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IN THE COMPETITION APPEAL TRIBUNAL

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

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

22nd June-31st July 2026

Before:

The Honourable Mr Justice Roth
Dinah Rose KC
Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

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

Claimants

- and -

GOOGLE LLC & OTHERS

Defendants

A P P E A R AN C E S

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

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

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

Tuesday, 23 June 2026

(10.15 am)

(Proceedings delayed)

(10.21 am)

THE CHAIRMAN: Yes, Mr West.

MR WEST: Should your Lordship give the usual warning before we begin?

THE CHAIRMAN: Well, I am not going to give a warning every day in a case of this length. I might do it when we come to particular witnesses which might attract new viewers, but I hope —— and there is, I think, a warning on the online feed for those who are watching remotely, a sort of banner on the screen anyway, so, what I said yesterday obviously applies throughout the trial.

Opening submissions by MR WEST (continued)

MR WEST: Very well.

Before we look at how Algorithm A operated, can I just make two points by way of framing. The first concerns the effect of Algorithm A where it is applied to a site, and certainly where it applied at the level of the domain, so here, for example, Foundem.co.uk, the effect of an Algorithm A penalty was to remove the site from Google's results, certainly from the visible part of the results, down to perhaps number 200 or thereabouts. That was so for all queries for

which the site would otherwise have been relevant with the exception of queries taking the form of that site's name.

So in my submission, this is a different situation from a normal ranking question where Google's algorithms have to grapple with the question whether site A is of better quality than site B, so that it should appear somewhat higher in the results by adding some points to its relevance score, for example.

Where a site falls foul of Algorithm A, it is effectively removed from the results, and the justification for that is that the purpose of Algorithm A was, or was said to be, to catch spam. Now, there is no official definition of spam, so far as I am aware, but broadly speaking, I think it is common ground between the witnesses that "spam" means sites of no value to users which they do not wish to see, and indeed which usually appear in Google's results at all only because they have done something misleading, such as, in the case of a content site, copying all of its content from somewhere else. But in no sense, in my submission, could Foundem, or sites like it, be described as "spam".

My second point is simply the position that Foundem found itself in in mid—2006. At that stage it was a new entrant to the vertical search market. It had its own

innovative and indeed patented search technology. Its unique selling point was that its technology enabled it to build a search service for any so—called vertical, that is to say any specific topic. So whereas all of Foundem's rival CSSs were just CSSs, just in shopping, Foundem was also a travel search service, for example, and a job search service and so on, and it was the only site of that kind. It was launched in stages over 2025 to 2026, as is normal with launching a website, and it originally ——

THE CHAIRMAN: 2000—and ——

MR WEST: Sorry, 2005 to 2006 and it ranked normally to begin, that is to say it appeared at various points within the visible part of the results for searches for which it was relevant. For example, as set out in Foundem's email to Google, which we do not need to go to now because we will in due course, initially seeking relief from the Algorithm A penalty in August 2006, for various product model number searches, it had ranked at 1 or 5 or 6 in Google's results for those searches, but after 27 June 2006, its rankings deteriorated seriously and before long it disappeared altogether.

But Foundem could see, by running searches for results which would otherwise be relevant to it, that its rival CSSs continued to appear within the results,

other ones, like the ones we have mentioned so far, Shopping.com, PriceRunner, Nextag and so on.

Kelkoo is in a slightly different position because, as Mr Hunt's analysis shows, it was in fact significantly penalised over this period, although it did not disappear entirely.

MS ROSE: Can I just understand. I think you said that the application of Algorithm A meant that you were removed from the rankings, so how does that square with Kelkoo being penalised but still appearing in the rankings?

MR WEST: There are a few explanations. One is that, whilst Foundem's site was demoted at the domain level, so the penalty was applied to Foundem.co.uk, some other sites were penalised at the sub—domain level, so only parts of their sites were penalised. Also whereas Foundem was penalised throughout the whole of the Pre—Decision Period without exception, some other CSSs were, it appears, only penalised on certain days or for certain periods of time within the Pre—Decision Period.

MS ROSE: Which are you saying applies to Kelkoo?

MR WEST: I think the position is both. So Kelkoo had, over some periods of time, a whole domain penalty and for some other periods of time a sub—domain penalty.

MS ROSE: So how was it still appearing in the rankings when it had a whole domain penalty?
MR WEST: Well, it wouldn't appear on those days or those periods of time. We will go into this in detail with the experts.
So with that by way of preface, could we now look at Algorithm A, and I am afraid we will need to sit in private briefly to do this.
THE CHAIRMAN: You would like to do that now, yes?
MR WEST: Yes.
THE CHAIRMAN: Very well.
So could we ask —— and this is LEO Confidential?
MR WEST: It is, in part.
THE CHAIRMAN: So all persons who are not in the inner LEO confidentiality ring, we have to ask you please to leave the court.
(Pause)
I imagine that those instructing you know who is in the rings and can just briefly check that there is no one remaining who should not be.
If we pause the live feed, please.
(In private)
(In public)
MR PICKFORD: Sir, might I take the opportunity, whilst people are coming back in, just to mention one concern

that we have.
THE CHAIRMAN: Yes.
MR PICKFORD: On timing, if we were to finish at 11.30 this morning, that would have meant that the Claimants had 45 minutes more than we would have unless we also have a 45—minute lunch and we also sit half an hour late. If they go beyond 11.30, then that becomes even worse. So I am not actually currently asking for a 45—minute lunch and sit half an hour late, I am not quite sure what progress I am going to make, but I am drawing attention to the desire on behalf of my clients to have equality of arms in that sense.
THE CHAIRMAN: Yes. Thank you.
MR WEST: Has the Tribunal formed a view when it would like me to sit down? I think I was supposed to have three hours, which would mean going on until 12, by my calculation.
THE CHAIRMAN: Yes, well, you go on, take your three hours.
Just to be —— one thing you can help me on, Mr Pickford, is looking at our timetable, I see that Mr Stables —— Dr Stables, I think, is due to start tomorrow, but is also all day Thursday.
MR PICKFORD: (Off microphone) Yes.
THE CHAIRMAN: How long in fact tomorrow? Because tomorrow is divided up, he is not all day tomorrow, so ...

MR PICKFORD: (Off microphone) —— No, so it was due to be that he would start after lunch —— we would then have a day and a half (inaudible).
THE CHAIRMAN: One and a half.
MR PICKFORD: (Off microphone) —— And we do need a day and a half.
THE CHAIRMAN: Yes, one and a half days. Right, thank you.
MR PICKFORD: (Off microphone) If necessary —— it would be undesirable but, if necessary, that could carry over into (inaudible).
THE CHAIRMAN: Yes.
MR PICKFORD: (Off microphone) And we do have quite a lot of ——
THE CHAIRMAN: Yes, one and a half, that is what I wanted to know. Yes.
MR WEST: If I could briefly just address in the context of the discrimination claim between Foundem and Google any suggestion that the difference in treatment between the two was justified by a difference of quality. That —— the premise of that would be that Google's CSS, which of course continued to appear in the SERP, was of higher quality than Foundem's, which did not. But as we heard yesterday, in the Pre—Decision Period, Google's CSS was very low quality. For the Pre—Decision Period, mid—2006 to the end of 2007, for about the first half of that

period, Google's CSS was Froogle, which we heard about yesterday. It may just be worth explaining the name.
You may be a bit confused by the name. I understand it is a pun on the word "Google" and word "frugal", if people were looking for cheap deals. But it was notoriously poor quality, the Commission found —— at recital 490 {BA/2/154}, and it referred at recital 491 {BA/2/155} to the document we looked at yesterday, where it referred to Mr Truher saying the results often "stink" and so on. Google accepts in its skeleton that Froogle was discontinued because it was not —— it did not meet the competitive challenge at the time, that is paragraph 59 {A2/1/28}. Google also accepts, based on the evidence of its own witness, Mr Goodrow, that Froogle did not enable users to compare results on the page, all it provided was a list of links. If the users wished to compare the results, they had to follow the links and sort of keep a mental note of what they found on each of them.
Then, in April 2007 or thereabouts, Froogle was relaunched as Google Product Search. But even over that period, Google Product Search continued to be very low quality. For example, in its early stages, Google Product Search provided no grouping functionality, that is it did not enable offers to be

categorised into groups of the same offers so as to enable users to compare comparable products. Foundem's evidence is that that functionality was only introduced in April 2008, which is after the end of the Pre—Decision Period. Mr Goodrow says in fact it was a few months earlier, but on any view, for most of the period, that function, absolutely key CSS functionality, was absent. GPS, Google Product Search, also did not enable users to view results in a grid format at the time, and nowhere really in its skeleton argument does Google make any attempt to get to grips with this question of whether its own CSS suffered from the same or worse quality deficiencies as those which Google is perfectly happy to criticise others for.

Foundem in fact secured lots of positive feedback for its site which has been drawn together in a document at {M3/491}, and this goes on for many pages and it goes right back to the Pre—Decision Period, in fact prior to the Pre—Decision Period in early 2006. Just one example, number 8:

"Great, found the cheapest TV for me."

Which is similar again to what Mr Dave Williams had to say about how Foundem would enable one to save money by comparing results. But there are many, many pages of these examples of positive feedback.

Now, Google no doubt will also point out that Foundem received some negative feedback as well, which is true, but what we say this positive feedback shows conclusively is that Foundem was not and cannot sensibly be regarded as a spam site, because the one thing a spam site never gets is anyone saying, "Thanks very much, how useful your site is".

Then, just running through Google's other criticisms of Foundem: no original content. Well, in fact, it did have some, as we have seen.

THE CHAIRMAN: Yes.

MR WEST: But Google's did not.

Pattern of outward traffic. Again, Google's pattern was likely the same. Indeed, so the Commission found, at recital 380 {BA/2/112}:

"... Google's own comparison shopping service is not subject to the same ranking mechanisms ... This is despite the fact that Google's own comparison shopping service exhibits several of the characteristics that make competing comparison shopping services prone to being demoted ..."

So the Commission is there making the point these same criticisms apply equally to Google.

Then ——

THE CHAIRMAN: But we have got the finding in the decision

that Froogle's pages were unlikely to be ranked highly in generic search results on Google's general search results pages if it had been applied.

MR WEST: Yes, indeed ——

THE CHAIRMAN: (Overspeaking — inaudible) —— the ranking had been applied to Froogle and that is binding, so we do not have to labour that. But it seems to me that has been established that, if it had applied to Google's CSS, and that is obviously in the Decision Period, it was no better, as you have indicated, Pre—Decision Period, if anything it was worse, so Google's CSS would not have done well. So I think that is the baseline.

MR WEST: The other way we put our case is as lack of objective justification, but in a sense that is simply a different label on many of the same arguments.

THE CHAIRMAN: Yes.

MR WEST: So ——

THE CHAIRMAN: I think we want to move on really to the whitelisting. Do you want to say something about that?

MR WEST: Well ...

THE CHAIRMAN: Because ——

MR WEST: Can I address just briefly the relevance of the whitelisting material?

THE CHAIRMAN: Yes.

MR WEST: It is primarily relevant, in my submission, to the other penalties claim pursued by Foundem. Google does not seem to be arguing in this case that an abuse can only be found against it where it has wrongly or unintentionally demoted a site where that site has pursued the proper appeal processes. That would, in theory at least, be available to it and one might have to then look at what Foundem did. In fact, Google does not seem to be saying that. Its case is: Foundem was properly penalised at all times until it was whitelisted. So that point does not seem to arise.

Foundem's position, by contrast, is that it was wrongly penalised at all times, and so, again, the appeal process point does not seem to arise there either.

But the detailed evidence about whitelisting is relevant to Foundem's case that Google had a strong motivation to ensure that Foundem continued to be penalised after it was notionally whitelisted from Algorithm A in December 2009. That is quite a complicated factual story which we are going to be going through with the witnesses. I have set out a summary of it, or the highlights of it, in my skeleton argument. I was not proposing to go through it in detail within opening unless the Tribunal would like

me to, simply because it is quite a time—consuming ——
THE CHAIRMAN: Yes.
MR WEST: —— process.
But in a nutshell, when Google eventually decided to whitelist Foundem in December 2009, what it did was to whitelist Foundem from its Algorithm A penalty, but that is not the story which it gave to the press and the world at large, which was instead that Foundem had made some changes to its site, as a result of which it had risen in Google's rankings. In fact, the only changes Foundem had made concerned the removal of some textual errors of the kind that we saw yesterday. So that story had two main problems. The first is that of course it was not true. But the other is that if Foundem's site had risen too precipitously in the rankings, going back to the sort of top five or top ten and receiving many millions of monthly visitors, the explanation that this is because it made some changes to textual amendments —— to textual errors, rather, to its site would not have been credible. So that is what all of the —— or that is the primary relevance, I suggest, of most of the evidence about the requests to seek whitelisting, and we are going to go through it with the witnesses.
THE CHAIRMAN: Yes, I see.

MR WEST: If I can briefly just address the other —— or briefly address just some other points about the other penalties claim.
Following whitelisting in December 2009, Foundem's traffic remained low. It had been even lower, of course, during the period of its Algorithm A penalty, but it remained low thereafter and continued to be such until it was hit by the Panda penalty, whereupon it reduced to almost nothing, certainly far lower traffic than Foundem's comparator sites were getting at the time. Foundem continued to rank very low on Google for most queries, lower than it had done prior to the Algorithm A penalty, and it ranked consistently lower on Google than it did on either Yahoo! or Bing. It is not obvious, we say, why Foundem would have done so much worse than other similar CSSs unless there was some further penalty that continued to apply. We have seen that Foundem had won many awards in the interim, including best CSS; it had significant commercial relationships with many major UK publishers, and therefore it is difficult to understand why, absent some other further penalty applying to it, it continued to fare so much worse.
This claim is very important for the purposes of Trial 2 because, absent a finding that there was some

other thumb on the scale, as it were, over this period, Google will no doubt say at Trial 2 that the traffic Foundem was getting in the interim period is to be regarded as the counterfactual traffic Foundem would have got if it had never been penalised, and that would mean Foundem would ultimately recover only a fraction of the damages it would have recovered if its counterfactual traffic was at the same level as people like PriceRunner or Shopping.com.
Google's position on this issue is that its disclosure exercise has not identified any such further penalty which might apply. But as the Tribunal may recall from the PTR, Google submitted evidence at the disclosure stage of the case which stated in the most unequivocal terms imaginable that it would not necessarily be possible for Google to find any such record if one even existed. That is the statement, the second statement of Mr Kwok about whom the Tribunal has heard before, which is at {H3B/2}. Again, we have set out the key paragraphs of this in our skeleton argument, but the key is perhaps paragraph 18, if we can scroll through to that {H3B/2/7}, where he says:
"... I can categorically confirm that there is no single CMS ..."
That is configuration management system:

"... that stores all algorithmic demotions that can be queried by the Penaltyserver and that not all demotion algorithms are associated with the Penaltyserver. It would accordingly be impossible to provide a comprehensive list of all demotion algorithms over time."
PROFESSOR SMITH: That statement would imply that, at the time that Algorithm A was in operation, there may well have been other algorithms in operation at the same time.
MR WEST: Undoubtedly.
Nevertheless, Google's position at this trial, strongly advanced, is that because Google did not find a record of any further penalty when it did its disclosure on this point, that shows that there was not one.
Google also says it is up to Foundem to identify what the other penalty was. Of course, that is outside Foundem's knowledge.
Application by MR WEST
I should mention at this stage a procedural issue which is just necessary to raise briefly before the Tribunal. The Tribunal may recall that at the PTR, Foundem withdrew its previous claim of abuse by means of an AdWords penalty, we did not pursue that as a separate

abuse, and the pleadings had to be amended consequentially. The defence amendment can be seen at {C3/4}. I am afraid I do not have a page number, but it is paragraph 54A.7A.

THE CHAIRMAN: You want 54A, paragraph ...?

MR WEST: A.7A, I am afraid.

THE CHAIRMAN: 7A, I think it is {C3/4/70}. Is that it?

MR WEST: Yes. So pink is this round of amendments, and one sees the second sentence there:

"It is ... noted that Foundem does not particularise or identify any other specific search penalty as having been applied to it ..."

So Google made that point specifically in this round of amendments.

The draft reply is not in the bundles yet because Google has not consented to one particular paragraph of it and so it is necessary for to us seek permission for that paragraph now.

THE CHAIRMAN: The paragraph you have just shown us is from an amendment of 28 May; is that right? That is the very recent amendment, this .7A paragraph?

MR WEST: Yes.

THE CHAIRMAN: The pink is the latest round?

MR WEST: That is right.

THE CHAIRMAN: Which seems to be 28 May.

MR WEST: Sounds right, shortly after the PTR.

THE CHAIRMAN: Yes.

MR WEST: And paragraph 44 is the disputed paragraph, which is in blue. I believe everything else is agreed apart from this one paragraph.

THE CHAIRMAN: It is paragraph?

MR WEST: 49AA on page 44:

"As to the plea in paragraph 54A.7A ..."

That is the one we have just been looking at:

"... that Foundem does not particularise or identify any other specific search penalty as having been applied to it, the identity of penalties that Google applied to Foundem's site without informing Foundem of the fact is necessarily a matter outside Foundem's knowledge. However, based on the disclosure in the case, in addition to a manually applied penalty, where it would be up to Google to decide whether to use an existing manual penalty that might be recorded, or a custom penalty, that would not, there are at least three algorithmic penalties which are candidates to be the other search penalty.

"(a) the keyword 'stuffing penalty' which Google referred to in its November 2010 response to the Commission RFI noting it was subject to two algorithmically compiled exception logs containing at

least 25 CSSs not including Foundem." [As read]

So that is a whitelist for the keyword "stuffing penalty" which has got lots of CSSs on it.

The draft goes on:

"The fact it was necessary to whitelist a large number of other leading CSSs suggests that this penalty would otherwise tend to apply to CSSs. However, Foundem was not included on the list of excepted CSSs in Google's sent RFI response." [As read]

Then there is another candidate identified at (b), the Anchor ++ penalty, and some further particulars, and another one at (c), the JS demotion or JavaScript penalty. So we have identified three possible candidates. None of that, of course, is within our knowledge, but doing our best based on the disclosure that we have received.

