IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1424/5/7/21 1589/5/7/23
1596/5/7/23
1636/5/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17th March 2025 – 20th March 2025

Before:

The Honourable Mr Justice Roth

Dinah Rose KC

Paula Riedel

(Sitting as a Tribunal in England and Wales)

BETWEEN:

KELKOO.COM (UK) LTD AND OTHERS
INFEDERATION LTD
WHITEWATER CAPITAL LTD
CONNEXITY UK LTD AND OTHERS

Claimants

-v-

GOOGLE UK LTD AND OTHERS

Defendants

A P P E A R A N C E S

Philip Moser KC & Sarah Love & Matthew O'Regan & Hugh Whelan (Instructed by Linklaters LLP, Hausfeld & Co LLP & Preiskel & Co LLP)
on behalf of the Claimants

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Monday, 17 March 2025

(10.30 am)

Preliminary remarks

MR JUSTICE ROTH: Good morning.

MR MOSER: Good morning.

MR JUSTICE ROTH: These Proceedings, like all proceedings in this Tribunal, are being live streamed. An official recording of the Proceedings is being made. It is strictly prohibited for anyone to make any unofficial recording or to make any visual image of the Proceedings and to do so is punishable as a contempt of court. So you have been warned. We will, as usual, take a short break at some convenient time mid-morning and mid-afternoon for the benefit of our transcriber and, indeed, for the benefit of everyone else as well.

We are, of course, aware that there are aspects of the documents before us that are confidential and have been highlighted as confidential. I hope it would be possible for counsel to just, insofar as necessary, refer to recital 216 without having to actually refer to the confidential parts of it.

It seems to me we ought to be able to proceed in that way throughout, but, if necessary, we will go into closed session at some point, if one party or the other wants to refer to the substance of the confidential

recital. I think we all know that the two algorithms that Google was using are referred to as Panda and in these Proceedings as Algorithm A as a code word for the actual name of the other algorithm.

We have, of course, read your skeleton arguments. We appreciate the efforts, no doubt considerable efforts, on both sides to narrow the issues, and in particular the very sensible adoption of the formula "not contested" when you disagree as to the principle as to whether a recital is binding, but it is not relevant or it covers matters that are not in dispute, so you are not going to, as it were, take up time in arguing on the principle. That seems to us very sensible.

Bear in mind we are not concerned in this hearing to determine the counterfactual. We appreciate some recitals might be relevant in that regard, but it is not something that we are going to actually decide, what is the counterfactual. That is for the subsequent trial.

I do want to say something about abuse of process. That was not raised at the CMC and it is not part of the preliminary issues that were directed, and so we take the view, Mr Moser, that it is not open to the Claimants, either as a primary submission or, indeed, as some sort of secondary or supportive submission, as was suggested in a way we didn't quite follow in a recent

solicitors' letter. It is not something one can just sort of take in on the hoof as a supportive suggestion. It is either a substantive point or it isn't, and if it is a substantive point it has to be argued properly. It is certainly not straightforward. That is not part of this hearing.

If the Claimants do now wish to run an abuse of process argument, then it is perhaps unfortunate that it is not part of this hearing, but if necessary there will have to be another hearing to deal with that. But that is subject to anything you wish to say, Mr Moser. Is there a very firm view about that?

MR MOSER: I entirely understand what you are saying, Sir. The reason it is not more squarely part of this hearing is as set out in our letter of 14 March, that at the time we all met to determine the shape of the hearing, the position on certain matters, as far as Google's arguments are concerned, were as yet unknown.

So Google pleaded its defences and populated its part of the schedule after we had put in our original points in --

MR JUSTICE ROTH: Well, could I interrupt you, because I mean whatever the reason why it is not part of this hearing, I don't think we need go into -- and no doubt Mr Pickford might have a different view -- the plain

fact is it is not part of this hearing.

MR MOSER: No.

MR JUSTICE ROTH: So we won't hear arguments on abuse of process.

MR MOSER: We are clear that the hearing is to determine the question of which recitals are binding and which are not. I'm not going to run an abuse of process case. The only aspect on which this is even relevant is an aspect that we say is squarely within the question of bindingness, and that is, as it were, a cross-check as to whether things are appealable, because part of *Trucks* -- I'm often going to refer to *Trucks*, and I'm conscious I'm telling the person who co-wrote it -- but part of *Trucks* of course is saying: well, it is the same principle as to whether something is or is not appealable within the hierarchy of the EU courts. There we do say on occasion: well, it is interesting to see that they did appeal this recital to the GC.

MR JUSTICE ROTH: We understand that, and I think Google sometimes engages with the same point and points out the nature of the appeal.

There are a number of recitals, it seems to us, where the General Court's judgment is very relevant. One is clearly where the General Court has annulled something in a recital. If it has annulled something in

a recital, clearly that can't be binding on us and I think that is common ground and it is obvious common sense.

The second is the point that you have mentioned that one of the criteria on whether a recital is binding is could it be challenged on appeal? If it couldn't be challenged on appeal, then it can't be binding, or is not binding. We have some statements in the General Court judgment saying, well, this isn't relevant. That may be helpful and there may be some statements the other way.

The third aspect in which we think it is relevant is that where there is a dispute, as there is on some of the recitals, as to what they mean, the judgment of the General Court may have held what the correct meaning is and what actually the Commission was deciding. Even if the General Court's judgment is not formally binding on us by matter of res judicata -- and that is also not raised -- it is clearly relevant and it is persuasive and so we can look, it seems to us, to the General Court for assistance on that. None of that, of course, goes anywhere near abuse of process.

Good.

MR MOSER: Good.

MR JUSTICE ROTH: Then the other thing we wanted to raise

with you both, really, is how we are going to deal with the hearing.

MR MOSER: Yes.

MR JUSTICE ROTH: We think it is not very productive for you, as it were, to open on everything, go through all the recitals to the end, and then sit down and then Mr Pickford starts at the beginning and goes through. But it is more productive for you to perhaps open your case, and then we might hear from Mr Pickford on any general principles and then take the recitals in blocks, as it were.

We will just have to play it by ear as we go along, what is a sensible point at which to break, so that there will be -- sometimes it will be one recital, sometimes it will be that a group of recitals go together, we can hear from you, we can hear from Mr Pickford, we can have a short reply, and do it that way. That seems a much more efficient way and certainly more helpful way in which to address the issues before us.

MR MOSER: Yes, that broadly corresponds to the way that we discussed it briefly before. Mr Pickford.

MR JUSTICE ROTH: Yes, Mr Pickford.

MR PICKFORD: Thank you. If I could just make two comments.

Firstly, on the suggested approach. We certainly agree that is, broadly speaking, a very sensible

one. Could I just make one point on that, which is we have broken our submissions into effectively two parts, and I understand Mr Moser agrees this is also quite a helpful way of doing things. Which is, firstly, to look at meaning, because there are four key areas where there are contests as to meaning, and that meaning often pervades through large sections of recitals, and indeed it can slot back again and again in different bits.

So we were going to propose, subject to the Tribunal's agreement, that we deal with those as discrete matters and then come back to run all the way through on bindingness, which is more able to be done, you know, section by section, in that way.

But obviously, subject to the Tribunal, that is what we were going to propose.

MR JUSTICE ROTH: Yes. We are very content with that.

MR PICKFORD: Thank you.

MR JUSTICE ROTH: While you are on your feet, can I raise one question for clarification?

MR PICKFORD: Yes.

MR JUSTICE ROTH: For me, just on the product. As I understand it, Froogle then was developed into Google Product Search.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Which was then developed into

Google Shopping.

MR PICKFORD: Yes.

MR JUSTICE ROTH: That bit I follow. Product Universal then became Commercial Unit.

MR PICKFORD: I think that's right. Commercial Unit and Google Shopping were the same thing.

MR JUSTICE ROTH: Commercial Unit and Google Shopping, the same thing?

MR PICKFORD: Shopping Unit and Commercial Unit --

MR JUSTICE ROTH: Are the same thing.

MR PICKFORD: -- are apparently the same thing.

MR JUSTICE ROTH: Yes, it just changed its name.

But can you just clarify for my mind, what is the difference between Product Universal and Shopping Unit?

MR PICKFORD: So Product Universal, which was the first incarnation, was non-ad-based results, so what we might call "organic results", in relation to shopping. So that was the incarnation of the Unit, that if you typically -- there are a couple of different variants, but in some of them, if you pressed a link, you would then get taken through to the merchant, and in others you might get taken to Google's CSS. But those were organic links that were not paid for in any way by the merchant.

Whereas when it went to the Shopping Unit, then it

1 became a fully commercial Unit, and so to appear in the
2 Shopping Unit there had to be a commercial relationship
3 between the merchant and Google or the merchant and the
4 person who was putting the ad, if I can call it that, in
5 the Shopping Unit on behalf of Google.
6 MR JUSTICE ROTH: But once Shopping Unit came in, it
7 replaced Product Universal, they didn't run in tandem?
8 MR PICKFORD: In essence. (Pause)
9 I think there's a slight complication that in
10 different countries it might have come in at slightly
11 different times. So there may have been some overlaps
12 in timing between there being a Product Universal in
13 existence and a Shopping --
14 MR JUSTICE ROTH: But they are not in the same country?
15 MR PICKFORD: My understanding is it's the same country, the
16 Shopping Unit came in --
17 MR JUSTICE ROTH: Replaced Product Universal. That is very
18 helpful.
19 MR PICKFORD: Could I also make one point on
20 confidentiality?
21 MR JUSTICE ROTH: Yes.
22 MR PICKFORD: So, again, very much agreeing with the
23 proposal put forward by the Tribunal, I am confident
24 that we can deal with confidential information in
25 a sensible way by referring to recitals without actually

having to read them out. Having said that, we are obviously aware that the Tribunal is going to have to write a judgment and confidentiality has not been looked at for some time. So, in recent days, trying to be of assistance to the Tribunal, those behind me have been engaged in a proactive and fairly intense attempt to review confidentiality and to see whether all the confidentiality that is marked still needs to be maintained.

There are effectively two types of confidentiality in the Decision. There is the external eyes only so-called confidentiality, which is marked in blue, and that nearly always relates to things like signals of algorithms. That information is going to remain confidential.

There is then a second category of information, which is information that was marked as confidential and redacted in the public version of the Decision, and that is marked in yellow in these Proceedings, in the Decision and in the schedule you have.

MR JUSTICE ROTH: Yes.

MR PICKFORD: That information covers both third party information and Google information. For the vast majority -- not absolutely all -- but for the vast majority of the Google-only information, we are going to

be able to produce a new marked-up version which shows that we no longer maintain confidentiality in that kind of material. Because it is now many years on since the Decision was originally published, and we accept that things that were confidential eight or more years ago, many of them are not confidential anymore.

We will be able to, I think tomorrow ...

In the next few days.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Certainly before the Tribunal has to write any judgments, for sure, I will be able to provide that, both obviously to my learned friend and to the Tribunal, to assist, principally, in the writing of the judgment. It has been a task that has been happening over the weekend, and it is not possible to integrate it into submissions for today, but we were aware that it was a sensible task to get done and so we have sought to do it.

Order

MR JUSTICE ROTH: That is very helpful. Thank you.

On confidentiality, I think I should then formally make an order under Rule 102, paragraph 5, that matters that are marked "confidential" in documents that the Tribunal has read are not available to the public, save on further order. So I make that order.

We have a slight technical problem, we are not getting the transcript, the live transcript. Is there someone who can assist with that?

(Pause)

Yes. Thank you. Mr Moser.

Submissions by MR MOSER

MR MOSER: Thank you, Sir.

I'm not planning a grand opening. You have obviously pre-read -- you have seen the skeleton arguments. In my respectful submission, the way that we have approached the recitals can be encapsulated in one passage in *Trucks*, which is at A6, tab 7, page 226, paragraph 75.

MR JUSTICE ROTH: Just to understand how this is working, we have to call these up, is that right? They are not -- yes, we have to call it up ourselves. A6?

MR MOSER: A6, page 226.

MR JUSTICE ROTH: Just one moment. (Pause)

Yes.

MR MOSER: It is quite short. It is halfway through paragraph 75:

"However, we think it is important to keep in mind throughout that the question being addressed is what in the recitals is necessary to interpret the above determinations in the operative part, or provide

an essential basis or necessary support for these elements, such that a contradictory finding by the Tribunal would be inconsistent with those determinations as so interpreted."

So "necessary to interpret" or "essential basis or necessary support", where it has been determined that "essential basis" or "necessary support" essentially mean the same thing.

There are fairly obviously two different approaches to how this is to be applied before the Tribunal. As far as Google is concerned, they take the view that this means that you have the basic building blocks, and we get into the details, but essentially very little more. More a sort of Lego figure of what the decision is. We take a view that you really start more holistically and look at what falls away, and what you are left with is the essential basis for the Decision. And that necessarily involves, we say, a wider look at not only the basic building blocks, saying Google is dominant or this is an abuse, but also the reasons for it.

Now, in their skeleton argument, Google have sought to expand that a little by their three-tiered approach, the first order, the second order and the third order. We don't agree that there is a hierarchy of recitals. The relevant basis for the articles that form the

Decision is contained in the recitals throughout the Decision. They sometimes have to be read together, sometimes not in the same part, and in order to understand fully what a particular term means, for instance, you do have to look wider.

I surmise that the reason they are saying this could be quite a short hearing, or rather a two-day hearing instead of a four-day hearing, is because they take the approach that you look at the basic principles and, once you have determined the basic principles, you apply them mechanistically through the Decision. And there you are, you are left with what they say are the basics, generally the first order, no more than the second order, in their language.

But we say, with respect, that is wrong and the correct approach is, I'm afraid, a recital-by-recital basis.

I am going to dive straight into the submissions on perhaps the first section in a moment. The way I will try and do it is broadly following the helpful, in my respectful submission, order in Google's skeleton argument. I may stray a bit, especially at the beginning, because I want to establish quite clearly what we are talking about when we are talking about Google's comparison shopping service. But then we go

more regularly into sections as to what is the market definition, what is the abuse, what is the counterfactual -- we have touched on it -- as necessary. I appreciate you won't be making a finding on the counterfactual, that is understood. And so on.

Then I will try and indicate, if I may, when I think a section is, as it were, done. Of course, if the Tribunal thinks, "That's enough of you for the moment, sit down and we will listen to Mr Pickford", then you can tell me that at any time.

Before I dive straight in, I just want to deal with a few main themes to keep an eye on. We say it is important to keep an eye on where Google is going with some of these submissions, because we say that there is an agenda. I know they have said we are laying traps, somewhat amusingly the -- I haven't thought of a suitable advocacy opposite of a trap -- but they are seeking some sort of point landing, we submit, for Trials One and Two, on matters like abuse and causation.

So I just want to deal with four of these themes, and the first of those is abuse. It is conveniently at the beginning of the recitals. Now, I'm generally going to look at the recitals in the table. I hope that is where the Tribunal is happy to look. But they, of course, are also in the Decision itself. So they exist

as bundle A1, tab 5, which is -- in my case this --

MR JUSTICE ROTH: Yes.

MR MOSER: -- and they also exist in bundle A2. A2 has the original Decision, so it has all the footnotes and so on, which is, I suppose, helpful for reading generally. But since we are working with the table, I will try and deal with the table.

At the beginning of the table, at page 595, is Introduction and recital 1 and recital 2. Recital 2 is agreed and it tells us something about the abuse. The abuse -- well, it tells us something about the conduct, first of all, and then we will come on further:

"The Decision establishes that the more favourable positioning and display by Google, in its general search results pages, of its own comparison-shopping service compared to competing comparison-shopping services (the "Conduct") infringes Article 102… and Article 54."

So that is a more favourable positioning, and that is expanded on -- and here we have to leap ahead to page 695 -- that is expanded on in what is section -- it is not mentioned in the table, but it is section 7.2.1 of the Decision:

"The abusive conduct: the more favourable positioning and display, in Google's general search results… [that is the heading in blue] of Google's own

comparison-shopping service compared to competing shopping services."

The only flaw in this otherwise excellent table is it does not give you the section numbers for the Decision. So this is section 7.2.1.

MR JUSTICE ROTH: Sorry, 341?

MR MOSER: 341, it starts.

MR JUSTICE ROTH: It is actually 7.2.

MR MOSER: 7.2.

MR JUSTICE ROTH: 7.2.1 starts with 344.

MR MOSER: I am sorry, that is my fault entirely. I have written that wrong. 7.2.

You are ahead of me, anyway. But there we are. "The Commission concludes the conduct", that we have just looked at,

"... constitutes an abuse of Google's dominant position in each of the thirteen national markets for general search services where Google either launched the Product Universal, or if [it] was never launched…, the Shopping Unit. The Conduct is abusive because it constitutes a practice falling outside the scope of competition on the merits as it: (i) diverts traffic in the sense that it decreases traffic from Google's general search results pages to competing [CSSs] and increases traffic from Google's general search results

page to Google's own comparison-shopping service."

So pausing there, we have the decreasing of traffic from Google to, essentially, us and the increasing of traffic to Google's own CSS.

And:

"(ii) [It] is capable of having or likely to have anti-competitive effects in the national markets."

That is then expanded on in 3.4.2. I won't read it all out, but it is generally about displaying your (inaudible) own CSS and diverting traffic, in the sense it decreases traffic, and so on.

MR JUSTICE ROTH: To interrupt you, this is then the last phrase, the last three words, that is an example where it has been annulled by the General Court.

MR MOSER: It is.

MR JUSTICE ROTH: Therefore, everyone is agreed the reference to "general search services" is not binding.

MR MOSER: Yes. So that is entirely agreed.

MR JUSTICE ROTH: Yes.

MR MOSER: Yes.

MR JUSTICE ROTH: For that reason.

MR MOSER: For that reason. That was annulled by the General Court, and nobody, I think, is taking a point on that.

But the reason that I wanted to show this at the

beginning is to explain that the abuse is really all about traffic. Traffic is what drives this business and clicks through to your platform. Creating traffic is -- and we will find that when we come to that in the Decision -- is essentially the currency of the industry. By cutting off or decreasing the traffic to us and increasing the traffic to them, Google promoted its own competitor comparison shopping services and damaged us, and that is fairly straightforwardly the abuse.

I come back to all of that in greater detail. It is important to bear in mind that traffic is what it is all about.

There is then also, as part of this first theme, Google's argument that the abuse is only the very specific combination of the algorithms that demote and the promotion that was found to be an abuse by the Commission. Effectively, reading in the word "only", because the word "only" isn't in the Decision.

