that, it can be done purely on
 19 bidding, although you say bidding would only have come
 20 in anyway --
 21 MR JOWELL: Yes.
 22 THE CHAIRMAN: -- further down the line --
 23 MR JOWELL: Yes.
 24 THE CHAIRMAN: -- so before that, that ranking has to be
 25 done somehow --

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1 MR JOWELL: Yes.
 2 THE CHAIRMAN: -- and you accept it therefore would be done
 3 logically on a quality basis --
 4 MR JOWELL: Yes.
 5 THE CHAIRMAN: -- and a poor CSS either would not get in at
 6 all or would be number 14 down the carousel.
 7 MR JOWELL: No, quite. Absolutely, yes.
 8 So I think that leads me then to 3b.
 9 THE CHAIRMAN: Well, in that case, that is a convenient
 10 moment --
 11 MR JOWELL: A convenient moment.
 12 THE CHAIRMAN: -- to take a short break.
 13 We will come back at 12.10.
 14 (11.59 am)
 15 (A short break)
 16 (12.11 pm)
 17 MR JOWELL: So to come back to the issue about privacy with
 18 3a, of course it only applies to -- well, I say "only"
 19 -- it applies to 35% or so of cases, so it is not
 20 completely prohibitive of the solution in anyway. But
 21 secondly, there are, we say, definitely workarounds for
 22 the privacy issue in relation to 3a that Google could
 23 and would implement if it suited it and if, for example,
 24 its own CSS was in the same shoes as other CSSs in not
 25 being able to have access to the information.

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1 The workarounds could be relatively straightforward.
 2 So, for example, if you had a query that mentioned, say,
 3 a particular postcode, or an address, as well as other
 4 information, so if you were looking for, I do not know,
 5 "pink shoes in NW6" or whatever, then you would simply
 6 take out the "NW6", so you simply redact the bit of
 7 information that was potentially private and provide
 8 the other information.
 9 Another workaround would be to -- slightly more
 10 sophisticated, would be to replace the private
 11 information with something more generic. So, for
 12 example, instead of "NW6" of, you would say "Greater
 13 London".
 14 A third possibility would be to match the query to
 15 Google's own internal categorisation of the query so
 16 that if Google has got, for example, categories or
 17 subcategories for certain products to which it matches
 18 the query, then that information would be provided to
 19 CSSs more generally.
 20 MS ROSE: (Off microphone - inaudible).
 21 MR JOWELL: Well, so suppose it was women's shoes. If you
 22 had a private -- you had a query that said, "Pink shoes
 23 in NW8", and then that could be translated into "Greater
 24 London women's shoes", or something like that, whatever
 25 internal category that Google translates it to.

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1 So --
 2 MS ROSE: (Off microphone - inaudible).
 3 MR JOWELL: I think there was not specific evidence on this
 4 point. I think that is right.
 5 But we say that those -- I think Mr Stables alludes,
 6 you know, to the fact that he is sceptical. He alluded
 7 in his evidence to the fact he is sceptical about
 8 the privacy concerns, but you are right that we do
 9 not --
 10 MS ROSE: None of these workarounds were put to Google's
 11 witnesses, were they?
 12 MR JOWELL: I think that is right. I do not think we
 13 specifically put them. But, at the same time, I do not
 14 think it was said that these -- we do not understand
 15 their evidence to be that 3a is an unworkable solution,
 16 so -- and so --
 17 MS ROSE: Well, I am not sure that it would make it
 18 unworkable. I think what they say is it makes it a very
 19 unsatisfactory solution from the perspective of users if
 20 35% of queries do not take you to the page that shows
 21 Kenwood mixers but take you to the homepage of the CSS,
 22 so you have got to start again with your query. I think
 23 that is their point. That is a very bad user
 24 experience. You know, if you do not want to be on
 25 the homepage.

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1 MR JOWELL: Yes, so, I mean, we say in response to that,
 2 well, we do not accept that they cannot give some
 3 information in response to those queries and that is not
 4 sufficient. Even if it were the case that, for a third
 5 of queries, it gives a slightly unsatisfactory solution,
 6 that is not prohibitive, because it does not mean --
 7 I mean, at the end of the day, one has to say: well,
 8 what is a lawful solution? If 3a were the only lawful
 9 solution, then that would be it.

10 MS ROSE: But it has to be a commercially viable solution.

11 MR JOWELL: Yes, well, it certainly -- it does not render it
 12 commercially unviable, otherwise they would not have
 13 been proposing it in their commitments for half of
 14 the box. In our submission, it does not come close to
 15 showing that it is commercially unviable.

16 So, I mean, at the end of the day, you are not --
 17 one is not saying it could not be done, it is just
 18 saying, well, this makes it slightly less attractive,
 19 and our response to that is also that, in practice,
 20 there would be workarounds for these kind of privacy
 21 issues if Google had actually had an incentive to deal
 22 with them, which it does not at the moment.

23 That brings us then to 3b, where, as we have
 24 described, this would involve CSSs competing for control
 25 of the contents of the shopping box and the winning CSS

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1 would then rank and display offers that it considers
 2 most relevant for the user query, and that includes
 3 the ability to offer catalogue-type view, so 3a, or an
 4 offer-type view with links to the merchants, like PLAs,
 5 or a hybrid indeed. So in that way, as I have said,
 6 that would be more flexible than 3a and would allow
 7 the market to decide the preferred outcome, and in
 8 particular it might be more desirable for those users
 9 who are further down the shopping funnel.

10 Now, Google --

11 MS ROSE: Would your 3b work if it is not paid for?

12 MR JOWELL: It -- I think -- yes, we think it could still
 13 work. It could still work. It would have to be ranked
 14 on the basis of relevancy, but it could still work.

15 THE CHAIRMAN: Ranked, again, in the sense that -- because
 16 you have got almost a carousel of CSSs, have you not,
 17 when -- you have still got the options of choosing an
 18 alternative CSS?

19 MR JOWELL: Yes, just different CSSs -- one CSS or another
 20 CSS would --

21 MS ROSE: The front tab is the most desirable by a factor of
 22 many times.

23 MR JOWELL: Yes, and I cannot remember now which signals are
 24 confidential but -- so I will not mention particular
 25 signals, but there are signals that you could use,

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1 objective signals, that you could use to rank
 2 independent of the bidding.

3 PROFESSOR SMITH: So in ranking, Google would rank the CSS
 4 -- possible CSSs --

5 MR JOWELL: Yes. That is right.

6 PROFESSOR SMITH: -- to get into the box --

7 MR JOWELL: Exactly.

8 PROFESSOR SMITH: -- when it is a free box, and that seems
 9 to involve two steps. I mean, Google would need to
 10 interrogate each CSS bid and go down and --

11 MR JOWELL: Yes.

12 PROFESSOR SMITH: -- evaluate the quality of what underlay
 13 the CSS bid to --

14 MR JOWELL: Yes.

15 PROFESSOR SMITH: -- be the place to go for toasters.

16 MR JOWELL: Yes.

17 PROFESSOR SMITH: So that would involve some sort of
 18 two-stage process for Google.

19 Similarly, if we have a monetised box --

20 MR JOWELL: Yes.

21 PROFESSOR SMITH: -- the auction would be quite
 22 a complicated auction, would it not, because the --
 23 again, the auction is run by Google --

24 MR JOWELL: Yes.

25 PROFESSOR SMITH: -- and Google has got to make --

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1 MR JOWELL: Yes.

2 PROFESSOR SMITH: -- its predictions as to which CSS to put
 3 in on the basis of what product offers underlie the CSS
 4 tile?

5 MR JOWELL: I think -- yes, I am not sure the auction
 6 itself, the auction element, would be any more
 7 complicated, because each CSS would be bidding for
 8 the entire unit, and so they would simply -- again, they
 9 would presumably apply their second best bidding
 10 strategy and there would simply be an auction, but here
 11 the CSSs would just be bidding for the whole -- they
 12 would be bidding for the whole unit, and that aspect --
 13 that aspect of the choice would not be any more
 14 complicated. I accept that there is a certain degree of
 15 complexity in then Google assessing the signals,
 16 the quality signals of an entire box, but again, what
 17 one sees in the evidence is that this was a solution
 18 that Google was clearly contemplating and Mr Friedman
 19 conceded was workable, certainly with the addition of
 20 the sandboxing element.

21 MS ROSE: So what this envisages is that, for these
 22 commercial-type queries, the most valuable part of
 23 the page, what that looks like, what it displays, is
 24 sold as a black box, effectively, by Google to
 25 the various CSSs.

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1 Is there any precedent for Google surrendering
 2 control of the appearance and functionality of the core
 3 of its SERP to a third party? Is there any other
 4 instance where it has done that?
 5 MR JOWELL: Well, I think there are certainly instances
 6 where Google has input into its OneBoxes information
 7 that comes from third parties, and I think -- I will be
 8 told of the specific examples, but I think financial
 9 information, for example, comes from third parties.
 10 I think that there is -- we do not think that there is
 11 any -- we do not -- I would not entirely endorse your
 12 characterisation of it, because, of course, we do accept
 13 that Google is entitled to, first of all, establish
 14 certain parameters and quality parameters on what would
 15 go in, and secondly, it also chooses which of the CSSs,
 16 so it has its own ranking mechanism as to what it
 17 chooses. In the same way it does not -- one could say:
 18 oh, well, it surrenders control when it comes to its
 19 text ads as well. So I think this -- when they say,
 20 "Oh, it is like us giving our SERP to the New York
 21 Times", we say, not at all, it is really just a natural
 22 extension of what they do already.
 23 So the reality is that it is almost identical to
 24 the variants of the single CSS SCU option that were
 25 being considered, actively considered by Google in

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1 response to the Remedy.
 2 So if we go, for example, to {M1/537/4}, this is one
 3 of the internal Google documents that Mr Friedman,
 4 I think, largely was responsible for when they were
 5 considering all the different options, and you see
 6 number 2, you see -- well, first of all, you see the two
 7 general varieties that they considered, which were
 8 a mixed CSS and a single CSS SCU --
 9 MS ROSE: So is (a) your 3a?
 10 MR JOWELL: No, (a) is the Remedy more or less, or
 11 the Remedy is one variety of (a).
 12 MS ROSE: Because these are offers only?
 13 MR JOWELL: Yes.
 14 (b) is when you give -- effectively is close to 3b,
 15 where you give the entirety of the --
 16 MS ROSE: Of the box.
 17 MR JOWELL: -- box to a single CSS. Now, there is nothing
 18 radical about that at all, because that is clearly one
 19 of the main -- one of the -- it looked, at one point
 20 when you go through these documents, as though that is
 21 what they were going to opt for.
 22 Then a variant of that is number 2, which is what we
 23 are proposing, which is the "CSS ranking of CSS
 24 inventory", and now the variant of that was:
 25 "The current proposal [at that time] is to use

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1 a 'query-time callout' approach, where we call out to
 2 third-party CSSes to have them dynamically construct an
 3 SCU. We then decide (in a compliant manner) which CSS's
 4 SCU to show. The key characteristics of this proposal
 5 is that third-party CSSs are responsible for generating
 6 the slate of results they would like to show in the SCU,
 7 using their own ranking technology, metadata, etc."
 8 So they were actively considering it. So, so much
 9 for it being unthinkable.
 10 Now, until the oral evidence, at least, Google's
 11 main objection was: well, yes, we were thinking
 12 about it, but actually it was technically impossible.
 13 That was the basis on which Mr Noble, in his report,
 14 rejected the scenario, citing really the evidence of
 15 Mr Friedman.
 16 Now, Mr Goodrow, in his oral evidence, he observed
 17 that scenario 3b would be difficult from a technological
 18 point of view and especially with the latency
 19 considerations, but of course, unlike Mr Friedman,
 20 Mr Goodrow had never had occasion to consider it in any
 21 detail.
 22 Mr Friedman, on the other hand, in his candid oral
 23 evidence, did not, I am afraid to say for Google, did
 24 not back up their case, and he recognised that the same
 25 technical issues had been surmountable back in 2017. We

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1 explored two different approaches to this option, first
 2 of all, the -- what one has just seen, the query-time
 3 callout or shopping API approach, which you have just
 4 seen. If one goes to {M1/537/14} of this document,
 5 please, you can see they saw some commercial benefits
 6 also to Google of this approach. They say -- at
 7 the bottom, the penultimate paragraph, they say:
 8 "Why? The main motivation behind this proposal is
 9 to avoid having to share Google Shopping's technical
 10 investments and innovations with 3rd party CSS, and
 11 instead having all CSS operate as independent entities
 12 with the same inputs but with access to the same 'real
 13 estate' on Google Web SRP."
 14 So we say that they actually thought it had some
 15 commercial attraction as well.
 16 Now, in his oral evidence, Mr Friedman agreed that
 17 presenting feeds would help mitigate the quality
 18 concerns to some degree, and as to the latency concerns,
 19 the contemporaneous documents show that this is not
 20 actually such an immovable feature as had been
 21 suggested. So, for example, you may recall that there
 22 was an email exchange which I went to with Mr Friedman,
 23 which one can see at {K3/13}, an exchange between him
 24 and Mr Tholomé, where one says there is some reluctance
 25 in relation to the query-time callout approach, and he

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1 says:
 2 "Do we really want to propose this? Have we not
 3 said in the past this wasn't realistic for user
 4 experience reasons (though I think it is clear we do
 5 this for some experiences such as flights -- but can
 6 argue flights are super high consideration purchases
 7 where users can wait for seconds to get answers, not
 8 true for most shopping purchases)."
 9 Mr Friedman replies:
 10 "Yes, I do think it's worth careful consideration,
 11 as we discussed at the last meeting."
 12 But there is quite an interesting indication, at
 13 least for flights, latency is not some sort of be all
 14 and end all, and the same would certainly apply, it
 15 seems to us, for high value retail purchases.
 16 THE CHAIRMAN: But you could not really have a separate
 17 arrangement for high value and low value.
 18 MR JOWELL: No, I see that. But one could -- but -- it
 19 might be complicated, it might be complicated, but it
 20 might be possible.
 21 The real mitigations on the latency issue, in any
 22 event, were resolved by the sandboxing approach and that
 23 was set out in a 2017 internal document, which you see
 24 at {M1/447/9}. Without going through that in detail, in
 25 summary, CSSs here would provide offline feeds to Google

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1 which Google would then process and rank before
 2 retrieving the feeds in response to real-time queries.
 3 If you go over the page to {M1/447/10}, the offline
 4 element is important, because, as it says:
 5 "In this option, Google requires each CSS to submit
 6 an offline list of queries on which they wish to
 7 trigger, together with a list of results they wish to
 8 display for each query. This has two advantages:
 9 "1. Latency: since everything is computed offline,
 10 there is no latency cost.
 11 "2. Privacy: there is no RPC to any external
 12 system, so information won't leak."
 13 You will recall that --
 14 THE CHAIRMAN: "RPC" is?
 15 MR JOWELL: It stands for "remote procedure call" modes,
 16 which is basically transaction metadata when routing
 17 queries. It is a form of transaction meta data.
 18 You will recall that --
 19 MS ROSE: Is it they are not sending the query externally?
 20 MR JOWELL: Correct.
 21 MS ROSE: The feed has been sent to Google, so what Google
 22 is effectively doing is interrogating a fixed feed that
 23 is separate from the CSS?
 24 MR JOWELL: Correct, by reference to information that
 25 the CSSs have provided.

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1 MS ROSE: So the CSS constructs the feed, that is then
 2 provided, as it were, on a floppy disk -- yes, I know it
 3 is not a floppy disk -- provided on a floppy disk and
 4 then Google is interrogating and ranking that, so there
 5 is no leak of data to the --
 6 MR JOWELL: Yes.
 7 MS ROSE: -- CSS.
 8 MR JOWELL: Yes. Yes, correct. But it is -- it basically
 9 -- the CSS submits an offline list of queries on which
 10 they want to trigger and then -- together with
 11 the results, so it supplies that information and then --
 12 MS ROSE: Google decides which CSS's feed best meets
 13 the query and also looks at the bids and that one gets
 14 the box?
 15 MR JOWELL: Yes, that is right. That is correct. So --
 16 MS ROSE: Now, could it be argued that that is Google's
 17 CSS --
 18 MR JOWELL: No.
 19 MS ROSE: -- on the basis that they are interrogating
 20 the feeds, they are ranking the feeds --
 21 MR JOWELL: Well, they are not --
 22 MS ROSE: -- and deciding what displays?
 23 MR JOWELL: Well, they are -- it is really the CSSs that are
 24 -- CSSs are ranking, but -- doing the ranking there, but
 25 they have provided that information in advance to

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1 Google. It is the CSSs that are really providing
 2 the algorithm, if you like, by which the list of
 3 the queries is going to trigger certain results. They
 4 decide what results the queries will trigger, the CSSs,
 5 by reference -- and that -- and Google will simply be
 6 implementing that for them.
 7 PROFESSOR SMITH: But can that be right?
 8 Occasionally we need to remind ourselves that when
 9 we are talking about these auctions and queries, we are
 10 talking about queries that come in, many, many queries
 11 per second, and each one of them goes into an auction
 12 and each one of them, if it is a Google Search, is fed
 13 through the Google indexes and the Google algorithms to
 14 produce a response.
 15 So what you are describing here is somehow that
 16 the CSSs have got to have a non-real-time technology
 17 that provides enough information to Google so that
 18 Google, facing these -- I do not know what the order of
 19 magnitude is -- millions of shopping queries per minute,
 20 can interrogate not its own indexes but these --
 21 something or other provided by the CSSs that allows
 22 Google to evaluate which CSS should go into the box.
 23 That is what is going on, is it not?
 24 MR JOWELL: Yes, well, it is Google is deciding which CSS,
 25 but it is the CSS which is ranking the products

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1 substantively in that scenario, and that, for us, is
2 the crucial point, because that enables them to operate
3 meaningfully as a CSS.

4 I think there is no question but that you could have
5 this query-time callout approach together with
6 the sandbox approach and that would overcome
7 the feasibility concerns. You see that recorded at
8 {M1/540/8}, where we see -- oh, forgive me, it is in
9 the comment bubble on the right-hand side. It says:

10 "With the addition of us getting at the data that is
11 potentially returned ahead of time (e.g. by submitting
12 a feed), I think this proposal became much more
13 realistic. Also because I now understand how we could
14 deal with images. The nice thing about the proposal is
15 that it allows all CSS to compete on quality which
16 aligns our overall goals with this proposal. So, now
17 I actually think this is a great idea, assuming we can
18 solve the technical problems!"

19 In his oral evidence, Mr Friedman made a similar
20 point in response to Professor Smith's question, if
21 I can show you that. If we go to {Day10MT1/113}.

22 MS ROSE: So the query-time callout goes to
23 the pre-submitted feed?

24 MR JOWELL: Yes, in the sandbox, yes.

25 MS ROSE: Right. So they submit the feed, then there is

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1 the query-time callout goes to the feeds and then Google
2 selects the CSS that is going to have the box?

3 MR JOWELL: Yes.

4 If we go to the exchange with Professor Smith, you
5 see Professor Smith asks:

6 "Does this address the issue that when Google is
7 searching for a product offer from Google, those product
8 offers are already in a Google-controlled index -- set
9 of indices, whereas the CSS offers outside Google's
10 system and ... does this solve the problem that it takes
11 much longer to assemble offers from outside the system
12 compared with ...

13 " ...

14 " ... offers already indexed within Google?"

15 Mr Friedman replied:

16 "I think I understand the question. I believe it
17 mitigates to some degree. I do not believe it solves it
18 in its entirety. You know, it mitigates it because to
19 some degree, we can -- Google -- because -- okay, so
20 let's say each CSS is submitting all their potential
21 offers, right? We can do these offline, you know,
22 before any query processing happens, quality
23 determinations and checks on those offers that we
24 wouldn't be able to do had the CSS not provided them to
25 Google, right? So that is one aspect that could be done

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1 and that would help, you know, would mitigate some of
2 the concerns. I think there remain several concerns
3 which we could -- I'm happy to get into."

4 So he is saying, in our submission, that that would
5 mitigate the concerns substantially about latency, and
6 later on --

7 MS ROSE: I think he is talking about quality. He is not
8 talking about latency there, he is talking about
9 quality.

10 MR JOWELL: Sorry, about quality, yes.

11 MS ROSE: Because he is saying having the pre-submitted feed
12 enables Google to conduct quality checks on the feed.

13 MR JOWELL: Yes. Yes.

14 MS ROSE: So, for example, if Google found there was lots of
15 random text, which we have seen in relation to some --

16 MR JOWELL: Yes.

17 MS ROSE: -- CSSs --

18 MR JOWELL: Yes.

19 MS ROSE: -- it could downrank the feed.

20 MR JOWELL: Yes.

21 The overall thrust of his evidence -- and you will
22 recall it -- was this was a workable solution, in our
23 submission. He was also unable to identify any
24 immediate blocker to implementing the API solution even
25 in 2009. You may recall that, that is {Day10MT1/123:7}.

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1 You will recall he very graciously went away and thought
2 about it overnight and came back and considered it.

3 Now, so we say the evidence suggests Google had
4 the capacity to develop those -- this type of solution
5 and indeed had -- no doubt has -- there are other
6 technical measures, like Mr Friedman's description of
7 the cloud server option which was mentioned in 2017.
8 Under this option, Google would put CSS services hosted
9 by Google Cloud in the same data centres as the shopping
10 server thereby further reducing latency, and you may
11 recall there was a discussion about that on
12 {Day11MT1/44:10} to {Day11MT1/45:24}.