Google does not accept —— does not consent to that amendment, but I seek permission to make it, so if I can very briefly address that.

Firstly, as the Tribunal has seen, it is a responsive amendment, responsive to the new 54A.7A.

But secondly, it must be open to Foundem, in view of its pleaded other penalties claim, to identify with the witnesses what other Google penalties might have affected Foundem in the interim period. It must be open

to us to investigate with them the disclosure we have received concerning Google's penalties to see whether any of these might have applied to Foundem. Indeed, these same candidates set out in this draft reply are addressed in Foundem's opening skeleton argument, and again I say it must be open to us to pursue those points.

The allegation that Foundem was subject to one or more other penalties has been pleaded for many years. There has been no attempt to strike it out for want of proper particularisation, and as I have said, in any event, these are not matters within Foundem's knowledge as it depends on the operation of Google's penalty algorithms.

We therefore say we do not actually need to plead this, and it appears that Google is not only objecting to this pleading, but it also seems to be seeking to prevent Foundem from investigating with the witnesses whether any of these candidate algorithms may in fact have applied. So Google's position seems to be that Foundem must identify the particular penalty that applied in order to satisfy the burden of proof, but its position is simultaneously that Foundem is to be shut out from doing so, and that, in my submission, cannot be right.

There is correspondence about this which —— I will just give the Tribunal the references. The letter from Google's solicitors of 10 June, {L4/11/1}, and another one of 15 June, {L4/12/1}, and Hausfeld's response, that is Foundem's solicitor's response of 19 June, {L4/13}, and Google ask that I bring those to your attention in relation to this application.

Would that perhaps be a convenient moment for a short break?

THE CHAIRMAN: Yes.

Can I just ask you before we take the break, in your written opening, there is a quote at paragraph 30 {A1/2/12}. We need not look at it now, you can look at it over the break. Can you just check the reference that is given, the Opus reference for that quotation?

MR WEST: Certainly.

THE CHAIRMAN: It says "M1/233", but I wonder if that is correct.

We will come back. How much more? You have made this application; we obviously then have to hear Mr Pickford on it.

MR WEST: I have few points to make just on the question of the counterfactual and whether Foundem's position is different in any respect to Kelkoo's. Unless those behind me ask me to make any other points, that is all

I was proposing to address.

THE CHAIRMAN: We will consider the point about timing.

Thank you.

(11.32 am)

(A short break)

(11.46 am)

THE CHAIRMAN: Would it be sensible, Mr West, to deal with that application now, as you have made it, straight away and just hear from Mr Pickford?

MR MCGURK: There is two possible ways of dealing with this. My learned friend has made his application on the back of the other penalties.

THE CHAIRMAN: Could you just identify yourself for the transcript.

MR MCGURK: Oh, I am so sorry, Brendan McGurk for Google.

THE CHAIRMAN: Yes.

Yes.

MR MCGURK: Yes, rewinding. My learned friend made his application on the back of his submissions to you on his other penalties claim, so he has had a bit of a run—up to it. I can deal with this now. I was proposing to deal with other penalties when you have got to the Foundem—specific claims tomorrow, and I can deal with it then, having had a run—up myself. If you want me to deal with it now, I can do, but I would invite

the Tribunal to read the letter at {L4/13}. My learned friend fairly referred to it. That is a detailed letter, it is our complete answer to the other penalties claim and it disposes of this point in relation to the new penalties that they are seeking to run in paragraph 49AA.

So, before I say any more, I can either deal with this as part of my submissions tomorrow, or I can deal with it now on the basis that you could read that letter before you decide.

THE CHAIRMAN: Yes. It is not going to really make much difference to anyone in terms of preparation if we decide this tomorrow rather than today, is it?

MR MCGURK: It will not.

THE CHAIRMAN: So in that case I think it is more sensible, because we have just got the letters but we have not read them and it will be much easier when we have read the letters, and probably quicker. So in that case, if that does not throw you out of course, Mr West?

No, well, we will do that, Mr McGurk, thank you.

MR MCGURK: I am grateful.

Opening submissions by MR WEST (continued)

MR WEST: So my final brief topic is the counterfactual and whether Foundem's case is different in any respect to Kelkoo's.

Foundem's primary case on the counterfactual is the same as Kelkoo's, and I should say, by "Kelkoo", I mean Kelkoo and Ciao. As Kelkoo explained yesterday, its primary case is one in which both limbs of the abuse are removed in the counterfactual meaning that CSSs are no longer penalised within the organic results. That corresponds to scenarios 1 and 2, and in both of those scenarios, the selection and ranking of CSS results on the SERP is in accordance with relevance. A number of different images were shown to the Tribunal from the most straightforward one, with all of the CSSs appearing in the organic links together with other results like merchant results, that is figure 11.1 in Mr Hunt's report, or there are images 15 and 16 in the images annex, which differ only in respect that there are enhanced display features of some of the results. Those are CSS results exclusively which are allowed to display images. In one of the examples they are scattered throughout the links and in another they are drawn together in a box. But in either case they are displayed in accordance with relevance.

THE CHAIRMAN: Sorry, images 15 and 16 in the images annex to the Kelkoo skeleton opening ——

MR WEST: Yes.

THE CHAIRMAN: —— which are scenarios 3a and 3b? I thought

you were talking about 1 and 2, that is why I am a bit confused.
MR WEST: Have I got the wrong reference?
THE CHAIRMAN: It is {A1/3/17}.
MR WEST: I said "15 and 16".
THE CHAIRMAN: Well, that is the reference, but it is image 15.
MR WEST: Sorry, I meant the page. The page reference, 15 and 16 {A1/3/15—16}.
THE CHAIRMAN: Ah. Yes, I see. Thank you. So, yes, I think it is images 13 and 14.
MR WEST: 13 and 14, I believe. I believe it is right to say that the only results which have enhanced display formats are CSS results, so those images.
One document the Tribunal may not have seen yet in this connection is Google's discussion paper, {J2A/54} where something very similar to these proposed counterfactuals was suggested by Google to the Commission. This was prior to any formal commitments offer being made. If one goes to the second page of the document {J2A/54/2}, one can see what it is.
Page 2:
" ... Discussion paper submitted by Google on the preliminary concerns identified by the ... Commission ..."

If one goes to {J2A/54/14}, one sees this proposal:
"The operation of Google's proposed display of links to vertical search sites within Local and Product Universal Results would be subject to the following basic principles:
"When Google displays Local or Product Universal Results that contain links to Local or Product Pages will display as part of such Local and Product Universal Results links for up to three rival vertical search sites that offer an alternative for the kind of review information displayed on Place and Product Pages, along the lines set out in the screenshot below."
So one can see there results being displayed in the form of a box.
Then underneath:
"These links will lead, to the extent possible, directly to result pages of the alternative vertical search site for the query that the user entered on Google (rather than merely to the home page of the site where the user would have to reenter the query)."
An example is given.
Then if one goes over the page {J2A/54/15}, the first bullet point:
"For each relevant query, Google will algorithmically select for display three qualifying

sites based on their Web Search rank for that query ... For example, if a user enters the query [lcd TV] on Google and that query produces the display of a Product Universal Result with review links Google will identify qualifying vertical product search sites that rank among the top 100 Web Search results for the query [lcd TV] and will display as part of the Product Universal Result links to the three highest ranking, non—duplicate sites."
Then one can turn to the next page {J2A/54/16}, one can see the fourth bullet point:
"The mechanism for the operation of the solution is well defined and based on existing Web Search algorithms. It should therefore not raise problems in implementation, interpretation, or enforcement. Indeed, the Commission will easily be able to verify compliance by entering product and local queries on Google to confirm that Google displays the requisite links."
Then finally over to {J2A/54/17}, the first bullet point:
"By relying on the Web Search rank of vertical search sites for the query that the user entered on Google, the proposed solution reduces query latency, minimizes the risk of irrelevant results, and offers the most efficient engineering method for addressing

the Commission's preliminary concerns."
So we see here Google itself proposing something very similar to scenarios 1 and 2, which are now advanced by Foundem and Kelkoo.
In the event, this never formed part of any formal offer of commitments by Google but one can see from this discussion paper that Google found it or considered it trivial to implement and it would have achieved much of what we are seeking. Because the results in the boxes in such a case would be organic results, it follows that there would be no penalisation of CSSs within the organic results in this proposed solution. So we say that is the preferable approach, it is our primary case and we agree with Kelkoo about that.
Scenario 3 is advanced only as an alternative case and it is advanced on the basis that the Tribunal does not agree with the primary case of both Foundem and Kelkoo that both limbs of the abuse have to be removed.
The point under scenario 3 where Foundem may part company with Kelkoo concerns charging to appear in the box. In particular, Foundem does not agree that an auction to appear in the box would be a permissible counterfactual. Can I briefly explain why.
Foundem does not say that no form of charge is allowed. A flat fee, for example, would be permissible.

This ties in with the Commission's view when it rejected Google's third offer of commitments. All of Google's commitment offers were based on an auction mechanism. If we look at {J2A/15/2}, we see the Commission's response. Could we go over the page {J2A/15/3}. Sorry, it must be internal page 2.

THE CHAIRMAN: Is it 15 you want?

MR WEST: Sorry, it is {J2A/15/2}. Perhaps we need to look at {J2A/15/1} just to see what this is. Yes, so this is the email from the Commission to Google following the rejection of Google's third offer of commitments in 2014.

If we look at {J2A/15/2}, the first bullet point:

"For Paid Rival Links, the auction should be replaced by a fixed fee of EUR 0.01 per click. As outlined above, selection and position must be determined by a neutral and objective mechanism (e.g. [predicted click through rate]."

Of course, these two points are linked. If selection and position is determined by a neutral and objective mechanism, it cannot also be the case that it is determined by an auction, we say, because under an auction, relevance, objective relevance, is replaced by subjective ability to pay.

The Commission said something similar in its

supplemental statement of objections {O/3/101}, paragraph 180:

"... if the Commission were to conclude that Google and Alphabet could charge for the prominent positioning and display of [CSSs], a number of different scenarios could be envisaged regarding the amount of such a charge: (i) an amount corresponding to the operational/actual costs incurred by Google; or (ii) a nominal amount based, for instance, on the lowest reserve price for AdWords (at present EUR 0.01 per click)."

So that was the Commission's opinion.

THE CHAIRMAN: This document signed by the Commissioner for the Commission, this is the formal rejection of the commitments, or this is what?

MR WEST: This is a supplemental statement of objections. The previous document we looked at was the correspondence following the rejection of the third offer of commitments.

Can I just briefly explain why Foundem says an auction would not be consistent with the principles in the decision. Can we look at recital 529, so it is {BA/2}. Sorry, I do not have a page number. Recital 539.

THE CHAIRMAN: 29 or 39?

MR WEST: 539.

THE CHAIRMAN: 539, which is page {BA/2/178}.

MR WEST: Page 178, I am very grateful.

So this is the Commission's finding that:

"... the traffic diverted by the Conduct, i.e. generic search traffic from Google's general search results pages, accounts for a large proportion of traffic to competing [CSSs] ... and cannot be effectively replaced by other sources of traffic currently available to [CSSs] including AdWords, mobile applications, direct traffic ..."

And so on.

So we say that consistent with that, any remedy cannot turn free organic traffic into paid traffic and that would be inconsistent with the principles underlying the decision.

Indeed, we will look at this with the experts, but because any auction is likely to be oversubscribed, the effect of an auction mechanism is to push prices up to the maximum bidders are prepared to pay, which is the same phenomenon as exist currently under the Compliance Mechanism and which has the effect that the vast majority of the economic benefit of clicks goes to Google. That was the position under the Shopping Units, it remains the position under

the Compliance Mechanism, and Foundem says that it would be the position under any new box based on an auction and would therefore be inconsistent with the decision which specified that Google could not introduce new charging mechanisms which had the same or an equivalent effect to the infringement. That is recital 700(d), the same bundle, {BA/2/233}.

MS ROSE: Can I just ask a question about 3a and actually also 3b? Those alternative counterfactuals both envisage a box or, in 3b, a series of boxes which the CSSs can bid for, but they do not appear to envisage the removal of Algorithm A and Panda from organic search results, as I understand it. Would it be possible to have a hybrid counterfactual where there was a box at the top to which all CSSs had equal access on the basis of an auction, but then generic search results ranked purely on the basis of relevance without the penalising algorithms, and would that be acceptable?

MR WEST: It would certainly be possible. I would have to take instructions on whether that is something my clients would be comfortable with as a counterfactual. It would certainly be an improvement on the current scenario 3, because CSSs would not have to bid to appear on the page because they would appear in the organic results if they were relevant. So it would certainly be

an improvement on the current suggestion of scenario 3, although it is not intrinsic in scenario 3 that there has to be an option; there could be another method of selection for inclusion in scenario 3 —— in the box in scenario 3, such as relevance or proposed click—through rate plus a flat fee.

Finally, just on the auction, I do not think we have looked yet at recital 630 of the decision, {BA/2/217}, but it is a very important recital where the Commission says —— this is concerned with the movement from product universals to Shopping Units, and Google argued that because a click on a link in a Shopping Unit went to the merchant, that could no longer be regarded as Google's CSS traffic. But the Commission says:

"... clicks on links within the Shopping Units that lead the user directly to a webpage of a merchant should be counted as visits to Google Shopping because Google's [CSS] benefits economically from clicks on those links in the same manner as if the user had taken the intermediary step of going through the standalone Google Shopping website before clicking on the product of that merchant partner."

So, the Commission says, clicks on the shopping box, although they take you to the merchant, continue to be Google Shopping traffic, and we say that establishes

the principle that if the economic benefit of the click goes to Google, effectively one is replicating the effect of the abuse. So these two principal objections that all the money goes to Google and that there is no free organic traffic to CSSs are really just flip sides of the same coin.

So we —— I think the only part of anything Foundem said yesterday with which we part company with —— sorry, the only element of what Kelkoo said yesterday with which we part company is whether an acceptable counterfactual is scenario 3 plus an auction. As I said, we accept there can be payment for inclusion in the box in scenario 3, but not an auction. Notably, Mr Hunt's position is not that an auction is permissible. He says at paragraph 472(b)(iii) of his report, which is {I2/1/212}, that a fee would be permitted only if it ensured:

"... equal treatment, and ... did not have the same or equivalent object or effect as the infringement ..."

Mr Hunt also raises the objection that Google's CSS could never participate in the auction on an equal basis because if Google's CSS participates then Google is both the bidder and the recipient of the bid which means that the bid is not a real economic cost for Google, which is another objection to any auction mechanism.

Subject to the fact that I would like to be able to revert once I have taken instructions on the point about scenario 3 plus organic results, that is all I was proposing to say in opening.

THE CHAIRMAN: Yes. Thank you.

Were you able to check that reference?

MR WEST: I am told that the reference is correct.

THE CHAIRMAN: It is correct, is it?

MR WEST: It is {M1/223}. I am told it is correct.

THE CHAIRMAN: So, Mr Pickford, we do not want to sit late tonight, but we can start earlier tomorrow to make sure that you have the time that you need.

MR PICKFORD: Thank you, Sir.

THE CHAIRMAN: We can decide at the end of the day how much earlier.

Opening submissions by MR PICKFORD

MR PICKFORD: Thank you, Sir.

Members of the Tribunal, I think as the transcript writer may have heard, my name is Meredith Pickford.

I have to confess, I am unfortunately suffering from laryngitis at the moment. I went to the doctor and they said, "It is fine, just do not speak". I said, "Well, I am a barrister" and they looked slightly crestfallen at that. But what I am going to ask, if it is okay, is if my microphone could be turned up a little bit louder

than usual. I am not normally accused of being quiet at all, but I spoke to the Tribunal, or rather my clerk spoke to the Tribunal and they said that that should be perfectly feasible, and that apparently they can ... —— indeed, it sounds like it is getting louder already.

Also, just on that topic, it was pointed out to me that in the transcript, yesterday, a number of the comments from the bench, I think in particular you, Sir, were lost and so it may be helpful for your microphone to be made louder too, potentially, I do not know.

So in terms of the structure of submissions that I am going to be making ——

THE CHAIRMAN: Just on that, if it helps you to have a very short break, not our usual sort of 10/15 minutes, but a five—minute break at some point, because however the microphone is turned up, just continually speaking is obviously straining the larynx, just I am sure we can accommodate that.

MR PICKFORD: I am very grateful, Sir, thank you.

THE CHAIRMAN: So just you might want to think about doing that, saying: can we have five minutes.

MR PICKFORD: Thank you.

So Mr McGurk and I will both be making submissions on behalf of Google.

First, I am going to provide an overview of our case on the core issues in this case as advanced by Kelkoo.

Secondly, I am going to provide a broad overview of how users make shopping journeys and where the various participants in internet shopping fit in, and I am going to show you a few documents in connection with that.

Third, Mr McGurk is then going to take you through a more detailed factual background on Google's generic and specialised results, Google's algorithms and the shortcomings of some CSSs.

Then it is going to be back to me and I am going to address you then on, in particular, what we can learn from the decision with some limited reference to some other points of law, because Kelkoo, remember, says that its case merely implements the reasoning in the decision into the post—Decision Period. Notably, Mr Jowell largely stayed clear of the decision in his oral submissions yesterday and we say a proper understanding of the decision is crucial to understanding the evidence that you are going to hear in this trial in its proper context, and in fact it shows where the remedy is not abusive.

So my fifth point will be I will then make good on that and explain why we say the remedy is not abusive.

Then, sixth, I will address you again very briefly

on some legal points in relation to counterfactuals responding to Mr Jowell.

Then, seventh, I will go on to deal with the counterfactual issue in the light of some of the material that relates to that.

Then eighth and finally, Mr McGurk will address you on the discrete issues that have been raised by Foundem.

Now, there is just one small point that arises out of the submissions that we just heard from Mr West, which is, as you would expect, there have been a very large number of submissions and positions taken over the course of this proceeding so far. We prepared for this hearing on the basis of the parties' skeleton arguments, obviously, because that is where they synthesise and decide which of the points they are now taking. Kelkoo did not pursue a number of points in relation to the counterfactual. You will have heard what Mr Jowell said yesterday on the counterfactual. In their skeleton argument, Foundem do not advance any case on the counterfactual at all, so the points that Mr West made were news, as it were. Now, obviously I will attempt to deal with them, but until five minutes ago, I did not know I was going to potentially have to deal with those, so I just lay down that small marker.

