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

Meredith Pickford KC & Luke Kelly (Instructed by Herbert Smith Freehills LLP and Bristows LLP)
on behalf of the Defendants

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Tuesday, 18 March 2025

(10.00 am)

(Proceedings delayed)

(10.04 am)

MR JUSTICE ROTH: Yes, good morning.

MR MOSER: Mr Pickford has his reply.

MR JUSTICE ROTH: Yes.

Reply submissions by MR PICKFORD

MR PICKFORD: Mr President, members of the Tribunal, I was going to just briefly reply on recital 439 that Mr Moser addressed at the end of yesterday.

MR JUSTICE ROTH: Yes.

MR PICKFORD: In my submission, it is revealing that Mr Moser resists my suggestion yesterday that one needs to read --

MR JUSTICE ROTH: Pause a minute. Again, we are not getting our transcript -- (Pause)

I think you can continue for the moment, but we will get it resolved.

MR PICKFORD: Thank you, Sir. I am just trying to get mine going as well. Someone might have to help me in a moment.

MR JUSTICE ROTH: You say it is revealing that --

MR PICKFORD: Well, perhaps it is sensible to ground it in the words of 439 again, so if one takes up the schedule

at page 750.

MR JUSTICE ROTH: You better wait. (Pause)

Yes. Thank you. We have recital 439.

MR PICKFORD: Thank you very much. So I submitted to the Tribunal yesterday that the correct meaning of the first sentence of that recital had an implied "whereas Google did not have to do so" at the end. That is the context in which it needed to be understood because this is all still about discriminatory treatment as between Google's CSS and rival CSSs.

It is not saying that the mere fact of itself that a rival CSS might have to adapt its business model or change its business model to fit in with the shopping boxes is inherently unlawful, but that is my submission about the meaning of that.

I say it was revealing that Mr Moser resists those words being implied at the end of that first sentence. That shows why this matters, because the Tribunal were perhaps reasonably puzzled yesterday as to why I was making a point about 439 because, Sir, you correctly noted that if you were to go back to recitals 402 and 405, you see that this is simply responding to a Google submission, saying: "don't worry, there isn't any discrimination because they are treated in the same way".

This is the Commission then responding, saying: "no,

we disagree with you, there is still discrimination because they are going to have to change their business model". Implicit in that is where you don't have to --

MR JUSTICE ROTH: It is kind of obvious because you are Google and this is Google Shopping, so you wouldn't have to change your own business model for your own site that you have created.

MR PICKFORD: Quite. But in which case, hopefully I am home and dry, but the reason why it matters is -- and it is very important, therefore, that this is understood properly -- is that that is not what the Claimants are going to say -- because Mr Moser resists the point that you, Sir, say is obvious. He says: "no, no, no, don't read this as implying that those words are at the end".

The issue here, of course, is that what the Commission is saying here is that if you are a CSS -- a rival CSS, you have either got to place ads that directly link to merchants or you have to become a merchant yourself.

The difference of course with Google is Google at the time had links that went through to its CSS. So it could appear in the CSS, for instance, in a Product Universal world. If you click on the header you go through to Google CSS. That is why it was getting the benefit of being in that box in

a way that the Commission here is saying that rivals didn't.

And that the reference, just for your reference, Sir, and members of the Tribunal, that is 419 on page 736, where the Commission explains that Google's CSS could receive traffic directly from the Shopping Unit, via the header or the "view all" links.

That is what this is really about. It is not about changing your business model per se. To put that in context, the situation today is that Google's CSS and rival CSSs are receiving equal treatment because both can place ads for products on behalf of merchants that link through to the merchant's website. So they are both doing something that is inter-mediating, but both can also receive traffic from the Shopping Unit directly if the name of the CSS, who is presenting that ad, is clicked.

So that is why when we will be coming on to later stages of this litigation, we will be saying: "well, there is equal treatment and, therefore, the remedy has addressed the Commission's concern". Whereas Mr Moser's clients will be saying: "because the Commission objected to any change in your business model per se and, look, we have a CSS here that had to change its business model a bit to fit in with this because it didn't use to work

in quite that way, so what you are doing is still unlawful".

We will say to that "no" because all 439 is about is discrimination; it is not changing your business model per se.

Now, the Tribunal may think I have laboured that point because, Sir, you said it is obvious, but it is very important and that is why I have laboured it.

MR JUSTICE ROTH: Yes. Thank you.