13 Now, in the context of what Google fairly describes
14 as its "vast capital expenditure" in its closing
15 submissions at paragraph 163 {AA2/1/62}, we say that
16 these sorts of initiatives are not far-fetched and show
17 that scenario 3b is entirely feasible for it. It also,
18 of course, would pose real value for CSSs and for users,
19 as Mr Friedman acknowledged in an exchange with Ms Rose
20 on Day 10, if I can show you that. {Day10MT1/112},
21 please. You see from line 4:

22 "So the difference between that and the Remedy as
23 implemented ...

24 " ...

25 " ... is that the CSS determines which results appear

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1 in the unit?
 2 "Answer: Yes, that is one of the differences .
 3 "MS ROSE: It is not just a Google auction with
 4 the merchant with the CSS basically acting as agent for
 5 the merchant?
 6 "Answer: Yeah, I think, it's -- that is one
 7 difference, correct."
 8 Then Ms Rose says:
 9 "Right. That is quite an important difference from
 10 the perspective of the CSS.
 11 "Answer: Yes.
 12 "MS ROSE: Because it means that this is a shop
 13 window into their service --
 14 "Answer: Mm-hm.
 15 "MS ROSE: -- rather than simply them acting as
 16 agent for an individual merchant.
 17 "Answer: Right, I think it's a higher fidelity
 18 representation of what you would find on their site if
 19 you were to click through than if Google were to do
 20 the ranking, etc.
 21 "MS ROSE: Yes. It gives the CSS some control over
 22 the parameters and the quality issues that they want
 23 reflected on Google's shop window.
 24 "Answer: Correct."
 25 So by "a higher fidelity representation", we say

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1 that that is effectively accepting that what they
 2 actually get to show are real comparison shopping
 3 services that they can offer to users and merchants, and
 4 what that will then allow is differentiation between and
 5 among CSSs, including Google's CSS, and that should lead
 6 to benefits for users and indeed for merchants.
 7 Now, Google seek to reject that point in their
 8 closing submissions. They say: well, this kind of
 9 single CSS box will not be as comprehensive, they say,
 10 as Google's CSS, and they say that that will --
 11 MS ROSE: What do you mean by "Google's CSS"?
 12 MR JOWELL: Well, I mean by that Google's current Remedy.
 13 THE CHAIRMAN: You mean the Remedy box?
 14 MR JOWELL: The box, yes.
 15 They say that that will -- it will decrease
 16 the quality of the shopping box, they say, and they say
 17 that will decrease its performance in the whole page
 18 auction. We say that rests on two fallacies .
 19 First of all, it rests on the fallacy that it has
 20 somehow competed its way on the merits to supremacy
 21 because its -- the manifestation of its CSS is better
 22 than everyone else's and we say that is not the case.
 23 The evidence shows that, actually, in Europe at the time
 24 that the abuse started, it was the other way round, it
 25 was Google's CSS that had been outcompeted by other

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1 CSSs.
 2 We say, more generally, that competition will bring
 3 results, good results, and if CSSs could compete on
 4 equal terms, each would have had an incentive to invest
 5 in its offering, improve their offering, improve their
 6 comprehensiveness -- and bear in mind that merchants are
 7 free to supply their feeds to multiple CSSs -- and they
 8 could have also offered substantively different and
 9 differentiated services and that would have actually
 10 improved the experience for users and improved
 11 the experience also for merchants.
 12 So that is what we say about 3b.
 13 I want to deal specifically with two further points:
 14 one is charging and the other is the mixed mode box and
 15 the PLA process. I hope I can do those before the short
 16 adjournment.
 17 Charging. Now, we accept that, as I have said,
 18 the Decision does not prohibit Google from seeking to
 19 monetise its box, subject of course to the requirement
 20 in recital 700(d) {BA/2/233}, that the charge should not
 21 have:
 22 "... the same or an equivalent object or effect as
 23 the infringement established by [the] Decision."
 24 Now, the position on charging can get quite complex
 25 and confusing and I think there is a certain amount of

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1 ships passing in the night, and it is quite, actually,
 2 important to take it in stages and it is important to
 3 distinguish who is charging who and also to do so for
 4 each of the different counterfactuals. So there are
 5 essentially three issues in relation to each of
 6 the counterfactual scenarios.
 7 So, first of all, would independent CSSs charge
 8 merchants? Secondly, would Google's CSS charge
 9 merchants? Thirdly, would Google charge CSSs, whether
 10 its own or its rivals, for access to the box?
 11 Now, the background, as we know, is that independent
 12 CSSs have typically historically charged merchants for
 13 clicks that they receive from users that have come from
 14 their CSS website page. That traffic might have
 15 originally been found from Google's SERP, but it is only
 16 charged when it goes from the CSSs' website to
 17 the merchant.
 18 The exception to that charging pattern was of course
 19 Froogle and subsequently Google Product Search. They
 20 chose, up to 2013, not to charge merchants at all, but
 21 instead for clicks from their website or indeed for
 22 clicks from the OneBox or Product Universal, they chose
 23 instead to make their revenue from advertising. Then,
 24 from -- under the Shopping Unit, from 2013,
 25 Google Shopping then charges merchants for clicks,

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1 whether from the Shopping Unit or from the website.
 2 Under the Remedy, we know that Google still effectively
 3 charges merchants for clicks, albeit that there is an
 4 intermediary agent in the form of a CSS that keeps
 5 a tiny proportion.
 6 So starting then in relation to counterfactual
 7 scenarios 1 and 2. Here we have no OneBox linking to
 8 the merchants and the CSSs are just featuring in
 9 the organic results, whether those may be enhanced in
 10 scenario 2 or not enhanced as in scenario 1, and they
 11 feature more often because the demotions have been
 12 lifted.
 13 Now, in that scenario, we say no one, neither
 14 Google's CSS, nor the independent CSSs, would be
 15 charging anything for clicks direct from the SERP to
 16 merchants because there would not be any. Instead what
 17 there would be would be clicks from the SERP to their
 18 website and then on to merchants and that would apply to
 19 both -- all forms of CSS. So in that scenario,
 20 effectively you would be in the same world as pre-2004:
 21 Google's CSS presumably could charge -- could choose to
 22 charge whether or not for clicks from its website to
 23 merchants, and the evidence suggests that Google would
 24 not have chosen to charge -- it would not have chosen to
 25 charge, just as it did not from 2002 to 2013, and CSSs

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1 would be in the same situation where they would be
 2 charging -- independent CSSs would be in the same
 3 situation, they would be charging merchants for clicks
 4 from their website.
 5 So scenarios 1 and 2 are relatively clear and I do
 6 not think there is anything between us.
 7 MS ROSE: There is no charging?
 8 MR JOWELL: There is no charging.
 9 In relation to 3a, first of all, there is an issue
 10 between us, I think, as to whether Google would have
 11 charged for access to such a box, and if so when.
 12 So let us take it on two scenarios. One scenario
 13 is, let us say, Google did not charge. Now, the first
 14 point -- and I am saying did not charge for access to
 15 the box.
 16 So the first point to bear in mind is that, under
 17 3a, there is no link from the 3a box to the merchant,
 18 there is only a link to the CSS. So if Google did not
 19 charge for CSSs to access this catalogue-type of box and
 20 the clicks went through to CSSs, then we say there would
 21 not be a problem with Google's CSS not subsequently
 22 charging merchants for links from its website. There
 23 would not be any sort of margin squeeze issue there.
 24 There would be no initial charge.
 25 If, on the other hand, Google did charge for access

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1 to the box, it would then have to charge, we say, all
 2 CSSs, including its own CSS, for access to the box, it
 3 could not charge everybody but not charge its own, and
 4 it seems at least likely that Google's CSS would also
 5 have passed that cost on in charges for clicks from its
 6 website to merchants, otherwise there would have been
 7 some kind of a margin squeeze. Of course, rival CSSs,
 8 we accept, would have continued to charge merchants for
 9 the clicks that came from their websites. Effectively
 10 there would be no difference if the click originated
 11 from the 3a box or not. So that is 3a.
 12 Then 3b, one needs to consider whether Google is,
 13 again, charging CSSs for access to the box. Let us
 14 assume, again -- let us assume Google did not charge.
 15 Now, we accept the argument that is made by Google and
 16 acknowledged by Mr Hunt that, in a box 3b scenario, it
 17 is likely that whether or not Google charged CSSs for
 18 access to the 3b box, independent CSSs would have
 19 charged merchants for clicks in the box.
 20 So then the difficult scenario is: well, what about
 21 Google's CSS? Would it have had to charge in that
 22 scenario?
 23 We say that is not clear. It might, if otherwise,
 24 if, in not doing, so it was engaging in some form of
 25 predatory pricing, but otherwise we say it would not

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1 have been obliged to charge. We say whether Google's
 2 CSS would have in practice charged merchants is very
 3 difficult to say. The evidence suggests that if
 4 Google Shopping had charged, then it would have had
 5 a very small CSS. So we say, in effect, there are two
 6 scenarios, either it would have on-charged, in which
 7 case it would have had a very tiny CSS share of
 8 the market, or it would not have charged, assuming it
 9 was not predatory pricing, in which case it would have
 10 had a somewhat larger share of the market.
 11 MS ROSE: Does that dilemma, of Google as at 2008, suggest
 12 that 3b would have been quite commercially unattractive
 13 for Google at that date, if its options are either risk
 14 predatory pricing or never get your shopping website off
 15 the ground?
 16 MR JOWELL: That may well be, yes, yes. I mean, I think it
 17 does suggest that 3b would probably have come a bit
 18 later.
 19 MS ROSE: So you could have had 1 or 2 followed by 3b?
 20 MR JOWELL: Yes. Yes, indeed.
 21 MS ROSE: Or, conceivably, you could have a non-charging
 22 version of 3a followed by 3b?
 23 MR JOWELL: Yes. Yes, or you could have 1, 2 and 3a.
 24 MS ROSE: And then 3b.
 25 MR JOWELL: And then 3b, yes.

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1 I am sorry to give you all this sort of dilemma, but
 2 these are not -- you know, these are not easy questions
 3 to answer.
 4 MS ROSE: On the balance of probabilities.
 5 MR JOWELL: Yes.
 6 MS ROSE: In an entirely hypothetical universe.
 7 MR JOWELL: Yes, in an entirely ... I know, it is difficult .
 8 Now -- so then let me then try and address that
 9 prior question, which is: would Google have charged for
 10 access to the box, whether that is 3a or 3b?
 11 We say it is unlikely , given what Google was
 12 actually doing in 2008, that it would have charged for
 13 a box from the outset, certainly not a 3a-type box.
 14 That is for a number of reasons.
 15 First of all , Google would still have had an
 16 incentive to devote the space to attract shopping starts
 17 to Google. You will recall Mr Hunt's example of
 18 the news stand competing to attract the magazines with
 19 classified ads and why they might want to make the news
 20 stand free. Not charging initially was, of course,
 21 the approach that Mr Goodrow explained. He said you
 22 start -- there is there the email where he says: you
 23 start by just getting the traffic ; do what it takes to
 24 make sure everyone starts their shopping queries on
 25 Google and then, down the line, second order, we can

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1 figure out how to make money from it. You will remember
 2 that that is the meeting note at {J3A/4/1-2}, and for
 3 your note, that was discussed with him on {Day9MT1/77}
 4 to {Day9MT1/78}.
 5 MS ROSE: Let us say Google is charging for access to
 6 the box.
 7 MR JOWELL: Yes.
 8 MS ROSE: Whether it is 3a or 3b.
 9 MR JOWELL: Yes.
 10 MS ROSE: Google might decide that it can make so much
 11 money. I mean, let us hypothesise that CSSs compete
 12 with each other vigorously and become very attractive to
 13 shoppers.
 14 MR JOWELL: Yes.
 15 MS ROSE: So the 3a or 3b options result in a very
 16 attractive experience for users of Google.
 17 MR JOWELL: Yes, yes.
 18 MS ROSE: Google might decide that it is really happy with
 19 that situation , because it is able -- it is generating
 20 loads of shopping traffic --
 21 MR JOWELL: Yes.
 22 MS ROSE: -- via the CSSs --
 23 MR JOWELL: Yes.
 24 MS ROSE: -- it is charging the CSSs for access to the box
 25 and it is also getting loads of money from the AdWords.

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1 MR JOWELL: Yes.
 2 MS ROSE: So in that situation, Google might not take
 3 the trouble to develop its own shopping website.
 4 MR JOWELL: That is a possibility, yes. Yes. That is --
 5 I have to accept, that is a possibility , that it would
 6 have just done away with its ...
 7 But you would also have to remember that it had
 8 invested an awful lot of money in it and a lot of
 9 effort .
 10 MS ROSE: Between 2006 and 2008.
 11 MR JOWELL: That is right. So -- and -- so we say not
 12 charging would also --
 13 MS ROSE: So that would have been a more likely development
 14 in 2006 than in 2008 --
 15 MR JOWELL: Yes, that is right --
 16 MS ROSE: -- (overspeaking -- inaudible).
 17 MR JOWELL: That is right. They would have to have said,
 18 well , that was all money down the drain. That seems
 19 a little unlikely .
 20 Now, the other benefit of the box is --
 21 MS ROSE: Mind, you look at the metaverse.
 22 MR JOWELL: Look at the ...?
 23 MS ROSE: They invested billions in it and it was all
 24 wasted.
 25 MR JOWELL: Oh, yes. Yes, well ... yes.

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1 But what would have happened is, if you had had
 2 a free box, it would have given Google the marketing
 3 benefit of saying that whatever CSS results did appear
 4 in a privileged position in the box, those results were
 5 the product of an objective selection process. So that
 6 is the other advantage of a free box is that if you do
 7 not charge, you can say to everyone, "Well, this is
 8 not" -- as I think my learned friend said, "This is not
 9 skewed by filthy lucre", so it is objective and that
 10 would have been a -- potentially a good marketing tool
 11 for them in getting their shopping starts.
 12 Also, of course, if it did not charge, then it would
 13 have been able to keep its own Google Product Search
 14 free for merchants, it would not have had concerns about
 15 predatory pricing and it could have continued to build
 16 that business, which, as I have mentioned, it had indeed
 17 invested a lot of money in.
 18 So we say that, on the balance of probabilities , it
 19 would not have charged initially .
 20 MS ROSE: Until when?
 21 MR JOWELL: Well, we say that, really, the natural point in
 22 time to take -- and actually there may not be that much
 23 between us and Google on this -- is the point in time
 24 when they start to develop product listing ads in
 25 the actual or when they start -- when they actually

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1 launched the --
 2 MS ROSE: But that was over a period --
 3 MR JOWELL: Yes.
 4 MS ROSE: -- between 2011 and 2013.
 5 MR JOWELL: Yes, well, we say either -- we say either 2013,
 6 when they actually launched the shopping box, or
 7 November 2011, which is I think when they started
 8 product listing ads in the first European countries.
 9 So that is effectively what we say about charging.
 10 I would like to say something about mixed mode.
 11 I can probably do that in about ten minutes, if
 12 that is --
 13 THE CHAIRMAN: Yes, do. We will continue until then, yes.
 14 MR JOWELL: Now, finally, the one -- there is this
 15 counterfactual option that has been explored, in
 16 particular by Ms Rose, as to whether there might have
 17 been a mixed mode box which included some PLAs as well
 18 as some catalogue-type tiles linking to CSSs, and
 19 I think Mr Hunt explained that whether that option would
 20 be lawful would depend on its precise configuration, and
 21 we agree with that, of course. But before one comes to
 22 that, there is actually a prior question, which is: is
 23 this actually a realistic counterfactual? In other
 24 words, would Google have been likely to have introduced
 25 it at any point onwards from 2008?

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1 It is important to note that Google did not, in
 2 the actual world, voluntarily choose to mix links to
 3 a merchant offer and links to a CSS website in this way.
 4 When it introduced the catalogue variant, it is
 5 interesting to note that was a separate variant to
 6 the offer variant. It did not mix them and match them;
 7 it either had a catalogue variant or it had the offer
 8 variant. When it came to the commitments, as you have
 9 seen, it -- again, it proposes a split mode, so half of
 10 the box are PLAs and half of the box is reserved for
 11 enhanced CLAs and with the two really quite visually
 12 distinct.
 13 THE CHAIRMAN: But they are not bidding against each other.
 14 MR JOWELL: They are not bidding against each other and they
 15 are not mixed in with each other.
 16 Those choices -- now, there is one exception to
 17 that, which is when PLACSSs, as they are called, were
 18 introduced in 2024, but that was really under pressure
 19 from the European Commission, and I think that is common
 20 ground --
 21 MS ROSE: Sorry, PLACSSs?
 22 MR JOWELL: PLACSSs.
 23 MS ROSE: What is that?
 24 MR JOWELL: So that is -- it is in our evidence, which is it
 25 is a mode where -- let me see if I can find the image.

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1 It is a mode where -- I will get you the reference --
 2 where effectively what happened was, under pressure from
 3 the European Commission, Google eventually, in 2024,
 4 said, "Okay, well, CSSs, under the Remedy, should be
 5 allowed to link to their own website".
 6 MS ROSE: So it is a producing listing that links to
 7 the CSS?
 8 MR JOWELL: Correct.
 9 THE CHAIRMAN: Is it {A1/3/14}?
 10 MR JOWELL: Exactly. It is at 13 and 14. I think in
 11 {A1/3/13} you see it in its natural state, which is you
 12 cannot see which is the CSS, basically, in the natural
 13 state.
 14 But then if you go to {A1/3/14}, you can see here,
 15 this is an artificially mocked up version with
 16 the colour boxes to indicate what is what, and the blue
 17 box is -- the third from the right, Professor Smith, is
 18 the PLACSS tile. But this is the first time that there
 19 was a sort of mixing and matching like this. That might
 20 well --
 21 THE CHAIRMAN: They came in 2024?
 22 MR JOWELL: 2024, and under pressure from the Commission.
 23 Now, we suggest that that actually reflects that there
 24 are probably difficulties, from a user perspective, with
 25 a mixed mode.

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1 MS ROSE: Confusing.
 2 MR JOWELL: Confusing, exactly. You see a point is made on
 3 that by Mr Stables at paragraph 112.2 of his witness
 4 statement {H1A/1/40}, that it can result in users not
 5 getting the result they expect when they click on a tile
 6 and that leads to consumer confusion and
 7 dissatisfaction. So we say it is actually unlikely for
 8 that reason.
 9 But in terms of the acceptability of PLACSS as
 10 a form of mixed mode, if you like, we say, at least as
 11 implemented, there are two issues with it that go to its
 12 legality and those were summarised by Mr Hunt in his
 13 evidence.
 14 First of all, at least under the current
 15 arrangement, Google gets in effect a first mover
 16 advantage. Well, why? Because it is placing
 17 a manifestation of its CSS on -- as front and centre on
 18 the search page, and so consumers get, as things
 19 currently stand, access to a range of merchant offers
 20 that Google has ranked, with Google's choice of images,
 21 and in a format that enables price comparison, and any
 22 CSS placing its own tile within that context is
 23 effectively competing within Google's own manifestation
 24 of Google's own CSS. So Google thus obtains first
 25 exposure to the consumer before any rival CSS has

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1 the opportunity to engage them.
 2 There is also a technical limitation on PLACSSs,
 3 which is that the CSS is only allowed to link to
 4 a product page for a single specified item on their
 5 site, and you will recall Mr Hunt discussed that --
 6 well, you may or may not recall, actually, it is quite
 7 a specific point. It is on Day 143 -- sorry Day 14,
 8 page --
 9 THE CHAIRMAN: It feels like that sometimes!
 10 MR JOWELL: Yes, it feels like Day -- yes, it feels like
 11 that. {Day13MT1/127:24} to {Day13MT1/128:13}. CSSs are
 12 not permitted, in other words, to link to a range of
 13 different types of products and thereby offer their full
 14 comparison shopping services. So if you are clicking
 15 through, say, from, say, lots of Fisher & Paykel fridges
 16 to a further website page, you then go through to
 17 another website where you see --
 18 MS ROSE: It still would not have to be like that.
 19 MR JOWELL: No, in theory, it wouldn't, but you still have
 20 the problem, at least --
 21 MS ROSE: You still have the problem of confusion under
 22 first-mover advantage.
 23 MR JOWELL: Correct. Exactly.
 24 So we say that, effectively, the 3b option is more
 25 attractive, because it gives you everything you want in

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1 terms of competition and in terms of variety for users
 2 without those --
 3 MS ROSE: It enables CSSs to compete on the question of what
 4 format is most attractive to users.
 5 MR JOWELL: Yes.
 6 MS ROSE: So if they decide that a box of a number of PLAs
 7 is the most attractive format, they will bid for that --
 8 MR JOWELL: That is exactly right.
 9 MS ROSE: -- (inaudible).
 10 MR JOWELL: -- right. That is exactly right. So if Google
 11 are right about that, then that would be how the market
 12 would have evolved, but we say that does not actually
 13 seem very likely; it would have been much more variety
 14 than that.
 15 I should just say that the reference I gave you to
 16 Mr Hunt's evidence should have been to Day 13 not to
 17 Day 14.
 18 So those, unless I can be of any further assistance,
 19 are my submissions.
 20 THE CHAIRMAN: I think there was just one thing you were
 21 going to check at some point. There was the letter from
 22 -- was it the chief executive of Ciao to Google which
 23 Mr Cutts said he never got, and whether that -- the copy
 24 came in whose disclosure.
 25 MR JOWELL: As I understand it -- and I will be corrected if