So turning then to the overview of our case.

Google must now accept that although its conduct was not part of any anti—competitive strategy, it did nonetheless infringe competition law between 2008 and 2017 in its general search business because that discriminated in favour of its distinct CSS business which was to be found in a separate market. What Google did, in effect, was to provide a privileged window from its general results page through to its own CSS and denied access to that window to other CSSs. Instead they either used text ads or had to rely on generic results, where, as we have heard, Google's algorithms might demote them. Now, there have already been consequences to that conduct and there may be more to be determined at Trial 2. We do not shy away from that. Obviously we cannot. However, the unlawful conduct came to an end on 28 September 2017 with the remedy, which was developed in close dialogue with the Commission and for which the Commission never even opened a non—compliance investigation, still less found an ongoing breach.

Now, what the remedy does is it allows CSSs to bid on behalf of merchants to place ads in a box of PLAs, as we have heard, that appear on Google's search engine, the SERP. Now, all rival CSSs are able to do this on the exact same basis as Google's own CSS Google Search

Europe, or the GSE as it is called. Now both GSE and rival CSSs can use their relationships with merchants to earn a fee whenever a user clicks on a PLA that has been provided to Google's general search service and then selected by Google's general search service in response to a user query. Placement within the remedy box is determined by algorithms that take account of bid amount, expected click—through rate and ad quality and they are entirely blind to the identity of the bidding CSS. You will have also obviously noted that there is organisational and financial separation between GSE and the rest of Google so it is not given any advantages in the auction.

Now, this case was, at the time it was brought, the biggest case that the Commission had ever brought, and we say that the idea that the Commission would have happily allowed Google to implement an infringing remedy in breach of the decision is not really that credible. The Commission had all the power it needed to address a continuing abuse if it thought there were one.

THE CHAIRMAN: Well, I do not know how much we can really draw from that. The Commission has been asked about this and has stated quite clearly that it has not taken a position one way or the other and that is where it is. So, equally, the Commission has started proceedings on

the DMA, raising a similar kind of complaint, and that is based on the current practice of Google, which is the remedy. So I do not see that we can say one way or the other.

MR PICKFORD: Sir, I do not say that you can draw any hard—edged legal inferences. I say as a matter of —— well, in my submission, as a matter of common sense, it is unlikely that the Commission really —— because we did negotiate —— because there were negotiations with the Commission.

MS ROSE: Why does it matter?

THE CHAIRMAN: There are all kinds of considerations that can go into a negotiation. We have their letter, it is very clear what it says. It does not say: well, you can infer that we are not concerned about it. Equally, we know they have formally started proceedings under the DMA on a basis that almost word for word it appears to replicate the substance of what has been found to be an abuse. So I do not see how we can have any, not even legal, but inferential indication one way or the other.

MR PICKFORD: I am very happy to demonstrate on the merits why the remedy solves the abuse.

THE CHAIRMAN: Yes, I mean, that ——

MR PICKFORD: (Overspeaking) —— And so I can move on.

The reason why it does that is that it severed

the privileged connection that had previously been afforded via the previous shopping boxes to the benefit of Google's CSS and Google's CSS alone. Now, today, and since September 2017, insofar as Google offers its own CSS promotional advantages from the SERP in terms of a place to show ads from merchants and to profit from that, and from associating its brand the "By Google" with shopping and having the possibility to have a link through to Google's CSS site, all of those advantages now can also be afforded to rival CSSs, whereas previously they were not. All of the advantages in the previous world all went to Google's CSS.

Now, turning to the Claimants' case, there appear to be to us two central allegations which underpin it. The first one did not actually come through so loudly in Mr Jowell's submissions yesterday, but it is an important point in Mr Hunt's evidence and it amounts to this. Google's general search page, in essence, is a popular place for users to start product searches, because, of course, if people did not care about using Google to start product searches at all, none of this case would ever have arisen. We would not have been said to have the power that we did. Now, on that, as I will show you shortly, Google's SERP is not in fact as popular as the Claimants make out and it is notable how

little of the Claimants' case pays attention to what we say is the shopping elephant in the room, namely Amazon, and I am going to come back to that, because that is an important point.

However, what we can accept is this, that Google's general search page is a starting place for a material proportion, albeit a minority, of shopping searches. Now, that is not surprising, because Google is the most popular place in general terms for users to search the web at all. Why is that? Well, because Google has invested tens, if not hundreds of billions of dollars in that endeavour, and it has a resolute determination to be the best general search engine in the world. So, in my submission, that is an enviable place to be, it makes Google a powerful company, it makes Google a very profitable company. None of those are bad things and none of those things are things that it is required to share simply because someone else wants to cash in on that popularity.

Now, competition law does, with great care, sometimes trespass into a dominant undertaking's right to use its assets for its own purposes, not the purposes of others. The leading, very well known case is the Bronner line of authority, where an input is indispensable to carry out a downstream activity and

refusal to supply it would eliminate competition in the downstream market, then a downstream competitor may be able to require an upstream competitor to make supply, an upstream undertaking to make supply. But this is not a Bronner case, the Claimants do not say it is, they do not try and establish indispensability and they do not try and establish that competition from rival CSSs has been eliminated. Obviously, it has not. So where that leaves us is that they have no prima facie right to access Google's SERP. Their right derives from the way that Google treats its own CSS.

THE CHAIRMAN: Well, that is —— is that not —— the Bronner line of authorities has explained and significantly narrowed by the Android case, has it not? Quite expressly narrowed, as explained by the Grand Chamber. This is the Google SERP has not been built and is not operated that only Google can be on the SERP; it is something that is expressly for a whole lot of third parties to appear on the SERP.

MR PICKFORD: Yes.

THE CHAIRMAN: Therefore Bronner just does not apply in terms of access.

MR PICKFORD: Well ——

THE CHAIRMAN: We can look at —— no doubt we will —— at the Android Auto but there is a lot of discussion there

explaining Bronner and how narrow the Bronner reservation in fact is.

MR PICKFORD: I will come back to that later.

The reason, we say, that there is a right of access in this case all derives from avoiding discrimination between Google's own downstream CSS and alternative rival CSSs. In my submission, and I anticipate I will obviously have to come back to deal with the Android point, Google is entitled to give preference to its own general search business when responding to users' general searches. So what I mean by that is that when someone inputs something into the SERP, what they see is always results that are exclusively chosen using Google's technology and presented in the format decided upon by Google, and that includes links to sites where users could go on to find different answers to their question, for instance by clicking on and going through to a CSS site.

But Google's SERP does not ever present results chosen by Bing or by Yahoo!, it is choosing results using Google's algorithms, and we say nor should the SERP be controlled by the Claimants to present results using their algorithms. If that is what users want, they can navigate to the Claimants' site and get the Claimants' algorithms.

Now, what Kelkoo says about that is that that set up means that Google extracts the vast majority of the economic value that the remedy generates. My response to that is: too right it does. Of course Google gets to earn the vast majority of economic value from a box of results on Google's SERP. That is because it is Google that owns the scarce resource, namely the SERP, and in particular the top of the SERP. That is the really valuable asset here. That is what Google has invested billions in creating and maintaining as a destination for high-quality results. Insofar as there is scarcity value associated with that, what the economists call "economic rents", I believe, it is Google that is entitled to that reward. Kelkoo and Foundem did not make the investments that enable Google to be the place where consumers naturally want to start their searches and they are not entitled to the scarcity value associated with the Google SERP.

Second key allegation, and this is one that was majored on yesterday, is that the remedy box is, as Mr Jowell put it yesterday, the manifestation of Google's CSS on the SERP, and they say, well, unless they get the same thing, well, that is discriminatory. That is the heart of their case now. I have got three points to make in response to that.

The first involves examining what the remedy box actually is. Now, it is important to remember that general search and comparison shopping are in two separate markets. That lies at the very heart of the Commission's case, because of course, without that, there would not be any leveraging abuse from one market into another. So if the remedy box is, as we say, a legitimate part of Google's general search service and therefore not a manifestation of its CSS, that kills the Claimants' case, and yet I say, on inspection even of the Claimants' own case on what is and is not a legitimate general search result, that shows that the remedy box is indeed a legitimate part of a general search service.

So, first, the Claimants do not challenge Google's right to put product ads on its SERP. Indeed, the Commission made binding findings that that is a normal part of what a general search engine does, for the obvious reason, if you do not have some ads, you have not, ultimately, got a business. Text ads are an example.

Second, the Claimants do not object to Google being able to put attractive product pictures on the SERP. They are quite content for there to be such pictures if they lead users to CSSs. That is the essence of their

counterfactuals 2a and 3. It would be helpful if we can go back to see the pictures there. It is {A1/3/15}. So I do not need to go into the detail of it. The simple point is this is said to be something that it would be legitimate for Google to present, namely pictures that have —— there are attractive pictures of product on the SERP. So that of itself cannot be outside what a general search service does, because we will be doing it in their world. Nor do they object to such pictures being grouped to aid comparison, because that is just what they are doing here in this example. Indeed ——

THE CHAIRMAN: Sorry, when you say no objection to them being grouped as in this example, but that does not mean that this is not a form of comparison shopping, does it?

MR PICKFORD: Well, if you bear with me on my argument, I am going to explain why it is not, because I have not got to the end of my point. But my point will be indeed it is not a comparison shopping service, because what this case really comes down to, or one of the really big issues anyway, at least on abuse, is working out the dividing line between what is a general search service and when does a general search service step over the line and stop being a general search service and start in fact sticking a comparison shopping service on the page. That is one of the core points that this case

ultimately is going to turn on.

My explanation is that let us just deconstruct and understand what it is that we can do as part of a general search service. We can obviously have ads, that is part of a general search service. We can have pictures. The fact that there are pictures on the page, that does not stop us being a general search service, obviously, because this is an example. The fact that they are grouped does not stop it being part —— does not stop what we are doing being part of a general search service, because in this world, they say this is legitimate. So this cannot be a world where we are putting our CSS on the page. By definition, this is something that a general search service is apparently allowed to do. The difference, the core difference is that what they say we cannot do is have ads with nice pictures grouped together that lead through to merchants where we have chosen what the ad is, and yet they do accept that we can show links to merchants on the SERP, because obviously we do that in text ads and generic blue links.

So to recap, we say ads, okay; with pictures, okay; grouped together, okay; containing information on offers with links to merchants, okay. Those are all features of a general search service. But what I have just

described is the remedy box. There is not one aspect of that, of what is in the remedy box, that is outside something that a general search service is permitted to do.

Now, as I said, what it comes down to is the claim: well, a—ha, if you are going to have all those things together, only we —— by which I mean the CSSs, I am taking their voice now —— only we, the CSSs, get to control that, and we say that is just a hugely self—serving carve—out from what a general search engine is allowed to do. The true distinguishing features that set apart a CSS from a general search service are these: comprehensive filtering tools; price comparison tools; detailed product information and reviews, at least on a good CSS; and an exclusive focus on the page on shopping rather than having other results too. Those four features, in my submission, are the differentiating features between general search and a CSS, because of course, they both ——

MS ROSE: How does that correlate with the Commission's definition of a CSS?

MR PICKFORD: Well, the Commission did not define the CSS.

THE CHAIRMAN: I thought they did.

MR PICKFORD: They do not —— the Commission does not —— well ——

THE CHAIRMAN: We can look at that.

MR PICKFORD: This was a point that came up in the Preliminary Issues Judgment, I believe, and there are different indications in the decision as to what a CSS really is or is not, because there is a footnote early on that contains one definition and then there is binding recitals later which are different. The binding recitals later say in terms that the Commission's case is that —— is not that the box is itself a CSS. The box is not a CSS. What the Commission's case was was that the box was the means of favouring Google's CSS.

MS ROSE: But did it not also say what are the key features of a CSS?

THE CHAIRMAN: Yes, they did.

MR PICKFORD: Yes, they do, and I am going to come back to this. But in my submission, the core features of a CSS as opposed to a general search service, as I am explaining them, are entirely consistent with the Commission's findings on this. I would like, if I may, because there is quite a lot of the Commission's decision that I would like to go through sequentially, if it is okay, I would like to come back to it, but I can assure the Tribunal I am not going to skip the elements of the decision which bear on this very point about what is a legitimate part of a general

search service versus what is a CSS. I am going to come back to that, because I say the decision strongly supports our case.

Can I, at this moment, pick up the Tribunal's invitation from previously to address you on the pictures, the picture annex?

THE CHAIRMAN: Yes.

MR PICKFORD: Because we do have some comments and indeed something of a complaint about the pictures annex provided by the Claimants.

So if we could go, please, to —— if we could start at {A1/3/8}.

So this is said to be an illustration of the —— what they call the Compliance Mechanism, what we call the remedy. What is important to observe about this picture, and I am going to show you one that rectifies it later, is it is devoid of all the context. It does not show you everything else on the SERP, and that is relevant because it is only general search results that show you a range of things, whereas CSSs are just focused on PLAs.

If you go on to the next slide, please, {A1/3/9}, this is a particularly, we say, grievous example of the cases having —— sorry, the images having been somewhat misleadingly truncated, because this is

a picture that is said to come from Google's standalone CSS, and on its face, it looks remarkably similar to what you saw on the previous page, and that is what they are trying to show you, they are trying to show that: look, there is just no difference between these things. But this image has been deliberately doctored and truncated so it does not actually show you a fair representation of what the CSS looks like. I am going to show you what it looks like in a moment, but the key point is —— there are two key points, actually.

Firstly, it is an entire page that is devoted to PLAs, it is not just a bar across the top. That is a difference. Secondly, there is a host of filters and key tools which are at core, they are at the heart of what comparison shopping services do as compared to a general search service and they are on the left, and I am going to come and show you a picture that does that.

THE CHAIRMAN: I mean, we can —— and I indicated this yesterday, if that can be done on the EPE system —— go into Google and do this search for "Bialetti coffee maker" and we will then see, rather than having just screenshots, exactly what one gets, and that might be rather more effective, frankly, than getting a whole series of different pictures and people complaining

about each other's.

MR PICKFORD: It might well be, but can I —— because I do not know if that is —— sort of dealing with a child or a minor, given that I do not know exactly what we are going to see, can we ——

MS ROSE: Surely, Mr Pickford, you know exactly what you are going to see, you have been viewing all these results for months!

(Simultaneous speakers — inaudible)

MR PICKFORD: I think it would be very helpful, but if what we could do, first, is go to the images that we have done, because we have seen all the Claimants' images, and in fairness, I think it would be fair to show the defendant images as well.

THE CHAIRMAN: But, I mean, if these are said to be truncated and yours are said to be whatever, the correct one, because this is the current Google Search engine ——

MR PICKFORD: Yes.

THE CHAIRMAN: —— is what we will all get simultaneously by doing the search.

MR PICKFORD: Yes. Sir, I am very keen to do that, but there are various little things that I would like to pick out to be able to show you ——

THE CHAIRMAN: Yes.

MR PICKFORD: —— and I know that I can do that by reference

to our images. One thing that I have discovered, I have to say, because I have done quite a few of these searches, is that sometimes, you know, you do not get exactly the same thing every time. I think the things that I am going to be showing you are consistent. However, I also want to show you not just things on Google, but things on Kelkoo and things on Amazon, and I would like to be able to make those comparisons, and that is just going to be slightly complicated for me to do live.

THE CHAIRMAN: Well, for that, I can see. But on the point you were making, that this is misleading and truncated and this purports to be what you get —— I mean, it is obviously not the full page, because the organic results will come below.

MR PICKFORD: Yes ——

MS ROSE: And the ads.

THE CHAIRMAN: And the ads maybe.

MR PICKFORD: I can see —— as long as I get an opportunity to go to my slides as well, if the Tribunal would like at this moment to go to a live version, let us do it.

THE CHAIRMAN: Can we do that easily? Yes. That is wonderful. Because we all want to do the same thing, if we just bring up —— here we are —— Google, and we type in "Bialetti coffee maker". Do we type it, or you type

it? I think we have to ask —— yes, into the search, "Bialetti", B—I—A—L—E—T—T—I, "coffee maker", with a "B", "B" for "bravo", "coffee maker" —— there we are —— then we get this, and I think it is a carousel, so you can scroll along and you will get more, and scroll back, and there we are, something that looks rather like what we have seen. Then if we scroll down, you get this, and then you get these further product sites.

PROFESSOR SMITH: But what we do not get further down is any CSSs.

MR PICKFORD: No, you do. What was called, if we go back up a bit, "Product sites", that is CSSs. PriceRunner is a CSS.

THE CHAIRMAN: Yes.

MR PICKFORD: Kelkoo is a CSS, or it claims to be.

MS ROSE: Which of these image rich boxes is the remedy?

MR PICKFORD: Go up to the top. That one.

MS ROSE: So "Sponsored products".

MR PICKFORD: Yes.

THE CHAIRMAN: As we have here.

MS ROSE: That is where we see "By Google", "By Kelkoo"?

MR PICKFORD: Exactly.

If we go, the second along —— in fact the first one, because Kelkoo is ... and if we go down to "By Kelkoo" and click on "By Kelkoo", we are now on Kelkoo's page,

and so anyone that is interested in what Kelkoo can provide them, with one click, they are right here, the Bialetti coffee maker page, and they can choose from all of what Kelkoo provides.

PROFESSOR SMITH: But we were told yesterday that fewer than 1% of actual viewers of this page will click on any of these CSS links, including ——

MR PICKFORD: Indeed, yes.

PROFESSOR SMITH: —— Google Shopping.

MR PICKFORD: Yes, and that is because what consumers most want is, generally, to go to an actual product page, somewhere where they can buy something, rather than go and go off on a deviation via a further search engine, unless what they are particularly interested in is the filtering tools, like being able to order by price, being able to filter down to a particular criterion. They can only get those tools by going through to a comparison shopping service.

So it would appear from the data that most people do not value those tools sufficiently that that is what they are keen to click on, but they can, and that is the service that is on offer to them.

PROFESSOR SMITH: But can I put it in slightly different words. When you say most people, when they look at the box at the top ——

MS ROSE: Can we go back to the general search page?