Also, Google seeks to extrapolate from that a finding that individually, for instance, the algorithm is fine, is lawful. They say: well, the Commission said that in combination this was an abuse. That, Google says -- and I am simplifying their point -- is the same as saying that, when you uncombine it, each individual strand is fine, and, in particular, the demoting

Algorithm A and Panda.

MR JUSTICE ROTH: Well, is it? Is that quite right? I mean, it is not a demoting algorithm. I thought the point is that the algorithm was applied -- or the algorithms were applied to the comparative shopping -- to the third party CSS and not to Google's CSS.

MR MOSER: Yes.

MR JUSTICE ROTH: That is the problem. It is not that there is something inherently wrong with the algorithm, it is the fact that it was not applied equally to everyone. You could resolve that in two ways: you could scrap the algorithm altogether or you could apply it to the Google Shopping as well, in the same way that it is applied to your clients. But it is not that -- there is no suggestion that I saw in the Decision that there is anything wrong with the algorithm as an algorithm, it is just that it is applied in a discriminatory way.

MR MOSER: I think we half agree, with respect. I think where we differ is that we say that the algorithm -- that the way the algorithm worked, and continues to work in what they call their "Shopping Remedy", which is their compliance mechanism, is abusive, and that it is not right to read it as saying that the algorithm is fine. The Commission says that the algorithm is fine, you can have an algorithm that does something like this.

But, as I will explain in greater detail when I come to this section, it is our case that the algorithm, including the continuing Shopping Remedy, are very much not fine. I will --

MR JUSTICE ROTH: We are not looking at what is happening post-Decision with the Remedy in this hearing, are we?

MR MOSER: No. But the reason that I raise these things is not so much that I am seeking a finding now as to the answer to this in Trial One and Trial Two, but just to flag up that the reason Google is making some of these arguments is because they are -- of course, you know, that is the name of the game -- they are looking ahead strategically to Trial One and Trial Two, and, for instance, they are saying that their compliance mechanism that they have put in place is lawful and has resolved the abuse, so there can be no loss or abuse after the date of its introduction. Or, indeed, before the beginning of the combination.

As I say, I will explain our position on why that is wrong in detail. But we say that is not how one reads the Commission's findings. In fact, we went to -- or clients went to the trouble of writing to the Commission, and there is a letter -- I don't think I want to go to it more than once, but in opening -- there is a letter in the supplemental bundle at A5, page 2,

a letter or an email.

MR JUSTICE ROTH: Yes. That was Kelkoo?

MR MOSER: Yes. You have seen it.

MR JUSTICE ROTH: Yes. Well, I haven't seen it, I have it, but I haven't read it.

MR MOSER: It is in answer to an email that was sent from -- or a letter that was sent from Kelkoo at page 1 of this bundle, to Vice President Vestager. At page 2 we see the email of 27 July 2023, which is the response from the Commission:

"In relation to your specific question: (1) the mechanism put in place by Google to comply with the Decision… was not agreed by the Commission. The Commission did not express a disagreement on that mechanism either. The Commission has taken no position on the compliance of the mechanism with its decision."

Now, that, one might say, neatly encapsulates the obvious, but it nonetheless frames our point, which is that the Commission has not made a ruling that the Shopping Remedy is lawful. Google says -- they then make their point -- but, you know, they say, well, the Commission hasn't objected to it. I think the court also notes that.

That is not the same, not objectively, it is not the same as a finding that it is lawful. It is certainly

not in any way a binding part of this Decision that the Shopping Remedy is not anti-competitive.

MS ROSE: But they are not suggesting here either that the algorithm is per se unlawful, are they?

MR MOSER: No, they are not.

MS ROSE: I am slightly unclear as to whether your case is that the algorithm itself is abusive and that that is the proper interpretation of these recitals, or, as the Chair has suggested, that it is the discriminatory application of the algorithm. Because this does not seem to be consistent with the idea that the algorithm per se is abusive.

MR MOSER: They say they haven't come to a view on that at all.

MS ROSE: Exactly. So if the right interpretation of this Decision was that the algorithm itself, the demoting algorithm itself, was abusive, then wouldn't they be saying: well, we refer you to recital whatever it is?

MR MOSER: No. Indeed. Well, our position remains that -- you are entirely right that they don't make a finding that it is unlawful, but they also don't make one that it is lawful because that's not the nature of the abuse that they were looking at. They were looking at the conduct and the abuse, which it says constitutes a practice falling outside the scope of competition

because of the way it diverts traffic. Whether that is because of the way the algorithm was applied or the way the algorithm was designed is entirely outwith the ambit of this decision.

So that is the first theme that I wanted to raise, to flag.

The second theme I wanted to flag, which is part of this preparation for future trials, is that Google raises what is the relevant product market. You will have seen this -- and I will try and take this much more briefly -- you will have seen this in the skeleton argument, that whereas we say one might be forgiven for thinking that the Commission had determined the relevant market, Google says no, in essence, because they raised a possible alternative definition, which includes merchant platforms for the market, that means that the relevant product market for CSSs somehow is no longer a binding finding.

Now, we say really that is fanciful, but we also see that the European Court seemed to be in no doubt as to what the relevant market was. But it is a theme in the submissions. So we will deal with it in the course of my addressing you.

The third theme is what is Google's comparison shopping service. This is perhaps also a slightly

surprising one, but it is really part of the old chestnut of a defendant wanting the narrowest possible definition to minimise damages. We say that the Commission is quite clear that every link to Google's CSS, and, indeed, to the merchant platforms, or the CSS, Google's CSS page itself, all count, in the Commission's view, as part of Google's comparison shopping service.

So the Commission, we say, takes a maximalist approach to what is Google's CSS. So essentially the whole ecosystem of searches and clicks that constitute shopping traffic via Google.

Perhaps if one imagines the different screens on a computer, if you do your Google search, you get your Google search result, and that is a screen that is -- you will have seen, referred to as the "SERP", the search engine results page. On that page you will see the box that they put at the top, or you would have seen the box they put at the top, and then the plain text links underneath.

MR JUSTICE ROTH: This is the box that we have in the Decision, is it?

MR MOSER: There is certainly, I think, an image in --

MR JUSTICE ROTH: Yes, if we go to the actual Decision, it is on page 12, perhaps if we look at that.

MR MOSER: Yes. Exactly.

MR JUSTICE ROTH: Is this what --?
MR MOSER: That is actually -- that is not the search results page.
MR JUSTICE ROTH: That's the search results page --
MR MOSER: If we look at --
MR JUSTICE ROTH: -- on Google general search, with the Shopping Unit box at the top.
MR PICKFORD: This is precisely the SERP.
MR JUSTICE ROTH: It is.
MR MOSER: Yes, it is the SERP. I misheard what I was being told.
MR JUSTICE ROTH: As I understand it, the bit at the top with the photographs of the different cameras and the shop for Canon70D on Google, which is a link as well, that is the Shopping Unit.
MR MOSER: Yes. So you have various different ways of directing traffic from the search results page, and it may take you on to Google's own comparison shopping service, or it may take you on to the merchants.
MR JUSTICE ROTH: Yes.
MR MOSER: The way that the Commission looks at this is that all of the traffic that is via the SERP, that goes either to the Google CSS page or the merchant page, all of those clicks, all of that traffic, is part of this ecosystem, as I call it, of Google's comparison shopping

service. So all of that is economically of the same value to Google, as though people were clicking in Google's own CSS page.

I have come to that as part of the first section on what I'm going to talk about. So, thank you, that was very helpful.

The fourth theme I can take even more briefly. But that is, as you have already alluded to, there is some shadow-boxing about the counterfactual. For the avoidance of doubt, the Commission has not found this is the counterfactual. Although the Court of Justice is rather more decisive on that. But it does hark back to the similar issue of the combination of algorithms and promotions. There is a suggestion going to be made that in the national proceedings there could be somehow a different counterfactual. We will have to deal with that also.

So those are the four themes I just wanted to address.

MR JUSTICE ROTH: When you say you have to deal with that also, is that part of this hearing then?

MR MOSER: Well, the counterfactual was not -- the finding of what the counterfactual is would not be part of this hearing. But there is quite a lot of it in the skeleton arguments. I may be stopped at some point by being

told, well, this is not helpful. I am planning somewhere towards the end of my submissions, and probably not today, to say something about that. By then it may be so obvious that not much has to be said.

MR JUSTICE ROTH: Yes.

MR MOSER: But, again, it is a matter of Google positioning itself for Trials One and Two, for a counterfactual where any damage might be limited or eliminated on the basis that they say: Ah, no, the correct counterfactual is one where we could have happily and would have happily applied our algorithms, and that it would have been non-abusive and so nothing to see here.

MR JUSTICE ROTH: Well, we fully appreciate the reason why Google is contesting some of these things, and equally the reason why you are adamantly advancing them is because you say it is important for the ultimate trial. So both sides clearly have a view as to what is going to be significant for trial.

MR MOSER: Yes. It is, in a sense, why we are here.

MR JUSTICE ROTH: We recognise that. We would be surprised if it were otherwise. I think that applies to both sides.

MR MOSER: We are not claiming that we are somehow immune from this, although we obviously resist the trap allegation.

So that brings me to perhaps the first section. The first section is about the meaning of things and also the definitions that Google uses in its skeleton argument. Google says that a core point of principle that needs to be looked for, and it considers that -- this is the answer to most of the disagreements between us -- they say the recitals can be subdivided into a hierarchy of first order, second order and third order categories. That is Google's skeleton, paragraph 22.

We say that we either don't fully follow, or at any rate that this isn't enormously helpful, in a way that I have already pre-advertised in opening.

As for first order, which is Google's paragraph 23 of its skeleton argument, it says that that is what underpins the Decision. So it sets out various examples of its first order findings. This category, in my submission, essentially amounts to little more than the components of abuse of dominance. Dominance, abuse and competitive effect on trade, objective justification. So it is a minimalist approach, and it seems to be roughly a sort of constituent elements exercise for which purpose you hardly need to engage with the Decision itself at all.

I submit that that is not the approach taken by the Tribunal in *Trucks*. It is respectfully submitted that

we can't gain very much from this category of first order other than that those seem to be the individual recitals that state them as basic conclusions. Obviously they are going to be binding.

Then Google expands that and says, well, we have second order and third order. They make a division, which is not always clear, with respect, between recitals that are directly necessary to sustain each first order finding, as they see it, and those which contain evidence and reasoning relied on for second order findings. That is Google's paragraphs 23 and 24.

We have two issues with this division. The first is, Google does not clarify what it means by "evidence", and that is an issue that pervades the whole analysis. The reason for any nonbinding recital in Google's comment section is that it provides "illustrative evidence" without an explanation of what that term means or why some of that is illustrative evidence. We submit illustrative evidence can't be used in such a broad and undefined way. Importantly, we say, it wasn't the way that this was approached in *Trucks*.

In that case the Tribunal held that recitals are not binding where there are examples in that case of collusion that took place, for instance, the details of the meeting of a cartel.

If you want to look at the *Trucks* decision, it is A6. If we look at page 229 of A6.

MR JUSTICE ROTH: Sorry, can you give me a paragraph number.

MR MOSER: Paragraph 83. So there the Tribunal held that recitals are not binding where there are examples of collusion that took place. For instance, evidence of meetings of the cartel, of which there were many. They were simply examples of occasions when such collusions took place. But the Tribunal then goes on to note that there is a distinction between evidence that is merely illustrative, if we turn over to paragraph 85, on the next page:

"We do not consider… all… other details… which go beyond what is set out above, are covered by the obligation in Article 16. Once the general position… is established, these details are essentially evidence, and indeed merely illustrative evidence, in support."

Then there is Mr Ward's argument about, well, if there had been only one meeting, that would be more than illustrative, that would be the whole abuse. But then that was not the facts of that case.

So there is a distinction here between evidence that is merely illustrative and then evidence that comprises the foundation of the infringement. We see that in the bottom third:

"By contrast, for a single meeting cartel, the finding as to that meeting is not an illustration: it comprises the foundation of the infringement... for a national court to find that that meeting had a different character [and so on]… would run counter to the decision."

So these sorts of recitals, the ones that are the foundation of the infringement, are binding, not illustrative examples. So a recital, we say, can't be an illustrative example, or illustrative evidence, and therefore will be binding, if its content is necessary to clarify the infringement found in the operative part and does not go beyond the operative part.

For example, in *Trucks*, if we look at paragraph 89, there is a finding there set out which explained what the evidence showed, and that concerned elements of the infringement. That was, therefore, binding.

So that is the line that we take. If the evidence concerns -- it is necessary for interpreting or forms the essential basis of the finding of infringement, it is binding.

So, against that, we have set out at paragraph 27 our own structure of how we say the *Trucks* judgment is to be interpreted. That is our skeleton argument, the page reference is A1/6/880. You may have the skeleton in

other places. In particular, you identify the operative part of the Decision. That seems to be the easy part of this case, everyone agrees it is Articles 1 to 4. Then you have regard to the constituent elements of the operative part of the Decision, so that the building blocks of the Decision can be properly understood. We have set out in our covering submissions what the building blocks were.

Then, finally, you consider the interaction between any given recital viewed in isolation, and in context, and the constituent elements of the operative part.

So we appreciate our proposed approach does not give you a blanket rule to seek to try to resolve all recitals at once, but a nuanced approach to the binding recitals founded in the principles set out in *Trucks*.

With that in mind, I would like to turn, if I may, to what Google addresses in paragraphs 10 to 12 of its skeleton argument, which is the introductory part of the Decision. That starts at page 595 of the table, where we also started this morning.

Now, on the face of it, the only issue in dispute in this section, which is "Introduction, (section 1)", is the bindingness of footnote 3.

Now, as a starting point, I note that, judging from paragraph 27 of Google's skeleton, they don't take issue

with the point of principle that footnotes can be binding. Which, in my respectful submission, must be right, for the reasons set out in our skeleton argument, they are part of the Decision.

So looking at the text of footnote 3, the simple point is the one that we have made in our comments, which is that it is the only place in the Decision where the Commission explains what it means by the phrase "more favourable positioning and display in Google's general search results pages of Google's own [CSS] compared to [a] competing [CSS or compared to competing CSSs]". That phrase is a foundation of the abuse found by the Commission.

By footnote 3, the Commission explains what it means:

"The more favourable position in display of (i) links to Google's own comparison shopping service…; and/or (ii) parts or all of Google's own comparison shopping service."

That is what I have called in my brief opening the maximalist approach, what is Google's CSS.

There is an element of misunderstanding with respect of our case on this. I am going to expand from this simple point about footnote 3 into more fully where one sees the Commission's explanation of what is in fact

Google's CSS. That I am going to do for the rest of, as it were, this section. Then I'm going to suggest that is probably a moment for my learned friend to reply. This takes us slightly out of Google's skeleton, paragraphs 10 to 12, but it does all hang together, in my respectful submission.

So Google asserts that we say that those shopping boxes that we saw at the top are themselves comparison shopping services. This rather mischaracterises what our case is and what we say the Commission said.

So the shopping boxes are not somehow in themselves a CSS, but they are part of Google's own comparison shopping service as defined by the Commission, as that term is used.

MR JUSTICE ROTH: By "shopping boxes", that is Product Universal/Shopping Unit?

MR MOSER: Yes.

Now, we have seen recital 2, which everyone agrees is binding. What recital 2 talks about is Google's own comparison shopping service. In our "constituent elements" column, which is the penultimate column on the page, we have referenced the part of the Decision, Article 1, that sets out the infringement committed by Google:

"[By] positioning and displaying more favourably in

Google Inc's general search results pages, [Google Inc's own comparison shopping service] compared to competing comparison shopping services."

Essentially, Google has infringed Article 102.

So understanding the meaning of the term "Google's own comparison shopping service" is central, therefore, to understanding the operative part of the Decision.

We have looked already at recitals 341 and 342. We can turn back to them, they are at page 695 and following of this table. The definition of "abuse". Again, in summary, what recital 341 says is that there is a diverting of traffic that "increases traffic from Google's general search results pages to Google's own comparison-shopping service". So, again, links directly through to the relevant article. That is capable of having anti-competitive effects.

It also makes clear that an essential component of the abuse is the launch of either the Product Universal or the Shopping Unit. These are the boxes. They don't contain results from competing CSSs.

We see at 342, again, the abuse: to demonstrate why the conduct is abusive and falls outside the scope of competition on the merits. You will no doubt have read this. I don't know whether you want to remind yourself for a moment, rather than my reading out the whole of

342, of what it says. It is on page 696.

MR JUSTICE ROTH: Do you want us to read it to ourselves?

MR MOSER: That would be helpful. (Pause)

MR JUSTICE ROTH: Yes, Mr Moser.

MR MOSER: I submit it is beyond argument that the definition of Google's own comparison shopping service is clearly part of the essential basis of the Decision. It is relevant both to abuse and anti-competitive effects. It is also relevant to the remedial measures that Google was required to take and we need not turn it up but, for instance, recital 700(c) talks about any measure "should subject Google's own comparison-shopping service to the same underlying process and methods… as those used for competing comparison shopping".

So the question is: what does "Google's own comparison shopping service" mean?

MR JUSTICE ROTH: Well, I mean, you need not really go as far, do you, as saying it is an essential basis? That phrase is in Article 1.

MR MOSER: Yes.

MR JUSTICE ROTH: And so one needs to understand what does that phrase mean.

MR MOSER: Exactly. Exactly.

MR JUSTICE ROTH: So on the first of the two limbs on which you say a recital can be binding, namely to clarify the

meaning of the operative part, doesn't it come in the clarification criteria without having to get to the essential basis?

MR MOSER: Yes. Indeed. That is, of course, *Trucks*, paragraphs 56 and 57. And we agree. I am not going to push further at that open door.

So we say that there is a selection of footnotes and recitals, which taken together provide the answer and allow us to understand and interpret the meaning of the phrase "Google's own comparison shopping service" and for that reason, they are all binding.

If I can give you the list, as it were, and then I will go through them as efficiently as I can: the first one is footnote 3; the second one is recital 29; the third lot is recitals 408 to 411.

MR JUSTICE ROTH: Sorry, 408?

MR MOSER: 408 to 411, including footnote 463, which is a footnote to recital 408.

412 to 423; footnote 604; and, finally, recital 630 and 631.

So that is quite a shopping list. As I indicated, this opening bit is probably the only one where I'm really cutting across so many recitals and not necessarily in the order in which Google addresses them, but it should become apparent why.

MR JUSTICE ROTH: Yes.

