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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 Wednesday, 29 July 2026
 2 (10.03 am)
 3 THE CHAIRMAN: Yes, Mr Pickford.
 4 Closing submissions by MR PICKFORD (continued)
 5 MR PICKFORD: Thank you, sir, members of the Tribunal.
 6 So, yesterday, I went through the decision in some
 7 detail, and one of the core, if not the core, issues
 8 that I say comes out of that and also the discussion
 9 that I had with the Tribunal, that was very helpful in
 10 elucidating the Tribunal's thinking, is: what does it
 11 mean to say that the Product Universal or the Shopping
 12 Unit is part of a CSS as it is obviously common ground
 13 the Preliminary Issues Judgment says that it is?
 14 I say that there are two essential possibilities for
 15 what that can mean.
 16 Now, the first is this. A box can be said to be
 17 part of Google's CSS recognising that there is in fact
 18 something else that exists, the standalone site, but
 19 that that standalone site is unnecessary for
 20 the self-preferencing abuse.
 21 Now, in that case, the box, in itself, must be
 22 a sufficient manifestation of Google's CSS that it is in
 23 the CSS market. In other words, in law, it is itself
 24 a CSS, even if, as a matter of fact, it is not the only
 25 manifestation of Google's CSS because there is also

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1 a standalone site. Now, that is what I say Kelkoo's
 2 case must amount to. They say that the boxes, both past
 3 and present, have what they allege are the essential
 4 features of a CSS, namely they group together product
 5 results thereby enabling a user to compare between
 6 different results. So that is one approach to what that
 7 phrase could mean and that is what I say is Kelkoo's
 8 case on it.
 9 Now, the alternative is that the box can be part of
 10 Google's CSS, recognising that the standalone sites are
 11 ultimately necessary in conjunction with the box for
 12 the act of self-preferencing. Now, in that case,
 13 the box is not of itself a sufficient manifestation of
 14 Google's CSS to be in the CSS market in that way of
 15 thinking about it. In other words, it is not itself
 16 a CSS. The self-preferencing that arises in that world
 17 comes down to the degree of connection between the box
 18 and the standalone site and whether Google's standalone
 19 site is treated differently from rival standalone sites
 20 in terms of its access to the box, and that is my case
 21 on what the theory is in the decision, and in my
 22 submission, the basic job for this Tribunal on the abuse
 23 case is to work out which of those is a better
 24 description of the decision.
 25 Now, we can answer that, unsurprisingly, by

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1 the decision itself, and what I want to do first is
 2 apply Kelkoo's case that the boxes of themselves do all
 3 that is necessary to constitute the core elements of
 4 a comparison shopping service and test that against
 5 the recitals in the decision. So if we could go back,
 6 please, to the decision at page 119, so that is
 7 {BA/2/119}.
 8 You saw this yesterday, this is from recitals 408 to
 9 411. That is the Commission's response to why it says
 10 that there is favouring by Google of its comparison
 11 shopping service. Basically, what it says, as you saw
 12 yesterday, is the problem is there are exclusive links
 13 to your standalone CSS.
 14 Shall I pause for a moment to allow the Tribunal to
 15 get that in hard copy?
 16 THE CHAIRMAN: No, that is all right. We have seen it
 17 already.
 18 MR PICKFORD: Yes.
 19 So that is what the decision says there.
 20 Had Mr Jowell's theory of what the decision must
 21 mean been what the Commission actually had in mind, they
 22 would not have said what they say here at 408 to 411.
 23 What they would have said is: no, the problem is you had
 24 boxes of grouped results on your page that enabled users
 25 to compare products and those boxes were produced using

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1 your own methods and processes, so slam dunk, you did
 2 enough merely in having the boxes to self-preference,
 3 and that is not at all what the Commission says here in
 4 relation to the Product Universal.
 5 Moreover, that argument would be contrary to
 6 the recitals that I showed you yesterday, 668
 7 {BA/2/227}, 699 {BA/2/232} and 700(c), which expressly
 8 permit Google to have groupings of product results using
 9 Google's own processes and methods just so long as
 10 Google applies the same processes and methods to the way
 11 that it ranks results from rival CSS.
 12 It is also inconsistent with recital 176 {BA/2/33},
 13 which I showed you yesterday, which distinguishes
 14 between specialised services and general search results,
 15 as you will recall, not on the basis that general search
 16 results do not allow comparison, because that is
 17 manifestly what they do and I say the Commission would
 18 have been daft to have made that finding,
 19 the distinguishing features, according to
 20 the Commission, between general search results and
 21 specialist search services is that general search
 22 results do not have features like filtering and reviews
 23 that specialised services do, or at least not to
 24 the same extent.
 25 Now, you can trace the same form of reasoning

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1 through in the analysis of recitals 412 and following.
 2 So if we go, please, to the next page {BA/2/120}, we
 3 have to go over to the next page and 412. So we now
 4 move from considering the Product Universals to
 5 considering the Shopping Units, and we see at 413:
 6 "The fact that the positioning and display of
 7 the Shopping Unit is one means by which Google favours
 8 its comparison shopping service is confirmed by
 9 the following."
 10 So {BA/2/121}:
 11 "In the first place [414], the Shopping Unit is
 12 based on the same database of products and merchants as
 13 the standalone Google Shopping website."
 14 Now, today, that is not true, the Remedy box is not
 15 based on the same database of products and merchants as
 16 the standalone Google Shopping website. Any CSS can use
 17 their database of products and their merchants, and as
 18 an analogue to the merchant centre, Google created
 19 the CSS centre, that is first Friedman, 176 {H3A/7/46},
 20 I am not proposing to take you to it, which was created
 21 specifically for access to the Remedy box. Google also
 22 changed the merchant centre to enable merchants to opt
 23 out of CSSs, including Google.
 24 Now, just one small side point here, just of
 25 clarification. Ms Rose, you put to me a point yesterday

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1 about merchants paying Google direct, and of course that
 2 is correct under the self-service model, it is not
 3 correct under the managed model. Under the managed
 4 model, as Mr Hunt explains at paragraph 199(a) of his
 5 evidence {12/1/92}, as one example, the CSS pays Google
 6 and the merchant pays the CSS and does not have any
 7 visibility, unless it is given particular visibility by
 8 the CSS, of what is going on. So you could have
 9 contracted with Kelkoo to say, "I would like some
 10 traffic", and Kelkoo would be entitled to give you that
 11 traffic potentially from anywhere, including placing
 12 your ad on Google's CSS and Kelkoo is responsible for
 13 all of that. So it does depend which model you adopt.
 14 I just wanted to footnote that point. It is not central
 15 to my argument, but I thought I should clarify that
 16 issue.
 17 MS ROSE: But is that not just about the scope of
 18 the authority you have given the agent?
 19 MR PICKFORD: Well, it is about, potentially, that scope,
 20 but of course you never have the right to go yourself to
 21 the -- as a merchant, to put your ad directly in
 22 the box, you always have to do it through a CSS, and
 23 that is one of them. That might be relatively thin, and
 24 we have never argued --
 25 MS ROSE: That is the question. I mean, that is sort at

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1 the heart of the problem, that all the CSS is doing is
 2 acting as a conduit.
 3 MR PICKFORD: Well, as I said, it depends which model you
 4 adopt, and in my submission, that is not actually at
 5 the heart of the problem, because what the problem was
 6 that was identified in the decision, and we are confined
 7 to the decision's problem, the decision's problem was
 8 unequal treatment as between Google and rivals and
 9 the fact that the box was totally bound up with Google
 10 and not -- and rivals did not have an opportunity to
 11 have access to it. What Google has done --
 12 THE CHAIRMAN: There is nothing in the decision saying
 13 rivals did not have an opportunity to access the box.
 14 MR PICKFORD: Well, on the same terms.
 15 THE CHAIRMAN: No, it is not. It does not talk about access
 16 to the box on the same terms, it is self-preferencing
 17 Google's CSS over rival CSSs.
 18 MR PICKFORD: Yes.
 19 THE CHAIRMAN: The box is one way Google promoted its CSS,
 20 but there is nothing in the decision about access to
 21 the box for rivals.
 22 MR PICKFORD: Well, in my submission --
 23 THE CHAIRMAN: Is there anything in the decision that talks
 24 about rivals?
 25 MR PICKFORD: In my submission, it is certainly implicit in

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1 the whole structure of the discrimination section that
 2 I took you to previously that the basic problem is that
 3 Google set up a privileged box on the page, and
 4 the reasons why it was privileged are, firstly, that if
 5 you clicked on a link it would only go through to
 6 Google's sites, and secondly, because -- and I am going
 7 through the reasons here, and I am only at the early
 8 ones -- the site -- sorry, the box was intimately bound
 9 up with Google's CSS, and so, for that reason, it was --
 10 the General Court felt it could go on to say it was part
 11 of Google's CSS. What I am showing you is that each of
 12 the reasons why it was intimately bound up with Google's
 13 CSS and Google's CSS only, such as it only had products
 14 and product databases from Google's CSS, no longer apply
 15 in the Remedy world.
 16 So if I could continue going through the recitals.
 17 THE CHAIRMAN: Yes.
 18 MR PICKFORD: 415, that deals with common technology
 19 {BA/2/121}, and one of the things it says is that at
 20 the pre-query stage there was that common technology and
 21 then that led to there being a common pool of products
 22 and merchants and the results are taken from the same
 23 database, and it is comparing here the database for
 24 the standalone CSS and the unit.
 25 Now, Google, again, changed its technology so that

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1 each CSS could independently form part of Google's
 2 database and index. That is Friedman 1, paragraph 185,
 3 for your note {H3A/7/48}. So as between the standalone
 4 site and the Remedy box, there was no longer a common
 5 pool of products and merchants with a single database.
 6 Now, there also need to be quality checks which apply to
 7 CSSs only, such as that they represent 50 merchants and
 8 have filtering functionality on their site, and none of
 9 those quality checks apply to Google's own relationships
 10 via its CSS with merchants. So, again, there is
 11 a distinction there.

12 Now, when one goes to 415 {BA/2/121}, which is
 13 the post-query stage, essentially there are now two
 14 separate auctions so that you can compete to be in
 15 the Remedy box without ending up on Google's standalone
 16 CSS. Each of those is accessed now separately via
 17 a separate auction.

18 Now, I accept that some of the -- as Google is
 19 a vertically integrated undertaking, some of
 20 the infrastructure is common to both the upstream and
 21 downstream elements of what Google does.

22 MS ROSE: What infrastructure is in common?

23 MR PICKFORD: So in order to take through that I would have
 24 to go to the document that I took Mr Hunt to, which
 25 shows specifically the types of infrastructure. I will

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1 get a reference for it. I can take you there, but
 2 I have not got the reference to hand immediately, but
 3 I will go there very quickly. What there is is
 4 a document which I showed him, and he agreed with me in
 5 relation to it, which shows that Google allocates its
 6 costs in a way where it says: well, this is something
 7 that the CSS does all of itself and therefore it is
 8 going to get 100% of those costs. Then there are some
 9 other types of costs where it says: well, this is
 10 an infrastructure that is shared across different bits
 11 of Google and so therefore we are going to allocate
 12 costs, typically, I think, in accordance with clicks,
 13 I think, or traffic. There are measures that they use
 14 for cost allocation purposes and those were looked
 15 at/audited by the Commission's advisers and no one said
 16 they were unfair means of allocating the costs. So it
 17 takes on the responsibilities and it incurs the costs,
 18 even though some of those costs are ones that it
 19 basically has to pay back its parent company for,
 20 because it is taking on some of the burden of those
 21 costs.

22 Whilst I have been saying that, I have been told
 23 that the relevant document is at {K1/26/6}. I do not
 24 know if Mr Gregory is right about that but I am just
 25 going to have to see whether he correctly anticipated

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1 what I was thinking about when I was making those
 2 submissions.

3 Yes, so in this section here, on page 6 of this
 4 letter from Cleary Gottlieb to the Commission,
 5 explaining how the Remedy is going to work, we have:

6 "GSE Bidding Rules. Two principles will apply to
 7 GSE's bids: First, GSE will bid in a manner that
 8 maintains its overall profitability for a given
 9 reporting period. Second, GSE will limit the level of
 10 individual product ad bids such that the costs of those
 11 bids will not exceed the payments from its advertising
 12 partners. In more detail."

13 If we go to "GSE's costs ...", in the second bullet.
 14 They:

15 "... will comprise the variable and fixed costs
 16 required to carry out its activities (i.e., activities
 17 related to EEA Google Shopping websites, AdSense for
 18 Shopping in the EEA, and bidding to place GSE product
 19 ads on the Google General Search pages)."

20 Just pausing there. I put it to Mr Hunt that he
 21 agreed that those were the essential activities that
 22 a CSS, a complete CSS business carries out and they were
 23 analogous to the things that Kelkoo did and he agreed
 24 with that proposition.

25 Then it says what those will comprise: "payroll,

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1 opex, capex" etc.

2 Then it says, at the bottom part of that
 3 subparagraph:

4 "Common costs across GSE and other parts of Google
 5 (e.g., costs corresponding to shared technology and R&D,
 6 or common sales and marketing expenditures) will be
 7 allocated on the basis of reasonable accounting
 8 conventions."

9 Then there are other parts -- I think it may be this
 10 document or another document, which says what those
 11 reasonable accounting conventions are.

12 MS ROSE: The reference to "shared technology" --

13 MR PICKFORD: Yes.

14 MS ROSE: -- what is that referring to?

15 MR PICKFORD: Well, I am afraid I do not know precisely what
 16 the technology is, because this has not been put in
 17 issue in these proceedings. My understanding is that
 18 obviously Google develops certain technologies that are
 19 integral to the way that it thinks about going about
 20 selecting results.

21 MS ROSE: Yes.

22 MR PICKFORD: So, as an example, I would have to get proper
 23 instructions on this to check that I have got this
 24 perfectly right, but it would be intuitive, certainly,
 25 that where Google has invested a lot of intellectual

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1 capital in what is the best -- what are the best 200
 2 algorithms that you might apply to try and choose
 3 a result in this circumstance --
 4 MS ROSE: For relevance for a query.
 5 MR PICKFORD: Yes. You can see that it could apply similar
 6 algorithms, probably not exactly the same, but some of
 7 that technology may both apply when it is doing the job
 8 on its own standalone website and when it is doing
 9 the job on its SERP. Inevitably there are going to be
 10 some overlaps there, but in my submission, that is just
 11 part and parcel of the fact that Google is a vertically
 12 integrated undertaking. You could not say to it, "Now,
 13 forget everything you know about search and ..." --
 14 MS ROSE: So both GSE and the Remedy box are -- they are
 15 taking an input feed from merchants -- sometimes direct
 16 from merchants, sometimes via a CSS --
 17 MR PICKFORD: Well, in the case of the box, always via
 18 a CSS.
 19 MS ROSE: Well, query for self-service, but leaving that
 20 aside, they are taking input feeds of products --
 21 MR PICKFORD: Yes.
 22 MS ROSE: -- and they are searching those input feeds --
 23 MR PICKFORD: Yes.
 24 MS ROSE: -- to rank the results based on an algorithm that
 25 deals both with relevance to the query and the bids per

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1 click and the anticipated click-through rate.
 2 MR PICKFORD: Yes, I think that is fair.
 3 MS ROSE: That is being done on both the website and on
 4 the Remedy box.
 5 MR PICKFORD: Yes, I think that is fair. Can I just --
 6 because you are asking me a question that, as I said,
 7 was not put in issue, I think it is important that
 8 I check that people behind me are nodding.
 9 I think they -- they are not nodding as
 10 enthusiastically as I would like.
 11 MS ROSE: They are mutedly nodding.
 12 MR PICKFORD: So I think I am obviously at the limits of
 13 what I can tell you without going beyond the evidence --
 14 MS ROSE: Yes, yes.
 15 MR PICKFORD: -- and just straying into --
 16 MS ROSE: It is just that you raised the point about
 17 the shared technology, so I am just trying to
 18 understand.
 19 MR PICKFORD: Well, I mean, the point about the shared
 20 technology is there in the decision.
 21 MS ROSE: But I think we can infer that both of those search
 22 operations are doing -- that is what they are doing,
 23 basically.
 24 MR PICKFORD: Yes.
 25 MS ROSE: They are taking input feeds; they are matching

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1 them with queries to produced ranked results.
 2 MR PICKFORD: Yes. I think we can infer that there must be
 3 some common technologies.
 4 MS ROSE: Yes.
 5 MR PICKFORD: We see there is a recognition by Google here
 6 of some common technologies, but precisely what they
 7 are, I am not in a position to tell you.
 8 MS ROSE: Obviously neither GSE, nor the Remedy box is
 9 crawling the web to get its results, they are both using
 10 these input feeds that come whether from merchants or
 11 CSSs.
 12 MR PICKFORD: Yes.
 13 MS ROSE: So, I mean, just to be clear, what I am looking at
 14 is recital 168 at {BA/2/31}. This is in the description
 15 of -- where the Commission is comparing general search
 16 services with specialised search services.
 17 MR PICKFORD: You said recital 161?
 18 MS ROSE: 168.
 19 MR PICKFORD: 168, sorry.
 20 MS ROSE: Page 31.
 21 MR PICKFORD: Yes.
 22 MS ROSE: It identifies the differences in the technical
 23 features of specialised and general search services.
 24 MR PICKFORD: Yes, but remember this -- and I will find
 25 the recital -- that earlier on, the Commission also

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1 explains how Google presents specialised search results
 2 on its general search page that had been drawn from its
 3 specialised search service. So the fact that there is
 4 some overlap in technology does not mean that
 5 the specialised result suddenly becomes a separate
 6 service. If it did --
 7 MS ROSE: That is the significance of 168, because what 168
 8 is telling you is how, in terms of the technology and
 9 the source of the results, there is a difference between
 10 generalised search and specialised search/vertical
 11 search.
 12 MR PICKFORD: No, I do not agree with that.
 13 MS ROSE: Okay. Okay, well, that is what I am putting to
 14 you, so tell me why --
 15 MR PICKFORD: Yes. So coming back to the submissions that
 16 I made yesterday, I say that general search -- and
 17 the nomenclature is unhelpful, but nonetheless it is
 18 used consistently in the decision -- general search
 19 comprises three things, and that is -- we are back in
 20 the territory of sort of recitals 10, 12 to 13 {BA/2/8},
 21 23 {BA/2/10}, etc, there. The three things that general
 22 search comprises is: generic, i.e. crawled, results;
 23 ads, which are definitely not crawled; and indeed PLAs,
 24 in my submission, are a form of ad, and --
 25 THE CHAIRMAN: You say "general search comprises" --

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1 MR PICKFORD: Yes.
 2 THE CHAIRMAN: -- I think what they were talking about there
 3 is the search results page, not General Search as
 4 a service.
 5 MS ROSE: Yes, correct.
 6 MR PICKFORD: Well, sir --
 7 THE CHAIRMAN: That is a different thing.
 8 MR PICKFORD: Well, sir, I say it is very much -- I do not
 9 stop at that point, but I say it is very much consistent
 10 with my interpretation and not with the interpretation
 11 that there is something -- there is a different service
 12 on the page. Where that really gets critically drawn
 13 out is in the section that I showed you that compares
 14 general search to specialised search, because what it
 15 does not say there is: a-ha, the difference here is that
 16 general search results are just what is crawled. It
 17 absolutely does not say that. In 167 {BA/2/31}, it is
 18 absolutely in accordance with my case. What it says --
 19 sorry, 176 I think it is, I beg your pardon, 176
 20 {BA/2/33}. What it says is the crucial difference
 21 between general search services and specialist search
 22 services, which it has already now just accepted
 23 overlap, is that specialist search services allow you to
 24 go further because they allow things like filtering and
 25 reviews.

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1 THE CHAIRMAN: Well, there are various possibilities.
 2 Certain --
 3 MR PICKFORD: Well, yes --
 4 THE CHAIRMAN: It could be stars, it could be reviews, it
 5 could be prices, certain things. There is no definitive
 6 list.
 7 MR PICKFORD: I think we can all agree there is no
 8 definitive list of exactly what the dividing line is --
 9 THE CHAIRMAN: Yes.
 10 MR PICKFORD: -- otherwise we would not be here. But --
 11 MS ROSE: I --
 12 MR PICKFORD: Could I just ...
 13 MS ROSE: Yes.
 14 MR PICKFORD: But it is not just 176, it is also 172
 15 {BA/2/32}, which lists out those same differences again.
 16 They are all of a piece. In my submission, what it is
 17 getting as is this. It is saying general search is --
 18 it is a first pass, it is general. You get a selection
 19 of different types of things that you might want. What
 20 it does not allow you to do is the detailed comparison
 21 and using comparison tools that you would be able to do
 22 using a comparison shopping service.
 23 If I may, I can illustrate the point by a point that
 24 you put, I think it was to Mr Friedman, about how poor
 25 you found searching for a camera on Google -- a digital

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1 camera on Google Search. The point is this: yes, if you
 2 put in a search for a digital camera on Google's
 3 General Search, that is not going to be that helpful to
 4 you in terms of -- and it is not going to allow you to
 5 do a proper comparison shopping service-type experience
 6 because what you get is just -- as what you described,
 7 I think, Ms Rose -- sorry, I am using your words rather
 8 than labelling my clients in this way -- is a random
 9 selection of different results for different prices.
 10 The point is you have -- in order to make that useful
 11 and actually engage in a comparison shopping service,
 12 you have then got to go on and start using filters.
 13 If you did -- I have got some slides I can show you,
 14 but if you did the same search, the digital camera
 15 search, on Amazon, and that is all you did, you would
 16 also find the results equally unhelpful, because at that
 17 stage, there is nothing between Amazon and Google, it is
 18 not that Amazon has got much, much better products or
 19 a much, much better search. You also get a fairly
 20 random array of prices and products. What Amazon has
 21 and what CSSs have is the ability to then go on and
 22 start filtering, sorting by price, looking at product
 23 reviews and those are all the things --
 24 MS ROSE: I understand that is your case. But what I want
 25 to put to you is something a little bit more

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1 fundamental, which is about the structure at
 2 paragraphs 166 {BA/2/31} down to 177 {BA/2/33}, which is
 3 where -- it is headed {BA/2/31}:
 4 "General search services versus specialised search
 5 services."
 6 MR PICKFORD: Yes.
 7 MS ROSE: So it is actually addressing the question: what is
 8 the distinction between a generalised search service,
 9 not general search results page, but a general search
 10 service, and a specialised search service.
 11 MR PICKFORD: Yes.
 12 MS ROSE: It approaches it from two sides. First of all, it
 13 looks at it from the perspective of the operator and it
 14 is looking at the technology and the technical features
 15 -- the nature of the service and the technical features,
 16 and we see that at 167 and 168.
 17 MR PICKFORD: Yes.
 18 MS ROSE: Then it looks at it from the perspective of
 19 the user, if you look at 174 down to 177 {BA/2/33}, and
 20 it is basically saying from the perspective of the user,
 21 they are complements, not substitutes, and they say why.
 22 Now, the first critical distinction, what I am
 23 suggesting to you, is they are different services
 24 produced by different means: a general search service is
 25 what you get from crawling the web, a specialised search

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1 service is what you get from ranking --
 2 MR PICKFORD: Yes.
 3 MS ROSE: -- you know, input feeds from a particular
 4 category, whether it is merchants or CSSs acting on
 5 behalf of merchants or --
 6 MR PICKFORD: Yes.
 7 MS ROSE: -- airlines, whatever it is. That is what gives
 8 you a vertical search service. That then enables you to
 9 introduce features which mean that, from the user
 10 perspective, it is a more targeted search experience to
 11 a particular type of query.
 12 Now, of course there may be a different -- different
 13 specialised search services may do that to a different
 14 extent. We have heard an abundance of evidence,
 15 including from Google's witnesses, that there is a range
 16 of CSSs and some of them provide sophisticated filtering
 17 and some of them are what I think you would call thin
 18 aggregators which do not provide many features at all,
 19 but they are all providing these essential distinctions.
 20 None of them are general search services.
 21 MR PICKFORD: Yes. So --
 22 MS ROSE: That, I think, is the case you have to meet.
 23 MR PICKFORD: Well, and I can meet it. The way I meet it is
 24 this way.
 25 If you look -- if you take 168 as an example

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1 {BA/2/31}, one has to read it very carefully and look at
 2 all of the words. So point 1 is that it says:
 3 "... there are a number of differences in the
 4 technical features of specialised and general search
 5 services. In the first place, specialised search
 6 services and general search services often rely on
 7 different sources of data ..."
 8 Now, that is true, they often rely on different
 9 sources of data, because often what a general search
 10 service is doing is relying on crawled data because it
 11 produces generic results, whereas a specialised search
 12 service never does that. So the critical distinction
 13 there, in my submission, is that they often rely on
 14 different sources of data, but it does not say they
 15 always rely on different sources of data. Whereas if
 16 there was a sharp division of the sort that, madam, you
 17 have put to me, it would just say "general search
 18 services and specialised search services rely on
 19 different sources of data", because it would be
 20 basically saying, if it is crawling, it is general; if
 21 it is specialised -- sorry, if it is a specific
 22 technology, it is specialised, and it does not say that.
 23 Then that theme continues. So after the colon, it
 24 says:
 25 "... the main input for general search services

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1 originates from an automated process called 'web
 2 crawling' ... "
 3 So, again, it is not saying that the only input, it
 4 is saying "the main", and that is because one of
 5 the essential characteristics of the general search page
 6 is it has always got generic results on it. Sometimes
 7 it has other types of things --
 8 MS ROSE: But the Remedy box does not have anything in it
 9 for web crawling, does it?
 10 MR PICKFORD: Sorry?
 11 MS ROSE: The Remedy box has nothing in it from web
 12 crawling, does it?
 13 MR PICKFORD: I do not -- I do not think --
 14 MS ROSE: It does not. We know it does not.
 15 MR PICKFORD: No, I do not think it does. Well, when you
 16 say does not have anything from it, I think it is the
 17 case --
 18 MS ROSE: The results in the Remedy box are never the result
 19 of web crawling.
 20 MR PICKFORD: Well, when you say -- I may need to ask some
 21 other people who are more expert than me on this, but
 22 I do not think that is quite right, in this sense, in
 23 that, although they are selected -- they are based on
 24 feeds, my understanding is that Google does use crawling
 25 as a means of verifying information that it is given in

23

1 feeds.
 2 Yes.
 3 THE CHAIRMAN: Yes, but that --
 4 MS ROSE: That is --
 5 THE CHAIRMAN: -- that is different, is it not?
 6 MS ROSE: That is not the same thing.
 7 THE CHAIRMAN: That is just a quality check.
 8 MR PICKFORD: Yes, well, I am just giving a complete answer.
 9 MS ROSE: They are not results derived from crawling
 10 the web.
 11 MR PICKFORD: Not in the first place. But I think my
 12 qualification is relevant in this sense, that crawling
 13 the web is a function into the delivery of those
 14 results, because they are based on the feed, but if, for
 15 instance, Google then, to ensure that it was high
 16 quality, discovered through crawling that the feed did
 17 not live up to what it says on the tin, then the fact --
 18 then the information that is gleaned through crawling --
 19 MS ROSE: But the source of data -- the source of data is
 20 not web crawling, the source --
 21 MR PICKFORD: Well, the original source of the data is
 22 not --
 23 MS ROSE: Is feeds.
 24 MR PICKFORD: Is feeds, yes.
 25 MS ROSE: Thank you.

24

1 MR PICKFORD: Yes.
 2 THE CHAIRMAN: I mean, all they are saying is the main input
 3 in general search is web crawling and that is not
 4 the case with specialised search, and, I mean, that is
 5 common ground, I think.
 6 MS ROSE: Yes.
 7 THE CHAIRMAN: I mean, all this is doing here, it is not
 8 specifying every criterion of general searches, this is
 9 a market definition section and it is saying there are
 10 four broad bases on which we can see that these are in
 11 different markets. Then, under each of the four heads,
 12 it has some sub-heads, and it is the accumulation, and
 13 it is not saying: well, in every case, you must have
 14 everything under all four. But there are sufficient
 15 there, like in any market definition exercise, to see
 16 that these two markets are separate. That is what this
 17 is all about.
 18 MR PICKFORD: Yes.
 19 So I agree with that. But I am showing you why,
 20 when you actually look at those criterion -- those
 21 criteria, they support what I am saying about
 22 the distinctions, because, from the user perspective,
 23 there is nothing at all supporting Mr Jowell's case.
 24 From the user perspective, everything that is there,
 25 which is not definitional but it is highly indicative,

25

1 is supporting my position that the critical difference
 2 from their point of view is: can you engage in something
 3 that is sufficiently detailed through filters and
 4 reviews and the like, or are you stuck at a much higher
 5 level? On the technological side, it is not saying that
 6 there is a sharp divide, it is recognising that there is
 7 -- implicitly, that there is an overlap, that general
 8 search services can be produced using non-crawling
 9 technology, otherwise what it says about the main input
 10 would not make sense. It is allowing scope for there
 11 being other types of inputs, all of those other types of
 12 inputs, their feeds, therefore it must be the case that
 13 a general search service also has specialist results on
 14 it.
 15 THE CHAIRMAN: But the main input for the box is not web
 16 crawling, is it?
 17 MR PICKFORD: That does not -- sorry, that does not matter,
 18 sir, in my submission. What we are talking about is
 19 whether generic -- whether general search services can
 20 include results produced from specialised feeds, and
 21 I say that is a necessary implication of generic
 22 crawling -- sorry, crawling only being the main input,
 23 otherwise, if what is being put to me were correct, it
 24 would be the sole input.
 25 Now, this cashes out, in my submission, in 408

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1 {BA/2/119} and 412 {BA/2/120}, because if it were right,
 2 if all you need is for the box on the page to be
 3 produced by a specialised technology, then
 4 the Commission just would not have made the findings
 5 that it makes at 408 through to 411 and then 412 onwards
 6 through those passages. They just would not make sense,
 7 because if all that was necessary was to say, "Look,
 8 the technology on the box is specialised technology",
 9 they could have just said, "Well, there you go, you have
 10 got your CSS on the page", but they do not say that,
 11 they say the opposite of that. They say, "Of itself,
 12 the box is not a CSS", the reason why there is favouring
 13 is because it has -- and the case is simplest in
 14 relation to the Product Universal, so you can really
 15 test it most easily there, it says the reason why there
 16 is favouring is not because of the box on the page, in
 17 terms of its technology, it is not a CSS, it is because
 18 it has links through to something that is a CSS.
 19 In my submission, the point that is being put to me
 20 about the market definition cannot be reconciled with
 21 408 through to 411. All of this has to be read as
 22 a piece.
 23 THE CHAIRMAN: Yes, well, I think we have got the point.
 24 PROFESSOR SMITH: Can I ask a slightly different question
 25 with market definition? The box on the page supplies

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1 services to customers.
 2 MR PICKFORD: Yes.
 3 PROFESSOR SMITH: Customers who are using Google. Are these
 4 services in the same market as what you regard as CSS
 5 services?
 6 MR PICKFORD: No. Sorry, well, which services are we
 7 talking about? What is in the box? The services in
 8 the box?
 9 PROFESSOR SMITH: A Google user puts in a product search --
 10 MR PICKFORD: Yes.
 11 PROFESSOR SMITH: -- looks at the box --
 12 MR PICKFORD: Yes.
 13 PROFESSOR SMITH: -- does not look at anything else.
 14 MR PICKFORD: Yes.
 15 PROFESSOR SMITH: They have been provided with some
 16 services. You are saying they are not -- they do not
 17 look like top class comparison services because they do
 18 not have various features.
 19 MR PICKFORD: Yes.
 20 PROFESSOR SMITH: Are they in the market?
 21 MR PICKFORD: No.
 22 PROFESSOR SMITH: They are not in the market for comparison
 23 services?
 24 MR PICKFORD: They are not in the market and the reason for
 25 that is that they are complements rather than

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1 principally substitutes .
 2 PROFESSOR SMITH: So they are a separate -- what market are
 3 they?
 4 MR PICKFORD: They are part of the general search services
 5 market --
 6 PROFESSOR SMITH: Oh, you mean they are substitutes for
 7 general -- but as the economic experts agreed when they
 8 were asked about market definition questions as opposed
 9 to legal questions about what is a CSS, they agreed that
 10 the issues of market definition are issues about
 11 substitutability and I think they agreed with
 12 the primary issues about consumer substitutability --
 13 MR PICKFORD: Well, they did --
 14 PROFESSOR SMITH: So when you say that the services provided
 15 to the Google user by the box are in the same market as
 16 general search --
 17 MR PICKFORD: Yes.
 18 PROFESSOR SMITH: -- you are saying they are a good
 19 substitute, a close substitute for a general search
 20 service rather than for consumer comparison services?
 21 MR PICKFORD: I am saying that they are all part of a piece
 22 of a general search service, which approach -- and one
 23 of the essence of a general search service is that it
 24 gives a variety of different ways of answering
 25 the question. The reason why I say that is because what

29

1 Mr Noble did say in his evidence, and he pointed to
 2 the passages of the analysis of the Commission in this
 3 respect, is that what the Commission says is that there
 4 is a distinction between a specialist search service,
 5 such as a CSS, and a general search service in that they
 6 are complements, principally. There is some
 7 substitutability between the two, but what the decision
 8 says is the substitutability is not enough to make
 9 the fact that when they sometimes overlap -- in 174
 10 {BA/2/33}, it contemplates that there will be an overlap
 11 between the types of results that you are getting, but
 12 they are complementary, ultimately, rather than
 13 substitutable.
 14 THE CHAIRMAN: Yes, so where do we go to next?
 15 MR PICKFORD: So what I was doing, before addressing
 16 the Tribunal's questions very helpfully seeking to
 17 clarify my case, is going through the various steps that
 18 the Commission went through in saying that there was
 19 favouring in relation to shopping boxes, and we had got
 20 to -- I think we were now basically going to be on 416,
 21 and I would just like to finish that off, if I may,
 22 because although there is a common theme, in my
 23 submission, it is very important to our case.
 24 So if we could go back, please, to recital 416.
 25 I am afraid I have lost my reference for that.