PROFESSOR SMITH: —— click on what they see —— they can go along the carousel and look at the different things and then click on the one that looks most attractive to them. That does not mean that they do not value comparison, it is saying when a consumer is presented with this picture most consumers behave in a particular way, and it is suggesting, perhaps, one has to be careful of the use of words of "value". We are talking about people's behaviour, not necessarily what is in their best interests, or what —— if they were presented the information in a different way, they might make their decisions differently.

I am saying no more than that commercial organisations present information to consumers in ways that are effective commercially ——

MR PICKFORD: Yes.

PROFESSOR SMITH: —— and those do not necessarily correspond with what the consumers, if presented with information in a different way, the way they might make a different decision.

MR PICKFORD: That is a fair point. I think my point was that there is a revealed preference here, and what is revealed is that, presented with these options, what consumers seem to be more interested in doing most of

the time is clicking on the nice image as opposed to clicking on the option of then going off to a CSS site where they can perform all of the filtering. I think that is a fairly neutral way of putting it.

THE CHAIRMAN: Yes. I think, qua Professor Smith's point, the whole of behavioural science is based on the notion that the way you present things to people will influence their behaviour, so their behaviour is conditioned by, or strongly influenced by the way things are presented. It does not mean, therefore, you can deduce from that there is really a higher value.

MR PICKFORD: Well, I think ——

THE CHAIRMAN: Present it differently and you will get a different choice.

MR PICKFORD: I certainly ——

THE CHAIRMAN: That is the whole of behavioural science, really.

MR PICKFORD: I certainly agree with the proposition that behavioural science has a lot to tell us about how, if different things are presented —— you know, if things are presented differently, then that may well lead to different outcomes. But I do maintain that if anyone with the slightest curiosity —— and I have certainly done it, maybe because I have a particular interest in this case —— clicks on the "By Kelkoo" link or

the whatever link, they will discover that there is something different there, and it is not very hard, and what I am saying is that —— I am not saying that those things are not valued. Indeed, I will come on to —— I mean, again, it is the elephant in the room. The main reason why consumers do not actually use CSSs for those kinds of filtering is because they go to Amazon. Amazon has —— and I am going to come on and show you this —— filtering and tools, shopping tools, to pulverise everyone else into oblivion, and Amazon is the most popular place to start a shopping search on the internet, as I will also come on to show you. That is the real reason why people do not use CSSs any more particularly.

MS ROSE: Can I just ask you a question about this results page? Can we just scroll down again to where we had the "Product sites". So what is this bar here that says "Product sites"?

MR PICKFORD: So that is CSSs.

MS ROSE: So Google is giving CSSs their own shop window here ——

MR PICKFORD: Yes.

MS ROSE: —— on the front page?

MR PICKFORD: Yes.

THE CHAIRMAN: Is this part of the remedy, or not?

MR PICKFORD: No, it is not ——
THE CHAIRMAN: It is not.
MR PICKFORD: —— part of the remedy, but it is something that Google does. So we do not rely on it to say: look, this is a necessary component of what we do and therefore that is why you should find for us. My case is: look at that box at the top, that box at the top is on entirely equal terms and that is good enough.
MS ROSE: Yes, but just going back to the product. So the "Product sites", does that mean then —— so CSSs are no longer being demoted in generic search by Algorithm A and Panda because in fact they are all appearing in a group on the front page?
MR PICKFORD: I do not know, because it is not ——
MS ROSE: You do not know if they all are?
MR PICKFORD: —— because it is not part of anyone's case ——
MS ROSE: Right.
MR PICKFORD: —— in relation to these, exactly what the algorithmic processes are behind the "Product sites" tab. I can no doubt take instructions ——
MS ROSE: But "Product sites" means CSSs?
MR PICKFORD: Yes.
THE CHAIRMAN: But do Algorithm A and Panda continue to apply?
MR PICKFORD: I will have to take instructions on that,

because that is not —— it is not part of their case. The "Product sites" tab is not part of the fight between us. We are not relying on it positively, I do not see where it is identified as part of their case, and therefore I cannot give you an immediate answer to it, because what I am focused on is the points that have been ——
MS ROSE: But it would take the sting out of the demotion point, would it not, "Product sites"?
MR PICKFORD: Well, it depends what you call "the sting". I mean, Mr McGurk is going to deal with algorithms, but I can address you in this way. We say that there is absolutely nothing wrong with either Algorithm A or Panda and we are not ashamed of them in any way. What they are doing is providing higher—quality links, and the way that they do that is by looking at signals that show what is most useful to users. They are good things.

Also, they are no different, in reality, to all of the many hundreds of algorithms that Google uses. Every single algorithm that Google uses when it is choosing what results it is going to put on the page is a sorting algorithm. What it is intended to do is differentiate between different alternatives and decide what to put higher and inherently what to put lower. So if you do

well on a particular algorithm, if it is a promoting one, well, then you will move up. But of course by you moving up, other people who did less well move down and vice versa. If you do worse on a demoting algorithm but other people do better relative to you, they move up. All they are doing is sorting.

It is a deliberately pejorative approach that the Claimants have to say it is a demotion. I mean, yes, in a sense it is, but it is not more fundamental than just sorting everyone out.
THE CHAIRMAN: We understand that, but clearly one of the aspects of the abuse was that, were these algorithms that apply to the third party CSSs and not to Google's CSS, Google still has something that I think you would recognise and accept is a CSS, if indeed that is the other picture that you just referred to on page 9, and I will come to that in a moment. So there is the question: do Algorithm A and Panda still exist, and do they apply to third party CSSs and do they apply to the Google CSS?
MR PICKFORD: I can answer all those questions.
THE CHAIRMAN: Yes.
MR PICKFORD: So, yes, they still exist.
THE CHAIRMAN: They do.
MR PICKFORD: Yes, therefore, they would still apply

inter alia to third—party CSSs in the types of links to which they apply, which is in particular just general organic blue links.
THE CHAIRMAN: Yes.
MR PICKFORD: No, they do not apply to Google's CSS. Why? Because Google applies a harsher algorithm to itself. It simply takes itself out of generic results all together. So the logic matrix is effectively this —— and this is obviously not how Google works, but in terms of exposition or clarity, I think it would help to try to explain it in these simplified terms. You can imagine it in these terms. Google looks at a potential result. Is it a rival CSS eligible to be ranked but subject to —— in generics, but subject to the algorithms? Is it Google's CSS? Does not —— not eligible to be ranked, never gets a look in, simply outside of the scope of those results.

So, in that context, there cannot be more favourable treatment by Google of itself relative to rivals. The more favourable treatment that was the concern of the Commission in the decision was not that within generics Google got a better deal. Google did not. Google simply was not there. Wiped out. It is like having a demotion of, you know, 100% at all times. The way that Google got a better deal is that there was

a box on the page that was insulated from algorithms, the algorithms did not apply to that box, and that was what the complaint was by the Commission. They said: well, that is unfair, because you —— because there is this box here and it is a means by which you favour yourselves, but ——
THE CHAIRMAN: It is because it is exclusive to you.
MR PICKFORD: Yes, because it is exclusive to you, because although it is not itself a CSS, what it does do is act as a window onto your CSS, because all of the results that are in it, they have all just been basically taken up from your CSS, lifted, a section of them put into the box, and all of the links are only ever going to go your CSS, and it is only your merchants and so it is all bound up with just you, Google. They said, no, that is favouring. If you are going to have a box that is a kind of promotional box on your page, well, you have got to share that equally, and that is what we now do. So we have a promotional box, but every single CSS is entitled to use it in exactly the same way as Google's CSS.
THE CHAIRMAN: You are not in the organic results?
MR PICKFORD: We are not in organic.
THE CHAIRMAN: But if we go back to the live experiment here and scroll back to the top of the page, in the tool bar

at the top where it says "AI Mode", and then "All", and then "Shopping", if we click on "Shopping", which is the third one from the left, that takes you to the Google CSS, does it not? Is that not right?
MR PICKFORD: I am sorry, my junior was just saying something to me and I am afraid I did not hear you.
THE CHAIRMAN: What we have done, and it is being done again so you can watch it ——
MR PICKFORD: So, yes, we went to "Shopping"; is that right?
THE CHAIRMAN: "Shopping", yes. You come through to the Google CSS exclusively.
MR PICKFORD: Yes.
THE CHAIRMAN: So you have got this window straight to the Google CSS. So when you say they do not appear in the organic results, they have been taken out of the organic results, well, they do not need to be because they have got this favourable link right at the top of the page.
MR PICKFORD: Well, that is not part of the Claimants' case, it was never part of the Commission's case and ——
THE CHAIRMAN: No, because the Commission's case, you had the special —— as you have explained, you had this high profile remedy box. But now, looking at where we are today, the point you were just making saying, "Oh, it does not matter that Google's CSS is not in Algorithm A

because they are treated worse than everybody else, they do not appear in organic results at all" ——
MR PICKFORD: In the context of organic, they ——
THE CHAIRMAN: Organic, because they have instead —— it is an answer to your point, it is not really a complaint. It is an answer to your point: well, they would not be because they have got this favourable position instead.
MR PICKFORD: Well, it may be an explanation, it may be an answer, but certainly, Sir, it is not a legitimate complaint, because that tab has always been there and the Commission has never taken an issue with the tab right at the top where you get to choose —— if you have gone to Google, it basically is allowing us —— because Google does lots of different things, it is allowing people, if they want to, and I have no data on how often those are clicked because it is not part of anyone's case, but it is able to choose, okay, this Google service or this alternative Google AI service or whatever, because Google does lots of different things and it is a way of basically directing people to the bit of Google that they are most interested in.
MS ROSE: Can I just ask a question? Can we just go back to the general results page. So looking at the toolbar, we were just looking at the "Shopping" one. If you go down to the end, after "Short videos", it says "Product

sites"; do you see that?
MR PICKFORD: Yes.
MS ROSE: Is that the CSSs again? If you just click on "Product sites".
MR PICKFORD: I think so yes. Yes, it is.
MS ROSE: Does Google Shopping appear under "Product sites", or is that only the rival CSSs?
MR PICKFORD: Rivals, yes.
MS ROSE: So essentially you have got two tool bars at the top, one is for Google Shopping and one is for rival CSSs?
MR PICKFORD: Correct.
PROFESSOR SMITH: While we are on this page, can I ask a question? Can we go back to the "All" tab so we get back to the original. Have I understood you, earlier, Mr Pickford, you were saying this carousel of sponsored products at the top is not a CSS?
MR PICKFORD: Correct.
PROFESSOR SMITH: It is a general search result?
MR PICKFORD: Yes.
PROFESSOR SMITH: So this box is part of general search?
MR PICKFORD: Yes, it is a specialised result. So, just, Sir, to be clear, it is a specialised result which is part of a general search service.
PROFESSOR SMITH: Yes, so part of the general search

service.

My question is —— and I will not try and remember which previous iterations of this box was called what, because I get confused, but would the same be true of the earlier versions of this shopping box, or is it only true of the remedy box? If we go pre—2017, the shopping box was then called Product Universal, was it? Is the Product Universal box also the result of a general search?

MR PICKFORD: Well, this is where it gets complicated, because this is where we come into the question of whether it is a CSS in itself —— no —— or whether it favours Google's CSS. What the General Court held and the Tribunal adopted in its Preliminary Issues Judgment was the notion that in the pre—remedy world where you had two things, firstly, a separate CSS, and then, secondly, a privileged window onto that CSS, a kind of special billboard just, you know, these things might be better on the street, you have got your shop and then at the end of the street you have got this great big billboard saying, "Come to our shop", and what was said to be the case is that taken together, they were part of —— the way it was put by the Tribunal was part of the ecosystem of Google's comparison shopping service because, we say, of that exclusive link. So in that

world, it was not itself a CSS. How you define it in the market becomes quite muddied by the fact that it was doing this job of promoting Google's CSS.

Does that answer your question?

PROFESSOR SMITH: Well, it answers the question in the sense that you have clearly said this carousel here is the result of a general search, and asked does the same apply to Product Universal, you have not been able to say, "Oh, yes", it is more complicated than that.

MR PICKFORD: Yes, it is more complicated than that.

PROFESSOR SMITH: Okay. That is fine. That does answer my question. Thanks.

THE CHAIRMAN: Would that be a sensible moment?

MR PICKFORD: It would. Can I just say, obviously, hopefully I have been able to provide some illumination through this live experiment in terms of answers to questions. I am making relatively slow progress at the moment, because we have basically done a live experiment that I have been hosting, so ——

THE CHAIRMAN: Well, you did complain about the imagery and you were saying it was misleading.

MR PICKFORD: I did, but I did not ask the Tribunal to look at them live. What I wanted to do was look at my images, which we have not looked at yet. It is not a complaint whatsoever, I am just saying that I am

currently not making particularly good time because we have had what is hopefully a useful exchange and therefore we may need some of the same indulgences that ——

THE CHAIRMAN: Yes, we understand.

MR PICKFORD: —— my learned friends had.

THE CHAIRMAN: But we have found it helpful.

2.05.

(1.08 pm)

(The short adjournment)

(2.10 pm)

THE CHAIRMAN: Yes, Mr Pickford.

MR PICKFORD: Thank you, Sir, members of the Tribunal.

If I could begin with just a couple of points of nuance and clarification to some of the responses that I was giving to some questions about the application of algorithms and what still applies to what. So it would be strictly correct to say that Panda was succeeded by other algorithms which serve a substantively similar purpose. The reference for that, that can be picked up in, amongst other places, Mr Hunt's evidence at —— I do not want to go there, but this is for your reference —— paragraph 167(c) to (d) of his first statement and the reference for that is {I2/1/80}. The details of that are confidential.

In relation to Algorithm A, I am instructed that that still exists in name but obviously it does get updated over time, so perhaps it is more accurate to say a version of Algorithm A still exists today. One then is into the classic philosophical question that one I think is often asked of a bicycle, whether it is still the same bicycle after it has been altered a number of times.

In relation to rival CSSs and the applicability of the algorithms, yes, as I said, in relation to generic results, those algorithms still apply in the manner that I have described to generic results. They do not apply to the comparison sites boxes that you saw in the live experiment.

MS ROSE: The one that says "Product sites".

MR PICKFORD: "Product sites", that is correct. Both the box and also the link right at the top of the page that you referred me to, those are 2024 developments on the SERP.

Then the final point before I continue with the submissions that I was making before is there was a question, Sir, from you about the definition of a CSS in the decision. I do not want to spend a lot of time on that, but very briefly, it might be helpful to pick up the Preliminary Issues Judgment, which can be found

in {E/2/17}.

So we see there is a section that begins:

"The meaning of Google's own comparison shopping service."

Then at paragraph 43 of the judgment, about halfway down, it is said that:

"As there is no definition of Google's CSS in the operative part of the Decision, it is common ground that [it] is necessary to rely on certain recitals of the Decision as an aid to interpretation of this term."

So that is what the Tribunal then went on to do in this section. I do not want to read all of this section. Essentially what the Tribunal did is weighed competing textual considerations.

MS ROSE: But that is Google's CSS. I think the question related to a definition of a CSS.

MR PICKFORD: Oh, I beg your pardon. I am sorry. I misunderstood. I will be coming on to that later.

The point that comes out of these paragraphs is that when we get to the conclusion at paragraph 54, Google's CSS is said to include the boxes in the specific context of the favouring {E/2/19}. That is the point.

Okay, if I could then go back to some of the images that we say ——

THE CHAIRMAN: Yes.

MR PICKFORD: —— are helpful for the Tribunal to see. Hopefully I can go swiftly through this because we have had the delight of the live show.

But if we could go, please, to {A2/2/4}. The things to draw out from this, which I think we did see in the live presentation, are that there are a number of different types of results on the page. It is a general search results page. So we have got the box at the top, but then we have also got then an organic link through to Bialetti beneath that. We have then got questions people ask often beneath that. We have then got another website which seems to be another organic link to Brew Italia, and then we have got the product sites that we saw. So there is a whole range of different things on the page.

The other point to note is that there is nothing down the left—hand side. There is nothing in terms of the whole host of tools that are one of the unique features of comparison shopping services, the specific tools that enable users to perform refinements, ordering, etc.

So then if we go on to the next slide, please, which is on {A2/2/5} of Google's annex, it is called "Figure 7", and this is a search for Bialetti coffee maker on Google Shopping, and what one sees here is that

you have got a whole page, a continuing page of PLAs. So you do not get a range of results any more of different types, you just get PLAs, and what you also get given, on the left—hand side, is the tools that I mentioned that would enable you to do, for example, some kind of filtering, including by price. So that is an example of Google's CSS.

We have then got a similar one for Kelkoo on the next slide {A2/2/6}, and again, it is in materially similar terms to Google's one, a whole page of PLAs, various tools on the left—hand side.

Then the next slide {A2/2/7} is Amazon, and again, on Amazon you get a whole series of PLAs and you have a set of filtering tools down the side, and in the case of Amazon, those filtering tools are particularly comprehensive, more so than on either of the CSSs' own websites. One can also see that there is a —— there should be a "Sort by ..." button on Amazon, towards the top. It is quite hard for me to see on here, but it is sort of top right. I think it says there "Sort by ..." is it "featured" or "relevance"?

MS MORRISON: (Off microphone) "Featured".

MR PICKFORD: Featured, thank you.

Then if you go back to Kelkoo {A2/2/6}, there is one which is sort by "Relevancy". Google also ——

THE CHAIRMAN: Amazon is partly selling its own product, is it not?

MR PICKFORD: Yes, it is.

THE CHAIRMAN: Yes.

MR PICKFORD: So Amazon is —— well, it depends on the products, but, yes, Amazon is a merchant platform and so provides a place and a number of other services on behalf of merchants, independent merchants, to sell their products, and also it supplies products itself and it supplies those products also through its own platform.

The point of showing you this slide, Sir, is not to demonstrate that Amazon is in the CSS market. I am not trying to argue that. What I am trying to show you is that there are other providers of services that are not even in the same market but are actually closer to what a CSS does than what Google Search does when it provides the remedy box on its page. That is the point underlying this.

For completeness, there is a filter by —— sorry, there is an "arrange by" —— "Sort by" on the Google page as well back on page 5 {A2/2/5}, but it is on the left—hand side, not the right—hand side.