MR MOSER: So diving in to footnote 3, which we have looked at and which is at the beginning at 595.

MR JUSTICE ROTH: It looks as though this got into the final Decision without being edited, because clearly the section numbers have been left blank. I think the first -- we just have section zero, but obviously one can work out what section they mean.

MR MOSER: Yes. Exactly. Perhaps I needn't suggest that the section zero numbers are binding, but the meaning of the footnote, we say, is binding. Because it makes clear "the more favourable positioning and display in Google's general search results pages of Google's own comparison shopping service… means the more favourable positioning and display… [of(i)] links to Google's [CSS] and [](ii) parts or all", and this footnote is necessary for understanding the abuse, in the way that I explained.

I don't feel like I need to add very much to that because it is, again, clear from everything I have already said that this goes to the heart of the question of the traffic. The traffic that was abusively diverted from the Claimants' CSS, from us, to Google's own CSS and, therefore, benefited that service, or the more favourable positioning and display of the whole or part of Google's CSS.

I take that on then to recitals 341 and 342: they are at 695 and 696. We have been there. You will have seen this in your reading that the abuse is the diversion of traffic and even if matters such as the Shopping Unit or the Product Unit were not themselves a CSS, they were an integral part of the abuse by facilitating a preferential and more favourable positioning and display of results from Google's CSS and enabling the diversion of use of traffic. And that was in Recital 342.

That is then confirmed in recital 343, which is not agreed, and in recital 343 which we consider to be binding. The Commission says:

"Google has artificially reaped the benefits of the conduct ... [and I skip a bit] [i]t was only after Google started the conduct in each of the thirteen national markets for general search services that traffic to Google's comparison-shopping services from Google's general search result pages began to increase on a lasting basis whereas traffic to almost all competing comparison-shopping services began to decrease on a lasting basis."

We say that the binding finding explains the working of the abuse.

That is further confirmed by a binding recital, which is recital 408, which is helpful to look at in

this context at page 731. It says:

"[T]he Commission's case is not that the Product Universal was in itself a comparison shopping service [footnote 463]. Rather, the Commission's case is that the positioning and display of the Product Universal was one means by which Google favoured its comparison-shopping service."

Here comes the footnote that we say is binding and not agreed:

"In the same way, generic search results leading to competing comparison shopping services are not comparison shopping services in themselves."

That is a footnote that could just as easily be part of the wording of the recital, and we say "it clarifies [that] the point (made in recital 408) that the Product Universal (even if not itself a CSS) – [even if not itself a comparison shopping service] -- was part of the 'Google comparison shopping service'", as defined. So part of the "Froogle comparison shopping service", as were the generic results that led users to the Product Universal (even if also not themselves a CSS) and that the Decision concern[s] the discriminatory display of general search results (which contain[ed] links to CSSs) on [the server].

MR JUSTICE ROTH: Aren't they saying, as I understood it,

the Product Universal and therefore also Shopping Unit is not in itself a comparison shopping service? It said clearly, but Google's use of Product Universal/Shopping Unit is part of the more favourable positioning and display of Google's comparative shopping service; it is a mechanism for the more favourable display and positioning which is, of course, the heart of the abuse. That is what I understood them to be saying and that is why they take objection to the Product Universal and Shopping Unit.

MR MOSER: That's the gravamen of 408, and also 412 in relation to Shopping Unit.

MR JUSTICE ROTH: Yes. One can see the logic of that.

MR MOSER: Yes, one can. It is important to read them together because reading just, for instance, recital 408 on its own without all of the other recitals I mentioned might lead one to the conclusion that Google's comparison shopping service is being defined somehow in a more minimal way. But I say that this is part of the ecosystem. I don't disagree with you, Sir, on your reading of this recital.

MR JUSTICE ROTH: Well, does it matter whether one technically -- they say in terms it is not a comparison shopping service, that's clear. But it doesn't seem to me it terribly matters. The abuse is the more

favourable positioning and display, and this is part of the more favourable positioning and display. That is why it is objected to.

MR MOSER: That is the abuse.

MR JUSTICE ROTH: Yes.

MR MOSER: We obviously say it is important to understand what the Commission means by "Google's CSS", for the reasons you yourself said, Sir, that that is obviously part of Article 1, so it must -- those are all binding aspects where if it is in any way vague as to what Google's comparison shopping service means, we have to look across the recitals in order to get the answer.

I think it may become clearer if I carry on from 412 through to 423. If we look, for instance, next at recitals 414 and 415, they are not contested by Google. We consider them to be binding, but anyway. They explain and emphasise the close relationship between the component parts of Google's comparison shopping service, including an underlying database of products and merchant data, and common technological features and mechanisms.

If you cast your eye over those. I should have started, really, by 413 which is the headline.

MR JUSTICE ROTH: Yes. 413. Yes.

MR MOSER: "The fact that… positioning and display of the

Shopping Unit is one means by which Google favours its comparison-shopping service". That's a binding finding, we say.

MR JUSTICE ROTH: Well, I think that is not, as I understand it -- it is really the next bit, "[It] is confirmed by the following ...", which is objected to.

MR MOSER: Yes.

MR JUSTICE ROTH: Because the first part of 413 is just repeating what has been said in 412, which is agreed.

MR MOSER: Yes. We say this is one of those examples where what is the following is not somehow just illustrative evidence, as they say, but rather is essential to understand what is being said here. The recitals at 414, 415: they explain the component parts of Google's CSS; an important part of understanding.

416, where we consider the first sentence to be binding, says:

"[M]erchants cannot choose to have their products displayed only in the Shopping Unit or in the standalone Google Shopping website, neither in aggregate, nor for individual products."

Google makes that choice for the merchants. Again, an important part of understanding how all of this hangs together, both the abuse and the nature of the CSS itself.

The integrated nature of the different parts of the CSS is then, we say, further made clear in recitals 420 and 421. We will start at 736. In particular, 421 -- for all the same reasons flowing from recital 413 -- you can see that "in the eighth place", it says:

"[L]inks within the Shopping Unit fulfil the same economic function as links within Google's standalone comparison shopping website."

We say that's a very important phrase:

"Both lead users directly to the website of Google's merchant partners and trigger a payment by the relevant partner to Google. Google's comparison shopping service therefore benefits economically from that click 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 that really makes good what I have been advertising from the beginning: that whether you click on something in Google's own CSS or whether you click on a link within the Shopping Unit at the top, it fulfils the same economic function as links within Google's standalone comparison shopping website, and so the Commission treats all of that as being part of "Google's comparison shopping service".

It is the links that enables the diversion of the traffic to Google's comparison shopping service, whether directly to a merchant website or indirectly, via Google's shopping website, whether from a link in the box or via the thing called a "header link". Each generates benefit and revenue for Google and each causes harm to competitors. They gain traffic; we lose traffic. That harms the competitive process as a result of conduct that is not competition on the merits. It goes to the heart of all of that.

That is why -- perhaps too extensively -- but that is why I'm banging on about the definition of Google's comparison shopping services being an important part of the abuse.

Further, and importantly, recital 421 -- I don't know when you are planning a break?

MR JUSTICE ROTH: I am just waiting for you to conclude this bit of your submissions. 421?

MR MOSER: recital 421, which we have just been looking at. It needs to be read with two other recitals, which are in fact in a completely different part of the Decision, but which refer back to it directly. That is recitals 630 and 631. They are -- forgive me. (Pause)

They are at pages 833 and 834.

Now, although they are found in a different section

of the Decision, Section 7.3.2, about the Commission's hypothetical competitive effects analysis based on Google's proposed alternative products market, they also assess the diversion of traffic and they identify what traffic must be undertaken in carrying out the analysis.

So 630 says:

"In the first place, as noted above, (see recital (421)), 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 comparison shopping service 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."

"In the second place [this is 631], each individual click on a link within the Shopping Unit should be counted as a separate visit to Google Shopping. That is because any subsequent clicks on another link within a Shopping Unit after a user has clicked on a link within the Shopping Unit and gone back to Google's general search result pages is influenced by the Conduct."

I hope it is clear why I say that 630 and 631 are to be read with 421.

MR JUSTICE ROTH: Yes.

MR MOSER: Again, less traffic went directly to Google. Traffic of those clicks, by reason of the abusive conduct, was unlawfully diverted from competing CSSs --

MR JUSTICE ROTH: You are repeating the point, but in a different context.

MR MOSER: Yes. It is, but also elucidating because it makes it quite plain now -- if there was any doubt after 421 -- quite plain the Commission treated that traffic as being within the scope of the abuse and being part of the traffic going through Google's own CSS.

The point is further made in footnote 604, which in the schedule is at page 779, a little earlier.

MR JUSTICE ROTH: Yes.

MR MOSER: That analyses of the evolution of traffic to Google's own CSS and to competing CSSs, and it clarifies the meaning of traffic to Google's own comparison shopping service. I think at C -- I won't read it all out, but you will see there what it says.

MR JUSTICE ROTH: Yes.

MR MOSER: We say it is necessary to understand how the traffic to Google's CSS was calculated, read together with footnote 3, recitals 421, 412 and 630, and essential for understanding the abuse as found and so is an essential basis and provides necessary support for the finding of infringement in Article 1 of the

Decision.

I have rather skated over some of the recitals that I have listed to you. I wonder whether this is a convenient moment to have a break and then I can see whether I can rationalise the rest of this section. I am almost at the end of it. I sense I still need a few minutes.

MR JUSTICE ROTH: Yes, we'd better stop now. We will come back at 12.05.

(11.57 am)

(A short adjournment)

(12.08 pm)

MR JUSTICE ROTH: Yes.

MR MOSER: Thank you. I have used the short adjournment to review what more I need to say. I submit the Tribunal has my points about all of the recitals that I have listed, even if I haven't touched on every one, but the point is the same.

What remains is, it is in my submission useful just to look at what the General Court said about this general area, not because that makes it binding, but because it confirms, in my submission, what we say about it.

The General Court judgment is in bundle A3. The bit that I am looking at starts at page 180 at

paragraph 329. It is behind tab 2 if you are in hard copy.

MR JUSTICE ROTH: Paragraph 329.

MR MOSER: 329. So what the General Court is dealing with here is what Google's own comparison shopping service included, and in particular specialised pages, Froogle, Google Product Search, Google Shopping and so on, as well as grouped product results, Product Universals, the ads and the Shopping Units.

At 329, we see reference to recitals 26 to 35. Google's comparison shopping service has taken several forms, most recently Google Shopping. Grouped product results which evolved into Product Universal and product ads, which have evolved into the Shopping Unit, as my learned friend explained at the beginning:

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

If we go ahead to paragraph 337 on page 181:

"On that basis, the specialised pages Froogle, Google Product Search and Google Shopping, as well as grouped product results, notably Product Universal ... must be considered to form part of the comparison

shopping service which Google offered to internet users. In addition, in relation to Shopping Units specifically, the Commission pointed out in recitals 414 to 421… that the Shopping Unit was based on the same database as the specialised page and so on."

Then the last sentence:

"Consequently, a click in a Shopping Unit was indeed to be regarded as a manifestation of the use of Google's comparison shopping service from the general results page; that is to say, as traffic for that comparison shopping service from that page."

At 338:

"It must be stated that certain formulations… such as those in recitals 408 and 423 can viewed in isolation and at first sight, appear ambiguous. However, those formulations do not affect the Commission's general analysis, according to which Google's comparison shopping service was available in different forms. In particular, recital 423 of the contested Decision must be read as following on from recitals 414 to 421, which are intended to show that Shopping Units and Google Shopping are components of a whole."

That was the point I was trying to make, less well, in response to the panel's question:

"In that regard, it must be noted that recital 422

indicates that, in six EEA countries… 'Google Shopping existed only in the form of Shopping Unit ...'"

And so on.

The conclusions are at 339 to 340:

"In those circumstances, the Commission was fully entitled to find that Shopping Units favoured Google's CSS."

And consequent to the second part of the second plea in that case was rejected.

So that is what we say further informs what I have been saying.

There is a similar sort of argument a little bit later on at paragraph 407 which I don't propose to read out because it gets quite involved. The Court essentially comes to the same conclusion at 408 and 409.

At 408 on page 198:

"The Court considers that Google's objections to the fact that clicks on Shopping Unit ads and, where appropriate, clicks on a menu link, such as the shopping menu link, were taken into account in the assessment of the traffic… must be rejected. First, as has already been indicated in 328 to 339 above, recitals 26 to 35 and 414 to 421… provide sufficient grounds to support the conclusion that Google's [CSS] has taken several forms ..."

And so on.

So that is the General Court.

Our conclusion isn't based on it, but it informs our conclusion and the conclusion in summary and finally is we say it is plain that although shopping boxes weren't of themselves a CSS, they were an integral part of it, and it is plain that this cluster of recitals, wherever they appear and that I have listed, are therefore essential to understand the meaning of Google's CSS, which is part of Article 1 and must be integral to the finding.

So unless I can say anything more on that, excuse me for a moment. (Pause)

My learned friend reminds me that Google say that all of this is some sort of trap. Well, I think I have explained, it is not a trap. This is an integral part of understanding what the Decision says. Obviously if the Tribunal is against me on that, that is fine, but I'm not laying it in some way as a trap, and if I were trying that, it would be a pretty inexpertly flagged trap because it is central to our submissions on this whole section. I will let my learned friend debate that and we will see where we go.

MR JUSTICE ROTH: Yes. Thank you.

Submissions by MR PICKFORD

MR PICKFORD: Thank you.

So I said at the beginning, reflecting

a conversation between myself and Mr Moser, that we decided we were going to deal with meaning first and then bindingness second.

I think with respect to Mr Moser, he has actually dealt with some points on bindingness and some points on meaning. In my submission, by far the most sensible way of approaching this decision is to address the points on meaning first, to decide what recitals mean and then to go through and decide which of those recitals, having taken a view on their meaning, are binding.

That's the way in which I propose to take it, with the permission of the Tribunal.

On meaning, there are four key disputes between the parties, of which three have been flagged up by Mr Moser.

So the first one is the issue of the combination abuse, that is, is it both elements together that are abusive or does each element of the abuse, namely the algorithms part and the boxes part itself, constitute an independent abuse?

So that's point one, and we need to grapple with that because that's at the heart of the Decision.

The second point is the one Mr Moser has just been addressing, which is about comparison shopping services appearing on the search engine results page.

Now, from my understanding of the way the point is put this morning, the Claimants appear to be backing away from the hard version of that argument, namely that the CSS itself was on the page, but I'm going to need to address that because they still actually say -- they make some submissions that suggest they actually go that far still, so I want to make sure we are clear on that.

The third area is one that Mr Moser didn't mention, but it does come up and it is a subsidiary point, but it is a point about meaning and not bindingness, which is: did the Commission make a finding that it was unlawful for Google to act in a way that required other CSSs to change their business models to fit in? Or, as we say, is that just a yet further illustration of an issue about discrimination?

So that's the third issue we are going to have to deal with on meaning.

The fourth issue on meaning is one that Mr Moser did make submissions on, which is this issue about counterfactual and effects.

Now, the only one of those four that, as I understand it, Mr Moser has developed his full submissions on is the CSS being on the page, albeit he has said a fair bit about the combination abuse. So I'm in the Tribunal's hands somewhat as to whether you would

like me to deal and address the Tribunal on all of the four issues we say go to meaning or just the first two. I will obviously do whatever is most --

MR JUSTICE ROTH: Well, why don't you start with the first two and we will see where we go.

MR PICKFORD: Very good.

I also have some preliminary points to make about the right approach to bindingness, and in my submission they would be most helpfully made just before we get on to bindingness. I am equally happy to do them now, whatever is most helpful to the Tribunal. That was going to be my plan, prior to hearing Mr Moser.

MR JUSTICE ROTH: Well, I don't want to take you out of your course.

MR PICKFORD: Very good.

Okay. So then there are two issues then that have been canvassed on meaning. One is this question about what is the abuse; and the other is about whether the CSS itself appears on the page, or if not, what is the CSS.

The first issue is necessary to understand a core recital that we all agree is binding, which is recital 344, and if you could turn that up, please, in the schedule. It is to be found at page 697 of the schedule.

So this reflects something that is very similar in Article 1 itself, and it is about Google positioning and displaying in its general search results pages, its own comparison shopping service more favourably compared to competing comparison shopping services. Then it goes on to explain that: "while competing comparison shopping services can appear only as generic search results and are prone to the ranking of the webpages in generic results on Google's general search pages being reduced ("demoted") by certain algorithms, Google's own comparison shopping service is prominently positioned, displayed in rich format and is never demoted by those algorithms."

Now, the conjunctive word there "while" we say is a strong indication that we are dealing here with a combination abuse; that is, it is only those points in combination that are abusive, but I have a number of submissions to make that support that.

So the dividing line, as I think will be clear between myself and Mr Moser is I think he is still, in answer to questions from the Tribunal, saying that the algorithms on their own are abusive. I think that is his case. It certainly was his case as expressed in his skeleton argument.

My case is the algorithms on their own are not abusive, they are only abusive in conjunction with the

fact Google had shopping boxes, which were a privileged place to appear, where Google's CSS was not subject to those algorithms. So it is not the application of algorithms per se that is the problem, it is the discriminatory application because Google didn't apply them to itself, but it did apply them to others. That is the, I think, the nub of what is between me and Mr Moser, as I understand it.

MS ROSE: Can I clarify one thing. So discriminatory application could mean either being lower down the generic search results or it could also mean being excluded from the boxes?

MR PICKFORD: Yes.

MS ROSE: Do you accept that either of those forms of discrimination would be sufficient to be an abuse?

MR PICKFORD: Well, I think I can -- I will tackle a different question first, then I will come back to your question, if I may.

The answer to the discrimination question is that Google itself did not appear – Google’s CSS did not appear in its generic results at all. So when one is considering generic results, they were filtered by a number of algorithms, a host of them, that included the two algorithms to which the Claimants object.

That has an effect in terms of ordering. And they

say: well, but for those algorithms we would have appeared higher up and, therefore, we would have done better. That is one of the things they say and they want to claim some damages for that.

As regards those algorithms and their application in generic results, Google literally applied an algorithm that took itself out entirely from those, so there is no favourable treatment within generic results in terms of that kind of ranking.

So insofar as that is what your question was going to, Madam, that point whilst technically, yes, that could be a form of discrimination, it is not part of this decision. The only thing that is part of the Decision here is that there were those algorithms and they were applied, apart from they weren't applied in the box that Google stuck itself in. It is the introduction of the box that causes the problem.