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1 I am wrong -- the answer to that is we understand that
 2 that came from -- it came from -- I think it -- yes, it
 3 came from Google's disclosure, but via -- but from
 4 the Commission file, I think. So I think that -- so
 5 Google disclosed to us the contents of the Commission
 6 file and within the Commission file was the complaint
 7 from Ciao, I understand. Yes, I see nodding.
 8 MS ROSE: Was there a covering email with it?
 9 MR JOWELL: Yes, if we go to -- Ms Love may be better placed
 10 to deal with it. She has got the details at her
 11 fingertips.
 12 MS LOVE: If the Tribunal goes to {M3/576}, one sees there
 13 a cover -- a letter to the head of unit at DG COMP, and
 14 over the page {M3/576/2}, at the bottom of page 2, there
 15 is a paragraph beginning:
 16 "Microsoft does not deny ..."
 17 Of course, Ciao was owned by Microsoft at the time.
 18 About five lines down, it says:
 19 "As Mr Musikant highlighted in the attached letter
 20 to Google, Ciao is a well-respected ..."
 21 Etc, etc. Not a content farm.
 22 MS ROSE: So this is a letter from Google?
 23 MS LOVE: This is --
 24 PROFESSOR SMITH: No, this is from Ciao.
 25 MS ROSE: Oh, so it was not disclosed by Google, it was

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1 disclosed by Ciao?
 2 MS LOVE: We received it as part of Google's disclosure
 3 to us from the Commission file.
 4 MS ROSE: But it came from Ciao?
 5 THE CHAIRMAN: Ciao sent it to the Commission. It was in
 6 the Commission file and the Commission file was
 7 disclosed by Google to Kelkoo.
 8 MS LOVE: It will, of course, have included third party --
 9 MS ROSE: But Google never disclosed it from its own
 10 records, then?
 11 MS LOVE: Not as far as I am aware of. I will turn behind
 12 me.
 13 MS ROSE: I mean, that must mean that Google did not have
 14 a copy of it, because if it had a copy of it, it would
 15 have had to disclose it.
 16 MS LOVE: I mean, they clearly had a copy. At least it was
 17 sent to --
 18 MS ROSE: We know it was sent, but we do not know if it was
 19 received, because if it had been received, it would have
 20 been sent by Google.
 21 MS LOVE: I mean, from the point when they had access to
 22 the file, they would have been aware of it, and of
 23 course --
 24 (Simultaneous speakers - inaudible)
 25 MS ROSE: But there is no evidence, but the evidence

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1 suggests that it was not received, because if it had
 2 been received, it would have had to be disclosed in
 3 these proceedings.
 4 MS LOVE: I am not -- I mean, we are told in the paragraph,
 5 just above the words "Google's demotion of Ciao", that
 6 "Google has refused to engage or reply to our letter
 7 (attached) in any way".
 8 MS ROSE: Well, that may be because they never got it.
 9 MS LOVE: I am not sure that we can take it much further.
 10 MS ROSE: No, but the point I am making is, if it had been
 11 in their system, it would have had to be disclosed by
 12 Google in these proceedings.
 13 MS LOVE: I do not know what Google's document retention or
 14 deletion policies at the time and in different
 15 jurisdictions may have been. I think it may be that
 16 those on the other side are better placed to assist on
 17 what should have been disclosed. Certainly, at this
 18 point, they would have been aware of it for a while. We
 19 know the email addresses to which it was sent, we know
 20 the recipients, we know that Ciao was owned by
 21 Microsoft, a major competitor, and we also know from
 22 the Decision that there was, at the time, an extant
 23 complaint by Ciao, originally to the Bundeskartellamt,
 24 that had been referred to the Commission, so it is not
 25 as if Ciao was a non-entity, or one CSS among many

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1 others. There is a limit to how much further we can
 2 take this.
 3 PROFESSOR SMITH: The sentence, "We urgently sought
 4 discussions with Google to understand the situation
 5 better ... but Google has refused to engage or reply to
 6 our letter ...", does not suggest that the letter has
 7 simply got lost and nothing was said by anybody
 8 about it.
 9 THE CHAIRMAN: The date of this letter to the head of unit
 10 is what?
 11 MS LOVE: The data that we have attached to it puts it in,
 12 I think, 6 July 2012. The original letter from
 13 Mr Musikant to Mr Cutts and Mr Page was from April 2011.
 14 THE CHAIRMAN: Yes, that is probably as far as we can take
 15 it.
 16 MR PICKFORD: Yes, I was not rising to add anything further
 17 to that, because I have nothing, but what I was just
 18 going to say -- and it is not criticism at all of
 19 Mr Jowell -- if he wants to, say, have about an hour in
 20 reply, we are currently running about an hour behind.
 21 THE CHAIRMAN: We are going to sit -- we are going to say
 22 that we can sit until 5.15 today and we can start at 10
 23 tomorrow --
 24 MR PICKFORD: Thank you, sir.
 25 THE CHAIRMAN: -- to make up the time.

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1 MR PICKFORD: Thank you.
 2 THE CHAIRMAN: We will come back at 2.05 to get another
 3 five minutes.
 4 (1.12 pm)
 5 (The short adjournment)
 6 (2.05 pm)
 7 (Proceedings delayed)
 8 (2.09 pm)
 9 THE CHAIRMAN: Sorry, just one moment.
 10 (Pause)
 11 Sorry, Mr Pickford.
 12 (Pause)
 13 Yes, Mr Pickford.
 14 Closing submissions by MR PICKFORD
 15 MR PICKFORD: Thank you, sir, members of the Tribunal.
 16 To read Kelkoo's written closing and to hear some of
 17 their oral submissions, particularly on the background
 18 facts, the informed observer might understand that this
 19 case required the Tribunal to make new findings about,
 20 for example, the workings of Algorithm A and Panda,
 21 which they criticise in their written closings and which
 22 they seek to unpick in some of their counterfactuals,
 23 and Google's strategy in relation to abuse, which exited
 24 stage right and then promptly re-entered stage left,
 25 dressed instead in layers of insinuation, and allegedly

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1 that also goes to the counterfactual.
 2 Now, we say much of that case is irrelevant and/or
 3 inadmissible. The Tribunal is not required to decide
 4 the abuse again and cannot. Kelkoo's Decision Period
 5 case is purely follow-on, and they have made that clear
 6 in their pleadings, and its post-Decision case is as
 7 close as one can effectively get to follow-on in that
 8 whilst of course, technically, they need to establish
 9 the post-Decision abuse on a standalone basis by
 10 reference to the facts in the Post-Decision Period,
 11 their case is put on the same basis, they say it is
 12 the same abuse and it just continued through into
 13 the Post-Decision Period.
 14 Now, we set out in our written openings that
 15 the Tribunal had already found that Kelkoo's
 16 post-Decision claim was the same as its Decision claim,
 17 just mapped on to the later period, and we had
 18 understood that Kelkoo had accepted that. Yesterday,
 19 I suspected that Mr Jowell was beginning to slightly row
 20 back from that point, but just very briefly quoting what
 21 the Chair put to me at the January hearing and the quote
 22 is in our written closings, it was said that {AA2/1/8}:
 23 "... the conduct under the Remedy continues to be
 24 abusive for the same reasons ... the abuse is the same
 25 and if the Remedy cures it in the Decision Period, it

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1 cures it in the Post-Decision Period."
 2 That reflected the Tribunal's understanding of
 3 Kelkoo's case at the time and obviously the reason why,
 4 sir, you were putting that to me is because you were
 5 explaining that my submissions that I was concerned that
 6 there might be a proliferation of cases and then
 7 counterfactuals was unmerited and that that was not
 8 something that we had to worry about.
 9 So that is, in my submission, the parameters of
 10 the case that Kelkoo can now put, and an implication of
 11 that is that Kelkoo cannot, for example, criticise
 12 the algorithms as impermissible or improper in any way.
 13 It is either the algorithms or it is not the algorithms.
 14 There is no case that: well, there is this bit of
 15 the algorithm and we think that maybe you should have
 16 modified that and turned that down, because they do not
 17 have that pleaded case.
 18 So turning to what the abuse is, we have often
 19 talked in these proceedings, in slightly simplified
 20 terms, about the demotion limb and the promotion limb of
 21 the abuse, and I include myself in going along with that
 22 articulation. That is indeed how the European courts
 23 dealt with it when addressing the question of effects.
 24 It is not quite on all fours with precisely how it is
 25 put in the Decision when discussing discrimination,

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1 which of course lies at the very heart of the abuse.
 2 That is the first step you have to get to before you get
 3 on to then effects on traffic. I say so therefore
 4 whilst it is sometimes a convenient shorthand, it is not
 5 always useful to talk in terms of the promotion limb and
 6 the demotion limb.
 7 The way it is put in the Decision -- and I am going
 8 to come on to develop this obviously in more detail --
 9 is that the discrimination is about the unequal
 10 treatment by Google of results from its own CSS versus
 11 rival CSSs in two respects: first, their display, and
 12 secondly, their positioning. Now, the Commission did
 13 not challenge either the existence of a monetised
 14 shopping box of rich results which sent users to
 15 merchants or the use of algorithms in generic results,
 16 which, in themselves, the Commission considered to be
 17 perfectly permissible, we say are therefore
 18 correspondingly so in the Post-Decision Period. It did
 19 not say there was anything discriminatory at all about
 20 having algorithms in generic results, because of course,
 21 as, Ms Rose, you noted, we were demoted out of generic
 22 results all together, and that is an important point
 23 when it comes to the counterfactual, because, in my
 24 respectful submission, some of Kelkoo's points on this
 25 are confused and they lose focus on what the Decision

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1 actually held about discrimination.
 2 MS ROSE: They really just say you are bound.
 3 MR PICKFORD: Yes, well, if -- I think that may be right.
 4 Mr Jowell, I think, accepted your logic on that, that it
 5 was just being a bound point. At times, I thought that
 6 he moved away and actually argued the substance of it,
 7 but I am happy to meet just the "you are bound" point,
 8 if that is all it comes to, because I will come on and
 9 explain why you are not bound.
 10 What we say is that the Remedy box unequivocally
 11 cures the self-preferencing of Google's standalone CSS,
 12 the abuse found in the Decision, because it treats GSE,
 13 our CSS, and rival CSSs equally on the SERP, and I do
 14 not understand Kelkoo to have seriously argued otherwise
 15 in relation to that form of equal treatment. I do not
 16 understand Mr Jowell to say: you are not really actually
 17 treating the GSE and rival CSSs particularly
 18 differently. The focus of his submissions is on
 19 a different point. He says, and certainly he said when
 20 he opened his case, that the problem was that the Remedy
 21 box itself is a CSS. You may remember that, amongst
 22 other things, there was the quacking duck submission and
 23 there were a number of similar submissions about how
 24 the Remedy box was effectively a CSS there on the page.
 25 Indeed, when I cross-examined Mr Hunt, he accepted that

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1 his economic case was that the Remedy box was a CSS.
 2 There was initially a bit of equivocation about it, and
 3 then he said, "Yes. No, I accept that point".
 4 Now, despite some, one might say, telling linguistic
 5 lapses, Mr Jowell appears now to want to distance
 6 himself from the case that the box is a CSS, and I say
 7 that he is right to do that because the case that
 8 the Remedy box is a CSS cannot succeed. It is not
 9 the abuse set out in the Decision, and I am going to
 10 come back to the Decision, but you will probably recall
 11 recitals 408 {BA/2/119} and 412 {BA/2/120}, amongst
 12 others, that make very clear that the Commission's case
 13 was not that the boxes themselves were CSSs, their case
 14 was that there was preferencing by the boxes of Google's
 15 CSS. More specifically, the Tribunal has already found
 16 that the boxes were not themselves CSSs, as I am sure
 17 you recall, in the preliminary issues judgment at
 18 paragraph 54 {E/2/19}. If it is convenient, I can go
 19 back to that, but I anticipate that you are probably
 20 well familiar with that.
 21 THE CHAIRMAN: Well, I think we will need to look at that,
 22 because we have addressed precisely this argument in
 23 the preliminary issues hearing.
 24 MR PICKFORD: Yes, well, in which case, let us do -- please,
 25 let us go to it. It is at {E/2/19}.

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1 THE CHAIRMAN: Because you argued that Google's CSS is only
 2 the standalone shopping site.
 3 MR PICKFORD: Yes.
 4 THE CHAIRMAN: That was your argument --
 5 MR PICKFORD: Absolutely.
 6 THE CHAIRMAN: -- and the box is not part of that.
 7 MR PICKFORD: And I lost.
 8 So if we go to paragraph 54 -- can I ask --
 9 THE CHAIRMAN: Well, I think it really starts, does it not,
 10 at paragraph 43?
 11 MR PICKFORD: You are very welcome to go back to 43. I was
 12 hoping obviously to sort of move speedily to
 13 the conclusion, but if the Tribunal would find it
 14 convenient obviously to recap on all of that, then
 15 please do read it.
 16 THE CHAIRMAN: Because 43 and 44 is -- was key to the issue.
 17 If we go back, please, two pages back {E/2/17}. Then
 18 there is the Claimants' position in 44.
 19 (Pause)
 20 That was the Claimants' position. That is
 21 paragraph 44.
 22 Then your position is paragraph 50, over the page
 23 {E/2/18}, "Google submitted ...".
 24 MR PICKFORD: Did you read, sir, 48, over the page, as well,
 25 from the Claimants' position?

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1 (Pause)
 2 THE CHAIRMAN: Yes. Then 50 was your argument.
 3 Then, in paragraph 52 {E/2/19}, you referred, as you
 4 just have, to recitals 408 and 412.
 5 MR PICKFORD: Yes.
 6 THE CHAIRMAN: Then the Tribunal's conclusions start in 53.
 7 MR PICKFORD: Yes.
 8 (Pause)
 9 THE CHAIRMAN: We rely also on the General Court judgment.
 10 MR PICKFORD: That is correct, yes.
 11 THE CHAIRMAN: Yes, in 56 {E/2/20}.
 12 MR PICKFORD: Indeed, I think that is where the form of
 13 words is part of actually -- ultimately come from.
 14 My learned junior is concerned that you might not
 15 have read 54, but I think I thought that the Tribunal
 16 did.
 17 THE CHAIRMAN: Oh yes, we have.
 18 MR PICKFORD: Yes, thank you.
 19 MS ROSE: Paragraph 62 {E/2/21}.
 20 (Pause)
 21 THE CHAIRMAN: Yes.
 22 MR PICKFORD: So what we understand and take from
 23 the Tribunal's ruling of 9 July, which was the one about
 24 the admissibility of the traffic evidence, is that it
 25 establishes the following proposition, that findings in

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1 the Decision -- binding findings, that is, in
 2 the Decision on abuse that are binding for the Decision
 3 Period must also be binding for other periods unless
 4 those other periods are factually distinguishable in
 5 a way that would allow the Tribunal to reach a different
 6 conclusion without implicitly calling into question
 7 the analogous finding in the Decision. That is my
 8 attempted summary of what I understand to be the essence
 9 of the Tribunal's reasoning on that issue.
 10 Now, I accept that cuts both ways, and what I say,
 11 however, is that when one applies that reasoning to this
 12 case, one gets to the following result. The finding
 13 that the boxes were not CSSs must bind, in
 14 the Post-Decision Period, with respect to the successor
 15 box, the Remedy box, unless Kelkoo is able to show that
 16 the circumstances changed in such a way as to mean that
 17 whereas the box previously was not a CSS, because that
 18 was the conclusion in the Decision, the facts have
 19 changed so that it has now become --
 20 THE CHAIRMAN: But it is not the conclusion of
 21 the Decision --
 22 MR PICKFORD: Sorry?
 23 THE CHAIRMAN: But it is not the conclusion of the Decision.
 24 MR PICKFORD: No, the previous conclusion was that it was
 25 not of itself a CSS.

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1 THE CHAIRMAN: Not in itself --
 2 MS ROSE: Of itself --
 3 MR PICKFORD: Yes.
 4 THE CHAIRMAN: Of itself --
 5 MS ROSE: Because it was part of a CSS that also included a
 6 standalone website --
 7 MR PICKFORD: Yes, well --
 8 MS ROSE: -- that is just the -- those are just the facts.
 9 MR PICKFORD: I am happy with the order itself. The order
 10 itself does not undermine my point --
 11 THE CHAIRMAN: But you cannot say it is a finding that it
 12 was not a CSS.
 13 MR PICKFORD: It was --
 14 MS ROSE: A finding that it was a CSS.
 15 MR PICKFORD: Well, no, it was a finding that it was part of
 16 a CSS.
 17 THE CHAIRMAN: Yes.
 18 MS ROSE: Exactly.
 19 MR PICKFORD: Okay. So it was not of itself a CSS, so what
 20 was on the page was not sufficient --
 21 MS ROSE: No, it does not say it is not sufficient. Nowhere
 22 does it say it is not sufficient.
 23 MR PICKFORD: Well, in --
 24 MS ROSE: It simply says it is part of a larger thing which
 25 is the whole of Google's CSS, which manifests in

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1 different forms.
 2 THE CHAIRMAN: It does mean if you remove the other part
 3 there is no CSS left.
 4 MS ROSE: Yes. That is the whole point about what the court
 5 said in clarifying the recitals 408 and 412, whatever it
 6 is.
 7 MR PICKFORD: Yes, because --
 8 MS ROSE: Because those are the ones that you -- and
 9 completely understandably, because there is ambiguity in
 10 the Decision, it is completely understandable why Google
 11 would rely on those recitals, but what the court said
 12 was, no, that is not what they mean, when you read
 13 the Decision as a whole.
 14 MR PICKFORD: I am obviously not doing my job effectively.
 15 I am making a different argument now to the argument
 16 I made before. I lost the argument that the only thing
 17 that was a CSS was the standalone box.
 18 MS ROSE: Yes. So you are saying the standalone box cannot
 19 be a CSS unless it has also got a website attached?
 20 MR PICKFORD: No, I am not saying -- that is not my
 21 submission now.
 22 MS ROSE: So what are you saying now?
 23 MR PICKFORD: My submission now is that one of the things
 24 that we have debated and heard much evidence -- heard
 25 a lot of evidence about in this hearing is whether

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1 the box on the page has sufficient attributes that it is
 2 providing the service of a CSS on the page, and that has
 3 been the heart of the case. It has been about whether
 4 that box -- putting aside -- so kind of we do not almost
 5 need to think about whether there is or is not
 6 necessarily a standalone, but I am not saying there is
 7 not.
 8 The question is: is that, of itself, sufficient to
 9 mean that basically there is a CSS service there right
 10 on the page? In my submission, that is an argument that
 11 is equivalent to saying there is a manifestation of
 12 the CSS on the page, i.e. of itself that is a CSS
 13 service. That point, that "of itself what is on
 14 the page is a CSS service", in my submission, has been
 15 found, consistently with the Decision, not to be
 16 correct, because --
 17 MS ROSE: Where?
 18 MR PICKFORD: Well, at 54, the final sentence of 54 says
 19 {E/2/19}:
 20 "The latter ..."
 21 So we are now talking about the Product Universal
 22 and the Shopping Unit:
 23 "... were not CSSs in themselves ... they were part
 24 of the 'ecosystem', as Mr Moser put it, of Google's CSS
 25 and the prominent positioning and display of the Product

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1 Universal and Shopping Unit were at the heart of
 2 the abuse of the more favourable positioning and display
 3 of Google's CSS."
 4 What I say --
 5 MS ROSE: That is just talking about the facts, which were
 6 that the CSSs on the page did not exist in a vacuum but
 7 were part of a broader ecosystem, including the website,
 8 and it is making clear that the display of the Shopping
 9 Unit is in itself self-preferencing of the CSS. It is
 10 not saying the CSS on the page cannot be a CSS unless it
 11 has got a website attached.
 12 MR PICKFORD: No, I do not --
 13 MS ROSE: Yes, but that has to be your argument --
 14 MR PICKFORD: No.
 15 MS ROSE: I know you say that is not your argument, but
 16 otherwise you do not have an argument, because --
 17 THE CHAIRMAN: If we look at what the -- how
 18 the General Court put it, which we endorsed, it is
 19 quoted in paragraph 59 {E/2/20}:
 20 "The specialised pages ... as well as grouped
 21 product ... notably Product Universals, and ... notably
 22 Shopping Units, must be considered to form part of
 23 the [CSS] ..."
 24 MR PICKFORD: Yes, and --
 25 THE CHAIRMAN: So if you -- all that has happened is, you

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1 may take away Google Shopping, but you have still got
 2 the Shopping Unit, which is therefore then the CSS.
 3 MR PICKFORD: No, sir, with --
 4 MS ROSE: It is part of the CSS because the CSS happens to
 5 be bigger.
 6 THE CHAIRMAN: Yes.
 7 MR PICKFORD: No, it is not that only. With respect, if we
 8 go back to paragraph 48 of the judgment {E/2/18} -- let
 9 me explain where I am going and then I am going to make
 10 it good.
 11 THE CHAIRMAN: Yes.
 12 MR PICKFORD: The reason why, in the Decision, as ultimately
 13 found in the General Court -- because the words are not
 14 in the Decision, but they are in the General Court's
 15 judgment and they are in the preliminary issues judgment
 16 -- that the boxes were part of the CSS is because they
 17 were exclusively bound up -- part of Google's CSS. It
 18 is because they were exclusively bound up with Google's
 19 CSS and so --
 20 MS ROSE: What do you mean by "Google's CSS"?
 21 MR PICKFORD: Well, the -- sorry, with Google's standalone
 22 CSS.
 23 MS ROSE: So are you saying it depends on the website?
 24 MR PICKFORD: I am saying -- well, what I am -- sorry --
 25 MS ROSE: You are saying you cannot have a CSS without

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1 the standalone website. That is what you are saying.
 2 MR PICKFORD: No, I do not think I am saying that. I am
 3 saying that in the --
 4 MS ROSE: So what are you saying then?
 5 MR PICKFORD: I am saying that in the world that we were in
 6 at that time, there was a standalone website. I am not
 7 making a generalised submission that it would be
 8 impossible to have a CSS box on a page if you had all of
 9 your technology to produce it but you did not have
 10 a standalone site. So let us -- just to explain why my
 11 submission is not what, madam, you are suggesting,
 12 I think I would accept that if the only thing that
 13 appeared on the page was a comparison box and it had all
 14 the filtering tools and it had all the sorting tools and
 15 it had the ability to click through and get reviews and
 16 that was the only thing that we had and it was just
 17 a box on the page and there was nothing separate, that
 18 would still be a CSS.
 19 MS ROSE: But you are saying this box cannot be a CSS
 20 without the website.
 21 MR PICKFORD: I am saying the reason why this box --
 22 MS ROSE: This box.
 23 MR PICKFORD: Yes, the reason why this box is not part of
 24 Google's CSS in the way it was part of Google's CSS is
 25 because the linkages between Google's standalone CSS,

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1 that were exclusive previously and formed part of
 2 the self-preferencing, have been broken.
 3 MS ROSE: So that means --
 4 THE CHAIRMAN: I think we are jumping ahead to -- when you
 5 say "this box" to the Remedy box.
 6 MS ROSE: Yes. Yes, exactly.
 7 MR PICKFORD: The Remedy box, yes.
 8 THE CHAIRMAN: But we are sticking at the moment, to what --
 9 which was not, of course, the focus of the preliminary
 10 issues judgment at all --
 11 MR PICKFORD: Yes.
 12 THE CHAIRMAN: -- but on the point on -- if we take it in
 13 stages -- of what we found to be Google's CSS, because
 14 you were saying that the Shopping Unit and considered in
 15 the Decision was not Google's CSS, or --
 16 MR PICKFORD: Yes, that is right, and that has been held
 17 against me, and I accept that for the Decision Period,
 18 I lost that argument.
 19 MS ROSE: So you are saying -- but you are saying the reason
 20 why --
 21 MR PICKFORD: Yes.
 22 MS ROSE: -- the reason why the Shopping Unit is part of
 23 Google's CSS --
 24 MR PICKFORD: Yes.
 25 MS ROSE: -- is because it links to Google's website?