So those submissions conclude my first point responding to the suggestion that what is on the page is

inherently a manifestation of Google's CSS. It is not. It was not found to be by the Commission. I mean, if what is currently on the SERP in the form of the remedy box, if that is a CSS, that is very hard to reconcile, in my submission, with the findings, the binding findings in the decision that the shopping box and the Product Universal were not Google's CSS. That was not the problem. The problem was not that Google had literally put its CSS on the page. The problem was that it had given itself an unfair advantage in relation to its separate CSS by the way it was constructed and the exclusive window, effectively, that it gave to its own CSS. In my submission, that is a very important point to be clear on. Mr Jowell in his submissions, yesterday, made the submission that: you can see that the remedy box is a CSS today, just like it was found to be in the decision. That is wrong. It is not found to be a CSS in the decision, as we saw in the paragraph of the Preliminary Issues Judgment that I took you to.

The second main point in response to the Claimants' case is this. We say that there is an exceptional disregard in the Claimants' case for the legitimate interests of all the other internet shopping participants. So I begin with users. We say never mind that users can reasonably be assumed to come to Google's

general search results to get results chosen by Google. According to the Claimants, that is just tough. Either Kelkoo and other CSSs get to choose the results using their algorithms that take users through to merchants, that is their 3b, or users do not get attractive links to merchants at all, because in all of the counterfactuals that you were shown yesterday, there is only one form of counterfactual where users still get the option of clicking to go through to merchants from the page and that is 3b. Every other option is —— that possibility is removed. So if you end up clicking on a picture of a product, in all the other options you go through to a CSS. So we say that the first point is that the Claimants' case has no regard to the interests of users. It is entirely self—centred.

The next point: never mind also the interests of merchants, who would no doubt prefer to maximise the traffic that they get from the internet, but in Kelkoo's world, certainly in their option 2 and 3a, gets routed via a CSS first. Now, there is a big problem to being routed by a CSS which Kelkoo itself recognises, and I will show you this evidence a little bit later in my submissions. The point is that Kelkoo itself recognised that if, rather than merchants going —— sorry, rather than users going direct to merchants from

Google's page, if they went via a CSS, there would be a 60% attrition rate so that only 40% of the traffic that would have gone had it gone direct actually ends up with the merchant. So what that means is that Google's SERP is two and a half times more effective from a merchant's perspective than the same traffic then diverted off via Kelkoo, presumably because people do not really enjoy the Kelkoo site so much and, for whatever reason, it disappears. We will come back to deal with the detail of that in due course.

THE CHAIRMAN: Just so I understand your point, you say 60% attrition rate, you mean that 60% of the people who go on Kelkoo's site for a Nikon camera do not proceed to buy a Nikon?

MR PICKFORD: No, sorry, I am not talking about conversion rate, I am talking about the fact that on the box, if someone clicks on the box at the moment, unless something went wrong with their internet, 100% of the time they end up at a merchant. What happens thereafter is then another question.

THE CHAIRMAN: Yes.

MR PICKFORD: But they get to the merchant.

If they go via the routed journey, via an intermediary, so rather than going direct to the merchant they go off via Kelkoo's site, only 40% of

that traffic ends up at the merchant.

THE CHAIRMAN: The rest of it ends up where?

MR PICKFORD: I mean, it just does not get to the merchant. It would be, for instance, a user who decides, you know, actually, this was a bit of a pain, I thought I was going to —— you know, I was clicking on a kettle that I wanted from John Lewis, but actually now I have gone —— you know, I now have a whole host of other things, you know, I am not doing that. I do not —— the evidence that I am going to take you to does not explain exactly why users give up going via Kelkoo, albeit there was quite a lot of material in these proceedings from which you can draw inferences about why users give up when they go via Kelkoo and it is mainly to do with the poor quality of Kelkoo's site. As an example, something we will come on to, Kelkoo themselves recognise that when you search for a kettle on their site, you got one kettle, eight toasters and some things that have nothing whatsoever to do with sort of relevant product results at all. So that is some evidence, to answer your question, Sir, but the evidence that I was referring to does not go into precisely why consumers leave, it just recognises —— Kelkoo recognises that if people come via Kelkoo, only 40% of them are actually going to go and end up going on to the merchant.

PROFESSOR SMITH: But, of course, from the merchant's perspective, if the customer ends up going to the merchant but then dropping out, the merchant has not gained anything from that ——
MR PICKFORD: That —— that is ——
PROFESSOR SMITH: —— so you need to think about ——
MR PICKFORD: That is right, so ——
PROFESSOR SMITH: —— the main(?) drop out rate.
MR PICKFORD: You are quite right, Sir, you obviously also need —— there are two levels here. I am talking about the first level. Ultimately, the question is: well, do they go on to buy? There is further evidence that we will come to in these proceedings about the preponderance of different users that come via different routes to going on to buy. The short answer is, traffic from Google's site has a relatively high level of preponderance to buy and it is not worse than traffic via CSSs' sites, indeed in many cases it is a lot better.

So if you have got a 60% drop out and then you have got a similar conversion rate, basically, you have got —— you have lost 60% of the value in those customers. There is users there who could have had their demands satisfied and they were not, and that is a loss to society if that happens, it is a loss to those users.

The next point is another group that Kelkoo do not pay any regard to is other intermediaries, because in their world they are very keen on having this box which promotes CSSs in version 2, for free, at the top of the page. I am sure there are other intermediaries who would love to be told that as a matter of law they get that, from Which? to newspaper reviews, other publishers. No doubt they would say, "Well, why are we not entitled to the same privilege"? I say there is not a good answer to that.

Then, finally, never mind that it is Google that made the huge investments in its SERP, built up its brand, built up all of the knowledge in using its technology in order to find the best results. On the Claimants' legal analysis, it faces a pretty invidious choice, because on the one hand, it can go down an option 3b route and allow Kelkoo and others like them to reap the rewards, we say, of Google's investments in what we say is ultimately a pretty extraordinary act of free riding, because they are saying that they should be entitled to be the people that choose the results on Google's general results search page, Google's SERP. That is one option. Or, as I mentioned before, it can just not serve the PLAs that users, it believes, want, that have been very popular in

the market, that not only Google provides but we saw Amazon provides something very similar, and as I can show you later, Bing and Yahoo! and all other general services also provide these PLAs. But on the Claimants' case, unless the Claimants are allowed to effectively take over, Google cannot serve those kind of results any more, even though its rivals will be able to. We say that that really cannot be something that competition law requires, that Google uniquely is disentitled from serving up its own general search results in the same way as Bing does or Yahoo! does responding to users' needs and rather that has to be something that is only delegated to CSSs.
THE CHAIRMAN: I see your point about delegate to CSS, but of course it is not at all unusual under competition law that a dominant company cannot compete in the way that the other companies, the non—dominant companies in the market, can.
MR PICKFORD: No.
THE CHAIRMAN: There is that, if you like, additional burden on the company.
MR PICKFORD: I accept that. But nonetheless, in my submission, it would be a surprising result if something that is a standard part of normal competition, and, as I say, as I have tried to explain, is in fact just part

of a general search service, was something that uniquely Google could not do.

So we say, therefore, that the claims in this trial ultimately amount to an attempt to seize control of and the rewards from something that the Claimants just do not have an entitlement to in law, that is the inherent and very substantial value in Google's own SERP. I will come on, Sir, if I may, to the Android Auto point, but I have a response in relation to, Sir, the point that you put to me about that.

Then the third point that we will be making is that once you have heard from Mr McGurk on some of the background facts, that if one analyses the decision properly, this claim is contrary to binding findings in the decision and I would like to go through that in due course with some care.

So then, turning to the damages counterfactual, I am going to try to provide a response to our —— response in a nutshell to this and somewhat more quickly, hopefully, than I was able to do on abuse.

For the counterfactual for the Decision Period, we say that naturally follows from our case on abuse because we say what we did was perfectly lawful. The principal attack that we heard yesterday on that came from Mr Jowell in his submission, when he said,

well, just because it is what you did in 2017, that does not mean it is what you would have done in 2008.

Now, I quite accept as a general principle that may be true. If there is good evidence to suggest that we would have done something very different faced with the constraints that we now face, then he might have a good point. But there is no such evidence whatsoever. What the Claimants point to is they say: a—ha, well, look, in 2008, you had a unit, the Product Universal, that was free to merchants, and they say, so therefore, you know, logically, surely the box, the remedy box, would have been free to merchants as well. That overlooks a stark difference between the obligations that Google is now under in order to comply with the decision and what Google's reasoning was when it had the Product Universal in 2008, because in 2008, as has been now held against us, the Product Universal was a box that was dedicated to Google's CSS. So it was free to merchants, and the point of it was to build up Google's business, because only Google got to benefit from it. It was always clear that it was ultimately going to be monetised at some point in the future, but nonetheless, for a period, Google was willing to say: okay, well, let us have free results and we will build up our business and create relationships through that.

That is a competitive strategy to gain an advantage over your rivals.

Now, the counterfactual that is envisaged by Mr Jowell, which is in —— so it is in our world in the sense that a remedy could in principle be permitted, but he is saying: well, even if in principle it is okay, here is why you would not have done it on the facts, because you did something different in 2008. There are two key changes which he fails to take into account that are implicit in his case.

The first, of course, is that Google's CSS no longer gets the exclusive benefit of the box. In the remedy world, the whole point of the box now is that all CSSs get to benefit from it. So that immediately is going to change any calculus in relation to whether it is a good idea to have a free box, because it would be able to be used to build up all CSSs' businesses equally.

But there is a second and still worse problem in Kelkoo's world, which is, even if we do not charge —— Google Search does not charge for the PLAs, entry into the box is no longer free to merchants, because in his world —— in both of our worlds, CSSs are now the gatekeepers to the box. If you are a merchant, you cannot just put your PLA in the box, you have to go through a CSS. They are the gatekeepers. What that

means, because the CSSs are not going to stop being profit making and wanting to earn a margin whenever they possibly can, merchants that go through all rival CSSs will inevitably need to pay to appear in the box, so the box stops being free. It is quite wrong for Mr Jowell to say, "Oh, look, you just do not have a free box". Not to merchants, we would not. What he wants is a box that is free to CSSs so that CSSs get to interpose themselves in the middle and cream off the margin.

Not only that. Because CSSs will inevitably charge, Google can itself offer its CSS services free to merchants even if it wanted to, because imagine we are now in a world where we have gone back to 2008 and it has put the remedy box on the page and it has said, "There is no auction for this, it is free". Then what happens is that CSSs, including Google, compete to put their merchants in the box. Now, if Google was competing to put its merchants in the box and Google's proposition to merchants was, "We will do it for free, come to us and you do not have to pay a things, you can get into the box for free", but the CSSs obviously cannot afford to do it for free, because they want to make money out of it, they are going to be margin squeezed.

So when one thinks through the implications of

Mr Jowell's alternative counterfactual, where he says, okay, fine, maybe you could have had something like the box, but the box would have been free, he has not fully thought through that what really means. It is not going to be free to the merchants, and ultimately all CSSs, because Google could not margin squeeze everyone else out, are going to charge.

So where that leaves us is that in effect what he is saying is that Google would have taken —— apparently taken the decision, notwithstanding it has this incredibly valuable real estate in the form of its own SERP, it will have said, "You know what, have that for free, you, CSSs, do what you want with that, go away, go and sign merchants up and come back to us and you get to earn the margin on it". In my submission, that is nonsensical. That is just commercially illiterate. No company would ever just give away the value in its core Crown jewel asset in that way. Still less, because what we do know in 2008 is that Google had text ads which it sold to CSSs and to merchants and they paid good money for. Of course they did, because being on Google's SERP is a great place to be. So what we are imagining now is a world in which Google provides something that has improved, it is better now than just a text ad, it has got pictures associated with it too, and according to

Mr Jowell, in 2008, would have given that away for free. That simply makes no sense.

THE CHAIRMAN: (Off microphone – inaudible) –– the point about the auction.

MR PICKFORD: Sorry?

THE CHAIRMAN: The complaint about the auction to get in the box.

MR PICKFORD: Well ––

THE CHAIRMAN: They should not bid to have a right to be in the box.

MR PICKFORD: Sir, I apologise if I was not very –– yes –– clear about what part of the case I was addressing that we heard from yesterday. Yesterday, what I understood from Mr Jowell's case is he said: it is all very well you, Google, saying that you are going to have this box that you hold an auction for and that you charge for, and sure, maybe you would have done that in 2013, because that is what you did when you brought in Shopping Units, but I have seen what you did in 2008 and in 2008 your box was free. So he says because your box was free in 2008 and there were commercial reasons for having a free box in 2008, I am going to infer that means that you would have had a free remedy box in 2008 too.

I say that entirely overlooks the different legal

constraints on the remedy box as opposed to what we did, because what we did offended competition law, because what we did was just a box that simply was free to merchants and only went to Google, so we could afford to do that. But if you change the rules and you say, as we must, for any counterfactual, no, you cannot self–preference any more, you have got to give rival CSSs exactly equal access to what you give your own CSS, then that change in the rules totally changes the commercial implications of giving the box for free, because, for a start, you do not get the benefit, all the benefit of it any more, but worse, because the rule now is that you cannot have a direct relationship between Google and Google general search and the merchant, it has all got to go through CSSs, it is the CSSs that would get to earn the margin, so you are just giving away your Crown jewels asset for free.

So that is the counterfactual question on our case.

PROFESSOR SMITH: You are not making a distinction in thinking about the counterfactual for the fact that the pictures were very different between 2008 and 2012 from 2012 to 2017, you are saying the same counterfactual, the paid for shopping box but with other CSSs having access, would be the appropriate counterfactual from 2008 onwards?

MR PICKFORD: That is our case. I mean, Sir, you have a point, that obviously ––

PROFESSOR SMITH: I was not making a point, I was just asking a question.

MR PICKFORD: Okay. Yes, that is. Well, I think a point is that the pictures obviously get better over time, probably. The quality of the picture that one sees today is a better quality picture than one probably saw in 2008. But the essence of it is the same, yes.

PROFESSOR SMITH: So between 2008 and 2012, or whenever in the counterfactual Google might have started to –– or Google starts charging from 2008 in your counterfactual?

MR PICKFORD: Yes.

PROFESSOR SMITH: Yes, okay.

MS ROSE: Um ––

MR PICKFORD: Can I –– sorry. Just –– well, I can take your question or I can respond to ––

MS ROSE: What I was going to just ask is, in 2012, what Google started charging for was access to Google Shopping?

MR PICKFORD: Yes.

MS ROSE: I am not sure if you have said whether, in your counterfactual, you would have charged for access to Google Shopping, because that is not quite the same thing as charging for access to the remedy box.

MR PICKFORD: So if we are talking about the separate site ––

MS ROSE: I am talking about the separate site. If you decide you want to build up your market share, you know, you need more merchants on your dedicated shopping website, then you might attract them without charging them. But it does not necessarily follow, I think you would say, that you would offer free access to the remedy box?

MR PICKFORD: Correct. That is exactly correct, because they are different –– entirely different commercial decisions. This in many ways goes to the heart of one of the issues in this case, which is we have a CSS, just as the other Claimants have their CSS businesses, none of those CSS businesses, even including ours, is as inherently a valuable business as Google's SERP, because that is where people actually go to. If you want to do a search, people think, "I want to go to Google", go to Google. There is a reason for that. It is because of the incredible investments that Google has made in making it the best place to go on the internet to do a search, and there is an enormous value in that, and that is value that is attributed to Google as a general search engine. People do not, in the same way, navigate directly to Google Shopping, nor do they navigate

directly to the other CSSs. In fact, where they do tend to navigate —— if they do not want to go to Google Search, where they do tend to navigate to is to Amazon, as I will come and show you.

THE CHAIRMAN: That is today, but back in 2008, they did navigate to some of the ——

MR PICKFORD: Yes.

THE CHAIRMAN: —— comparison shopping sites.

MR PICKFORD: Yes, that is true.

So what I have been dealing with is a world where we are right about abuse and that something along the lines of our remedy box would have been permissible, but I was responding to Mr Jowell's case, where he says, "I do not care whether it was permissible, you would not actually have done it, look at what you did in 2008".

What I now turn to is the flip side, which is the world in which the Claimants are correct on abuse and so we are not allowed a remedy box, and the question is: what would we do then instead? They have advanced their four different counterfactuals. Very briefly, the first two involve us removing something that is of itself not unlawful, which is our algorithms. That is numbers 1 and 2. For reasons I will come on to explain, as a matter of law, that is just wrong. We would not have done that, it is not realistic, we were not

required to do it and that is the end of options 1 and 2.

Option ——

THE CHAIRMAN: When you say "not unlawful", the objection is not, parking Mr West's particular point regarding his application to found it through the algorithms, but that the algorithms did not apply also to Google's CSS, that was the point.

MR PICKFORD: In the box.

THE CHAIRMAN: No, generally. Algorithm A did not —— I mean, there are numerous things in the decision that the Algorithm A did not apply to Google's CSS.

MR PICKFORD: Yes, but, Sir, we have to deconstruct that and understand what does that mean. It did not apply in generics, because it did not apply at all. So if you are looking at generic results, we say that cannot be discrimination of itself, because we were not treating ourselves more favourably, because we excluded ourselves all together from generic results. So, Sir, yes, it is true as a bald statement that Algorithm A did not apply to Google's general search in generic results because it was not —— but that is because it was not there at all. So we say that cannot be the problem.

What the problem that the Commission identifies is, and this goes back to the point that it is —— it was

only discriminatory, it was only a discrimination problem because of the combination of the demotion aspect and the promotion aspect. If you recall, we had a discussion at the preliminary issue stage which Google won, where the Claimants were saying Algorithm A, of itself, abusive. We said, no, no, that is wrong, it is only in combination with what we were doing in promotions. This is the heart of the answer to you, Sir, which is that it is not the algorithm per se that is the problem. There are a number of recitals in the decision that make that abundantly clear. The problem was there was a special place in the SERP where it did not apply, and that was a place that only Google got the benefits from, it was the box, because before we had the very —— the increasingly complicated options that we now have on the SERP, there were basically two places where Google could have been. It could either have been in generic results. It was not there at all. Or it could have been in this specialist box at the top. The problem was, that box was —— for good reason, it is not criticised that it was not applying there, but it is just said, "You kept that box to yourselves, and because you were the only people that got the benefit of that special box and other CSSs are outside, and they" —— and so they are subject to two

problems. One, they do not get all the benefits of the box, and two, outside is not such a lovely place for them to be, because actually quality algorithms may mean that they do not score particularly highly and show particularly highly.

