IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1408/7/7/21

BETWEEN:

ELIZABETH HELEN COLL

Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE COMMERCE LIMITED
(5) GOOGLE PAYMENT LIMITED

Defendants

and

THE COMPETITION AND MARKETS AUTHORITY

REASONED ORDER

UPON the Tribunal's Directions Order made on 16 December 2022

AND UPON considering correspondence from the Class Representative dated 20 December 2022 providing a draft confidentiality ring order to apply until determination of these proceedings; the Defendants' response dated 25 January 2023 providing an alternative form of order; and the Class Representative's reply dated 7 February 2023 and upon the parties requesting that the Tribunal determines the appropriate form of Order

AND HAVING REGARD TO the Tribunal's powers pursuant to Rule 53(1) and 53(2)(h) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules")

IT IS ORDERED THAT:

1. A confidentiality ring shall be established by separate order in the form proposed by the Class Representative.

2. The parties have liberty to apply at the CMC listed for 21 June 2023 to vary the terms of the confidentiality ring.

REASONS

1. By an order made on 17 January 2022, the Tribunal established a confidentiality ring in these proceedings that applies unless and until a further order is made by the Tribunal (the **"Pre-CPO CRO"**). However, it only applies to information sought to be designated as Confidential Information during the period up to and including judgment in the application for a Collective Proceedings Order (**"CPO"**). A CPO was granted on 18 July 2022. Since that date, the parties have attempted, and failed, to agree the terms of a confidentiality ring order to apply from the grant of the CPO onwards.

2. The Class Representative's position (subject to one point referred to in paragraph 6 below) is that a confidentiality regime order (**"CRO"**) in similar terms to the Pre-CPO CRO should now be made to apply up to and including judgment in these proceedings.

3. The Defendants (collectively "**Google**") disagree. Google takes as its starting point the confidentiality ring order made in *Dr Rachael Kent v Apple Distribution International Ltd*, and proposes a form of order that comprises two tiers: an "inner" and an "outer" ring. The Pre-CPO CRO did not provide for two tiers, but only one. Google propose that (i) the Class Representative; (ii) two individuals employed by Google, and (iii) their respective legal teams and teams of economists be members of the "outer" ring. No proposals have been made as to who would be permitted to be in the "inner" ring, but Google's position is that the Class Representative ought not to be. The undertakings to be given by members of both the "inner" and "outer" ring are the same. The only difference between the rings is their respective membership.

4. The reason that Google says that the Class Representative should be excluded from the inner ring is to "*ensure adequate protection of the highly commercially sensitive and confidential information which Google anticipates disclosing in the Proceedings*

(including information that is confidential to third parties and is subject to extant confidentiality protections in the United States)". The words in parenthesis refer to confidentiality orders and stipulations made in relation to documents disclosed in proceedings in the United States to which Google entities are parties ("**the US Play Proceedings"**). In support of its position, Google submits that:

(a) A two-tier ring reflects the ordinary approach to confidentiality rings which do not normally extend beyond a party's external legal advisors and experts absent good reason;

(b) A two-tier ring is consistent with confidentiality protections adopted in other similar collective proceedings, including *Kent*; and

(c) A two-tier ring would ensure that disclosable material, including confidential material belonging to third parties, receives an appropriate level of protection when disclosed in these proceedings consistent with Google's contractual obligations to third parties.

5. The Class Representative does not accept that she should be excluded from the inner ring. She submits, in summary:

(a) That whilst confidentiality rings are common in competition proceedings, and an order is appropriate in this case, it is an exception and should be limited to the narrowest extent consistent with maintaining sufficient protection for the information, and ought not to create unfairness.

(b) It is not possible to assess whether the confidentiality regime proposed by Google is the minimum necessary to ensure protection of the information because Google has (a) not provided sufficient information regarding the nature of the information, or type of documents that it is suggested would be classified as being *"commercially sensitive and highly confidential"*; (b) not explained why such information or documents should be considered to be commercially sensitive or highly confidential (for example whether it is said to disclose intended future conduct on the market); and (c) not explained who should and

who should not be in the inner ring, or why the Class Representative cannot be. As to the latter point, the Class Representative submits that inner rings limited to external legal and expert advisors are generally employed where parties are competitors or commercial counterparties, and she is neither.