30

1 THE CHAIRMAN: It is {BA/2/121}.
 2 MR PICKFORD: Thank you.
 3 So 416:
 4 "In the third place, merchants cannot choose to have
 5 their products displayed only in the Shopping Unit or in
 6 the standalone Google Shopping website, neither in
 7 aggregate, nor ... individual products ..."
 8 So that was said to be a problem, and of course now
 9 merchants do not need to be included in the shopping
 10 property, they can appear in the Remedy box, so long as
 11 their inventory appears on the site of a CSS
 12 representing them. So, again, we have cured that
 13 problem.
 14 The next problem in 417, over the page {BA/2/122} is
 15 that:
 16 "... merchants are not informed of whether they are
 17 paying for a click that happened on the Shopping Unit or
 18 on the standalone Google Shopping website."
 19 Again, that, by reason of the same changes, has been
 20 addressed.
 21 418:
 22 "... the links in the Shopping Unit and
 23 the standalone Google Shopping website lead to the same
 24 landing page on the merchant site for a given product
 25 where users can purchase that product."

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1 Again, that is no longer true in the sense made
 2 there, because the landing pages can correspond to those
 3 of rival CSSs -- well, the ads that have been chosen by
 4 rival CSSs, so, again, that link has been broken.
 5 If you go to 419, it says -- it talks about how
 6 the unit previously favoured Google's own CSS because it
 7 was expandable to 17 PLAs with links only to Google's
 8 CSS. That is the essence of what it says, and now any
 9 CSS can occupy any one of those 17 slots. So, I mean,
 10 in theory, if Kelkoo was having an absolutely storming
 11 day and wanted to bid really high for all of
 12 a particular category of results, it could occupy all of
 13 them. It obviously depends on how well it gets on in
 14 the auction.
 15 In 420 --
 16 THE CHAIRMAN: Sorry for interrupting you, but you really
 17 did all this in page 60 and 61 of your closing, did you
 18 not? You had a little table going through these.
 19 MR PICKFORD: Yes.
 20 THE CHAIRMAN: I mean, we have got it all there, have we
 21 not?
 22 MR PICKFORD: Well, I mean, it is -- I am --
 23 THE CHAIRMAN: I mean, you are basically taking us through
 24 the table on pages 60 and 61, are you not?
 25 MR PICKFORD: I am, in essence. I am doing it to make

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1 sure --
 2 THE CHAIRMAN: That we have read it. I understand that.
 3 MR PICKFORD: Well, I am grateful, but it is --
 4 THE CHAIRMAN: It is important.
 5 MR PICKFORD: But the fact that we wrote it does not mean
 6 that it is not critical to my case --
 7 THE CHAIRMAN: No, it was very clearly set out --
 8 MR PICKFORD: Thank you.
 9 THE CHAIRMAN: -- I thought.
 10 MR PICKFORD: Right.
 11 THE CHAIRMAN: I think we have got it there precisely in
 12 the way you are doing it --
 13 MR PICKFORD: Right --
 14 THE CHAIRMAN: -- comparing the objection in these
 15 paragraphs.
 16 MR PICKFORD: In which case, can I just come back to 422,
 17 which we discussed yesterday {BA/2/125}, because that
 18 was put as a recital that potentially undermined my
 19 case.
 20 THE CHAIRMAN: Which one is that, sorry?
 21 MR PICKFORD: So 422, that is the one about Sweden and other
 22 countries, where there was no standalone site for
 23 a certain period. It was suggested to me, yesterday,
 24 I think, that that undermined my case, and I say it
 25 actually, on proper inspection, supports my case, and

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1 the reason is this. The Commission is saying in this
 2 paragraph, they are saying: is it a problem for our
 3 theory that the shopping -- and our theory being that
 4 the Shopping Unit favours Google's comparison service --
 5 that for certain years and for certain jurisdictions,
 6 Google did not have a standalone CSSs.
 7 We can test that question against Mr Jowell's theory
 8 of what the decision must mean, because if Mr Jowell's
 9 case had been correct, what would the answer to this
 10 question have been? They say: is it a problem that
 11 there is not a standalone site? The answer would have
 12 been: no, of course it is not a problem, you do not need
 13 a separate standalone CSS in any jurisdiction or in any
 14 year, because the whole point is that the boxes
 15 themselves have sufficient CSS qualities that they are
 16 a manifestation of the CSS on the SERP. So if he is
 17 right, that the boxes themselves are sufficient because
 18 they have got the qualities that basically mean they are
 19 CSSs, that is a trivially easy response for
 20 the Commission to provide. It is very, very
 21 straightforward and it would be totally watertight to
 22 the question that they pose.
 23 But they do not say that. What they do is adopt
 24 what, in my respectful submission to them, is a somewhat
 25 tortured and slightly feeble response, where they

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1 say: ah, well, the fact that Google only existed in
 2 the form of an SU was -- it was a transitional phase
 3 because there was in other years. They say: well, okay,
 4 there was not one in that jurisdiction, but, look, there
 5 was one in other jurisdictions so it is ... In my
 6 submission, it is a tacit admission that, yes, given
 7 the nature of the boxes and that they are not in
 8 themselves in the CSS market, there ultimately does have
 9 to be a standalone CSS to be able to favour it, but they
 10 then go on to fudge it for these six jurisdictions by
 11 saying: yes, but they are transitional, and in any event
 12 you can think about the standalone sites in the other
 13 jurisdictions. That can only be understood, in my view,
 14 as recognising the importance -- the importance of that
 15 standalone service, because it does not make sense if
 16 the case that you are putting to me is right. There is
 17 just an absolute scything that they can do of
 18 the problem by just saying: what do you mean, obviously
 19 there does not have to be anything else, all that
 20 matters is what is on the box?
 21 MS ROSE: Did Google appeal that finding?
 22 MR PICKFORD: Did we? I do not think so, no.
 23 THE CHAIRMAN: It is quite significant for the fine.
 24 MR PICKFORD: Sorry?
 25 THE CHAIRMAN: It was quite -- not insignificant for

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1 the fine.
 2 MR PICKFORD: It was not insignificant for the fine. I do
 3 not recall that we appealed that specific finding.
 4 THE CHAIRMAN: No, I --
 5 MR PICKFORD: Sir, I am being told that I need to check
 6 whether we appealed that.
 7 MR JOWELL: (Off microphone) In respect of the fine, they
 8 did appeal.
 9 MR PICKFORD: Yes, we appealed the fine.
 10 MR JOWELL: (Off microphone) On the basis that --
 11 THE CHAIRMAN: That these countries --
 12 MR JOWELL: (Off microphone) Yes.
 13 THE CHAIRMAN: -- should not have been included.
 14 MR JOWELL: (Off microphone) One can see it in --
 15 THE CHAIRMAN: It will be in the General Court judgment.
 16 MR JOWELL: -- (off microphone - inaudible).
 17 MS ROSE: Can we just see that?
 18 MR JOWELL: 56, 107.
 19 MS ROSE: Sorry, can you give us the reference?
 20 MR JOWELL: It is {J2B/56/108} and paragraph 451.
 21 MS ROSE: Sorry, paragraph?
 22 MR JOWELL: 451 --
 23 THE CHAIRMAN: So it is the appeal?
 24 MR JOWELL: Yes.
 25 THE CHAIRMAN: It should be in the judgment --

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1 MR JOWELL: Well, one can see the point is dealt with in
 2 the judgment at pages 338 to 339, which is at {BA/3/60}.

3 MS ROSE: Okay. Just let us look at 451 for a minute
 4 {J2B/56/108}.

5 So they made this very point that there was no
 6 standalone website:

7 "Prior to that time, there was no Google comparison
 8 shopping service that could be favoured ..."

9 MR PICKFORD: Which page is it?

10 MS ROSE: 451, second bullet.

11 (Pause)

12 What was the paragraph in the judgment?

13 MR JOWELL: I think the paragraph in the judgment that deals
 14 with the fine we are looking at, but one can see that
 15 they deal with the point here at 338 to 339 {BA/3/60}.

16 MS ROSE: Can you give us the reference?

17 MR JOWELL: It is at {BA/3/60}.

18 Forgive me for interrupting.

19 MR PICKFORD: No. Thank you.

20 (Pause)

21 Might I continue?

22 THE CHAIRMAN: "... 'Google Shopping existed only in
 23 the form of Shopping Unit without an associated ...'"

24 Yes.

25 MR PICKFORD: My point in relation to all of this is I am

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1 not saying, because obviously I cannot, that those are
 2 not binding findings that I have to live with.

3 The point is, what does one draw from those
 4 findings? Does one fairly draw from 422 {BA/2/124}
 5 the following? Does one fairly draw from it that what
 6 it is saying is you only need the box on the page, that
 7 that in of itself has got sufficient in it that makes it
 8 basically a CSS to find against Google? Which is
 9 the case that is being put against me, because that box
 10 -- what is said by Mr Jowell in relation to that box is,
 11 well, it allows comparison. It has got products in it,
 12 it allows comparison, therefore it does the job of
 13 a comparison shopping service. One asks oneself, is 422
 14 endorsing that analysis? In my submission, it is not
 15 endorsing that analysis, because, if it were, the answer
 16 would be totally different. The answer would be: it is
 17 totally irrelevant to us whether there is a separate
 18 service --

19 THE CHAIRMAN: No, no, well, you have made that point. We
 20 have got the point.

21 MR PICKFORD: Yes. Well, sir, that is the answer.

22 THE CHAIRMAN: Yes.

23 MR PICKFORD: It is that --

24 THE CHAIRMAN: Well, we have got that, so we understand
 25 the point.

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1 PROFESSOR SMITH: Can I just ask the market definition
 2 question again but now in relation to 422?

3 Is it your submission that consumers in those
 4 countries in that period could get comparison shopping
 5 services in foreign languages from the Google Shopping
 6 website in other countries, but the services that they
 7 were getting from the shopping box in their own country
 8 were not consumer comparison services? A Polish shopper
 9 wishing to have access to a comparison service had to go
 10 to a foreign language website and was not doing
 11 comparison shopping using the Shopping Unit in Poland.

12 MR PICKFORD: My submission is what the Commission found is
 13 that there was favouring because of the fact that this
 14 was a transitional phase and there were alternative
 15 options. I think that is all I can say in response to
 16 that, Professor.

17 PROFESSOR SMITH: Well, that is not an answer to my
 18 question.

19 MR PICKFORD: Sorry.

20 PROFESSOR SMITH: My question was about which market -- it
 21 is the same question I asked a little while ago: which
 22 market are the services -- in the Shopping Unit in
 23 Poland, in Polish, used by Polish customers, which
 24 market are these services in?

25 MR PICKFORD: They are in the general --

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1 PROFESSOR SMITH: They are in general search?

2 MR PICKFORD: Well, yes, they are in the general search
 3 market.

4 PROFESSOR SMITH: So any Polish shopper who wishes to have
 5 a comparison service has got to go to a German website
 6 to get their comparison service?

7 MR PICKFORD: Yes, that is right. That is why I say this
 8 was a slightly feeble argument by the Commission but it
 9 is nonetheless one that I am stuck with.

10 PROFESSOR SMITH: Okay.

11 MR PICKFORD: Can I -- I would just like to finish 423,
 12 because it is the final one, and although I addressed it
 13 in my written submissions, I have something more to --
 14 I have a development of it that I wish to make in this
 15 session, which is, recital 423 -- sorry, I just have to
 16 get my computer back to it -- is addressing a Google
 17 submission.

18 So just to give you the background to it -- and
 19 I can show you the documents if you want, but I am
 20 incredibly pressed for time at the moment, because --

21 THE CHAIRMAN: Well, that is why I said to you, you have got
 22 your table, you need not spend time going through every
 23 point --

24 MR PICKFORD: Yes, but this is a different point -- this is
 25 actually a subtly different point, if I may?

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1 THE CHAIRMAN: Yes.
 2 MR PICKFORD: So what the Commission had identified in
 3 a supplemental statement of objections was that they had
 4 said merchants could only be substitute -- sorry,
 5 merchant platforms could only be substitutable with CSSs
 6 where they showed different offers for the same specific
 7 item. Would you like me to show you that?
 8 THE CHAIRMAN: Yes, I have seen that. I could not quite
 9 understand that.
 10 MR PICKFORD: So that is at {O/3/104}.
 11 Do you have the top of that page?
 12 THE CHAIRMAN: Yes.
 13 MR PICKFORD: You see there is an argument about certain
 14 exclusions, and it says -- so this is the Commission
 15 speaking:
 16 "These exclusions reflect the fact that
 17 substitutability between merchant platforms and
 18 comparison shopping services is at most limited to
 19 the webpages of merchant platforms that display offers
 20 from: (i) different sellers for a same specific
 21 item ..."
 22 Do you see that?
 23 THE CHAIRMAN: Yes.
 24 MR PICKFORD: So there is an argument here between Google
 25 and the Commission about whether merchant platforms

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1 should be in the same market as the -- as CSSs, and what
 2 is being said in response to that is, one of the key
 3 points is that there is only overlap, if there is
 4 overlap, as regards where, on a merchant platform, you
 5 are looking at one specific product, because that is
 6 what CSSs in particular enable you to do. So Google
 7 sought to capitalise on that in its response to the SO.
 8 If I could take you to that, please, that is at
 9 {K2/60/31}.
 10 THE CHAIRMAN: This was a supplementary SO?
 11 MR PICKFORD: Sorry, in response to the supplementary SO.
 12 Sorry, I misspoke.
 13 THE CHAIRMAN: Yes.
 14 MR PICKFORD: If you look at the top paragraph, 84, it says:
 15 "Nor does the Shopping Unit meet the definition of
 16 comparison shopping pages that the SSO uses to exclude
 17 portions of merchant platform traffic from its
 18 foreclosure analysis. In that context, the SSO explains
 19 that 'substitutability' with 'comparison shopping
 20 services' is 'at most limited' to pages that 'display
 21 offers from [...] different sellers ..."
 22 Then in bold:
 23 "... for a same specific item' ..."
 24 So what Google then goes on to say is for over 90%
 25 of what Google shows, it is not the same specific item,

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1 it is just a variety of different products, or as
 2 Ms Rose might characterise them, random products.
 3 Now, that was then answered by the Commission in
 4 423, and it -- what the Commission says, if you go back
 5 to 423 {BA/2/125}, and I am going to have to go back to
 6 it too, it is on page 125, is this:
 7 "... the fact that certain Shopping Units in the EEA
 8 [in fact over 90%] display different offers for
 9 different product items is irrelevant in relation to
 10 the Conduct, since the Commission's case is not that
 11 the Shopping Unit is in itself a comparison shopping
 12 service which displays different offers for the same
 13 product items, but rather that the positioning and
 14 display of the Shopping Unit is one means by which
 15 Google favours the standalone ... Shopping website which
 16 does show different offers for the same product items."
 17 So what that shows is that showing different offers
 18 for the same product items is considered to be a core
 19 element of what CSSs do, and the way that the Commission
 20 deflects that is it says: we do not care about what your
 21 box is showing in this respect, the point is that your
 22 box is a means of favouring your CSS, which does show
 23 different offers -- your standalone site, which does
 24 show different offers for the same product items, i.e.
 25 is a CSS.

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1 MS ROSE: I think we understand the point.
 2 I just want to ask you this question. Obviously
 3 these are points that were made by Google in
 4 the proceedings not just before the Commission, but also
 5 before the General Court. What do you say is the status
 6 for us of the General Court's interpretation of
 7 the Commission's decision?
 8 MR PICKFORD: I am not sure that these points were --
 9 MS ROSE: Well, hang on, we have just been looking at --
 10 THE CHAIRMAN: Yes, they were.
 11 MS ROSE: Well, leaving aside specific points, I am asking
 12 you a general legal point.
 13 MR PICKFORD: Yes.
 14 MS ROSE: What do you say is the status of the General Court
 15 judgment for this Tribunal when interpreting
 16 the Commission Decision and when looking at
 17 the General Court's interpretation of the Commission
 18 Decision? What is the status of that?
 19 MR PICKFORD: So, what I say is if one goes back to
 20 Article 16 of Regulation 1 of 2003, that applies to
 21 decisions of the Commission, it does not apply in terms
 22 to judgments of the court. Judgments of the court have
 23 a binding effect by a different means. It is not
 24 the Article 16 route. They are binding as to, firstly,
 25 their operative part, and secondly, any recitals that

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1 are necessary even to understand the operative part, or
 2 that effectively explain some -- they are necessary
 3 because they explain some ambiguity. So it is the same
 4 test as we had in relation to the decision for
 5 the Preliminary Issues Judgment. It is the common test,
 6 in my submission, in Community Law, which is that only
 7 certain recitals to a decision are binding. So the test
 8 that one would have to consider is: is the particular
 9 recital we are looking at binding, i.e. was it necessary
 10 for the General Court to reach the particular decision
 11 it did on the point on appeal? I have not --
 12 THE CHAIRMAN: Is it not --
 13 MR PICKFORD: -- done that analysis.
 14 THE CHAIRMAN: -- a slightly different point? Article 16
 15 says we cannot act inconsistently with a decision of
 16 the Commission --
 17 MR PICKFORD: Yes.
 18 THE CHAIRMAN: -- and we have identified what in
 19 the decision is caught by that. The exclusive
 20 jurisdiction to review Commission Decisions rests in
 21 the General Court --
 22 MR PICKFORD: Yes.
 23 THE CHAIRMAN: -- and then further application to the Court
 24 of Justice. If the General Court has determined, as
 25 the exclusive forum that can do so, the only place

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1 an appeal from the decision can go, what part of
 2 the decision means, is that not then determinative, as
 3 a matter of EU law, of what that part of the decision
 4 means --
 5 MR PICKFORD: Well, in my submission --
 6 THE CHAIRMAN: -- and therefore, if we cannot act
 7 inconsistently with the decision, we cannot act
 8 inconsistently with the decision, as
 9 conclusively interpreted by the sole judicial body that
 10 has the jurisdiction to interpret it?
 11 MR PICKFORD: So my response to that is in two parts.
 12 Certainly not as regards merely what I am going to call,
 13 using English law terminology, obiter comments of
 14 the General Court. So if it does not fall within
 15 the strict test in EU law for something that is binding,
 16 then in my submission it cannot assume a greater binding
 17 force because it was about a decision which was binding.
 18 So that is the first point.
 19 I am also being given a reference to something in
 20 the bundle and I have no idea what it says, so I am
 21 going to have to take a moment to look at it.
 22 Before I look at that, because it might be that
 23 I can do that in a break later, could I come back,
 24 please, to, madam, your point saying: you must have
 25 taken these points in the General Court.

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1 THE CHAIRMAN: That is a separate point.
 2 MS ROSE: That is a separate point.
 3 I am interested in the status of the General Court
 4 judgment. So I think we understand what you say about
 5 bindingness.
 6 MR PICKFORD: Yes.
 7 MS ROSE: If and to the extent any paragraph of
 8 the General Court decision is not binding, do you accept
 9 it is persuasive?
 10 MR PICKFORD: I do not think I could possibly argue that you
 11 are allowed to take it into account as something that
 12 you might be persuaded to agree with. I think I am
 13 equally allowed to submit to you that if it is merely
 14 persuasive, I might be right and the General Court might
 15 be wrong and you would be allowed to accept that
 16 submission.
 17 MS ROSE: So what is your position specifically on
 18 paragraphs 328, 329, 338 and 339 of the General Court's
 19 judgment?
 20 MR PICKFORD: Bear with me.
 21 MS ROSE: Do you say they are binding or not binding?
 22 THE CHAIRMAN: (Off microphone) We did this a bit last
 23 night, did we not?
 24 (Off microphone discussion)
 25 MR PICKFORD: Page 338?

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1 MS ROSE: Paragraph 338, page {BA/3/60}. But also it really
 2 starts at 328 {BA/3/58}.
 3 MR PICKFORD: So I think I might have to look at it --
 4 MS ROSE: Okay, because the reason I am putting this to you
 5 is because 338 {BA/3/60} is specifically addressing
 6 recitals 408 and 423 --
 7 MR PICKFORD: Yes.
 8 MS ROSE: -- which you are relying on very heavily --
 9 MR PICKFORD: Yes.
 10 MS ROSE: -- and it is interpreting them in a certain way.
 11 MR PICKFORD: In the Decision Period. In the Decision
 12 Period.
 13 MS ROSE: Of course. Of course, the decision is only about
 14 the Decision Period.
 15 MR PICKFORD: Yes, and -- but the reason why I make that
 16 submission is because one has to remember what the facts
 17 were in the Decision Period, and in the Decision Period,
 18 this box was, as I have said many a time, intimately
 19 bound up --
 20 MS ROSE: Yes, but look what it says at 338. 339.
 21 MR PICKFORD: Yes, well, taking it bit by bit, the first bit
 22 that shows that:
 23 "... Shopping Units and Google Shopping are
 24 components of a whole ..."
 25 Well, during the Decision Period, I do not argue

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1 with that, because the shopping box was exclusively
 2 drawn from the -- from Google's CSS service, so they
 3 were part of a whole in that period.
 4 Applying that reasoning now, you would say that
 5 the Shopping Unit is also part of Kelkoo's CSS, because
 6 it treats everyone's CSSs in the same way.
 7 Then the next sentence that:
 8 "... 422 indicates that, in six ... countries,
 9 during a certain period, 'Google Shopping existed only
 10 in the form of the Shopping Unit without an associated
 11 standalone website'."
 12 Yes, that is obviously factually true, and that is
 13 all -- that is what it is saying there.
 14 If you go back to 422 and you read what that says,
 15 then I come back to the point that the Chair said he
 16 does not want me to make again, so I am not going to
 17 make it again. But what I say about that is, you have
 18 got to then decide, read in the context of the decision
 19 as a whole, what is 422 really telling you. Is it
 20 really telling you that the standalone site is just an
 21 irrelevance, or is it really telling you that: we think
 22 we can get away with it here, because this was just
 23 transitional and there were standalone sites elsewhere?
 24 MS ROSE: Okay. Thank you.
 25 THE CHAIRMAN: Yes, we have got that point.

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1 MR PICKFORD: I am being reminded that, at 6 -- if we go
 2 back to the Preliminary Issues Judgment -- I am not sure
 3 how much further this takes it forward, but --
 4 THE CHAIRMAN: We did go into this in the Preliminary Issues
 5 Judgment --
 6 MR PICKFORD: Yes, if --
 7 THE CHAIRMAN: -- and you submitted there the same point,
 8 that we are not bound.
 9 MR PICKFORD: Well, I think there might be a different point
 10 that I am being taken to.
 11 THE CHAIRMAN: I see.
 12 (Off microphone discussion)
 13 MR PICKFORD: What you will recall that you said below, I am
 14 sure, is that there was this debate about bindingness
 15 there, and what you said is: well, we are not sure that
 16 what I am saying is right, but we are not going to
 17 decide it, because we do not need to decide it because
 18 all we need is the decision, basically, we are convinced
 19 that the decision is on all fours with the General Court
 20 and so we just decide it on the basis of the decision.
 21 THE CHAIRMAN: Yes.
 22 MR PICKFORD: So that is what I was being shown.
 23 THE CHAIRMAN: I think we went a little further than saying
 24 we are not sure that what you said is right.
 25 MR PICKFORD: Okay, I think, yes --

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1 THE CHAIRMAN: I think we said we are very doubtful --
 2 MR PICKFORD: Yes, you might say you were deeply sceptical
 3 of my --
 4 THE CHAIRMAN: Yes, but we will not reach a definitive view.
 5 MR PICKFORD: -- my submission.
 6 I do not think I put it quite in the same way then
 7 as I am putting it now. I think, for a start, there is
 8 an added important nuance that I make now, which is
 9 the extent to which the General Court could be binding.
 10 THE CHAIRMAN: Yes.
 11 MR PICKFORD: I have made that point.
 12 THE CHAIRMAN: Yes.
 13 MR PICKFORD: I say it is an untested point of law,
 14 in fact --
 15 THE CHAIRMAN: Yes.
 16 MR PICKFORD: -- whether the General Court can be read as
 17 a gloss on what the decision says when you are
 18 interpreting the decision and giving binding effect to
 19 it, and I am going to say, but I do not know if there is
 20 any authority that goes either way, my submission is,
 21 no, it cannot, but I anticipate that obviously that was
 22 not convincing before and I am not going to try and
 23 argue the point any further now.
 24 THE CHAIRMAN: Yes.
 25 MR PICKFORD: So that -- going through those parts of

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1 the decision is my means of explaining why we meet all
 2 of the self-preferencing problems that were identified
 3 by the decision, because they are all about -- they all
 4 depend on not treating the standalone CSS in the same
 5 way as we treated standalone rivals and so what we put
 6 in place was mechanisms that ensured that we did treat
 7 standalone rivals in exactly the same way as we our own
 8 standalone CSS.
 9 So I have taken you through my submissions as to why
 10 we say the claim -- that the box is a manifestation of
 11 the CSS cannot be reconciled, I say, with the decision,
 12 so I do not think I need to cover that any further,
 13 because we have had that debate out in the course of me
 14 trying to go through those recitals.
 15 So I say that, actually, if you take the decision,
 16 it is actually me that wins as a result of what
 17 the decision finds in binding terms, you just have to
 18 interpret the decision properly. Obviously Mr Jowell
 19 has a contrary case on what it means.
 20 If you then move on to the next topic -- well,
 21 sorry, actually, there is perhaps just one further point
 22 just to underscore.
 23 Mr Jowell used a number of different phrases when he
 24 was describing what the box was, and sometimes he talked
 25 -- certainly in opening, he was saying the box is a CSS,

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1 "It quacks like a duck, it is a duck". Sometimes he
 2 talks about "manifestation of" a CSS, and in my
 3 submission, when one is -- when this Tribunal is
 4 addressing a submission that the box is a manifestation
 5 of a CSS, what that, in my view, must -- in my
 6 submission, must mean is that is in essence a CSS,
 7 irrespective of whether there might be something else in
 8 existence as well that is also a CSS. So it is
 9 obviously not saying it is the only CSS, because that
 10 would be silly, everyone knows there is a standalone.
 11 But it is saying, when you talk about a manifestation of
 12 a CSS, in my submission, you can only read that and
 13 understand that as saying what is on the page is
 14 sufficient of itself to tick all the boxes that we need
 15 to be -- that need to be ticked to show that it is --
 16 that it performs the job of a CSS. That is what he must
 17 mean and that is what I have been seeking to address you
 18 on and saying that is not what the decision in this case
 19 is.
 20 So when he says "part of a CSS", in my view, he just
 21 has to still come back -- in substance, although he says
 22 the box is part of a CSS, he is not making out the case
 23 that there was preferencing because the box in itself is
 24 not sufficient but there is something else that is being
 25 given a boost. That is not his case. His case in

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1 substance is the one that I have just explained.
 2 The reason why I make that point is I think that it
 3 is easy to elide different concepts and then be confused
 4 by the particular formulations that have been used, and
 5 one has to come back and always analyse what in
 6 substance is being said about the functioning of this
 7 box.
 8 So I see it is --
 9 THE CHAIRMAN: Would that be a sensible --
 10 MR PICKFORD: -- the halfway point, so that would be a --
 11 THE CHAIRMAN: That would be a sensible moment to take
 12 a break.
 13 (11.24 am)
 14 (A short break)
 15 (11.39 am)
 16 THE CHAIRMAN: Yes.
 17 MR PICKFORD: Thank you, sir.
 18 So I am now coming to the moment in submissions
 19 where I am stepping outside the confines of the decision
 20 and introducing some of the fact evidence and economic
 21 evidence that we heard, which I say reinforces my case
 22 and is inconsistent with the case against me about
 23 the Remedy box.
 24 THE CHAIRMAN: Can I put the decision away, as it were?
 25 MR PICKFORD: I think, for now, we can put the decision

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1 away, yes. I am going to obliquely -- I am going to
 2 make tangential references to things that I think you
 3 will be very familiar with, so I do not think you will
 4 need to pick it up again for it.

5 So what I say is that the Remedy box is a box of
 6 shopping ads selected on the basis of an auction
 7 combining bid, click-through rate and quality signals.
 8 That is common ground, it is Friedman 2, paragraph 20
 9 {H3A/15/5}.

10 Now, that is exactly how text ads are also selected,
 11 and not even Kelkoo is saying that having text ads is
 12 a CSS. Indeed, Mr Hunt acknowledged that the provision
 13 of ads is integral to general search. Just for your
 14 note, I am not going to take you there, that is
 15 {Day14/130}.

16 Mr Hunt also acknowledged that product search may be
 17 part of general search, and that is {Day14MT1/130}
 18 again, through to {Day14MT1/131}. And indeed, the
 19 experts agreed that a general search service seeks to
 20 respond with relevant responses to user queries of any
 21 kind or category, that is why it is general.

22 Now, what we know from the passages that we have
 23 seen in the decision is that a specialist service offers
 24 certain search functionalities that do not exist, or not
 25 to the same extent as on a general search service, and

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1 whilst the decision itself does not give us a totally
 2 watertight, concrete answer in relation to CSSs in that
 3 respect, we have to draw certain inferences from
 4 the paragraphs that I showed you, 172, 176.
 5 The evidence that we heard in this case very much
 6 answers that question as to: what are those search
 7 functionalities which do not exist, or not to the same
 8 extent, on a general search service? You know my answer
 9 to that. You know it is the filtering, it is the price
 10 sorting and it is the detailed reviews or buying guides,
 11 and I say that those functionalities are quite clearly
 12 core to a CSS on the basis of the Claimants' own
 13 evidence.

14 So if we could go, please, first, to Mr Hunt's first
 15 report, page 51. I am looking at paragraph 116(b),
 16 I think. Yes. {I2/1/51}.

17 So he is talking here about what CSSs do to deliver
 18 "a superior experience for users who navigate to" them:

19 "I understand ... a good CSS does this by:

20 "(i) Offering comprehensive, accurate,
 21 well-organised and structured product information from
 22 a variety of merchants in response to users' shopping
 23 queries, to allow category-based navigation."

24 So on (i), the information in the Remedy box is not
 25 comprehensive and structured so as to allow

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1 category-based navigation. That is simply not something
 2 you can do in the Remedy box at all.
 3 (ii), I accept, is common to both: returning
 4 results. Where it says:
 5 "... the availability of such products at the price
 6 listed."
 7 I mean, that is true insofar as there may be
 8 a price. It is not true if what is being suggested by
 9 that is that you can specify the prices, because you
 10 cannot filter by price.
 11 For (iii):
 12 "Catering for different types of user-specific
 13 considerations in order to be able to attract users with
 14 different needs ..."
 15 The way they do that is by:
 16 "... information on tax ... shipping costs, product
 17 and merchant reviews/buying guides, and technical
 18 filters based on assignment of product attributes so
 19 that sub-categories of products can be considered ..."
 20 Obviously the Remedy box does not do that.
 21 Then (iv) {I2/1/52}:
 22 "Providing a website which users can easily navigate
 23 through category structures, apply attribute level
 24 filters ..."
 25 Etc.