THE CHAIRMAN: It was more than they are outside the box, they are not above the fold.

MR PICKFORD: Yes.

THE CHAIRMAN: They are not within the first ten, because they have been demoted so heavily, and there was no demotion of Google's CSS.

MR PICKFORD: Because Google was not in them at all. Basically, as regards the generics, it is like —— effectively we did apply demotion to ourselves, it was 100% infinity out of the bottom. We are just never going to appear. We are never going to appear above the fold, below the fold ——

THE CHAIRMAN: Well, if it did not apply to you in the same, you would not be in a box, you would be way down the organic links.

MR PICKFORD: Well, there is a factual debate about that.

THE CHAIRMAN: (Overspeaking — inaudible).

MR PICKFORD: There is a factual debate about the extent to which it would or would not have applied. Obviously there is some evidence, there are some findings. I do

not want really to dwell on those, they are really for more Mr McGurk.

But what I am dealing with is the conceptual point about what the problem was, and the problem, the only discriminatory problem, was the fact that there was a special place. That is it. It was not —— it could not sensibly have been it is discriminatory. So let us just put the box to one side for a moment and imagine that the box does not appear. We are in a situation —— because the box does not always appear, so we are in one of those situations where the box did not appear. In that world, there is still a chance for good CSSs to appear on the page. Indeed, they will have done. Idealo is the ideal example we give of a good CSS and it did what it was supposed to do and people liked it and it regularly appeared. We simply would not appear. Our CSS does not get to take part in that at all in that instance. So that cannot be favouring us; that simply, we say, makes no sense. The only favouring is the special reserved area.

MS ROSE: Is what you are saying that the analysis is that there is a single act of discrimination, which is the special box only accessible to Google, but the impact of that discrimination is greatly exacerbated by the application of the algorithms to the other CSSs,

which mean that not only are they not in the box, but they are not even on the first page?

MR PICKFORD: That is, I think, a very fair way of putting it.

THE CHAIRMAN: Because otherwise we would not be concerned with the other algorithms at all.

MS ROSE: No. No.

THE CHAIRMAN: The Commission would have said there is a single act of discrimination, there is a box reserved for Google, and they would not even discuss the Algorithm A. But they did ——

MR PICKFORD: They did.

MS ROSE: If there had not been the demotion algorithms but you had still had the shopping box, then you might have had a page that looked a bit more like the kinds of pages we have been looking at, where you might have had the Google Shopping results at the top and then you might have had, whether it is an other "Product sites" box or it could just be a list of results from other CSSs on the front page, and the Commission might have said that was an abuse of dominance, it might have said it was discriminatory, but it might have questioned whether that was going to have a very significant —— or likely to have a very significant impact on competition. Depending on what the evidence showed, it might or might

not have been capable of having an effect on competition. But the combination of those two puts it beyond doubt, because you are right up front because of being in the box, everybody else is nuked.

MR PICKFORD: Yes. I mean, I think there is an interesting feature, actually, in this case, if I may, which is there is an asymmetry, because had we not had the algorithms but we had had the boxes, on the Commission's logic, there would still have been a problem because, just putting aside the algorithms, there is still this special place and we get the benefits from that, so that would have —— we could not have got out of the problem by saying, "Okay, well, we will just take the algorithms away". It is not symmetrical, because if we completely took the boxes away, then because of the fact that we do not apply the algorithms to ourselves at all and because we do not appear in generics at all, there could not be any favouring any more. That is the point I was making before. Imagine a world without a box; does that deal with it without taking away the algorithm? Yes, it does, because the only people that you ever see then are rival CSSs, Google is simply off the map in that world.

MS ROSE: Now, the only exception to that would be the Foundem complaint that the algorithm discriminates

between CSSs.

MR PICKFORD: Yes, that is true. I mean, Mr McGurk will deal with that in more detail, but, I mean, the essence of our answer to that is absolutely, of course it discriminates, but not in an unlawful sense. It discriminates in the other sense of the word, as in it is deliberately seeking to differentiate between different types of site, the neutral meaning of the word to discriminate, to enable them to be ranked. But that is not unlawful discrimination, because that is treating unlike situations differently, because the whole point is Foundem is not as good as Idealo and it does not deserve to be in the same place on the page as Idealo. It is subject to the same rule. That is the critical point. I think where Foundem gets really confused, if I may respectfully say so, is it gets confused about outcomes as opposed to rules. So the rule that applies is exactly the same rule for Idealo as it is for Foundem. The point is, Idealo is a good site that users seem to value. Foundem was not a good site and users did not seem to value it and so it led to different outcomes. What Foundem complained about is the outcome, but the outcome is entitled to be different.

MS ROSE: But that begs the question whether the discrimination is justified, because if you have ——

if you are applying the same rule to people who are in different circumstances, that may be discriminatory if it is not justified. So what Foundem says is they are in a different situation because they are a new entrant, and because they are a new entrant, it is much harder for them to meet the confidential item that I will not mention. Question: in that situation, is that part of the rule that triggers the algorithm justified in terms of quality even when you are looking at a new entrant versus an established player?

MR PICKFORD: Well, I think we need to be very careful here, if I may, and I will give you my answer and then I will let Mr McGurk, later on in his submissions, give you his.

This is effectively an indirect discrimination point that is being put here, and of course, as good public lawyers, we are well aware of the context in which indirect discrimination can arise, particularly in relation to certain protected characteristics. So if there is a certain type of characteristic where someone is not entitled to be discriminated against, then you have to be very careful about discrimination, both direct and even indirect. Obviously it arises a lot in employment law, as one example.

In my submission, there is not quite the same

parallel with this case for there being a protected characteristic of being a new entrant. Now, that does not —— what I am not saying by that is that Foundem cannot say, "Oh, well, look, this is useless, this algorithm, because it is simply one that we are never going to get a look in because we are new entrants". I mean, they can come and say that if they want, but of course Google, in its algorithms, is not seeking for perfection, it is seeking to balance a host of competing considerations in trying to ultimately get the best results, and it may have some means of trying to allow people who are new to still rank. Indeed, I mean, again, it is difficult for me to go into the details, but it did. So it is not that it just said, "If you are new, you do not get on Google". I mean, that would be a pretty bad business if it did, because very, very soon Google will get overtaken by the people that kept with the times. So obviously it does not have algorithms that prevent people that are new from doing well.

It happens that, in this case, the signals were such that Foundem was not able to demonstrate the kind of positive signals that would have allowed it to progress, and we say, you know, I am afraid that is tough, ultimately, because we have to balance a whole host of considerations in order to give those results, and they

are not perfect, and all we are ever doing is using effectively proxies to try to get the best result we possibly can, and, you know, we do do incredibly well. There is a reason why people still go to Google; it is because Google does an exceptionally good job at taking all those considerations together.

MS ROSE: I understand what you are saying on the facts, but just thinking about the legal analysis, if you are right and this is a case of indirect discrimination, where potentially there was the application of the same rule to people in different circumstances, i.e. new entrant versus established player, then, I mean, I suppose the first question is: is that rule being applied to those two groups? Yes, it is. Are those two groups in a materially different situation? I am not clear whether that has been clearly stated, i.e. is there evidence that it is systemically harder. The third question then would be: if that is right and they are in a materially different situation so that they are disadvantaged, is it nevertheless justifiable?

I think what you have just been saying goes to the question of, where there may be indirectly a discriminatory impact but not an engaged protected characteristic, what is the legal test for justification in that situation?

MR PICKFORD: Well ——

MS ROSE: What is the standard?

MR PICKFORD: It probably is dangerous for me to say too much, because, again, this is Mr McGurk's territory, ultimately. But, in my submission, in the competition law context, it is actually simpler than in a statutory discrimination context, because there is EU law that tells us time and time again that, in this competition context, what discrimination means is treating similar situations differently, or treating different situations the same.

MS ROSE: It is the second that we are really talking about.

MR PICKFORD: Yes. So ——

MS ROSE: But then you come on to the question of whether, if there is difference in treatment, is it justified —— or the same treatment?

MR PICKFORD: Well ——

MS ROSE: If they are differently situated but you are treating them the same way, is that justified?

MR PICKFORD: Ah, there are two aspects —— so there are two aspects of difference here, of course, and I think this is where it may —— the analysis may get confusing.

So, we, Google, have focused on the difference in quality in ——

MS ROSE: But that is part of the justification.

MR PICKFORD: No, in my submission, we do not have to get as far as saying there is a difference in treatment but it is justified, because we say we are already in a world where we are starting from different places. So they are both CSSs and they are both subject to the same rule, but they perform differently because they have different intrinsic degrees of quality and different intrinsic ——
MS ROSE: They say that they perform differently not because they have different intrinsic degrees of quality but because one of them is a new entrant and therefore cannot satisfy the ——
MR PICKFORD: Okay, I will put it this way. We say they have different intrinsic degrees to which users want to —— are going to find their results helpful. We have a set of proxies ——
MS ROSE: But I think they would dispute that.
MR PICKFORD: Well, they would, I am sure. They dispute it on the facts.
MS ROSE: Okay, so that is a dispute of fact. Okay.
MR PICKFORD: Yes, they dispute the facts.
But we say there must be, in the context of the imperfect world of search, in my submission, it would not be the correct approach for this Tribunal to seek to effectively say, "We think there is a better

algorithm that you can use to differentiate between your —— the different services you are trying to rank".
That, in my submission, would be going too far. In my submission, unless there is something that is very obviously suspect and wrong about what Google was doing, then Google was allowed to do it, because it is in a domain that is simply not amenable, in my submission, to that level of fine—grained supervision from a court. That might be different in a case of indirect discrimination in a statutory context where there is a statutory obligation on a particular decision—maker not to discriminate either directly or indirectly. In that situation, in my submission, the courts are unlikely to engage in a more intense review than is appropriate in this competition law context, because there is not the same obligation on Google.
THE CHAIRMAN: If Google were to say, "In our ranking differentiation —— to use a neutral word —— which is core to our business, we will give a low score to any business that has not been trading for a year because we think that is a proxy, we cannot see how reliable they are, how many complaints there have been", and that would therefore have a huge effect on people trying to enter the market, because Google is such an important and visible means by which people discover and access

businesses, that could constitute, potentially, an abuse in discriminating against new entrants to say: well, Google has to be left to choose its means of differentiation as best it thinks fit. If it operates in a way that can be said to be manifestly unfair in affecting competition, that is something that Google could be restrained from doing.
MR PICKFORD: Yes, and the reason for that is ——
THE CHAIRMAN: Even though it is a rule that applies to everyone ——
MR PICKFORD: The reason for that is, in EU law, another way that the test for discrimination is sometimes advanced is that the difference in treatment is arbitrary.
THE CHAIRMAN: Yes.
MR PICKFORD: So if it could be said that our approach was arbitrary, then that might be one of those situations where ——
THE CHAIRMAN: No, it is not arbitrary, it is very clear.
MR PICKFORD: Yes.
THE CHAIRMAN: It is, everyone can understand it, you have got to be in business for a year. You might be an unreliable company and people might send you money and you go out of business; that would be bad for —— it would not be a service to users. People would then blame us for having listed you and so on. There are all

sorts of reasons one could give. But if the effect was so great that it was to exclude new entrants from the market, if that was the potential effect of such a policy, it could constitute an abuse.
MR PICKFORD: It might. I think it all —— I mean, it would all depend on all of the circumstances of this particular hypothetical situation.
THE CHAIRMAN: Yes.
MR PICKFORD: It might be that those arguments that you were suggesting that Google made were ones that ultimately were fair and the ones that the court accepted. I mean, I do not think it is —— it is not, in my submission, really amenable to some sort of hard—edged line where I can say —— and I am certainly not saying —— there is nothing that we can do that is so wild, you know, you cannot touch us, it is our algorithms, go away. That is not my submission. But what I have been trying to be very careful to say, particularly in response to Ms Rose's questions about indirect discrimination, is nor should we import everything that we know about discrimination in a public law —— indirect discrimination in particular, in a public law context where there is a statutory requirement on someone to avoid indirect discrimination into this scenario, because in my submission, that would also be going too

far in the opposite direction.
THE CHAIRMAN: (Off microphone) I understand.
MR PICKFORD: We have been having such fun that I momentarily lost my screens.
Right, this might be a good moment to take a short break. I have to say, I do not know how much of Mr McGurk's submissions I have been helping him avoid later on. Obviously I am always delighted to assist the Tribunal in whatever manner I can. I am making, again, quite slow progress through my script, but that is not to say, hopefully, I am not making some progress in terms of explaining the nature of our case to the Tribunal.
THE CHAIRMAN: Yes. How much more have you before you hand over to Mr McGurk, who I think was —— on your roadmap, he was on point 2?
MR PICKFORD: Yes, so I had just a few —— we went off on something of a diversion. I was actually going to finish off, very briefly, some submissions why we say they are wrong on the counterfactual.
THE CHAIRMAN: Yes.
MR PICKFORD: On their case. I can do that probably in a few minutes.
Then, after that, we are on to some relatively brief contextual, sort of overarching contextual points that

I was going to make before I then handed over to Mr McGurk. But we are still —— I certainly could not do that before ——
THE CHAIRMAN: Yes, we will finish off on the counterfactual and then we will have the break.
MR PICKFORD: Thank you.
So, before the discussion of the many interesting things that we have been discussing, I was making the submission that I have been addressing our legal world where we are right on abuse but what they say about the counterfactual, and now I am coming on to their legal world, when where they are right on abuse and what we say about their counterfactual.
What we say about their counterfactual is, firstly, I made the point about 1 and 2 —— I remember now why we got on to this, 1 and 2 simply do not work because they require us to do something that goes further than what we need to do in order to remedy the abuse. It would be an act of self—harm. If we put a box in place and that solves the abuse —— and of course, Mr Jowell, it is worth remembering, Mr Jowell's case, he advances no case that, in relation to the period from 2017 onwards, the algorithms are inherently problematic. His case is simply: whatever they said in the decision, I extend it to the future. I have explained what the reasoning is

in the decision and how there is in fact an asymmetry in the decision, and what that means is that if we addressed the abuse by putting in place a non—discriminatory box, obviously there is an argument between us about that, that is as far as, in any realistic counterfactual, we would go, because going beyond that is an act of self—harm. What we are doing at that point is not abusive any more, so why on earth do we imagine a world where not only have we solved the abuse, but we also take away something that we would have been entitled to have? That, in my submission, makes no sense and I can come back to that and expand on that a little bit later.
Then we have got options 3a and 3b. 3a —— I have dealt with all the problems, I think, in relation to 3b. We say that is basically usurping our control and our right to monetise our SERP. 3a means that everything now just gets sent to CSSs and not to us —— sorry, and not to merchants any more. That was the old world. We say neither of those is at all attractive from Google's point of view commercially.
The Claimants have their finger on it when, in their skeleton, they refer to experience in Turkey and they say in their skeleton in relation to Turkey {A1/1/57}, actually, look at Turkey, Turkey shows you what we might

do, we might turn off the boxes. That is what we —— we agree with them, we would indeed, because that is what we did, that is what we did in Turkey when we were told, "You cannot have a remedy box". We say that is by far the best evidence as to what would in fact happen in a counterfactual world. The Claimants have gone very cold on Turkey in their oral submissions because they have realised they shot themselves in the foot by referring to it because it goes entirely against them, it does not support their case, it goes against them. So that is a summary of what we say on counterfactuals, and I can come back and deal with any points of detail in relation to that at the end of my submissions after the law.
With that, that is all I need to say on that section of my submissions.
THE CHAIRMAN: We will be back by 3.30.
(3.21 pm)
(A short break).
(3.33 pm)
THE CHAIRMAN: Yes, Mr Pickford.
MR PICKFORD: So I am now going to turn to some high—level context for product search on the internet and I am going to cover three things fairly rapidly. First, the means by which users search for products. Secondly,

a little bit on the evolution of Google general search, because there will be more detail on that to come from Mr McGurk. Then, thirdly, a high—level overview of the commercial model of a CSS.

So starting then with how users search for products, could I ask the Tribunal please to go to {I3/1/13}, which is in the report of Mr Robin Noble.

So this is a schematic representation of users' online shopping journey and the players involved. We do not need to spend a lot of time on it, but what it I think is, as I understand it, intended to illustrate is that there are quite a number of different potential search paths that one can go down when a user is ultimately ending up buying a product. So one option is the user just navigates directly to the merchant or the merchant platform and buys the product via that route. That is the most direct possible route.

The next route, which is the second most direct, is that they first navigate to a search engine such as Google, Bing or Yahoo!, and then there are different types of results that they can get from that. Any one of those could potentially take them on to a number of different places. So they could get a generic result that might take them through to a CSS, or it might take them through to a merchant. Equally a text ad could do

that. They could get a specialised organic result, or they could get a specialised sponsored result, such as the PLA box. Then, ultimately, they can either then go from there on to merchant platforms, or they can go off via a further level of complexity, which is they also go via intermediaries, such as the publishers, product review sites, content creators, etc, first.

Or indeed obviously, as shown in the pink line, if they were particularly interested in those in the first place, they might not have gone to Google at all, they might go straight to —— an example might be they might be reading The Guardian, and then they go to some reviews The Guardian did of some electronics and they think, "You know what, I am going to click through there", and they end up on Amazon. That would be a classic way that does not involve Google at all, but that someone ends up at a merchant platform.

That is a kind of schematic which I find helpful sometimes just to go back to, just to sort of orientate myself in terms of the different routes that one can go down.

The key point probably to pick out that goes back to my earlier submissions is that appearance on the SERP is also a zero sum game. So to the extent that a CSS gets more promotion, then another CSS will get less promotion

or a merchant will get less promotion, or potentially some product review site might get less promotion. So everyone is always competing insofar as they are appearing on Google's SERP for user attention, and in my submission, it is important to remember it is not just about CSSs and Google, it is actually about CSSs, merchants and other intermediaries that also want to be in that chain.