To just take, I mean, a step back, just to take that slightly further, if one imagines a world without the boxes at all, so it is just a world where there are some algorithms that apply to everyone, apart from Google's position is it doesn't appear in generic searches at all, it is impossible to see how Google could have been favouring itself unlawfully in that world because in that world, there is no special place to appear on the

page; it doesn't get to create nice pictures at the top that aren't subject to algorithms. They don't exist. Those boxes have been taken away.

MS ROSE: In that world, Google Shopping would not appear at all in Google's own search results?

MR PICKFORD: That's right. The only respect in which it would appear is in relation to something called a -- I can't remember the word. It is something -- a navigational query. So if someone put in the words "Google Shopping website", then a link would appear to take you through to the Google Shopping website, just as if someone put in "Kelkoo comparison shopping website", there would be a link to that. But other than a navigational query, yes, Google simply would not have appeared at all. The only reason why it was appearing was because it was appearing in those boxes.

MS ROSE: So the vice is they basically have two different buckets that you end up in if there is a generic search?

MR PICKFORD: Yes.

MS ROSE: If you are the Google CSS or a merchant who has their own website, but are in the database, then you are in the rich format box above, and if you are another CSS, you are only in the generic results with the algorithm?

MR PICKFORD: Correct.

MS ROSE: You are saying it is the combination of those two, it's the two buckets that is the vice?

MR PICKFORD: It is.

MS ROSE: If you have only one bucket, then Google could choose to take itself out of that bucket -- which would be a perverse and odd thing to do -- but it could decide it didn't want to be in its own searches -- it would be a very strange thing to do, but you are saying there would be nothing wrong with Google operating a single algorithm and Google Shopping participating in that algorithm on the same terms as everybody else.

Wouldn't that be what happened originally with Froogle; and wasn't the point that Froogle didn't feature very highly in the search results, it got demoted by the algorithm?

MR PICKFORD: No, Froogle was a precursor --

MS ROSE: I know.

MR PICKFORD: -- no, it was a precursor to the Product Universal.

MS ROSE: But Froogle was not found to be an infringement; right?

MR PICKFORD: Correct, because it predated the infringement period.

MS ROSE: But one of the reasons -- as I understood it, one of the reasons Google replaced Froogle was Froogle was

doing really badly in the search results -- and getting demoted by the algorithm.

MR PICKFORD: There was a dispute about that because the Commission -- the answer to that is the Commission say that is what was happening. We said: no, no, no, that is not what is happening. We actually appealed in relation to that issue and the General Court said: we don't care about any of this because it does not go anywhere, it is not part of the infringement so ineffective, go away.

MS ROSE: But the point actually supports your position, doesn't it, because what it suggests is if you don't have the Shopping Units, if you just have an algorithm that applies -- I mean, obviously it would be discriminatory if your algorithm didn't apply to Google and it got more favourable treatment; if you have an algorithm and it does not apply to Google and it gets less favourable treatment because it does not appear at all, that is bizarre but not an abuse. If you have an algorithm that applies to everybody equally, what is the abuse?

MR PICKFORD: Quite.

MS ROSE: You are looking then at a different abuse, which is: is the way the algorithm demotes people weighted to favour Google?

MR PICKFORD: Yes.

MS ROSE: And I don't think --
MR PICKFORD: That is not part of the Decision at all.
MR JUSTICE ROTH: Of the two algorithms that feature, Algorithm A and Panda, which came first?
MR PICKFORD: Algorithm A.
MR JUSTICE ROTH: When was that introduced?
MR PICKFORD: 2004.
MR JUSTICE ROTH: That is somewhere in the Decision, is it?
MR PICKFORD: It is somewhere. I think it is in around about the 20s, from recollection. So if one was to go -- this is not in the 20s, if one was to look at 350, which is on page 699, so recital 350 on 699, one sees the algorithm A.
MR JUSTICE ROTH: Sorry, which recital? 350. Sorry.
MR PICKFORD: Recital 350. It is in yellow (inaudible) that was introduced in June 2004.
MR JUSTICE ROTH: We call it Algorithm A.
MR PICKFORD: We call it Algorithm A, yes. What we are not allowed to do is say the blue words.
MR JUSTICE ROTH: Yes. Introduced in June 2004. Thank you.
MR PICKFORD: So if we could go on then, please, to have a look at some of the other recitals in the Decision, which we say make very clear that we are right and the Claimants are not on this particular point.
Could I ask the Tribunal, please, to go to page 844

of the schedule. We are looking at 661 and 662.

(Pause)

In particular, 661, which is the one that deals with whether the algorithms of themselves are abusive, the Commission is not preventing Google from applying adjustment mechanisms. The abuse established by this Decision concerns simply the fact that Google does not apply these mechanisms in the same way to Google's comparison shopping service and competing comparison shopping services. That is entirely consistent with the way that I have just been putting it to Ms Rose.

MR JUSTICE ROTH: But you are saying it is all tied to the introduction of Product Universal?

MR PICKFORD: Yes, exactly. I can show you that.

MR JUSTICE ROTH: Well, it seems to me that the clearest illustration of that is from the operative part, isn't it?

MR PICKFORD: Yes, probably. Also, some recitals that reflect the dates in the operative part.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I mean, Article 1 of the operative part, which is fundamental, in (a) just gives the commencement of the infringement --

MR PICKFORD: Yes --

MR JUSTICE ROTH: -- country by country.
MR PICKFORD: Indeed.
MR JUSTICE ROTH: If one wants to understand what was it that happened in 2008 in Germany or the UK or in October 2010 in France, the answer is in Recital 30, I think.
MR PICKFORD: Yes -- yes, so the way that I actually analyse it, I start off with recital 686, which is at page 851. So this is on duration.
MR JUSTICE ROTH: Yes.
MR PICKFORD: And --
MR JUSTICE ROTH: Yes, that is even clearer. Yes.
MR PICKFORD: And it says in terms that the starting point is when we introduced the Product Universal and then followed by the Shopping Unit.
MR JUSTICE ROTH: Yes.
MR PICKFORD: But we know from the question, Sir, that you asked me, Algorithm A was in existence in 2004, so if it were just the algorithms in themselves, the necessary implication of Mr Moser's case is the abuse should have started in 2004. It didn't. It didn't start until one gets the additional necessary ingredient, that is the different treatment, by Google appearing in the privileged place in the shopping box.
MS ROSE: So when they introduced the algorithm in 2004, did

it apply also to Froogle?

MR PICKFORD: No, it didn't.

MS ROSE: So how did Froogle appear on search results?

MR PICKFORD: I'm just -- so the people behind me know a lot more -- I know something about this, I just want to check the answer I'm going to give you is correct.

(Pause)

So Froogle, as I explained, being the precursor to the Product Onebox, it wasn't ranked in the same way by the --

MR JUSTICE ROTH: Sorry, it wasn't the precursor to Product, it was the precursor to --

MR PICKFORD: Sorry, Google Products, I beg your pardon. It was not ranked in the same way as generic search results, it was its own little thing. So in answer to the question that I -- the point that I think may lay behind your question, Madam, one might say: so why doesn't the Decision start at the same time as Froogle was introduced? Because if Froogle is -- like the Product Search, it is being treated in the same way, isn't there differential treatment?

The Commission's Decision does not start at Froogle; their position was that Froogle was ineffective, not a competitively relevant force and they do not start their infringement with Froogle. And one can infer,

potentially, whether that is because they thought things actually only started to matter competitively with the introduction of the Product Unit.

MR JUSTICE ROTH: Yes, so significant competitive effect.

MR PICKFORD: I mean, they didn't make that finding, but they don't find that Froogle was part of the abuse.

In my submission, given everything else that I have shown you in terms of recitals 661, 662 and 686, the way that those pieces logically fit together is the one that I have described. It is not because actually Froogle was in the generic search results, it must be something else.

MS ROSE: Did the Commission misunderstand that, then?

MR PICKFORD: No, I don't -- I mean, our submission is that, well, Froogle was beginning to do better than you think, but there was a minor spat about that, which the General Court said: we simply don't care about, that doesn't go anywhere, it is not part of the abuse, it could only ever go to an issue about Google's motivations and we find that Google's motivations are not a constituent element of this Decision. So none of it relevant, none of it binding.

Then I am not going to expand upon the point, because I think the Tribunal has already got it, about the combination, but if needed, you can do the same

exercise we just did in relation to looking at the start dates, to looking at countries. So there were some countries that did not have Product Units or Shopping Units; in those countries, there was no abuse.

MR JUSTICE ROTH: Yes.

MR PICKFORD: But there were findings of dominance in general search in those markets, so again that can only be reconciled by my construction of the combination abuse, not Mr Moser's.

In our skeleton argument -- but I'm not going to labour it here -- you see the very same point being made by the General Court; you see it being made by Advocate General Kokott; and you see it being made by the Court of Justice.

Shall I just give you the references?

MR JUSTICE ROTH: If you give us the reference, which paragraph of your skeleton this is.

MR PICKFORD: So in our skeleton --

MR JUSTICE ROTH: This is paragraph 8 or -- no. (Pause)

MR PICKFORD: So we have the Court of Justice in 10.4. I tell you what, I did my own preparation additionally to what is in the skeleton; can I just give you the key paragraph references that I thought were of help?

MR JUSTICE ROTH: Yes.

MR PICKFORD: But I don't want to drag the Tribunal through

them all. So starting at the General Court, the General Court's judgment at 187, 261, 369 to 372; then Advocate General Kokott, paragraphs 179 and 182; and then the Court of Justice, paragraphs 97, 108, 140, 241, 244 and 246. All of those paragraphs are all making variants of the same point, that this is about a combination only and that the Commission never found that the application of algorithms per se, including the application of Algorithm A and Panda, was unlawful.

So if I may with that, I will go on to the second topic that Mr Moser covered, which was about the shopping boxes and whether they are, themselves, comparison shopping services.

So we are not entirely sure quite how far Mr Moser goes on this point, but at least the strongest version of his case appears to be -- at least was -- that the comparison -- sorry, the boxes are themselves comparison shopping services. And the reason why one -- I say that is, notwithstanding his oral submissions today, they say that footnote 3 is binding and defines what a CSS is.

So if we go to footnote 3, which is in the recitals schedule on page 595 -- we have been to it already -- the bit that they initially at least relied on was when it says that:

"Throughout this Decision whenever the Commission

refers to the more favourable positioning and display in Google's general search results pages [so in Google's general search results pages] of Google's own [CSS], compared to competing [CSSs] the Commission means the more favourable positioning and display of: (i) links to Google's own [CSS] (see section 0 ...) [et cetera] and/or (ii) parts or all of Google's own [CSS]."

So no dispute there about links. We all agree that the CSS contained links. The dispute is about the second part, which is the parts or all of Google's own comparison shopping service.

For reasons I'm going to come on to explain, the reference there to all of Google's comparison shopping service as if all of Google's CSS is somehow also on the page, that cannot be right. It is inconsistent with a number of later recitals which I'm going to come on to deal with. If that is not right because that is inconsistent with other parts of the Decision, it can't be binding either, which is what is said by Mr Moser about it.

There is another part here, which is the reference to parts of Google's own comparison shopping service being on the SERP. Now, in relation to that, I want to come on to explain what that actually means, and what that is referring to is results from the comparison

shopping service.

So the ways in which Google favoured itself, we say, in reality, were links to its CSS -- so sometimes you might click on something which took you to the CSS -- and secondly, results from Google's CSS appeared on its SERP, but the CSS itself did not appear on the SERP. That is the distinction here.

MR JUSTICE ROTH: It is almost a semantic debate, isn't it? Of course if you define Google's CSS as meaning its shopping comparison website, then you can say that is not there; if you define Google's comparison shopping service more broadly, then you can say it is there.

MR PICKFORD: Yes. So I do agree, Sir, that ultimately this is not a particularly exciting debate. It does not ultimately take us anywhere because it doesn't inform what is the favouring. When one can analyse what the favouring is -- either of those definitions still work. It can't be binding, therefore, what the particular definition of the Google CSS is. And one does not need to get into a metaphysical debate about it, particularly, because it is not going to be something that this Tribunal, we say, are ever going to be bound by.

MR JUSTICE ROTH: But it is important to know what the Commission means by "Google's comparison shopping

service", what they mean by it.

MR PICKFORD: Yes --

MR JUSTICE ROTH: That is important because that is fundamental to the Decision. What I'm saying is you can define that -- if you define the Google website to be the Google comparison shopping service, that may not be what they mean by the "Google comparison shopping service".

MR PICKFORD: Well, the Decision is perhaps not an absolute model of clarity on this issue. Our submission is going to be -- and I am going to explain why I get there -- is that really what they are talking about is the standalone site, just as they are talking about the standalone sites of rivals. Because this is all about the favourable treatment of us, compared to the allegedly -- well, in fact it was found, unfavourable treatment of our rivals. What I say is that the abuse is manifest really in two things that we did. It is taking results from our own CSS, results from --

MS ROSE: You mean individual merchants?

MR PICKFORD: Exactly. And ads that will take you through to an individual merchant. It is presenting results from on our SERP. The reason I keep saying "results from" is one sees those words repeated again and again throughout the Decision and throughout the General Court

and the CJEU's judgment.

So that is one aspect.

Then the other aspect is that in some cases when one goes back to the PU, there were actually links that went through to -- so rather than going to the merchant, they went through to Google's standalone CSS. That was another means, the Commission found, of us favouring ourselves.

It is those two aspects that are in factual terms the things that we did wrong. And one can understand that by the CSS itself being a separate thing still, it is not actually the CSS which is on the page, it is results from the CSS that were on the page or links to the CSS.

MR JUSTICE ROTH: I say, it comes back to definition because what the Commission held was you were displaying your own comparison shopping service in your general results page. That is what they decided.

MR PICKFORD: Yes -- well -- yes, but one has to understand what did they mean by that. This is one of those points where one has to look at quite a lot of the recitals to understand what that operative part actually means because there is some ambiguity, we say, as to what displaying our CSS really means. They can't be meaning displaying the CSS in itself because they expressly

disclaim that in 408 and 412, so they must be meaning something different.

MR JUSTICE ROTH: I say, it comes down to the slightly linguistic point: whether the CSS is your standalone website, which in the case, as you say, they can't mean that; or when the Commission uses the term Google's comparison shopping service, that has a broader meaning than just your website.

MR PICKFORD: Yes, you have heard what our position is on it and I can now explain to you the five reasons why we say that is the right answer.

So can we go back to the recital that Mr Moser did take you to, but it is the important stepping off point here, which is recital 408 on page 731.

Sorry, I beg your pardon. I thought this was going to be an easier way of navigating, but it is not always true.

So, yes, this sets out "the Commission's case is not that the Product Universal was in itself a comparison shopping service, rather the Commission's case is that the positioning and display of the Product Universal was one of the means by which Google favoured its comparison shopping service."

So we say that is core -- it is common ground that it is binding, and that is consistent with the

submissions that I have been making that it is not about the CSS actually being on the page, and so insofar as one might be tempted to understand that that is what the operative part means, it cannot. What it actually means is that there were means by which we favoured the CSS and it goes on to explain what those means were.

Mr Moser highlighted footnote 463, which is directly below, as a point in his favour. I say it is a point in mine. In the same way, ie as just explained, that the Commission's indication is not the PU itself is a shopping service, generic search results leading to comparison shopping services are not comparison shopping services in themselves.

So it is drawing an equivalence there between generic results in which competing CSSs appeared and shopping boxes in which Google's CSS appeared, and it is saying in exactly the same way, just as the generic result is not a manifestation of the rival CSS, in the same way Google Shopping result is not a manifestation of the CSS, it is just a link to it or a result drawn from it.

Then if we go to 412, we see exactly the same point being made in relation to Shopping Units as opposed to Product Universals.

So that is my first point on why we say when one

analyses what the Commission is actually saying in the key binding recitals of the Decision, it is talking about favouring in that context, but not the CSS actually being there on the SERP.

The second point is that that construction is consistent with a significant number of places in the Decision where what the Commission talks about in terms is the more favourable display of results from Google CSS.

So if we could begin, please, with page 602, which is recital 29, which again is I think one that Mr Moser mentioned.

So here, it is explaining what the Product Universal comprised, and it comprised results from Google's product search -- specialist product search.

Then it goes on to explain:

"In most cases they led the user to the standalone Google Product Search websites."

MR JUSTICE ROTH: You say this recital is not binding.

MR PICKFORD: I think I do say it is not binding, but I --

MR JUSTICE ROTH: -- you are now relying on it, saying that it actually helps us to understand -- to clarify.

MR PICKFORD: Indeed -- because I say you can rely on nonbinding recitals to inform the meaning of binding recitals. Strictly speaking, those are different

exercises.
MR JUSTICE ROTH: But I thought that it was common ground that one of the criteria for binding is if it is necessary to understand, to clarify an ambiguity in the operative part, then you are saying this helps us understand it.
MR PICKFORD: Well --
MR JUSTICE ROTH: -- or maybe it is a narrow point, Mr Pickford, and I am being unfair. Is it the only point you object to in 29 is that in most cases, should include the header link? And it is not most cases if you exclude the header link, because 411 --
MR PICKFORD: Yes.
MR JUSTICE ROTH: -- recital 411, you accept, is binding.
MR PICKFORD: Yes.
MR JUSTICE ROTH: So is that the only objection --
MR PICKFORD: That's the point there, yes.
MR JUSTICE ROTH: -- apart from that narrow point of how you calculate the majority, in fact, the first sentence, I think, you then accept, don't you, of 29?
MR PICKFORD: Yes.
MR JUSTICE ROTH: You are content with that one. So we need not -- so you just think it has an error?
MR PICKFORD: It has an error.
MR JUSTICE ROTH: On how you calculate the majority as

compared to 411?

MR PICKFORD: Exactly.

MR JUSTICE ROTH: Otherwise, it is binding?

MR PICKFORD: Correct.

MR JUSTICE ROTH: I see.

MR PICKFORD: Then if we go on to a couple of recitals later, recital 32, we see a point being made again:

"In the same way as the Product Universal comprised specialised search results from Google Product Search, the Shopping Unit comprises specialised search results from Google Shopping."

So, again, a linguistic point consistent with my interpretation of what the Commission is really saying. I'm not going to take the Tribunal to all of them, because it will get a bit boring, but could I just list out other recitals which contain exactly the same formula. They are recitals 379, 385, 397, 510, 537, 662 and 699.

I suggest just before the short adjournment, we just look at 699 because that one is quite helpful, given it occurs in a key part of the Decision. So that is on page 855.