(c) The creation of an inner ring would potentially significantly disadvantage the Class Representative because the existence of a category of document that she is unable to access runs the risk that her ability to give instructions to her legal teams and expert advisors is inhibited.

(d) Confidentiality regimes create a logistical burden and increase the time and costs associated with proceedings, A CRO that creates an inner and outer ring will necessarily impose a greater burden than one that does not.

6. As regards transactional data to be disclosed by Google, she submits that it is to be anonymised, and therefore does not need the protection of an inner ring. The Class Representative would nevertheless be prepared to agree to a provision in the same terms as was agreed in *Kent* (which in summary provides for extra and enhanced levels of security to be applied in relation to storage and access).

7. In support of her position, the Class Representative relies upon the decision of the Court of Appeal in *OnePlus Technology v Mitsubishi Electric Corporation* [2020] EWCA Civ 1562 (***"OnePlus"***). At paragraph [39] Floyd LJ said:

> "Drawing all this together, I would identify the following non-exhaustive list of points of importance from the authorities:
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> i) In managing the disclosure of highly confidential information in intellectual property litigation, the court must balance the interests of the receiving party in having the fullest possible access to relevant documents against the interests of the disclosing party, or third parties, in the preservation of their confidential commercial and technical information: Warner Lambert at page 356; Roussel at page 49.
>
> ii) An arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all: Warner Lambert at page 360: Al Rawi at [64].
>
> iii) There is no universal form of order suitable for use in every case, or even at every stage of the same case: Warner Lambert at page 358; Al-Rawi at [64]; IPCom 1 at [31(ii)].

iv) The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional: Roussel at [49]; Infederation at [42].

v) If an external eyes only tier is created for initial disclosure, the court should remember that the onus remains on the disclosing party throughout to justify that designation for the documents so designated: TQ Delta at [21] and [23];

vi) Different types of information may require different degrees of protection, according to their value and potential for misuse. The protection to be afforded to a secret process may be greater than the protection to be afforded to commercial licences where the potential for misuse is less obvious: compare Warner Lambert and IPCom 1; see IPCom 2 at [47].

vii) Difficulties of policing misuse are also relevant: Warner Lambert at 360; Roussel at pages 51-2.

viii) The extent to which a party may be expected to contribute to the case based on a document is relevant: Warner Lambert at page 360.

ix) The role which the documents will play in the action is also a material consideration: Roussel at page 49; IPCom 1 at [31(ii)];

x) The structure and organisation of the receiving party is a factor which feeds into the way the confidential information has to be handled: IPCom 1 at [33]."

8. In my view, that approach applies, by analogy, to competition cases and reflects the principles applicable to disclosure under Rule 101 of the Tribunal Rules and paragraph 1(2) of Schedule 4 of the Enterprise Act 2002.

9. I am not persuaded by Google's argument that a two-tier ring should be ordered because it is said to be *"the ordinary approach"* to confidentiality rings, and that such rings are *"typically"* limited in scope to the parties' legal and expert advisors. Whether or not a CRO is appropriate, and if so, what its terms should be will turn on a consideration of matters such as those set out in *OnePlus* and the particular facts of each case. There is no *"one size fits all"*. In support of their argument, Google relies upon *Carphone Warehouse Group Plc v Ofcom* [2009] CAT 37. However, that was not a collective proceedings case. It was a case where British Telecommunications Plc opposed the disclosure of commercially sensitive information to Carphone Warehouse Group Plc on the basis that it was an actual or potential competitor. Google also relies on *BskyB v Competition Commission & Anor* [2008] CAT 9, but again that case was concerned with the disclosure of commercially sensitive information (belonging to ITV Plc) to a competitor (being BskyB).

10. Nor am I persuaded that a two-tier order is appropriate because it would be *"consistent with the confidentiality protections adopted in other recent and materially similar collective proceedings"*. That statement may be strictly accurate, but collective proceedings are still in their relative infancy, and practice and procedure will inevitably develop over time as issues are identified and addressed by the parties to such litigation.