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1 It is basically the same points and I have the same
 2 response, that that is not something that you are able
 3 to do in the Remedy box.
 4 So that is the first bit of his evidence.
 5 I then come on to paragraph 292(b), which is on
 6 {I2/1/137}. Here, he is describing, at the final couple
 7 of sentences, starting with what the CSSs do.
 8 He says:
 9 "This may include a range of features, which could
 10 differ across CSSs, but often include the ability to
 11 implement advanced filtering tools, display
 12 comprehensive price information, and offer value-added
 13 features such as reviews and buying guides. These
 14 elements are likely to be central to
 15 the comparison shopping experience and enable CSSs to
 16 compete on quality and relevance."
 17 Now, I cross-examined Mr Hunt on this paragraph and
 18 I say that, realising too late that his core position
 19 set out here was incompatible with the case that
 20 ultimately his clients needed, what he said about this
 21 is that: well, maybe these are just -- when I said they
 22 were central to the shopping experience what I really
 23 meant was central optionality. That is the way he put
 24 it: "central optionality" {Day14MT1/125}. We say that
 25 that is an implausible change and that what Mr Hunt said

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1 in his report, he meant, and in any event, the idea of
 2 "central optionality", insofar as it means anything,
 3 does not make any difference from a market definition
 4 perspective, which is where all of this economic
 5 evidence comes in, because Mr Hunt conceded that in
 6 practice, standalone CSSs websites would want to, and
 7 do, provide filtering tools, {Day13MT1/33} and
 8 {Day14MT1/122}. He said that where CSSs are given
 9 the freedom and ability to compete with each other, that
 10 they would provide these functionalities, that is
 11 {Day14MT1/125} through to {Day14MT1/126}, and he
 12 accepted that buying guides and price history tools were
 13 functionalities by which CSSs competed with one another,
 14 and that is -- there is quite a few of these --
 15 {Day13MT1/16}, {Day13MT1/18}, and {Day14MT1/125-126}.
 16 So what I say in relation to that evidence is that
 17 even Mr Hunt is in practice driven to make concessions
 18 that make clear that the features that I have been
 19 banging on about, and no doubt boring the Tribunal with,
 20 are actual -- they are essential to an actual, real life
 21 CSS. So a box on the general engine's results page that
 22 does not offer these things is not a CSS and it is not
 23 a manifestation of Google's CSS either.
 24 The Claimants' own factual evidence also supports
 25 that view. So as one example, regarding Foundem,

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1 Mr Raff said:
 2 "... the filters on the left are absolutely vital to
 3 understanding the quality of our service, because you
 4 can instantly click a button and it would narrow
 5 [the results] ..."
 6 That was {Day6MT1/98}.
 7 That equally corresponds with Mr Stables'
 8 description of the characteristics of a good CSS that he
 9 sets out at paragraph 17 of his first statement
 10 {H1A/1/4}. So that is the first point there.
 11 Then, to meet criticism from the CSSs, including
 12 from Kelkoo, that fake CSSs were participating in
 13 the Remedy, Google introduced further criteria that
 14 needed to be satisfied in order to qualify to get
 15 the benefit of the Remedy, and that included that
 16 participants must offer sorting and filtering
 17 functionality on their sites. Now, nobody has suggested
 18 that we were wrong to do that --
 19 THE CHAIRMAN: Can you just remind me when Google did that?
 20 MR PICKFORD: Yes.
 21 THE CHAIRMAN: It was an amendment to the eligibility
 22 criteria, as I recall.
 23 MR PICKFORD: That is correct.
 24 So there is a letter of 20 November 2018, when we
 25 wrote to the Commission explaining that that is what we

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1 were doing. So it was on or around then. I would need
 2 to look to see precisely .
 3 THE CHAIRMAN: That is probably good enough.
 4 MR JOWELL: (Off microphone) In paragraph 42 of
 5 Mr Braendle's statement, I think it was a little later,
 6 in March.
 7 MS ROSE: March 2019?
 8 MR PICKFORD: That is slightly surprising, but I would have
 9 to check that.
 10 MS ROSE: So what were the eligibility criteria before that?
 11 THE CHAIRMAN: They had to have a certain number of
 12 merchants, I think.
 13 MS ROSE: 50 merchants.
 14 What else was it?
 15 MR PICKFORD: I am afraid I would have to go back to
 16 the document.
 17 MS ROSE: But it would be good to know what were
 18 the original eligibility criteria .
 19 THE CHAIRMAN: We have got a reference somewhere.
 20 MR PICKFORD: Well, my point here, if there was a problem
 21 with what Google did initially in that --
 22 MS ROSE: But your case is there was not a problem.
 23 MR PICKFORD: No, can I just -- sorry.
 24 I say there is no competition law problem with what
 25 we did at the very outset, because if the problem is we

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1 just gave too many people, that we were overly inclusive
 2 in the way that we were non-discriminatory, so we were
 3 not merely non-discriminatory between us and Kelkoo, but
 4 we were also non-discriminatory between us and people
 5 that, frankly, did not deserve to be treated in
 6 a non-discriminatory fashion, that is not a breach of
 7 our non-discrimination obligations as regards Kelkoo,
 8 that is just us having gone too broad and narrowing.
 9 The narrowing might have been sensible, because you do
 10 not want to have to -- you know, we all know the reasons
 11 why we narrowed, but that does not mean that when we
 12 were too broad we were in breach of our obligations --
 13 MS ROSE: But it is an indication of what Google thought
 14 were the essential features of a CSS.
 15 MR PICKFORD: I think -- I mean --
 16 MS ROSE: I think you would call that a revealed preference?
 17 MR PICKFORD: No, I do not accept that. All we were doing,
 18 initially, was seeking to, under, what I think you have
 19 seen evidence on, considerable pressure from
 20 the Commission to make the Remedy work, we initially
 21 cast the net very wide and then there were complaints
 22 and people were saying, "Ah, hold on a minute, you have
 23 cast it so wide that there are people that are joining
 24 in with ..." -- basically, we had the likes of Kelkoo
 25 saying it is too wide. So we responded to that to try

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1 to narrow it, because we were constantly seeking to keep
 2 the Commission happy.
 3 My point is this. When we introduced -- that was
 4 a restriction, so we said: actually, having reflected on
 5 it, we might have been too broad, and so what we are
 6 going to do is we are going to exclude people that
 7 cannot do these things. But in effect, at that point we
 8 are saying we are recognising that these are central to
 9 being a CSS and we drew the line too broadly initially .
 10 My point is, what was the response to that? No one
 11 was shouting at that point, "Oh, no, no, no, no, no,
 12 that is going beyond -- that is far beyond what a CSS
 13 does, all a CSS does is just do some very, very basic
 14 comparison". That is the point I draw from that.
 15 I am going to give you a reference to a document,
 16 but I do not particularly want to go through it, because
 17 I am -- I have to say, I am behind on my submissions,
 18 and obviously I am trying to answer as many questions as
 19 I can, but the reference as to the original requirements
 20 is set out in {M4/208/2}. So that is where we can find
 21 them, but if I may, I am just going to plough on on my
 22 course just for the moment, if, Ms Rose, you are content
 23 with that.
 24 So we all know that the Remedy box does not contain
 25 the features that we say make it -- would be necessary

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1 to make it a CSS. That is not in contention. Indeed,
 2 Kelkoo itself, even Kelkoo, who are obviously always
 3 going to argue that it is in some form a Remedy box,
 4 because that is their -- sorry, it is in some form
 5 a CSS, because that is their complaint. If you go to
 6 {J1A/91/1}, they have to cling on to the idea of some
 7 sort of way in which we are offering a comparison
 8 shopping service, otherwise obviously that is -- their
 9 case falls apart, but they say:
 10 "The key issue ..."
 11 In the first -- second paragraph:
 12 "The key issue is that this Remedy only results in
 13 users accessing a quasi-comparison service: an
 14 advertising box with a selection of advertisements from
 15 a selection of Google's advertisers."
 16 Just pausing there. It is not just Google's
 17 advertisers, it is also Kelkoo's advertisers and any
 18 CSS's advertisers.
 19 Then this crucial sentence:
 20 "There is no actual comparison shopping experience."
 21 So that is what Google -- that is what Kelkoo itself
 22 is telling the Commission: "no actual
 23 comparison shopping experience". Well, that, in my
 24 submission, is impossible to reconcile with
 25 the submission that they now have to make, that the box

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1 is sufficiently a comparison shopping experience but it
2 is in the CSS market. Those two statements both cannot
3 be true at the same time.

4 Now, Mr Friedman explained in his evidence that in
5 designing the Remedy, Google had given attention to
6 precisely the question of what kind of functionality
7 the box would or would not be allowed to have for risk
8 of it becoming a CSS, and, self-evidently, we did not
9 include the kind of functionality that we say would have
10 tipped it over into the edge of being a CSS.

11 Now, Mr Hunt responded to that and he said: oh,
12 well, that is because Google was providing a cut-down
13 service because it does not need to compete. What he
14 was really suggesting there was that, effectively, as an
15 incumbent, we were being lazy. I say, seen against
16 the obvious constraints that Google faces in not
17 providing a CSS on its SERP, a legal constraint that it
18 is common ground that we face, and the intense
19 competition that we face from Amazon in the shopping
20 sector, and Mr Friedman's evidence that we gave careful
21 consideration to what we could and could not include as
22 features of the box, Mr Hunt's suggestion that
23 the reason why the box does not have those features,
24 because it is just a cut-down service because we are not
25 trying to compete, in my respectful submission, is not

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1 credible, and it was not an objective and balanced
2 position that he advanced there.

3 So turning then to the way that Mr Hunt analysed
4 whether the Remedy box was a CSS, he, rather than
5 approaching it in the way that I have done, looking at
6 the functions which distinguish comparison shopping from
7 general search, honed in on what he said were
8 the similarities between the Shopping Unit and
9 the Remedy box. Firstly, he looked at visual
10 similarity, and you will remember that
11 cross-examination. He said that visual similarity is
12 important to why the Remedy box is still part of
13 Google's CSS. Then you may recall that in
14 cross-examination he then had to accept that Kelkoo's
15 proposed counterfactual 2, where, necessarily for
16 Kelkoo's argument, the box is not a CSS, bore
17 essentially the same visual similarity to
18 the purportedly unlawful Remedy box. Visually, they are
19 all of a piece. So we say that those visual
20 similarities are not helpful when what one is trying to
21 do is distinguish between what is and is not a CSS. So
22 that is what I say on that part of his analysis.

23 He then focused also on functional overlaps between
24 a CSS and the Remedy box in terms of the need to employ
25 algorithms, to select results, curating user

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1 experiences, holding the auction, etc. My response to
2 that is that that is equally uninformative, because
3 Google does those very same activities to place text ads
4 on the page, which Mr Hunt conceded are part of Google's
5 general search results and are not CSSs. So I say
6 again, the similarity in terms of functionality, in
7 terms of underlying types of technology, cannot get
8 Kelkoo home either.

9 Now, what Mr Hunt did note, again in
10 cross-examination, is he said this, a CSS is never going
11 to link through to other CSSs. His words
12 {Day14MT1/163}. He also said that he was not aware of
13 any CSSs that allow other CSSs to basically rent a spot
14 on their CSS which is an advert for their CSS. That was
15 {Day15MT1/11:11-14}. That was confirmed also by
16 Dr Stables in his evidence, and indeed Mr Hunt went on
17 to question why would they ever do that. In my
18 submission, that correct evaluation by Mr Hunt is
19 impossible to reconcile with the Remedy box being a CSS,
20 because that is exactly what the Remedy box does enable.
21 You can click -- it says "By Kelkoo", and you can click,
22 if you really want to, to go through to Kelkoo, and that
23 is something that would never happen on an actual CSS.

24 So in conclusion then, I say that when one brings
25 the economic evidence into play, it shows that

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1 the Remedy box is not a CSS but is part of Google's
2 general search service and therefore Kelkoo's
3 post-decision claim for abuse fails on the facts.

4 I am just being --

5 THE CHAIRMAN: When you say "brings the economic evidence",

6 I mean, I know it was Mr Hunt, but it is not really
7 economic evidence at all. This is not economics.

8 Indeed, Mr Noble, to his credit, said, I think, what he
9 was instructed by Google, that the question of whether
10 it is a CSS is a legal question, he will not, therefore,
11 address it. I think he was quite right.

12 MR PICKFORD: Yes. Well, that is consistent, sir -- I do
13 not think that can be held against me. That is
14 consistent with my primary submission, but you have
15 heard Kelkoo have advanced a case, and they put in two
16 very long reports by Mr Hunt seeking to support their
17 case about the Remedy box in essence being a CSS, or
18 a manifestation of Google's CSS.

19 THE CHAIRMAN: No, you can make those submissions. I am
20 just saying I do not think it is really economic
21 evidence.

22 MR PICKFORD: Well, whether it is economic evidence or not,
23 whether it is just -- what one might say, perhaps, is
24 that it is evidence that seeks to collect together some
25 facts about the way the boxes work now.

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1 THE CHAIRMAN: Yes.
 2 MR PICKFORD: I mean, I am not -- as you know, we instructed
 3 -- we gave the instructions that we did to Mr Noble
 4 because our case has always been you can determine this
 5 by reference to the decision. But I obviously have to
 6 meet the case that actually you need to go wider, and
 7 I say when you do go wider, it is absolutely on all
 8 fours with our case. It firmly confirms -- firmly
 9 supports what we say about the nature of that box.
 10 THE CHAIRMAN: Yes.
 11 MR PICKFORD: Then there are -- there are complaints that
 12 Google makes about the Remedy box in terms of its
 13 profitability, that it offers etc to Kelkoo. We
 14 covered -- we touched on that yesterday. I say none of
 15 those matter. Ultimately, the question is
 16 the definitional one that we have been addressing and we
 17 are either right about that or we are wrong about that,
 18 but that is the answer to all of those complaints,
 19 because they all depend on, implicitly, Kelkoo being
 20 right about their entitlement to have access to
 21 the page, which we say they are not entitled to.
 22 So I can then move on to the issue of
 23 counterfactual.
 24 Starting with the legal framework, our case on
 25 counterfactual is that the legal question under English

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1 law of causality of damages is a different question from
 2 the causality question posed for the purposes of effects
 3 under EU law on abuse of dominance, and that all this
 4 Tribunal needs to decide for the Decision Period and
 5 also obviously if we lose on abuse for the Post-Decision
 6 Period, is the former question, the English law, common
 7 law question of causality of damage. It is not required
 8 to revisit or reconcile its approach with what
 9 the Commission said about it or what the European courts
 10 said about it.
 11 I do come on to say -- and this is my secondary
 12 case -- that actually, if you trace through the rather
 13 tortured nature of the arguments in relation to this,
 14 one sees that you can actually distinguish the two,
 15 because they are also looking at, ultimately, different
 16 things. One is said to be, that is the European part of
 17 the equation, is said to be looking at potential
 18 effects. Now, it is a very -- I am going to do that,
 19 but I am going to do that second, because I do not have
 20 to win on that point, I can just win on the first point,
 21 and it is rather convoluted and involved and we have to
 22 go back to some of the same things that Mr Jowell went
 23 to.
 24 So I am going to start, if I may, with Regulation 1
 25 of 2003, and could we please -- so that is to be found

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1 at {AB1/1/1}.
 2 MR JOWELL: (Off microphone - inaudible).
 3 MR PICKFORD: I do not know who that was. Mr Hunt.
 4 THE CHAIRMAN: Yes, where in the regulation?
 5 MR PICKFORD: So I would like to start, please, with
 6 recital 1, at the beginning:
 7 "In order to establish a system which ensures that
 8 competition in the common market is not distorted,
 9 Articles 81 and 82 ..."
 10 Obviously now 101 and 102:
 11 "... of the Treaty must be applied effectively and
 12 uniformly in the Community."
 13 So the purpose of this regulation, as I think we all
 14 know, is to harmonise the substantive law on Article 101
 15 and 102 across the Community. It is not to harmonise
 16 damages law. To the extent that there was some
 17 harmonisation of damages law, that came later in
 18 the damages directive.
 19 Now, if I could then take you, please, to
 20 recital 22, which is on {AB1/1/5}.
 21 We see that:
 22 "In order to ensure compliance with the principles
 23 of legal certainty and the uniform application of
 24 the Community competition rules in a system of parallel
 25 powers, conflicting decisions must be avoided. It is

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1 therefore necessary to clarify, in accordance with
 2 the case-law of the Court of Justice, the effects of
 3 Commission Decisions and proceedings on courts and
 4 competition authorities of the Member States."
 5 So that reflects Article 16 that we are going to
 6 come to. It confirms that its purpose is "legal
 7 certainty and the uniform application of Community
 8 competition rules". That is the words I place emphasis
 9 on "Community competition rules".
 10 Now, if we then go to recital 34 {AB1/1/6}, this is
 11 the subsidiarity recital.
 12 It says:
 13 "The principles laid down in Articles 81 and 82 of
 14 the Treaty, as they have been applied by Regulation ...
 15 17, have given a central role to the Community bodies.
 16 This central role should be retained, whilst associating
 17 the Member States more closely with the application of
 18 the Community competition rules. In accordance with
 19 the principles of subsidiarity and proportionality as
 20 set out in Article 5 of the Treaty, this Regulation does
 21 not go beyond what is necessary in order to achieve its
 22 objective, which is to allow the Community competition
 23 rules to be applied effectively."
 24 So what this tells us is that regulation --
 25 the regulation cannot be construed expansively, it needs

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1 to be construed only as broadly as necessary to achieve
 2 its objectives, those objectives being the uniform
 3 application of Articles 101 and 102.
 4 So then if we go to Article 16, which is the central
 5 provision that we have been concerned with in this
 6 context, which is on {AB1/1/13}, what that says is that:
 7 "When national courts rule on agreements, decisions
 8 or practices under Article 81 or Article 82 of
 9 the Treaty which are already the subject of a Commission
 10 Decision, they cannot take decisions running counter to
 11 the decisions adopted by the Commission."
 12 That is the crucial sentence. It then goes on to
 13 deal with things that are contemplated, but that is not
 14 what we are concerned with here.
 15 So what it says is that when a national court is
 16 ruling on the causative consequences in -- sorry.
 17 What I say about this is that when a national court
 18 is ruling on the causative consequences in damages
 19 arising from a breach of Community Law, which is what we
 20 are concerned with when we are dealing with
 21 the counterfactual analysis, it is not ruling under
 22 Article 101 or 102 of the Treaty. It is simply not
 23 ruling under those provisions and therefore Article 16
 24 has no application to the English law question that we
 25 are concerned with.

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1 One sees that echoed through the case law. There
 2 are a number of cases that have been referred to. So if
 3 we could start, please, with the *Deutsche Bahn* case,
 4 that is at {AB2A/10}. This is a judgment of Lord Mance,
 5 with whom the other members of the Supreme Court agreed.
 6 If we could go, please -- if we start at paragraph 1
 7 {AB2A/10/3}.
 8 Could I just ask you to read paragraph 1 to see
 9 the context?
 10 THE CHAIRMAN: Can I just say that it really would be
 11 helpful, when one has English cases, to have, in
 12 accordance with the practice direction, a copy of
 13 the report, because then you get a headnote and it is
 14 really helpful when looking at things quickly. I know
 15 you did not compile this personally, but in general. If
 16 it is a very new judgment, it may not yet be reported,
 17 but this clearly is reported.
 18 MR PICKFORD: Yes, I apologise on behalf of whoever put this
 19 together.
 20 THE CHAIRMAN: Yes.
 21 MR PICKFORD: I could not agree more. It is obviously
 22 helpful for me as an advocate as well.
 23 THE CHAIRMAN: Yes, it is helpful for everyone, really.
 24 Anyway, you want us to go ...
 25 MR PICKFORD: If I could take you to {AB2A/10/3}, please,

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1 and to begin at paragraph 1.
 2 If I could just ask you to read paragraph 1 for some
 3 context.
 4 (Pause)
 5 Then we see -- if I could go to {AB2A/10/5}, please.
 6 If I could ask you to read paragraphs 10 and 11,
 7 which set out the key principles here.
 8 THE CHAIRMAN: This case, what was this about? Someone --
 9 various cartel members had appealed and one had not; was
 10 that it? The question, what was the actual issue that
 11 came --
 12 MR PICKFORD: So the issue I think ultimately went to a time
 13 -- went to a time-bar point, but within the context of
 14 that time-bar point, there came -- there was also
 15 a question about the bindingness of decisions of
 16 the European Commission.
 17 THE CHAIRMAN: Is this the case where the extended
 18 limitation period from the point of an appeal would
 19 apply to one of the cartelists who did not appeal?
 20 MR PICKFORD: I think that is right.
 21 THE CHAIRMAN: Was that the --
 22 MR PICKFORD: To be clear, I am not saying that -- so
 23 the statements that I am relying on here --
 24 THE CHAIRMAN: Yes.
 25 MR PICKFORD: -- they are dicta and they are summarising

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1 European case law. I am not saying that they were
 2 the basis of the decision of the Supreme Court --
 3 THE CHAIRMAN: Yes.
 4 MR PICKFORD: -- but they are a convenient way of tapping
 5 into what the law says.
 6 THE CHAIRMAN: Yes.
 7 MR PICKFORD: I am also going to take you to some of
 8 the other cases.
 9 (Pause)
 10 On 11, it is basically just the first sentence that
 11 I rely on. You do not need to read the whole of it,
 12 unless you would like to.
 13 (Pause)
 14 So if I could then show you *Otis*, which is referred
 15 to there, that is at {AB2B/24}, and this was a judgment
 16 concerning -- it was a preliminary reference concerning
 17 the interpretation of Articles 282, 353 and 47 of
 18 the Charter of Fundamental Rights of the European Union.
 19 The basic context was that there was a -- there had been
 20 a cartel in relation to lifts, and then the Commission
 21 was also suing and there were questions about the fact
 22 that, well, the appellants needed to be able to exercise
 23 their rights in the Community institutions and there
 24 were questions raised about the extent to which any of
 25 this was sort of -- that the Commission's pursuing its

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1 own damages was fair, in essence. I can ...
 2 THE CHAIRMAN: Yes.
 3 MR PICKFORD: The relevant passages that are referred to in
 4 the judgment in *Deutsche Bahn* that I showed you are on
 5 page {AB2B/24/11} of this judgment, starting at 65.
 6 If I could ask you, please, to read 65 and 66.
 7 (Pause)
 8 THE CHAIRMAN: So this was a reference from -- was it
 9 the Belgian court where --
 10 MR PICKFORD: Yes.
 11 THE CHAIRMAN: -- the Commission was suing the cartelists
 12 for damages?
 13 MR PICKFORD: Exactly, and what was being said against it
 14 is: well, you are judge and a party in your own cause
 15 and that is unfair.
 16 THE CHAIRMAN: Yes.
 17 MR PICKFORD: What is being said here is: no, that is not
 18 a problem. A distinction is being made between what
 19 the Commission does in relation to Community Law, where
 20 it makes findings about abuse, and then this very
 21 separate thing, which is what the Belgian courts then
 22 had to grapple with, which is, separately: what are
 23 the damages implications of that abuse? Sir, that is
 24 why it is referring here to the distinction that one
 25 finds in Regulation 1 of 2003 and Article 16 in

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1 particular as between, on the one hand, questions of
 2 Community Law -- and I accept fully that on questions of
 3 Community Law this Tribunal is inherently bound by
 4 anything that has been found to be binding in
 5 the decision, but what I say is that you are not bound
 6 by those findings, which only concern the question of
 7 abuse, when you then turn your mind to the question of
 8 damages. You are allowed to apply English law and you
 9 must apply English law to the question of the causation
 10 of damage for the purpose of damages.
 11 MS ROSE: So paragraph 66:
 12 "... even when the Commission has in its decision
 13 determined the precise effects of the infringement, it
 14 still falls to the national court to determine
 15 individually the loss caused to each of the persons to
 16 have brought an action for damages."
 17 MR PICKFORD: Yes.
 18 MS ROSE: Now, is the court saying, even where there is
 19 a finding of actual effects of an infringement,
 20 the question of causation of damages is at large for
 21 the national court --
 22 MR PICKFORD: Yes.
 23 MS ROSE: -- or is it simply saying, where there is
 24 a finding of the effect of an infringement on
 25 competition, you have still got to assess the effect on

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1 the individual defendant? Do you see what I mean?
 2 MR PICKFORD: Yes, I understand the distinction.
 3 MS ROSE: It is saying that the individual -- it is
 4 the individual assessment. So, in other words, if you
 5 applied it to this case, you could say, well, the court
 6 has to operate within the framework -- the Tribunal has
 7 to operate within the framework of what the Commission
 8 has decided and the findings that are binding --
 9 MR PICKFORD: Yes.
 10 MS ROSE: -- but within that framework, it still has to
 11 assess the loss suffered by Kelkoo, and that is
 12 a question. So, you know, Kelkoo has got to establish
 13 what would its business have done over the years, how
 14 would it have been different if there had not been an
 15 infringement and so on.
 16 MR PICKFORD: Yes.
 17 MS ROSE: Or does it mean that the whole question of whether
 18 there was an effect and, if so, what effect, is up for
 19 grabs?
 20 MR PICKFORD: I say it is the former, and the reason why
 21 I say that is the construction that I had of
 22 Regulation 1 in 2003 itself.
 23 THE CHAIRMAN: So it is the former?
 24 MS ROSE: Do you mean it is the latter?
 25 MR PICKFORD: Sorry, I think you started with one and

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1 then --
 2 MS ROSE: Sorry.
 3 You mean that the whole question of causation of
 4 loss --
 5 MR PICKFORD: Exactly.
 6 MS ROSE: -- is up for grabs?
 7 MR PICKFORD: I say the whole question of --
 8 MS ROSE: Not just the individual question?
 9 MR PICKFORD: Yes.
 10 What I am saying here is they are saying that -- all
 11 that further paragraph is saying is, even if it has gone
 12 so far as to effectively make precise findings, when it
 13 comes to considering claims for damages, you have just
 14 got to do that under the national law, and that could --
 15 there are situations, and in my submission this is
 16 potentially one of those situations, where the question
 17 of causation under Community Law, because of the type of
 18 question that it is answering under Community Law, has
 19 a different answer to the question of causation under
 20 English common law on how you go about assessing damages
 21 and how you go about creating a counterfactual for that
 22 purpose.
 23 THE CHAIRMAN: You will come on to that.
 24 I have to say, for myself, I do not think that is
 25 what they are saying here at all. I think they are

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1 simply making the point that Ms Rose has made, that if
 2 the decision has determined the effects, still
 3 the national court is going to have to see whether
 4 the individual claimant before it, what loss they have
 5 suffered. So I do not think this particularly helps.
 6 MR PICKFORD: Well, can I also just show you one further,
 7 more recent authority, just so you have the full
 8 picture?
 9 THE CHAIRMAN: Yes.
 10 MR PICKFORD: So this is *Meliá Hotels*, it is at {AB2B/25},
 11 and it was a request for a preliminary ruling on
 12 the interpretation of the damages directive. In that
 13 context we see the third question which arose, and we
 14 can pick that up on {AB2B/25/10} at paragraph 49.
 15 A question arose about the criterion plausibility of
 16 harm under Article 5(1) of the Directive. What one sees
 17 is that, firstly, there is some re-interpretation by
 18 the court, as is so often the case --
 19 THE CHAIRMAN: This is the disclosure provision, is it?
 20 MR PICKFORD: Yes, I think that is right. I will have to
 21 just double-check that.
 22 Yes, it is about:
 23 "... the gathering of requested evidence dependent
 24 on the claimant submitting a reasoned justification ..."
 25 Yes.

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1 THE CHAIRMAN: In order to -- the national law has to allow
 2 disclosure depending upon:
 3 "... justification ... sufficient to support
 4 'the plausibility of its claim for damages'."
 5 Yes.
 6 MR PICKFORD: Then the analysis is picked up in 55, where it
 7 is recalling Article 16 of Regulation 1 of 2003. I do
 8 not think you really need -- we can just go through that
 9 very fast, because we know what that says.
 10 Then it goes, at 57:
 11 "It ... follows from the Court's case-law that
 12 [the] obligation on the national court not to take
 13 decisions running counter to a Commission Decision
 14 finding an infringement ... requires the national court
 15 to accept that a prohibited agreement or practice
 16 exists. By contrast, the existence of harm and of
 17 a direct causal link between the harm and the agreement
 18 or practice in question remains a matter to be assessed
 19 by the national court ..."
 20 It refers back to *Otis* there, which I showed you.
 21 I take from that that it is the bolder proposition of
 22 the two that were put to me by Ms Rose rather than
 23 the narrower one.
 24 Now, if I could go then, as the final preliminary
 25 point on this, to --

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1 THE CHAIRMAN: The issue before them was whether the mere
 2 fact that there is a decision finding an infringement is
 3 sufficient to establish the plausibility of a claim for
 4 damages.
 5 MR PICKFORD: Yes.
 6 THE CHAIRMAN: Or whether the party seeking disclosure might
 7 have to do a bit more. That was the --
 8 MR PICKFORD: That is right.
 9 THE CHAIRMAN: -- question.
 10 MR PICKFORD: Yes.
 11 THE CHAIRMAN: I think the court is saying, no, the fact
 12 that the Commission has found an infringement, that does
 13 not, in itself, establish plausibility of damages, that
 14 is something --
 15 MR PICKFORD: Yes.
 16 THE CHAIRMAN: -- you look at in the -- the national court
 17 looks at.
 18 MR PICKFORD: Yes --
 19 THE CHAIRMAN: But it is not saying what you do, how far
 20 the national court has to pay regard to a finding of
 21 effect --
 22 MR PICKFORD: Well, in my submission, the reason why it is
 23 saying you need to look at -- you need to grapple with
 24 that in the national court is because in tort, I think
 25 commonly across all jurisdictions, you need both the bad

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1 act and the damage, and you get the bad act from
 2 the decision, but you get -- you need arguable loss, and
 3 in order to get the arguable loss, you have then moved
 4 into the realms of national law. That is what say
 5 I this means.
 6 THE CHAIRMAN: Yes.
 7 MR PICKFORD: Can I go, please, to the damages directive.
 8 That is at {AB1/3}, and I am going to recital 11, which
 9 is on {AB1/3/3}.
 10 For my purposes, what I need is, four lines down,
 11 the sentence:
 12 "All national rules ..."
 13 National rules:
 14 "... governing the exercise of the right to
 15 compensation for harm resulting from an infringement of
 16 Article 101 or 102 TFEU, including those concerning
 17 aspects not dealt with in this Directive such as
 18 the notion of causal relationship between
 19 the infringement and ... harm ..."
 20 So the point there being made that that is
 21 a national rule, the notion of causal relationship
 22 between infringement and harm:
 23 "... must observe the principles of effectiveness
 24 and equivalence."
 25 So consistent with all the other submissions that

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1 I have been making, I say that recognises that that
 2 notion of causal relationship between infringement and
 3 harm is an exclusively domestic question and therefore
 4 it has to be answered properly according to domestic
 5 law.
 6 The final point on this directive, if we go to page
 7 {AB1/3/12}, please, and Article 3, which concerns
 8 the "Right to full compensation", it says:
 9 "Full compensation ..."
 10 At point 2:
 11 "... shall place a person who has suffered harm in
 12 the position in which that person would have been had
 13 the infringement of competition law not been committed."
 14 Then 3:
 15 "Full compensation under this Directive shall not
 16 lead to overcompensation ..."
 17 So insofar as those are principles that need to be
 18 reflected in national law, I say they are properly given
 19 effect by English law and the test that you remove
 20 the abuse but you do not go further than that, because
 21 otherwise you would have overcompensation, because
 22 where, as I am sure you know, this is heading -- where
 23 this point is heading is that, if one imagines
 24 a counterfactual world that addressed
 25 the discrimination, for example by giving equal access

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1 to the boxes, whatever that means, even if it is equal
 2 access on the approach that Kelkoo takes, say we are in
 3 their world 3a, that has solved the discrimination.
 4 They accept that. They accept that. Obviously they do.
 5 They cannot deny that.
 6 MS ROSE: I think the only basis on which they put that is
 7 that they say we are bound in relation to 3a.
 8 MR PICKFORD: Yes. Okay. So -- but what I --
 9 MS ROSE: But you would say that we cannot be bound to give
 10 what would be overcompensation as a matter of English
 11 law and also as a matter of identifying what is the loss
 12 caused by the breach --
 13 MR PICKFORD: Yes.
 14 MS ROSE: -- because that would be incompatible with
 15 the damages directive, and a finding made by
 16 the Commission in relation to the establishment of
 17 the infringement --
 18 MR PICKFORD: Yes.
 19 MS ROSE: -- cannot require the national court to
 20 overcompensate in a way incompatible with the damages
 21 directive --
 22 MR PICKFORD: Correct.
 23 MS ROSE: -- and incompatible with national law.
 24 MR PICKFORD: Quite.
 25 So I say, not only does Article 16, on its own --

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1 sorry, not only does Regulation 1 of 2003/Article 16
 2 give you the answer in terms, because it talks about
 3 when the national court is taking a decision under 101
 4 and 102, which this Tribunal, once it turns its
 5 attention to the counterfactual, is not doing any more,
 6 so on its own terms, that must be the right construction
 7 of the regulation, and that is --
 8 MS ROSE: But, I mean, you say that -- you would say that is
 9 actually a result in EU law and national law, because
 10 EU law, one, requires the national courts to apply
 11 national law --
 12 MR PICKFORD: Yes.
 13 MS ROSE: -- and two, it requires it to apply national law
 14 in accordance with the principles set out in Article 3
 15 of the damages directive.
 16 MR PICKFORD: Yes.
 17 Sir, if I then may go to the -- to national law on
 18 the causative link. That is -- what we rely on is
 19 dicta. It is not the ratio of the case, but in my
 20 submission they are really helpful dicta because it is
 21 a very succinct and clear explanation of what is
 22 required in national law, and it is in Lord Leggatt's
 23 judgment in *Rukhadze*, and that is to be found at
 24 {AB2A/23/32}.
 25 So this was a case -- as Kelkoo explained in their

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1 closing submissions, this was a case that concerned
 2 a challenge to the duty of fiduciaries to account for
 3 unauthorised profits and the defendants contended that
 4 the appropriate Remedy was a breach of duty -- for
 5 the breach of duty was damages calculated on
 6 the ordinary "but for" basis by reference to a lawful
 7 counterfactual. The majority of the Supreme Court
 8 rejected that submission. Lord Leggatt reached the same
 9 conclusions, ultimately, as the rest of
 10 the Supreme Court, but by a different legal route, and
 11 that required him to consider the ordinary law on
 12 damages and that is why he is explaining it.
 13 MS ROSE: So you say it does not matter that he is
 14 dissenting on the result here --
 15 MR PICKFORD: Yes.
 16 MS ROSE: -- because you are looking more at his reasoning
 17 in relation to damages?
 18 MR PICKFORD: Exactly --
 19 THE CHAIRMAN: In fact, he did not dissent on the result.
 20 (Simultaneous speakers - inaudible)
 21 -- he reached the same conclusion by a different
 22 route.
 23 MR PICKFORD: Exactly.
 24 THE CHAIRMAN: I do not think there is anything
 25 controversial in what he says anyway. I doubt anyone

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1 would seek to suggest that it is incorrect, and I do not
 2 think Mr Jowell did say that, it is just a convenient
 3 statement of what is well recognised is the principle.
 4 It is in which paragraph?
 5 MR PICKFORD: So if we go -- if we pick it up on
 6 {AB2A/23/60}.
 7 THE CHAIRMAN: The details of the case do not really matter.
 8 MR PICKFORD: No, they do not.
 9 THE CHAIRMAN: It is quite a complicated case.
 10 MR PICKFORD: Exactly.
 11 I was giving you the facts --
 12 THE CHAIRMAN: No, well, it is --
 13 MR PICKFORD: In fairness, I did not want it being suggested
 14 that I was overplaying this, but I still say it is very
 15 useful.
 16 THE CHAIRMAN: It is 162 and --
 17 MR PICKFORD: 162, that is right.
 18 THE CHAIRMAN: -- yes, to 164, is it not?
 19 MR PICKFORD: If I could ask you to read 162 down to 165.
 20 (Pause)
 21 THE CHAIRMAN: 163 seems to me the critical statement.
 22 MR PICKFORD: Yes, well I certainly place a lot of weight on
 23 the defendant's conduct being:
 24 "... changed to the minimum extent necessary to
 25 achieve compliance with the duty."