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1 MR PICKFORD: Exactly.
 2 MS ROSE: So you are saying that if there was no underlying
 3 website but the Shopping Unit existed in the form in
 4 which it existed at the relevant time, that would not be
 5 a CSS?
 6 MR PICKFORD: I think that is too -- with respect, I think
 7 that is a slightly too hypothetical --
 8 MS ROSE: It is not hypothetical, it is reality. It is what
 9 happened in Sweden.
 10 MR PICKFORD: Well, the difficulty, madam --
 11 THE CHAIRMAN: We'll come to that.
 12 MR PICKFORD: -- is one has to ask oneself: where do
 13 the results come from? I think, if what you are
 14 positing to me is that there is a box on the page, there
 15 is no standalone Google CSS at all, so we just remove
 16 that from --
 17 MS ROSE: So it goes to merchants.
 18 MR PICKFORD: -- and the ads go to merchants and the only
 19 ads that appear there have been provided by non-Google
 20 CSSs; is that right? Or --
 21 MS ROSE: No, we are looking at the Shopping Unit.
 22 MR PICKFORD: The Shopping Unit, okay.
 23 THE CHAIRMAN: In the Decision Period.
 24 MR PICKFORD: Yes. I think that that is a difficult
 25 question to answer, because it is certainly not

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1 the Remedy box. What I think would concern
 2 the Commission in that context is that, exclusively,
 3 the relationships -- as I understand what is being
 4 posited to me here, is that the relationships that
 5 enable advertisers to appear in that box, merchants to
 6 appear in that box, are exclusively owned by Google. Is
 7 that what is being put? So the scenario is that CSSs do
 8 not get a look in in that box, it is simply Google
 9 saying to merchants, "You advertise in my box". Is that
 10 the hypothetical that is being put to me?
 11 I think, if that is the hypothetical, I think
 12 the Commission would have said: no, that is problematic
 13 because, in that world, you are keeping out all CSSs.
 14 Now, arguably, there is a question --
 15 MS ROSE: But hang on -- hang on --
 16 MR PICKFORD: -- there is a question there about whether you
 17 are allowed to do that if you are not yourself in
 18 the CSS market, and that was one of the -- and I think
 19 you posited to me that Google does not have a CSS.
 20 MS ROSE: No --
 21 MR PICKFORD: A standalone CSS.
 22 MS ROSE: -- what we are putting to you is that that is
 23 Google's CSS in that situation, because if Google is
 24 doing a specialised form of selection or ranking or
 25 searching, whatever we want to call it, to rank products

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1 in response to a commercial query in its box, with
 2 prices, with links to merchants to buy, enabling
 3 comparisons to be made between the prices of products,
 4 that will be Google's CSS.
 5 MR PICKFORD: Well, I can certainly see the argument as to
 6 why the Commission would say that that was sufficient.
 7 MS ROSE: But is that not what happened in relation to
 8 Sweden?
 9 MR PICKFORD: Well, my --
 10 THE CHAIRMAN: If you look at --
 11 MR PICKFORD: -- my position is this. I do not accept -- so
 12 if you want to know what -- I do not accept that that
 13 would be a CSS, and --
 14 MS ROSE: Okay. So how do you explain the Decision --
 15 MR PICKFORD: Well, can I take it in stages?
 16 THE CHAIRMAN: If we go to Article 1 of the operative part
 17 of the Decision.
 18 MR PICKFORD: Yes. Could you give me a page reference,
 19 please, for that?
 20 THE CHAIRMAN: {BA/2/241}:
 21 "By positioning and displaying more favourably, in
 22 [Google's] ... general search results pages, [Google's]
 23 own [CSS] compared to competing [CSSs], the undertaking
 24 consisting of Google [etc] ... has infringed
 25 Article 102 ..."

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1 So that begs the question of what is Google's own
 2 CSS which is being displayed in the SERP.
 3 MR PICKFORD: Yes.
 4 THE CHAIRMAN: Then the second sentence:
 5 "The infringement has been taking place in
 6 the following countries since the following dates.
 7 "(a) as regards Google ..."
 8 Then the last tab:
 9 "Since November 2013 in Austria, Belgium, Denmark,
 10 Norway, Poland and Sweden."
 11 Then we go to why those countries, if we go to
 12 recitals 34 and 35, which is a {BA/2/12}, recital 34:
 13 "Subsequently, the Shopping Unit was launched on
 14 Google's domains in the EEA as follows ..."
 15 Then (ii):
 16 "... in November 2013 in Austria, Belgium, Denmark,
 17 Norway, Poland and Sweden."
 18 So that is the Shopping Unit in November '13.
 19 Recital 35 {BA/2/13}:
 20 "As for the standalone Google Shopping website, it
 21 was launched ... (ii) in September 2016 in Austria,
 22 Belgium, Denmark, Norway, Poland and Sweden ..."
 23 In other words, for --
 24 MS ROSE: Three years.
 25 THE CHAIRMAN: -- almost three years we had the Shopping

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1 Unit in Austria, Belgium, Denmark, Norway, Poland and
 2 Sweden, but no standalone Google Shopping property and
 3 that was an infringement for those two-plus years.
 4 MR PICKFORD: Well, there are particular -- when I get to
 5 the Decision, there are particular -- there is
 6 a particular recital, which is 422 {BA/2/124}, which
 7 addresses that and it is a transitional issue.
 8 THE CHAIRMAN: Yes, but two and a half years, there was --
 9 422 says there was a sort of remote link that people
 10 could go to a shopping CSS in another country if they
 11 wanted to.
 12 MR PICKFORD: Yes, and --
 13 THE CHAIRMAN: But so --
 14 MR PICKFORD: Well, sir, that is the point. I mean, if --
 15 I think the situation in relation to Sweden is --
 16 THE CHAIRMAN: Well, it is not just Sweden, it is five
 17 countries, is it not?
 18 MR PICKFORD: Yes.
 19 THE CHAIRMAN: No, six countries?
 20 MR PICKFORD: What the Commission says in relation to those
 21 is: well, there was a form of standalone, you go to
 22 the other standalone sites that do exist. That is their
 23 reasoning dealing with that issue and it is a binding
 24 recital, so it must be essential to the Commission's
 25 reasoning in making the Decision that it did. If it is

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1 binding, it cannot be just an obiter comment, it is
 2 core, and in my submission it is core. The point is
 3 there was, even in the countries where there had not
 4 been a standalone Swedish CSS, there was nonetheless
 5 a standalone site which, in the Commission's view, was
 6 sufficient, and indeed it is necessary as part of
 7 the reasoning here, because otherwise it would not be
 8 binding, to justify the finding that there is still
 9 discrimination in favour of that alternative site.
 10 So, sir --
 11 THE CHAIRMAN: It is not discrimination in favour of that
 12 alternative site --
 13 MR PICKFORD: Well, discrimination in favour --
 14 THE CHAIRMAN: -- it is discrimination of preferencing --
 15 MR PICKFORD: Yes.
 16 THE CHAIRMAN: -- Google's CSS --
 17 MR PICKFORD: Yes.
 18 THE CHAIRMAN: -- on the SERP --
 19 MR PICKFORD: Yes.
 20 THE CHAIRMAN: -- in those six countries for those
 21 three years. So it was being preferenced on the SERP in
 22 those countries.
 23 MR PICKFORD: Yes, and in my submission, for that reason,
 24 because that is a binding part --
 25 THE CHAIRMAN: Yes, but it is still Google's CSS that is

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1 appearing on the SERP in those countries. It is
 2 a preferencing -- there is a link, a loose link to
 3 the standalone website in some other countries.
 4 MR PICKFORD: Well, what is appearing on the SERP is not
 5 a CSS, it is part of the CSS. That is the first
 6 critical point.
 7 THE CHAIRMAN: Yes.
 8 MR PICKFORD: So the Commission is not finding, and nor did
 9 the General Court find, that there was a CSS on
 10 the page.
 11 What they found is that the box was part of the CSS,
 12 and in my submission, it is slightly less clear why they
 13 found that in relation to places such as Sweden, but
 14 there is an answer here, and the answer is, well, in any
 15 event, this was transitional and ultimately, even during
 16 the period, you would then be redirected to a different
 17 national CSS, if you wanted -- sorry, a different
 18 national standalone Google CSS, if you wanted to be.
 19 If I may, I would like to come back to --
 20 PROFESSOR SMITH: Was it --
 21 THE CHAIRMAN: It was not redirected.
 22 PROFESSOR SMITH: Was it in any sense a national Google CSS
 23 site that people in Sweden or Poland were redirected to?
 24 THE CHAIRMAN: They were not redirected.
 25 MR PICKFORD: Sorry, I beg your pardon, they could visit.

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1 They could visit.
 2 THE CHAIRMAN: They were not redirected, and these were
 3 national markets, but they could visit the German one if
 4 they wanted to.
 5 PROFESSOR SMITH: Presumably, if they were literate in
 6 German.
 7 MR PICKFORD: I am sorry, sir, Professor, I was just --
 8 PROFESSOR SMITH: Presumably, if the Poles or Swedes who
 9 were sufficiently excited by the Shopping Unit that they
 10 wanted to do a further shopping search, they needed to
 11 do it in German?
 12 MR PICKFORD: Yes.
 13 PROFESSOR SMITH: Okay.
 14 MR PICKFORD: Now, if I may, I would -- I accept that there
 15 was a slightly -- there was a complicating feature in
 16 relation to those six countries, and one might say,
 17 well, is that not a bit -- it was a bit close as to why
 18 they were actually included. But the Commission does
 19 include them and it says, well, here is how we are going
 20 to get you: we are going to get you because (a) it is
 21 a transitional phase, and (b) in any event, users in
 22 those countries can still go to a Google standalone
 23 website. Both of those sentences at the end of that
 24 paragraph are binding sentences, so that must be
 25 the reasoning by which, ultimately, it is said that

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1 there is still self-preferencing.
 2 Coming back to all of the other factors that apply
 3 to all of the other countries, and remember, these are
 4 domestic CSS markets, so ultimately it might be --
 5 I have not accepted that it is, but technically it could
 6 even be the case that I have an argument in relation to
 7 the UK, Germany, etc, and there is a different argument
 8 in relation to Sweden. I say, well, actually, using
 9 what one discerns from recital 422 is that it is not so
 10 different.
 11 But the point is this. If we could come back to
 12 the slightly simpler case of how the CSS worked in, say,
 13 the UK. The reason, in my submission, why, in the UK,
 14 it was said that the box preferences Google's CSS and
 15 why, therefore, it is part of the CSS is all of
 16 the connecting features that one finds in recitals 413
 17 through to 423, and I am going to come -- I would like
 18 to come back to those in a structured fashion when I get
 19 on to the Commission Decision. But what they all have
 20 in common is that they are all concerned with one of two
 21 basic ideas, either links, so actual physical links,
 22 between the box on the page and Google's standalone
 23 site, or they are concerned with links in practical
 24 terms, in particular that the only party providing their
 25 results into that box is Google. So that box is

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1 intimately bound up with Google's CSS. Google's CSS is
 2 the only place you go out to if you click on the link
 3 and it is the only place that the box draws results from
 4 because of all of the interlinkages that are set out in
 5 those recitals which I am going to come to, and it is
 6 for that reason, I say, that the General Court was able
 7 to conclude that the box on the page was part of
 8 Google's CSS, because in effect it was a window onto
 9 the more fully evolved standalone CSS.
 10 PROFESSOR SMITH: Although for the majority of users of
 11 the box it was not a window onto anything else, it was
 12 where they stopped. They looked at the list of PLA ads
 13 that had been selected by Google's auction --
 14 MR PICKFORD: Yes.
 15 PROFESSOR SMITH: -- and they said, "Oh, that has given me
 16 a picture of what is available in the market and I can
 17 now click on a merchant's website and proceed".
 18 MR PICKFORD: Yes.
 19 PROFESSOR SMITH: So the window onto Google's CSS was of no
 20 interest to most of the users.
 21 MR PICKFORD: That is true, but that still does not address
 22 the -- so that is the -- effectively the point that
 23 marries up with the links, the links where you could
 24 actually click, where you can click out. You are,
 25 Professor, putting to me, well, not many people did

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1 that, and I accept that. But that was not the only
 2 reason why there was a connection. The other reason why
 3 there was a connection is because all of the results
 4 were drawn exclusively from Google's own CSS service.
 5 MS ROSE: When you say that -- hang on, you say the results
 6 are drawn from Google's CSS service. You mean that
 7 the results are product listing ads placed on behalf of
 8 merchants who have an agreement with Google?
 9 MR PICKFORD: Yes.
 10 MS ROSE: Now, that is the case under the Remedy box, right,
 11 because all of the merchants have an agreement with
 12 Google, it is simply that they are contracting through
 13 an agent?
 14 MR PICKFORD: Well, they have an agreement with their CSS
 15 partner --
 16 MS ROSE: But they are paying Google to be on the page, pay
 17 per click.
 18 MR PICKFORD: Yes, they ultimately pay, but --
 19 MS ROSE: So they have a contract with Google via
 20 the intermediary?
 21 MR PICKFORD: I would have to take instructions on
 22 the precise nature of the contract.
 23 MS ROSE: But why does it matter, because there is no
 24 fundamental substantive difference?
 25 MR PICKFORD: Yes, there is. In my submission, there is

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1 a very significant difference, which is that, in this
 2 world that we are in now with the Remedy box, any CSS
 3 has the opportunity to monetise its portfolio of
 4 merchant relationships on Google's SERP by placing an ad
 5 in the box as long as they win the auction. So if you
 6 are Kelkoo and you have contracted with Amazon to feed
 7 Amazon a certain amount of traffic, you can get that
 8 traffic from your own website, you can get it from other
 9 publishers that Kelkoo might have deals with, and you
 10 can get it from Google's -- the PLAs in the Remedy box,
 11 and that is an opportunity that they have now and they
 12 have to bid in an auction equally against Google for
 13 that, and that is not the world as it was before.
 14 Google did not have a separate entity where it had to
 15 bid to be in its own box. It just -- because it had not
 16 actually split out any sort of separate CSS at that
 17 point, just the merchants simply had to come direct to
 18 Google -- to Google Search. That is not what happens
 19 now; Google has separated off an entity which is
 20 equivalent to --
 21 MS ROSE: It is not an entity, though, is it?
 22 MR PICKFORD: Sorry?
 23 MS ROSE: It is not an entity.
 24 MR PICKFORD: Well, it is not a legal entity, it is an
 25 economic entity.

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1 THE CHAIRMAN: Well, Mr Pickford, you are clearly right that
 2 what we have got in the Remedy box, as we call it, is
 3 different from the Shopping Unit.
 4 MR PICKFORD: Yes.
 5 THE CHAIRMAN: It is a change.
 6 But taking it in stages, the first point on which
 7 you were addressing us was to say, well, the Shopping
 8 Unit, although part of Google's CSS, can only be seen as
 9 in any sense Google's CSS because of this exclusive
 10 linkage, I think is what you are saying, and now you are
 11 coming on to say, well, the Remedy box is different. It
 12 is clearly different, and the material question is, it
 13 seems to me: are the differences of such a nature that
 14 it now ceases to be part of Google's CSS when previously
 15 it was? That must be the critical question: is it still
 16 -- have these changes been so fundamental that it no
 17 longer involves the self-preferencing that existed
 18 before?
 19 MR PICKFORD: I almost agree with that, but there was one
 20 very important qualification, which is, I think you said
 21 that the question is whether it -- whether the box
 22 ceases to be Google's CSS, and of course my point is
 23 that there was never a finding that the box was Google's
 24 CSS, the finding was that the box was part of Google's
 25 CSS.

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1 Now, Mr Jowell has very skillfully elided those two.
 2 He said, consistently throughout his submissions, that
 3 the ideas of a box being a manifestation of Google's CSS
 4 and a box being part of Google's CSS are exactly
 5 the same thing, and I disagree with that contention.
 6 So I say that the argument that Google's box is
 7 a manifestation of Google's CSS is equivalent to saying
 8 that it has the qualities of a CSS in itself, that is
 9 that it is sufficiently in the CSS market, to put it in
 10 economic terms, that it can be treated as being a CSS,
 11 and that is different from, for the reasons I have just
 12 been explaining, the proposition that Google's CSS --
 13 sorry, Google's box is part of a CSS. It can be part of
 14 merely by being, as I have sought to explain and will
 15 explain further, by having sufficient connections that
 16 the box is basically just bound up with Google's own CSS
 17 and only Google's CSS.
 18 MS ROSE: But it could also be part of simply because Google
 19 is offering a consumer shopping service which in fact
 20 takes different forms. So if the position is that,
 21 before the Decision, Google was offering a consumer
 22 comparison shopping service via the website and via
 23 the Shopping Unit, then the question might be: after
 24 the Decision, is the Remedy box so different from
 25 the Shopping Unit that Google is no longer offering

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1 a comparison shopping service through the Shopping Unit
 2 or the Remedy box as well as through other means, such
 3 as its website? It does not mean that -- saying it is
 4 part of Google's CSS does not need to mean it is
 5 incomplete without the rest of it, it may just simply be
 6 a factual description of the fact that Google offers
 7 comparison shopping services by different means, by
 8 different modes.
 9 MR PICKFORD: Well, as a purely linguistic point, that is
 10 conceivable, but if you read the recitals in
 11 the Decision, both 408 and 412, and put those together
 12 with the reasons why the Commission found that there was
 13 favouring, one sees, time and again, that the critical
 14 factor is in fact the linkages between the box and --
 15 MS ROSE: Is that not the argument that the court rejected,
 16 that it is just the links?
 17 MR PICKFORD: No, when I say the linkages, I do not mean
 18 the links in the sense of a link that you can click on
 19 a page, I mean the broader connections between the box
 20 and Google's CSS, that the two entities were so
 21 interbound with one another.
 22 Sorry, I am just going to need a moment to see,
 23 because I have been improvising for about 40 minutes so
 24 I need to see where I might be in my notes.
 25 (Pause)

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1 Yes, so I think my first point, albeit I see I have
 2 a somewhat uphill struggle potentially to convince
 3 the Tribunal on it, but my first point is that in fact
 4 you do not necessarily need to get drawn into lots of
 5 the evidence about the box, because I say actually I win
 6 on the basis of the reasoning in the Decision properly
 7 construed, and obviously we have had a robust exchange
 8 about what it means and I am going to come back to it.
 9 The second point on this is, if that is wrong, then
 10 we say, on the facts, the box is not a manifestation of
 11 a CSS, because it does not have the --
 12 THE CHAIRMAN: The new box, the Remedy box?
 13 MR PICKFORD: Yes, because it does not have the critical
 14 features that would require it to be. You will be very
 15 familiar with what I say those are, I am not -- it is
 16 the filtering, it is the sorting, and, for a good CSS,
 17 it is the additional content.
 18 Then, very, very briefly, because I think what my
 19 attempt to put the case in a nutshell has taught me
 20 is that it can be very dangerous to attempt to do that
 21 at the outset, is that when one goes to
 22 the counterfactuals, we say that if we are right on
 23 the law, so assuming that the Remedy box is lawful, that
 24 is the starting point for an analysis of what
 25 the counterfactual would have been. I accept it is not

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1 determinative, but in order for it to be replaced by --
 2 but I do say it is a very, very strong starting point
 3 because it is real life evidence of what we did, at
 4 least in 2017. So the challenge then becomes for Kelkoo
 5 to say: okay, well, that is what you did in 2017, but
 6 here is why the world was sufficiently different in 2008
 7 to 2012 that you would have done something different.
 8 I say that their entire case on that is based on
 9 a false premise, because the essence of their case --
 10 and I will develop it in more detail -- is: well, look
 11 at the Product Universal, that was a free box and it
 12 also, some of the time, went to your own CSS, not to
 13 merchants. So they say: well, there you go, that is
 14 what you would have done in 2008. What that entirely
 15 overlooks is that the existence of that box and all of
 16 the commercial thinking that would have underpinned that
 17 box happened in a world where Google was
 18 self-preferencing, where it believed that it could
 19 self-preference and did. So rival CSSs were not getting
 20 a look in in that world. As soon as you change that
 21 essential part of the assumptions, and of course one has
 22 to, because we have to undo the self-preferencing that
 23 we now have to accept that we did, that changes all of
 24 the commercial dynamics in relation to what Google would
 25 have done, and I will come on and develop why that is

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1 the case. So that will address both whether the box is
 2 paid or free, and it will address where the traffic
 3 would have gone.