MR PICKFORD: Sir, you also asked us yesterday to consider paragraph 8 of the Claimants' skeleton argument and to say which propositions we agreed with and disagreed with; would it be helpful for me to do that now?

MR JUSTICE ROTH: It would. Thank you.

MR PICKFORD: So we can pick that up in bundle A1, the page number is --

MR JUSTICE ROTH: 873, I think.

MR PICKFORD: Thank you very much. 873. Oh, I seem to have become much louder suddenly.

Yes. So there are two subparagraphs with which we disagree and one subparagraph on which I would like to add a note. So the one that I'm going to add, what is hopefully an uncontroversial note to, is 8b.

So 8b is talking about what a defendant -- well, a party -- can or cannot do in its pleadings by

reference to what is binding or not binding in a decision. The basic point it is making is that if a point is binding, then you are stuck with it no matter what.

There then becomes a slightly difficult point, which I don't think has ultimately any substantive content to it, but I'm going to note it. Any pleading that we submit will be signed by a statement of truth that we believe the facts in it.

There may be some points where we don't believe the fact, because we think we thought that the Commission got it wrong, but we accept that we can't dispute it and, therefore, in this rather unusual circumstance it may be after the Tribunal gives its judgment following this hearing that there are some parts of our defences where we have to basically say that -- we have to say: "we cannot contest this".

What we can't really do is sign a statement of truth that says: these are effectively the facts as we believe them, i.e. we admit fact X when we think fact X is wrong. So we are not trying to pull a fast one.

MR JUSTICE ROTH: No, I understand. So you accept you are bound, but you do say: actually, we happen to know this is factually wrong.

MR PICKFORD: Yes. Where that may be important potentially

is of course we will have witnesses that the Tribunal will hear and there will be times when possibly it is said to them: well, that is what you think, but we don't care about what you think because that has already been decided against you and it is binding.

But it would be obviously very unfortunate if the witnesses who have contributed to the pleading and ultimately led to there being a signed statement of truth are in this Catch 22 situation, where they are being forced to say things that they believe are untrue.

MS ROSE: You can just omit the fact on the basis that you are bound by the Commission's Decision --

MR PICKFORD: Yes, we could omit it that way. I think the point is we probably have to make it clear the way in which -- the way in which we are omitting it, so we don't get into a situation where my opponents stand up and say: hold on a minute, you have omitted X, now your witness is saying Y, this is wholly improper.

The Tribunal has the means of dealing with this problem, but I'm just flagging it up that it is a small wrinkle.

The points that are probably more important are subparagraphs h and i. So the beginning part of that we agree with, so where h says:

"A recital is not binding if "without that recital

the conclusions as to the nature, scope and extent of the infringement [is] substantiated by other recitals"”

So that is obviously the corollary of the point I was making yesterday, that if you can strike a recital down, but if there is still enough basis for the Decision in other recitals, then it is not binding. So that much we agree with.

Then there is a qualification in the Claimants' skeleton, and they go on:

"Nevertheless, a finding that is “directly relevant to a decision” (and not “peripheral or incidental”) will be binding “because to challenge them would be tantamount to challenging the finding of infringement".

Those words, "directly relevant to the decision” and “peripheral or incidental", come from an English law case, *Enron*, they don't come from the EU case law. It is helpful to see what the Tribunal said about that in *Trucks*. So if you could, please, turn to *Trucks* and we will have to come back then ultimately to the skeleton in a moment.

So *Trucks* is in authorities bundle -- it is bundle 6, tab 7, and I am going to page 223. The discussion begins at paragraph 65.

Does the Tribunal have that?

MR JUSTICE ROTH: Yes.

MR PICKFORD: Thank you. So the discussion here is what insight one can gain in relation to the obligation in Article 16 from some similar, but importantly, I would say, different provisions in the then Competition Act, in particular Section 58. That provides that:

"[u]nless the court directs otherwise", a "finding of fact" by the Office of Fair Trading is "binding on the parties".

So that is the comparison being made. It is important just to pause there because that is, in my submission, a broader and more far reaching obligation, subject of course to the proviso that the court can direct otherwise than the EU law equivalent, because it refers to a finding of fact, whereas in EU law we are only concerned with the binding findings of fact, which is equivalent to the appealable findings of fact.

So one has to be very careful, in my submission, in reading across from the English law provision here and what has been said about it to the EU law provision that we are concerned with, namely Article 60.