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1 THE CHAIRMAN: Well, yes, the two steps.
 2 MR PICKFORD: Yes, that too.
 3 (Pause)
 4 MS ROSE: What are the "recognised situations in which this
 5 method ... does not work" that he says at 166
 6 {AB2A/23/61}?
 7 MR PICKFORD: They are effectively when you have got -- an
 8 example would be like when two people shot the same
 9 victim at the same time, and then it becomes quite
 10 complicated to -- you --
 11 MS ROSE: What you might call the Julius Caesar conundrum?
 12 MR PICKFORD: Yes, that is the classic. He does not put it
 13 quite as colourfully as that, but, yes, that is the sort
 14 of classic example of where, philosophically, it can
 15 break down, because, of course, Lord Leggatt has
 16 the advantage of having been a philosopher,
 17 I understand, prior to becoming --
 18 THE CHAIRMAN: But that will not be the FCA case, clearly,
 19 but I do not think we need worry about that.
 20 MR PICKFORD: So what I draw from that is the sentence that
 21 I particularly emphasised.
 22 Also, sir, as you say, identifying the specific
 23 duty, and remember the specific duty that was breached
 24 here was not having algorithms, it was
 25 the discrimination in relation to having --

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1 MS ROSE: You would accept that --
 2 THE CHAIRMAN: Well, the duty was the duty not to abuse your
 3 dominant position.
 4 MR PICKFORD: Yes.
 5 THE CHAIRMAN: That was the duty you were under.
 6 MR PICKFORD: Yes.
 7 THE CHAIRMAN: Then there is a question of what is
 8 the particular conduct which constitutes the breach, and
 9 that begs the question. That is where we run up against
 10 the fact the conduct was the combination, and then --
 11 MR PICKFORD: Ah, well, sir, I do have something to say on
 12 that, which is I was at pains to stress, yesterday, that
 13 the conduct, i.e. what Google did, is the discrimination
 14 in terms of positioning and display, and that all
 15 basically takes effect through the box, because in
 16 generic results it does not rank itself at all. So --
 17 THE CHAIRMAN: We understand the point, that you say -- but
 18 the conduct that was identified as constituting
 19 the breach had these two limbs which -- not
 20 individually, but in combination. That was the conduct
 21 identified.
 22 MR PICKFORD: Well, sir, my point is -- the point that --
 23 I do not want to --
 24 THE CHAIRMAN: That is why I find -- I mean --
 25 MR PICKFORD: -- spend too much time doing what I did

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1 yesterday --
 2 THE CHAIRMAN: Yes.
 3 MR PICKFORD: -- but just to remind you, my point on that
 4 from yesterday is that the conduct, that is the bad act
 5 by Google, is just the discrimination. What then --
 6 THE CHAIRMAN: But --
 7 MR PICKFORD: Sorry, could I just --
 8 THE CHAIRMAN: Yes, sorry.
 9 MR PICKFORD: What then happens is that there is then an
 10 analysis in the -- of the effects of that in both
 11 the decision and the -- and then that is carried through
 12 in the European courts. In particular, the question
 13 is: what are the effects of that on traffic? It is in
 14 that context, when considering effects on traffic, that
 15 the court starts talking about the two limbs being
 16 the demotion limb and the box limb. That is not how
 17 the discrimination part of the case is actually put.
 18 The discrimination part of the case is put, as I showed
 19 you yesterday, that it is about the discriminatory
 20 positioning and display.
 21 An important point that comes from this is, the way
 22 that the Commission effectively looked at effects, it
 23 was basically imagined implicitly -- it does not
 24 actually explain that this is what it is doing and
 25 the later courts have to kind of tease this out of

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1 the decision, but, implicitly, it is taking away the box
 2 and taking away algorithms.
 3 Now, my learned friend does not say you are bound,
 4 in your counterfactuals, to take away the box, he
 5 envisages worlds with boxes. Indeed, the most
 6 profitable worlds for him are with boxes. So, with
 7 respect, I say it is not quite precise enough to say it
 8 has got two limbs and you take both of them away. I say
 9 you have got to be really precise, just as we are urged
 10 to by Lord Leggatt, and you have to just take away
 11 the discrimination and there is only one means of doing
 12 that.
 13 THE CHAIRMAN: No, I fully see your argument, but the
 14 conduct, nonetheless -- I mean, as you say, the courts
 15 had to tease it out, but it has been teased out by
 16 the Court of Justice very expressly in paragraph 24 of
 17 the Court of Justice's judgment, if we just look at
 18 that. I think it is {BA/4/6):
 19 "More specifically, the conduct identified by
 20 the Commission as the source of the abuse ..."
 21 MR PICKFORD: Yes, and I agree with that. That is
 22 the point:
 23 "... that Google displayed its comparison shopping
 24 service on its general results pages in a prominent ...
 25 eye-catching manner in dedicated 'boxes', without that

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1 comparison service being subject to its adjustment
 2 algorithms ..."
 3 That is the core point.
 4 THE CHAIRMAN: But the sentence goes on.
 5 MR PICKFORD: Yes, but what that is calling out is that
 6 there was a special place on the box -- sorry, there was
 7 a special place on the page that was -- that had a host
 8 of advantages. One advantage is it was eye-catching,
 9 another advantage is it was right at the top and another
 10 advantage is it did not get subject to any algorithms.
 11 There is no finding, ever, in any part, that there is
 12 anything wrong with even heavy demotion.
 13 THE CHAIRMAN: No, I understand your argument. I just say
 14 that I think the conduct identified is both, otherwise
 15 the court would have stopped and just said:
 16 "... whereas competing shopping services can appear
 17 only as general search results."
 18 MR PICKFORD: Well, sir, I do not -- I mean --
 19 THE CHAIRMAN: It is, clearly, and we have had all those
 20 references in the decision where they say: it is not
 21 this alone, it is not this alone, it is the combination.
 22 MR PICKFORD: Yes, and what that means, as a matter of basic
 23 logic, in my submission, is if you have got something
 24 that is a combination, then you can solve it by taking
 25 away one of the things. It is like drunk driving.

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1 THE CHAIRMAN: Well, that I --
 2 MR PICKFORD: If -- in order to be drunk driving, you have
 3 to be drunk and driving. You can solve that problem by
 4 either not being drunk whilst you are driving or not
 5 driving whilst you are drunk. I might have said
 6 the same thing twice, I am not sure, but anyway ...
 7 MS ROSE: Can I just ask you a slightly different question?
 8 Where it says defence conduct is changed to the minimum
 9 necessary to achieve compliance with the duty.
 10 MR PICKFORD: Yes.
 11 MS ROSE: Now, you would accept, I think, that that is
 12 subject to a qualification --
 13 MR PICKFORD: Yes.
 14 MS ROSE: -- that the change must also be commercially
 15 plausible --
 16 MR PICKFORD: Yes --
 17 MS ROSE: -- and also -- I mean, obviously it has to be
 18 technically feasible or you could not do it, but it must
 19 also be commercially plausible.
 20 MR PICKFORD: Yes, I accept that.
 21 MS ROSE: That is one point where we get into some
 22 difficulty here, because it is easy, if you are talking
 23 about somebody breaking the speed limit, to say, well,
 24 they had to comply with the speed limit. I mean, he
 25 nuances it by saying, well, actually it might have been

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1 unsafe for you even to drive at the speed limit,
 2 actually, to drive carefully, you might have had to
 3 drive at 25 and not 30. But here we are looking at
 4 a different situation, where you say, well, okay, it
 5 might have been lawful just to take away the box, but
 6 is it commercially plausible --
 7 MR PICKFORD: Yes.
 8 MS ROSE: -- that Google, seeking to maximise shopping
 9 starts, would have no box? That is where things start
 10 to get extremely messy.
 11 MR PICKFORD: Well, I say they get messy, arguably --
 12 obviously I have some answers, but they get messy,
 13 arguably, on the facts, but in my submission, there is
 14 no --
 15 MS ROSE: But that is the principle. We all agree that is
 16 the principle.
 17 MR PICKFORD: Yes, but I say there is no problem, actually,
 18 with what the law says we are supposed to do here,
 19 because what the law says is both you change the minimum
 20 extent, but obviously it has got to be realistic, and
 21 when Lord Leggatt is saying that you make a change to
 22 the minimum extent, what he is not saying is you have
 23 got to do some strange contortion to just make
 24 the tiniest tweak, even if that is not commercially
 25 sensible. The reason why he is talking about changing

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1 to the minimum extent is because he is recognising,
 2 I say, the precise point that I make and the problem
 3 with their case, which is if -- which is what you cannot
 4 do is bring in lawful conduct and get rid of that in
 5 your counterfactual, because if you start getting rid of
 6 things that are lawful in your counterfactual, then you
 7 will overcompensate, because you will not merely
 8 compensate for the bad act, you will compensate for acts
 9 that were perfectly permissible. I say that is what he
 10 is talking about there. That is why he is saying what
 11 he does.
 12 So I think if I can then turn to Kelkoo's points on
 13 the law. It has a couple of cases that it relies on to
 14 argue against me.
 15 The first of those is the *Sainsbury's v Mastercard*
 16 case in the Supreme Court, which, Ms Rose, you will know
 17 well.
 18 MS ROSE: There is no need to rub it in, Mr Pickford!
 19 MR PICKFORD: Sorry?
 20 MS ROSE: There is no need to rub it in!
 21 MR PICKFORD: Sorry, no, I was not trying to rub anything
 22 in, no, only that this was a -- well, I was not even
 23 going there, but obviously this is an extremely rare
 24 occasion that things happened in the way they did in
 25 this case.

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1 My learned friend, we say, has misunderstood
 2 the case, and it concerns the lawfulness of certain UK
 3 MIFs which mirrored EEA MIFs and then were the subject
 4 of a Commission Decision, and then there was an appeal
 5 and an CJEU judgment, and what Kelkoo relies on it for
 6 is the proposition that the Supreme Court considered
 7 itself bound by the essential factual basis of
 8 the CJEU's findings, including as to counterfactual.
 9 We say that that is wrong. The question in that
 10 case was whether the fact pattern regarding UK MIFs was
 11 materially distinguishable from that applying to EEA
 12 MIFs, and if it was in that case, the UK courts would
 13 have been bound to apply the law established by
 14 the Court of Justice in *Mastercard* and so find that
 15 there was an infringement of the UK MIFs as well. If we
 16 could pick it up at paragraph 40(a), which is on
 17 {AB2A/14/26}, the question posed is:
 18 "Did the Court of Appeal err in law in finding that
 19 there was a restriction of competition in the acquiring
 20 market contrary to art.101(1) TFEU and equivalent
 21 national legislation? (the restriction issue)."
 22 If we go, please, to page -- sorry, paragraph 45,
 23 and I will have to find which -- {AB2A/14/28}.
 24 MS ROSE: I think we might have the wrong judgment.
 25 MR PICKFORD: Oh, gosh.

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1 MS ROSE: I think you wanted the *Visa* judgment. We have
 2 got *Merricks*.
 3 THE CHAIRMAN: You have not given the *Opus* reference,
 4 actually, for the judgment.
 5 MR PICKFORD: I beg your pardon. I am in the judgment I am
 6 meant to be in, but it is a different one. There was
 7 obviously confusion because I was not being
 8 significantly clear. It is *Sainsbury's v*
 9 *Mastercard* [2020] UKSC --
 10 THE CHAIRMAN: Have you got the *Opus* reference?
 11 MR PICKFORD: Yes.
 12 MS ROSE: The bundle reference?
 13 MR PICKFORD: I beg your pardon. It is {AB2A/14/1} to
 14 start, and I have obviously gone too fast, I apologise.
 15 Yes. So to rewind, Kelkoo relies on this for
 16 the proposition that the Supreme Court considered itself
 17 bound to apply the essential factual basis of the CJEU's
 18 findings, including as to counterfactual, and I say that
 19 that is wrong. The question was whether the fact
 20 pattern regarding UK MIFs was materially distinguishable
 21 from that applying to EEA MIFs and therefore whether
 22 the legal findings carried over because the facts were
 23 equivalent. I was picking it up at 40(a), which is on
 24 page {AB2A/14/26} of the judgment. Sorry, I beg your
 25 pardon, I was on my own version, I had not realised we

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1 had not got there on the wider --
 2 THE CHAIRMAN: Yes.
 3 MR PICKFORD: Yes. So that is the question under 40(a).
 4 Then if we go to {AB2A/14/28}, we are concerned with
 5 the first of those issues, the 40(a) one.
 6 MS ROSE: Sorry, where are you? Paragraph?
 7 MR PICKFORD: Sorry, I am at paragraph 48:
 8 "... there are essentially two issues which
 9 arise: (i) whether, as the Court of Appeal held,
 10 the court is bound by the *Mastercard* CJ decision on
 11 the restriction issue ..."
 12 So that is the point that I am concerned with.
 13 Then if we go, please, to paragraph 68, which is on
 14 {AB2A/14/32}, and what was happening here is that *Visa*,
 15 as, madam, you will know, were seeking to distinguish
 16 the factual basis for the Court of Justice judgment in
 17 *Mastercard*. One sees that in 68 and one sees the same
 18 point again in 72, which is on the next page
 19 {AB2A/14/33}:
 20 "*Mastercard* CJ is accordingly factually
 21 distinguishable."
 22 So that is the point that was being made.
 23 Then we see how that is dealt with by the court at
 24 page {AB2A/14/36} of the report, and could I ask you
 25 please to read 92 and 93.

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1 (Pause)
 2 So what one sees from that is that
 3 the counterfactual question was just one part of
 4 the factual matrix that needed to line up between the UK
 5 and the EEA MIFs for the CJEU's ruling on law to be
 6 formally binding and non-distinguishable, but an
 7 implication of that is that if the UK courts had not
 8 found that the facts lined up, i.e. if the facts had
 9 been distinguishable, a different outcome would have
 10 been available to the UK court. So this simply does not
 11 support, in my submission, my learned friend's point at
 12 all. It is just a classic question about whether
 13 facts --
 14 MS ROSE: Is it also relevant that this is only about
 15 whether there was an infringement --
 16 MR PICKFORD: Yes, it is also that.
 17 MS ROSE: -- and it is not about the purely domestic law
 18 question of causation of damages?
 19 MR PICKFORD: Yes, and the same point applies to their other
 20 authority, which is the *Merricks v Mastercard* one.
 21 I think we can get through that, too, before lunch, if
 22 we may. That is at {AB2A/21}. So this is a decision of
 23 the Court of Appeal, and the Court of Appeal found that
 24 *Mastercard* could not argue for a MIF above zero because
 25 the Commission's decision required *Mastercard* to remove

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1 the MIFs entirely, and the argument was about, well,
 2 what was permissible under Article 101(3). Could we
 3 have something non-zero.
 4 If you go to the judgment of the Chancellor at
 5 paragraph 160, which, hopefully, we are going to find on
 6 {AB2A/21/48}, he says:
 7 "Articles 3 to 5 [about halfway down] of
 8 the operative part of the Decision do not say that
 9 *Mastercard*'s MIFs are too high and should be set at
 10 a lower level but that *Mastercard* has to dismantle its
 11 entire system of rules and decisions insofar as it
 12 concerns EEA MIFs, its entire EEA MIF architecture,
 13 within six months."
 14 Then at 163 {AB2A/21/49}, he concludes, in relation
 15 to where all this is all going on counterfactual, and
 16 that is the counterfactual based on 101(3), the 101(3)
 17 counterfactual:
 18 "Accordingly, in my judgment, the correct
 19 counterfactual by reference to which damages are to be
 20 assessed is that of no or zero EEA MIFs."
 21 So the point being made there was that the abuse was
 22 sufficiently clear-cut that the bad act there was having
 23 anything non-zero, and therefore, when you get to
 24 101(3) --
 25 MS ROSE: Yes.

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1 MR PICKFORD: -- in order to Remedy having anything
 2 non-zero, you have got to dismantle the thing and have
 3 zero.
 4 THE CHAIRMAN: It was really just the construction of
 5 the decision --
 6 MS ROSE: What the abuse consisted of.
 7 THE CHAIRMAN: -- what did the abuse involve, and there, on
 8 the reading of the decision, it was having any MIF --
 9 MR PICKFORD: Exactly.
 10 THE CHAIRMAN: -- and so end of question.
 11 MS ROSE: I mean, in fact, you can contrast it with
 12 a finding in which the court found that the MIF was
 13 unlawful because it was above 0.2.
 14 MR PICKFORD: Yes.
 15 MS ROSE: If the court had found that the MIF was unlawful
 16 because it was above 0.2, you would not say
 17 the counterfactual is a zero MIF.
 18 MR PICKFORD: Yes.
 19 So in my submission, these points are just -- they
 20 do not go anywhere to assist my learned friend. Indeed,
 21 what they do emphasise is that -- well, two things: one,
 22 they are all contained within the abuse part of
 23 the analysis, they are all about what can this court do
 24 under abuse, so that is consistent with my whole
 25 framework under Article 16; and secondly, what they say

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1 is just what I am saying, you have got to look at
 2 the precise abuse and take that away. That is what
 3 you --
 4 THE CHAIRMAN: Well, that is why it does seem to me -- and
 5 I am not sure these -- I know Mr Jowell sought to rely
 6 on them -- really take it much further --
 7 MR PICKFORD: No.
 8 THE CHAIRMAN: -- and help them.
 9 MR PICKFORD: I agree.
 10 THE CHAIRMAN: The real question is: what is the abuse and
 11 how is it analysed in the decision and by the courts?
 12 If one describes it as discrimination, then you can say
 13 changing the box, that deals with discrimination and
 14 the algorithms do not discriminate. I fully follow that
 15 argument.
 16 If, on the other hand, one says, well, the abuse is
 17 actually the combination, then you get into the more
 18 difficult question of: well, what is the -- this is
 19 the Lord Leggatt point -- can one do a lesser change, as
 20 it were? That is really -- it all comes back to that,
 21 rather than being helped particularly by *Mastercard* or
 22 *Merricks*.
 23 MR PICKFORD: Yes, and I say I win on either of those legal
 24 approaches, not least because of recital 661, that tells
 25 us in terms the algorithms are not the problem.

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1 THE CHAIRMAN: Yes. But we have got to look, I think, at
 2 what the -- the way the court looks at counterfactual in
 3 what the General Court and the Court of Justice say --
 4 MR PICKFORD: Yes, I will show --
 5 THE CHAIRMAN: -- because it goes to that question --
 6 MR PICKFORD: Yes.
 7 THE CHAIRMAN: -- of what actually is the conduct that is
 8 the offensive conduct.
 9 Okay. Is that a sensible point?
 10 MR PICKFORD: That is a very sensible point.
 11 THE CHAIRMAN: We will return at 2 o'clock.
 12 (1.01 pm)
 13 (The short adjournment)
 14 (2.00 pm)
 15 (Proceedings delayed)
 16 (2.05 pm)
 17 MR PICKFORD: Thank you, sir.
 18 May I enquire, when does the Tribunal need to -- or
 19 would it like to rise today? Is it ...?
 20 THE CHAIRMAN: That is two questions and I have different
 21 answers!
 22 MR PICKFORD: Sorry. That is very fair.
 23 (Pause)
 24 THE CHAIRMAN: We want to rise at 5 o'clock.
 25 MR PICKFORD: Thank you --

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1 THE CHAIRMAN: I think we said yesterday that that is what
 2 we would do.
 3 MR PICKFORD: Oh, did you say that? I beg your pardon.
 4 THE CHAIRMAN: I thought we said that because you were an
 5 hour and a bit behind.
 6 MR PICKFORD: Thank you. In which case, I apologise for
 7 asking. It sounded as if I was pushing beyond 5, but
 8 actually I was pushing beyond 4.30 --
 9 THE CHAIRMAN: No, I think we said 5, after we spoke that
 10 time on the DMA Decision and the delayed start.
 11 MR PICKFORD: Right. In which case, I will not waste any
 12 more of my time and I will crack on.
 13 So what I would like to do now is go to the Court of
 14 Justice's judgment in relation to the whole issue of
 15 effects, because you were taken to the General Court's
 16 judgment at some length yesterday, and I do not want to,
 17 basically, just go over a lot of the same material
 18 again. We spent less time on the Court of Justice, and
 19 I actually say that there are some things that we can
 20 learn from that, so that is how I am going to approach
 21 it.
 22 THE CHAIRMAN: Yes, that is helpful.
 23 MR PICKFORD: What I would like to do, actually, just to put
 24 that in concrete context, is start with our application
 25 to the Court of Justice, which really shows you what was

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1 being argued about.
 2 So if you could go, please, to {O/11/36}, and if you
 3 could go toward the bottom of the page and start at
 4 paragraph 115.
 5 So what it says is:
 6 "The Commission, not Google, bears the burden of
 7 proving an infringement, including (i) conduct that
 8 departs from competition on the merits, (ii) likely
 9 anti-competitive effects, and (iii) the causal link
 10 between the two ... Contrary to GC's reasoning, it was
 11 therefore for the Commission to conduct a counterfactual
 12 analysis.
 13 "The GC's answer that the burden for establishing
 14 a counterfactual was with Google because the Commission
 15 alleged potential, and not actual, effects ... is
 16 mistaken for several reasons."
 17 Then if you could read paragraph 117 as to what
 18 those reasons are {O/11/37}.
 19 (Pause)
 20 It is only the first point at 117 you need to read,
 21 118 is --
 22 THE CHAIRMAN: I see.
 23 MR PICKFORD: Sorry, I beg your pardon. I beg your pardon.
 24 If I could just ask you to read 117 and then I will
 25 come on to the other points, because I want to make

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1 a point about 117.
 2 THE CHAIRMAN: Yes, we have read 117.
 3 MR PICKFORD: So the key thing that we are saying here in
 4 117 is look at 462 of the decision, which we have seen,
 5 that is all about actual effects, and you cannot do us
 6 down and say: oh, well, you do not need to have a proper
 7 counterfactual because you are only concerned with
 8 potential effects. In order to get to your potential
 9 effects, you had to have an actual effects analysis of
 10 traffic, and therefore, because of that, you have got to
 11 do the job properly, is what we are saying in 117.
 12 Then if I could ask the Tribunal please to read 118
 13 to 119.
 14 (Pause)
 15 This point is subsidiary, but it does help
 16 contextualise what is said by the court.
 17 (Pause)
 18 In essence what we are saying here --
 19 THE CHAIRMAN: Yes.
 20 MR PICKFORD: -- is that in any event, you have still got to
 21 do a proper job and you cannot just seek refuge in this
 22 idea that it is only potential effects for not grappling
 23 with the points that we have been putting to you.
 24 Then one sees how this is addressed by the Court of
 25 Justice. There are two different parts of the judgment

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1 that are relevant to it. If we could start, please,
 2 with tab 4 -- so we are going to {BA/4/34}, and I am
 3 just showing you that I am in the right bit of
 4 the judgment because 210 and 211 and 212 are recording
 5 the complaint that I just showed you. You do not really
 6 need to read that in depth, that is just contextualising
 7 where we are.
 8 THE CHAIRMAN: Yes.
 9 MR PICKFORD: Then if you go to 218 to 222 {BA/4/35-36},
 10 the findings of the court, we see how the first
 11 complaint is answered it says {BA/4/35}:
 12 " ... it must be observed that [in] recital 426 ..."
 13 Just a small point, but it can be confusing. That
 14 must be a typo. It must be referring to 462 there,
 15 because 426 is something about AdWords and it was 462
 16 that we were challenging.
 17 THE CHAIRMAN: Thank you.
 18 MR PICKFORD: It says:
 19 " ... it must be observed that 426 of the decision at
 20 issue is set out in [the Section] of [the] decision
 21 relating to the conduct at issue and concerns
 22 the analysis of the impact of conduct on traffic
 23 generated by Google's general search pages to competing
 24 comparison shopping services ... The Commission found
 25 ... that there was a decrease in that traffic in each of

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1 the [various countries] ...
 2 "By contrast, it was Section 7.3 of the decision at
 3 issue that the Commission analysed the effects of
 4 the conduct at issue, which it classified as potential
 5 anticompetitive effects capable of affecting
 6 the competitive structure of the relevant markets."
 7 Then it explains what those potential
 8 anti-competitive effects were.
 9 Then what it goes on to say in 221 {BA/4/36} is:
 10 "The evidence concerning the variation in traffic
 11 from Google's general results pages to competing
 12 comparison shopping services and to its own comparison
 13 shopping service did not therefore constitute actual
 14 anticompetitive effects relied on by the Commission, but
 15 tangible evidence on which the finding of the potential
 16 anticompetitive effects of the conduct at issue was
 17 based."
 18 So this is how they answer our complaint.
 19 So the irony here, of course, is that we were saying
 20 this is actual effects, you have got to treat it as
 21 actual effects, and they say, no, it is just tangible
 22 evidence on which the potential effects are based.
 23 MS ROSE: Is the point that the evidence of effects on
 24 traffic has potential anti-competitive effects?
 25 MR PICKFORD: Well, that is a point, but that is not what is

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1 being said here, because we were not challenging
 2 the potential effects analysis. We were saying, look at
 3 recital 462. 462 is the central recital that makes
 4 the findings of actual traffic diversion, and we said,
 5 look, that is an actual finding of effect and therefore
 6 you have got to look at that properly. The way that we
 7 were seeking to persuade, first, the Commission and then
 8 the court to look at that properly was the same way that
 9 I say you should look at it for the purposes of
 10 a damages assessment.
 11 We were given an answer to that, which is: no, that
 12 is not an actual effect, that is just a tangible -- that
 13 is just tangible evidence on which they then go on to
 14 look at potential effects. That is just side-stepping
 15 -- in my respectful submission, it is side-stepping what
 16 our argument was.
 17 Now, to be clear, as always, I am not seeking,
 18 because of that, to -- I am not saying, well, it is
 19 wrong and therefore we can go behind it --
 20 MS ROSE: Maybe what they are saying is: we can show that
 21 after this unlawful combination of practices came into
 22 effect, there was a diversion of traffic from most of
 23 the leading CSSs to Google's CSS.
 24 MR PICKFORD: The Commission is saying this?
 25 MS ROSE: Yes.

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1 MR PICKFORD: Yes.
 2 MS ROSE: So the tangible evidence, if you like, is, after
 3 these two practices, the combination came in, we can
 4 demonstrate there is traffic diversion, and that is what
 5 the court is saying is enough to be tangible evidence of
 6 an anti-competitive effect.
 7 MR PICKFORD: Yes, it is --
 8 MS ROSE: Now, if that is so, then you do not need
 9 a counterfactual analysis, because you do not need to
 10 say, you know, have you proved that the cause of
 11 the traffic diversion is the unlawful conduct, or
 12 could it have been the same if there had been different,
 13 but lawful, conduct, e.g. a demotion algorithm but no
 14 box.
 15 So you do not need to go through those hoops,
 16 because it is enough to say, look, they introduced this
 17 combination of practices that was unlawful. The traffic
 18 diverted. That is enough to show potential effects on
 19 competition.
 20 MR PICKFORD: That is absolutely right. That is what
 21 the court is saying and I --
 22 MS ROSE: So that means there is no need for
 23 a counterfactual.
 24 MR PICKFORD: Exactly, and they go on and say that. They
 25 actually go on in some later recitals, which I will show

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1 you, they say, basically : correlation is good enough
 2 here; you, Google, stop bleating about counterfactuals;
 3 we are only in a potential effects world, and all they
 4 had to do was show some correlation, and they did it,
 5 and that is good enough and therefore you do not get
 6 anywhere, sit down, is what they were saying to us.
 7 Now, the reason why I am showing you this is, as
 8 I do wish to make clear, I am not showing you this to
 9 say --
 10 MS ROSE: No, no, it means that it does not foreclose
 11 the proper counterfactual analysis for the purposes
 12 of --
 13 MR PICKFORD: Exactly. Exactly. I mean, for two reasons.
 14 One --
 15 MS ROSE: It is addressing a different question.
 16 MR PICKFORD: Yes. Because, one, I have got my line in
 17 the sand in any event, and two, even if I did not have
 18 that line in the sand, it is just a different question,
 19 and that is why this court is not ham-strung by what
 20 the CJEU endorsed and the Commission did answering
 21 a different question. It is very simple, you just
 22 approach this on the basis of ordinary English law
 23 principles.
 24 Madam, you precisely got the point, but just for
 25 your reference, at paragraph 245, that is where

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1 the context of potential effects comes home and
 2 the Court of Justice gives its final answer {BA/4/39}.
 3 So can I go on then to deal with the issue --
 4 the final issue then that arises in relation to
 5 the legal points is, if I am right about EU law --
 6 THE CHAIRMAN: I am just trying to understand 245.
 7 MR PICKFORD: Yes, sorry, in my desire to get ahead, I have
 8 gone too fast again. So --
 9 THE CHAIRMAN: Which is the second part of your --
 10 MR PICKFORD: So:
 11 "Accordingly, in so far as the increase in traffic
 12 in favour of search results from Google's comparison
 13 shopping service and the decrease in traffic from its
 14 general results pages to competing comparison shopping
 15 services, on which the potential anticompetitive effects
 16 of the conduct at issue are based, resulted from
 17 the joint application of the two practices at issue, an
 18 appropriate counterfactual ... should have made it
 19 possible to examine the likely development of the market
 20 in the absence of both ... those practices and not only
 21 the absence of one of them."
 22 So what is being said, in my submission, here, is
 23 the conclusion of everything is that taking away both
 24 elements in the way that implicitly one does if one just
 25 looks at the correlation between before and after is

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1 fine in that context, and that context is looking at
 2 the potential anti-competitive effects, and that comes
 3 back up to the point that I showed you before. So as
 4 unlikely as it might seem if you just looked at
 5 the decision and you read the decision and you thought,
 6 "Well, it looks very like a natural effects analysis
 7 here", what we are ultimately told is, no, it is just
 8 the tangible effects on which potential effects are
 9 based and therefore a correlation analysis is
 10 sufficient, in effect.
 11 Would it be helpful for me to take the court to
 12 the particular paragraphs that talk about correlation?
 13 I can do that if that is helpful.
 14 THE CHAIRMAN: I think I still struggle with what they are
 15 doing. Which is the correlation paragraph?
 16 MR PICKFORD: So that is back -- sorry, I just have to find
 17 it. It is at 225 {BA/4/36}.
 18 So if I could ask you just to read 225.
 19 (Pause)
 20 Then 228 {BA/4/37}, where it says that no single
 21 tool is required. So it is setting up a very broad
 22 approach, pushing back against us saying you have got to
 23 have a clear counterfactual and it has got to satisfy
 24 these criteria, and the push back is, no, you can just
 25 point to correlation plus additional information, that

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1 is 225, and then no single tool is required, that is
 2 228.
 3 Then it is probably helpful, because I have kind of
 4 jumped ahead a bit in my haste, for you to look at 231
 5 and 232. That is the court rejecting what is said by
 6 the General Court about counterfactual -- that is
 7 basically : counterfactuals are too hard, so you do not
 8 need one. That is not the approach that the Court of
 9 Justice endorses, because it does seem to accept that if
 10 we push back with a counterfactual, then there needs to
 11 be at least some engagement with one, but then they
 12 still say -- but then they do not like our one and so
 13 they still ultimately say that what -- the analysis in
 14 the Commission's decision was sufficient.
 15 It is not the easiest part of the judgment to
 16 understand. I really struggle with it and I was there
 17 at the court when we had the argument about it.
 18 If I may, would it be okay if the Tribunal looks
 19 again at that afterwards, because otherwise --
 20 THE CHAIRMAN: No, we cannot spend too much time on it.
 21 MR PICKFORD: -- I (inaudible) a lot of time on it.
 22 So just to draw the strands together, I say if I am
 23 right on either of my approaches on EU law, either that
 24 there is a hard division between abuse and effects or,
 25 in any event, that the court was just looking at

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1 a different question here, then you are not constrained
 2 by what the court did and therefore you have to just
 3 apply ordinary English law principles, and ordinary
 4 English law principles most definitely do not require
 5 you to overcompensate the Claimants by imagining a world
 6 which goes beyond the minimum necessary to get rid of
 7 the unlawful conduct.

8 Indeed, it leads to obvious absurdities, because
 9 suppose -- just to test the argument, suppose that we
 10 are right about the abuse and we are right about
 11 the fact that we ended the abuse in 2017. If we are
 12 right about that, then the world as it exists today,
 13 with the algorithms and Kelkoo being subject to those
 14 algorithms in generic results but not when it appears in
 15 the box, is a perfectly lawful, satisfactory state of
 16 the world and it has been since 29, I think it is, or
 17 28 September.