4 The remaining two core points then are handing over
 5 our Crown jewels so that CSSs get to choose, using their
 6 algorithms, what appears on our SERP, and in my
 7 submission, that is wholly commercially implausible; it
 8 is totally implausible today and it would have been
 9 implausible in 2008.

10 Then the final aspect is the question about removing
 11 algorithms, and on that I say there is only one issue,
 12 Ms Rose, as you put it to me, there is only one game in
 13 town left on that, which is whether this Tribunal is
 14 simply forced to find we would have removed algorithms
 15 because of the findings in the Decision and ultimately
 16 as upheld by the Court of Justice.

17 Then there is -- just to cap off the introduction so
 18 that the Tribunal has a kind of map for my case, of
 19 course then there is the alternative world, where Kelkoo
 20 is right on the abuse, and I say if we are sufficiently
 21 constrained by Kelkoo's view of the world, which is that
 22 if we are to have PLAs going to merchants on our SERP at
 23 all, we have to allow any CSS to control the SERP to do
 24 that in one way or another. That is their case, because
 25 it is only 3b that you get to have a click through to

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1 a merchant. I say that world is so undesirable from
 2 Google's point of view that the logical thing it would
 3 have done is to get rid of the box all together.
 4 Mr Jowell supported his submissions on scenario 1, which
 5 also involves getting rid of the box, by reference to
 6 Turkey. He said: look, that is what they did in Turkey,
 7 they just rely on getting income from text ads. We say,
 8 yes, subject to --
 9 MS ROSE: So you say, if they are right on abuse, the right
 10 counterfactual is scenario 1?
 11 MR PICKFORD: Subject to a very important point, which is,
 12 I say that they have made a mistake in relation to their
 13 counterfactual 1 if they are saying we would have
 14 willingly got rid of our algorithms if we did not need
 15 to. So it just comes back to the question of law about
 16 algorithms. If he is right that because it is --
 17 because of what he says about it being a combined abuse,
 18 we have to get rid of our algorithms in
 19 the counterfactual, then he wins for his version of
 20 scenario 1. If I am right --
 21 MS ROSE: So that is organic search with algorithms and text
 22 ads?
 23 MR PICKFORD: Yes.
 24 I say that all comes down to who is right on that
 25 question of law.

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1 So in terms of the structure of the rest of what
 2 I am going to advance to the Tribunal this afternoon and
 3 tomorrow, I am not proposing to have a large section
 4 where I go through background facts. What I would like
 5 to address you on very briefly is a question that you
 6 put, Ms Rose, to Mr Jowell about the relevance of some
 7 of the evidence on Kelkoo, and so I am going to address
 8 the relevance question, but I am not then going to go
 9 through all of the evidence, but it is important,
 10 I think, that I respond on that.
 11 Secondly, I am then going to go back to
 12 the Decision, because what this -- the exchange that
 13 I had at the outset of my submissions with the Tribunal
 14 shows is that that is absolutely critical, and I am
 15 going to go through that carefully and slowly. I know
 16 I did it in opening, but in my submission, I need to go
 17 through it to make sure that I have properly explained
 18 my position on what that Decision means.
 19 I am then going to come on to why we say the Remedy
 20 cures the infringement, my third point.
 21 Then, fourthly, I am going to deal with the law on
 22 counterfactuals.
 23 Fifth, I am then going to deal with the substance of
 24 the counterfactual arguments.
 25 Then, finally, there is the issue of jurisdiction

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1 that Mr McGurk is going to address you on and I am going
 2 to try to make sure that I pause with sufficient time
 3 for him to do that before the end of today so that
 4 Mr Jowell has a fair chance to consider what we are
 5 saying in response to him overnight.
 6 So, on that, I will deal with the relevance of
 7 Kelkoo, if I may.
 8 So what Kelkoo have come to this Tribunal to
 9 persuade you is that it was a good site and it was
 10 deprived of traffic and scale by Google's
 11 anti-competitive conduct. That is the thrust of quite
 12 a lot of Dr Stables' written evidence. We say that
 13 the true story is one of a poor quality site which had
 14 a repeated pattern over many years of being unwilling to
 15 invest when others were investing and that it suffered
 16 a significant degradation in its own business at least
 17 in a substantial part because of its own unsavoury
 18 business practices. We say that is all supported by
 19 reams of evidence. It is not cherry-picking. Or at
 20 least, if it is cherry-picking, then Kelkoo had some
 21 bumper harvests of cherries over the period. Now, in my
 22 submission, that debate is relevant to trial 1 for three
 23 reasons.
 24 First, Mr Hunt, in his economic evidence, made much
 25 of Kelkoo's alleged lack of commercial success in

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1 the post-Remedy period as, he said, evidence of there
 2 being a lack of competition on the merits. We say that
 3 Mr Hunt's reports of Kelkoo's demise have been greatly
 4 exaggerated. Kelkoo was not doing as badly as claimed
 5 at all, and indeed you saw some of the evidence in
 6 cross-examination about that. But to the extent it has
 7 not done fabulously, that does not infer -- or one
 8 cannot infer from that that there was a lack of
 9 competition on the merits. We say there is strong
 10 evidence that its poor performance arises from
 11 self-inflicted wounds and it is simply not possible for
 12 this Tribunal in any event to disentangle the reasons
 13 for why Google is or -- sorry, why Kelkoo is or is not
 14 doing well now.
 15 MS ROSE: Do we need to make any finding on that? I mean --
 16 MR PICKFORD: No.
 17 MS ROSE: -- because the simple question is, surely, whether
 18 the Remedy box is a continuation of
 19 the self-preferencing or not.
 20 MR PICKFORD: I agree. I agree.
 21 MS ROSE: If it was, then the question about competition on
 22 the merits is decided in the same way that
 23 the Commission already decided it.
 24 MR PICKFORD: Yes, I totally agree.
 25 MS ROSE: So it is not relevant for now.

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1 MR PICKFORD: Well, it is relevant to meet a point in
 2 the alternative. If what you have just articulated to
 3 me is the Tribunal's Decision --
 4 MS ROSE: But I do not think it is in dispute between
 5 the parties, is it?
 6 MR PICKFORD: Well, I say --
 7 MS ROSE: There were no submissions from Mr Jowell about
 8 competition on the merits in the Post-Decision Period.
 9 MR PICKFORD: Well, I say they blow a little hot and cold on
 10 that. I think there are points made in their written
 11 closings about Kelkoo and its profitability or success.
 12 I will have to get you the references. It might be just
 13 a very easily addressed point. I mean, I agree, if
 14 insofar as the Tribunal says, and Mr Hunt accepted
 15 himself ultimately in cross-examination, it all comes
 16 down to the "is it a CSS" issue, well, then that is it,
 17 and in which case my point on relevancy goes away --
 18 that first point on relevancy goes away. I accept that.
 19 The second is an issue that goes to counterfactual,
 20 and that is that Kelkoo portrays itself as being, at
 21 best, the victim of a false positive in terms of
 22 demotions and, at worst, the victim of some deliberate
 23 strategy to sideline a competitor by Google. Then, as
 24 we understand it, that is said to feed into its case
 25 somehow on the counterfactual as to whether we would or

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1 would not have removed or adjusted our algorithms. This
 2 comes back to a point where I am not entirely sure
 3 whether Mr Jowell has conceded that the algorithm point
 4 is purely a question of law about whether he is bound or
 5 whether he is still maintaining something there. But
 6 insofar as he is still maintaining something additional,
 7 the evidence on Kelkoo's success or otherwise and its
 8 quality would be relevant to that issue.
 9 It may be again that I am --
 10 THE CHAIRMAN: I still struggle to see how it would.
 11 I mean, there is the legal question are we bound on
 12 the algorithms. There is the binding finding that
 13 the algorithms demoted CSSs in general, not specifically
 14 Kelkoo, by reason of their characteristics as a CSS and
 15 that is all one needs.
 16 MR PICKFORD: Well, it is not quite that they were demoted
 17 in general, it is that they were prone to demotion is
 18 the thing.
 19 THE CHAIRMAN: Yes, with a lot of then detailed figures
 20 backing it up.
 21 MR PICKFORD: Yes, but ultimately what that evidence
 22 actually shows is that prone to demotion is not
 23 a very -- it is not that substantial, because actually,
 24 there is evidence in this trial about what actually
 25 happened in relation in particular to Panda. It has

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1 been --
 2 THE CHAIRMAN: Well, there is binding -- I know you put in
 3 stuff about Panda, and it seems to me that is
 4 contradicting the binding findings of Panda in
 5 the Decision --
 6 MR PICKFORD: Well, sir --
 7 THE CHAIRMAN: -- and whether Kelkoo would have done well or
 8 not under an algorithm which was modified is not
 9 something we need concern ourselves with. You may say
 10 that even a modified algorithm that was more nuanced in
 11 its treatment of CSSs, Kelkoo would have done very badly
 12 because it is poor quality, and Kelkoo will say, "No, we
 13 would have done very well", but we do not have to get
 14 into that, do we?
 15 MR PICKFORD: Well, I am glad to hear that, sir, because
 16 I think what that means is that we do not need to worry
 17 about the points -- some of the points that have been
 18 canvassed about a potentially nuanced algorithm and how
 19 one might tweak the algorithm to have less of an effect,
 20 because we only have two Claimants left and they are
 21 Kelkoo and Ciao, and so if it is not relevant precisely
 22 how Kelkoo and Ciao were affected by --
 23 THE CHAIRMAN: Well, it would be relevant for Trial 2 how
 24 they would be affected, because that is when you are
 25 looking at the actual result on their profit.

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1 MR PICKFORD: Well, sir, in that respect, I struggle to see
 2 -- and I am sure this is my fault -- but why -- why at
 3 this stage, it could be relevant to investigate changes
 4 to the algorithms when there is not a case that is
 5 saying any of the algorithms are unlawful and as --
 6 THE CHAIRMAN: Well, there is a case saying that they are --
 7 that is a question of whether the algorithms have to be
 8 -- whether the counterfactual has to bite on
 9 the algorithms as well. If it does, that is because
 10 they are unlawful in the way they operated.
 11 MR PICKFORD: But I think that is a pure -- that is a kind
 12 of -- in my understanding, that is a binary question.
 13 That is either a, yes, you include them/no, you do not
 14 include them, and it depends on whether you are bound by
 15 what the European Court said about counterfactuals. In
 16 my submission, that cannot lead to then a more nuanced
 17 tinkering with the algorithms.
 18 THE CHAIRMAN: Well, I am not sure about that. It means
 19 that, in their present -- it is just like saying does
 20 the box -- is it lawful in its present form. It does
 21 not mean you cannot have in the counterfactual
 22 a different form of box.
 23 MR PICKFORD: Well, in my submission, the counterfactual can
 24 only remove something that is unlawful. If it is not
 25 unlawful, then it should not be being removed.

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1 THE CHAIRMAN: But it can be substituted by something that
 2 is lawful in the counterfactual. That is the whole
 3 point of your Remedy box --
 4 MR PICKFORD: Right.
 5 THE CHAIRMAN: -- you are substituting for the Shopping
 6 Unit, which is unlawful, another form of box which you
 7 say is lawful.
 8 MR PICKFORD: I think the difficulty here is that there is
 9 a kind of -- there is a Decision point in this tree
 10 about whether we are in a world where we are getting rid
 11 of the algorithms because we are told we have got to get
 12 rid of the algorithms, because that is what
 13 the European Court says --
 14 THE CHAIRMAN: Or we have got to get rid of them because of
 15 the way they operate in a particular way.
 16 MR PICKFORD: Okay. I think --
 17 THE CHAIRMAN: I think you have got the point. I will not
 18 say any more.
 19 MR PICKFORD: The third point then on the relevance of
 20 Kelkoo's poor quality and we say unscrupulous business
 21 practices is it is illustrative -- and I put it no
 22 higher than this -- of the kinds of reasons why Google
 23 might prefer not to hand over control of its Crown jewel
 24 SERP to third parties. If it does that, it is
 25 relinquishing control over something that is at the very

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1 heart of its own business and it is potentially allowing
 2 parties, who we have had evidence of, who are willing to
 3 charge merchants for worthless traffic, and we say that
 4 opens up a whole can of worms which Google is
 5 commercially well entitled not to want to get into,
 6 so -- and also the illustrations of the poor quality of
 7 Kelkoo's results are themselves, again, illustrations
 8 and nothing more of the sorts of difficulties that one
 9 has with allowing the SERP to be opened up and others to
 10 choose what goes on it.
 11 THE CHAIRMAN: I think we can accept, irrespective of
 12 Kelkoo, that there are some poor quality CSSs, and one
 13 does not have to identify Kelkoo. So the general point
 14 you wish to make, that Google would not wish to hand
 15 over control to CSSs who may be of poor quality, stands
 16 without having to denigrate Kelkoo and having evidence
 17 about Kelkoo. I think we can accept there will be CSSs
 18 that are of poor quality and there are others that are
 19 of good quality.
 20 MR PICKFORD: Well, it is possible that that is all
 21 the Tribunal feels it needs to do for this hearing.
 22 I say that the Tribunal has heard enough that it could
 23 make further findings if it wanted to and we invite
 24 those further findings to be made.
 25 THE CHAIRMAN: Yes, I see.

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1 MR PICKFORD: On that topic, I should make clear that --
 2 I think it is paragraph 112 of our submissions
 3 {AA2/1/43} -- we do not allege fraud against Kelkoo. We
 4 have not ever pleaded it, we do not allege it in our
 5 closing submissions. The reason why
 6 the word "fraudulent" appears is because Kelkoo itself
 7 discusses what it does with fraudulent traffic, so we
 8 cannot avoid mentioning the word "fraudulent", but we
 9 are not --
 10 THE CHAIRMAN: No, well, that is helpful. Thank you.
 11 MR PICKFORD: But there is no allegation of fraud against
 12 Kelkoo itself in this trial.
 13 So with that introduction, I was proposing next to
 14 go to the Decision. I do not know whether now is an
 15 appropriate moment for ...
 16 THE CHAIRMAN: Perhaps, we should -- yes, that is a good
 17 idea. Let us have a ten-minute break now.
 18 (3.22 pm)
 19 (A short break)
 20 (3.36 pm)
 21 THE CHAIRMAN: Yes, Mr Pickford.
 22 MR PICKFORD: So I am now going to go to the Decision,
 23 the much loved Decision, and pick up it briefly where we
 24 picked it up originally, but I think the early sections
 25 we can go fairly fast and then we can probably slow down

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1 when we get to some of the more critical ones.
 2 So if we could begin, please, at page 8, so it is at
 3 {BA/2/8}.
 4 Just for context, to remind you that I previously
 5 picked it up around recital 10 -- perhaps slightly
 6 earlier, but 10 is the first important one:
 7 "When a user enters a keyword or string of keywords
 8 (a 'query') in Google Search, Google's general search
 9 results pages return different categories of search
 10 results, including generic search results ...
 11 specialised search results ... In addition,
 12 Google Search may return a third category of results,
 13 namely online search [ads] ..."
 14 I am sure the Tribunal will recall that there was
 15 a discussion between myself and Ms Rose about in fact
 16 there being effectively a Venn diagram there, because
 17 ads are a form of specialised result because they have
 18 specialised technology, they are not based on crawling.
 19 Then we see recitals 11 through to 13, a further
 20 description of what happens on Google's page when
 21 a search term is entered and the two sets of algorithms
 22 that are run, both the generic search and specialised
 23 search algorithms.
 24 Now, I say that these provisions are a good early
 25 indication that general search results can comprise both

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1 generic search results and specialised results and, to
 2 the extent different, ads. Now, I do not go so far as
 3 to say, on its own, that these recitals rule out
 4 the possibility that Google might go further and put an
 5 entire specialist search service on the page. But what
 6 I do say is that they are, in terms of a general
 7 introduction to the way in which Google works,
 8 consistent and indeed support the idea that general
 9 search results comprise a number of different types of
 10 results, including specialist results. You will
 11 remember that there was an exchange that I had with
 12 Mr Hunt when he said that his approach was based on
 13 the proposition that general search inherently excludes
 14 specialised results, and in my submission, that is
 15 inconsistent with the Decision. General search, in my
 16 submission, includes generic, specialised and ads.
 17 Then recitals 14 through to 17 {BA/2/9} go on to
 18 talk about generic results. Recitals 18 through to 22
 19 {BA/2/9-10} talk about ads, and 20 talks about
 20 the specialised processes for ads.
 21 Just pausing there. Again, referring back to
 22 the economic evidence that we had later, even Mr Hunt
 23 ultimately accepted that the provision of ads is
 24 integral to a general search service, and that is
 25 something that becomes important later on when we get on

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1 to my alternative submission about the nature of the box
 2 in economic terms.
 3 But what --
 4 MS ROSE: Of these three types of results, only the generic
 5 search results are the results of crawling the web?
 6 MR PICKFORD: That is right, yes.
 7 MS ROSE: The others are the result of some sort of search
 8 through feeds?
 9 MR PICKFORD: Yes, that is my understanding. Exactly.
 10 So -- and what these recitals are showing is that,
 11 although the terminology can get confusing, there is an
 12 important distinction, and it is used consistently
 13 throughout the Decision, between "generic", as in
 14 generic result, and "general search service", which has
 15 three things beneath it: generic, specialised results
 16 and ads.
 17 MS ROSE: Specialised is the same as vertical?
 18 MR PICKFORD: Yes -- well --
 19 MS ROSE: Well, that is what it says in 9.
 20 MR PICKFORD: Sorry, did you say in 9?
 21 MS ROSE: Footnote 9.
 22 MR PICKFORD: Footnote 9.
 23 MS ROSE: {BA/2/8}.
 24 MR PICKFORD: I think that is -- that -- "specialised
 25 search", "vertical search", yes, I think that is

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1 basically fair. The reason why I am pausing slightly,
 2 I do not think it is really essential to the argument,
 3 but there are -- there is also a discussion, I think, in
 4 the Decision at other points about the idea of
 5 a vertical search service which is a specialised search
 6 service, so those two go together, but --
 7 MS ROSE: A CSS is a type of vertical search service.
 8 MR PICKFORD: Exactly. Exactly. But I am not sure that
 9 every single specialised result necessarily has
 10 a vertical attached to it. I think that is why I am
 11 slightly pausing, because there may be results -- for
 12 instance, the way in which you get -- this may or may
 13 not be a good example, but the way in which you get
 14 images onto the page is different from crawling, there
 15 are special feeds for that.
 16 MS ROSE: So that is a vertical search?
 17 MR PICKFORD: Maybe one says that is also a vertical search
 18 service as well. It may -- I will have to seek
 19 instructions as to whether there are examples of one
 20 that does not immediately correlate with the other.
 21 I am not 100% sure about that.
 22 Then we get to -- I was going to get to recital 23
 23 {BA/2/10}, after the section on ads, "Specialised search
 24 results":
 25 "In response to a user query, Google's general

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1 search results pages may also return specialised search
 2 results from Google's specialised search services. In
 3 most instances, specialised search results are displayed
 4 with attractive graphical features, such as large scale
 5 pictures and dynamic information. Specialised search
 6 results in a particular category are positioned within
 7 sets referred to by Google as 'Universals'
 8 or 'OneBoxes'. They are in most instances positioned
 9 above generic search results, or among the first of
 10 them."
 11 So that appears to answer my point actually. There,
 12 they are drawing a direct correlation between the two,
 13 they do not seem to be allowing for there to be
 14 a divergence.
 15 So that is just context, which I say is important
 16 when we then come on to some of the later recitals that
 17 begin to put together other pieces in the jigsaw.
 18 So could I ask the Tribunal please to move on to
 19 {BA/2/31} of the Decision, and this is the section
 20 entitled -- in true Commission fashion:
 21 "5.2.1.2.2. General search services versus
 22 specialised search services."
 23 This is a very important part of the Decision in
 24 relation to this case, in my submission.
 25 THE CHAIRMAN: This is all about definition of the product

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1 market.
 2 MR PICKFORD: That is right, exactly. So this all occurs in
 3 the product market definition, and what the -- just
 4 standing back a moment before going through these
 5 recitals, what the Commission does is, in defining
 6 the markets that matter, both the general search market
 7 and also the CSS market, it engages in classic market
 8 definition analysis and it compares attributes of
 9 services provided in different markets and it says,
 10 well, let us compare, at this point, general search
 11 services to specialised search services to see whether
 12 they are in the same market. The reason why in
 13 particular it is doing that is Google argued that it was
 14 all just one big search market and what the Commission
 15 is at pains to explain in this section is: no, that is
 16 wrong, you have got specialised search services, of
 17 which CSS services are ultimately one, and general
 18 search services. That, of course, is absolutely
 19 critical to this Decision, because it is about
 20 leveraging from one market to another, and if they are
 21 all part of the same market the whole reasoning
 22 underpinning the Decision would have fallen apart. So
 23 this is an absolutely central part of the Decision.
 24 So recital 166 begins -- talks about "limited
 25 substitutability", and that is a theme that one sees