So I then turn to the relative importance of different channels by which one ultimately gets to buy a product, and what we have got in the bundle appears to be snapshots from different surveys at different points in time. I am going to show the Tribunal a number of them. I am not saying that any one of those surveys is the perfect survey from which the Tribunal should conclude this is a definitive assessment of exactly who was using which route at which time. What one does see, from seeing a number of them, is a number of common ideas and common threads.

So if we could start, please, with {J3A/1/4}. I should also say, I hope this has been drawn to the Tribunal's attention, all of the documents that I am referring to should hopefully, if everything has gone well, be in hard copy as well as soft copy, if you prefer to look at them in hard copy. I am only looking

at them in soft copy myself.

THE CHAIRMAN: Yes.

MR PICKFORD: So we begin, as I said, in bundle {J3A/1/4}.

This is a slide, it is an internal Google document. It is LEO Confidential, and it sets out Google's assessment of the market in 2008. Probably the easiest way, without having to read the whole slide, to get the essence of what one can draw from this slide is if you see about four lines down, it says:

"Merchant site ..."

Then a figure in brackets.

Do you see that, Sir?

THE CHAIRMAN: Yes. "Merchant site", and it is —— is it 39%?

MR PICKFORD: It is. I mean, to be honest, I am not sure why —— I am just going to take instructions briefly.

(Pause)

Okay, sorry, yes.

Thank you. I was being ultra cautious. I saw "LEO Confidential" and there are some documents where the whole document is LEO Confidential. This one, none of this is. I was rather surprised as to why any of this should be LEO Confidential. It is not, so I can sort of read it out. It will be highlighted if it is.

So, yes, it shows you, in 2008, that 39% of users in

the survey that this was based on were going directly to merchant sites. EBay took 20%; other referrers, 17; Google, 14%; and Amazon, I think it is 8 or 9, my eyesight is not quite good enough —— 9%. So that is what the market, in a snapshot, looked like in 2008.

The next slide that I have is from 2000—and —— actually, the next one is not a slide, but a submission. The next one is from 2015, and that is to be found in {N/13/59}. If you look at paragraph 210. So this is ——

THE CHAIRMAN: This is also not confidential?

MR PICKFORD: This is also not —— so it says "LEO Confidential", but it is not because it is not highlighted. I am going to —— yes, I think everything that I am referring to, it is only if it is highlighted that it is confidential.

So, if one looks at paragraph 210, there is a reference —— this is a Google submission to the Commission, but it references some market research from 2015, and we see things have changed a bit:

"... market research shows that roughly 33% of online shoppers start directly on Amazon, more than twice as many as those who start on Google."

So it seems that Google has not really changed very much:

"Amazon has worked hard to increase this trend by

offering, in addition to just buy—and—sell information, product reviews and answers to ... questions."

So we are seven years on and by this point Amazon appears to have overtaken Google and is now where 33% of users start their shopping journeys.

If then we —— the next snapshot that I have been able to find is 2016.

MR JOWELL: Forgive me for interrupting, but just a technical question. If it could be specified what are the countries that these are referring to in these various —— both the four—month graph and this one.

MR PICKFORD: So I will not be able to tell you that directly from this particular page. Some of them are clear, some of them are US, some of the things I am going to show you are UK and some are Germany. I cannot immediately answer that for this one.

I go back to the point that I made initially, which is I am not seeking to show —— I am not seeking to rely on the precise numbers for particular dates in time. That is not the purpose of this. It is that what I have done is to try to find in the bundle illustrations, snapshots, of how the market was progressing over time, and obviously it will tend to vary from country to country. We do not have comprehensive information on Germany. We do not have comprehensive information on

the UK. We do not have comprehensive information on the US. We just have to make do with what we —— with what we can.

THE CHAIRMAN: I think perhaps the point of Mr Jowell's intervention is the US in particular might be very different from Europe. But this was put in to the Commission, so one would expect it is more Europe focused.

It does say at the top "... SO 4 Countries", I do not know if that is relevant to —— "SO" presumably being statement of objections, is it?

MR PICKFORD: I am not going to be able to answer that question, right now. Obviously Mr Jowell wants to —— we all have access to the same bundle. If he wants to make some submissions about it in due course, he is more than welcome.

THE CHAIRMAN: Well, the quote comes from an article which is referenced, so perhaps overnight somebody can follow up ——

MR PICKFORD: Certainly.

THE CHAIRMAN: —— that link and it probably tells you.

MR PICKFORD: I think I would accept, as a general proposition, that the United States tends to lead Europe. Overall, the trends that seem to be common indeed amongst many things is that things seem to happen

first in the US, then typically in the UK, and then to some degree in Continental Europe. So to the extent that we have higher numbers in the US, then one would expect Europe to perhaps be a bit behind, but the overall trends are the same.

So if we go, please, to the next slide, which is at {N/188/1}. This is the United States, because it is a survey of US consumers.

We see that it is reported in this research that —— so it is in 2016, which one can see, it is "the critical 2016 holiday season", it says at the top:

"Amazon has grown its lead as the place where consumers first search for products. Now 55 percent of consumers begin their search on Amazon when shopping for products online."

That is obviously the US.

Then there is an explanation below of the survey and that search engines and retailers have lost ground. So "Search engines" at this point are apparently 28% and then "Retailers", 16%.

If I may, if that is convenient, I am going to go to the next slide that I have. That is to be found in J2B —— or the next data point, {J2B/22/34}.

So this is in fact a Foundem article where Foundem is quoting a Google blog post and then it goes on to

critique what Google refers to in the blog post. I am relying on this for the purposes of the blog post that is cited at "4.10 Paragraph 10 ...". Again, it is just another snapshot, this time of the German market, and it says:

"A third of online consumers go first to Amazon irrespective of where they ultimately make their purchases. Only 14.3% go first to Google, and only 6.7% to price comparison sites."

So this is from 2016 and it is Germany. They then refer to what I think is actually the slide that I just showed you, the US slide.

THE CHAIRMAN: Yes.

MR PICKFORD: The next one, very briefly, is —— so a US analyst called Raymond James to be found at {N/192}, and if we go to {N/192/7} of that.

So we are back in the US now, and there is —— the graph shows quite a clear trend over the three years to December '14, '15 and '16, and what it shows is Amazon is gaining ground and search engines are losing ground. So at the beginning of the period, search engines were doing better, and that is obviously largely Google, when it refers to that, but by the end of the period, they have lost a lot of ground and vice versa for Amazon.

Then we have got a UK snapshot from 2022, if one goes to ——

THE CHAIRMAN: Sorry, the one you just ——

MR PICKFORD: I beg your pardon.

THE CHAIRMAN: —— Raymond James is —— that is US?

MR PICKFORD: Yes, that is US. It is US, 2017.

Then if we go please to the bundle at {M4/128}, and this is a market research by a company called Remazing x Appinio. They seem to be consultants who advise merchants on Amazon. So obviously one can perhaps reasonably take from that that they are going to have a relatively pro—Amazon perspective, so I do note that. But nonetheless, from their review of the market, if you go to {M4/128/28} of that slide pack, this is 2022, UK, and it gives a split of 63% Britons being likely to start a search on Amazon as opposed to 37% being likely to start on Google.

So what I draw from that very quick tour of snapshots is the following. The real success story in internet shopping in the US and in Europe, so we have seen Germany and the UK, in the last 20 years is Amazon. It has gone from, in 2008, being last place where people start their shopping journeys, and now, today, it is, on the evidence we have seen here, first place for where users start their shopping journeys. So that is the key

market background that I say is relevant in the context of what is going on in this market.

Secondly, Google seems to come second. Originally it was ahead of Amazon. These days it appears to be behind. Thereafter we have got merchants, who seem to come in third, and then you seem to have everyone else, including CSSs. This rising dominance of Amazon was not a surprise to Google because, even back in 2008, Google produced a paper analysing the impact of Product Search on Google.com's revenue. That is to be found in {M2/360}. The paper is entitled:

"Product Search Impact on Google.com Ad Revenue."

If you go to {M2/360/3}, please, and look at the second line from the bottom and on to the next page {M2/360/4}, there is a sentence which begins:

"We are competing for product queries not so much with comparison shopping engines (Product Search is now the leading shopping engine in the US in terms of pageviews, according to [confidential], CUP, Nielsen, and ComScore), but with Amazon, eBay, and other merchant sites."

So this is a confidential internal Google analysis, and in 2008, the people that they were worried about were Amazon and eBay and other merchant sites.

So that is a very, very brief tour through the ——

a wider perspective on internet shopping in the last two decades.

I then turn very briefly ——

THE CHAIRMAN: Just a second.

MR PICKFORD: I beg your pardon, Sir?

THE CHAIRMAN: Just one moment.

MR PICKFORD: Yes.

(Pause)

THE CHAIRMAN: Did they not go on to say it is crucial to keep product queries going on Google general search?

MR PICKFORD: Yes, because —— and what they are worried about is them going instead to competitor sites such as Amazon. You see that in the fifth line of page 4. So absolutely, I do not demur from that at all. Google, in 2008, was very strongly trying to be the place where consumers went to to begin their product searches. That is what it was aiming to do.

THE CHAIRMAN: Yes.

MR PICKFORD: Ultimately, it lost that battle to Amazon. It saw what was coming and Amazon got the better of it.

So, Sir, the next very, very brief point is the evolution of Google. I think I can be probably very fast through this, because we have covered quite a few things in the discussions that we have had already. I think the point, hopefully, is well understood by now

that Google was not gifted its position as the favourite place for people to go and search for, it ultimately was much smaller than its rivals when it started out in 1998. It got to where it has done by innovating and doing two things which are indeed the subject of —— doing two things that are argued about, namely providing the highest quality results, and part of that is it used algorithms such as Algorithm A and Panda to do that, and that is one of the —— we say those are pro—competitive, positive things that Google was doing, and it also provided attractively presented results on its page. The problem was, as we know, that there was a period when it gave itself, its own CSS, an advantage in relation to that, which it has now remedied.

I think I can leave the rest of the points that I was going to make there for Mr McGurk to pick up insofar as he needs to at all in his submissions, because I am trying to make sure that I get a move on.

So the next point then for me to make before Mr McGurk stands up is on the CSS commercial model and how that works.

What we say in relation to that is that the essential business model of a CSS is to gain clicks from Google and other sources at a lower cost than the price that they can then sell them on to merchants,

who either contract directly with the CSSs or participate in affiliate programs, so where there is a merchant that says, "I want lots of users to come to my site", and then, on their behalf, third parties try and get those users, and therefore sometimes the CSS will sell directly to a merchant such as Amazon, or sometimes it will sell into an affiliate program and those clicks will ultimately go on to Amazon insofar as it was an Amazon affiliate program, but there is no direct contract in that context. They have relied on a heavy degree of automation to upload very large volumes of material, because, ultimately, if it is a business that is based on making sure that you get a margin between what you can buy in your click set and what you can sell them at, you are going to make most money by maximising your volumes.

Some CSSs, such as Idealo, invested in their sites and were comparatively high quality, and as we shall see —— and quite a lot of this will come out during cross—examination because we do not have a chance to present all these documents now in opening —— there are other CSSs that were much lower quality and the Claimants —— the remaining Claimants fall into that category. We say that they presented often misleading or irrelevant information, there was a lack of human—led

quality control, there was evidently insufficient capital investment, and ultimately what that meant is that they became more and more a model of pure arbitrage. They added less and less real value to users and were ultimately simply just trying to exploit the price differential I just mentioned.

An implication of that is the point that we addressed a little bit before lunch —— I think it was before lunch —— when what one found is that lots of users who go to a CSS page might not find it very satisfying, and so what they do is they potentially just bounce back to Google, or they exit all together without going through to a merchant. That is what explains the attrition rate that I was referring to before. I probably was not as helpful as I might have been explaining where those users go. I think, hopefully, I will be slightly clearer now, that sometimes they may just go back to Google because they go to the CSS, they think, "Mm, that is not very helpful, I'll go back and I'll continue on the way", or they might just give up. Both of those are means by which CSSs are not really assisting —— they are situations where CSSs are not assisting their users and we are going to see quite a lot of evidence on that in this trial.

So we say that the reason why many CSSs have not had

the kind of business success that they say they are entitled to is not a function of abuse by Google, it is a function of the fact that they are not as good as they say they are. When they point to —— they say, "Oh, well, but we would have been better had Google not done what it had done", well, there may be an argument to be had there, but what one does see is that there are other CSSs that did a lot better and performed much more effectively in terms of the kind of quality scores and feedback they were getting from users.

One of the points that this leads to is Mr Hunt's evidence, because Mr Hunt has developed an economic framework where his third criterion for assessing whether there is competition on the merits is looking at the kind of margins that Kelkoo earns today, and he says that you are able to infer that there is an abuse of dominance if Kelkoo does not make the sort of margins that Mr Hunt thinks they should be making.

We say there is not any basis for that kind of analysis in law. Google is not under an obligation to ensure that Kelkoo is profitable. There are all sorts of reasons why Kelkoo may be not very profitable. In fact, it does make what we say is a material and reasonable profit, but that is not really the point. Even if it did not make a profit, one cannot infer from

that that that reveals that there is an abuse of dominance today. It could well be —— and we say there is strong evidence to show —— it is because it is not a very good business.

Now, with that introduction, if I may, I can hand over to Mr McGurk.

THE CHAIRMAN: You say, not a very good business by comparison with, say, Idealo ——

MR PICKFORD: Yes.

THE CHAIRMAN: —— which you say is a good site.

MR PICKFORD: Yes, and we will see copious evidence of how Kelkoo in particular, because there is quite a lot of disclosure on Kelkoo, compares to other CSSs and the many business problems that it had.

THE CHAIRMAN: Though Idealo has also established abusive dominance in other proceedings.

MR PICKFORD: Yes, indeed. I said at the outset, I am not saying we are not going to have a Trial 2.

THE CHAIRMAN: Yes.

MR PICKFORD: What I am saying is the abuse finished in 2017 and we have to be very clear about what the counterfactual is, and those are the things we are arguing about now.

So unless I can assist the Tribunal further, I was proposing to hand over to Mr McGurk.

THE CHAIRMAN: Yes. Thank you.

So Mr McGurk, we will sit for half an hour, if that is ——

MR MCGURK: Yes, thank you.

THE CHAIRMAN: We will discuss when we start tomorrow.

Opening submissions by MR MCGURK

MR MCGURK: Thank you.

Before I introduce what I want to cover, can I issue one correction. When we had our discussion this morning about my response to Mr West's application, I invited the Tribunal to read some correspondence. I gave you the wrong reference for what I particularly invite the Tribunal to read. It is {L4/11} and {L4/12} which we are most concerned that you have a chance to see. They cover our entire position on other penalties which might allow me to take that short tomorrow, which may be helpful for reasons of timing.

THE CHAIRMAN: Yes.

MR MCGURK: It also might allow me to take the response to Mr West's application short as well.

THE CHAIRMAN: Yes. Well, we will read those overnight.

MR MCGURK: Thank you.

If convenient, I propose to address you on five topics. First of all, I want to make some introductory remarks about ranking, both in general and as undertaken

by Google. Secondly, I will address you on the algorithms in issue in these proceedings. Third, I am going to address you on two discrete Google Shopping—related points and in response to observations made by Mr Jowell in opening yesterday. Fourth, and if time, I wanted to say something about the evolution of CSSs. Fifth, I am going to set out a number of the problems inherent within the Claimants' CSSs claims.

So starting with ranking, as Mr Pickford has already pointed out, ranking is inherently zero sum. If one website ranks higher and moves up, inevitable somebody else will move down. Now, in this regard, Foundem claims that ranking is done by reference to what it calls a "natural relevance score", which is premised on a suggestion that ranking can be done objectively, in a hard—edged way, such that looking at one set of results you could in fact say that is incorrectly ranked, whereas looking at another set of results could be regarded as correctly ranked.

Now, we say, with great respect, that is obviously wrong and a webpage can have no natural relevance score because there is no platonic ordering of the web waiting to be revealed, whether by the senses, the intellect or an algorithm, whether in response to a particular search

query or in relation to the ordering of the web as a whole. It makes no sense because ranking is, as Mr Cutts says, inherently subjective and there are myriad ways in which general search engines might go about undertaking ranking. It is for that reason that the approach to ranking becomes the fulcrum of competition between general search services, and who does it well and who does it badly is precisely what drives competition.

So for that reason, a ranking on Bing or a ranking on Yahoo! cannot be held up as a benchmark or metric against which to assess results on Google, and that is particularly so where users have overwhelmingly opted to use Google as the starting point for their search queries.

Ranking is not set in aspic either, because webpages change in their content, user behaviour changes over time, new websites enter the market with new content that they want to rank in relation to, and in addition, problems emerge that require algorithmic responses, whether to avoid website owners, who we refer to in these proceedings as "webmasters", gaining what they discern to be the signals on which ranking takes place, or to deal with the new mischiefs that emerge online from time to time. So for these reasons, the idea that

there is a pre—demotion natural ranking order is, with respect, hopelessly confused.

Can we turn, please, to paragraph 95 of Mr Kim's first statement. It is {H3A/2/22}.

THE CHAIRMAN: Did you say paragraph 95?

MR MCGURK: I think this is 3. H3A/2 ——

THE CHAIRMAN: 95?

MR MCGURK: Yes.

THE CHAIRMAN: I think that is page 26, is it not?

MR MCGURK: There we are. Apologies:

"There is [he says] no such thing as a 'natural relevance score'. In fact it is baloney — I want to be very clear about that. Ranking is determined by engineers, not by a universally understood or common [Information Retrieval] score."

Now, just for your note, Mr Cutts addresses the same point under the heading, "No right answer in search rankings", at paragraphs 25 to 29 of his first statement. For your note, that is {H3A/5/9}.

Google's ranking process ——

THE CHAIRMAN: Just one moment.

I mean, I think we have got your point. I do not think you need take us to a lot of material on it.

MR MCGURK: What I was going to go to next is just how Google does ranking ——

THE CHAIRMAN: Yes.

MR MCGURK: —— and some of this is sensitive so I was going to take it cautiously, but hopefully quickly.

If you have this, or I am otherwise boring you, please tell me to move on.

THE CHAIRMAN: No, you are not boring us, but I am just saying because we want to concentrate on what troubles us or is most difficult or ——

MR MCGURK: Indeed.

THE CHAIRMAN: We have read that, and take the point that is made and you do not have to reinforce it, as it were.