18 But just -- on their approach, even if I am right
 19 about that, they say: even if you are right about that,
 20 turn back two days, or even a day, and you have to
 21 imagine a world in order to calculate how much we have
 22 suffered, how much loss we have incurred where you take
 23 away the algorithms. Therefore you imagine a world
 24 where those algorithms are not in place any more. I say
 25 that is just absurd and makes no sense. So that is

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1 the essence of the point there.
 2 THE CHAIRMAN: 28 September was the date the Remedy was put
 3 in, is it?

4 MR PICKFORD: It was the date that the Remedy was put in
 5 place --

6 THE CHAIRMAN: Yes --

7 MR PICKFORD: So I think we go from 28 back to -- yes, so,
 8 on the 28th, there are algorithms; per 661, they are
 9 perfectly fine. Then we imagine a world where, the day
 10 before, Kelkoo is entitled to be compensated for
 11 the fact that there are algorithms, and I say that just
 12 makes no sense.

13 Now, I am now going to move on from the law to
 14 the final, but quite complicated, chapter, which
 15 is: factually, what would have happened in
 16 the counterfactual?

17 I need to address that on two alternative bases.

18 So the first is that I am going to assume that I am
 19 right on the abuse issue, and then the second is that
 20 I am going to assume I am wrong on the abuse issue.

21 Now, there is quite a lot of commonality between
 22 the two, but in my submission you do need to go through
 23 in that structured way, because the constraint of what
 24 Google is or is not allowed to do obviously has
 25 the potential to have a bearing on what would be

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1 commercially realistic in a counterfactual world.

2 So starting with my preferred world where we win on
 3 abuse. We know, in that world, that from
 4 28 September 2017 onwards, we implemented the Remedy
 5 box, and so I say that that is the obvious starting
 6 point for any counterfactual for the whole period
 7 indeed, subject to Kelkoo showing you that we would have
 8 had something different for a different period. Kelkoo
 9 does not, I think, seek to establish that circumstances
 10 were different from 2013 onwards. My understanding of
 11 their case is -- and certainly Mr Hunt's evidence
 12 accepted this -- that from 2013 onwards, when we had got
 13 rid of free boxes in the real world and we only had
 14 Shopping Units, then the realistic counterfactual at
 15 that point, if I am right about the Remedy box being
 16 lawful, is that we would have had something like
 17 the Remedy box.

18 What they want to put up for grabs is the 2008 to
 19 2012 period, and their essential argument there is they
 20 say: well, look at what you had in the real world then.
 21 You had a box of product results that were, at least
 22 some of the time, until we introduced PLAs in
 23 November 2011, they were free and they also often linked
 24 to your own Google Shopping property rather than going
 25 to merchants, and they use that as the springboard for

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1 their two arguments that we would have had a free box in
 2 the counterfactual world and also that it would have
 3 gone to CSSs and not merchants in the counterfactual
 4 world.

5 Now, I am going to take each of those in turn and
 6 explain why Kelkoo are wrong.

7 So, first question: would Google have had a free or
 8 a paid box in 2008?

9 Now, the reason, we know, why the Product Universal
 10 was free to merchants from 2008 was that it brought
 11 Google certain benefits for it to be free to merchants.
 12 Firstly, it encouraged merchants to sign up to Google
 13 Product Search.

14 MS ROSE: Can you just define what you mean by "free"?

15 MR PICKFORD: Yes.

16 MS ROSE: Because the point has been made that there are
 17 different types of payment. I mean, if we look at
 18 the Remedy box --

19 MR PICKFORD: Yes.

20 MS ROSE: -- there are payments made by CSSs --

21 MR PICKFORD: Yes.

22 MS ROSE: -- on behalf of merchants --

23 MR PICKFORD: Yes.

24 MS ROSE: -- and that are also made by merchants to
 25 the CSSs, if you see what I mean, which could be Google

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1 itself .
 2 MR PICKFORD: Yes.
 3 MS ROSE: So if you are looking at Google's website or
 4 Google Europe being the supplier, merchants are paying
 5 them and they are also paying Google Search.
 6 MR PICKFORD: Yes.
 7 MS ROSE: So in this putative, monetised box that is open to
 8 everybody fully --
 9 MR PICKFORD: Yes.
 10 MS ROSE: -- what are you saying would or would not be paid
 11 for and would or would not be free?
 12 MR PICKFORD: So my case on what would be --
 13 MS ROSE: You say it would all be the same as it is under
 14 the Remedy.
 15 MR PICKFORD: Yes, and I do not particularly need to get
 16 into what would happen on the standalone service.
 17 MS ROSE: So you say you would still have been recruiting
 18 merchants for free for the website?
 19 MR PICKFORD: Yes, possibly. I say that the Tribunal does
 20 not really need to answer that question because, from
 21 a damages perspective, what is going to matter to Kelkoo
 22 is whether it gets access to the box for free or not.
 23 That is what we are really fighting about here, and my
 24 case is focused on that question and I say that access
 25 to a box that is like the Remedy box but in 2008 would

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1 always have been charged for. That is --
 2 MS ROSE: So you envisage that Google might have recruited
 3 merchants to its CSS for free but then charged them for
 4 access to the Remedy box?
 5 MR PICKFORD: I say that if an ad is going to end up on --
 6 well, yes, that Google would have conducted an auction,
 7 as it does now, also in 2008. I mean, broad -- this is
 8 always going to be slightly broad brush, obviously,
 9 because that is the nature of a hypothetical
 10 counterfactual. But I say that, yes, there would have
 11 been an auction and therefore, for everyone that wanted
 12 to participate in that auction, whether it be a rival
 13 CSS or it be Google itself, they would have had to bid
 14 to get on the page.
 15 Now, what happens --
 16 MS ROSE: So how does that work then, because if Google
 17 Europe is not getting revenue from merchants who are on
 18 its website?
 19 MR PICKFORD: Well, in my -- so I am not seeking to make
 20 a positive argument that Google Europe, the standalone
 21 entity, would have been free to everyone. Indeed, I --
 22 MS ROSE: That is quite an important question.
 23 MR PICKFORD: Yes. So, in opening -- so, I made the point
 24 in opening -- Mr Jowell originally said it is just all
 25 going to be free, and I said, "Hold on a minute, you

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1 have not thought through properly what that means", and
 2 I took the Tribunal through and then Mr Hunt through
 3 a sequence of logic as to why I said that the box would
 4 be charged for, and --
 5 MS ROSE: But just thinking about how does Google build up
 6 its own -- for the sake of argument, because we are in
 7 your world now --
 8 MR PICKFORD: Yes.
 9 MS ROSE: -- assuming that the website is Google's CSS for
 10 a minute --
 11 MR PICKFORD: Yes.
 12 MS ROSE: -- how does Google build up its CSS?
 13 We know that at this time, in 2008, Google is trying
 14 to recruit merchants.
 15 MR PICKFORD: Yes, although we also know in 2008 that it has
 16 already got a good CSS. Froogle was poor. It then --
 17 MS ROSE: It has invested a lot of money.
 18 MR PICKFORD: It then starts putting big investment in and
 19 also it changes its concept, because the problem -- what
 20 you saw in some of the evidence was that the original
 21 concept of Froogle was that it was all about offers and
 22 it was not about products and that did not work, users
 23 did not respond to that, and so they realised that they
 24 needed to come into line with a different approach.
 25 MS ROSE: In other words, people preferred links to a CSS

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1 than to products on the page?
 2 MR PICKFORD: No, that what they preferred -- that, at that
 3 time, what they wanted to be able to do was think about
 4 products. Some of the time, as we know, they then went
 5 to the CSS -- there is the ablation experiment or
 6 withholding experiment -- but some of the time they did
 7 not.
 8 Yes, so coming back to the question about, well,
 9 what would Google -- we are imagining a hypothetical
 10 situation in 2008, where Google has to do a number of
 11 things. One, it has to comply with a non-discrimination
 12 obligation, and two, it has some commercial imperative
 13 to build up its own CSS business.
 14 MS ROSE: Also a strong commercial imperative to increase
 15 shopping starts.
 16 MR PICKFORD: Yes. I say all of that is perfectly
 17 consistent with charging CSSs to appear on the page.
 18 Now, insofar as Google is charging its own CSS,
 19 because it has to be non-discriminatory, then obviously
 20 I think it follows that from a margin squeeze point of
 21 view, Google would also have to, at the downstream
 22 level, charge an appropriate fee to its own merchants,
 23 otherwise it is squeezing out rival CSSs. So if
 24 merchants end up on the box, then they are going to be
 25 charged, whether it is by Google or whether it is by

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1 a rival CSS. We know that from starting in a slightly
 2 different place, which is if we think about what
 3 the CSSs are going to do, a rival CSS -- Mr Hunt fully
 4 accepted and it is not argued against by Mr Jowell now,
 5 rival CSSs, whether they are getting free access or paid
 6 access to the box, they are going to charge -- they are
 7 going to make a margin on that when they put their
 8 merchants in the box. So they are definitely charging.
 9 MS ROSE: So you say Google would have done the same?
 10 MR PICKFORD: I say, inherently, Google would have had to do
 11 the same at least for those results that ended up in
 12 the box. There would have been an option for Google to
 13 have retained free results on its own CSS page,
 14 potentially, as long as they did not end up in the box,
 15 because Google is not dominant in the CSS market. So if
 16 what is going on is purely confined to a non-dominant
 17 activity, you might argue -- it might be arguable that
 18 it would not have to charge in that context, but I say
 19 it would have to charge when the merchant ad ends up in
 20 the box.
 21 PROFESSOR SMITH: So, to be brief, you are saying that in
 22 the counterfactual, Google would have started
 23 the auctioning of PLAs in 2008?
 24 MR PICKFORD: Yes. Yes.
 25 PROFESSOR SMITH: It would have filled the box with a PLA

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1 auction in 2008?
 2 MR PICKFORD: That is entirely right.
 3 PROFESSOR SMITH: So it required for that that it had
 4 the capability of doing that in 2008?
 5 MR PICKFORD: Yes, and there is evidence from Mr Friedman
 6 that although we did not actually launch PLAs until
 7 the following year in the US, that had it been
 8 a commercial imperative and a legal -- and given
 9 the legal imperative that we have got to do something
 10 new, then Google would have put -- there was not any
 11 reason why we could not necessarily have done it.
 12 PROFESSOR SMITH: So if Google had the ability to run a PLA
 13 auction for the box in 2008, why, in the actual, did it
 14 not do this, because surely it would have been in
 15 Google's commercial interests to have monetised the box
 16 in 2008, if it was possible, rather than having --
 17 monetising the actual box in 2008?
 18 MR PICKFORD: So there is an answer to that and it is that,
 19 in the real world, of course, Google was allowed --
 20 sorry, it was not allowed, it did, I beg your pardon, it
 21 did self-preference. So what was happening in the real
 22 world is it faced the option of keeping all of
 23 the traffic and bringing in all of the merchants -- so
 24 what it could do was it could bring in all the merchants
 25 for free, because merchants get the box for free because

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1 Google controls that, and also, if it sends a user off
 2 to, say, its own standalone page, it also has not lost
 3 the traffic to a CSS at that point. So this is a world
 4 in which Google has lots of flexibility to build up its
 5 CSS by the strategy of making it free to merchants. So
 6 in that world, you can see why, at least for a while,
 7 Google did offer its box free to merchants, because it
 8 gets something from that, it gets -- well, it gets
 9 a couple of things: one, it is an incentive for
 10 merchants; two, it enables Google to -- and, again,
 11 there is evidence on this as well -- market the box as
 12 unbiased, untainted by money.

13 So that is -- those are positive benefits which
 14 explain why, in the real world, although PLAs were
 15 coming, and one sees through the documents that there
 16 were parts of Google, the part run by Nick Fox, that
 17 increasingly pressed for PLAs, and eventually Nick Fox
 18 won that argument, there were counter arguments that
 19 could be made that the point, which is, well, but this
 20 is helpful, this is bringing shopping starts, the only
 21 cannibalisation is going off to our own product website,
 22 we are not losing this to other CSSs at this point, and
 23 so that has a certain commercial dynamic to it.

24 Now -- so let us just put that on hold and sort of
 25 keep that in one part of our working memory. Now let us

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1 compare that to the world in which we have to comply
 2 with a non-discrimination obligation.
 3 PROFESSOR SMITH: Well, but my question was about two
 4 options in the actual, rather than having to have
 5 a non-discrimination --
 6 MR PICKFORD: Well, if I may -- so what I was seeking to do
 7 was to explain -- your question to me, Professor,
 8 was: why, if they could do it, did they not do it? My
 9 submission is, well, there were commercial reasons why
 10 they did not get straight on with it in 2008, because
 11 there were some advantages to them in it being free.
 12 There was a balance. To some extent, they would have
 13 benefited from monetising everything, but there were
 14 disadvantages to that, and as Mr Goodrow very clearly
 15 gave evidence, he liked aspects of the fact that it was
 16 a free box. So that is why they did not do it straight
 17 away.
 18 What one sees is in the evidence is, progressively,
 19 even in the real world, that logic became weaker and
 20 weaker. So, first, they ultimately introduced the PLAs:
 21 they came in quite quickly in the US; they came in by
 22 2011 in the UK, Germany and France, I think -- sorry,
 23 maybe UK and Germany, I beg your pardon; and then by
 24 2013 they had -- they were running the show and
 25 the PU had gone. So that is why, even if they could do

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1 something technically, commercially they might not have
 2 done it.
 3 By contrast --
 4 PROFESSOR SMITH: I thought Mr Goodrow's argument was not
 5 really a commercial argument, was it? He was not saying
 6 that Google -- that it was in Google's commercial
 7 interests to have a free box, was he?
 8 MR PICKFORD: Yes, I think he was. I think he was saying --
 9 PROFESSOR SMITH: That you got more shopping -- that you
 10 build up more shopping starts --
 11 MR PICKFORD: Yes.
 12 PROFESSOR SMITH: -- by having a free box than you would
 13 have done if you had had a free website and an auction
 14 for the box.
 15 MR PICKFORD: Yes, the whole idea behind Mr Goodrow's
 16 enthusiasm for the project that he was working on, which
 17 was the free box, was that even if there is some
 18 cannibalisation, i.e. you could have sold some ads here,
 19 because you are increasing shopping starts, overall you
 20 are getting a benefit from that because more people come
 21 to Google and then more people may, for instance, see
 22 a text ad, etc. So there is some benefit. But -- and
 23 he made commercial arguments as to why that was
 24 worthwhile.
 25 But my point, and this is really, really important

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1 in relation to this, is that all changes when you can no
 2 longer self-preference.
 3 PROFESSOR SMITH: Yes, I understand that.
 4 MR PICKFORD: Yes.
 5 Just as an illustration of some of the evidence, it
 6 might be helpful just to have a quick look at an
 7 October 2008 slide, which is at {K3/11/5}. I just need
 8 to find the reference.
 9 (Pause)
 10 Yes, so "Google Product Search" -- if you look at
 11 this slide on the bottom left-hand side, you see that
 12 what is being said is that:
 13 "Google Product Search ... helps shoppers find the
 14 exact and right item by presenting the most
 15 comprehensive and unbiased results ..."
 16 So that is the bit about it being free:
 17 "... therefore getting at the core of what the
 18 shopper is really looking for."
 19 So that was Google saying: well, look, there is
 20 a benefit here to it being free, it is unbiased.
 21 But then, if you go on to {K3/11/12} of the slide
 22 pack, you see "Our unique challenges ...", and on
 23 the "Sellers" side:
 24 "Long association with being a free product ..."
 25 This is now a challenge:

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1 "... (especially challenging with the upcoming
 2 monetization)."
 3 So at this point in October 2008, even then, it is
 4 being contemplated that monetisation is round
 5 the corner, and the point that I was making previously
 6 is that if that was being contemplated in a real world
 7 where there were material benefits to keeping the box
 8 free, it sure would have happened as quickly as it
 9 needed it to if we move to a counterfactual world, where
 10 everyone else, including all other CSSs, like Kelkoo,
 11 now get to play in the box.
 12 MS ROSE: Well, that is the question. That is the question,
 13 and clearly the incentives change somewhat, but the
 14 question is whether they change to that extent.
 15 MR PICKFORD: Well, let me --
 16 MS ROSE: Because you have got a number of incentives in
 17 favour of keeping access to the box free. That document
 18 we just looked at shows the importance to Google in
 19 terms of its credibility with users --
 20 MR PICKFORD: Yes.
 21 MS ROSE: -- and also just the volume of merchants, because
 22 it basically means you get a massive number of merchants
 23 with access to the box.
 24 Now, those make sense if your dominant incentives
 25 are, one, increasing traffic and increasing shopping

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1 starts, and two, competing effectively with Amazon.
 2 MR PICKFORD: Yes.
 3 MS ROSE: Because one of the advantages that Google can say
 4 it has over Amazon is that its shopping comparison box,
 5 unlike Amazon's, is unbiased.
 6 MR PICKFORD: Yes.
 7 MS ROSE: That gives it a USP versus Amazon.
 8 MR PICKFORD: Yes. So I am very grateful for that.
 9 MS ROSE: But that applies whether or not other CSSs have
 10 access to the box. Indeed, you could argue that Google
 11 can get even more -- there could be a bigger commercial
 12 advantage for Google vis-à-vis Amazon, and Mr Goodrow
 13 was very clear that Amazon was the main competitive
 14 threat, because if that is right, then if Google can
 15 say, "You can access all of our search power and all of
 16 the power of these other thriving and successful CSSs
 17 with their snazzy filters and links and what have you
 18 on our search page without commercial bias", that is
 19 quite an attractive proposition, and it might -- you
 20 never know, it might have enabled Google to compete more
 21 effectively with Amazon than in the real world they did,
 22 because in fact what they produced was not that great
 23 and has lost ground significantly to Amazon.
 24 MR PICKFORD: Well, that is --
 25 MS ROSE: This might have been a better strategy.

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1 MR PICKFORD: That is a very helpful question to put to me,
 2 because I say that there are reasons why that logic
 3 would not have flown from Google's perspective.
 4 The first one is this, that as soon -- what we have
 5 established so far I think is common ground in this
 6 chain of argument, indeed it is also common ground with
 7 Mr Jowell, is that merchants are going to be paying to
 8 get into the box, because they are definitely paying
 9 CSSs irrespective of whether the box is free or the box
 10 is charged for. So that is point one.
 11 So the world we are envisaging is one where we know,
 12 from a consumer point of view, that immediately this is
 13 not a box that has the purity that Google's previous box
 14 had, because Google's previous box, when it thought that
 15 there were benefits, as I showed you that slide about
 16 being untainted, that was truly untainted. No one, at
 17 any stage, was paying as a condition of access to
 18 the box.
 19 In this new counterfactual world, that no longer
 20 applies. The only way in which you can get into the box
 21 is if you pay the CSS, the standalone CSS. That is
 22 the only way a merchant -- so a merchant is always going
 23 to pay, a merchant can never get in just for free, and
 24 therefore, from the word go, we have immediately tainted
 25 the selection by the commercial issue of whether they

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1 are prepared to pay to be there or not. So Google can
 2 no longer say to its users, "Look at this box, these are
 3 selected purely on the basis of relevance and usefulness
 4 and nothing more", because even if it is giving that box
 5 away for free, the only people that would ever have got
 6 into that box are the ones that are prepared to pay
 7 their own CSSs.
 8 MS ROSE: So that logic holds for your preferred
 9 counterfactual, which is the Remedy box.
 10 MR PICKFORD: Yes.
 11 MS ROSE: I think it also holds for the variants 3a and 3b.
 12 MR PICKFORD: Yes.
 13 MS ROSE: But it does not hold for, let us say -- take
 14 scenario 2.
 15 MR PICKFORD: Yes.
 16 MS ROSE: Because scenario 2 is an enriched format organic
 17 search.
 18 MR PICKFORD: Yes.
 19 MS ROSE: So under that scenario, merchants will be paying
 20 to get into CSSs, but the organic search results will
 21 include results that are not paid on the basis of
 22 relevance.
 23 MR PICKFORD: Yes, absolutely. So I accept that point, but
 24 I have another, because I am not done with how this all
 25 plays through in terms of Google's commercial

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1 incentives.
 2 So I think you must be right that if what is on
 3 the page is 100% organic at all points, there is never
 4 any money --
 5 MS ROSE: I mean, CSSs are still charging merchants for
 6 clicks.
 7 MR PICKFORD: So it depends -- so then -- yes, I mean --
 8 well, I have to say, maybe I was slightly to
 9 enthusiastic in terms of agreeing with you, madam.
 10 I have to perhaps take it in stages.
 11 If what is happening is that the links are just
 12 going to the CSS, I think that is what we are
 13 considering here, is it not? Because scenario 2,
 14 I think the links just go to CSSs, as far as
 15 I understand what Mr Jowell says ultimately.
 16 He is not standing up to contradict me, he is
 17 concentrating very hard! The --
 18 MS ROSE: He is looking concerned.
 19 MR JOWELL: (Off microphone - inaudible).
 20 MS ROSE: He has got no idea what is going on!
 21 MR PICKFORD: So I am going to plough on until I am told
 22 that I am wrong.
 23 So they are only going to CSSs in this world. So,
 24 yes, what does the consumer get from that?
 25 Well, they know that the CSSs having ranked without

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1 reference to money. Well, that is fine. But I say that
 2 does not take you that far, because as soon as they then
 3 get to the CSS site, what they are doing is they are
 4 going -- because that is when they actually start
 5 getting a selection of products, which is the analogue
 6 to my world, then they are just at the mercy of the CSS
 7 in exactly the same way as they would have been.
 8 Remember, I put to Dr Stables a classic tactic of
 9 Kelkoo was that it told its users that its offering was
 10 ranked by popularity, and that was a fib, it was not
 11 ranked by popularity, it was ranked by who paid them
 12 the most, unless you then clicked on something
 13 like "Sort by price" and that might override it. But
 14 the "By popularity" was not by popularity at all and
 15 I took him through his own evidence which showed that to
 16 be true and he accepted that.
 17 So, in my submission, it is incredibly limited
 18 benefit and it is just not the same benefit that Google
 19 was getting by being able to offer actual links to
 20 products itself that could be sold by merchants for
 21 free, because the merchants benefit from that and
 22 the whole dynamic is that you can say to your users,
 23 "Here, look at this selection of products, they have
 24 been selected without money coming into the equation at
 25 any point". Even under counterfactual 2, the very best

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1 that can be said is , "Look, these CSSs have been
 2 selected without money coming into it at any point", and
 3 that is , as I said, really not much of a sell, because
 4 as soon as you go and click on the CSSs, it is necessary
 5 to then take the next step, you are into their murky
 6 world.
 7 THE CHAIRMAN: That was true of CSSs in generic results all
 8 along, before any abuse.
 9 MR PICKFORD: Yes.
 10 THE CHAIRMAN: The concept that the results, the organic
 11 results were not paid for was still fundamental for
 12 Google.
 13 MR PICKFORD: It was, but I think --
 14 THE CHAIRMAN: I mean, it has always been the case that if
 15 you then go through to the CSS, the merchants will --
 16 MR PICKFORD: Yes, but with respect, I think that is to
 17 conflate two different issues here, or at least it is
 18 addressing a different issue. What I was addressing
 19 Ms Rose on was the question about the box and whether
 20 you can sell a box on the page as being untainted by
 21 monetary considerations.
 22 THE CHAIRMAN: I thought you were on --
 23 MS ROSE: (Overspeaking - inaudible).
 24 THE CHAIRMAN: -- scenario 2?
 25 MS ROSE: Scenario 2, there is not a box.

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1 THE CHAIRMAN: There is no box.
 2 MR PICKFORD: I think there are two variants of scenario 2.
 3 I was thinking of -- sorry, this is partly -- sorry,
 4 this is part of the problem.
 5 Scenario 2 was presented in two formulations. There
 6 was the one where everyone appears vertically --
 7 MS ROSE: Scenario 2 --
 8 THE CHAIRMAN: There are two.
 9 MS ROSE: -- is organic search.
 10 THE CHAIRMAN: Well, there are two on here ...
 11 (Off microphone discussion)
 12 There are two alternatives.
 13 (Pause)
 14 So I am still --
 15 MR PICKFORD: Yes, so I -- what I had in my mind, I have to
 16 say, and this may be part of why we are speaking past
 17 one another, was on {A1/3/15} we have the "Possible
 18 implementation of counterfactual scenario 2 ...", and
 19 that is a box where everything goes to CSSs.
 20 Now, it is true that I think they have an
 21 alternative --
 22 THE CHAIRMAN: Yes, on {A1/3/16}.
 23 MR PICKFORD: -- which is the next one, which is
 24 {A1/3/14} --
 25 THE CHAIRMAN: It is 16, is it not?

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1 MR PICKFORD: Sorry, yes, it is 16 and then it says "14" in
 2 the top left, for some reason {A1/3/16}, and that is an
 3 alternative approach where everything is in generics.
 4 Now, obviously if it is that version, then I think
 5 Google would have to make that free. If we were
 6 required to do that, i.e. as a matter of law the only
 7 thing that was permissible for us was to integrate into
 8 generic results and that we had to have rich generic
 9 results, as are shown here, then, at that point,
 10 I accept there has to be a question about how we would
 11 do that, and given that the essence of generic results
 12 is that they are free, then presumably that would be
 13 free. But that is --
 14 MS ROSE: That is basically the world as it was before
 15 Froogle but with pictures.
 16 MR PICKFORD: Yes -- well, subject to this very important
 17 qualification. They are only showing CSSs.
 18 MS ROSE: No, they are not.
 19 MR PICKFORD: Are they not?
 20 THE CHAIRMAN: No, Currys --
 21 MR PICKFORD: Oh, sorry, I beg your pardon, I misunderstood
 22 what my Lady said. The only people who get pictures are
 23 CSSs?
 24 MS ROSE: Yes.
 25 MR PICKFORD: Yes.

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1 MS ROSE: So CSSs get pictures.
 2 MR PICKFORD: Which I am unable to understand. I do not
 3 understand why that could possibly be, as a matter of
 4 law, something that we would have to do.
 5 But, sir, my response to this is, yes, if you
 6 sufficiently constrain the counterfactual,
 7 the counterfactual is that we could only have done it by
 8 putting things in generics, then, I accept, well,
 9 sure ... because basically what you are saying is, in
 10 that situation is, as a matter of law, pretty well we
 11 could not have charged, because we are being told that
 12 it has to go into the free part of our page. In my
 13 submission, that is absurd, because these are ultimately
 14 ads that go through to CSSs, and the idea that, as
 15 a matter of law, that there is a discrimination --
 16 MS ROSE: I do not think I was saying as a matter of law,
 17 I think the question is simply: what is commercially
 18 plausible?
 19 MR PICKFORD: Okay, well, if that is the question, I am
 20 saying there is no way we would have done -- why would
 21 we have done this? Why would we have --
 22 MS ROSE: To increase shopping starts.
 23 MR PICKFORD: Well, can I explain why -- this now takes me
 24 back -- we have gone in a bit of a loop, but it takes me
 25 back. I was about to give you my second point as to why

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1 I say that all of this is just a sort of commercial
 2 Alice in Wonderland. Because what we do have to always
 3 remember here is that although Google had generic
 4 results that it was proud of and that were part of its
 5 Crown jewels, it is still a commercial undertaking and
 6 its ultimate job is not only to help users, but also to
 7 make money for its shareholders. How does it do that?
 8 Well, in 2008, it does that via text ads. That is
 9 the core means by which, in 2008, it is monetising
 10 the immense value that it has created in having this
 11 extraordinary search service that has just beaten
 12 everyone else's search services.
 13 You have to ask yourself: what would happen in
 14 a world where, instead of text ads, suddenly Google
 15 introduces a new, shinier, richer, better form of ad and
 16 puts that on the page for free? Because what happens in
 17 that world is it destroys its business, because who is
 18 buying -- when a user has put in a product search, who
 19 is buying the text ads? There are two categories of
 20 people that are principally buying the text
 21 ads: merchants and CSSs. What happens if you put
 22 a shinier, better option on the page and you say, "Hey,
 23 guys, have that, we do not want any money for this".
 24 The first thing that happens is of course the CSSs stop
 25 buying your text ads. Why on earth would they want to

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1 spend money on text ads when they have got something
 2 better for free?
 3 But it gets worse than that, because what the CSSs
 4 can then do, certainly if they are able to move into
 5 a world where -- for instance, if we move into like a 3b
 6 world or a world where they are able to exert some
 7 control, is they say -- and also merchants have got
 8 a nice deal really here -- you do not need to pay for
 9 those slightly rubbish text ads, no, we have got
 10 something better and we can undercut the text ads, just
 11 come through us.
 12 So Google just trashes its business by doing this.
 13 In my respectful submission, you have been led down
 14 the garden path by my learned friend very skillfully in
 15 the idea that this makes commercial sense. It makes no
 16 commercial sense at all.
 17 THE CHAIRMAN: That was not the same -- exactly the same
 18 consideration that Google was weighing up when it
 19 introduced -- was it, Product Universal -- when it
 20 introduced the box, which was also harming its text ads
 21 and doing it for free and that was that trade-off?
 22 MR PICKFORD: But, with respect, sir, in a totally different
 23 way, because it was not -- it was the sole beneficiary
 24 of -- insofar as there was some loss, it was getting it
 25 back because it operated in a closed system where it was

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1 self-preferencing and anything that went to, say,
 2 the standalone site, that was still Google's business
 3 and it got all of the benefits from that. In this
 4 new world, there is this enormous leakage where we are
 5 having to give this box -- we are not giving it to
 6 ourselves for free any more as a standalone, we are
 7 giving it to rival CSSs, and in my submission, in that
 8 world, we have not only undermined any incentive for
 9 the CSSs to continue to take our text ads, we have then
 10 opened up the whole -- there is just an enormous doom
 11 loop at that point, and this is -- I mean, if -- I would
 12 like to take you to some concrete evidence on it, if
 13 I may.
 14 THE CHAIRMAN: But I thought the trade-off was not that you
 15 get the benefit of people going through to the CSS,
 16 because no other CSS is there, you are the only game in
 17 town and you will get the money there, I thought
 18 the trade-off is increasing the attractiveness of
 19 the search engine to get shopping starts onto Google,
 20 not making it up through people buying on Google's own
 21 Google Shopping page to which they might go through from
 22 the box, but just attracting them onto the SERP and
 23 then -- that that was the benefit and then seeing
 24 the ads.
 25 MR PICKFORD: Well, and then selling them text ads, for

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1 which, at the very least, a core constituent of
 2 the people that would have been buying them no longer
 3 are going to want to buy them any more because the CSSs
 4 were advertising heavily on Google's SERP when a product
 5 search came up. That tailed off and by the time we are
 6 in this period --
 7 MS ROSE: Well, why would they want to buy the text ads in
 8 the situation in the real world where they can get on to
 9 the Product Universal box for free?
 10 THE CHAIRMAN: Merchants.
 11 MS ROSE: Yes, merchants. Why --
 12 THE CHAIRMAN: Why did merchants buy text ads? But they
 13 did. The text ads were not exclusively CSSs, were they?
 14 MR PICKFORD: I mean, the -- I am not saying that there is
 15 not some -- that you could not -- if the price is low
 16 enough, you would not still benefit from a text ad in
 17 some way, because if there is a text ad, then one of
 18 the advantages is you get higher up on the page than you
 19 would if you were purely in generic results.
 20 But the CSSs, previously, the only way that they
 21 could get -- they could outdo their generic placing was
 22 by a text ad. They could leapfrog their generic placing
 23 by a text ad. Now, they have been given this new option
 24 where, for free, they get a really nice, shiny picture
 25 instead, and in my submission, at least focusing on

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1 CSSs, why would you, as a CSS, bother to ever invest in
 2 a text ad again if you could just get -- if you were
 3 entitled to be on the SERP for free with a better form
 4 of ad, because it has now got pictures?
 5 THE CHAIRMAN: That, you say, applies to scenario 3a?
 6 MR PICKFORD: It applies to any scenario where we are being
 7 required to give away something that is attractive, like
 8 a PLA-style thing --
 9 MS ROSE: But why --
 10 THE CHAIRMAN: It would not apply to your Remedy box,
 11 because they are not on the Remedy box really as a CSS,
 12 they are just selling a product for a merchant.
 13 MR PICKFORD: Okay, so if --
 14 THE CHAIRMAN: If we go back and rewind to your Remedy box,
 15 back in 2008/2009, a CSS would still have every
 16 incentive to take a text ad, because that is really
 17 advertising its whole CSS service, is it not?
 18 MR PICKFORD: So I think there are different considerations
 19 that come into play.
 20 If we are back in the world of --
 21 THE CHAIRMAN: Your Remedy box.
 22 MR PICKFORD: -- my preferred counterfactual in 2008, then
 23 I make the points that I made previously to Ms Rose,
 24 which is, why are we going to give that away for free to
 25 CSSs? They are the only people that are allowed to