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1 throughout some of the other recitals.
 2 If I could ask -- I think the Tribunal has probably
 3 been reading ahead anyway, but if I could ask you to
 4 continue reading and look at recitals 169 and 171
 5 {BA/2/32} -- through to 171. It is essentially
 6 the first binding sentence of each of those that is
 7 the most important. You just really need to look at
 8 the binding sentences.
 9 (Pause)
 10 So what is happening here, at 169, is that
 11 the Commission is relying on facts observed in
 12 the market and the history of the development of
 13 products and Google's own commercial practice to support
 14 its conclusion that specialised search and general
 15 search services are different. The reason why that is
 16 important context is because we then come on, in
 17 171/172, to a discussion about what Google does. Sir,
 18 we had an exchange in the opening where you fairly put
 19 it to me, you said, well, 172 is talking about Google's
 20 description of itself here, and the reason why that is
 21 important is because one sees from 169 that
 22 the Commission are relying on Google's own description
 23 of itself as indicative and important in terms of
 24 delineating the market.
 25 So if I could ask you please to then go on to read

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1 172.
 2 (Pause)
 3 Does --
 4 THE CHAIRMAN: Yes.
 5 MR PICKFORD: Thank you.
 6 So what the Commission is saying here is
 7 specifically concerning the comparison shopping service
 8 and it is distinguishing it from the general service.
 9 It is not saying, oh, well, products is only -- if you
 10 are in the world of products, then you are suddenly in
 11 the world of comparison shopping. It is saying that
 12 what Google recognises itself is that there are specific
 13 elements to its comparison shopping service that make it
 14 stand out as a separate service, and it refers to
 15 filters, like price, size, technical specifications on
 16 the left-hand side of the page as being one of those
 17 absolutely core factors. I accept it does not refer to
 18 product reviews and information, but it does cover
 19 the first two of my filters and price tools points.
 20 Then we get to, over the page {BA/2/33}, 174, three
 21 critical recitals:
 22 "Fourth, contrary to what Google claims, even though
 23 search results provided by ... general search service
 24 may sometimes overlap with the results provided by
 25 a specialised search service, the two types of search

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1 services act as complements rather than substitutes."
 2 Now, remember, when we are putting products on our
 3 page, we are doing it in the boxes. We are also
 4 providing product ads, but central to the way that
 5 Google serves specialised ads, so its specialised
 6 product results, is either in a PU or an SU, and what is
 7 said here is that that may overlap with a specialised
 8 search service, but not that it is a specialised search
 9 service when it appears on the page. On the contrary,
 10 it is distinguishing the two and it has reasons for
 11 doing that. The first place is that the general search
 12 service is the only online search service on which users
 13 can seek potential relevant results from all categories
 14 at the same time. So this is the first point about what
 15 general search offers which a CSS does not, and what
 16 general search offers is that smorgasbord of
 17 possibilities, it is a little bit of this, it is
 18 a little bit of that, it is a kind of inspiration as to
 19 where one might, if you are a user, want to go next, and
 20 that includes the specialised results in the boxes.
 21 Then in the second place, what you do not get on
 22 the SERP but you do get in a specialised service is
 23 certain search functionalities that do not exist, or not
 24 to the same extent, on general search services.
 25 Then, interestingly --

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1 THE CHAIRMAN: (Overspeaking – inaudible).
 2 MR PICKFORD: Sorry, sir. It uses travel, but in my
 3 submission that is actually -- what it says about travel
 4 is revealing. It says:
 5 " ... on search services specialised in travel, users
 6 may look for hotels with a certain number of stars or
 7 within a certain range of a city, or they may read user
 8 reviews of these hotels. These functionalities are
 9 unavailable to the same extent on a general search
 10 service for the same queries."
 11 So what is -- and those are, in my submission,
 12 the exact analogues of the points that I have drawn out
 13 in relation to shopping. Now, obviously they are not
 14 binding here, because it is talking about hotels, but
 15 they illustrate precisely what are the types of things
 16 that a specialised search service does as distinct from
 17 a general search service, and it is basically filters
 18 and content in terms of things like user reviews. Those
 19 are the two core things that come out from that.
 20 Just to be clear, the Commission talks about these
 21 two different types of services being complements rather
 22 than substitutes. Of course, at the beginning it said
 23 that substitutability was low, and it also -- I think it
 24 is fair to show you 105 -- footnote 105, which is
 25 a reference to the German Monopolies Commission, which

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1 again is saying that there is low substitutability. So
 2 it is not saying that there is no substitutability at
 3 all between a general search product result and
 4 a specialist product result, but it is saying that it is
 5 not sufficient for them to be in the same market.
 6 PROFESSOR SMITH: With respect to 176, if I search on
 7 Google Maps for hotels in this neighbourhood --
 8 MR PICKFORD: Yes.
 9 PROFESSOR SMITH: -- and Google returns to me a little map
 10 of where the hotels are and provides me with pricing
 11 information --
 12 MR PICKFORD: Yes.
 13 PROFESSOR SMITH: -- is that a specialised search service?
 14 MR PICKFORD: Well, it is called -- I mean, the way in which
 15 Google approaches that is it is called a "local", so --
 16 because the dominant aspect of it is geographic.
 17 PROFESSOR SMITH: Yes, but it is hotels with prices in
 18 a particular locality, is what I am saying.
 19 MR PICKFORD: I think I can give an answer to that, but
 20 I would just like to check that those behind me are
 21 content with the answer I am about to give, so if I may,
 22 I am just going to just momentarily seek instructions.
 23 (Off microphone discussion)
 24 Yes, because I had not just previously discussed --
 25 yes, I agree that is a form of a specialised search

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1 service.
 2 So those, in my submission, are absolutely critical
 3 recitals in the Decision because they are concerned with
 4 the core question that we are seeking to really grapple
 5 with, which is: where does one draw the line between
 6 a specialist search service, such as a CSS, and
 7 a general search service which is therefore a legitimate
 8 part of what appears on the SERP and would not involve
 9 self-preferencing?
 10 If we could then go, please, to {BA/2/35}, and we
 11 get to the section "The market for comparison shopping
 12 services" at recitals 191 to 192 and following. Now, we
 13 covered these -- I covered these in opening, and what
 14 these recitals do is define the market for CSSs, taking
 15 as read that CSSs are a subset of specialised search
 16 services that have in turn been defined distinctly from
 17 general search services. So one cannot just look at 191
 18 and 192 in isolation, you have to read those recitals in
 19 the light of the recitals that I was just showing you
 20 between 167 and 176 and ultimately also the recitals at
 21 the beginning from 10 through to 23.
 22 What this section of the Decision is doing is,
 23 having done the hard work of distinguishing general
 24 search services from specialist search services, it is
 25 now going on to distinguish CSS services from other

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1 types of specialist search services. So in this section
 2 it is now engaged with a different exercise and it looks
 3 at the distinction between those in specialist search
 4 services and then it compares to online search
 5 advertising, online retailers, merchant platforms and
 6 offline comparison tools. But it does not revisit, at
 7 that point, the analysis that it has already carried out
 8 at 167 to 174.
 9 So that is the market definition background that one
 10 has to understand to then go on to properly understand
 11 the Commission's findings on discrimination, and I am
 12 now going to come on to those.
 13 I have explained what we say the nature of
 14 the discrimination is, and there is one point to note,
 15 which is, on inspection, although we do talk about
 16 the effects in terms of the demotion limb and
 17 the promotion limb, when one is considering
 18 the discrimination, it is all about there being
 19 a privileged box on the page to which only Google had
 20 access, and one can test that very easily because one
 21 can pose two counterfactuals. If you get rid of
 22 the box, you immediately get rid of all of
 23 the discriminatory problems. If you get rid of
 24 the algorithms, you do not get rid of all of
 25 the discriminatory problems, the problems of positioning

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1 and display are still there. So that is why it is
 2 really all about access to the box.
 3 If you go to --
 4 PROFESSOR SMITH: But if you get rid of the box, you are
 5 effectively getting rid of Google Shopping. If that is
 6 all you are doing, then Google Shopping disappears off
 7 the scene.
 8 MR PICKFORD: Off the SERP. I mean, it depends what --
 9 PROFESSOR SMITH: Or --
 10 MR PICKFORD: There could still be a standalone CSS.
 11 PROFESSOR SMITH: There could still be a standalone.
 12 MR PICKFORD: Yes.
 13 If we could then go, please, to {BA/2/84}, and that
 14 sets out the essence of the discrimination claim and it
 15 is about, as I have articulated, positioning and
 16 display.
 17 Then that is then broken down into the constituent
 18 elements of positioning -- and you do not need to read
 19 these in detail, but just to show you the structure of
 20 the Decision. Positioning is then dealt with at 345
 21 {BA/2/85} as regards competing CSSs. So it explains
 22 that competing CSSs, including those of -- that they are
 23 subject to algorithms, and it mentions they are
 24 there "to improve the user experience". That is a quote
 25 from Google, but it never challenges that. It does not

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1 say, "We disagree that they are to improve the user
 2 experience", it notes that that is what they are there
 3 for.
 4 Then at 378 -- so having explained how
 5 the algorithms apply to competing comparison shopping
 6 services in generic results, if you can then go on to
 7 378, which is at {BA/2/111}, we then get the way in
 8 which Google's comparison shopping service is displayed
 9 differently, and then we get, at 379, the two main
 10 differences in terms of Google's own comparison shopping
 11 service not being subject to the algorithms, by which it
 12 means in the box, and, when triggered, appearing high up
 13 on the SERP. So that is the positioning aspect. It
 14 makes the comparison between how competing CSSs were
 15 positioned and how Google was positioned.
 16 Then there is an analogous pair of sets of recitals
 17 for display, and because of the way in which
 18 the Decision is structured, you have to go back a bit to
 19 pick those up.
 20 I am pausing because I can see that Ms Rose is
 21 reading. Is it convenient for me to go back? Thank
 22 you.
 23 So if one just goes back to page {BA/2/110}, just
 24 the previous page, you see at 371 there is then
 25 the comparison made in relation to the display aspect,

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1 and the display aspect in relation to competing
 2 comparison shopping services is at 371. Then if one
 3 traces that through forward to {BA/2/118}, you see at
 4 397 it then sets out the differences with the way in
 5 which Google's own CSS is displayed and it is all about
 6 the rich graphical features, including pictures and
 7 dynamic information.
 8 Now, I realise that is slightly laborious.
 9 The reason why I showed you that is because that is
 10 the structure, that is the backbone and underpinnings of
 11 the discrimination allegation. It says there is
 12 discrimination via positioning and display, and
 13 algorithms obviously come into an aspect of that in that
 14 there are no algorithms in the boxes, but it is not put
 15 in quite the same way as the discussion that has evolved
 16 through the courts in terms of a promotion limb and
 17 a demotion limb, which is a gloss, in my submission, in
 18 terms of the way that the discrimination part of
 19 the case is actually described.
 20 So we can then move on, please, if we may, to
 21 the next page after 118, to {BA/2/119}, where we get
 22 into some of the critical recitals.
 23 So from 408, the Commission is dealing with
 24 the response to various Google arguments and this
 25 elucidates what it says is and is not problematic about

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1 what Google was doing. Dealing, firstly, just with
 2 the Product Universal, what the Commission complained
 3 about is actually relatively limited. It said:
 4 "... the Commission's case is not that
 5 the Product Universal was in itself a comparison
 6 shopping service. Rather, the Commission's case is that
 7 the positioning and display of the Product Universal was
 8 one means by which Google favoured its comparison
 9 shopping service."
 10 In my submission, that is at the heart of
 11 understanding why the General Court then comes on to say
 12 it was part of the service, and if you read 409 to 411
 13 {BA/2/120}, that covers the three reasons why it is
 14 a means of favouring Google's comparison shopping
 15 service.
 16 (Pause)
 17 Now, for the Product Universal, that is it, and
 18 the reason why we originally pleaded a counterfactual
 19 for the Product Universal period, which simply got rid
 20 of the links, because that is all it is basically
 21 talking about here, is because we focused in on those
 22 paragraphs specifically.
 23 Now, we then reacted to the preliminary issues
 24 judgment where the Tribunal said: well, actually,
 25 Google's CSS is part of -- sorry, the box, including

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1 the PU, is part of Google's CSS. What we understood
 2 from that is effectively the reasoning that one then
 3 sees at 412 and following could also be said to apply,
 4 or some of it could be said to apply to
 5 the Product Universal, and so that is why we changed our
 6 position in relation to the counterfactual that we
 7 pleaded, because we thought that it was not going to be
 8 good enough just to rely on addressing 409 -- sorry, 410
 9 and 411.
 10 So then one gets, at 412, to the Shopping Unit, and
 11 one sees the exactly corresponding language about
 12 the Shopping Unit not in itself being a comparison
 13 shopping service, rather the problem is that it is
 14 the positioning and display of the Shopping Unit being
 15 one means by which Google favours its comparison
 16 shopping service. Then we go through a series of --
 17 a long section, and the way I am going to deal with this
 18 is I am going to come back to it. I have a table in my
 19 closing submissions and I am going to come back to show
 20 you where we say we deal with each of these recitals in
 21 the way that we have constructed the Remedy box.
 22 I think that is a more efficient method of doing it
 23 rather than asking the Tribunal to read pages now. But
 24 obviously I --
 25 THE CHAIRMAN: We have, of course, read a lot of this --

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1 MR PICKFORD: Yes.
 2 THE CHAIRMAN: -- in the course of both before the case
 3 started -- the hearing started and, you know, over
 4 the couple of weeks of hearing.
 5 MR PICKFORD: Yes. Well, the reason why I come back to it,
 6 sir, and I am going through it carefully is because
 7 I say this is the answer to the point that was put to me
 8 at the beginning about what it means to say, in
 9 the General Court's view, Google's -- that the boxes are
 10 part of the CSS. It is because they favour the CSS, not
 11 because they are of themselves a CSS.
 12 One sees the same point, just briefly, at 423
 13 {BA/2/125}, the same theme is reiterated.
 14 Then we come to -- if I may, I will try and speed up
 15 -- page {BA/2/178}. We see at 537 and 538 the point
 16 being made that it is not about Google having rich
 17 results or applying criteria, it is all about equal
 18 treatment.
 19 Then we come on at {BA/2/226} to Decision 661 and
 20 662, and I am sure you have seen these, but I do want to
 21 show you them again, because they are core:
 22 "... the Commission is not preventing Google from
 23 applying adjustment mechanisms. The abuse established
 24 ... concerns simply the fact that Google does not apply
 25 these mechanisms in the same way to Google's comparison

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1 shopping service ..."
 2 Similarly, an analogous point, in 662, about
 3 the display of specialised search results.
 4 Then 664 --
 5 MS ROSE: That is very difficult to reconcile with what they
 6 say about the counterfactual, is it not?
 7 MR PICKFORD: Yes, exactly. So, I mean, just to anticipate
 8 the submission that I am going to make on that,
 9 obviously I am stuck with what the Commission said and
 10 what the court said about it in the context of abuse and
 11 my argument is going to be that that is as far as it
 12 goes and you do not -- this Tribunal does not need to
 13 make the same mistakes as -- it is not compelled in law
 14 to make those same errors of logic.
 15 Then one sees, at 664, that the:
 16 "... requirement on Google to treat competing
 17 comparison shopping services no less favourably than its
 18 own ... within its general search services does not ...
 19 prevent it from monetising its general search results
 20 pages. Google can choose the specific measures through
 21 which it intends to comply with this Decision and
 22 the possible measures Google might take do not preclude
 23 the monetisation of its general search results pages
 24 when making this choice."
 25 So it could not be clearer that if it is

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1 commercially in our interests, we are quite entitled to
 2 charge, and when we come on to the counterfactuals,
 3 I would say it is frankly not remotely credible that we
 4 would not charge people like Kelkoo for taking a prime
 5 position on Google's search page. It simply does not
 6 stack up remotely.
 7 Then 668 {BA/2/227} is another important recital
 8 that:
 9 "... any restriction on ..."
 10 Sorry, it says there is no restriction on Google's
 11 rights and freedoms because:
 12 "... any restriction does not interfere with how and
 13 what information Google can provide to users in response
 14 to a given query, including in terms of grouping
 15 together product information."
 16 So here is the Commission saying: we do not have
 17 a problem with you grouping together product information
 18 on your general search results pages, that is totally
 19 fine. Now, that is impossible, in my submission, to
 20 reconcile with the case as it has now evolved and is put
 21 by my learned friend, that at the heart -- they say:
 22 okay, it is not the filters, no, we have not got
 23 filters; it is not the sorting, we have not got those;
 24 what it is is you have grouped together product
 25 information, that is the problem, and that enables

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1 a comparison. But you cannot reconcile that, in my
 2 submission, with 668 of the Decision.
 3 We then have 671 --
 4 MR JOWELL: (Off microphone) Perhaps before you get there,
 5 you could look at 669.
 6 (Pause)
 7 MR PICKFORD: Yes. In my submission, those recitals do not
 8 alter in any way what I have said. They explain that,
 9 to the extent that there are restrictions on Google's
 10 rights and freedoms, they are necessary ones, but it
 11 makes clear that one of the things that it is not
 12 restricting us from doing, in terms, in the sentence of
 13 668 that I have read out, is the grouping together of
 14 product information.
 15 Then, in 671, we also see it is said that:
 16 "... Google has failed to demonstrate that it cannot
 17 use the same underlying processes and methods in
 18 deciding the positioning and display of the results of
 19 its own comparison shopping service and for those of
 20 competing comparison shopping services."
 21 Indeed, that refers -- that effectively reflects
 22 what is said in 670 above, but the problem is that we
 23 are not using the underlying processes and comparison
 24 mechanisms in the same way.
 25 So what I say this shows is Google is not being

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1 required to allow rival CSSs to use their processes and
 2 methods on the SERP, per counterfactual 3b, what is
 3 being said is that Google must apply its processes and
 4 methods to show results from rival CSSs in the same way
 5 as for its own CSS.
 6 MS ROSE: 671 could be read as endorsing scenario 2:
 7 "... applying pictures, prices and other rich
 8 information to generic search results ..."
 9 MR PICKFORD: Well, when you say "endorsing", we have to be
 10 careful. There are obviously a number of means by which
 11 Google could solve the self-preferencing, and indeed
 12 the --
 13 MS ROSE: This is basically scenario 2.
 14 MR PICKFORD: Well, I say it is also the Remedy box. It is
 15 very much the Remedy box, because what the Remedy box
 16 does is apply Google's processes and methods to show
 17 results from rival CSSs in the same way as for its own
 18 CSS, because it has split out the part of its business
 19 that is responsible for procuring merchant ads and --
 20 MS ROSE: Sorry, I was referring to the end of
 21 the paragraph.
 22 MR PICKFORD: Oh, sorry.
 23 MS ROSE: "... generic search results ..."
 24 (Pause)
 25 MR PICKFORD: Yes, I think that is contemplating that. That

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1 is not mandating that as --
 2 MS ROSE: No, no, but it is contemplating scenario 2.
 3 MR PICKFORD: I think that is right. I would like to
 4 reflect on that I think.
 5 MS ROSE: That suggests it is technically feasible.
 6 MR PICKFORD: Yes.
 7 So what I say in relation to these passages -- these
 8 recitals in this passage is they show that
 9 the Commission clearly understood and made clear that
 10 its case was that Google was entitled to retain complete
 11 editorial freedom over its own SERP and the processes
 12 and methods that it deploys and the results that it
 13 shows, including, if it wants to, to charge for
 14 the right to appear on the SERP, provided that it does
 15 not treat results from rival CSSs less favourably than
 16 results from its own CSS. That is all that we were
 17 required to do and, as I will come on to show you,
 18 the Remedy box satisfies that requirement.
 19 Critically, what it is definitely not saying is that
 20 third parties need to be doing the processes themselves
 21 and that they should be let loose with their algorithms
 22 on Google's SERP. It is quite the opposite, in saying
 23 it entirely reflects consistently that it is always
 24 going to be Google that is doing the choosing, and of
 25 course it is, it is Google's general search results

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1 page. In my submission, it is very, very cleverly put,
 2 but the case that is being advanced against us is -- it
 3 is a heist, it is an attempt to hijack Google's general
 4 search results page and say: you, Google, have put
 5 together this incredibly valuable business, and when you
 6 want to show a product result, you have got to put us
 7 and allow us to provide our full service in a different
 8 market, in the CSS market, right on your page, and we
 9 say that cannot be right. It is Google's
 10 infrastructure, and of course Google, as Mr Hunt showed,
 11 makes the majority of the money out of this business,
 12 because people want to come to Google to do product
 13 searches. If they wanted to go in the first place to
 14 Kelkoo to do product searches, well, then, Kelkoo would
 15 be a far more profitable business.
 16 Now, I think I may well have covered this already
 17 with some of the exchanges that I have had, but just,
 18 I want to be clear about it.
 19 I was going to address next a point that was
 20 canvassed by you, Ms Rose, with me in opening, and you
 21 said to me, "Is what you are saying that the analysis is
 22 that there is a single act of discrimination which is
 23 the special box only accessible to Google, but the
 24 impact of that discrimination is greatly exacerbated by
 25 the application of the algorithms to other CSSs which

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1 mean that they are not in the box, they are not even on
2 the first page"? In our written closings, we say -- we
3 answer that {AA2/1/56}: yes, but with a caveat. I think
4 I should actually say: yes, but with two caveats, to be
5 clear.