So this is the Remedy section of the Decision and the reason why the Remedy section is helpful is because it really draws together the essence of what the

Commission were complaining about in the Decision, and it is about the favouring.

At the end of that, they say that the principles that they mention in the next recital:

"... should apply irrespective of whether Google chooses to display a Shopping Unit or another equivalent form of grouping of links to or search results from comparison-shopping services."

So, again, that is exactly what I have identified as the two vices which actually concern the Commission in this Decision. It is links to our CSS, or results from it, and not doing the same for our rivals, not treating them in the same way.

I have a couple of other short points on this issue on construction, but it is 1 o'clock, so I'm very happy to pause.

MR JUSTICE ROTH: Yes, we will return at 2.

MR PICKFORD: Thank you.

(1.00 pm)

(The short adjournment)

(2.02 pm)

MR JUSTICE ROTH: Yes, Mr Pickford.

MR PICKFORD: Members of the Tribunal. We have been dealing with the issue of the meaning of a number of recitals, which include 420, 421 and footnote 3, about whether the

CSS was on the page and whether the SERP includes the CSS.

In that regard, the Claimants say in the schedule and in their skeleton that the CSS included Froogle, Google Product Search, Google Shopping, as well as group product results, notably Product Universal, product ads and Shopping Units. They get that from the General Court's judgment at paragraph 330. If we could please go to that. I think you were taken to 329, I think it is actually 330 that is probably the core one that is relied upon by my learned friend.

So it is at page 180 of A3.

So we accept that the General Court does obviously say what it says there. However, there is no such finding in those terms in the Decision, and it is the Decision which is the relevant legal instrument for the purposes of an examination of bindingness that we are concerned with.

MR JUSTICE ROTH: If we are concerned not with -- with understanding the meaning of the Decision --

MR PICKFORD: Yes.

MR JUSTICE ROTH: -- and the General Court has reached a clear view on the meaning of that expression in the Decision, that is clearly something we can take into account.

MR PICKFORD: Yes.
MR JUSTICE ROTH: And it may be highly persuasive.
MR PICKFORD: I don't --
MR JUSTICE ROTH: The General Court has far more experience, speaking for myself, at scrutinising Commission decisions than I do.
MR PICKFORD: I don't disagree with that -- so it is obviously potentially persuasive. Of course, I do come back to a point that I have made before, which is this exercise of determining the meaning of recitals only ultimately matters for the binding recitals because if the Tribunal is not bound by those recitals, their precise meaning is a somewhat subsidiary consideration because it will be open to both parties to say: well, whatever the Commission did or didn't do, or whatever it did or didn't mean, here is what we are going to argue now, and because we are not bound by it, then a debate as to meaning does not take us that far.

It will be my submission -- when we come on to deal with bindingness -- I don't want to get on to that right now because in my submission it is taking it out of sequence -- but when we come on to deal with the bindingness of recitals 420, 421, et cetera, footnote 3, my submission is going to be they are not binding.

MR JUSTICE ROTH: But I go back to Article 1 of the Decision

--

MR PICKFORD: Yes.

MR JUSTICE ROTH: -- which is determinative, which says Google's own comparison shopping service and I ask myself: well, what does that mean? Never mind binding recital, what does that mean? We have to understand what that means because that is the infringement.

MR PICKFORD: What we need to understand is in Article 1 when it is talking about the favouring of Google's own CSS, what does that mean? What that means is the point that I was making before the lunch adjournment, it means putting results from the CSS on the page and it means providing links to the CSS on the page.

MR JUSTICE ROTH: Why does this matter so much? I mean, we all understand what the infringement is; why does the exact meaning of the phrase "Google's comparison shopping service" actually matter?

MR PICKFORD: Well, it may ultimately not matter that much --

MR JUSTICE ROTH: Well, you are spending a lot of time arguing about it, if it is not really relevant.

MR PICKFORD: Well, the reason I apprehend why the Claimants raise this point and why we are addressing it is because they, in their pleaded cases -- and based on things that have been said outside the court, they are going to

argue that the Remedy is not a proper remedy because the boxes are Google's CSS.

So they are going to say that the fact that there is now equal treatment and that anyone can appear in that box, whether it is Google CSS or a rival CSS, on equal terms, but they can say that is not good enough, because it is still Google's CSS which is on the page: look, the Commission made findings about that; look, they hope, now, the Tribunal has said that those are binding, and therefore you are stuck. It does not matter whether you treat it as equally or not, because what you have still done is stuck your CSS on the page. And that's the problem. So that is where this catches out for them and that is why we are having a debate about it today.

MS ROSE: So under the Remedy, can anybody's CSS be included in the boxes?

MR PICKFORD: You have to meet certain, what we say, are non-discriminatory criteria to appear in the box, and they are applied equally to Google's CSS and to other CSSs. So there will be quality checks; there will be the need to ensure that you can produce the right type of data feeds that enable Google to choose what is going to go in the box, based on the data feeds; you need to take part in the auction.

So there were a whole set of things you need to do

to satisfy getting in there, but ultimately it is as open to Kelkoo as to Google's CSS. And if one was to go to that unit today, you would see that there were a series of product ads, and some of them had been supplied by Google and some of them had been supplied by Kelkoo, et cetera. They had been supplied by different people and their names will appear underneath them. And you could click through to Kelkoo's CSS by clicking on the "provided by Kelkoo" button -- link.

MS ROSE: But I mean, even if the boxes at the material time were the Google CSS or part of the Google CSS --

MR PICKFORD: Yes. Yes.

MS ROSE: -- then the same logic that would lead you to that conclusion would presumably lead you to the conclusion that those boxes now were both the Google CSS and other CSSs, because both were included in the boxes -- because the rationale for it is that the economic effect from the perspective of the merchant is identical, whether it is a click through from the Google website or from the ad that is in the box. It does not make any difference to the merchant. They don't know.

MR PICKFORD: That's right --

MS ROSE: -- that would apply to whether they were signed up with Kelkoo or signed up with Google.

MR PICKFORD: Absolutely. That is what we will argue in

response to that. Even if we are wrong, we say: you still don't get home -- you are still not going to prove our Remedy is unlawful even if you are right --

MS ROSE: I am wondering why this point we are arguing about matters because ultimately however you analyse it, whether you analyse it as a link or analyse it as being in and of itself part of the CSS, you are always addressing the same vice, which is the discrimination.

MR PICKFORD: So I do agree, but of course my position here is to defend Google and we say there were two reasons why they are wrong about that. One is the point, Madam, you just articulated. So we say that still does not get you home in the claim that you are acting unlawfully now. But you are also wrong because the Commission did not make a binding finding in the Decision that the CSS appeared on the page. What they found was that results from the CSS appeared on the page, and we say that is yet another reason which cuts through this argument. That is why -- it is not my only point, it is necessary for me to engage with it because I don't want to give that point up.

MR JUSTICE ROTH: I mean, the problem is that the way this is addressed in the Decision is not wholly consistent and, therefore, each of you can pick up certain recitals and say: aha, that shows -- such as 408, you were

saying -- couldn't be clearer what it says in 408. It seems to me that is exactly the point that the Court -- General Court addressed in paragraph 338 of the judgment, where they say it is ambiguous. But it is clear to the Court that, looked at as a whole, what is the abuse.

MR PICKFORD: Well, I have two answers to that, Sir. The first is insofar as it is ambiguous in the judgment -- sorry, in the Decision, what that is actually ultimately telling you in this case is it does not really matter either way for the finding in the Decision about favourable treatment; and if it doesn't matter either way, it is not going to be binding.

MR JUSTICE ROTH: No, I think they are saying certain bits of the Decision are ambiguous, but if you look at the Decision, read it as a whole, it is clear. That's what they are saying.

MR PICKFORD: Well, that is what they are saying. I'm saying that the finding that they purport to make there is not one that is in the Decision, and I would like to go on to, please, explain why this Tribunal should not rely on it, because if you look elsewhere in both the General Court's decision and the decision of the Court of Justice -- this comes back to a point I made earlier -- what they refer to continually in terms of

the favouring is the fact that there was discriminatory treatment of results from Google's CSS, ie the CSS is something different and results had been taken from it, versus results from rivals. One begins to see that -- and I will take you to a couple of examples, if I may.

If we could go, please, to the Court of Justice judgment at 325, page 325 of the bundle that we have been in. It is tab 4.

Yes. We see here at paragraph 140 a discussion of the General Court's judgment. Here, it says:

"In paragraph 168 of the judgment under appeal the General Court stated that in recital 344 of the decision at issue, [you remember, that was where we started this whole debate because it is an ambiguous one] the Commission had observed that while results from [I emphasise 'results from'] competing comparison shopping services could only appear as generic results, that is to say, simple blue links that were also prone to being demoted in Google's general results pages by adjustment algorithms, results from Google's own comparison shopping service were prominently positioned at the top of those general results pages, displayed in rich format and incapable of being demoted by [the] algorithms."

So here is the Court of Justice talking about the favouring, albeit in relation to results from, also

referring back to what the General Court itself said, which was a focus on a comparison of results from Google's CSS and the rival CSSs --

MR JUSTICE ROTH: This isn't the Court of Justice saying anything, it is just quoting paragraph 168 of the General Court, isn't it?

MR PICKFORD: Yes. Yes -- well, I think it is quoting it with approval. But point one, this is what the General Court itself says, and then the Court of Justice then goes on to develop that and it runs with that as its analysis. So one sees -- if one then would go to paragraph 180, which is on page 331, so, again, it is talking about what the General Court did, but approvingly because ultimately it is upholding the General Court, it's making the point about the different treatment of results from the CSS, that is Google's CSS, versus results from rival CSSs.

Then one sees the same point at paragraph 183 of the judgment when talking about the nature of the favouring. It is the treating of the results from the CSSs differently. One sees it also at paragraph 191, the final full sentence on the page there, on page 322 -- 332, I beg your pardon. (Pause)

Then, again -- I'm not sure whether I'm allowing the Tribunal enough time to read, but there are two more

recitals to look at. (Pause)

MR JUSTICE ROTH: Yes.

MR PICKFORD: If I could finally ask the Tribunal to look, please, at paragraphs 244 and 245. Again, these are dealing with the essence of what is said to be the combination abuse. It is, again, all put in terms of the discriminatory treatment of results from Google's own CSS versus results from competing CSSs. (Pause)

MR JUSTICE ROTH: This is all about counterfactual, isn't it?

MR PICKFORD: That's right, but it is also instructive, in my submission, for understanding what is at its heart the abuse, because the counterfactual is part of describing what the abuse is, so that you know by reference to what you should have done, at least for the purposes of analysis of potential effects. In this context, there is a continued emphasis, as I have showed you through all of these paragraphs, on the point which I won't repeat because you will be getting annoyed with hearing it, but it is the 'results from' point. (Pause)

MR JUSTICE ROTH: Just one minute.

MR PICKFORD: Of course. (Pause)

MR JUSTICE ROTH: Yes.

MR PICKFORD: Thank you. So that is all I have to say on that issue. There are then two further issues as to

meaning that I outlined at the beginning of my submissions. If the Tribunal is content, I propose --

MR JUSTICE ROTH: If I can just go back. Before lunch, you said you had five reasons.

MR PICKFORD: Aha, yes.

MR JUSTICE ROTH: I have three at the moment.

MR PICKFORD: That's very fair.

MR JUSTICE ROTH: I am happy to stop at three, but if there are another two --

MR PICKFORD: The other two I have effectively made in answer to questions from the Tribunal. I wove them into responses on issues and I don't need to make them separately. So I have reduced it to three, but you are very right, I headlined it before lunch as it being five.

MR JUSTICE ROTH: Yes.

MR PICKFORD: But those three points are the essential ones.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Particularly if one -- my preliminary point, not one of my three, was about -- sorry, footnote 3 itself, and I began on that. I actually made some submissions about that, so, strictly speaking, if I can call that my fourth.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So if the Tribunal is content, I have now got

two further points on meaning or construction to cover and then I'm done for meaning, and apart from picking up on one point about bindingness, which I may or may not need to do, I can then sit down and Mr Moser can continue.

MR JUSTICE ROTH: Yes.

MR PICKFORD: If that's acceptable.

Okay. So the third dispute is about whether it is unlawful for participation in the Shopping Unit to require a change of business model. This concerns recital 439 of the Decision and that is at page 750 of the schedule.

MR JUSTICE ROTH: So that's a recital you agree is binding; is that right?

MR PICKFORD: That's a recital we agree is binding; the question is: what does it mean?

For completeness, there is a cross-reference there -- there is a cross-reference in that recital to recital 220(2) and it is the second bullet of that which has been cross-referred, so it is probably helpful just to look at it. It doesn't take it much further. I'm just getting a page reference for that. It is page 650.

MR JUSTICE ROTH: While you are on that, I'm also a bit puzzled that it is agreed that 439 is binding, but not the cross-reference, as it were, because 220(2), it is

disputed.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I don't quite understand that.

MR PICKFORD: Let me see if I can assist. Sorry, I am just having a moment's difficulty with my own navigation, but I have got there myself. (Pause)

Yes. So this is, we say, not strictly binding. It is cross-referred, but we would say in essence you could delete -- it potentially takes one forward a little bit further in one's understanding of 439. In our submission, that is probably not enough to make it binding in terms of helping you interpret the operative part.

But the crossed-reference part, we don't particularly object if it is considered binding, it is just that on a strict analysis, we say that the cross-referenced part is not itself binding. But it may not matter very much, because I don't think there is any particular concern about its content.

MR JUSTICE ROTH: So is it not contested, effectively?

MR PICKFORD: I think in effect it isn't contested. Well, I am going to stick to -- I am going to stick to my guns, which is, strictly speaking, it is not binding.

We were not asked, as I understand it, to look at this as to determine -- so in relation to -- sorry, let

me take a step back. In relation to the non-contested recitals, what happened with those is we initially said: okay, there are some bits we can easily take off the table, we will take off these sections of the Decision about descriptions about Google, et cetera; we won't argue about those.

Then the Claimants very fairly came back and said: okay, you are not arguing about those, here is another list of a further set of lots of recitals; would you like to not argue about those too?

So we went through their list and we said: sure, we will not argue about a selection of points on your list.

To the best of my knowledge and belief, this one is not one of the ones that was identified in part of that exercise and, therefore, we have not gone through the process that would be required to get sign-off from Google to say it falls into the 'we accept those facts are totally correct' box.

MR JUSTICE ROTH: I understand the historical, as it were, explanation, I just might in my rather simple-minded way, when it is agreed that 439 is binding and 439 says, "See also recital 220(2)", and that is agreed to be binding, I find it hard to understand that recital 220(2) is therefore not binding if it is -- if "[S]ee also recital 220(2)" is binding. That's all; do you see the

point?

MR PICKFORD: I see the point. I don't need to take a point on this, so I'm very happy -- if the Tribunal would like to treat it as binding as -- the part that is cross-referenced in 439, in fact, they are only really referring to the second bullet, which is the bullet beginning "the fact that", which I now understand we are not going to maintain confidentiality in relation to this, so that second bullet need no longer be in yellow.

But the fact that Google indicated, that one, that is the bit that is actually being cross-referred to if you analyse what 439 is saying and we are quite content not to argue about it.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Can I come back to what 439 means, however, because that is really the focus of the debate here. So if we go back to that recital, back to page 750. To understand what the Commission is saying here, you have to understand the context of the question that the Commission is dealing with. There are two competing versions of what this means.

So -- I am pausing because I apprehend the Tribunal is rereading 439. I don't want to interrupt.

MR JUSTICE ROTH: Go on.

MR PICKFORD: There are two competing constructions of 439.

What the Claimants, as I understand it, say about it is that if to avail itself of Google's services a third party has to change the way it operates and change its business model, that is inherently unlawful in and of itself. That is what they appear to be saying about it.

What we say is that when you read it in its proper context -- and I am going to come to that -- 439 is just another point about discrimination. So what it is saying is that Google requiring rivals to change their business models to appear on the page, but not requiring the same of its own comparison shopping service would be unlawful, and it is in that context that it is talking about requiring rivals to change their business model.

So that sets up what the debate is. I haven't obviously gone on to explain why I say we are correct about that yet.

Again, I am pausing because I can see there is reading going on, so I want to make sure --

MR JUSTICE ROTH: That's all right.

MR PICKFORD: Is the Tribunal content for me to continue?

MS ROSE: I am slightly puzzled about this. As I read the Claimants' comments on 439, what they are saying is there is still discrimination under the Remedy because they are saying that Google requires merchants -- or sorry, rival CSSs, either to link to the merchant

platform or the advertising for individual merchants, and in doing that, they would not be operating as CSS, but it treats itself more favourably.

That is what I understand them to be saying. So it does seem to me that they are interpreting 439 as being about discrimination, and they are saying the discrimination still persists and they are saying your interpretation is too narrow because you are saying it is only about whether or not it's leading to -- directly to their CSS site.

MR PICKFORD: My understanding of what the Claimant is saying is that the mere fact of the changing of the business model is something which is at the heart of the discrimination. So what they are saying is --

MS ROSE: Well, because you don't require it of yourself. That's the reason. I mean, the mere fact -- if anybody in order to be in the box had to have a particular business model, whether they were Google or not Google, that wouldn't be a problem. I think what they are saying is Google requires rivals to change their business model in a way that they don't require themselves.

MR PICKFORD: Well, it may be that there is very little between us on this. I think the best way of testing that is if I come on to develop my submissions on what it means and then Mr Moser will be able to tell me -- or

the Tribunal -- whether he in fact agrees with that or whether he is saying something that goes beyond it. We apprehend that actually they went further than we did and therefore it is important to explain what we say this means.

MS ROSE: But is it factually correct that under your Remedy, other CSSs are treated differently from Google?

MR PICKFORD: No.

MS ROSE: So Google links to merchant platforms or merchant websites as well?

MR PICKFORD: Yes. Yes.

MS ROSE: Okay.

MR PICKFORD: But something that is important here, in our submission, is that the changing business model bit of that is potentially a slight red herring because -- I am going to come on to explain why. I'm not expecting the Tribunal will see that from 439 on its own.

One can see that the mere fact that someone comes along who has their business arranged in a particular way and needs to make some alterations to fit in with Google, and then ultimately does the same thing as Google is doing, we say that is sufficient to satisfy non-discrimination. Because they may have come from a different place, so the mere fact that they had to change to avail themselves of the Remedy isn't really

the issue, it is how they are treated under the Remedy.