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1 mediate the ads that appear in that box; they are
 2 merchant ads, but you have to go through a CSS. We do
 3 not get any benefit from that because the benefit that
 4 we used to get was that our ads were free to merchants
 5 and that meant that merchants were more keen to sign up
 6 to them and we could also say that our results were
 7 untainted by money. As soon as we are in a world where
 8 -- if we are in my Remedy box world, we have lost both
 9 of those benefits which were the reasons why we were
 10 able to use that as a marketing advantage -- both
 11 a marketing advantage and benefited from free results.
 12 THE CHAIRMAN: Well, it is still untainted by money, is it
 13 not? The fact that the CSS, if you go through to a CSS
 14 and you make a purchase on your Remedy box, go through
 15 a CSS, the CSS -- if you make a purchase, obviously
 16 the merchant from whom you are buying gets money and
 17 maybe the CSS also gets some money, but still
 18 the selection of what is presented to users would be
 19 untainted.
 20 MR PICKFORD: No, it would not in this really crucial way,
 21 which is, the only way you can ever get in that box is
 22 by paying a CSS. If you are a merchant and you are not
 23 prepared to pay a CSS in order for them to then bid to
 24 get into the box, you will not appear in that box, and
 25 therefore it is a fundamentally different world from

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1 the real world where a merchant could appear on
 2 the page, irrespective of having made any financial
 3 payment. In my world, they have to make a financial
 4 payment. We do not get the benefit of it, or at least
 5 Google Search does not get it.
 6 THE CHAIRMAN: So when you say a merchant has to pay a CSS
 7 to bid. To whom?
 8 MR PICKFORD: To Google Search to get in -- sorry,
 9 the merchant pays the CSS -- I beg your pardon, "bid"
 10 may have not been a helpful word.
 11 THE CHAIRMAN: I mean, if it is free --
 12 MR PICKFORD: Yes, sorry, I beg your pardon. I was using
 13 the word "bid" because that is how we operate even at
 14 the CSS level, but I take the word "bid" back because
 15 that is not very helpful.
 16 They have to pay in order to -- because CSSs are
 17 entirely commercial organisations that do not give
 18 anything for free, they do not have an equivalent of
 19 a generic search result, and you have to go through
 20 a CSS in order to get into the box. So all those CSSs
 21 -- to make it more concrete, imagine Kelkoo. Well,
 22 Kelkoo's business was basically to sell traffic to
 23 merchants, to get in traffic as cheaply as possible and
 24 then to sell it on to merchants for as much as possible.
 25 So, in that world where Kelkoo is using our Remedy box,

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1 what it will be doing, certainly when it is operating
 2 under the managed model, which it made substantial money
 3 from, is it will be using Google's SERP as somewhere
 4 where it can show ads that it has contracted to its
 5 merchants to place. So it is going to say to Amazon,
 6 "I am going to give you 1 million clicks this week", and
 7 then it can harvest those clicks from wherever it can
 8 find them; some might come from its own website, and
 9 some of those clicks are going to be coming from
 10 Google's PLAs. Even in this world, even if they are
 11 free, even if we have given them away for free, that
 12 does not stop Kelkoo from monetising them and using --
 13 and indeed, if they are free to Kelkoo, you can be damn
 14 sure that is its best source of traffic, so almost all
 15 of its traffic is going to start coming from us and
 16 therefore the result that appears in the page, say it is
 17 an Amazon product, Amazon will have paid to appear in
 18 the PLA, irrespective of whether we made any money on
 19 it, and that is a totally different world.
 20 In my submission, that is just not -- that is not
 21 a commercially realistic world. Why would we want to do
 22 that? Because all we have done is taken something
 23 immensely valuable, which sometimes we are willing to
 24 trade to get benefits for ourselves, which is if we can
 25 increase shopping starts, but this is not increasing our

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1 shopping starts, the choice between whether it is free
 2 or paid to CSSs, that has no impact on our shopping
 3 starts. All that has an impact on is whether we have
 4 taken an extraordinarily valuable asset and then just
 5 given it away for free to CSSs so that they can exploit
 6 it, or whether we have, realistically, commercially
 7 said, "Oh, yes, we remember the Google SERP is worth
 8 a lot of money, if we are being required to allow CSSs
 9 to appear on the page, well, then we might as well
 10 charge them for it, because that is obviously
 11 commercially superior".
 12 Could I take you, please, to one of the documents
 13 that Mr Jowell I think relied on. It is at {M1/537/8}.
 14 So this is one of the documents that was considering
 15 the product change as to how we were going to comply
 16 with the Remedy. If we just go back, just for
 17 the context, to {M1/537/7}, you will see, about halfway
 18 down, there is the big heading:
 19 "Google ingestion and ranking of CSS inventory."
 20 Then below that, there is:
 21 "'Single CSS SCU' approach."
 22 So it does not particularly actually matter which of
 23 the variants is being considered because the important
 24 point for my purposes is over the page {M1/537/8}. If
 25 you get to -- there is a confidential bullet point at

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1 paragraph 2 which I am not allowed to read out. If you
 2 want to see that. Then there are two comments on
 3 the left-hand side which I am permitted to read. One
 4 commenter says:
 5 "So in the pure organic case ..."
 6 I.e. not charging:
 7 "... wouldn't this basically mean that the SCU ..."
 8 I.e. the Shopping Unit:
 9 "... becomes free?"
 10 Shopping commercial unit.
 11 Commenter 39 says:
 12 "Yes, if a 3rd party CSS wins. And I think that
 13 basically kills the business."
 14 Then:
 15 "We have [some] more nuanced thoughts on this, which
 16 we haven't had a chance yet to put in the main doc
 17 here."
 18 So this is someone at Google making exactly
 19 the point that I have made to you, admittedly in 2017,
 20 but I say that the world is not so different in 2008
 21 that the commercial logic does not still hold, which is
 22 that if you give this premium box away for free, it
 23 kills the business.
 24 You saw I took Mr -- I am not sure I immediately
 25 have the reference to it, but you may recall I took

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1 Mr Hunt to a comment from Sir John Vickers, who was
 2 analysing this issue, and he created a paper for Google.
 3 THE CHAIRMAN: Yes.
 4 MR PICKFORD: He made the same point. He is a highly
 5 distinguished expert economist. He was not making
 6 submissions to anyone on behalf of Google, it was an
 7 entirely candid internal assessment, and we saw that he
 8 expressed some very candid views that were disclosed.
 9 He made exactly the same point. He said, if Google --
 10 what he said is: I think if Google are made to do this
 11 for free, surely they just get rid of the box? Why
 12 would they want to give away their prime assets for
 13 free? He was completely right about that, and in my
 14 submission, considerable weight can be put on that
 15 informed, expert, eminent view. Likewise killing
 16 the business here.
 17 So I am not -- the submissions that I am making
 18 I say are -- they are not hypothetical and theoretical
 19 any more than they have to be because we are in
 20 the abstract world of counterfactuals, they have clear
 21 support in the contemporaneous documents, whereas
 22 the idea that in a counterfactual world where we are no
 23 longer able to self-preference we would have been giving
 24 things away like this central space for free has no
 25 support, because the only support they have for it are

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1 documents that simply do not deal with the fundamental
 2 change that comes from not being able to have a closed
 3 system where you self-preference.
 4 PROFESSOR SMITH: I normally apologise for hypothetical
 5 questions, but all the questions here are
 6 hypothetical --
 7 MR PICKFORD: No, no, not at all.
 8 PROFESSOR SMITH: -- so I do not need to apologise.
 9 Suppose that in 2008 the internal advice to Google
 10 was: yes, we are looking to monetise soon, but we
 11 cannot -- we have not developed the PLAs well enough to
 12 take them to the market but we have now got to comply
 13 with this no self-preferencing rule.
 14 MR PICKFORD: Yes.
 15 PROFESSOR SMITH: We are not ready to roll-out the monetised
 16 box.
 17 MR PICKFORD: Yes.
 18 PROFESSOR SMITH: What would they have done in the interim?
 19 MR PICKFORD: Well, I have got to accept that when we -- we
 20 are obviously painting all of this with quite a broad
 21 brush and we have to start making quite difficult
 22 assumptions about, sort of: is there a lead-in time,
 23 when do we know, etc? I mean, if one takes a world
 24 where we are suddenly told, and the information that we
 25 get is that we only know on the first day of

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1 the infringement on 1 January 2008 and we are suddenly
 2 told then: oh, actually, you were going to continue in
 3 this way but you cannot do that, by the way, that is
 4 unlawful. I accept that, well, realistically, even if
 5 we wanted to swerve, there would have had to be at least
 6 a few months while we swerved. You saw that Google can
 7 act incredibly fast when it needs to, it put in place
 8 the Remedy box in three months and there is evidence,
 9 again that you saw and heard, that had it not been
 10 required to do that for regulatory reasons, that was
 11 kind of -- I think it was like an 18-month project,
 12 I think is what the evidence was, but it did it,
 13 incredibly much faster because it had to. So, in my
 14 submission, if it really could not do it in this
 15 hypothetical world, well, then there might have been
 16 some interim period where it just did what it could, and
 17 if it could not charge, then it could not charge.
 18 But if I could just qualify that. In my submission,
 19 it is not necessary to make that kind of assumption
 20 against us. I say you do not have to assume that
 21 suddenly we had knowledge on the first day of the --
 22 the day of infringement. I say that, well, let us
 23 assume that we knew it was coming and that actually we
 24 always knew that what we were doing was unlawful and we
 25 had to do something different, well, then, Mr Friedman's

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1 evidence is that if it had to be done, it could have
 2 been done, in 2008.
 3 MS ROSE: I mean, I think one of the points you make is that
 4 you say it would not have increased shopping starts
 5 whether or not the box was paid.
 6 MR PICKFORD: In --
 7 MS ROSE: In the counterfactual world.
 8 MR PICKFORD: Yes.
 9 MS ROSE: Because the fact that the box contains commercial
 10 CSSs --
 11 MR PICKFORD: Yes.
 12 MS ROSE: -- means that there is no advantage in having
 13 a free box --
 14 MR PICKFORD: Yes.
 15 MS ROSE: -- because you do not have the "this is organic
 16 search" point --
 17 MR PICKFORD: Yes, and you also do not have the benefit --
 18 the merchants do not get the benefit of it being free
 19 either --
 20 MS ROSE: No.
 21 MR PICKFORD: -- if it is going to --
 22 MS ROSE: No, so you might as well charge for it.
 23 MR PICKFORD: Yes.
 24 MS ROSE: I see that point, and I think the question for us,
 25 assume for a minute that your Remedy box is

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1 non-compliant.
 2 MR PICKFORD: Yes.
 3 MS ROSE: What do you think Google would actually, on
 4 the balance of probabilities, have done in 2008? Which
 5 is the most likely scenario? Which is the one that you
 6 are going to pin your colours to if you cannot have your
 7 Remedy box?
 8 MR PICKFORD: My submission is that it is a variant of
 9 counterfactual 1 but with a very, very important
 10 qualification, which goes back to the point of law about
 11 whether we have to get rid of lawful conduct.
 12 So I say none of the other things that have been
 13 proposed are commercially attractive to Google. They
 14 all contain serious problems, and therefore I adopt
 15 the Sir John Vickers approach, what his evidence is,
 16 I adopt what -- sorry, not what his evidence is, but
 17 what -- there is contemporaneous evidence that shows
 18 what his view was, sorry, and I adopt what Google in
 19 fact did, its revealed preference, in Turkey.
 20 MS ROSE: So removal of the box?
 21 MR PICKFORD: Removal of the box, but not removal of
 22 the algorithms, because --
 23 MS ROSE: No, well, hang on. Hang on. Wait a minute. Wait
 24 a minute.
 25 Leaving aside the question whether you are legally

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1 obliged to remove the algorithms, let us assume for
 2 a minute that you are not legally obliged to remove
 3 the algorithms.
 4 MR PICKFORD: Yes.
 5 MS ROSE: In 2008, Google has a very strong imperative to
 6 increase shopping starts.
 7 MR PICKFORD: Yes.
 8 MS ROSE: We have also seen an abundance of material from
 9 Google at that date showing that people do want to see
 10 links to CSSs. I mean, we looked at all the material
 11 around the Diversity algorithm in America, that people
 12 do not want their feeds swamped with CSSs, but they do
 13 want CSSs on the feed.
 14 MR PICKFORD: Yes.
 15 MS ROSE: Now, does that not suggest that if you are going
 16 for algorithm 1 --
 17 THE CHAIRMAN: Counterfactual.
 18 MS ROSE: Sorry, counterfactual 1, you would have tweaked
 19 the algorithms to ensure that there were some CSSs,
 20 the best quality CSSs, prominent on the SERP so as to
 21 ensure that users got a satisfying experience and to
 22 enable Google to compete with Amazon?
 23 MR PICKFORD: I say my answer to that is no, and it is for
 24 this reason. When you referred to the Diversity
 25 evidence, we have to ask ourselves: what does that

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1 actually tell us? Diversity was a 2006 -- I think
 2 the experiments were around 2006 -- yes -- and so it
 3 applied in a world where Algorithm A was already in
 4 operation. So Algorithm A applied from 2004. So what
 5 Diversity -- and what we know from those experiments is,
 6 notwithstanding the application of Algorithm A, which
 7 was not targeted at CSSs, it just -- all -- the only --
 8 the finding is that CSSs were prone to being demoted by
 9 it, but even in that world, there were lots of CSSs
 10 appearing on the page. Kelkoo -- I mean, there is
 11 abundance of evidence, which we have not heard because
 12 it was said to be inadmissible, but I think it is
 13 a partial answer in fact to your question to me.
 14 Kelkoo's UK domain, and indeed its domain across a large
 15 number of European countries, was never hit by Algorithm
 16 A. In those cases, it was just some pages that were
 17 sometimes hit, so -- and that is Kelkoo. You have seen
 18 the cross-examination that I put about Kelkoo's quality.
 19 MS ROSE: And Ciao too.
 20 MR PICKFORD: Yes -- well, actually, no, Ciao, I think --
 21 MS ROSE: Not hit by Algorithm A.
 22 MR PICKFORD: Yes, oh, sorry. Yes, apologies, not hit,
 23 exactly, yes.
 24 Then there are better CSSs out there than those --
 25 MS ROSE: Okay, so do you say that -- I mean, we have seen

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1 the impact of Panda. Do you say that your
 2 counterfactual remains the same throughout the period?
 3 Is there any point where your counterfactual changes, or
 4 is your answer that it is counterfactual 1 with no
 5 tweaks to the algorithms? Is that the same throughout?
 6 THE CHAIRMAN: Because Diversity was pre-Panda.
 7 MR PICKFORD: It was pre-Panda, yes.
 8 THE CHAIRMAN: Once Panda came in and they went off
 9 the page, I do not know what happened to Diversity.
 10 MS ROSE: Do you say there would have been any difference?
 11 THE CHAIRMAN: It certainly was not rolled out.
 12 MR PICKFORD: Well, when we were in a Panda world -- and you
 13 will have to forgive me that I am going to make an
 14 answer by reference to some evidence that you may
 15 ultimately say I cannot rely on, but I am being asked
 16 a factual question and I am going to respond on
 17 the facts -- I showed you that -- what I say is a very
 18 interesting graph of what happened in relation to Panda.
 19 What Panda did was two things. Overall, it did have an
 20 impact overall on CSSs, so there were less CSSs -- there
 21 was less CS traffic going to CSSs. That was the 18%
 22 figure, or it might have been 19% -- sorry, 19% figure.
 23 It did something else, which is, in my submission,
 24 entirely -- if one actually stands back and thinks about
 25 what Google does in terms of an organisation that sorts

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1 results, something entirely predictable, which was that
 2 if you put in an entirely -- in a new algorithm that
 3 works on a new basis --
 4 MS ROSE: Yes, I know what you are going to say, but I think
 5 you are missing the point, with respect.
 6 MR PICKFORD: Sorry.
 7 MS ROSE: Because what is missing from your analysis, which
 8 is about the real world, is that the other thing that
 9 was happening at this time was that Google Shopping was
 10 massively increasing its traffic by self-preferencing.
 11 So the e-commerce market was expanding and
 12 Google Shopping was increasing its traffic by huge
 13 numbers at the expense of other CSSs because of
 14 the self-preferencing.
 15 Now, that suited Google, firstly, obviously, because
 16 it was making money from the traffic to the CSS, but
 17 secondly because it was increasing shopping starts on
 18 its site; it was getting lots of shopping starts on its
 19 site that were going to the OneBox, to
 20 Product Universal, to the shopping box and then making
 21 money for Google.
 22 Now, if you are in the counterfactual 1 world,
 23 Google does not have the boost not only to its own
 24 business, but also the boost to shopping starts and
 25 therefore more globally and importantly to

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1 the monetisation of its business of
 2 the self-preferencing, because the self-preferencing
 3 massively increases Google's hits on the page.
 4 MR PICKFORD: Mm-hm.
 5 MS ROSE: If that has gone, Google needs to find an
 6 algorithmic method to increase shopping traffic to
 7 Google's organic search results to compete with Amazon,
 8 and in order to do that, does it not need to have
 9 a solution like the Diversity algorithm that makes sure
 10 that you get the optimal results on page 1, including
 11 whatever it turns out to be, and of course one can argue
 12 ad infinitum about what user preference actually is, but
 13 what the aim is, to get the optimal selection on page 1
 14 of product results, CSS results, review sites, like
 15 Which?, and editorial articles, whatever you think is
 16 the right balance depending on the nature of the query
 17 and the product market.
 18 But that is a different algorithmic question from
 19 the one that you are addressing in a world where you are
 20 self-preferenced.
 21 MR PICKFORD: Well, can I --
 22 MS ROSE: You cannot just say: well, apply the existing
 23 algorithms. You will lose all your traffic to Amazon.
 24 MR PICKFORD: Two responses. Firstly, you said I was
 25 missing the point.

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1 MS ROSE: Yes.
 2 MR PICKFORD: I think I was responding, respectfully, to
 3 the Chair's question about Panda and so that was --
 4 MS ROSE: Yes, but that was following on from my question.
 5 MR PICKFORD: But coming back to --
 6 MS ROSE: It is the same point.
 7 MR PICKFORD: Well, to answer your question --
 8 MS ROSE: You cannot ignore the removal of
 9 the self-preferencing --
 10 MR PICKFORD: No, and --
 11 MS ROSE: -- and its effect on traffic.
 12 MR PICKFORD: -- indeed that is my argument about
 13 commercialisation. My argument about
 14 commercialisation --
 15 MS ROSE: No, but we are talking here -- we are not talking
 16 about commercialisation, because you are in
 17 counterfactual 1.
 18 MR PICKFORD: Yes.
 19 MS ROSE: You are saying that is -- the most plausible
 20 counterfactual is counterfactual 1, which is not
 21 commercialised. That means you have got to monetise
 22 your page through AdWords.
 23 MR PICKFORD: Yes.
 24 MS ROSE: That means you have got to maximise traffic.
 25 MR PICKFORD: Well, madam, my response on this is it is very

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1 -- it is challenging for everyone, whether as an
 2 advocate or as a member of the Tribunal, to work out
 3 what Google would have done in a hypothetical world
 4 where those conditions simply never existed. So all we
 5 can do is seek to draw inferences based on effectively
 6 the contemporaneous evidence insofar as that evidence
 7 actually is sufficiently similar factually that it bears
 8 on the considerations and also from just basic first
 9 principles reasoning of the sort that we have been
 10 entertaining this afternoon.
 11 What I say is that that kind of reasoning is just
 12 about, and even at this level it struggles, but it is
 13 just about capable of telling you -- answering questions
 14 about, for instance, would you have had a free box or
 15 a paid box? Or another question, which I have not yet
 16 got on to, which is: would the links go to merchants or
 17 CSSs? Or, in very, very broad terms: would you have an
 18 -- would you have just got rid of your algorithms or not
 19 had -- or had algorithms?
 20 In my submission, you can just -- when you are
 21 painting with your very broad brush, you can just about
 22 answer those questions, and the difficulties even that
 23 we have had this afternoon in terms of being fully
 24 concrete I think show why we are at the limits.
 25 My answer to your point, well, would you not have

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1 started tweaking the algorithms, is I see there are
 2 arguments that one might have started to make some
 3 possible changes. There are certainly arguments, but we
 4 then step over the line, in my submission, into just
 5 something that is so speculative that it is not sensible
 6 or appropriate for the Tribunal to go there, because --
 7 MS ROSE: Well, I can see that we cannot dictate how
 8 the algorithms would have been tweaked, but we can
 9 envisage, can we not, that it is likely that they would
 10 have been tweaked so as to ensure a mix on the homepage
 11 that would have been of most benefit to users on a
 12 maximised traffic?
 13 MR PICKFORD: So what has been pointed out to me is a very
 14 important point, which is this. You do not necessarily
 15 have to change the algorithms to address the point that
 16 you have put to me, because the algorithms, and in
 17 particular Panda, inherently respond to user behaviour.
 18 They reflect what users like. You can see how they
 19 operate in all of the evidence that we have provided in
 20 relation to that. I am not proposing to go through
 21 the detail of it, it is basically impossible to do it in
 22 open court. But it is critical to remember that if you
 23 look at the essence of the sorts of signals that they
 24 are responding to, they are already doing the job, in my
 25 submission, that effectively, Ms Rose, you are putting

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1 to me needs to be done, because what they are doing is
 2 sending users to sites that Google judges through
 3 the algorithms they are going to find most attractive.
 4 So if it is truly the case that CSSs are -- that --
 5 (Simultaneous speakers - inaudible)
 6 MS ROSE: I know the Chair wants to move on. I have just
 7 got one more question I want to put to you before we do.
 8 MR PICKFORD: Yes.
 9 MS ROSE: Looking at that specific point, we have seen all
 10 the various user signals, but one thing that I think has
 11 been consistently flagged is that one of the major ways
 12 in which CSSs add value is the aggregation of content
 13 and the functionality for filtering and sorting that
 14 content, and indeed that is something you yourself rely
 15 on.
 16 MR PICKFORD: Mm-hm.
 17 MS ROSE: One of the things, if I can say without breaching
 18 confidentiality, that is not necessarily captured by
 19 the algorithms is that particular feature. That is
 20 right, is it not?
 21 MR PICKFORD: I --
 22 MS ROSE: We have seen original content is one thing, but
 23 the functionality is another.
 24 MR PICKFORD: I think that is probably a question -- well,
 25 I am just going to turn to my right on that to get

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1 the answer, because I am not the algorithmic expert.
 2 (Off microphone discussion)
 3 MS ROSE: I can hear what he is saying, and the trouble is
 4 that it is directly responsive to original content. We
 5 have had that on the note, that you do get a boost for
 6 original content, it is not just about user signals.
 7 MR PICKFORD: Well, if -- but maybe -- the algorithms are
 8 quite complex.
 9 MS ROSE: Yes.
 10 MR PICKFORD: There are recitals in the decision that are
 11 binding -- I think they are binding -- actually, no,
 12 they are not. But anyway, there are recitals in
 13 the decision that explain them. There is also our
 14 evidence that explains them more fully.
 15 MS ROSE: All right, I have put the point. Okay.
 16 MR PICKFORD: Yes. Well, if --
 17 MS ROSE: I am going to shut up now because I can sense ...
 18 MR PICKFORD: I think the answer to that is, actually,
 19 whilst Google is obviously not perfect and
 20 the algorithms are not perfect, they obviously have to
 21 ultimately be based on proxies. Google is
 22 a multi-trillion organisation that hires the world's
 23 best engineers and has the largest resources in
 24 the world available to it to hone its algorithms to do
 25 a great job, and it has sustained its ability to be

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1 synonymous with searching on the internet for many years
 2 now, and that is because of its ability to do a really
 3 good job through its algorithms. In my submission, it
 4 would take -- it really should take a lot for this
 5 Tribunal to reach the view that Google was not doing its
 6 job effectively because its algorithms --
 7 MS ROSE: It was doing its job effectively in the world in
 8 which it was self-preferencing, but let us move on.
 9 MR PICKFORD: Well, my -- I think you have my submission.
 10 I say our algorithms are actually really good and they
 11 work, and also the beauty of them is that they are
 12 responsive to what users want, at the end of the day.
 13 What we cannot really do, of course, in these
 14 proceedings -- we would actually have to have expert
 15 evidence of this on a modelling, is we cannot see --
 16 even just by reading the terms of the algorithms, what
 17 we cannot see is the magnitudes of how different
 18 elements actually influence the results. You could only
 19 do that -- because they are very complex and they
 20 interact with one another, you could only do that
 21 empirically through experiments. That is how Google
 22 analyses how its algorithms work. It does, for
 23 instance, the hold-back experiments, etc. We cannot do
 24 that here, so in my submission the Tribunal should be
 25 incredibly careful and reluctant to get into the realms

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1 of saying: well, actually, we think that this algorithm
 2 might have been tweaked in this particular way to
 3 reflect this other particular thing, because we just do
 4 not know enough about how they would have operated to be
 5 able to do that kind of analysis. That is my response
 6 to that.
 7 So I am -- so if Mr Jowell was to have an hour,
 8 which is what I, yesterday, said, I presumed he would
 9 like an hour, I am going to have to finish in
 10 five minutes. I have a difficulty --
 11 MS ROSE: 15.
 12 MR PICKFORD: Well, with a break.
 13 I mean, I would ask that I can go at least until
 14 4 o'clock, because indeed --
 15 THE CHAIRMAN: Yes. Well, you have been interrupted a bit,
 16 so I think you had better get --
 17 MR PICKFORD: I have tried to be as helpful as I can and
 18 I have responded, but there are things that I need to
 19 say and I have not -- I just have not said them yet. So
 20 I am going to --
 21 THE CHAIRMAN: Yes --
 22 MR PICKFORD: I am going to keep on talking basically until
 23 the Tribunal stops me and I am going to go as fast as
 24 I can.
 25 So I need to find -- again, given that I have been

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1 talking without my notes for the last hour or so, I just
 2 need to find where I need to be.
 3 Yes, okay. Very quickly, next point: would the box
 4 have linked to merchants or rival CSSs? A couple of --
 5 about six points to make in relation to this.
 6 First, context. All of Google's rivals in general
 7 search, like Bing or DuckDuckGo, show specialised
 8 results with links to merchants on their pages. That is
 9 what they do. They do not have boxes that go to CSSs,
 10 they have boxes that go to merchants, and that is
 11 because that is part of normal, ordinary competition in
 12 this market and Google has to compete against those
 13 organisations. That is, in my submission, the starting
 14 point for what Google would have done, it would have
 15 competed, given the chance, unless it was mandated that
 16 it could not, it would have wished for its links to go
 17 to merchants, just like its rivals do, because
 18 otherwise, if that is what users like, then it is going
 19 to lose out to its rivals, like Bing, for shopping
 20 starts.
 21 Second point, there is a fundamental issue which
 22 I know the Tribunal has, which is it is -- there is
 23 ultimately a finite amount of space on the SERP and it
 24 is a zero sum game who goes at the top, who gets
 25 the best position. Insofar as CSSs get more, then

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1 everyone else, including merchants, but also other types
 2 of intermediary, get less and ultimately there is
 3 a commercial judgment to be made there and it is very
 4 much one that I say Google is entitled to make, and
 5 would make it most probably, assuming that we are in --
 6 so I am actually now back in -- I am actually now back
 7 in my world, of course, I should say that. I am going
 8 thorough -- we had a very long diversion through all
 9 sorts of different worlds, including when we are not in
 10 my world and when we are in my world, and at the moment,
 11 I am back in my world where I am right about the Remedy
 12 box and I am saying: is it plausible that we would have
 13 done something different in 2008? Sorry, I should have
 14 recontextualised where I was. I say, no, it is not
 15 plausible we would have done something different in
 16 2008, because, just as now, where they go to merchants,
 17 there are good reasons for them to go to merchants in
 18 2008 too, given that that is how the market works.
 19 Thirdly --
 20 THE CHAIRMAN: So you are just addressing the point that if
 21 it is your Remedy box --
 22 MR PICKFORD: Yes.
 23 THE CHAIRMAN: -- aside from the free/paid for question --
 24 MR PICKFORD: Yes.
 25 THE CHAIRMAN: -- would it have had a different form in

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1 2008 --
 2 MR PICKFORD: Yes.
 3 THE CHAIRMAN: -- of going to CSSs instead of merchants?
 4 MR PICKFORD: Yes.
 5 THE CHAIRMAN: I am not sure that is suggested.
 6 MR PICKFORD: I am very happy, if Mr Jowell is willing to
 7 say he has no case that in my world, so I am right on
 8 abuse, that our box would have gone to CSSs instead of
 9 merchants, I can strike through this. I thought that he
 10 did have such a case, which is why I am meeting it. But
 11 maybe he can assist me and he will then get more time
 12 himself by telling me whether he does or doesn't.
 13 MR JOWELL: I am confused, because if it is your Remedy box,
 14 then it does not go to CSSs. That is one of
 15 the features of it --
 16 MR PICKFORD: Yes, it --
 17 MR JOWELL: -- so therefore it cannot go to CSSs because you
 18 do not allow it to go to CSSs, or you did not until
 19 2024. So I am just confused, I am afraid. I do not
 20 understand the question --
 21 THE CHAIRMAN: The only point, if it is your Remedy box, was
 22 whether it would have been free/paid for right
 23 throughout the period, in other words the same Remedy
 24 box but introduced in 2008, which is your
 25 counterfactual, would it have been paid for in 2008 in

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1 the way it was in 2018.
 2 MR PICKFORD: In which case, I am very happy with that.
 3 I did -- I am afraid, particularly in some of
 4 the questions that were put, but it may be that we
 5 were -- I was at cross-purposes --
 6 THE CHAIRMAN: I think we were thinking about the
 7 counterfactual.
 8 MR PICKFORD: Well --
 9 THE CHAIRMAN: Not your counterfactual.
 10 MR PICKFORD: Yes, his.
 11 Okay, well, in which case, that is fine. I do not
 12 have to address that in that context.
 13 THE CHAIRMAN: So that was your second.
 14 MR PICKFORD: Yes.
 15 I think also, then, I am not going to have to
 16 address something else that it was not clear to me was
 17 not being alleged against -- I think he is going --
 18 I think the answer to the same point about rival CS --
 19 the 3b world, I think is, as I understand it, only being
 20 advanced purely in a world where we are wrong about
 21 abuse. Is that -- it is only being advanced in
 22 the context of Mr Jowell's case. It has not ever been
 23 said that, in 2008, we would have done something like
 24 that?
 25 MR JOWELL: Well, we --

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1 MR PICKFORD: In our world.
 2 MR JOWELL: In your world, in which -- in a world in which
 3 the Remedy box -- your Remedy box does cure the abuse,
 4 then I am not -- then we are not proposing -- that there
 5 would have been --
 6 THE CHAIRMAN: -- something else like that in 2008.
 7 MR PICKFORD: Great, that deals with that one. We are
 8 racing through.
 9 So we are now in the world where the counterfactual
 10 -- so I have addressed all the points on my world and
 11 I am now just addressing quickly the points on assuming
 12 that the Remedy is unlawful and we are now in the 1
 13 through to 3b.
 14 THE CHAIRMAN: The Claimants' counterfactual.
 15 MR PICKFORD: Yes, so this is the -- we are on the final
 16 straight.
 17 Now, you have heard quite a lot of my case in
 18 relation to that, because I say, actually, it is
 19 a variant of scenario 1 that is most likely out of these
 20 options.
 21 THE CHAIRMAN: Yes.
 22 MR PICKFORD: So we then go on to consider scenario 2. Bear
 23 with me. That involves -- so key aspects of scenario 2
 24 is that it involves free links rather than paid links,
 25 and I basically just refer back to the discussion that

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1 we have already had about that. I say, no, you would
 2 not give it away, it would be paid, and so that is not
 3 credible for that reason, and it also involves
 4 the removal of the demotion algorithms and you know what
 5 my case is on that too. So that deals with number 2.
 6 We are then on to 3a, and that has an -- well, it
 7 has some improvements over 2, in that we are now able to
 8 monetise the box and we are able to -- we are also now
 9 able to retain our algorithms, so it is an improvement.
 10 But it still suffers from some significant problems.
 11 One is this, which is that this is the only box,
 12 apparently, that we are allowed to present for shopping
 13 returns. So, in this world, in 3a, all of the links
 14 always go to CSSs, so we do not get the opportunity to
 15 have attractive PLA-style ads that go to merchants, and
 16 that has a number of draw backs. One of them is that
 17 the box is going to, for the reasons that Mr Noble gave
 18 in his evidence, which was {Day14MT1/75}, because of
 19 the whole page auction, at least in the period that we
 20 had the whole page auction, not going to -- it is very
 21 unlikely to trigger, because people, generally speaking,
 22 did not particularly like going to certainly CSSs like
 23 Kelkoo, a lot of them left --
 24 MS ROSE: What would go in its place.
 25 MR PICKFORD: Sorry?