Then the Tribunal goes on to quote from Lord Justice Lloyd in his judgment in *Enron Coal* about Section 58 and comparing it to Sections 47A(9) and 58A of the Competition Act.

If I could ask the Tribunal just to read that quote.

(Pause)

Then possibly because the Tribunal may want to do so anyway, you may want to go on and read what was said about it in paragraph 66.

MR JUSTICE ROTH: Yes. (Pause)

Yes.

MR PICKFORD: Thank you. So I have two submissions to make in relation to this. The first is that the use by the Claimants in their skeleton argument of language such as Is the recital "directly relevant" or is it "peripheral or incidental?", is not being endorsed by the Tribunal here in *Trucks*. One sees that very clearly from the final sentence of 66, which rejects Mr Brierley's approach, and says:

"But the language of Mr Justice Lloyd is not to be read as if it were a statute and we consider that the EU context [that] is appropriate to adhere to the language derived from the EU cases".

So that is the first very important point: the test applied in *Trucks* comes from the EU law and adopts the EU law language, it does not adopt the UK language, and in particular the language of Lord Justice Lloyd in *Enron*. So to that extent, the Claimants are simply wrong in what they say at point h.

That is the first point.

The second point may be slightly more controversial in that, with respect, I say that the Tribunal in fact in 66 went slightly too far when it said that Lord Justice Lloyd's words applied with equal force. In particular, it is obviously the reference back up to the quote in paragraph 65. The reason for that is because what Lord Justice Lloyd was dealing with, as I emphasised at the beginning of this submission, Section 58, which makes subject to a decision to the contrary, all findings of fact binding.

MR JUSTICE ROTH: I don't think -- and I do recall this point in fact -- we are saying that the words -- the formulation as such applies equally to EU decisions, indeed because the Tribunal went on to say it is not to be read as if it were a statute.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I think we are saying when it says the force of his observations, i.e. the common sense of saying there is a distinction between things that are peripheral and incidental and things that are of direct significance, is a sensible distinction to --

MR PICKFORD: Yes.

MR JUSTICE ROTH: Envisage when you are looking at the EU test, but we are not, I think, saying that this is the EU test. Indeed, I think we are saying it is not.

MR PICKFORD: Well -- and you will have my submissions on that from yesterday and I am not going to go over them again because the Tribunal well understood what I was saying, but my position is, in fact, that those -- a test based on directly relevant versus peripheral incidental is not a particularly hard-edged one. It is a somewhat soft test and, in my submission, in EU law it is actually a much more rigorous, harder-edged test based on logical necessity.

MR JUSTICE ROTH: Yes.

MR PICKFORD: That reflects the very strict approach that one encounters as an appellant before the EU courts because, as advocates that appear in front of EU courts know, it is very easy to come unstuck if it can ever be said against you that your point is ineffective because you haven't covered off the spectrum of everything you need to cover off, and because that is one of -- in EU law, derived from continental law, that is one of the key principles to determine.

Admissibility disputes are a huge part of proceedings in the EU courts which they are simply not in the same way in English law. So that is why there is a difference, in my submission. It reflects a different legal approach and culture and that is why it is a harder-edged test.

So that's the first point on which we disagree with 8h.

If I could then ask, please, the Tribunal to go back to paragraph 8 and also to look at 8i.

So there are two points on 8i. The nature of our disagreement is not quite as intense as it is on 8i, but I do need to make some submissions on it. So there is both a need for an extension in what is said, and also a need for a qualification of what is said in 8i:

"If a finding in a decision can be challenged before the EU courts, which have exclusive jurisdiction to review the legality of Commission decisions, as to both law and facts, it is binding in national proceedings".

Now, the Tribunal does say that in *Trucks*, but what it actually starts out by saying is the converse. They say if it is not appealable, then it is not binding. And that is also important. The two go hand in hand.

Then, of course, what was not addressed in *Trucks* is the point -- directly at least -- is the point that I was canvassing with the Tribunal yesterday, which is when one is considering whether a recital is appealable, how does one posit that hypothetical question? Do you look at the recital in and of itself or do you imagine that the recital is being challenged along with a group of other recitals and you posit the test in that context?

You have my submissions on that from yesterday, but I say that is not addressed in *Trucks*. And it is probably just helpful just to go back to *Trucks* again to see the relevant paragraphs here.