6 The first caveat, which is the one that is in our
7 written closings, is that we do not accept that
8 the Commission found that the demotions -- sorry, yes,
9 that the algorithms greatly exacerbated the impact.
10 Now, I accept that certainly Panda, which was the more
11 potent of the two, had a significant impact on a number
12 of CSSs, but its overall effect was highly mixed and
13 some CSSs benefited and some did not. Its overall
14 impact was in fact to reduce traffic to CSSs by 18% over
15 the relevant period, and there were winners and there
16 were losers.

17 Now, the Commission's Decision itself shows you that
18 there were winners and losers. If you go to {BA/2/179},
19 we see table 24, and this shows how traffic for various
20 CSSs in the EEA evolved over the period 2011 to 2016,
21 and it is -- I have got a challenge here. What I want
22 to communicate to you effectively is that there are at
23 least five in that table who were winners as a result of
24 Panda. I can only -- but everyone's name is
25 confidential.

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1 But what I can first say is that, if you go down to
2 the third, the third on page 179, so one up from
3 the bottom of the table, that CSS is a winner from
4 the application of Panda. If you go to the next one, at
5 the bottom of the page, which is footnoted for 650, that
6 CSS is also a winner. If you go to the next one, which
7 is attached to the footnote 651 {BA/2/180}, that CSS is
8 also a winner. If you go to the next page --
9 PROFESSOR SMITH: Sorry, the last one? Oh, I see, the last
10 one on the table is --
11 MR PICKFORD: Yes, sorry. This is a bit of a sort of silly
12 party game where I am not allowed to say the word.
13 Yes, so I was particularly focusing on traffic from
14 general search results, which is the first of those.
15 You have also got total traffic.
16 THE CHAIRMAN: All this shows is that the proportion of such
17 traffic as it got from general search results has gone
18 up.
19 MR PICKFORD: No, that is not all it shows, sir. That is
20 what the first column shows.
21 THE CHAIRMAN: Yes.
22 MR PICKFORD: But then the final column also shows you
23 "Total traffic ..." and how that has evolved. So one
24 can see, if you put the two together, you can discern
25 from that that there were winners and losers in terms of

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1 some CSSs benefiting in the era of Panda.
2 THE CHAIRMAN: This is in the context of what the source of
3 traffic is. At 7.2.4 {BA/2/178}:
4 "... traffic diverted by the Conduct accounts for
5 a large proportion of traffic ..."
6 MR PICKFORD: Yes. So it is obviously consistent with
7 the Tribunal's ultimate findings because it is in
8 the Decision, but what it shows you is that when
9 the Tribunal -- sorry, I beg your pardon, not
10 the Tribunal. When the Commission talks about, for
11 instance, Panda being prone to demote, it certainly does
12 not mean that everyone gets nuked, as has been, I think,
13 suggested by Kelkoo. Actually, what this table shows
14 you is that there is a heterogeneous impact on different
15 CSSs; some do well and some do less well.
16 THE CHAIRMAN: We previously have, at 361, where they are
17 looking there in the context of the impact of
18 the algorithms --
19 MR PICKFORD: Recital 361, yes.
20 THE CHAIRMAN: Yes, on {BA/2/89}.
21 MR PICKFORD: Thank you.
22 THE CHAIRMAN: That the visibility index in these various
23 countries, plus analysis by the Commission, that in all
24 those countries the traffic and visibility on the SERP
25 had a sudden drop after the launch of Panda and no

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1 sustainable recovery thereafter.
2 Then we have the tables, the graphs, which is --
3 that is a summary in 361 of what we see in the graphs.
4 If we look at the UK in graph 1 {BA/2/90} -- and we have
5 this in evidence elsewhere -- the drop is indeed
6 dramatic. Then you get something similar in Germany.
7 MR PICKFORD: Well, there are obviously different ways of
8 cutting the data.
9 THE CHAIRMAN: Yes.
10 MR PICKFORD: But what I am seeking to show you is that it
11 is not the case that there was a generalised effect
12 where everyone was hit, because you can see that there
13 are plenty of examples of CSSs that were --
14 THE CHAIRMAN: Well, there are a few winners, but the
15 binding finding is that there was a sudden drop after
16 the launch of Panda in all these countries and no
17 sustainable recovery thereafter, and that is 361
18 {BA/2/89}, and then we have got the graphs. So there we
19 are, so that is the result of Panda.
20 MR PICKFORD: Well, I am obviously not seeking to go behind
21 -- I cannot go behind that.
22 THE CHAIRMAN: You cannot go behind it. I think you are
23 seeking to, but you cannot.
24 MR PICKFORD: Well, I --
25 THE CHAIRMAN: I think that is precisely what you are doing.

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1 You are saying it is 19%, that is what you said --
 2 MR PICKFORD: I have -- there is other evidence that it is
 3 19%.
 4 THE CHAIRMAN: Well, I know you want to put in evidence that
 5 it is 19%, and you have put in evidence, but we are
 6 bound by 361.
 7 MR PICKFORD: Well, I would like to show you something that
 8 illustrates the point that I am going to make, because
 9 I think it is a helpful graphic to understand what I am
 10 about to say in mathematical terms. Could we go,
 11 please, to --
 12 THE CHAIRMAN: Just one second. Just one second.
 13 MR PICKFORD: -- M2 --
 14 THE CHAIRMAN: Just one second.
 15 (Pause)
 16 Yes, there is quite a lot of analysis of the effect
 17 of Panda, I think, in the Decision.
 18 MR PICKFORD: Yes.
 19 Sir, I would like to explain why the point I am
 20 seeking to make is not inconsistent with that binding
 21 finding that you have shown me.
 22 THE CHAIRMAN: Yes.
 23 MR PICKFORD: Could I ask you please to go to {M2/852/15}.
 24 So this is in an internal Google -- this is some
 25 internal Google analysis of traffic comparing what

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1 happened in -- comparing 2010 traffic to 2014 traffic,
 2 and in my submission, it is fully consistent with
 3 the recitals that we have just been looking at in
 4 the Decision, but shows you something very interesting.
 5 So the point that you have been putting to me, sir,
 6 is that of the biggest CSSs in the market prior to
 7 the introduction of Panda, there was a substantial
 8 contraction and a sustained loss of traffic, and you see
 9 that, and you see that graphically in the red bars. So
 10 we see, in 2010, the majority of the market -- do you
 11 have the graph that I am showing you?
 12 THE CHAIRMAN: Yes.
 13 MR PICKFORD: Thank you.
 14 So we see that the majority of the market, the 2,382
 15 -- I am not quite sure what the units are, it is some
 16 level of clicks, but it is obviously -- it is probably
 17 billions -- that we have the majority of the market
 18 which suffers a substantial contraction. But
 19 the interesting feature is that that is consistent with
 20 -- there is effectively a changing of the guard, because
 21 the paragraphs -- the recitals that you have shown me
 22 say: look, these are the biggest players at
 23 the beginning of period, or 2010, whenever it was, and
 24 they get much lower, but look what happens to
 25 the winners. At the bottom of the graph, we see that

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1 there were people who were previously small and they
 2 start doing much better as a result of Panda.
 3 So what effectively one learns from this is that two
 4 things can be true mathematically at the same time.
 5 Yes, there can be a large group of people who were
 6 previously the incumbents who lost a lot of traffic, and
 7 that is what those recitals show, but the thing about
 8 Panda is it shook things up. It basically said --
 9 MS ROSE: But that is totally inconsistent with the finding
 10 of the Commission. The Commission could have said --
 11 could have made that finding. I am sure you made this
 12 submission to the Commission.
 13 MR PICKFORD: Ah --
 14 MS ROSE: I would be amazed if you did not.
 15 MR PICKFORD: -- all right. Well, I certainly did not,
 16 because I was not involved then, so --
 17 MS ROSE: I am sure Google did, because this is an internal
 18 Google document identifying the point. But
 19 the Commission rejected it. The Commission did not find
 20 that Panda shook things up and increased competition and
 21 there was a change of the guard. The Commission found
 22 that Panda was prone to demote CSSs.
 23 MR PICKFORD: But, with respect, madam, the only thing that
 24 was found was that it was prone to demote --
 25 MS ROSE: Because of the features of CSSs, not because they

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1 were poor competitors.
 2 MR PICKFORD: Yes, but the idea that it had some devastating
 3 effect on CSSs generally was not necessary for
 4 the Tribunal's conclusion that there was discrimination.
 5 Because if we come back again and remind ourselves what
 6 the Commission's concern was, the Commission was never
 7 saying: you should not have introduced Panda, Panda had
 8 a terrible effect on the market.
 9 MS ROSE: No, it was saying what you should not have done is
 10 put yourself in the rich box at the top --
 11 MR PICKFORD: Yes.
 12 MS ROSE: -- and demoted everybody else.
 13 MR PICKFORD: Yes.
 14 MS ROSE: Or even demoted most other people.
 15 MR PICKFORD: Yes.
 16 MS ROSE: That is the combination.
 17 MR PICKFORD: But it did not find that we demoted most other
 18 people, it just found that it was prone to. My point is
 19 it is important to realise, particularly because
 20 the Commission can be a little -- as, madam, you saw in
 21 relation to recitals 512 and 514 --
 22 MS ROSE: I mean, it found that the effects were significant
 23 enough to be a departure from the normal --
 24 MR PICKFORD: Yes --
 25 MS ROSE: -- conditions of competition.

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1 MR PICKFORD: -- absolutely, and I obviously cannot go
2 against the "prone to demote" finding. What I am trying
3 to do is --
4 MS ROSE: And the fact that it was inconsistent with normal
5 competition.
6 MR PICKFORD: Absolutely. But the discrimination was.
7 The discrimination was inconsistent.
8 MS ROSE: Well, no, no, no, no. No, not just
9 the discrimination. It is the effect of
10 the discrimination in terms of the diversion of traffic.
11 The finding about the importance of the traffic,
12 the fact that it cannot be substituted for elsewhere and
13 that there is a significant enough diversion of traffic
14 to amount to not proper competition.
15 MR PICKFORD: Yes --
16 MS ROSE: So those are the effects findings.
17 MR PICKFORD: Exactly, it goes to effects. In my
18 submission, it does not go to discrimination.
19 MS ROSE: But that is exact -- I mean, I do not disagree
20 with that, but I think what you are trying to do is
21 minimise the effects and I think you have to just suck
22 that up.
23 MR PICKFORD: I am not -- what I am trying to do is put
24 a careful break on the Tribunal limiting itself to
25 the effects as actually found in the Decision to be

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1 binding and not going beyond that, because it is easy to
2 get the impression, from what the Tribunal says and
3 certainly what my learned friend has very skillfully
4 submitted to this Tribunal, that the effects of Panda
5 were more profound than they necessarily were. What
6 I am seeking to show you here is that there is other
7 information which is entirely consistent with
8 the findings in the Decision and it shows a more nuanced
9 picture, and therefore all I am urging on the Tribunal
10 is that you need to limit yourselves only to go as far
11 as the Decision goes and realise what is not said by
12 the Decision when it does -- when it says the things
13 that it does say. That is my point.
14 MS ROSE: I mean, it found, at 368 {BA/2/105}, that:
15 "... the average ranking in generic search results
16 ... of the most important competing [CSSs] in the [UK],
17 Germany, France, the Netherlands, Italy and Spain was
18 low."
19 MR PICKFORD: Yes, and at the time they were, because my
20 point is Panda did something quite radical and quite new
21 and it shook things up. So what one found -- because --
22 and this goes back to a point that I made in opening,
23 that ranking is a relative process, it is all about who
24 gets shifted relative to one another, and one can
25 imagine a world -- and this is the world that this graph

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1 shows {M2/852/15} -- where you have a set of incumbents
2 who get a certain amount of traffic under a certain set
3 of algorithms, and then you bring in a new algorithm and
4 that shakes things up and the incumbents lose out. What
5 the Commission was saying is: well, that is good enough
6 for us.
7 THE CHAIRMAN: No, they are not, with respect, Mr Pickford.
8 They are saying that this demotes CSSs by reason of
9 their character as a CSS, not because they are
10 the old-fashioned, sleepy incumbents and it enables
11 a lot of new CSSs to come in.
12 Now, I appreciate what you have shown us is
13 inconsistent with that approach of the Commission.
14 The problem is I do not see we can reopen that. It is
15 an argument Google could have, and I would be surprised
16 if it had not, addressed to the Commission in the course
17 of the many years that the Commission's deliberations
18 went on of saying: no, it is not that CSSs cannot
19 survive under this, look, lots of them are doing much
20 better, it is just that some of the old big ones are
21 being hit. But that is not the finding. The finding is
22 that these two algorithms, and Panda in particular, by
23 reason of their -- the nature of a CSS, strikes at CSSs
24 and demotes them and that is where we are.
25 You have a quite separate argument of what one

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1 should do in the counterfactual because of this being
2 a combination abuse and not a self-standing abuse of
3 anything abusive and having a demoting algorithm. But
4 in terms of the actual effect of Panda on the CSSs,
5 I think we have to operate in the light of what
6 the Commission found, because if that had not been
7 the finding, then this would not be part of the abuse at
8 all, not only as a combination, but just simply it would
9 be irrelevant.
10 MR PICKFORD: Well, I will not trouble you with it further.
11 My submission is that what I have shown you is not
12 inconsistent with the Decision, it just shows you what
13 the Decision does not say, and the Decision did not need
14 to do very much in order to substantiate what it said
15 about discrimination. It was sufficient for
16 the Commission to say: it is prone to because, look,
17 here is a bunch of big CSSs that got hit. From
18 the Commission's point of view, it was potentially
19 irrelevant that there was another bunch of CSSs that did
20 not get hit, because overall there is still a reduction,
21 there is a 19% reduction. If my graph went the other
22 way, I would accept that the graph that I was showing
23 you -- if the second chart on the right was higher,
24 I would accept that that is inconsistent with
25 the Decision. But I am just trying to contextualise

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1 what those recitals , I say, actually mean and how far
 2 they go.
 3 PROFESSOR SMITH: Are you suggesting that if we look at
 4 paragraph 368 of the Decision {BA/2/105} -- recital 368,
 5 there is wording here that is not completely
 6 unambiguous, to use a double negative, it is describing
 7 what happened to the average ranking "of the most
 8 important competing comparison shopping services in
 9 terms of traffic".
 10 MR PICKFORD: Yes.
 11 PROFESSOR SMITH: So the most competing --
 12 THE CHAIRMAN: Most important.
 13 PROFESSOR SMITH: -- "the most important competing
 14 comparison shopping services" lost their ranking in
 15 generic search results .
 16 Now, I could interpret the graph that you earlier
 17 showed us as saying maybe the Commission was
 18 overimpressed in deciding which were the most important
 19 ones by the past size , whereas a proper index of what
 20 happened would not be biased in favour of the largest
 21 ones at the beginning of the period, because that has an
 22 inherent bias and if there was a lot of movement, then
 23 choosing the biggest ones as the main -- the biggest
 24 ones at the start of the period as your measurement of
 25 what is happening to people over the period is

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1 necessarily a biased estimate, I think. So we could
 2 interpret what you have just said as warning us that
 3 368, although binding, has a touch of ambiguity
 4 about it.
 5 MR PICKFORD: Yes, I think what I am saying also is that,
 6 although binding, it is not the full story.
 7 PROFESSOR SMITH: Well, it could be the full story if
 8 importance were properly measured by the Commission.
 9 MR PICKFORD: Yes, yes.
 10 Also, we have to remember, if we go back to
 11 recital 661, which is on {BA/2/226}, the --
 12 PROFESSOR SMITH: As the Chair has said, if this is
 13 the issue, it is perhaps a little surprising that Google
 14 did not make the point strongly to the Commission.
 15 MR PICKFORD: I am afraid I am not able to say what
 16 submissions Google did or did not make to the Commission
 17 right now.
 18 (Pause)
 19 THE CHAIRMAN: Yes, well, there we are.
 20 MR PICKFORD: Yes. So my concluding comment on this is that
 21 one can infer something about what the Commission
 22 thought about the algorithms from the fact that at 661
 23 it says it has not got a problem with us applying those
 24 algorithms. So it is not concerned about some
 25 devastating effect , or you would think, if it had been,

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1 it would not have been so laissez-faire at 661. It is
 2 just concerned that there is a sufficient effect that
 3 they are prone to demote, and the critical bit, in my
 4 submission, is we do not do them to ourselves. That is
 5 the bit that they really care about. They are
 6 saying: look, there is something out there that other
 7 people have to contend with, it is sufficient to be
 8 material and you do not do it to yourself and that is
 9 discriminatory. That is the real issue , in my
 10 submission.
 11 THE CHAIRMAN: I understand that. That was the abuse. It
 12 was not unfair terms, it was discrimination, but that is
 13 a separate point.
 14 Did you -- the point you have been making now, was
 15 that -- which suggests that the "prone to demote" and so
 16 on is not a correct characterisation , was that
 17 challenged in Google's appeal to the General Court?
 18 MR PICKFORD: I do not think I am saying that "prone to
 19 demote" is not a correct characterisation . Well, I am
 20 saying that "prone to demote" should not be overread.
 21 THE CHAIRMAN: Well, you are putting quite a heavy gloss on
 22 it , which they did not, and I just wonder if, and
 23 suggesting actually that it is just re-shaking the CSS
 24 market, was that something that was argued on
 25 the appeal?

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1 MR PICKFORD: I do not recall that it was, and I was --
 2 I did argue that appeal and I do not recall that point
 3 being made, although there were other people involved as
 4 well. So I think the answer is no, but I do not have
 5 a very good memory, much worse than Mr Friedman's,
 6 certainly , so I think I would need to have that
 7 double-checked.
 8 THE CHAIRMAN: Yes.
 9 MR PICKFORD: The second caveat I think may have come out of
 10 the discussion we have just had, because I went to this
 11 just to make clear that I had two caveats.
 12 The second caveat is that I was agreeing with
 13 Ms Rose in relation to what the Commission was saying
 14 because of the Commission's analysis of effects , but
 15 obviously I have got a different position on effects as
 16 judged for the purposes of damages and that is the only
 17 qualification . I think it is just a small point.
 18 So I realise you gave me, I think, until 5.15; is
 19 that right?
 20 THE CHAIRMAN: That is right.
 21 MR PICKFORD: Are you content that I just plough on through
 22 until then?
 23 MS ROSE: You wanted to hand over to Mr McGurk?
 24 MR PICKFORD: Oh, yes, thank you for reminding me. I had
 25 lost sight of that. I think now is probably the moment.

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1 (Off microphone discussion)
 2 Okay, apparently I can go to 5 to, so let us see if
 3 I can finish off the Decision very, very quickly. I am
 4 not sure I can do it that quickly, but anyway, I will do
 5 my best.
 6 Okay, we were slightly diverted down some
 7 interesting alleys and I would now like to come back to
 8 finish off the Commission Decision.
 9 If we go to page {BA/2/132}, we have then got
 10 the section that sets out "The importance of user
 11 traffic for comparison shopping services", and that
 12 obviously is where a lot of this stuff crystallises.
 13 I showed you in opening how there were basically
 14 three aspects to what the Commission looked at here:
 15 the importance of traffic, the importance of the top
 16 three places and the diversion of the traffic accounting
 17 for a large proportion of competing CSSs' traffic that
 18 could not be effectively replaced. That is what one
 19 finds in the sections that follow from 444.
 20 There is a critical finding, which I believe
 21 Mr Jowell took you to, on page {BA/2/139} against us, at
 22 462, that:
 23 "The Conduct ... led to a decrease in generic search
 24 traffic from Google's general search results pages ..."
 25 That is one of the ones that has been referred to so

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1 far in these proceedings.
 2 It is obviously, on its face, an analysis of
 3 the actual effects of the traffic, and you will recall
 4 I had a discussion, sir, in opening about what
 5 the Commission was or was not finding, and at this point
 6 it is making what seem on their face to be findings
 7 about actual effects, because it is actual effects on
 8 traffic, and then later on, we get to the part of
 9 the Decision which deals with potential effects. Those
 10 potential effects, in 7.3 and following {BA/2/206}, are
 11 said to be potential effects.
 12 Then in 607 {BA/2/209}, which refers back to
 13 the actual effects analysis, because we were saying you
 14 have not done a good enough job, and they say: well in
 15 any event, we have shown actual effects, see what we
 16 said at 462 and following.
 17 So that is the structure of the Commission Decision
 18 and what it says about actual and potential effects.
 19 THE CHAIRMAN: Yes.
 20 MR PICKFORD: If one looks at -- and if you are happy that
 21 you recall that and you do not need me to develop that
 22 any further, then I think I can skip over that bit and
 23 move to the Remedy and then I will have completed
 24 the Decision and then Mr McGurk can take over.
 25 So if we go to {BA/2/232}, at recital 698, it makes

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1 good the point that I made before, that there is -- it
 2 is for Google to choose the various ways, because there
 3 is more than one way of bringing itself into conformity.
 4 What it needs to do is treat its own shopping service
 5 "no less favourably" than comparison shopping services
 6 within its general search results. Those principles
 7 apply:
 8 "... irrespective of whether Google chooses to
 9 display a Shopping Unit or another equivalent form of
 10 grouping of links ... or [to] search results from
 11 comparison shopping services."
 12 So, here, it is expressly contemplating that Google
 13 can choose "to display a Shopping Unit or another
 14 equivalent form of grouping of links". So this comes
 15 back to the point that I made previously, that these
 16 recitals are just inconsistent with this case that we
 17 cannot show groupings like the Shopping Unit.
 18 The problem with the Shopping Unit was the exclusive
 19 connection to Google's own CSS, and that is the point
 20 that I will make tomorrow by reference to my table.
 21 Then we see again a theme that comes back in 700(c)
 22 that Google:
 23 "Should subject Google's own comparison shopping
 24 service to the same underlying processes and methods for
 25 the positioning and display in Google's general search

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1 results pages as those used for competing comparison
 2 shopping services."
 3 Which is what I say the Remedy box does.
 4 Unless you have any further questions for me on
 5 that, I will sit down and I will allow Mr McGurk to make
 6 his submissions.
 7 THE CHAIRMAN: Yes, Mr McGurk.
 8 Closing submissions by MR MCGURK
 9 MR MCGURK: Sir, members of the Tribunal, jurisdiction.
 10 I wanted to pick up my learned friend's written closings
 11 at {AA1/1/80}.
 12 THE CHAIRMAN: We can put away the Decision, presumably?
 13 MR MCGURK: Happily, yes.
 14 I just wanted to respond to the point that my
 15 learned friend Mr Jowell makes in his paragraph 161,
 16 which flows out of the conversation he had with you,
 17 sir, at the end of Day 1 in opening.
 18 Just picking it up four lines -- three lines down in
 19 that paragraph, he says:
 20 "In connection with this, Kelkoo considers it
 21 appropriate to draw to the Tribunal's attention that, in
 22 the event that the Tribunal is with Kelkoo in relation
 23 to its claim for the Post Decision Period, this aspect
 24 of the claim might in due course raise a separate
 25 question about the Tribunal's jurisdiction to rule on

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1 the parts of Kelkoo's and/or Ciao's Article 102 TFEU
2 claims that post-date IP Completion Day and that do not
3 relate to an abuse that affected trade within the United
4 Kingdom."