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1 THE CHAIRMAN: When you say it is "unlikely to trigger",
 2 "trigger" is a word that has been used different ways.
 3 MR PICKFORD: Yes, so it would be -- we say, for a start, it
 4 would be a pointless box, because even if it was
 5 nominally the box that could appear, the only people
 6 that can bid for it are CSSs. We know that CSSs cannot
 7 bid that high because they have a very substantial
 8 bounce and exit rate when users go through their sites
 9 before then ultimately going on to a merchant.
 10 Sir, you are looking quizzical. Do you recall that
 11 there was evidence on this that -- which, again, that
 12 I canvassed with Mr -- with Dr Stables, which he agreed
 13 with, that showed that when users went to Kelkoo, they
 14 lost about -- in total about 80% of their users and only
 15 20% of them ultimately went on to a merchant, and that
 16 was not made up for in those users being more likely to
 17 buy on the merchant. Once users left Kelkoo, they had
 18 the same propensity to purchase, roughly speaking, as
 19 users that went straight from Google's page. So
 20 the main problem with going via a CSS is that you just
 21 lose a lot of traffic on the way, and that means that
 22 CSSs do not pay as much as merchants to appear on
 23 the page, and that means that even though, in this
 24 strange world, merchants are only entitled to a text ad,
 25 whereas CSSs are entitled to a picture, and I say that

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1 is just particularly bizarre, nonetheless text ads would
 2 be likely to dominate. So I am saying that the box
 3 would not actually really be worth a lot.
 4 THE CHAIRMAN: When you say the box would not be worth a lot
 5 in terms of --
 6 MR PICKFORD: In terms of --
 7 (Simultaneous speakers - inaudible)
 8 Yes, commercially, it would not actually appear very
 9 much --
 10 MS ROSE: So if it did not appear --
 11 THE CHAIRMAN: It would not appear very much because --
 12 MS ROSE: Being something else would outbid it.
 13 MR PICKFORD: Because the whole page auction, what Google
 14 says is: what is the most valuable thing I can put on
 15 the page?
 16 MS ROSE: Yes.
 17 MR PICKFORD: Ah, well, we have got --
 18 MS ROSE: So you are saying merchant text ads would outbid
 19 the box?
 20 MR PICKFORD: Merchant text ads would outbid, yes.
 21 THE CHAIRMAN: Because the way the whole page auction works
 22 -- and perhaps I should have asked this earlier -- is it
 23 is a bid for both where the box would be and ads at
 24 the side together; is that the whole page auction?
 25 MR PICKFORD: Yes, I think the way it works is that as well

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1 as having the external auctions where people can bid to
 2 appear on Google's SERP, then Google evaluates: all
 3 together, what is the best mix of things to present to
 4 respond to this particular query? That is why Google's
 5 page looks differently depending on when you put in
 6 different searches, because sometimes it will think,
 7 okay, this -- the most value-adding type of result that
 8 we can present to this search is we are going to put
 9 a box at the top of products, ad, etc. Or another one
 10 would be, we are going to put just text ads here. Or
 11 another one would be, actually, we are not going to give
 12 any ads in response to this, it is just going to be
 13 generics, etc. Google assesses that via a whole page
 14 auction which is what underpins its universal search
 15 methodology that it is trying to evaluate the relative
 16 usefulness of everything that it might serve on
 17 the SERP. So that is the first point.
 18 Next point is Mr Jowell said of this solution, or
 19 this proposal, there is no --
 20 THE CHAIRMAN: But the evaluation is not just on the amount
 21 of the bid --
 22 MR PICKFORD: No.
 23 THE CHAIRMAN: -- it is also on an assessment of relevance
 24 and user desire and so on.
 25 MR PICKFORD: Particularly click-through and also --

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1 exactly -- quality. So -- and it is looking at overall
 2 value to Google.
 3 THE CHAIRMAN: So if users were attracted by the comparison
 4 site ads or comparison site tiles --
 5 MR PICKFORD: Yes.
 6 THE CHAIRMAN: -- then they would not be squeezed out by --
 7 MR PICKFORD: That is --
 8 THE CHAIRMAN: -- merchant product ads?
 9 MR PICKFORD: That is true, but I have given you some
 10 empirical evidence as to why I say that is unlikely.
 11 Again, we are always painting with a broad brush, but --
 12 that was what Mr Noble offered in relation to that and
 13 I say that there is a basis for his views in that
 14 respect.
 15 THE CHAIRMAN: What is the reference to --
 16 MR PICKFORD: The reference for Mr Noble -- certainly one of
 17 the relevant references is {Day14MT1/75}.
 18 THE CHAIRMAN: We need not turn it up.
 19 MR PICKFORD: Yes, I just do not have the time. Thank you.
 20 So the next point I wanted to make is a reactive one
 21 on this. Mr Jowell said there are no privacy or latency
 22 issues in relation to 3a, and that is not correct. We
 23 say that the privacy issue -- because we are back in
 24 2008 here, the privacy issue does arise whenever you
 25 cannot hand over a result -- sorry, I just need to think

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1 through my logic here. I think the point I am about to
 2 make varies depending on the time period that we are in.
 3 I think the issue -- I am just going to revise my
 4 submission slightly because I have actually thought it
 5 through whilst I am on my feet.
 6 The privacy issue that was identified is one that
 7 can only be overcome, I say, by some sort of feed
 8 solution, and when Mr Jowell said he relied on there
 9 being evidence that we thought that privacy was not an
 10 issue in 2014 when we made proposals to the Commission
 11 and we had a little box and it had some examples of
 12 things going to CSSs, and that is true in 2014, because
 13 the GDPR had not come into effect then, but once
 14 the GDPR was known about and did come into effect, then
 15 the privacy issue arises. I accept that the point I am
 16 making only bites once the GDPR is in place, but that is
 17 what underpins the basic problem on that.
 18 THE CHAIRMAN: When is that? Can you remind us?
 19 MR PICKFORD: Yes, that was 2016, I think. Enacted in 2016
 20 and came into force in 2018, and we can obviously give
 21 you the exact dates.
 22 PROFESSOR SMITH: But Google now feeds in response to
 23 product searches, not at the top of the page of course,
 24 but a box of that includes -- a box of comparison
 25 websites. I forget what it is called. The product

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1 direct box. So presumably it has now, in 2026, solved
 2 the GDPR problem somehow if it is feeding comparison
 3 sites in response to consumer queries?
 4 MR PICKFORD: I am going to have to seek instructions on
 5 exactly what we do there and I am -- so I have your
 6 question and I suggest someone gives me the answer
 7 before --
 8 PROFESSOR SMITH: We are all looking at the clock, yes.
 9 MR PICKFORD: So, Mr Jowell, I can see, is keen to get to
 10 his feet. I am racing through, and, as you can tell, by
 11 racing through, I am actually -- it is quite hard to do
 12 justice to the submissions, but I am nearly there, so if
 13 he could resist the urge to stand just at the moment.
 14 I think if we could get to -- I am going to cut to
 15 the chase and get to 3b and just address that.
 16 This is the Kelkoo and others get to hijack Google's
 17 SERP option. Mr Jowell says, well, that is a natural
 18 extension of what we do already and my response to that
 19 is: it is most certainly not a natural extension of what
 20 we do already. We have never allowed third parties to
 21 use their algorithms to do the selecting and presenting
 22 of their results on our page. Now, we obviously have
 23 interacted with third parties to draw information from
 24 them and to allow -- for instance, like, there is
 25 the mention of air transport, and that we get

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1 information from third-party sources that we serve up,
 2 but you do not find a third-party box on our page, even
 3 in relation to airlines.
 4 Now, 3b envisages rival CSSs populating the boxes
 5 with their own algorithms. Even in 2017, the quality,
 6 latency and privacy objections to that, I say, were
 7 prohibitive, and in 2008, that would have been
 8 a fortiori the case.
 9 Now, what the evidence really came down to here was
 10 two alternative options: there was API on the one hand
 11 and sandboxing on the other. The problem with API is
 12 that you have privacy and latency concerns. Because if
 13 the -- everything is happening in real time and rival
 14 CSSs are feeding through their responses to queries in
 15 real-time, there are very substantial latency issues
 16 that arise from that, and you heard the evidence in
 17 relation to that, and there are privacy issues that
 18 certainly still exist today in relation to that, which
 19 is that we cannot -- we just cannot send through about
 20 30% of the queries.
 21 So what was canvassed in -- when Google was giving
 22 its -- going through its internal dialogue about what it
 23 might do is it said: well, maybe there is a sandboxing
 24 alternative. What sandboxing involves is it basically
 25 removes the real-time aspect, and what happens instead

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1 of that is that rival CSSs submit feeds, not only of all
 2 their results, but also a mapping, but it is a static
 3 mapping that then Google processes on Google's servers
 4 and using Google's computing power to provide results.
 5 That potentially overcomes, to a significant degree,
 6 the latency problems, and it would appear to -- or at
 7 least Google believed it could overcome the privacy
 8 concerns. That is what the evidence says. But it
 9 introduces its own very substantial problem of its own,
 10 which is that, in place of dynamic, real-time,
 11 algorithmic selection of results, one has put in place
 12 instead a static mapping that is used for selection of
 13 results, and Mr Friedman said that that would lead to
 14 a dramatic reduction in quality, very significant
 15 negative quality impact, that was his evidence. That
 16 was {Day10MT1/150}, ultimately through to
 17 {Day10MT1/152}, {Day11MT1/55} and {Day11MT1/84}. So
 18 the problem there, is it does not get rid of quality
 19 problems, it just transforms one quality problem into
 20 another.

21 Now, what Mr Jowell says about that, just to
 22 complete the picture, is he says: well, (a) you have got
 23 to suck it up, and (b) it is even worse for Google than
 24 that, because we have to dumb down our service so that
 25 we are not able to use our dynamic, far superior,

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1 real-time analysis of queries, we have to go through
 2 the same dumbed-down mechanism that would be envisaged
 3 under sandbox. I say that is a submission which is
 4 profoundly at odds with the underlying concept of
 5 competition law, of competition being on the merits. In
 6 that world, in a world of competition on the merits,
 7 rivals are entitled to out-manoeuvre each other because
 8 of their superior quality, and they are encouraged to
 9 innovate to provide better services to users and to
 10 thereby better meet their needs and themselves make
 11 greater inroads into the market.

12 The idea that, in this world of 3b, Google is to be
 13 ham-strung so that it cannot use its best technology, it
 14 has to compete on this dumbed-down, lowest common
 15 denominator field, there is simply no support in
 16 competition law for that. You were not shown any
 17 authorities to support it by Mr Jowell and there is
 18 none.

19 If I may just take instructions, if there is
 20 anything else that I need to say and then I can -- or,
 21 of course, if there are any further questions
 22 the Tribunal would like to ask me and then after that
 23 I can sit down.

24 (Pause)

25 So you asked me some questions that I was not

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1 particularly able to respond to because they dealt with
 2 algorithms. Mr McGurk says he has one-minute's worth of
 3 submissions that he -- that would respond --

4 MR JOWELL: I am sorry, I --

5 THE CHAIRMAN: Well, just one moment both of you --

6 MR JOWELL: (Overspeaking -- inaudible).

7 THE CHAIRMAN: -- just one minute. Just one moment.

8 (Pause)

9 What we will do, Mr Jowell, we are very conscious of
 10 the fact that you must have your hour, we will hear
 11 Mr McGurk for two minutes, we will then take a 15-minute
 12 break and come back and sit until 5.30.

13 MR PICKFORD: Thank you to the Tribunal.

14 Closing submissions by MR MCGURK (continued)

15 MR MCGURK: Thank you very much, sir.

16 Just extremely briefly -- and this is to come back
 17 on Ms Rose's questions to my learned friend about
 18 the world in which we are only dealing with algorithms
 19 and how you balance that with the need for shopping
 20 starts -- you heard evidence, in particular from Mr Kim,
 21 about church v state and how he described the blue links
 22 as hallowed ground and that Google, and in particular
 23 its search team who are responsible for the SERP, wanted
 24 to ensure there were honest, which is to say unbiased
 25 results on the page. That evidence from Mr Kim in

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1 particular was not challenged.

2 Now, the organic results were driven by quality
 3 concerns, and in 2008, my submission will be that would
 4 have been the same case and would not have been driven,
 5 Ms Rose, to your question, by the need to ensure
 6 shopping starts. The huge concerns, you heard in
 7 particular Mr Cutts talk about, from 2000 to 2004
 8 leading to the promulgation of Algorithm A in 2004, was
 9 the concern for spam thin affiliates, which included,
 10 but was not confined to, CSSs, and Algo A was launched
 11 to address that. Diversity was only, as you know,
 12 launched in the US, where Algorithm A also applied, and
 13 it was brought in because CSSs were absolutely flooding
 14 the SERP in the US. But the fundamental point is that,
 15 given the SERP was hallowed ground and the need for
 16 honest results would have been true in
 17 the counterfactual, then if we are confined to
 18 the "algorithms only" counterfactual, we say, as
 19 Mr Pickford put it, that there would not have been
 20 a tweak by way of something like Diversity to ensure
 21 additional shopping results appearing on the SERP.

22 Two final points. Just all of that is made good by
 23 reference to the evidence that you have got in annex K2
 24 to our closings.

25 Very finally, Ms Rose's last point was about

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1 functionality and you contrasted that with what
 2 the algorithms did in relation to content and
 3 the quality signals. We are not going into the quality
 4 signals, but as we explained earlier in the trial,
 5 the more functional options that there were on the page,
 6 the better that was in terms of how those particular
 7 websites would do because of the reasons set out in
 8 the confidential note on how Algorithm A worked, so
 9 there was a positive feedback loop there.
 10 Mr Cutts was asked about, "Could you have developed
 11 an algorithm to reflect the functionality on a CSS".
 12 Part of the answer was: the best of the functionality --
 13 MS ROSE: Can you give us a reference to that evidence from
 14 Mr Cutts?
 15 MR MCGURK: Yes, it was Day 6. I am going to have to come
 16 back with a full reference for that.
 17 But, in any event, you see how it loops back when
 18 you consider the note on Algorithm A as to how better
 19 functionality would result in better engagement of
 20 the quality signals, to put it that way in open. I will
 21 give you a reference after the break, madam, but we say
 22 there would have been no tweaks made to the algorithms
 23 in that counterfactual because of the approach of
 24 the search quality team to the SERP at that period in
 25 time.

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1 I am grateful for the extra time.
 2 THE CHAIRMAN: Yes. We will come back at just before 4.30.
 3 (4.15 pm)
 4 (A short break)
 5 (4.30 pm)
 6 THE CHAIRMAN: Yes, Mr McGurk.
 7 MR MCGURK: (Off microphone – inaudible) -- references.
 8 THE CHAIRMAN: The references, yes.
 9 MR MCGURK: On what could and would have been done in 2008
 10 in relation to the algos, it is {Day6MT1/182:2-8},
 11 {Day6MT1/212:20}, to {Day6MT1/213:7}, that is Mr Cutts;
 12 {Day8MT1/151:5-22}, Mr Kim; and finally,
 13 {Day11MT1/215:18} to {Day11MT1/216:19}.
 14 I am grateful to Mr Jowell.
 15 THE CHAIRMAN: Day 11 is which witness?
 16 MR MCGURK: I am so sorry. That is Mr Kalyanpur.
 17 THE CHAIRMAN: Thank you.
 18 Yes, Mr Jowell, I do not think we need to hear from
 19 you on the question of whether the Product Universal or
 20 Shopping Unit was -- what it means that it was part of
 21 Google's CSS or a manifestation of Google's CSS.
 22 Reply submissions by MR JOWELL
 23 MR JOWELL: Yes. Well, I am grateful for that indication.
 24 If I could show you perhaps just one point on that,
 25 because I think it may assist, which is -- it relates to

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1 the appeal that was made --
 2 THE CHAIRMAN: Yes.
 3 MR JOWELL: -- in relation to the duration of the fine --
 4 THE CHAIRMAN: Yes, that would be helpful, because we were
 5 trying to find that.
 6 MR JOWELL: Yes. I showed you 338 to 339. I think
 7 I pointed you to those paragraphs, where they talk about
 8 the position with regard to the -- to those countries
 9 where there was no website for many years.
 10 THE CHAIRMAN: This was 338 and 339 of ...?
 11 MR JOWELL: Of the General Court. We can look at those
 12 again, if you like. It is {BA/3/60}, which we saw, in
 13 which they note that during that period:
 14 "... Google Shopping existed only in the form of
 15 the Shopping Unit without an associated standalone
 16 website".
 17 Then 339, they say:
 18 "... the Commission was fully entitled to find that
 19 Shopping Units favoured Google's [CSS], irrespective
 20 moreover of whether or not they favoured the standalone
 21 Google Shopping website directly by providing it with
 22 revenue."
 23 If we go to {BA/3/131}, we see where they deal with
 24 this point in the context of the duration of the fine,
 25 and you see 665:

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1 "Google then disputes the duration of
 2 the infringement identified in the various countries
 3 concerned. It regards that infringement as not having
 4 been established before 2011 because no competition
 5 analysis was carried out."
 6 Then:
 7 "It submits that the specialised Google Shopping
 8 page was not introduced in some of the countries
 9 concerned until 2016."
 10 THE CHAIRMAN: Ah, yes.
 11 MR JOWELL: So that is the point.
 12 Then you see that the point is dealt with at 668
 13 below:
 14 "The argument relating to the introduction, which
 15 was not until 2016, of the specialised Google Shopping
 16 page in some of the countries concerned must be rejected
 17 for the same reason. The Commission's complaint in
 18 respect of Google's conduct is not that Google created
 19 a specialised search and results page for
 20 comparison shopping but that it treated its own
 21 comparison shopping service and competing comparison
 22 shopping services differently on its general results
 23 page by positioning and displaying its own results more
 24 favourably in the Product Universals, and subsequently
 25 in the Shopping Units."

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1 THE CHAIRMAN: Yes.
 2 MR JOWELL: So we say that that underlines the point.
 3 I think I can just make a few general points then
 4 about abuse.
 5 One is that we say that the General Court and
 6 the Court of Justice are uniquely authoritative
 7 interpreters of EU legal instruments, including
 8 Commission Decisions, and indeed that that follows from
 9 the entire structure of the Treaty. It is
 10 a long-established principle, as I am sure the Tribunal
 11 will be well aware, and one finds it reflected in
 12 the very structure of the Treaty, the fact, for example,
 13 that under Article 208, formerly Article 177, there has
 14 to be a reference from national courts to the Court of
 15 Justice on points of EU law, where you reach the court
 16 of final resort in a national Member State, unless
 17 the issue is acte clair, and that is because it is only
 18 the Court of Justice that is the authoritative arbiter
 19 of the meaning of EU law and EU law instruments. One
 20 sees that reflected in, for example, the *CILFIT* case.
 21 So we say that absolutely one has to look to what
 22 the General Court and the Court of Justice say about
 23 what a particular Commission Decision means and there is
 24 no question that, as I think you have accepted,
 25 the shopping box and the Product Universal before that

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1 are regarded by the General Court as forms of Google's
 2 CSS.
 3 It follows from that, that really the attempt by my
 4 learned friend to try and -- still to try to identify
 5 the CSS uniquely with the website simply does not work.
 6 So what we say is that, when one looks at the way in
 7 which one sees now the Remedy box, there is no
 8 substantive difference between that and the Shopping
 9 Unit that preceded it.
 10 You were asked about what underlies -- the processes
 11 that underlie the existing --
 12 THE CHAIRMAN: Well, there is, when -- you say "no
 13 substantive difference", there are obviously some
 14 differences.
 15 MR JOWELL: Some differences, but they are --
 16 THE CHAIRMAN: But the question, it seems to us -- it has
 17 obviously changed --
 18 MR JOWELL: Yes.
 19 THE CHAIRMAN: -- is: are the differences such as to mean
 20 that it is no longer -- or it is not Google's CSS?
 21 MR JOWELL: Google's, yes. It may be worth just looking at
 22 a few recitals quickly, back in the Commission Decision,
 23 that my learned friend did not take you to, just to --
 24 which are quite instructive in terms of the general
 25 approach.

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1 So if one goes, for example, to recital 344, which
 2 is at {BA/2/84}, one sees it says -- at 344, it says:
 3 "While competing comparison shopping services ..."
 4 It says -- this is the second sentence:
 5 "While competing comparison shopping services can
 6 appear only as generic search results and are prone to
 7 the ranking of their web pages in generic search results
 8 on Google's general search results pages being reduced
 9 ('demoted') by certain algorithms, Google's own
 10 comparison shopping service is prominently positioned,
 11 displayed in rich format and is never demoted by those
 12 algorithms."
 13 That, in a sense, shows that this distinction that
 14 my learned friend seeks to draw between the specialised
 15 results when they appear in the SERP and the service
 16 does not exist in the Commission's mind.
 17 THE CHAIRMAN: Yes. That does not go to the Remedy box.
 18 MR JOWELL: It does not go to the Remedy box, but what does
 19 perhaps go more to the Remedy box are some of
 20 the general statements that one sees in the decision.
 21 For example, if we go to {BA/2/80}, it reminds us of
 22 the importance of equality of opportunity as between
 23 the various economic operators. So it says, at 331 at
 24 the bottom:
 25 "Dominant undertakings have a special responsibility

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1 not to impair, by conduct falling outside the scope of
 2 competition on the merits, genuine undistorted
 3 competition in the internal market. A system of
 4 undistorted competition can be guaranteed only if
 5 equality of opportunity is secured as between
 6 the various economic operators. The scope of
 7 the special responsibility of the dominant undertaking
 8 has to be considered in light of the specific
 9 circumstances of the case."
 10 Again, if we go on to {BA/2/226}, one sees 663, just
 11 the first sentence:
 12 "... Google has provided no evidence to demonstrate
 13 that users do not expect search services to provide
 14 results from others."
 15 So it is about -- equality of opportunity is a theme
 16 in this and users can legitimately expect to receive
 17 different search service results.
 18 At 669, on {BA/2/227}, it talks about -- it says:
 19 "In the fourth place, any restriction on Google's
 20 rights and freedoms is necessary to protect the freedom
 21 of competing comparison shopping services and other
 22 economic operators to conduct a business consisting in
 23 returning product offers from merchant websites,
 24 enabling users to compare them."
 25 At 670:

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1 "Any restriction on Google's rights and freedoms is
2 also necessary to protect the right of users to receive
3 information from competing comparison shopping
4 services."

5 We say that those general principles of equality of
6 opportunity and of the right of users to receive
7 competing services are embedded in the structure of
8 the principles that underlie this decision and that is
9 what makes the discrimination that Google carried out
10 anathema.

11 Now, if one looks to the question of what is the --
12 what is underlying still done by Google, one sees a good
13 description of that in Mr Hunt's report, if I can show
14 you that. It is at {I2/1/7}, I believe. Is it? No,
15 {I2/1/107}, I think.

16 You can see, from paragraph 225, he describes how
17 Google Search retains control over a number of CSS
18 capabilities:

19 "Google Search has exclusive control over
20 the configuration and prominence of the CM-SU ..."

21 That is the Remedy box:
22 "... on the SERP, including all its design aspects
23 and operation."

24 He is summarising information that you find in
25 the -- the references are all in the footnotes:

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1 "It determines whether visual displays of product
2 offers are triggered, the positioning and ranking of
3 these displays, and the format, frequency, and features
4 presented to users."

5 It goes on from 225 -- I will not read it all out,
6 but from 225 to 229 {I2/1/107-108}, he describes in some
7 detail all of the activities that are still carried out
8 by Google in connection with the provision of the Remedy
9 box, and those are all -- those are what I called --
10 effectively, this is the engine that drives
11 the comparison shopping display, the manifestation on
12 the SERP, and continues to do so. None of that, that
13 underlying core comparison shopping functionality, is
14 done by anyone other than Google. As has been pointed
15 out and has not seriously been contested, the only role
16 of other rival CSSs are as bare intermediaries; they do
17 not carry out -- they are not -- they do not have
18 equality of opportunity, economically or commercially,
19 to provide rival CSS services on the SERP, only Google
20 continues to do that.

21 From the user point of view, there is evidence
22 that -- of substitutability, clear evidence, between
23 the Remedy box and CSSs and that is not undermined by
24 the fact that the Remedy box is in many ways a rather
25 inadequate CSS substitute, because it does not have

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1 the full functionality that one would ideally want to
2 see in a good CSS, but it is clearly carrying out
3 the same job for many users. You can see that if one
4 goes to Mr Hunt's second report, paragraph 84, which is
5 at {I4/1/37}, and you see he says there:

6 "... the fact that users encounter the CM-SU as one
7 element of the SERP, and may conduct more detailed
8 product comparison elsewhere, does not detract from its
9 economic role. When users do engage with the CM-SU,
10 their product discovery, product and price comparison,
11 and onward navigation to merchants are all mediated
12 through Google-controlled shopping functionality. This
13 user-side intermediation is central to the economic
14 definition of a CSS. On that basis, for users,
15 the [Remedy box] is an economic substitute for CSSs
16 hosted on standalone websites and should therefore be
17 regarded as part of Google's CSS."

18 That is intuitively true and none of the witnesses
19 really sought to deny that, from a user perspective, it
20 performs that function, and indeed, in the hot tub,
21 the discussions that Professor Smith had with Mr Noble
22 were also illuminating in that regard.

23 So we say that, for those reasons, it is plain that
24 the abuse continues, the self-preferencing continues.
25 MS ROSE: What about the argument that no CSS allows another

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1 CSS to advertise on its service?

2 MR JOWELL: Well, it is not -- I mean, the -- that is --
3 the fact is that the Commission has said that this is
4 a dominant undertaking which has got a certain special
5 responsibility to allow equal opportunity and therefore,
6 in these circumstances, Google has a choice. It either
7 can give equal prominence to rival CSSs or it can have
8 no CSS.

9 MS ROSE: That is a different point. I am just asking,
10 the point that was being made, I think, by Mr Pickford
11 was that this is not in the CSS market, this box,
12 I think the Remedy box --

13 MR JOWELL: Yes.

14 MS ROSE: -- because the Remedy box contains advertisements
15 for other CSSs, "By Kelkoo", "By PriceRunner".

16 THE CHAIRMAN: Or links to other CSSs --

17 MS ROSE: Links to other CSSs, yes.

18 THE CHAIRMAN: -- and that is not something a CSS --

19 MS ROSE: That is not something the CSS is --

20 THE CHAIRMAN: -- would ever do.

21 MR JOWELL: Well, that is a -- those links are clicked on by
22 1% of users.

23 MS ROSE: But does their presence take this box outside
24 the --

25 MR JOWELL: No, in our submission, clearly not. It cannot

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1 be that you can have a tokenistic presence of other CSSs
 2 and that that can in some way change the fact that what
 3 is actually being done here is you, Google, ranking and
 4 presenting offers to users and generating all
 5 the revenue from it.
 6 THE CHAIRMAN: You say they are so insignificant --
 7 MR JOWELL: Yes.
 8 THE CHAIRMAN: -- that they are not such as to take it out
 9 of --
 10 MR JOWELL: No, not even close.
 11 THE CHAIRMAN: -- the CSS market?
 12 MR JOWELL: No.
 13 So those are our submissions on abuse.
 14 If I may then turn just briefly to mention the point
 15 on jurisdiction that we raised in our skeleton.
 16 Now, I should say at the outset, we absolutely agree
 17 and accept that this is a matter that is not for today
 18 substantively, but I do want to just mention a couple of
 19 things about it, just as a -- just to raise it to your
 20 attention.
 21 THE CHAIRMAN: Yes.
 22 MR JOWELL: The reason that we raised this, and it was
 23 prompted really just by the Tribunal's observation about
 24 proper law at the outset, sort of triggered our interest
 25 as to how that might be relevant and I do not know

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1 whether it was directed at this point, it probably was
 2 not. I think I --
 3 THE CHAIRMAN: I can tell you it was not.
 4 MR JOWELL: It was not. Certainly I did not understand it
 5 to be. I thought it was prompted by thoughts about, you
 6 know, the proper law of interest or something like that,
 7 but anyway --
 8 THE CHAIRMAN: I can tell you, it was prompted by
 9 the reference to the judgments --
 10 MR JOWELL: Yes, yes, of the foreign court. That is
 11 what ...
 12 But, in any event, it prompted us to think about
 13 things, and it -- the issue is this, that after
 14 the issues were framed in these proceedings for
 15 resolution in Trial 1 and Trial 2, this point arose in
 16 relation to jurisdiction and the jurisdiction of this
 17 Tribunal, and we got -- we were a little concerned that
 18 one could potentially be in a position where this
 19 Tribunal hands down a judgment in which it might
 20 potentially say that the abuse continued up until
 21 the present day in these European countries, only then
 22 to be told that, "Oh, well, Google's position is that
 23 this Tribunal has actually got no jurisdiction to make
 24 such an order". That is why we thought it appropriate
 25 to raise this issue to the Tribunal's attention, and

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1 also what we proposed was the obvious solution to it,
 2 which was simply to -- if it indeed does not have
 3 jurisdiction, which is indeed to refer this matter back
 4 to the High Court from whence at least the Kelkoo claim
 5 came and for you, Mr Chairman, with a different hat, to
 6 make the appropriate order because we consider that
 7 clearly the High Court does have jurisdiction.
 8 THE CHAIRMAN: Well, I think it is a bit more complicated,
 9 is it not?
 10 MR JOWELL: Yes.
 11 THE CHAIRMAN: I can tell you it is arising in other cases
 12 in this Tribunal --
 13 MR JOWELL: No, indeed.
 14 THE CHAIRMAN: -- because essentially it may be that
 15 Article 102 is no longer as such --
 16 MR JOWELL: Yes.
 17 THE CHAIRMAN: -- part of the law of this country --
 18 MR JOWELL: Yes, well, that is --
 19 THE CHAIRMAN: -- from IP completion date that can be
 20 alleged, so it can only be brought in through alleging
 21 foreign law.
 22 MR JOWELL: Foreign law, yes, and so --
 23 THE CHAIRMAN: So it is a slightly more complicated process.
 24 MR JOWELL: Yes, indeed, and, indeed, I think we would say
 25 it is implicit in our submissions already that insofar

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1 as -- because we state in the relevant part of
 2 the pleading -- we already state that we do not claim
 3 for 102 insofar as concerns the UK, we only claim 102 --
 4 for the UK, we only claim under section 18 under
 5 Chapter II, and it is only for the foreign jurisdictions
 6 that we claim in respect of -- under 102. We
 7 respectfully suggest that it is obviously implicit in
 8 that that we are claiming, therefore, under foreign law,
 9 because we are implicitly accepting that under English
 10 law there is no such claim.
 11 Nevertheless, we have proposed an amendment to our
 12 pleadings to put that beyond doubt. For your reference,
 13 that is in -- you can find that in {L6/65} and {L6/66},
 14 and we have written to Google to make that clear and to
 15 propose -- it is {L6/64}. The letter is at {L6/64},
 16 yes, and the pleadings -- the proposed amended pleadings
 17 are at {L6/65} and {L6/66}.
 18 So what we have proposed is effectively that we seek
 19 to resolve this, and it probably needs to be resolved
 20 and probably the best time is either on hand-down of
 21 judgment, when we will see whether the point still
 22 arises, or on 11 September, at that hearing. We do not
 23 know yet what Google's substantive response is --
 24 THE CHAIRMAN: Well, we are not going to address it now --
 25 MR JOWELL: No, no, of course.

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1 THE CHAIRMAN: -- and we are not going to hand down judgment
 2 before 11 September --
 3 MR JOWELL: No.
 4 THE CHAIRMAN: -- because the whole point of 11 September is
 5 to be addressed on the implications of the ... If
 6 necessary, we can hear some submissions on this on
 7 11 September of how to deal with it, but I suggest we
 8 just park that question.
 9 MR JOWELL: Yes, indeed.
 10 THE CHAIRMAN: Mr Pickford accepted he is not expecting us
 11 to deal with it now.
 12 MR JOWELL: No, and nor are we.
 13 THE CHAIRMAN: The point is there, you are alert to it,
 14 Google is alert to it and we will have to address it at
 15 some point.
 16 MR PICKFORD: I would strongly resist this being dealt with
 17 at the hearing on the -- I think it is 11 September. We
 18 already have quite a lot to deal with in relation to
 19 the DMA and in my submission there are likely to be some
 20 complex issues that arise out of even the seeking of
 21 the amendment.
 22 THE CHAIRMAN: Well, let us not decide that now. You have
 23 not responded on this yet, I think, and we will see
 24 where we get to, but we --
 25 MR PICKFORD: Yes. The letter came in this morning.