11. As regards Google's third point, Google anticipates that its disclosure is likely to include, for example, contracts and communications between Google and third-party app developers; analysis of revenue/fee and transaction information attributed to the distribution and sale of apps and in-app products on the Google Play Store; and security processes and capabilities. Google says that the disclosure of such documentation could jeopardise the effective operation of those processes. Google's disclosure may also include third party confidential information. Google says that whether or not it may require an "inner ring" will depend on the terms on which it is held.

12. Google also anticipates that its disclosure will include Google and third-party confidential material which is subject to confidentiality orders in the US Play Proceedings. Google proposes that the repository of material produced by Google in the US Play Proceedings should serve as the primary source of disclosure in these proceedings (although the Class Representative has not agreed to this proposal). Google explains that orders have been made in the US Play Proceedings providing protection for material designated as "Confidential" or "Highly Confidential – Attorneys' eyes only", and for information provided by third parties. That protection is provided by, for example, limiting those to whom disclosure can be made, and requiring undertakings. Google considers that it is at least a possibility that material containing third party confidential information, and currently subject to the protection of such orders, will need to be disclosed in these proceedings. Google points out that the need to ensure an equivalent level of protection was recognised in *Epic Games, Inc. v Alphabet Inc & Ors*, by the Tribunal's order of 15 December 2021. In that case, the order established a multi-tier ring which reflected the substance of the orders made in the US Play Proceedings, and provided an opportunity to third parties to object to disclosure. Google suggests that, to the extent that the procedure of notifying third parties has already been carried out in the context of the *Epic* proceedings, and it would not need to be done again in these proceedings if a two-tier order was adopted. If a single tier CRO was

ordered Google says that further notice would need to be given to third parties. Google therefore submits that it would be more proportionate to have a two-tier CRO.

13. Google's third point is its strongest argument. However, I note that Google says that *"the extent to which it will actually be necessary, in due course, to disclose any materials into the inner ring is a matter for consideration at the point of further disclosure"*. Having read the submissions of the parties, I agree.

14. I am not prepared to order an inner ring, excluding the Class Representative, before it is possible to ascertain the extent to which it will actually be necessary or the terms that ought to apply to it. In my view, the appropriate time to consider whether an inner ring is needed and if so, the terms that should apply to it, is at the next CMC which has been listed to consider, in particular, disclosure matters and expert evidence. By that time, Google ought to have a clearer idea of the extent to which it is likely that disclosure into an inner ring will be required, be able to explain the categories of documents involved, and the protection that is required bearing in mind the factors the Tribunal should have regard to, including in particular those derived from Floyd LJ's judgment in *OnePlus*.

15. The Class Representative is not a competitor of Google, and her interest in the information and documentation arises solely as a result of her role as Class Representative. I will make an order for a confidentiality ring on the terms proposed by the Class Representative. I do not see anything in Google's submissions that leads me to believe that there is a risk that she would not comply with an order made in those terms. If the parties provide disclosure to each other prior to the CMC, then the terms of the Class Representative's CRO will apply. The parties have liberty to apply to vary the terms of the CRO at the next CMC, including so as to incorporate an inner ring if required.

16. I make one further observation. A CMC was listed to take place on 15 December 2022. That CMC was vacated, notwithstanding that the issue of the applicable CRO had not been resolved between the parties, neither side being prepared to press an application for its version of the CRO to be made. It would, I suspect, have been cheaper for the parties, and more efficient for all concerned had the parties acceded to the strong

indications given by the Tribunal that the CMC proceed to determine all outstanding matters. As it is, the parties have had to prepare written submissions so that the Tribunal can deal with this application on the papers (a course that is rarely, in reality, quicker if a short oral hearing can take place and has already been listed). In light of my ruling, the appropriate approach to confidentiality in this case will not be finally resolved until the next CMC in any event.

Bridget Lucas KC Made: 4 April 2023

Chair of the Competition Appeal Tribunal Drawn: 4 April 2023