5 Now, can I start by showing the Tribunal Kelkoo's
6 pleading on this? It is at {C1/2/60}, 95D.

7 Kelkoo pleads:

8 "Further, the aforesaid breaches have continued and
9 are continuing after the Google Shopping Decision. In
10 particular, the changes that Google has subsequently
11 introduced purportedly to comply with the requirement in
12 the Shopping Decision to bring an end to
13 the infringement failed, in reality, to do so."

14 Just pausing there. Kelkoo is alleging that
15 the breaches relied upon have "continued and are
16 continuing". This is not an allegation that
17 the consequences of a past breach, a prior breach, are
18 continuing.

19 Then just picking up the subparagraphs, 95D(a) it is
20 pleaded that:

21 "Since June 2017 until the date of these
22 Re-Re-Re-Amended Particulars of Claim (and ongoing),
23 Google continues to occupy a dominant position on all of
24 the relevant national markets as particularised
25 above ...

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1 "(b) Since June 2017 until the date of these
2 Re-Re-Re-Amended Particulars of Claim (and ongoing),
3 Google continues to abuse that dominant position by
4 continuing the abusive conduct identified above ... in
5 summary, continuing to discriminate against competing
6 CSSs (including Kelkoo) and to unfairly promote its own
7 shopping service, as particularised above ..."

8 So, again, we see the allegation that the breach of
9 duty is what is continuing to the date of pleading which
10 is a date beyond IP completion date, and that point is
11 addressed in 95D(c), where it is said:

12 "In these circumstances, by reason of its aforesaid
13 abusive conduct, Google has continued to be in breach of
14 Article 102 TFEU in all of the relevant national markets
15 as particularised above ... (with the exception of
16 the UK) from the date of the Shopping Decision until
17 the date of [this Re-Amended] Particulars of Claim (and
18 on an ongoing basis). In the case of the UK, Google was
19 in breach of Article 102 TFEU from the date of
20 the Shopping Decision until IP Completion Day and was
21 also in breach of Chapter II of the Competition Act 1998
22 from the date of the Shopping Decision until the date of
23 these Re-Re-Re-Amended Particulars of Claim (and on an
24 ongoing basis)."

25 So what is happening there in that subparagraph (c)

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1 is that Kelkoo's pleading is rightly distinguishing
2 between claims brought in respect of all the non-UK EEA
3 jurisdictions on one hand and the claims brought in
4 respect of the UK on the other. In particular, Kelkoo's
5 claim in respect of the EEA jurisdictions pre- and
6 post-IP completion date is brought solely in reliance on
7 the alleged continuing breach of Article 102 TFEU or
8 Article 54 of the EEA Agreement, whereas Kelkoo's claim
9 in respect of the UK post-IP completion date is a claim
10 that can only be pursued on the basis of the Chapter II
11 prohibition as Article 102 has ceased to apply as at
12 that date.

13 So the question arising is whether the Tribunal has
14 jurisdiction to hear and determine claims for losses in
15 non-UK countries in reliance on Article 54 EEA,
16 Article 102 of the TFEU.

17 MS ROSE: Can I just ask one question about the pleading
18 here? 95E, that seems to be a plea about continuing
19 consequences from the preceding breach before
20 the Decision; is that right?

21 MR MCGURK: Yes, that is the allegation that part of
22 the abuse is the failure to restore, which almost
23 amounts to a -- that is almost a restitutionary claim --

24 MR PICKFORD: Sorry, the reason why I am rising is because
25 Mr McGurk was not at the relevant hearing.

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1 Mr Jowell explained that that appeared -- that
2 whilst you might think that that is a claim of
3 continuing abuse, at the January hearing, he made it
4 clear it just went to damages, because --

5 MS ROSE: So that is like an umbrella effect? Hangover --

6 MR PICKFORD: Hangover.

7 THE CHAIRMAN: Hangover.

8 MR PICKFORD: Yes.

9 MS ROSE: Another hangover.

10 MR PICKFORD: He expressly disclaimed that it was
11 a continuing -- that itself was a continuing breach.

12 MS ROSE: Yes, yes.

13 So in relation to the EU jurisdictions, there is
14 a claim for damages in the Post-Decision Period whether
15 or not there is a continuing abuse?

16 I am just thinking about jurisdiction here. I mean,
17 obviously there is a claim for that in the UK as well.

18 MR MCGURK: Yes, well, it is premised on a continuing abuse
19 in relation to both, i.e. the claim in respect of the --

20 MS ROSE: Well, that is the question I am asking --

21 MR MCGURK: Yes.

22 MS ROSE: -- because it does not appear to be premised on
23 a continuing -- or is it? It is premised on
24 a continuing -- is it premised on -- sorry?

25 Is there a claim for damages, an overhang claim,

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1 regardless of whether or not there is a continuing
 2 abuse?
 3 MR JOWELL: Yes, there is.
 4 MS ROSE: Right, okay.
 5 MR JOWELL: I think the point is -- (Off microphone -
 6 inaudible).
 7 MS ROSE: There is also a claim for 102.
 8 MR JOWELL: For 102 -- post IP completion day.
 9 MS ROSE: Okay.
 10 MR MCGURK: Yes, and that is what I am focusing on.
 11 MS ROSE: Yes, okay.
 12 MR MCGURK: So we see how Mr Jowell puts it in paragraph
 13 161(a), if we could go back to {AA1/1/81} where he says,
 14 second sentence:
 15 "The Tribunal has jurisdiction to determine
 16 Article 102 TFEU issues for existing claims or new
 17 claims in relation to infringements that occurred before
 18 IP Completion day ..."
 19 He refers there to:
 20 "... [paragraph] 14(2) of schedule 4 to
 21 the Competition (Amendment ...) (EU Exit) Regulations
 22 ... as amended by the ... [2020] Regulations ..."
 23 I wanted to show you those. They are at {AB1/6/69}.
 24 The provisions he relies upon are in schedule 4 of
 25 the 2019 regulations as amended, and you see schedule 4

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1 is heading, "Saving and transitional provision".
 2 Then if we drop down, please, to {AB1/6/83} of this
 3 document, we get to paragraph 13A of part 6 which, as
 4 you will see from the heading is entitled: "Court and
 5 tribunal proceedings relating to competition". So these
 6 provisions relate to claims brought both in
 7 the High Court and the Competition Appeal Tribunal.
 8 Section 13A defines, as you will see there,
 9 "domestic competition infringement", but more
 10 pertinently for present purposes, "EU competition
 11 infringement" to include (b):
 12 "The prohibition in Article 102 ... [and]
 13 "The prohibition in Article 53 of the [EEA]
 14 agreement ..."
 15 If we could go to the bottom of the page, you will
 16 see the heading of paragraph 14, which is what we are
 17 going to focus on, it is entitled:
 18 "Claims before a court or tribunal relating to
 19 [pre-IP completion day] EU competition infringements."
 20 If we go over the page {AB1/6/84}, it provides:
 21 "Where an EU competition infringement ..."
 22 So that would include Article 102 TFEU and Article
 23 54:
 24 "... occurs before [IP completion day], on or after
 25 [IP completion day] a person may:

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1 "(a) continue any claim (or defence to a claim) in
 2 relation to that infringement in proceedings before
 3 a court or tribunal in the United Kingdom, and
 4 "(b) make any claim (or defence to a claim) in
 5 relation to that infringement in proceedings before
 6 a court or tribunal in the United Kingdom which the
 7 person could have made before [IP completion day]."
 8 Now, my submission is that Kelkoo is wrong in
 9 contending that paragraph 14 allows this Tribunal to
 10 determine the damages claims pursued by Kelkoo Claimants
 11 2 to 10 insofar as it is based on Article 102 TFEU in
 12 the post-IP completion day period. First of all, I just
 13 wanted to look at the scope of the savings provisions in
 14 schedule 4, both individually and collectively,
 15 which, in my submission, make clear that Parliament was
 16 not seeking to save claims based on Article 102 TFEU or
 17 54 of the EEA Agreement insofar as they arise out of
 18 conduct postdating IP completion day. Just starting
 19 with --
 20 THE CHAIRMAN: If I can interrupt you --
 21 MR MCGURK: Yes.
 22 THE CHAIRMAN: -- just to clarify. You accept that, I infer
 23 from the way you have put it, that the non-UK Kelkoo
 24 Claimants can maintain a claim for abuse up to
 25 IP completion day.

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1 MR MCGURK: Yes, subject to how claims are dealt with under
 2 EU -- retained EU law.
 3 THE CHAIRMAN: Because this action was commenced, I think,
 4 in 2015 or something, long before IP completion day.
 5 MR MCGURK: Yes, but my point is that it cannot be
 6 maintained, however it is put, post-IP completion day
 7 and that is --
 8 THE CHAIRMAN: For abuse post IP completion day; that is
 9 your point?
 10 MR MCGURK: Yes.
 11 MS ROSE: But the hangover effects claim could be?
 12 MR MCGURK: That is --
 13 THE CHAIRMAN: Yes, because that is abuse --
 14 MR MCGURK: -- (overspeaking - inaudible), I think, from
 15 what Mr Jowell said --
 16 THE CHAIRMAN: That is just damage continuing from --
 17 MR MCGURK: That would be the continuing damages from
 18 the previous breach pre-IP completion day, yes.
 19 So just as a matter of contextual interpretation, if
 20 you look at 14.2 again, it only applies to breaches of
 21 EU competition law that occurred before IP completion
 22 day, it does not apply to breaches of EU competition law
 23 that occurred after IP completion day, and we say that
 24 is for the entirely obvious reason that Articles 102
 25 TFEU and 54 of the EEA Agreement no longer applied in

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1 the UK after IP completion day such that a claimant
 2 cannot plead or rely upon them after that point.
 3 Secondly, there is a further savings provision at
 4 paragraph 15. That is at the bottom of page {AB1/6/84}.
 5 Paragraph 15(1) provides that:
 6 "In relation to claims (and defences to claims)
 7 described in paragraph 14(2) the enactments mentioned in
 8 paragraph 7(3) to (8) [of this schedule] have effect as
 9 described there."
 10 I just wanted to show you those provisions at
 11 paragraph 7. It is at {AB1/6/74}. So you will see
 12 the heading:
 13 "Completed investigations terminated by Decisions
 14 under Section 31(2)(c) or (d) of the 1998 Act."
 15 Paragraph 7(1) tells us:
 16 "This paragraph applies where, before [IP completion
 17 day], the CMA has made a Decision within the meaning of
 18 section 31(2)(c) or (d) of the ... Act.
 19 "(2) On [or] after [IP completion day], in
 20 connection with the Decision, the enactments mentioned
 21 in sub-paragraphs (3) to (8) have effect as described
 22 there."
 23 What you then see is a series of familiar provisions
 24 that are maintained in relation to the period -- to
 25 Decisions made in the period prior to IP completion day

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1 albeit where there are some modifications made in those
 2 subparagraphs (3) to (8).
 3 Now if we go back up to paragraph 15(1), at
 4 {AB1/6/84}. So what this is telling us is that if
 5 somebody is bringing a claim that falls within
 6 paragraph 14(2), then, in respect of a pre-IP completion
 7 day period, the same provisions which apply as modified
 8 in section -- in paragraph 7(3) to (8) will apply for
 9 the purposes of those 14(2) claims. So there is no
 10 saving here for conduct that extends beyond IP
 11 completion day.
 12 Then if you look at 15(2), it provides that:
 13 "Sub-paragraph (1) continues to apply if the claim
 14 ... includes a claim ... in respect of loss or damage
 15 arising from a domestic competition infringement that
 16 occurred before IP completion day including if that
 17 domestic competition infringement continues on or after
 18 [... completion day]."
 19 So what this is doing is that, where claims for
 20 domestic competition infringement are pleaded on
 21 the same facts alongside claims for EU competition
 22 infringements that are brought under paragraph 14(2),
 23 the very same provisions listed in paragraphs 7(3) to
 24 7(8) that I have showed you will also apply as modified
 25 in relation to the domestic competition infringement

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1 claims, and the obvious reason for that is that if you
 2 are pleading domestic and EU competition infringements
 3 in relation to the same period pre-IP completion day,
 4 given the risk of divergence of domestic law post-IP
 5 completion day and to ensure legal consistency in
 6 the treatment of both the domestic claims and the EU
 7 claims, the same modified body of law will be applied to
 8 both of those claims.

9 The final saving provision in relation to EU
 10 competition infringements is over the page, at the top
 11 of the page {AB1/6/85}, paragraph 16, which deals with
 12 references to the CJEU, which do not concern us.

13 So we say there is nothing in the scope of
 14 the savings and transition provisions that provide any
 15 support for the suggestion that paragraph 14(2) would
 16 allow EU competition infringement claims to be pursued
 17 by the Kelkoo EEA Claimants, either in the High Court or
 18 the Tribunal, for alleged infringements of Article 102
 19 TFEU post-IP completion day.

20 Now, the second point I wanted to make arises from
 21 an observation, sir, you made --

22 THE CHAIRMAN: How does that work? You can bring a claim in
 23 the High Court -- if you get personal jurisdiction of
 24 a defendant from breach of French law, you can bring
 25 a claim for breach of German law. If German law

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1 includes Article 102, as it does, you could, on
 2 the basis of German law, bring an Article 102 claim.
 3 MR MCGURK: The claim that is brought here is brought
 4 expressly under Article 102 TFEU. That ceases to apply
 5 in the UK post-IP completion date and these provisions
 6 are telling you what is saved in relation to claims in
 7 respect of infringement prior to that date, and unless
 8 you can bring your claim within paragraph (a) or (b) of
 9 paragraph 14(2) of schedule 4, you will not have a cause
 10 of action in the UK.

11 THE CHAIRMAN: But you could say you bring your claim under
 12 German law, which incorporates, as all Member States do,
 13 Article 102, so it is something of a formality, is it
 14 not? You would say: okay, as against the Dutch Kelkoo,
 15 our claim is under Dutch law, which incorporates
 16 Article 102, and therefore we rely on Article 102.
 17 Under German law, we will -- and so on.

18 MR MCGURK: These claims are not brought under German law,
 19 or French law or Dutch law, they are expressly pleaded,
 20 and only pleaded, in reliance on Article 102 TFEU. That
 21 was for the Kelkoo Claimants, and that is how they have
 22 put their case, and that is the case that I am
 23 addressing in terms of these savings and transition
 24 provisions.

25 THE CHAIRMAN: But you clearly can continue to claim under

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1 foreign law against foreign defendants.
 2 MR MCGURK: Well, this goes to the point -- this goes to
 3 the discussion you had on Day 1 where Mr Jowell relied
 4 upon the foreign law presumption, and he acknowledged
 5 that that has been modified and narrowed under
 6 the *Brownlie* Decision in the Supreme Court. But I say
 7 that is a bit cart before horse. That goes to
 8 the question of applicable law, but that assumes
 9 the Tribunal does have jurisdiction over these claims,
 10 and I am trying to show you why, having put the case on
 11 the basis of Article 102 and Article 54, no cause of
 12 action would accrue post-IP completion date in relation
 13 to Article 102 as pursued in the UK, albeit by foreign
 14 established Claimants, and having put their case that
 15 way, no cause of action can accrue the day after IP
 16 completion day. So I want to make that good by
 17 reference to a judgment you gave in *DSG Retail*, which is
 18 at --
 19 THE CHAIRMAN: What I am putting to you is if what had been
 20 said instead is post-IP completion date the claim is put
 21 under the respective national law of each respective
 22 claimant, there would be no objection to that, subject
 23 only to a point of the jurisdiction of this Tribunal
 24 compared to the High Court, and each of the national
 25 laws incorporates -- well, it does not incorporate, as

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1 a matter of law includes Article 102. So there may be
 2 a pleading point, but beyond that you end up -- it is
 3 only that, is it not?
 4 MR MCGURK: Well, no, it is not just a pleading point.
 5 I think there is a more fundamental point that you
 6 considered, sir, in a second judgment I am going to come
 7 back to, which is the *Umbrella Interchange Fee Claimants*
 8 judgment.
 9 But can I take you to two cases and two observations
 10 you make in turn to try and answer you?
 11 THE CHAIRMAN: I slightly suspect, Mr McGurk, you were
 12 optimistic in thinking this is just 20 minutes.
 13 MR MCGURK: It turns out that I thought I could take this at
 14 a canter and was wrong, I am sorry about that.
 15 THE CHAIRMAN: Anything to do -- in all my experience of
 16 these regulations is not straightforward, but I think we
 17 have got the essence of your point. We do have to stop,
 18 because a member of the Tribunal has another appointment
 19 at 5.15.
 20 I think we should consider this, and it is
 21 unfortunate, I have to say, that these points were not
 22 addressed in opening, because they really have nothing
 23 to do with closing on the evidence and argument we have
 24 heard, they are sort of fundamental points.
 25 MR MCGURK: Well, sir, paragraph 161 flows out of

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1 a discussion you had with Mr Jowell in opening.
 2 THE CHAIRMAN: Yes.
 3 MR MCGURK: We did not address the point. We were not sure
 4 how it was going to put or pursued in the course of
 5 the hearing. We have seen what is now being said
 6 about it on the basis of --
 7 THE CHAIRMAN: But you would make this point irrespective of
 8 what the defendants say, would you not? It is a point
 9 coming from you. It is an objection, and saying no
 10 cause of action.
 11 MR MCGURK: No cause of action.
 12 THE CHAIRMAN: Yes.
 13 MR MCGURK: We have pleaded no cause of action. There is no
 14 application to amend to rely upon --
 15 THE CHAIRMAN: But I did not think that was an issue that we
 16 were going to -- I mean, it is almost a separate issue
 17 that we could have addressed in this trial and it is an
 18 issue that has to be addressed, but it is very
 19 unsatisfactory to do it, as it were, in this way in
 20 closings, that is what I am saying. It has to be
 21 addressed at some point, but it is -- or if it was going
 22 to be raised, it should have been sort of identified as
 23 a separate issue: is there a cause of action?
 24 MR MCGURK: Well, we have taken the point in pleading.
 25 Nothing more was put in relation to this point by

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1 Mr Jowell in the course of the trial. He has raised it
 2 again in his closings and I think I am entitled to
 3 respond to it with --
 4 THE CHAIRMAN: Yes, but it is a question of whether we
 5 address it in this judgment or whether we really reserve
 6 it to full argument, that is my concern, because I think
 7 otherwise it would have been identified as an issue for
 8 this trial. It is a separate issue.
 9 MR PICKFORD: Sir, my understanding had always been that
 10 this was not an issue for this trial because it was not
 11 in the list of issues and therefore implicitly it was --
 12 but it had not been struck out, either his case or our
 13 defence, so it would have to be addressed at part of
 14 Trial 2 and therefore any judgment that this Tribunal
 15 gives is subject to that point having not yet been
 16 determined --
 17 THE CHAIRMAN: I think that is --
 18 MR PICKFORD: -- and that is how we had always -- I have to
 19 say, I had understood it.
 20 THE CHAIRMAN: Yes.
 21 MR PICKFORD: It then arose just before the end of trial
 22 and, very properly, you raised it with Mr Jowell,
 23 Mr Jowell responded and now we are responding to
 24 Mr Jowell.
 25 THE CHAIRMAN: Yes.

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1 MR PICKFORD: But that is not how I had ever anticipated we
2 would be dealing with the point, I have to say.

3 THE CHAIRMAN: Well, I am completely with you on that and
4 I appreciate that Mr Jowell having -- or Kelkoo having
5 said what they have said, you wish to respond, but if we
6 proceed -- obviously I will have to talk to my
7 colleagues -- on the basis that we are not going to take
8 any Decision on that as part of any judgment, then
9 I think this argument can be parked.

10 MR PICKFORD: We are quite content with that.

11 THE CHAIRMAN: Yes.

12 In any event, we will resume at 10 tomorrow and take
13 it that that is the course we will proceed with unless
14 we tell you otherwise.

15 (5.18 pm)

16 (The Court adjourned until 10.00 am on Wednesday,
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