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1 THE CHAIRMAN: It is not going to be dealt with now and
 2 I know you are short of time, so I suggest you move on.
 3 MR JOWELL: Yes. But I thought I should alert you to
 4 the point.
 5 So that brings me then I think to
 6 the counterfactual.
 7 THE CHAIRMAN: Yes.
 8 MR JOWELL: There are two areas here: the counterfactual on
 9 the law and the counterfactual on the facts. I will
 10 have to go through these both at quite a gallop, I am
 11 afraid.
 12 THE CHAIRMAN: Yes.
 13 MR JOWELL: So in terms of the authorities my learned friend
 14 took you to, he had a very -- he put his case very high,
 15 I think, at the outset. He said when we are dealing
 16 with a counterfactual analysis, one is not ruling under
 17 Article 101 or Article 102 and therefore Article 16 has
 18 no bearing. We do not think that can possibly be right.
 19 It is not what any of the authorities that he submitted
 20 support. The *Otis* case that he mentioned does not say
 21 that if the court has decided effects in relation to
 22 infringement that the national court can then say no
 23 effects, or different effects. It says rather that
 24 the national court then still has to decide
 25 the individual effects, which is an entirely different

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1 matter.
 2 Indeed, if one thinks about it for a moment, suppose
 3 you had an Article 101 infringement and suppose that
 4 the Commission Decision said there is no
 5 anti-competitive object here, but there was an
 6 anti-competitive effect, in our submission, it would
 7 certainly not be open to the national court to say: oh,
 8 well, in the context of causation, we are going to
 9 reopen the question of whether it had any actual
 10 anti-competitive effect. That would plainly be running
 11 counter to the decision.
 12 Likewise, one does not get any assistance really
 13 from the damages directive, which simply sets out
 14 the innocuous, general proposition that one must
 15 calculate damages on the basis that had the infringement
 16 of competition law not been committed, because that
 17 simply begs the question: how does one constitute
 18 the competition law infringement in a particular case?
 19 Equally, in *Rukhadze*, as the Chairman pointed out,
 20 the duty there was the duty not to breach a dominant
 21 position and the question is what was the conduct, and
 22 the question is: is the conduct to be regarded as
 23 the combined conduct or one or other limb?
 24 In relation to the *Merricks* case, it is important
 25 to note, this was a case not about infringement, it was

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1 a decision about damages and about the appropriate
 2 counterfactual for damages. No one was saying that --
 3 it was not an argument that there was an actual
 4 exemption that needed to be granted, it was a question
 5 of what exemption would have been given, and they were
 6 not able to argue for anything non-zero, because that
 7 was inconsistent with the finding of the court. So we
 8 continue to say that it is in fact on all fours with
 9 the present case, which is where one is talking about
 10 a situation where you have a causal link that is part of
 11 the infringement decision.
 12 Now, in relation to his pleadings before
 13 the European Court of Justice, my learned friend went to
 14 part of his pleading, which was at {O/11/36}, and this
 15 is, I think, where he went to and he said -- he took you
 16 to this pleading:
 17 "The GC erred in holding that the burden to conduct
 18 a counterfactual analysis was on Google, rather than
 19 the Commission."
 20 But actually the appeal was rather wider than that.
 21 You can see that from the preamble on the previous page
 22 {O/11/35}, in which it is noted that -- it says -- you
 23 see paragraph 110 and 111, and 111:
 24 "The Commission cannot presume a causal link between
 25 conduct and likely effects ... Establishing the causal

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1 link is a necessary element of an analysis under
 2 Article 102 ..."
 3 If you go forward to {O/11/39}, one sees
 4 the specific pleas that are developed under that limb:
 5 "The GC erred in holding that a counterfactual for
 6 an abuse that consists of the combination of two lawful
 7 practices requires removing both practices."
 8 So the question of the proper counterfactual and
 9 whether it required removing both limbs was an element
 10 of their appeal, and if you go over to {O/11/40}, one
 11 sees it developed.
 12 Perhaps if you can just cast your eye over page 40
 13 quickly.
 14 (Pause)
 15 THE CHAIRMAN: Yes.
 16 MR JOWELL: If one goes to the judgment of the Court of
 17 Justice one sees, for example, on page 224 -- which is
 18 at {BA/4/36}, please -- in 224, the Court of
 19 Justice confirms that the:
 20 "... causal link is one of the essential constituent
 21 elements of an infringement for competition law which it
 22 is for the Commission to prove ..."
 23 If one then goes to --
 24 THE CHAIRMAN: Sorry, you are at paragraph?
 25 MR JOWELL: 224.

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1 THE CHAIRMAN: 224, yes.
 2 MR JOWELL: That is a general principle in these cases,
 3 these exclusionary cases, that you have the conduct,
 4 then you have a causal link that you have to establish,
 5 and then you have either the potential or the actual
 6 effects, and the causal link, here, is the diversion of
 7 traffic to Google and from CSSs. It does not say that
 8 you do not have to establish an actual causal link, it
 9 says you do have to establish an actual causal link.
 10 MS ROSE: This is the causal link between the conduct and
 11 effects on competition --
 12 MR JOWELL: Correct.
 13 MS ROSE: -- or potential --
 14 MR JOWELL: Potential effects, yes, exactly.
 15 MS ROSE: That is not the same question as the causal link
 16 between infringing conduct which has an effect on
 17 competition, or a potential effect on competition, and
 18 an individual party who claims to have suffered damages?
 19 MR JOWELL: It is at an earlier stage. You have to -- it is
 20 part of the -- it is actually -- it is a constituent
 21 element of the infringement.
 22 MS ROSE: It is looking at the market as a whole.
 23 MR JOWELL: Yes. Yes, it is. Yes, it is.
 24 MS ROSE: If you are looking at the question has Kelkoo --
 25 MR JOWELL: Yes.

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1 MS ROSE: -- suffered damage and, if so, what damage, as
 2 a result of this infringement which is capable of
 3 impacting competition, that is a question that
 4 the damages directive tells us needs to be assessed
 5 under domestic law.
 6 MR JOWELL: Yes, but you have to, first, have
 7 the infringement. What you cannot do is -- it comes
 8 back to my point, you cannot have -- it is like saying,
 9 well, I have got this case about a cartel which has been
 10 found to have had anti-competitive effects. You cannot
 11 then make a subsequent -- logically subsequent
 12 determination about it, the effect of that cartel on an
 13 individual buyer or victim, which contradicts, which
 14 runs counter to the underlying infringement decision.
 15 MS ROSE: Well, that begs the question whether it does run
 16 counter.
 17 MR JOWELL: Well, if it -- in our submission, it does,
 18 because one cannot -- once one has established that
 19 there is an infringement based upon the existence of
 20 both elements, you cannot then -- one cannot then
 21 squeeze the toothpaste back in the tube and assess loss
 22 on a different basis, because that is a constituent
 23 element of the actual infringement. The causal link is
 24 essential, the causal link is founded on this particular
 25 counterfactual. They did not actually have to have

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1 a counterfactual, they say. No, that is absolutely
 2 right, they did not. But once Google came forward with
 3 its counterfactual, they had to deal with that and
 4 consider it, and they said: no, that is not the right
 5 counterfactual, just taking away promotion; no, you have
 6 to take away both promotion and demotion. That is
 7 the basis on which they found a causal link.
 8 We say, with respect, the Tribunal is stuck with
 9 that, even if it thinks it is illogical, which, from
 10 a formal logic point of view, it might be, but actually,
 11 as I submitted, it makes absolutely good sense in
 12 the real world, the real world in which we know that
 13 Google would never have done the one without the other.
 14 So you have seen -- I have shown you already
 15 the subsequent reasoning --
 16 MS ROSE: You say "Google would never have done the one
 17 without the other" --
 18 MR JOWELL: Yes, well --
 19 MS ROSE: -- you mean if Google could not self-preference,
 20 it would not have applied an algorithm that tended to
 21 demote?
 22 MR JOWELL: Yes, it would not have had to demote. Yes,
 23 correct.
 24 THE CHAIRMAN: Although the Algorithm A came in 2004, before
 25 any self-preferencing.

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1 MR JOWELL: Well, the Algorithm A, that was -- it did. It
 2 was also an algorithm that iterated and had numerous
 3 different effects over time. It coincided with
 4 the OneBox, and it was, in our submission, preparation
 5 for -- it was done in the knowledge that they were --
 6 had plans to integrate the OneBox more firmly into
 7 the SERP, as you have seen from the evidence.
 8 THE CHAIRMAN: I think we had quite a bit of evidence of why
 9 it was brought in.
 10 MR JOWELL: Yes.
 11 THE CHAIRMAN: Yes, well, there we are.
 12 MR JOWELL: Yes.
 13 So you have seen the reasoning and I have shown you
 14 the Advocate General, and it is all of one and it
 15 rejects their arguments, their appeal, as not realistic,
 16 plausible or likely, and it finds that -- and it
 17 dismisses the ablation experiments precisely on
 18 the basis that one has to strip out both elements.
 19 That then I think brings me to the question of
 20 the counterfactual on the facts.
 21 My learned friend, yesterday, could not seem to
 22 recognise that the one viable counterfactual for which
 23 we contend is that Google would have adjusted its
 24 algorithms so that they were not prone to demote CSSs by
 25 reason of their characteristics and at the same time

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1 have no specific box. That is our scenarios 1 and 2.
 2 We say that that is an obviously plausible scenario.
 3 One can envisage the removal of the algorithms or
 4 the offending aspects of the algorithms in various ways.
 5 One is by an adjustment, and you heard the evidence from
 6 Mr Kim and Mr Kalyanpur to the effect that that could be
 7 done algorithmically. It could equally have been done
 8 potentially by whitelisting, just as Foundem was
 9 whitelisted. That is another way to think of it. One
 10 can simply say --
 11 MS ROSE: How specific should the Tribunal be on this?
 12 MR JOWELL: Well, I think --
 13 MS ROSE: It is very difficult for us to --
 14 MR JOWELL: Yes, I mean, I think in a way the easiest way is
 15 simply to say that CSSs that were not -- that would have
 16 an equivalent effect, that CSSs that were not thin
 17 affiliates would be whitelisted. That would be one
 18 straightforward way to make the point.
 19 MS ROSE: That seems unsatisfactory though.
 20 Unsatisfactory --
 21 MR JOWELL: It may be. The alternative is to say that there
 22 would have been an algorithmic demotion along the lines
 23 of the -- forgive me, an algorithmic --
 24 MS ROSE: [Redacted].
 25 MR JOWELL: I am trying not to use the word, because I think

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1 it might be --
 2 MS ROSE: Adjustment.
 3 MR JOWELL: Yes, let us say adjustment. For some reason,
 4 the precise word that one is -- for some reason is
 5 confidential, we are told, but --
 6 MS ROSE: I mean, what about something in the algorithm that
 7 gave credit for the kind of functionality that is
 8 typical of a good CSS? So just as the algorithm might
 9 give credit for original content, it were to give credit
 10 for features such as price sorting, filters, so on.
 11 MR JOWELL: Yes, something that --
 12 MS ROSE: The aggregation --
 13 MR JOWELL: Yes.
 14 MS ROSE: The aggregation and ability to have
 15 a sophisticated search and sorting of aggregated
 16 content --
 17 MR JOWELL: Yes.
 18 MS ROSE: -- rather than just original content.
 19 MR JOWELL: Yes, that would certainly go a good deal of
 20 the way. I think that the evidence suggests that there
 21 would be an adjustment -- let us call it an "adjustment
 22 algorithm" -- there is a more technical word I am not
 23 allowed to use -- that would have been equivalent to
 24 that that was used for the Diversity algorithm, and that
 25 would have excluded the effect of these algorithms --

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1 these -- it would have moderated substantially
 2 the effect of these algorithms on CSS -- in demoting
 3 CSSs.
 4 Now, the one interesting point on scenario 2 was
 5 observed in the course of yesterday, when my learned
 6 friend referred to paragraph 671, which is at BA/2 --
 7 MS ROSE: Sorry, 671 of ...?
 8 MR JOWELL: Sorry, recital 671 of the Commission Decision,
 9 which is at {BA/2/227}.
 10 Ms Rose, you may recall that you put to my learned
 11 friend that the last sentence -- the last sentence seems
 12 to be envisaging a scenario 2 situation, and I think he
 13 broadly accepted that. It:
 14 "... mentions that Google was considering applying
 15 pictures, prices, and other rich information to generic
 16 search results concerning products ..."
 17 Now, today you heard my learned friend say: it is
 18 absurd, why would we possibly do that? Yet, here we
 19 are. If one goes to the footnote, 783, it is to
 20 a contemporaneous document of Mr Sameer Samat, and you
 21 see it quotes it. Now, we actually -- we have --
 22 I think we have managed to identify the underlying
 23 document. It is at {N/307}.
 24 MR PICKFORD: My submission is it would be absurd if we do
 25 it only for CSSs alone, not that it is absurd that we

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1 would enrich our results, to be clear.
 2 MR JOWELL: One sees at the bottom -- one sees a description
 3 of the current situation, and you see the quote at
 4 the bottom:
 5 "Amit is anxious to see Product universal move to
 6 Ads so it is removed ... But he is very interested in
 7 attaching pictures, prices, and other information from
 8 product search to the web results."
 9 You will see, further up, there is a reference to
 10 mock-ups.
 11 MS ROSE: What is the date of this?
 12 MR JOWELL: This is 17 September 2010.
 13 Now, we are not sure what is the precise mock-up,
 14 but there is one that is referred to in --
 15 MS ROSE: Do we know who Amit is?
 16 MR JOWELL: Yes, we do. I think it is Amit Singhal.
 17 I think he is one of the chief engineers in
 18 the Product Search, but we will double-check.
 19 There was another document which I think -- we think
 20 is referred to by Mr Hunt and we think represents
 21 the sort of thing that was being discussed at the time,
 22 which is {K1/16}. This is just a presentation from
 23 February 2011, so just a few months later.
 24 If you go to {K1/16/34}, and over the page to
 25 {K1/16/35}, here you see, "Google.com

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1 Integration: Mock-up", which looks rather like our
 2 option -- our scenario 2.
 3 MS ROSE: These seem to be links to merchants.
 4 MR JOWELL: They are. They are, but visually and the
 5 general look, and --
 6 MS ROSE: But they are not linked to CSSs?
 7 MR JOWELL: There are -- I am told, yes, there is one,
 8 the third one down refers to "Compare prices ...".
 9 MS ROSE: Where is that? Oh, "Compare prices ...", yes.
 10 MR JOWELL: Yes:
 11 "... from \$190 [view] at 22 stores."
 12 MS ROSE: This looks like Google's CSS, is it not?
 13 MR JOWELL: Maybe. But the point I am making is that -- is
 14 a simple one, there certainly was an interest in
 15 creating an enhanced --
 16 THE CHAIRMAN: These are all compare --
 17 MR JOWELL: Yes.
 18 THE CHAIRMAN: The first three are all comparing prices.
 19 MS ROSE: It looks like a variant of the catalogue view.
 20 THE CHAIRMAN: Mixed with -- mixed up with other things.
 21 MS ROSE: Mixed up with other things.
 22 Does your scenario 2 permit the enrichment of
 23 product ads as well as CSS -- sorry, product results --
 24 these are all organic results -- as well as CSS results?
 25 MR JOWELL: It does not specifically cater for that, but

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1 it --
 2 MS ROSE: But would it be incompatible?
 3 MR JOWELL: But it would not be incompatible. If --
 4 basically it is -- one has --
 5 MS ROSE: So you have an organic -- you have a search for
 6 a digital camera --
 7 MR JOWELL: Yes.
 8 MS ROSE: -- and the top ten results include both products
 9 and CSSs.
 10 MR JOWELL: Yes.
 11 MS ROSE: Would there be anything, in your submission,
 12 anti-competitive if both product ads and CSSs were
 13 enriched?
 14 MR JOWELL: Well, not product ads --
 15 MS ROSE: No, product results. Product results and CSSs
 16 were enriched.
 17 MR JOWELL: No, I think there is nothing wrong, in theory,
 18 with --
 19 MS ROSE: Say, top five results.
 20 MR JOWELL: -- other organic results --
 21 MS ROSE: Being enriched.
 22 MR JOWELL: -- also being enriched, no.
 23 MS ROSE: So they could rank on the merits of their
 24 relevance and utility --
 25 MR JOWELL: Yes.

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1 MS ROSE: -- and you might get -- over time, users would
 2 vote with their clicks and you might find that CSSs drop
 3 down the ranking and there are more product results more
 4 prominent.
 5 MR JOWELL: You might, but one saw that --
 6 MS ROSE: But that is just competition.
 7 MR JOWELL: That is just competition. Well, that is -- yes.
 8 But one did see that, prior to the demotion algorithms
 9 and the self-preferencing --
 10 MS ROSE: Yes, yes.
 11 THE CHAIRMAN: Well, that is what happened.
 12 MS ROSE: That is what happened, yes.
 13 MR JOWELL: One saw that --
 14 MS ROSE: So CSSs --
 15 MR JOWELL: -- CSSs were enormously successful.
 16 MS ROSE: Yes, the point is they have an opportunity to
 17 rank --
 18 MR JOWELL: Yes.
 19 MS ROSE: -- and they have an incentive to improve their
 20 website experience --
 21 MR JOWELL: Yes.
 22 MS ROSE: -- so that they do rank.
 23 MR JOWELL: Yes.
 24 MS ROSE: But the enrichment applies to everybody who is in
 25 the top five, say, above the fold.

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1 MR JOWELL: Yes. That is right, as long as they are not
 2 being ranked as specialist -- by some specialist service
 3 to allow -- to enable a price comparison, that is not
 4 a problem.
 5 THE CHAIRMAN: But fundamental to this is the modification
 6 or adjustment of the algorithms.
 7 MR JOWELL: Yes, that is right.
 8 THE CHAIRMAN: Otherwise we know you do not get onto page 1.
 9 MR JOWELL: That is right.
 10 THE CHAIRMAN: Yes.
 11 MR JOWELL: Now, I should mention a few things about -- and
 12 in relation to the algorithms, Ms Love, at the end, is
 13 going to tell you a few things about Panda in relation
 14 to this, but I am going to -- we are going to bracket
 15 Panda, if you like.
 16 But if I may, a few points on the various points my
 17 learned friend made on the different scenarios. He said
 18 that in scenario 2 -- he said -- well, we -- one point
 19 that he missed from scenario 2 which would have been an
 20 obvious advantage for Google is that its own website,
 21 its own comparison shopping website on which it had
 22 expended quite a bit of investment by 2008 could have
 23 appeared -- could have then been ranked and -- indexed
 24 and ranked, just as Mr Truher wanted it to be, and it,
 25 too, could have appeared in those enriched results.

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1 A point that my learned friend skipped over, of course,
 2 in scenario 2, its website could then have also remained
 3 free if they had chosen to keep it free. I say -- when
 4 I say "free", I mean free to merchants.
 5 MS ROSE: Also Google could benefit from the larger number
 6 of shopping starts, resulting in more clicks on the ads.
 7 MR JOWELL: Absolutely, and that is the fundamental -- that
 8 is the fundamental point. So this --
 9 MS ROSE: So it can compete with Amazon.
 10 MR JOWELL: Yes, and that is absolutely crucial to it at
 11 this point in time and indeed going forward.
 12 So -- now, would there have been -- my learned
 13 friend made a very strong push to say, well, there would
 14 obviously have been charging, he says. Well,
 15 obviously -- I think he accepted, under scenario 2,
 16 there would be no charging. But under -- would there
 17 have been charging under the other options?
 18 Well, we say, under 3a, where you just have
 19 effectively the enhanced catalogue box, we say it is not
 20 obvious that, at least at the start -- very far from
 21 obvious that there would have been charging. It would
 22 have made a lot of sense for Google to have kept an
 23 enhanced catalogue box with links to its own CSS and to
 24 other CSSs, because that would have been a very good
 25 way, potentially, of attracting shopping starts to

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1 Google, potentially on top of the scenario 2 that you
 2 have just seen. So we do not think it is obvious that
 3 at the outset they would necessarily have charged for
 4 that, because there were other reasons to include CSS
 5 results and its own CSS in those, and if people had --
 6 and if it did not charge for 3a, then there would not be
 7 a problem with its own Google Product Search also not
 8 charging when people got on to its website, and it could
 9 still have an element of that marketing advantage that
 10 it liked, saying: well, if you go through to Google
 11 Product Search at least, we will do a non-monetised
 12 ranking. So it is not obvious that, actually, under 3a,
 13 they would have been charging at the outset.
 14 Under the Remedy, or the 3b, under a PLA-based
 15 solution, we agree and accept that, if that had been
 16 implemented, then there would have been charging. But
 17 the question is a prior one: would there in fact have
 18 been a Remedy-type solution on -- or a 3b from
 19 1 January 2008?
 20 Now, initially, of course, their own pleaded case
 21 said there was a difference between the position pre and
 22 post-2013. I can just remind of you that if we go to
 23 {C1/4/7}, and you can see the struck-through words in
 24 paragraph 3A.11.3.1. They drew a distinction between
 25 the period from 2008 to 2013 and the period thereafter.

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1 Now they say: no, no, we would have -- it would have
 2 been technically possible, they say; the technology
 3 was there to do PLAs in 2008 and therefore we would
 4 have. Well, we find that a little unreal in
 5 circumstances where product listing ads were not even
 6 tested anywhere until 2009. So the idea that somehow,
 7 just because the technology was out there, it would have
 8 immediately been implemented seems to us to be a rather
 9 unreal proposal. So we think, if there had been
 10 a PLA-type solution, whether that is the Remedy or 3b --
 11 and of course we say it could only be 3b -- that would
 12 have come in later.
 13 MS ROSE: But immediately before the infringement period
 14 there is the OneBox.
 15 MR JOWELL: Yes.
 16 MS ROSE: Which is text only.
 17 MR JOWELL: Which is text only.
 18 MS ROSE: So the question is: if, at the beginning of
 19 the infringement period, Google was acting lawfully and
 20 not unlawfully --
 21 MR JOWELL: Yes.
 22 MS ROSE: -- would it have gone with an enhanced box of some
 23 kind that was an equal opportunity box --
 24 MR JOWELL: Yes.
 25 MS ROSE: -- or would it have gone with generic ranking,

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1 potentially enriched?
 2 MR JOWELL: Yes. Or a combination. It might have done
 3 both. But it would not -- what it certainly would not
 4 have done --
 5 MS ROSE: If you are going with a 3a-type box --
 6 MR JOWELL: Yes.
 7 MS ROSE: -- and it is not monetised --
 8 MR JOWELL: Yes.
 9 MS ROSE: -- how is Google ranking who goes into the box?
 10 MR JOWELL: On relevance, presumably.
 11 MS ROSE: But only CSSs?
 12 MR JOWELL: But only CSSs, yes.
 13 MS ROSE: So what is the justification for CSSs getting
 14 a privileged position on the SERP over products?
 15 MR JOWELL: Well, because that is what attracts people to
 16 Google.com to do product searches. It is --
 17 MS ROSE: So that is based on the claim that links to CSSs
 18 are inherently more attractive than links to products?
 19 MR JOWELL: Well, yes, but if you look at -- what was Google
 20 doing at that time? Putting more and more catalogue
 21 views in. Mr Kalyanpur is saying: we have got to have
 22 an algorithm that retains at least two CSSs on the page.
 23 MS ROSE: But that is a bit different from putting them at
 24 the top of the page.
 25 MR JOWELL: Yes, it is somewhat, although --

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1 MS ROSE: Does option 2 give you the -- it gives you more of
 2 an opportunity for competition to decide what is
 3 the right prominence for different types of offering.
 4 MR JOWELL: Yes, I see that, but it may be that at that time
 5 it is more natural to say they would have had something
 6 like an enhanced catalogue view or an enhanced OneBox.
 7 I mean, as you know, our main -- our primary position is
 8 1 or 2, so -- or 2 in fact, so, yes, but I mean, one can
 9 -- one can also envisage that it might have been
 10 supplemented by 3a.
 11 Now, there were a few other arguments that I should
 12 very quickly run through. One is the argument that my
 13 learned friend made. He said: our algorithms, he said,
 14 are really good. Mr McGurk did an expanded version of
 15 that where he said: we are only concerned with quality
 16 and we are really good. We say, well, the Commission
 17 Decision has found that those algorithms were prone to
 18 demote CSSs by reason of their characteristics, and we
 19 say therefore it is perfectly acceptable to envisage
 20 a counterfactual world in which they were removed.
 21 I should also mention -- and Ms Love is, in a moment,
 22 going to tell you more about Panda.
 23 I should mention briefly about 3b. My learned
 24 friend now, I think, has to accept that the sandbox
 25 version of 3b, I think he has accepted, would have been

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1 workable in the sense of there not being prohibitive
 2 latency and privacy considerations. He says now: ah,
 3 well, there would be a dramatic reduction in quality.
 4 Well, the evidence suggests there might be some
 5 reduction in quality in certain respects, but that has
 6 to be counter-balanced by two things.
 7 First of all, the inherent importance of equal
 8 opportunity that I have shown you that is embodied in
 9 the decision itself, equal opportunity to competing
 10 CSSs, and when my learned friend says, "Ah, well, Google
 11 should have the opportunity to be outside the sandbox
 12 but everybody else is within it", we say that would be
 13 completely counter to the whole basis of equal
 14 opportunity that forms the basis of the decision.
 15 The second point is this, that the absence of
 16 competition means -- is itself something that leads to
 17 lower quality, and the ability of different -- giving
 18 different CSSs equal -- genuine equal opportunity would
 19 have, over the medium term at least, have led, we say,
 20 to an enhancement of quality to the benefit of users.
 21 Ms Love will now briefly deal with --
 22 THE CHAIRMAN: Just one question, Mr Jowell.
 23 MR JOWELL: Yes.
 24 THE CHAIRMAN: On 3a --
 25 MR JOWELL: Yes.

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1 THE CHAIRMAN: -- the point was made about, if or when it
 2 was monetised, that CSSs would in fact lose out in
 3 the whole page auction.
 4 MR JOWELL: Oh, yes, forgive me, I had forgotten. I should
 5 deal with that. Well, we say a couple of points on
 6 that.
 7 We say that -- first of all, we say it is a circular
 8 argument, because what it is -- first of all, the prior
 9 point is the whole page auction did not come in until
 10 2013, okay? So that is point number one. So this is
 11 not even a consideration until that point in time.
 12 Secondly, their position is circular because it
 13 assumes that the whole page auction would have operated
 14 exactly as it did in the actual when effectively you
 15 were -- in the actual what it is doing is it is
 16 saying: should we have text ads or should we have
 17 product listing ads, which is more profitable to Google?
 18 But here you would have another consideration, because
 19 you would only have text ads, right? So what you have
 20 to -- it is all very well saying, "Oh, well, text ads,
 21 on this one occasion, would be more profitable to us
 22 than having the 3a box". Maybe. But if every time
 23 somebody comes to Google all they get are uninformative
 24 organic results for their product search and lots of
 25 text ads, they are not going to come to Google very

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1 often, and that is the whole point about the increasing
 2 the number of shopping starts.
 3 I put this to Mr Friedman and he actually agreed
 4 with me that Google would, or might have factored into
 5 its assessment the commercial value of having that box
 6 on the page and thereby increasing shopping starts.
 7 MS ROSE: Can you give us the reference?
 8 MR JOWELL: That is {Day11MT1/96} through to
 9 {Day11MT1/102:13}. He said, "I am not in a position to
 10 make those decisions", but he said, "Yes, they might
 11 well have factored that into the assessment",
 12 the commercial value of having the box. So that is
 13 the answer. It would have been something that --
 14 the whole page auction would have been configured in
 15 a different way such that you would have taken that --
 16 pushing out the demand curve, as Mr Noble put it, that
 17 factor would have come into the assessment and hence
 18 the 3a box would have featured more often.
 19 I should also just point out, just as a matter of
 20 correction, that it is not the case that Kelkoo was --
 21 did not have any whole domain demotions as a result of
 22 Algorithm A. That is not correct. You can see that in,
 23 for your note {4/1/100}, paragraph 252. Kelkoo was hit
 24 by whole page demotions and it was also hit by
 25 sub-domain demotions, numerous, which Mr Hunt addresses

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1 in his evidence. So just a point of correction.
 2 Now, if I may, Ms Love will --
 3 MR PICKFORD: I apologise for rising. Before Ms Love makes
 4 her submissions, I would just like to mention to
 5 the Tribunal there is a new counterfactual that
 6 Mr Jowell just raised, admittedly in response to
 7 a question from you, Ms Rose, and I would like, if
 8 I might have about 30 seconds to respond to that after
 9 Ms Love. The new counterfactual just, so you know that
 10 I am not making it up, is a variant of his 2 -- of his
 11 option 2 that he has now adopted and he says that we
 12 could have links that go through to merchants that are
 13 enriched in that.
 14 MR JOWELL: No, no, I am not making -- I think you have
 15 misunderstood.
 16 MR PICKFORD: Oh, sorry.
 17 MR JOWELL: That is not my submission. That is not my
 18 submission.
 19 MS ROSE: I think that organic merchant results --
 20 MR JOWELL: Yes.
 21 MS ROSE: -- could be enriched.
 22 MR JOWELL: Oh, yes, organic merchant results --
 23 MS ROSE: Not --
 24 MR JOWELL: -- as the diagram showed, as their own mock-up
 25 showed. Are you denying that? Are you saying that is

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1 technically impossible?
 2 MS ROSE: So organic product results, whether it is a CSS or
 3 a merchant --
 4 MR PICKFORD: Yes.
 5 MS ROSE: -- could be enriched.
 6 MR PICKFORD: Yes. I have a response to make to that.
 7 I can give it to you now, or I can give it to you after
 8 Ms Love. I did not want to interrupt her, I just wanted
 9 to make sure that you knew that I had something to
 10 respond to on that, because that is key.
 11 MS ROSE: It might be quicker if you do it rather than argue
 12 about whether you should do it.
 13 MR PICKFORD: I will do it right now.
 14 The answer to that is, if we are permitted to have
 15 rich results that go through to merchants, what is being
 16 said against us is the only thing we cannot do is
 17 monetise them and that is contrary to recital 664 of
 18 the decision. So by admitting that we can have rich
 19 results that go to merchants, implicitly we should be
 20 entitled to PLAs as well, see 664 of the recital.
 21 THE CHAIRMAN: This is the organic results.
 22 MR PICKFORD: Well --
 23 THE CHAIRMAN: That is what counterfactual 2 --
 24 MR PICKFORD: Yes, that is what he is saying, but he is
 25 accepting -- I am saying there is implication of that

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1 admission -- that acceptance that we could have rich
 2 results that go through to merchants means, combined
 3 with 664 of the -- recital 664 of the decision, means
 4 that we could also have PLAs, and therefore that --
 5 MR JOWELL: Well, I do not accept that, because we say
 6 that -- I have made it very clear that what you could
 7 not do is have grouped product results that enabled
 8 price comparison and that is a completely different
 9 beast from simply having the odd picture in the organic
 10 results.
 11 Ms Love will now deal with Panda.
 12 Closing submissions by MS LOVE (continued)
 13 MS LOVE: One very brief point, members of the Tribunal.
 14 You will recall yesterday, around page 177, Mr Pickford
 15 took you to a graph from Dr Curto Millet seeking to make
 16 the point that the Panda resulted in a changing of
 17 the guard, I think, along with the Crown jewels
 18 the guard changed and there were some winners but there
 19 were also some losers, and Ms Rose, with respect,
 20 presciently, said that she would be amazed if this point
 21 had not previously been made. I just wanted to take you
 22 to Google's response to the SSO in the supplementary
 23 statement of objections of 3 November 2016 and in
 24 particular to paragraphs 75 to 80, beginning at
 25 {K2/60/28}.

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1 THE CHAIRMAN: What was the date? You gave the date.
 2 MS LOVE: November 2016 was the response to the SSO. You
 3 will see the start of the claim, at paragraph 75, about:
 4 "The SSO, in any case, overstates the impact of
 5 [Algorithm A] and Panda on aggregators."
 6 If we then go over the page to page 30 {K2/60/29},
 7 I will draw your attention in particular to paragraph 79
 8 and to the second sentence, which is:
 9 "The graphs below show examples of sites for which
 10 Panda triggered, but that nonetheless experienced strong
 11 growth in traffic from Google ..."
 12 The examples given there are Beslist, Ceneo,
 13 Heureka, Ladenzeile, and, if we go over the page, please
 14 {K2/60/30}, Trovaprezzi and ShopStyle. It may be
 15 instructive at this point to go back to the paper that
 16 Mr Pickford was referring you to by Dr Curto Millet from
 17 July 2015, to {M/852} and to page {M/852/19}. If we
 18 zoom in in table 11 we see the identity of the top
 19 winner sites that Dr Curto Millet had identified
 20 in internal analysis back in July 2015, and it carries
 21 on over the page, but the Tribunal will observe a degree
 22 of overlap between those names that Dr Curto Millet
 23 identified and the graphs that were put forward to
 24 the Commission to no avail, which you will see from
 25 recitals 359 and footnote 393, which refers specifically

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1 to paragraph 75 to 80 of the SSO.
 2 One final -- I am sorry, I am trespassing on your
 3 indulgence, but one final point in relation to the point
 4 you raised, Ms Rose, about whether one could infer
 5 anything about whether the Ciao letter from 2011 was
 6 received. Obviously, as is usual in the CAT, there is
 7 no general or standard disclosure, so the question would
 8 be whether that letter, if it were retained, had been
 9 covered by a disclosure request or by a category that
 10 was ordered. I do not believe those behind me are aware
 11 of any disclosure request that would have covered that
 12 letter, and in fact, I know this may be amazing given
 13 the volume of stuff you have seen, but we got relatively
 14 limited disclosure in relation of the Decision Period,
 15 because we had the Commission's file, and Mr Jowell was
 16 in the happy position of doing the disclosure hearings
 17 on this, but I believe the approach that was taken at
 18 the time was that we should go and do a gap analysis of
 19 material that was missing from it. So in my submission,
 20 one cannot say anything either way about what was given
 21 in disclosure.
 22 MS ROSE: Thank you very much.
 23 Housekeeping
 24 THE CHAIRMAN: That concludes, slightly later than 5.30,
 25 this hearing. We will resume in September.

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1 Have you agreed directions for September 11?
 2 Well, if not --
 3 MR JOWELL: We have. Yes, I am told we have.
 4 THE CHAIRMAN: You have. Well, if someone can write and
 5 send them in to the Tribunal tomorrow. So we will hear
 6 more submissions then.
 7 In the meantime, can we just thank you all, and
 8 I mean all, not just those who have addressed us, but
 9 also the many others who worked very hard preparing for
 10 this heavy hearing --
 11 MR JOWELL: Well, on behalf of us both, we thank
 12 the Tribunal.
 13 MR PICKFORD: Likewise.
 14 THE CHAIRMAN: -- and a great deal of work has been done and
 15 we appreciate that.
 16 We also, on behalf of all of us, would like to thank
 17 the Opus operator, who has been remarkably efficient and
 18 quick producing documents, sometimes before I could even
 19 write down the reference, it was on the screen.
 20 I hope, after this, you all have a good summer.
 21 MR PICKFORD: Thank you.
 22 (5.42 pm)
 23 (The hearing concluded)
 24
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