And I think that might be at the heart of where me and Mr Moser differ, in that I think they seem to be saying -- at least we understand them to be saying -- that any change by a CSS in order to come within the scope of the Remedy means that the Remedy must be problematic. If they are saying that, that is a problem.

MR JUSTICE ROTH: I have to say, I think this is rather more limited than what you are saying. This is one of the however many, six, I think, answers to an argument advanced by Google.

MR PICKFORD: Exactly.

MR JUSTICE ROTH: Which is 402.

MR PICKFORD: Exactly.

MR JUSTICE ROTH: Google was saying to the Commission there is no discrimination, but one of the things they said is: well, any competing CSS could benefit from the same positioning because they can participate in -- they are eligible to participate in Google Shopping. The answer is: no, they are not eligible, as they stand. That was really a response to your argument which is summarised at 405, isn't it?

MR PICKFORD: Exactly. That was going to be my submission, Sir, that actually when you see it in context, it is

a very limited point responding to -- it is a counter about discrimination. It would be clearer if at the end of the first sentence it had some additional words, which said, "whereas Google's CSS did not have to do so". That is really what it says. So:

"[C]ompeting comparison-shopping services are not eligible to participate in Google Shopping, unless they change their business model by adding a direct purchase functionality or acting as intermediaries for placing merchants' paid product results in the Shopping Unit."

Then I would add: "whereas Google's CSS did not have to do so".

That was the discriminatory treatment. When you read it against 402 and 405, as, Sir, you had rightly pointed out, the limited nature of what is being discussed here becomes totally apparent.

Just one effective footnote to that is that one of the points that has been made by the Claimants in, as I recall, in their pleadings is they say: oh, you are turning us into intermediators and that's a bad thing. We say: it is inherent in the very business of being a CSS that you intermediate. You intermediate between users on the one hand and merchants on the other.

If one were to look, for example, at recital 191 of the Decision on 640, which explains what being a CSS

involves, it is very clear it is all about intermediation. So the complaint that they say they are going to make, because it is one of their pleaded complaints against us, but they are now just being made to intermediate, does not take them anywhere, because we are also intermediating. It is what one does.

So if the Tribunal would like to go to it, the reference is page 640 of the bundle. This defines what comparison shopping services are.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Okay. So I have nothing further that I need to add on that point because I think the Tribunal has the point about the limited scope of what 439 is actually directed at.

If I may then, there is one final issue on meaning that was canvassed by Mr Moser, and that is about -- at least in part, and that's about counterfactuals and potential effects.

MR JUSTICE ROTH: Yes.

MR PICKFORD: And in our skeleton argument, we picked out at paragraph 19 -- you don't need to turn to it -- but a selection of recitals where we said this issue particularly bit, but in fact, on reflection, it is actually an issue that pervades the meaning of the whole section of the Commission's Decision that covers traffic

diversion and potential effects.

Indeed, there are a couple of summary recitals as well which, strictly speaking, are outside that section, which are 341 and 342, which also are affected by it.

The basic point is this: in the Decision, as Mr Moser emphasised, the Tribunal looks at effects on traffic. There are two aspects of that. There is --

MR JUSTICE ROTH: In the Decision?

MR PICKFORD: In the Decision.

MR JUSTICE ROTH: The Commission, not the Tribunal.

MR PICKFORD: I beg your pardon, I misspoke.

In the Decision, the Commission looks at effects on traffic and the reason why -- and there are two aspects to that. It is looking at increases in traffic to Google and it is looking at reductions in traffic to rival CSSs, and it puts those together and it calls that the diversion, the traffic diversion.

The context is it is doing that, it is all leading up to its analysis of potential effects. It is the ground work for saying: we think there will be potential anti-competitive effects here.

There was in relation to that before the General Court and the Court of Justice a major appeal point about what the right counterfactual should be in that context; that is when considering potential effects.

We said: well, there are a number of possible counterfactuals and one of them is that we display the box, but -- sorry, we don't display the box anymore, but we do keep applying algorithms. Just as I was explaining this morning, it would have been a lawful thing for us to do.

What the Court turned round -- both the General Court and the Court of Justice turned around and said to us is: in the context in which the Commission was analysing this question, namely potential effects for the purposes of establishing an abuse, a permissible counterfactual would be to take both bits away. So when they are looking at effects in that context, we are going to imagine the real world compared to a world in which not only is there no box, but also there are no algorithms. That is going to be our comparison for the purposes of considering potential effects.

Now, we lost on that argument. We say: no, that's the wrong counterfactual. But we lost. The point where this all goes here is we say: okay, we have to put our hands up on that.

But that was a discrete question about effects in the context of potential effects for that part of abuse. It is not answering the same question that this Tribunal is going to need to answer in Trial One, which is: what

was the damage caused and what is the counterfactual for assessing the damage that was caused by the unlawful conduct?

What we say in that context is that that's an English law question, which whilst related to the EU law question, is ultimately a separate one and, therefore, the Tribunal is not going to be bound by the counterfactual analysis for the purposes of potential effects when establishing an abuse.

So that is the context for this. That is where it's going and that is why my learned friend and I have very different positions on it, because we are both anticipating where the Tribunal is going to go in Trial One.

MR JUSTICE ROTH: But if you are right on that, then that's a separate point from binding recitals. It is a binding recital in the context of showing potential effects which --

MR PICKFORD: Yes.

MR JUSTICE ROTH: -- is critical for the Decision because if there is no potential effects, there is no infringement. What you are saying is for the purpose of potential effects and it is binding -- or I think you are accepting that, in the context of submission that what you wish to argue is that when it comes to the

counterfactual trial, that should not be applied.

MR PICKFORD: Yes.

MR JUSTICE ROTH: So I'm not sure that is actually what we are -- that is a much wider point, as it were, than looking at binding recitals in terms of the submission.

MR PICKFORD: It is not a question about bindingness but it is a question about meaning. Because the reason why it is here and why I'm standing up making submissions on it is because in the overarching submissions that were submitted by the Claimants back in December, on 10 December, with their schedule, they said to the Tribunal: by the way, there is a big point here; obviously some of this is for Trial One, but, you know, there is a point here about the meaning of this Decision and effects.

We responded saying: you've got to be very careful there, the Decision is only talking about -- when it talks about effects, it is talking about it actually in a very precise way and it is only talking about effects for the purposes of potential effects for the purposes of unlawfulness. It is not talking about the right analysis of effects for the purposes of a damages causation analysis.

So that is where this debate began.

All I really need to ensure to protect my client's

interests is that wherever there is a binding recital about something to do with effects, we have effectively footnoted it saying: of course, this is only binding as regards the analysis that the Commission -- I will get it right -- the Commission carried out for the purposes of potential effects for demonstrating abuse. It is not a binding finding in any further context.

As long as the Tribunal today isn't deciding otherwise, then I effectively have achieved my aim, because we want to have that argument in the future.

Obviously I'm not shutting out Mr Moser in Trial One from saying: no, Mr Pickford, you are totally wrong, they are the same thing; they are the same counterfactual and, therefore, night follows day.

I don't want to have that argument now, but I'm just saying, likewise, we should not be shut out of being able to make that point in the future.

MR JUSTICE ROTH: Yes. Pause a moment. (Pause)

Yes. Well, unless Mr Moser is going to contend that, we are bound by the Decision to apply this in the same way. By virtue of the Decision itself, it does seem to us that this is an argument for Trial One and that you are accepting, as I understand it, that it is binding in terms of showing a potential effect.

MR PICKFORD: Yes.

MR JUSTICE ROTH: But when we look at the counterfactual, it does not necessarily read across, and whether it does read across or not is something you can argue about in Trial One.

MR PICKFORD: Absolutely. Yes.

MR JUSTICE ROTH: That does seem to us -- of course, we have not heard from Mr Moser. What I asked Mr Moser, I was slightly puzzled in this regard why you say that -- looking at the Remedy -- and this is looking at it in a sense to the Remedy -- that you accept 697 and 699 are binding, but not 698. I would have thought 698 sort of goes with them. And I can't understand why we are arguing about 698 -- I am sorry, Ms Riedel pointed out to me, it is not you, it is the Claimants who say it is binding -- yes, well, that is for Mr Moser.

Yes, Mr Moser, are you content with that course? Because it does seem to me this is more about how one can approach a counterfactual in an English damages claim.

Reply submissions by MR MOSER

MR MOSER: (inaudible) Content…. The reason that this arose is as my learned friend described, that when we had the hearing before, Sir, you alone last year, we detected Mr Pickford had made a remark along these sorts of lines, and counterfactual was going to be very important

and so on, therefore we detected this was an issue that Google was interested in.

I suppose one immediately has the equal and opposite concern the other way, that we didn't want to be shut out from arguing what the correct counterfactual was. It is surely obvious that the Commission didn't make an out-and-out finding as to the counterfactual at all on effects or otherwise. There is no recital that says "and this is the counterfactual".

We have, of course, the Court that talks about what the correct counterfactual is, and my learned friend took you to that, which was in paragraph 245 of the CJEU judgment. That was that the absence of both practices, as they put it, both the promotion and demotion practices, has to form the correct counterfactual.

We rely on that, quite heavily. That is not to do with the bindingness of the recitals. So on the basis that neither side is locked out from arguing what its respective counterfactual is, we have given you a pretty clear preview about what we say about the counterfactual.

They say: look at *Deutsche Bahn* and *Otis*, somehow because there is a mention in passing about causation and loss being for the national court, that means there is a different counterfactual in the national court than

in the European courts. We say that is nonsense, with respect -- or not so much respect -- there is only one counterfactual and it is going to be the same.

I can see that it is more refined in my learned friend's point today, that it is, well, this is a different counterfactual if you are just looking at potential effect and actual effect. It is a distinction without a difference. I'm going to submit when it comes to trial, that it is going to be the same.

Other than making all of those points, we have been frankly similarly baffled as to why quite such a lot of real estate in Google's arguments have been spent on the counterfactual. But it is overt now in relation to what my learned friend describes as his meaning submissions, his four submissions on meaning. I finally divined what the meaning of meaning is: it is a synonym for what I have described as 'things I want to flag up because they are going to happen and come out at trial'.

To that extent, we have been doing similar things, although my learned friend did it more fully and he had a couple more than I had identified.

But with all of that having been said, the question of the counterfactual is not for this hearing. So there isn't very much more to say. I notice it has barely been linked to any particular recital. I'm going to

come on to such recitals as were mentioned, but the counterfactual point does seem to be rather free-floating above any of the recitals.

MR JUSTICE ROTH: Well, I think it is the concern we have heard on the Google side that if that recital is binding, that is read across to mean that is the only counterfactual.

MR MOSER: The recital that we were looking at?

MR JUSTICE ROTH: Yes, I think so. After all, when they come to remedy, the Commission is very clear: there is no one way this has to be remedied; there are various ways it could be remedied, as long as it fulfils the criteria that are spelt out in recital 700. So there are various ways you can have a lawful operation.

MR MOSER: Yes. Again, that is recital 698 where you question why is that one in red when everything else is in green. That is our red, admittedly. Again, it is what my learned friend would call a "meaning point". We are concerned that 698 is not used as a launching pad for them to say: well, our Shopping Remedy is lawful because the Commission has told us that there is more than one way in conformity with a treaty of equal treatment et cetera, et cetera.

MR JUSTICE ROTH: That does not in itself make any particular remedy lawful; it just says there is no one

unique permissible remedy.

MR MOSER: Indeed. In which case, like Mr Pickford, my job is done, if that is an accepted limitation of 698. It is probably unhelpful to the Tribunal, but in the nature of most of the points that were discussed on this opening today, again, as meaning or flagged up, that a lot of this is defensive stuff of the parties sensing the other side is overinterpreting a recital, and is saying, for instance: oh, look at 698, that means our Remedy is fine. It of course does not mean that, but in the lead-up to this, both parties, I think, have been exceedingly cautious not to over-agree in case they agree to something which comes and bites them at trial.

Now, it has been aired, I probably don't have to come back to recital 698 ever again.

MR JUSTICE ROTH: Yes. Well, that is helpful, but I don't think we need to spend more time on the counterfactual point, on that basis.

Submissions by MR PICKFORD

MR PICKFORD: I am very grateful, Sir, in that case.

It then simply remains, I think, for me to respond to Mr Moser on the general principles that one applies to bindingness.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Then we can get stuck into bindingness.

So probably the quickest way of covering those is if we go to our covering submissions, which are in the A1 bundle, tab 3, at page 415. It is paragraph 12 where we set out what we understand to be the principles that are common ground. They are taken unashamedly from *Trucks*; we tried to synthesise a number of paragraphs there.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So the Tribunal's essential task is to identify what has actually been decided, either in the operative part, which is to be interpreted with the aid of the recitals, or a recital which is an essential basis or provides the necessary support for the operative part.

Then there is the two limbs on which I think we are agreed at 12.3; it either needs to be the operative part is itself unambiguous, in which case a recital may help resolve ambiguity. And we had an example of that kind of recital that I was just discussing with the Tribunal before.

Then alternatively -- and this is by far the majority of all the recitals -- it needs to be the essential basis or necessary support for the operative part. Essential basis and necessary support mean the same thing. It won't constitute an essential basis or necessary support for the operative part if without the

recital, the conclusions as to the nature, scope and extent of the infringement are substantiated by other recitals.

It is in this context that there is then reference in *Trucks* to recitals that constitute -- actually, the quote from *Trucks* is evidence -- indeed illustrative evidence, which weren't binding in that case, because there were a number of examples of reasoning and evidencing in the *Trucks* case for many of the recitals, each one of which was not of itself necessary because if you struck through that recital, the decision would still stand.

There is a long quote there from an exchange -- well, it is from the *Trucks* decision and it references an exchange that, Sir, you had with Mr Ward KC. The point that he was making is: well, isn't that a bit odd because if there was one single fact that the decision relied on, that would be binding; but if you got a range of them, and you can delete any one of them, then each of those will not of itself be binding?

The answer the Tribunal gave was: you can see it has some force, but ultimately that's the nature of the exercise. That is how one determines what is necessary as to take from what is not necessary, and therefore what is binding as distinct from not binding.

So those are the principles we draw from *Trucks* and we say it is helpful, given those principles, to analyse the recitals in the Decision in three tiers. There are --

MR JUSTICE ROTH: Just before you do that, if I may, the Claimants have set out, sort of, their version of the principles they draw from *Trucks* in their skeleton.

MR PICKFORD: Yes.

MR JUSTICE ROTH: You did it in your submissions, they have done it in their skeleton argument at paragraph 8. Not surprisingly, there is rather a lot of overlap. They have added some additional ones, if you like, so that the operative parts include the article on fines. It would be helpful to know if there are any of those that you take issue with.

MR PICKFORD: Can I come back to you on that? I mean, I think the general position is we broadly accept their submissions there, but I think before I commit to every word, I would like to review it in detail.

MR JUSTICE ROTH: Perhaps tomorrow -- it would be helpful to us to know what principles are common ground.

MR PICKFORD: Yes.

MR JUSTICE ROTH: That is always useful. If you could look at it overnight, it won't take you very long.

MR PICKFORD: Thank you very much, we will do that.

So the point that I was about to make is that against the principles that are set out in *Trucks*, we say it is actually quite helpful to do what we have done, which is to take the tripartite approach.

So, firstly, there is absolutely no dispute that a first order recital -- that is text that effectively finds itself in the operative part -- is binding. Quite plainly, it is, because if you took that bit out of the Decision, the whole thing would fall apart straightaway.

There are a number of examples of that. I don't need to particularly detain the Tribunal going through them because it is common ground that they are there. But as an example, Google was dominant in the relevant national EEA markets for general search services. recital 271 translates directly through into the operative part; that it abused that dominance in the way that is described; it translates through -- 344, it translates directly into the operative part, et cetera.

So there are those three ones which are mixed findings of fact and law. All of them have a legal element to them because all of them are basically ticking off a box on the constituent elements that the Commission would have had to prove in order to create a legally valid decision.

Supporting those, there are then second order

findings that are directly necessary to sustain each of the first order findings, and therefore also provide the essential basis for the operative part of a decision.

Now, those are all findings of fact. Actually, I have just thought of -- there is the occasional exception where there is a legal proposition which, arguably, you would need, but for the vast majority they are findings of fact; they are not mixed findings of fact and law.

The example would be if we consider the Commission's first order finding, that Google positioned and displayed its own CSS more favourably than its rivals, that is sustained by a second order finding about what more favourable treatment actually amounted to. And I was discussing in particular with Ms Rose, but the Tribunal generally this morning, what that was. It was a combination of two elements. The demotions -- sorry, I adopted Claimant language there -- the algorithms and the showing of the privileged boxes that weren't subject to those algorithms.

Then one gets to a third order category of findings, which is where pretty well all of the dispute between the parties lies. Those are made up of, in each case, a variety of reasons and evidence that support the second order findings. As a general rule, those are not

themselves binding. There may be exceptions where one needs to have regard to those in order to clarify or understand something that is ambiguous -- and again, we discussed some examples of that a little earlier on -- but in general, wherever there are a series of reasons and evidence that are said to support the core fact that is the second order finding, they are not binding and one can see that because you can apply a thought experiment.

You look at the recital and you say: well, if I took this recital away, would there be sufficient basis for this decision still to stand? As long as there are other reasons and other evidence there that support it, the answer to that is "yes", and therefore it is not a necessary part.

MR JUSTICE ROTH: If you took them all away --

MR PICKFORD: If you took them all away --

MR JUSTICE ROTH: -- then the second order finding would fall down.

MR PICKFORD: Well, if you took them all away --

MR JUSTICE ROTH: There would be no basis for it.

MR PICKFORD: My preliminary answer for that is you are back in the discussion you, Sir, had with Mr Ward that that isn't the test, that one has to look at them individually. If that is wrong, and you say, "Aha, well

looked at individually, this recital is not necessary, but looked at in conjunction with 30 other recitals and the second order one that is above it, together they are all necessary", then one gets into a world of contingent bindingness, which -- I'm not urging the Tribunal to go there, but it is the logical consequence of, in my submission, diverging from the approach that was adopted from *Trucks*, which was to look at whether each recital on its own was necessary, because what happens then is you have to say: well, in relation to each of these 12 reasons that were given, none of them is individually binding.

It is true that had Google brought an appeal which challenged every single one of those and the point above it, that would have been an admissible appeal, but --

MR JUSTICE ROTH: That --

MR PICKFORD: An admissible appeal. Sorry. But the implication of that is that if you are not content with the question only being posed by reference to each recital individually, you do, in my submission, get into contingent bindingness because the answer then is this.