MR MCGURK: Yes. Well, can I then start with {A2/1/19}. It is our written openings, and we give there a summary at paragraph 41 of how Google approaches ranking. Could I just invite you to read that paragraph.

(Pause)

THE CHAIRMAN: Yes.

MR MCGURK: So that summary is explained diagrammatically in Mr Kim's first statement at figure 1, which is on {H3A/2/14}.

Now, this diagram is very sensitive, so I would just invite you to pause and have a look at that diagram. As you will have seen, some of the phrases have been treated as non—confidential in other parts of these statements, but when you put them all together in

the context of explaining how a process works, it is extremely sensitive.

(Pause)

THE CHAIRMAN: Yes.

MR MCGURK: I wanted just to explain where the things that matter in these proceedings fit into this diagram, but again, to do it cautiously.

The signals and metrics against which ranking took place were in large part developed by two teams within Google, Mr Cutts' search quality team and in particular the webspam team which he was a member of and ended up leading, and the page quality team.

Starting with the former, they developed the PageRank algorithm, which Mr Cutts explains at paragraph 23(b) of his first statement, that is at {H3A/5/8}.

He says:

"The PageRank score was a measure of whether the webpage was reputable. PageRank measures a webpage's reputability based primarily on the importance of the inbound links to that webpage; the idea was to follow the quality trail from reputable sites. It is a model that therefore emerges from the link structure of the web."

So PageRank was an early quality signal.

Then dropping down to paragraph 28 on {H3A/5/10} of this document —— this statement, picking it up ten lines down, you see Mr Cutts saying:

"Crawling in PageRank ... is crucial because you're solving half the battle of spam by crawling the most reputable pages first."

So PageRank was the practical response to that simple intuition.

Now, in those early days, the search quality team developed further signals to address the relevance and usefulness of webpages via what were known as its ABCs: anchors, bodies and clicks.

Can we go to Mr Kim's first statement. It is {H3A/2/16}.

Could I just invite the Tribunal to scan down paragraphs 67 to 72, please.

(Pause)

THE CHAIRMAN: Yes.

MR MCGURK: It was the webspam team who then devised signals for spam and thin affiliate content, including Algorithm A, which I will address in detail in a few minutes. But just to help make sense of Mr Kim's diagram when we come back to it —— there is a second version —— for now, can we please go to Mr Cutts' first statement. It is {H3A/5/24}. It is confidential. Can

I therefore invite the Tribunal just to read that paragraph 68.

(Pause)

On the establishment of the page quality team later on, they sought to identify additional quality metrics by which to assess the expertise, authoritativeness and trustworthiness for a webpage, and those page quality metrics are, for your note, discussed in paragraph 79 to 84 of Mr Kim's first statement, that is at {H3A/2/18}.

If I could just invite you to read 81, 82 and 83, please, that will take us back to the second diagram I wanted to show you.

(Pause)

THE CHAIRMAN: Yes.

MR MCGURK: So Mr Kim brings these metrics back together in this second diagram, and again, to deal with this carefully, PageRank features at the point of the long, thin rectangle in the middle of the page. You see where the further metrics I took you through by reference to the witness evidence are dealt with and to what end at the bottom on the left side of the diagram on the page. Algorithm A applied at the box beside which you see the number 2. So too, initially, did Panda, but as Mr Kim explains at paragraph 214 of his first statement {H3A/2/49}, it now is applied in the fatter rectangle at

the bottom of the page. It is slightly cryptic, but hopefully sufficiently clear by reference to what I have shown you.

Just to finish this, you have seen the reference on that page {H3A/2/19} to "Navboost" and "Safe search". Just to show you what they both were, can we turn to {H3A/2/19}, which is paragraph 85 of Mr Kim's first statement.

THE CHAIRMAN: Just below the diagram?

MR MCGURK: Yes, we are in Mr Kim, so ——

THE CHAIRMAN: It is the next paragraph.

MR MCGURK: —— forgive me, yes.

(Pause)

THE CHAIRMAN: Yes.

MR MCGURK: Thank you.

So that is a general canter through how Google approached ranking.

Can I turn then to Algorithm A, and I think I can probably do the first document I was going to cover before the guillotine comes down.

Algorithm A was introduced in 2004 and was present throughout the pre—decision and Decision Periods. To address the mischief with which it was concerned, can I go, please, to {M2/122/1}, which is a "Web Spam" presentation from 2006. I was going to go to this

anyway, but particularly, Sir, in light of, Professor, your discussion with Mr West this morning about the notion of web spam and how it is defined, how broad it might be, how it impacts on CSSs. The beginnings of the explanation are in this document.

So can we go to {M2/122/2}, please.

You see:

"Google's mission is to organise the world's information and make it universally accessible and useful.

"Web Spam is techniques (and sites) that interfere with our ability to organize."

Then if we go over the page {M2/122/3}, we can see why web spam is a problem by reference to those four points:

"1) Google's natural results ... "

Pausing there. By "natural results" that refers to organic results, meaning results not influenced by ads or any form of monetisation.

That those results:

" ... aim to be a meritocracy, not influenced by money or technical loopholes."

What this means is that in relation to organic results, not the ten blue links, nobody can pay for placement. Point 2, web spam is a problem because:

"Others determine relevancy, not Google."

That occurs when webmasters have, for example, been able to gain Google's algorithms to suggest that a page is useful to a user entering a search query when it is not. A classic example of this is —— type of gaming, is keyword stuffing, where a webmaster will fill their webpage with specific terms or key words in an attempt to appear relevant, or more relevant, to specific queries purely to attract users.

Point 3, that obviously leads to a "poor user experience", because the user goes to a website expecting to get what they want and they do not.

Point 4 notes that this can also:

" ... lead to a 'Lack of Diversity' in results."

That is best explained by the worked example over the page on {M2/122/4}.

This, again, is pertinent, Professor, to the point you were discussing with Mr West, and "lack of diversity", just to be clear, this is not a reference to the Diversity algorithm, this is referring to the problem that is the SERP being flooded with identikit results. We can see this pictorially on the page. The user in this example is searching for "shoes", and is given multiple websites in the search results, but all of which ultimately contain the same

link to the same affiliate hub which might actually sell shoes to the user.

This example that you see on the page recognises that this type of outcome on the SERP was often a result of affiliate programs, where a merchant or an intermediary on behalf of an affiliate hub signs up affiliate members, all of whom can make money by redirecting traffic to the affiliate hub. The problem is that each affiliate member, and in some programs, as we will come back to see, there were thousands of members receiving the same standardised product information and containing the same links by which they could seek to redirect users to the same place, and in this example it is to the same end hub, Zappos.com. So without doing more, every webpage linked into an affiliate network will serve users essentially identical results taking them to the same ultimate end point.

Now, it is understandable that Google viewed this as a poor user experience and it was entitled to address that poor user experience and did so in part through Algorithm A.

Now, I note that at least Kelkoo and Ciao seem to appreciate this issue. Mr Jowell, yesterday, in his opening remarks, said: for many users, the priority is the quality of the shopping experience and the diversity

of the results they have access to. That was page 16, line 7 to 9. Google's focus was on assuring that its results were not filled with thin affiliates that simply served users with multiple results of the very same thing.

Can we go over the page in this presentation to {M2/122/5}.

Google further explain what properly meritocratic organic search results required. First, that meritorious results were not results you could pay for, and Mr Kim says more about this in his first statement at paragraphs 33 to 38, under the heading, "Honest results". That is just for your note and it is at {H3A/2/8}.

Good links would arise through human—built directories and citations, meaning that the owner of website A specifically referred users to website B as containing useful content by including a link to website B on its own page. Those links are organic, and this is effectively the web version of word of mouth, and this of course is the intuition that sits underneath PageRank, as I have shown you.

By contrast, bad links include things like bought links, and bought links are not as meritocratic on this analysis because users are not being referred to other

sites primarily because of the content of that site but instead because they are receiving a payment to send you there.

Then point 2 says that it wants:

"Content that's generated by the site owner, or a unique value add [and to] (filter out duplicate content)."

Page 6 {M2/122/6}, over the page, then reiterates what Google wants in its general search results. Importantly, for this case, again, "Unique content or added value", and gives the paradigm example of Wikipedia's creation.

At page {M2/122/7}, turning over again, one of the things Google does not want in organic search is "scraped" or feed—based content, for the simple reason that it ends up duplicating original content and Google was keen to take you to the original creator of content that may have been duplicated on the web, not to the duplicates.

Finally on this document, page {M2/122/38} deals specifically with the concerns around affiliate and pay—per—click content. Affiliate sites were defined as those:

"... that offer very little or no value add while earning [revenue] from affiliate commissions or PPC ...

revenue."

Which would include affiliate networks or programs.

So I hope, Professor, that shows you how that notion of web spam, the problems it created, bring us towards CSSs, certainly the poorer quality CSSs that we will be considering in this case, and Algorithm A was the ——

PROFESSOR SMITH: Just to make sure that I have understood what has gone on here, go back to page {M2/122/4}:

"What is a 'lack of diversity?'."

If we had in the box, "Query: 'shoes'", competing CSSs, they might well all legitimately be directing themselves —— each of them might have a perfectly proper commercial relationship with a merchant, so there is the risk that they all directed customers to the same merchant, but there is nothing inherently surprising or damaging about that, or is it, you think ——

MR MCGURK: Well, let us take that in stages. The reason I went to Mr Jowell's remarks is because, first of all —— and you see it in this case —— there are some CSSs who had direct relationships with merchants, and as we will come on to see, one of upsides of that direct relationship is that you can take a data feed that is sui generis, that you can dictate in the terms you have with that merchant as to how often you get the data feed, the contents of that data feed, any bells and

whistles you might want for your site, and you heard Mr Jowell also say yesterday that it involved a huge amount of negotiation through the sales and marketing team that they had in order to put those direct merchant relationships in place. But the upside of that is that you could potentially take a much better feed of product data.

What this is concerned with, on the other hand, is relationships not directly with the merchants but with an affiliate, and the affiliate in this example is Zappos, but you could take Amazon, for example, and as we will see in the witness evidence in this case, the problem with that is that if you sign up, and you could sign up for free, to become an affiliate member in a program, you would take a feed on terms dictated either by the affiliate themselves, if they were running the program, or an intermediary like Tradedoubler, which is an intermediary we will come back to, you took it on their terms, you took the data as you found it, the frequency with which you get it.

But, crucially, it is standardised, and in this example, all of these affiliate members of Zappos's affiliate program are getting that standardised feed. So if they do not do anything more to their page —— and I take your point that they could, and they could make

their page much more interesting, for example, by product reviews and so on, and differentiate themselves, but without more, if all they are getting is the standardised feed that everyone else who is an affiliate member is getting and they serve the same thing on their page, the users flicking down the ten blue links sees the same thing and ends up with each of those clicks going to the same place. That was the mischief that this presentation, and ultimately Algorithm A, was concerned with.

PROFESSOR SMITH: But if a number of bona fide CSSs have relationships with the same sets of merchants, genuine commercial relationships with the same kinds of merchants, are they at risk of —— or are you saying that if they have individual relationships with merchants, they will be sufficiently differentiated in the relationship that they do not get caught by this, or are they still at risk of getting caught for a lack of diversity just because they are all —— a number of them are dealing with the same merchant?

MR MCGURK: Oh, I see. We do not assess them collectively, we assess them individually by reference to the signals they exhibit on their own pages. So if, in your example, some of these on this list are not taking affiliate feeds, they are taking standalone data feeds

which they have agreed with a merchant, they may end up showing something different on the page. If they say more about that and add original content, then that is a quality signal that will be reflected in the algorithmic score.

So there are various things they can do to ensure that what they are serving is differentiated, original, provides useful content to users and a helpful experience, but that is not what is being posited here. What is being posited here is the problem with just standardised content being served and taking people to the same place.

PROFESSOR SMITH: So the CSSs have to make a special effort to differentiate what they get from their merchants from what other CSSs get from the same merchants?

MR MCGURK: Well, if one CSS knows that another is, like it, just an affiliate member taking the same feeds, then that is —— it is up to them to then seek to differentiate, but each of them are assessed by reference to the algorithmic signals.

Now, I note the time, and to give you a proper answer, I need to go to them and to explain what they can do by reference to those signals to ensure that they are not penalised by the algorithms, but that takes a little bit more work, which I need to come on to, and

I am conscious that there is a hard stop.

THE CHAIRMAN: Can you, perhaps tomorrow, address my query on this? The content may not be original or have anything added, not even a star rating, but the value can be from the aggregation from a lot of different sources together, onto one page, of the prices of different suppliers.

MR MCGURK: Yes.

THE CHAIRMAN: Just the process of aggregating, rather like compiling a database which refers to lots of different sources but does not put any content, any additional content, is itself a mark of —— could be a mark of quality and value, and how does that fit into this, in looking at sites?

MR MCGURK: Functionally, that is what CSSs do.

THE CHAIRMAN: Yes.

MR MCGURK: That is why, given the signals that we are considering in the context of this algorithm, the Commission noted that they were prone to being demoted. So nobody is denying that —— I mean, take it back to 1995/2000, when some of these CSSs were emerging. What you had was an exponential explosion of websites creating significant new search costs for users, so in theory, there was room for a CSS to differentiate itself not just by functionally managing

to bring in sources of product information and displaying it on a page, and there is of course a place for that, but the fact that there was an emergence of huge numbers of CSSs doing exactly the same thing created a problem for the user and the user experience if that is all they are getting.

So if there is going to be competition between CSSs, and bearing in mind Google's concerns, through the encoding of the signals and the intuitions they related to that were seeking to ensure their users were getting good results on the page, it was imperative for CSSs not just to be able to pull information together on the same page, and loads of them did, but to generate the diversity of result and to avoid the identikit ten links on the page, including taking you to the same result, there were things that they could do to improve the user experience, and the classic one, which we can talk about, hopefully, is original content through buyer guides, merchant ratings and so on.

THE CHAIRMAN: Thank you.

Housekeeping

Now, tomorrow, if we were to start —— we are keen, particularly, that Dr Stables' evidence should conclude by the weekend, and you want a day and a half, so that means a long half day.

MR PICKFORD: So by my calculations, we had this problem. The Claimants went over by approximately an hour and a half. Part of that time was achieved by sitting early and late yesterday and having a shorter lunch break. About 25 minutes of it was achieved from our time today. So that means that we started effectively about 25 minutes late. We are also —— we also need, I would say, a good hour and a half extra, because we are also running behind, given the helpful exchanges we have had. So that, in total, means we have got about an extra two hours that need to be found for submissions when one adds us starting later than we otherwise would, plus our extra hour and a half tomorrow.

So however early we start or however late we sit, we are not going to —— still, in my submission, going to be able to get a further day and a half in before the weekend. Well, I mean, ultimately I am in the Tribunal's hands, but it is going to be quite a big ——

THE CHAIRMAN: You need an extra two hours?

MR PICKFORD: It is going to be two hours, because we need our extra hour and a half and then we started late.

THE CHAIRMAN: Well, give me a moment.

(Pause).

Yes, the other thing we have to bear in mind is that

there are potentially some transport problems tomorrow because of the excessive heat that is forecast, and we recognise some people may have difficulties —— some difficulties getting in, so we do not want to start too early. If we were to start at 9.45 tomorrow and sit until 4.45, that will give you an extra hour, and we do the same on Thursday and you will then get your two hours.

MR PICKFORD: Thank you.

THE CHAIRMAN: We would otherwise have said 9.30, but we think we should build in a little bit of flexibility in case people are struggling to get in and no one with really predict that for the moment.

MR PICKFORD: Understood. I am very grateful. Thank you.

THE CHAIRMAN: Mr Jowell, we did want to ask you something about your case which I had omitted to do and that is this. Kelkoo, of course your client, is I think in this case 11 companies in the group in different countries. There is a Dutch Kelkoo, there is a German Kelkoo, there is a Danish Kelkoo and so on.

MR JOWELL: Yes.

THE CHAIRMAN: Have we understood this correctly, that the claim here is, to take the German Kelkoo, they are claiming for losses they have suffered presumably from their operation from Germany; is that right?

MR JOWELL: Yes, I believe.

THE CHAIRMAN: Or is it limited to people in England who initially might have ended up somehow on the German Kelkoo site?

MR JOWELL: It is certainly not limited to those in England, it is a European—wide claim.

THE CHAIRMAN: Yes, and so it will cover people in Germany by your German Kelkoo?

MR JOWELL: Yes.

THE CHAIRMAN: So the damages will be in different countries in Europe?

MR JOWELL: Yes, indeed.

THE CHAIRMAN: It may not affect this trial at all, but might eventually mean that will there be some issues of what law applies to certain aspects of the claim, insofar as there is any difference?

MR JOWELL: I think, yes. I mean, I think there is the default assumption, is there not, that if you do not plead a foreign law, then one assumes that English law applies, unless the other side plead back to say that some other law should apply. So I think we are all assuming that, at least unless there is an amendment to either our pleading or their pleading, that we will be applying English law.

THE CHAIRMAN: Is it that English law applies, or that any

foreign law ——
MR JOWELL: Is assumed to be the same.
THE CHAIRMAN: Which is not quite the same thing.
MR JOWELL: No, that is right. I appreciate there is a recent case on it which suggests that that default is not quite as strong a default as it used to be considered, but nonetheless —— I forget the name of the case now, but a recent decision ——
THE CHAIRMAN: Yes, but unless it is raised, one ——
MR JOWELL: No, typically ——
THE CHAIRMAN: —— can take it that English law is to be applied, but it would be clear that a German user buying on German Kelkoo for delivery in Germany, the proper law of that transaction is not going to be English law, it seems to me.
MR JOWELL: That is correct. I suppose the question is —— and that is true. I suppose the actual ultimate question is what is the law as between us and Google? Now, that may turn on —— if our damages are suffered by reason of loss of traffic in Germany, one can see there is an argument that German law could apply. But, equally, one could say that it is where we lose the clicks, which is somewhere in the ether, I suppose. It is a complex area, potentially, but we have proceeded on the assumption, largely simply for convenience, that

English law applies.
THE CHAIRMAN: Yes. Thank you.
So 9.45 tomorrow morning.
(4.45 pm)
(The Court adjourned until 9.45 am on Wednesday, 24 June 2026)

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