The Tribunal would be -- say you have 12 different reasons in evidence that all support a second order finding, the Tribunal would be quite free -- would be quite free to make findings that were inconsistent with

any one of those, indeed with any combination of them, apart from all of them.

So what it couldn't do is find that every single sub-reason was wrong and make a finding itself in the damages claim that cut across every single one of those reasons. Because arguably, in that situation, it would be totally cutting away the support for the second order finding and, therefore, the support for the operative part of the decision.

But in my submission, that's a very complicated -- that's a complex way of looking at matters, which is not how the Tribunal has ever approached it before and I am not urging it on the Tribunal, but the answer -- it is the logical answer, in my submission, to: well, what about if you took them all away?

MR JUSTICE ROTH: I think *Trucks* was very different. What we were dealing with with *Trucks* was a settlement decision, so the Commission could state its general proposition and just give an example.

MR PICKFORD: Yes.

MR JUSTICE ROTH: So the examples were not the necessary foundation for that because it wasn't having -- it didn't have to prove its primary finding because it was accepted.

MR PICKFORD: Yes.

MR JUSTICE ROTH: So no one can say this example is not binding because that is not the sole basis it is relying on to support its conclusion. It is basically relying on the fact that the offending parties were not challenging it.

MR PICKFORD: Well --

MR JUSTICE ROTH: That was the position in *Trucks*, which is why the *Scania Trucks* decision is written in a completely different way, but here if the essential basis means even in the first order -- sorry, the second order findings there may be three or four supporting the headline finding, I mean, you accept that they are all binding.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I'm not quite sure -- I understand what you mean by the third order, but why is it then a different test? If they are just illustrations or put forward as examples, then that, I can see, is not binding, but if it is -- it is more than that. It is actually a self-standing finding, which is a pillar of the second order finding to say, "Oh, well, we could take away that pillar, there would still be three other pillars". You go through that exercise with each of them and say, "Well, you could take away the second pillar, the first pillar is still there". Therefore,

the second pillar is not binding on the third pillar, you take that away and the second pillar is still there, so the third pillar is not binding. You pretty much exclude anything from being binding on that basis.

MR PICKFORD: Well, with respect, Sir, not in relation to all of the core factual findings that are the ones that support the -- that support the first order findings. So all the findings against Google having favoured itself, what the essence of that favouring was, et cetera, those are all necessary.

And the answer -- my point does not depend on there being a number of them, it depends on whether they are conjunctive or whether they are alternative. So if there are five elements, all of which are needed to get to the next stage in the analysis, well, then, they are all binding. If, however, there are five elements and any one of them would do, we have five answers -- the Commission says: we have five answers why you are wrong, Google; here is the first answer why you are wrong; here is the second answer why you are wrong. Et cetera. Then it does not need all five, one would do, and in that situation those five answers are not all binding.

That reflects what would happen, in my submission, in an appeal to the Court because what one sees repeatedly when one attempts to appeal to the General

Court -- and indeed you see it in this very case, we will come to examples of this -- is unless you as an appellant have been sufficiently careful to mop up every single recital that you -- that arguably goes to support some finding, then what the Court often turns round and says to you is: very interesting that you have got a complaint about this recital or that recital, but your complaint is in effective because you have not challenged the third one; so even if you are right on the first two, well, the third one still exists, therefore there is still support for this finding, therefore you lose -- and in particular, therefore your appeal is not an effective one --

MR JUSTICE ROTH: Yes, but you could have challenged the other finding.

MR PICKFORD: Yes.

MR JUSTICE ROTH: You could have. So it was capable of being challenged.

MR PICKFORD: Yes, but that comes back to my contingent bindingness point -- again, stepping back and asking yourselves: why do we care about any of this? The reason why we care about it is because it is giving effect to the obligations of the Tribunal pursuant to Article 16 of Regulation 1 of 2003; that is that it can't take a decision itself running counter to

a decision of the Commission.

We have to extract therefore what is binding here, so if the Tribunal were to do something that is so fundamentally different, it is actually basically tearing up the decision. It is doing something that just can't be reconciled, versus what is not binding and -- because even if the Tribunal were to reach a different answer on one sub-issue out of five, it doesn't matter, it is not striking at the heart of what the Commission did, the Commission's decision would still stand, notwithstanding that the Tribunal has decided that actually one of the Commission's reasons was a bad one and they have decided otherwise.

MR JUSTICE ROTH: But we couldn't decide that all five reasons were wrong.

MR PICKFORD: Correct. Correct.

MR JUSTICE ROTH: So which one of the five remains? Or is it your choice? It is Google's?

MR PICKFORD: No. Respectfully, when, Sir, you had this debate with Mr Ward as recorded in the *Trucks* judgment, what we infer from that -- you may now be telling me you actually meant something different -- but what we infer from it is -- what the Tribunal said was: yes, if there is one single meeting, if there is one single cartel meeting, that will be binding, because if you struck

that one single cartel meeting away -- and that was the whole thing, then the decision falls down.

That wasn't based on saying, "Aha, but because this is a decision -- a settlement decision, we don't need to go into any of the sub-strata", the reasoning there in that section, I would submit, is that because there is only one of them it is of itself necessary, whereas when you have a number of different pieces of evidence, indeed, illustrative evidence, then they are not.

So what we draw from that, from *Trucks*, is that actually it does depend on whether it is necessary because if you struck it through, the decision would fall; or whether it is not necessary, because if you struck it through, the decision would still stand.

That is at the heart of the vast majority of these arguments.

If the Tribunal accepts that my learned friend is right, then we say, actually, the logical implication of that is that basically everything becomes binding. The only thing that could not be binding on that view would be if the Commission included totally irrelevant findings in its decision. Anything that it found that was utterly irrelevant, on any view ever, that would be nonbinding because it wouldn't take you anywhere.

MS ROSE: Mr Pickford, so just going back to *Trucks*, that is

a settlement decision.

MR PICKFORD: Mm-hm.

MS ROSE: The key passage we were looking at on page 416 quoted in the skeleton argument, in the submissions.

MR PICKFORD: Yes.

MS ROSE: The point that is made at the top of page 417:

"Once the general position as set out above is established, these details are essentially evidence, and indeed merely illustrative evidence, in support."

Isn't the point that the infringement, the cartel, is established by the omission of an infringement over a particular period, and in that situation the individual meetings are simply illustrations of particular conduct that the parties engaged in?

The nature of the infringement and the duration of the infringement are established by the admission that is part of the settlement. Now, that is fundamentally different, or is it, from the situation we are in here, where Google are disputing that there is an infringement and, therefore, the Commission has to prove every element of its case?

And, for example, in proving that there is an abuse of dominance, it has to prove that Google is favouring its own service in the particular ways that are identified, and it has to prove that by establishing the

facts necessary for each element of the infringement.

Now, once you get into that situation, every pillar is essential, because otherwise, don't you get into the position that the Chair put to you, which is that if there are five sub-reasons why Google is favouring its own service, and you say all of these five are merely evidential and none of them is binding, then it must be -- it must logically follow that the Tribunal would have the power to overturn all five?

MR PICKFORD: Well --

MS ROSE: But that would be a clear breach of Article 16, so that can't be the right answer?

MR PICKFORD: So my answer to that is the implication of *Trucks*, in my submission, is that the Tribunal would have the power to overturn --

MS ROSE: But it is not, though, because *Trucks* proceeds on the basis that the infringement is already established.

MR PICKFORD: There are two factors that are relevant. In that paragraph you referred to it is true, as set out in the beginning, that it does say that once the general position is set out above as established, these details are essentially evidence.

Further down, that paragraph that we have quoted, there is then the question about, well, what about if there is just one item of evidence versus a number?

What the Tribunal says there is: we see some force in that complaint, but the reality is that here, the Tribunal is bound by the findings set out above which apply for the entire period.

By contrast, for a single meeting cartel, the finding as to that meeting is not an illustration; it comprises the foundation of the infringement and for a national court to find out the meeting had a different character, et cetera.

Our understanding of that is that it is contrasting when something is necessary versus when it is not necessary. That is when one has several possible supporting pillars, each one -- if there were five possible supporting pillars and each one gets you home, none of them is individually necessary.

My submission is if *Trucks* isn't right, so if the answer is not in *Trucks*, then actually it does become a question of contingent bindingness; that is, the Tribunal would be free to depart from a number of the supporting recitals, but it could not depart from all of them.

It is not a very neat answer, but it is the logical one, in my submission, to your question.

MR JUSTICE ROTH: Yes, I think you are reading a bit more into *Trucks* than it was intended to be holding. Apart

from anything else, one can't read a judgment like a statute. I think the point there was the Tribunal -- the Commission said there was this infringement over this long period through a series of meetings and then it says, for example, there was this meeting. So it didn't prove that there was an infringement over a long period by a series of meetings; it didn't set out to prove that. The quoted meeting was just an illustration, therefore that illustration in itself was not binding.

If the Commission had had to prove it and set out seven meetings as being the sole basis from which it was finding that there was a series of meetings over this long period, the outcome might have been very different. And it wasn't a question we had to address. So I think you are taking that too far, as Ms Rose, with respect, quite rightly emphasised. The reality is here, and "here" was a very important word because that was the nature of the decision. So I'm not sure that helps us.

I take your other point that if one was to appeal just one, the General Court might say: well, no, you can't appeal that, it is not relevant because there are the other five reasons. But I think that makes it -- why it is difficult to deal with this at sort of metaphysical level of conception, and that it may be

easier to grapple with when we actually look at the recitals at issue, because in some cases I think -- and I obviously haven't heard argument on them -- some of them do seem to me to just be illustrations where your submissions have force; others do seem to me really are -- there may be alternative building blocks, but they are still building blocks of what you call the "second order findings".

It will become perhaps easier to grapple with this point when we actually look at the particular recitals, as opposed to trying to deal with it at a conceptual level.

MR PICKFORD: Well, it might, although respectfully, I would say if our approach is not the right one, then it is very difficult for us to see what the coherent -- where one draws a coherent line -- where one divides between what is an example and what is an alternative support, because in my submission those really amount to the same thing.

If you have three things that are alternatives, or you have three things that are all examples, and each of them in each case they are said to support some point above them, analytically, I would respectfully suggest those are the same thing; therefore, one does not have, in my submission, a coherent basis for dividing between

what is binding and not binding. That world effectively leads to everything being binding because everything, arguably, that isn't totally irrelevant has a relationship with and sits underneath something else in the decision.

So that is the problem with that approach. I can see why contingent bindingness is not particularly attractive. Given that the Tribunal does not like my answer on *Trucks*, which is -- well, that wasn't the -- what I have suggested is the *Trucks* answer isn't the *Trucks* answer. I say that is where we go. That is ultimately where this analysis leads, because of the point that I made earlier: what are we concerned about here?

What we are concerned about here is the Tribunal not doing something which ultimately is tantamount to saying the Commission made a finding of infringement, but we have done so much damage to this Decision that we have actually ripped up a constituent element of that finding of infringement, and strictly speaking that finding of infringement could not have stood, given the other findings we have made.

MR JUSTICE ROTH: The other difficulty is really knowing whether findings are alternative or cumulative. As you say, as with any judgment, we reach this conclusion for

four reasons. It does not mean that therefore if you take one away, you would get to the same result from the three reasons because some have greater weight than others.

MR PICKFORD: Well, there is an example where the Claimants criticise us because the Commission says in the first place this, in the second place that, and we accepted those are binding. They say: hang on a minute, you have accepted those are binding, but that's the sort of formula you generally turn around to us and say is nonbinding. The reason for that, in that example, is because we think those two recitals go hand in hand and they are not really separate points.

It is true that one might argue actually when there is a list, they are to be read together rather than separately. That is not ordinarily the approach that we have taken and it is not our understanding of the way the Decision is constructed, but I agree that if I am right on my approach, one does still need to ask that question: are these cumulative or are they separate?

MR JUSTICE ROTH: Well, we have your point, and we understand the point.

MR PICKFORD: The only point on bindingness you were taken to was footnote 3 -- I think I have already covered footnote 3 -- we say it can't be binding because it is

inconsistent with later recitals that are binding, which are 408 and 412. I can go back over the detail of that, if that would help, but I fear I may be --

MR JUSTICE ROTH: Although it is intended -- it may not be very well expressed, it is intended to be a sort of interpretive key to the whole of the Decision.

MR PICKFORD: Well, it is. I mean, it is obviously a somewhat idiosyncratic point to begin the exploration of bindingness, because whilst we don't say that a footnote is of itself incapable of being binding, it is not where you would expect to find the core constituents of a decision.

The problem with it is that, with respect to the Commission, it is not a well checked footnote because, for a start, it includes references to section zero. Obviously, that goes to show that it was not well checked.

Secondly, it -- read on its face, it says that Google's CSS was on the page, effectively, is what it is saying. If I can bring it up.

MR JUSTICE ROTH: Yes.

MR PICKFORD: That just cannot be right, because 408 and 412 disclaim that. They say: our case is not that the CSS was on the page; our case is that you, Google, favoured your CSS through the two conducts which I keep telling

you about, namely links to it and putting results from it on the page.

So footnote 3 just can't be right. The reference to all of these, the CSS, is simply inconsistent with 408 and 412, therefore it can't be binding because it would be madness if -- even if it was purporting to be definitional, a footnote that was wrong and inconsistent with binding parts of the Decision were itself also binding --

MR JUSTICE ROTH: Yes.

MR PICKFORD: -- you wouldn't know which bit to follow.

I think that's it for an introduction to bindingness, because I think thereafter -- I don't think Mr Moser has generally developed points. There are a few points on market definition, but they are probably better, I would say, if we came to them in sequence -- I mean, I was imagining from now on --

MR JUSTICE ROTH: Yes.

MR PICKFORD: -- we would take section by section, in sequence, and you would hear from --

MR JUSTICE ROTH: I think that's exactly right. So that's a convenient moment then to take our break. We will come back at quarter to 4.

(3.36 pm)

(A short adjournment)

(3.48 pm)

MR JUSTICE ROTH: Yes, Mr Moser.

Submissions by MR MOSER

MR MOSER: Sir, the position we find ourselves in is that I opened on two matters, namely combination abuse and CSSs appearing as a SERP, and in particular the question of CSSs appearing on the SERP. My learned friend -- and I make no criticism of this -- has used it to expand it, as he said he would, into all of the matters that he has described as the meaning section of his skeleton argument. I submit that I will need to reply to some of those points --

MR JUSTICE ROTH: Well, the two points that he expanded it to, one was about changing the business model and the other was the counterfactual. The counterfactual, I think we have discussed and agreed that is not necessary to develop --

MR MOSER: Yes.

MR JUSTICE ROTH: -- because we are only going to say that this was binding for the purpose of establishing a potential effect in the Decision. But the question of whether that reads across to the counterfactual for a damages action is for Trial One and you are both free to argue the point. This does not cut you out, either of you. So you need not spend time on that. So it is

only the small point about the unlawful which is really one recital, I think, it is 439.

MR MOSER: It is one recital, yes, but there are -- just a couple of things. This is, I suppose, going to be a question of the procedure for all of these, so I address a section, my learned friend then makes his points about it; to what extent am I permitted a short reply on that?

MR JUSTICE ROTH: I think you are. That is the normal course. It seems to me that where it is the other -- in a sense, where it is the other way around, which is there are a few recitals that Mr Pickford says are binding and you say are not, it is probably sensible to reverse the process for those.

MR MOSER: Sir, yes.

What I would like to do is I would like to say just a very short thing in reply on what was just said on the law on bindingness.

MR JUSTICE ROTH: Yes, if you have general points on what approach we should take to bindingness, absolutely, as that is the sort of key to where we are then going.

MR MOSER: I'm grateful. So I propose to make just some short remarks on the law on bindingness; literally a sentence thereafter on footnote 3; then a short reply on the SERP and what is the CSS -- what is the Google

CSS; and a short reply on what they say about abuse.

Then I feel I do have to deal with the point that hasn't been dealt with me at all yet, which is the change of business model.

MR JUSTICE ROTH: Yes.

MR MOSER: It may only be one recital, but I will make it as brief as I can.

So without further ado, on the law on bindingness, I just wanted to remark in relation to, Sir, your question to Mr Pickford, and he said he would go and think about it overnight, as to what he thought about our summary of the law, that it was interesting that the one paragraph that I particularly relied on in opening, which is paragraph 75 of *Trucks*, doesn't seem to appear in their conspectus of *Trucks* references. That is the one that is at page 4 of our skeleton argument at 8(g)(ii).

It also recommended itself to His Honour Judge Pelling in *Granville*, and we have cited that at the top of page 6, which is the end of paragraph 10. I hazard that what my learned friend might not like is the bit that says:

"... necessary to interpret the operative determinations in the Decision ..."

As well as the bits that say:

"... scope and extent of the infringement."

It rather cuts across their somewhat minimalist reading.

MR JUSTICE ROTH: Well, why don't you wait and see what --

MR MOSER: Yes. Now, in relation to the discussion that happened between you, Sir, and my learned friend, Mr Pickford, about the discussion that had happened earlier in another case, between you and Mr Ward KC, two problems with that. I can take it briefly because, in essence, I'm going to agree respectfully with some of the things that were said from the panel.

My learned friend's difficulty is that once he has conceded the principle of what he calls the "third order finding" can be binding, then he gets into all sorts of difficulties as to how he delineates between different parts of the third order, other than by a recital-by-recital look at it and applying the actual reading -- the actual meaning of each recital.

It is not an appeal, although it is perhaps revealing that my learned friend sees it through the prism of an appeal, because this isn't a question of the Tribunal deciding anew on whatever basis the findings of fact in the Decision; the Tribunal is simply bound by them. It is not in the position of the European Court of Justice which has the luxury of saying: no, I think that's wrong; the Tribunal is simply bound by all the

essential findings of fact, not just the ones that Google likes.

There is a practical point about this, which is when one talks about what is illustrative -- and there has been the reference back to the decision in *Trucks* -- the decision in *Trucks* was talking about -- sorry, the Tribunal's decision in *Trucks* was talking about the Commission's settlement decision in *Trucks*, obviously. We have that in the bundle. What is interesting is the relevant bit -- and I just want to show you that, which is at bundle A6, tab 29, and then pages 1452 to 1453.

This is the *Trucks* decision. We see at the top of 1452, that is the tail-end of recital 54 in that decision. There is -- where the Commission is talking about the conduct, the collusive contacts at the headquarters, it says:

"... for example [for example] during a meeting on 10 and 11 April 2003."

Then it goes on about the different exchanges that had happened.

Over the page at 1453, recital 59:

"The following examples illustrate the nature of the discussions in which representatives at the German-Level took part."

So it is not only that the intrinsic nature of this

in a settlement decision rendered these illustrative examples, it is in fact expressly as illustrative examples that the Commission put this forward.

So obviously, in our case, if there were a recital where the Commission said: oh, well, here is an illustrative example, like it did in *Trucks*, that would be illustrative evidence. It isn't, so I am sorry to belabour the point, but it is not only but-also; it is absolutely a settlement point made by Ms Rose, but also the fact that actually in that case illustrative and example were baked into the decision that they were looking at.

MR JUSTICE ROTH: There are one or two instances I think in this Decision -- perhaps more -- where there are just examples.

MR MOSER: If they are just examples, then they are not binding.

MR JUSTICE ROTH: Yes.

MR MOSER: There may well be. I'm afraid we just don't follow the idea that if there are 12 reasons for something, the CAT can somehow make findings against 11 of them as long as one survives. Again, that might be for an appeal before the CJEU. That is not how Article 16 works.

It is not clear what the basis of that is. It is

going to be -- as, Sir, you pointed out, it is going to be much clearer once we look at each instance. So, for instance, if there is a recital that says there was favouring of Google, and then you ask: well, what was the favouring? Oh, there was preferential display. What was the preferential display? And then my learned friend may want to stop there, and say: well, we don't need to know that, the rest is just illustrative; and we say: no, that is within *Trucks* because it then explains what the finding is.

So there we are.

So that is all I wanted to say about the law. A micro-point about footnote 3, which was the only bit of bindingness my learned friend addressed, and he said: oh, well, footnote 3, it can't be binding because it is inconsistent with recital 412. He actually said 408 and 412.

If we remind ourselves for the last time perhaps of footnote 3, which is at page 595 of the table. What my learned friend is really now taking issue with is (ii), as I understand it.

MR JUSTICE ROTH: Yes, that's right. That is certainly my understanding.

MR MOSER: And that's the one that relates to recitals 412 to 423. He says: well, because you can't have all of

Google's own comparison shopping service on the search page, you can't say that footnote 3 is binding because it is therefore not right. I say that does somewhat overread footnote 3.

I think if one looks at the recital it there refers to, Recital 412, which is at page 732, it is completely obvious what the Commission's case is -- 412 at 732 -- "the Commission's case is not that the Shopping Unit is in itself a comparison-shopping service. Rather the Commission's case is that the positioning and display of the Shopping Unit is one means by which Google favours its comparison-shopping service", and so on and so forth.

It is followed by a variety of other recitals.

We just don't see how that is contrary to what is being said in footnote 3, that it somehow invalidates it. It is clear the Commission is going on about recital 412 and following, and it is perfectly clear that certainly parts of Google's own comparison shopping service, such as links and clicks, may appear on the search results page.

So I don't think very much more can be said about that. But the difference between us has narrowed and I say it has now narrowed to a difference that is so small that it becomes hard to see it with the naked eye.

Excuse me for a second. (Pause)

Sorry, I thought that was implicit. My learned friend expands on what I'm saying by saying -- when the Commission talks about Google's comparison shopping service, it is talking about all of the elements of it. So when it talks about parts or all of the comparison shopping service, it is talking about the links, and the illustrations and the shopping units as much as any other part of the comparison shopping service.

It goes back to the same argument as to what does it mean when it says "comparison shopping service". That is why we say, of course, it is important what "comparison shopping service" means.

And that brings me to the next bit of my reply, which is the third bit, which is about the Google CSS not being on the SERP.

It seems to be a misunderstanding, wilful or otherwise, of our case to say we allege that Google's comparison shopping service somehow appeared on the results page. It is the same overreading of footnote 3, so it is linked to the same point.

Google's own comparison shopping service is, as it were, a web page, if I can put it that way -- there will be people behind me fainting at the inaccuracy of this, but I think you understand what I mean. So the CSS as a web page obviously does not appear on the SERP because

the SERP is its own page.

As my learned friend, Mr Pickford, himself explained or admitted, both links and results from Google's CSS are there on the SERP. So the bold statement, bold and bald statement -- so when asked by the Tribunal: does the CSS appear on the SERP? No. Well, that is absolutely right, my learned friend is right to say that. But it is not the whole picture, because the fact that the CSS is itself not there is just a statement of the obvious.

The whole thrust of what we were saying is that the links and results in the boxes are there -- or were there. That is as much part of Google's CSS as anything else. That is the whole point why we felt it necessary to dwell on the definition of "Google's CSS", and it is so important.

The illustration for this, if I may -- one useful illustration may be derived from the following. This is an illustration, I say, of why it is important to understand the sense in which the Commission was referring to the Shopping Unit and the Product Universal as being part of Google's own CSS. If we look at the Decision at A2, page 12 -- well, either there or in the table which as we happen to have open, I want to look at recitals 34 and 35.

If we look at recital 34(ii), it shows us the date -- the start date of the Shopping Unit being launched on Google's domains in six countries. So we see the Shopping Unit was launched on Google's domains in the EEA as follows: "February 2013 in the Czech Republic [and so on]; and (ii) in November 2013 in Austria, Belgium, Denmark, Norway, Poland and Sweden. Google also started running a Shopping Unit experiment in Ireland in… 2016.

35 then tells us when the standalone Google Shopping website was launched in those countries. For (i) countries it was about the same time, but for (ii) in Austria, Belgium, Denmark, Norway, Poland and Sweden it was only launched in September 2016. So you have a Shopping Unit in those countries launched in November 2013 and the actual Google Shopping website only three years later.

Now, if we go forward certainly in the Decision, if we look at Article 1 of the Decision, that is -- one reference to it is A2, page 241 -- you will see that in those six countries, the infringement began in November 2013; in other words, the Shopping Unit being launched on the relevant national domain was the start of the infringement.

If you go back in the Decision to recital 422, which is either in the table or at page 125 in bundle A2, and

in the table, it is page 730 -- sorry --

740, forgive me. 740. At 422, you can see that the Commission dealt specifically with the point that those six countries have no national stand-alone website at all for nearly a three-year period: "The positioning and display of the Shopping Unit is one means by which Google favours its comparison shopping service is not called into question by the fact that during an initial period, Google Shopping existed only in the form of the Shopping Unit without an associated standalone website in six of the thirteen EEA countries in which the Conduct takes place (Austria, Belgium, Denmark, Norway, Poland and Sweden)… the fact that Google Shopping initially existed only in the form of the [SU]… was a transitional phase ..."

And so on.

The point here is the favouring by Google did not require for each EEA state a standalone website and an SU; it was enough that there was a SU diverting traffic away from competing CSSs, whether linked to a Google standalone website in another member state or straight to a merchant.

That is what we say illustrates the maximalist approach, that any aspect of this was considered part of Google's CSS ecosystem, even in countries where there

was no actual Google CSS website at all at the relevant time.

So we respectfully agree with the Tribunal's observation this morning that you need to understand what the Commission meant by Google's own CSS, because that is the key to understanding what conduct was infringing, and critically, what the effects of that infringement were; specifically, what fell to be counted as the diverted traffic.

Now, as we have already made exhaustively clear, the parties are anticipating the trial. In this case, Google is anticipating the trial and seeking to make the effects of its conduct apply to as narrow a base as possible of diverted traffic.

The Commission, while quite clear in the other recitals that the SU was not a CSS in and of itself, was clear that it was part of what the Commission told Google's own CSS. So that's just a point I wanted to add that we think illustrates it well, with respect.

That then brings one in the order of my learned friend's submissions to his submissions on abuse. I will try and take this as briefly as I can. He addressed abuse more fully than I did.

There are a number of recitals in the Decision that go to abuse. In fact, the important recitals on abuse

are, almost all of them, agreed, so that as far as deciding bindingness is concerned, you may hear relatively little about abuse.

If I can just give them to you, the Decision recitals that we say go to abuse are 344, 379, 512 to 514 --

MR JUSTICE ROTH: These are all agreed?

MR MOSER: Yes, with the exception of part of 512, which I will come back to -- 699 and 700, they are all agreed. So that is my point: we are not going to have a big argument over bindingness in relation to abuse.

MR JUSTICE ROTH: Well, most of the contested titles are in the section on abuse, aren't they?

MR MOSER: That is true.

MR JUSTICE ROTH: I mean, that's the bulk of what we are concerned with. There is a bit in market definition -- but it is in all abuse, isn't it?

MR MOSER: The basic elements of abuse, we say, are clear. Then there is an argument over how many of the further recitals are binding. But we detect, again, that the real argument over this part of the abuse definition, the 'meaning' part of the abuse definition before we come to bindingness, is about matters that will matter later on.

We have already dealt with the counterfactual.

There is also the question of the abuse if any committed by Google in the period before the Commission found that Google started the infringement -- found in the Decision. That is January 2008 in the UK and later in other countries. Because there was a standalone pre-infringement claim brought by Foundem and Kelkoo -- for those standalone claims, by definition the Decision is not binding. And there are no findings at all about abuse in the pre-decision period.

We will say -- or Foundem and Kelkoo will say -- they are entitled to prove that the discriminatory application of Algorithm A and Panda was itself an abuse, irrespective of how such results were positioned and displayed.

That's a matter for the first trial. I just want to make it clear -- as it were, the things that the parties are keen should not be cut across.

Then the post-Decision standalone claims brought by the Claimants that started in 2017 --

MR JUSTICE ROTH: Well, we know there are some standalone claims and they are obviously not -- therefore binding recitals are not directly relevant to that.

MR MOSER: No, but that is why you hear from the parties about the counterfactual that the question of the Remedy and what the Remedy has or hasn't solved. I just wanted

to draw attention to the fact that these other claims do exist.

MR JUSTICE ROTH: Yes, we know that.

MR MOSER: In relation to the post-2017 claims, it is the same infringement because what the parties say there is: well, the abuse continued because the compliance mechanism doesn't work.

I have already addressed you in opening on our point on all of this, which is that we say how they read these recitals is based on a logic of fallacy, that just because the Commission chose to investigate and found an infringement in relation to a combination of two practices does not mean --

MR JUSTICE ROTH: We have that one.

MR MOSER: I'm not going to belabour that point. We are no doubt going to hear more about it tomorrow. So that is really all I wanted to say in relation to the abuse point today.

I notice the time --

MR JUSTICE ROTH: Well, we can sit until 4.30. Shall we make a bit more progress?

MR MOSER: Yes. In which case, my learned friend has also raised -- and unless I am corrected, I think this is then the last point on meaning -- the question of the change of business model.

MR JUSTICE ROTH: That's right.

MR MOSER: And here, what we are talking about is the meaning of recital 439. If I can remind you of that, please, it is in the schedule at page 750. It looks like it is happily agreed; it comes up in green. But then you have all of the comments as to why the parties disagree as to its meaning. It is important, we say, for understanding the abuse. It is relevant, of course, eventually, to the counterfactual and all the points I have just made, which are going to come up at subsequent trials.

It states as follows:

"Fifth, competing comparison shopping services are not eligible to participate in Google Shopping, unless they change their business model by adding a direct purchase functionality or acting as intermediaries for placing merchants' paid product results in the Shopping Unit (see also 220(2) on the eligibility criteria for Google Shopping). Indeed, the examples that Google gives are only of comparison-shopping services that have changed their business model in one of the ways described above."

What the Commission was doing there was responding to an argument made by Google in its response to the SSO. It is at recital 402 -- we perhaps needn't turn it

up, but I will read out the gist of it.

The argument by Google was that it did not:

"... position and display its comparison shopping service more favourably in its general search results pages compared to competing comparison-shopping services ..."

This is, as you have observed, part of the abuse section of the Decision. Google raised four arguments in support, each of the four were rejected by the Commission in section 7.2.1.3. The third argument is set out -- and we should have a look at this -- in recital 405. That is -- it is at page 731.

So here, the third argument was that Google claimed that in any event competing CSSs can benefit from the same positioning and display as the Shopping Unit, since they are eligible to participate in Google Shopping. As the Commission explained in recital 439, that claim was misleading. The reason why it is misleading, we say, can be found in recital 220(2), that is at page 649. That is the one my learned friend Mr Pickford has already taken you to.

I understand it is now agreed it was binding. I don't want to make correspondence points. It was actually one of the matters that we asked them to consider as to whether they would not contest. But

there we are.

Comparison shopping services, we learn here, were never eligible to participate in Google Shopping and so could not be listed in the Shopping Unit boxes that were prominently displayed and positioned on Google search results page.

We see what is said in recital 220(2) that makes that good. Google allows merchant platforms, but not competing comparison shopping services to participate in Google Shopping. So you had to be a merchant platform, you had to be.

And the second bullet point:

"Google indicated to the Polish comparison shopping service… that it could participate in Google Shopping only if it emulates the characteristics of online retailers or merchant platforms ..."

Those are of course the main customers of Google Shopping:

"... by either (i) introducing direct purchase functionality, make it “look like a shop”; or (ii) acting as an intermediary for “submit[ting] items to Google on behalf of individual merchants” for display in the Shopping Unit and on the condition that the relevant landing web-page “cannot give the impression of being a comparison site.”"

So at the relevant time you had a comparison

shopping service where you could not participate in Shopping Unit -- Google Shopping because they don't sell products and they don't accept payments. So you had to change your business model. You had to either become a merchant and have a direct purchase functionality on the website, which is not allowed to look like a comparison site; or you had to become a provider of advertising intermediation services that pays ads on behalf of merchants, in which case the link would be to the merchant's website.

It is not just a question of: oh well, you had to begin as an intermediary, that is what you are. You essentially had to stop being a CSS.

The challenges of changing business model are set out in recital 240, which is at page 668:

"In the first place, as noted [above], a direct purchase functionality distinguishes merchant platforms from [CSSs]… (1) a direct purchase functionality can change the business model and nature of the service provided by [CSSs] to users and retailers to such an extent that the service may no longer be considered to constitute a comparison-shopping service, especially if the direct purchase functionality is introduced systematically for all (or the majority of) merchants and offers… [it] changes the regulatory framework… [and it] has an impact on the

relationship of [the CSS] with [its] customers."

In 4:

"[It] requires significant and time-consuming investments."

So there you have it. In the light of all of these factors, we say that recital 439, which is the recital in quo, the one that we are debating, which is at 750, has a clear meaning from its plain wording: to participate in Google Shopping -- that's the Shopping Unit boxes -- a business that operates a CSS must change its business model and stop operating the CSS and become either a merchant online retailer or a provider of advertising intermediation services to merchants.

And to the extent Google says, "You can be an intermediation provider", it appears to accept this, but without of course all of the detail I have just explained. It is simply not possible for a search result from a CSS to appear in the boxes as a CSS. So that denies CSSs traffic.

By contrast, search results from Google Shopping did appear in the boxes, and that was discriminatory and had anti-competitive effects.

So it is, with respect, misleading to say: well, they were all treated the same. They were only treated

the same if the others became something different.

That was confirmed -- that need to change business model was confirmed by the General Court in finding that Google had discriminated between product ads for its own CSS and the treatment of free generic results. And again, I'm going to -- well, I give some of the references, but if we can turn up, please, paragraph 319, which is at A3 tab 2, page 179.

At 319, we see:

"As is apparent from recital 439 of the contested decision which precedes recital 440 and from paragraph 310 above, competing comparison shopping services are not eligible for the same display criteria as Google's comparison shopping service - even by paying - to appear in Shopping Units, unless they change their business model, as is explained in paragraphs 346 [et cetera] ... below."

I will give you references, in particular paragraphs 348 and 349 -- 349 uses the words "fundamentally changed the business model" -- and 355. It is plain from the judgment and from the words, actually, of recital 439 that is exactly what it meant and what was approved by the General Court.

You don't need to read into recital 439 what my learned friend suggested earlier this afternoon, the

words, "Whereas Google's CSS did not have to do so"; it is just not necessary to understand the recital.

By the way, that is not the right approach to the exercise, in my respectful submission, because it is not the function of the Tribunal to rewrite the Decision. That would be contrary to Article 16.

And we have in our skeleton argument the words from *Merricks* that say it was the decision that was made that is binding on the Tribunal. It is not some other decision that might have been made if it had been argued differently. That is somewhere else, but I add that.

The same goes -- there is an argument from Google, I think, maybe not made today, but made in the skeleton argument, that the word "solely" should be added, acting solely as intermediaries, and the same applies. It is the same point; the meaning is plain. It can't require a competitor to change its business model in order to participate in the Shopping Unit and say: oh, everything is fine. If it does so, it ceases to be a competitor in the comparison shopping market.

That can't possibly be the correct answer when you are dealing with an abuse of a dominant position, that you say to your competitors: ah, you can take part then, but only if you stop competing with me.

There is a special responsibility of course on the

dominant firm and we say that is not met. So we take issue with the way that this is presented, and more generally that the Tribunal will be astute to be alert to what seem like innocuous changes or interpretations because, again, they could have significant implications for the future conduct of the trial.

That is all I was going to say and I note it is --

MR JUSTICE ROTH: That takes you very nicely to 4.30.

MR MOSER: So tomorrow we will plunge into the various sections.

MR JUSTICE ROTH: Yes. I know there are some discussions about how long this hearing might last. It was listed for four days. Mr Pickford optimistically thought it might be two.

MR PICKFORD: Possibly over-optimistic.

MR JUSTICE ROTH: I think if there is a chance of completing it in three, which does seem to me perhaps a realistic aspiration, then if we could start -- if it does not inconvenience anyone -- at 10 o'clock tomorrow; is that all right for all parties and their representatives?

MR MOSER: It is all right for me.

MR JUSTICE ROTH: Yes. That might assist in achieving my aspiration of concluding on Wednesday.

MR PICKFORD: Yes. I was just going to say, Mr Moser suggested we are going to jump straight into recitals,

and nothing would give me greater pleasure, tomorrow. Strictly speaking, I think I'm entitled to a very short reply on 439 because I had to open that and he has now responded to it, but I am happy to do that at any point. I don't really want to trouble the Tribunal with it now --

MR JUSTICE ROTH: Yes.

MR PICKFORD: -- because it is already 4.30. There is about two minutes' worth of submissions.

MR JUSTICE ROTH: Well, you can make your two minutes tomorrow, I think, not now, then we will plunge into the recitals.

Very well, 10 o'clock tomorrow.

(4.31 pm)

(The hearing adjourned until 10 o'clock on Tuesday, 18 March 2025)