So they begin -- it is the next paragraph along in the report at paragraph 67. It makes the point at the top:

"Secondly, if a finding in [the] decision cannot be challenged in proceedings before the EU courts, then it would ordinarily be a denial of justice for that finding to be binding in national proceedings. By contrast, to the extent that it can be challenged on an application in Luxembourg, it falls within the jurisdiction of the EU regime and thus outside the realm of the national court."

Then at 68, there are some important points made:

"Accordingly, we consider that the principles which determine whether a finding in a recital to a decision is susceptible to challenge before the EU courts are appropriately applicable to determine whether a finding is binding for the purpose of art. 16: the criterion is that the finding in the recital is an essential basis or the necessary support for a determination in the operative part, or necessary to understand the scope of the operative part."

This is consistent with my submissions yesterday and it is inconsistent with what Mr Moser was saying, because he said, well, the problem with my approach is I am viewing this as if I were an appellant in the General Court, and that's the wrong approach, he says, because that might be true of an appeal to the General Court, you might be right, you might have to -- it might be impossible for you to challenge a particular recital in the General Court. But that's not the test.

I say: no, it is the test, it is the very same thing.

So one always, in my submission, adopts the mindset of: could this recital, looked at of itself, be appealed? If not, not binding.

Sir, those are my submissions on paragraph 8 and which bits we do and don't agree with.

MR JUSTICE ROTH: Yes. Thank you. Just before you sit down, can we just ask you to clarify one, sort of, point for us: what actually do you say is the meaning of Google's comparison shopping service?

MR PICKFORD: The meaning of Google's comparison shopping service?

MR JUSTICE ROTH: Yes, in the Decision, what actually is it? You have made a number of points about various recitals, saying the points made by the Claimants; what is your

case as to what that actually means when that expression is used in the Decision?

MR PICKFORD: Of course. So I am going to answer the question and then I'm going to explain why there is some ambiguity here, in the Decision. So the meaning, we say, what inferentially one is able to determine from the Commission is that they are talking about the stand-alone website; they are talking about the infrastructure that sits under that stand-alone website as well. So they are saying the entity that is Google's comparison shopping service is basically effectively the page -- as Mr Moser put it yesterday, the web page you would go to if you wanted to do comparison shopping, and the technical infrastructure that underpins that.

Therefore, what the Commission is saying in the Decision when it talks about the favouring is that we are both taking our results from that website, effectively, and that underlying infrastructure and sticking them on the general search results page, and we are also providing for links from the general search page, back to that comparison shopping site.

So that is what we say is implicit in the Decision.

I cannot point to a recital which defines the CSS in that way because otherwise we wouldn't be having the debate we had yesterday. All I can point to is all the

variation recitals that must lead one to that conclusion, the emphasis on what 408 says and what 412, says, et cetera.

So that is my answer. I realise that is not as satisfactory as it might be --

MR JUSTICE ROTH: That's a clear answer, but just to wrap that up, so the one box, Product Universal/Shopping Unit, is not, you say, part of Google's comparison shopping service, it is a means whereby Google favours its -- is that right?

MR PICKFORD: Yes.

MR JUSTICE ROTH: That's the distinction you make?

MR PICKFORD: Yes.

MS ROSE: So you say the court misunderstood the Commission's Decision on that point?

MR PICKFORD: The General Court? Yes, it did, but it is not -- I mean, I understand why the Tribunal is keen to grapple with this and to get an answer. I would still make a point that I made yesterday, that actually it isn't ultimately going to be something that the Tribunal needs to resolve in this hearing because either way the Decision stands.

Whether I am right about what the Commission really meant by Google CSS and that it is about favouring because of the results drawn from and the links back to,

the Decision still stands; and if Mr Moser is right that in some way the box is itself an emanation of Google's comparison shopping service, the Decision still stands.

It wasn't actually necessary for the Commission to -- it is a bit unsatisfactory, but it wasn't necessary for them to grapple with this question, i.e. either way there is favouring, and what the Decision says is it is the favouring that is the problem. Therefore, the particular definition of the CSS can't be binding because if I had come along to the General Court and said, "It seems that the CSS has been defined in way X", the General Court can turn around to me and say, "It doesn't matter, Mr Pickford, either way you still lose because what you seem to have lost sight of is it is all about favouring".

So as intellectually unsatisfactory as it is, I say you don't need to decide this point.

MS ROSE: Does a lot of this difficulty come from footnote 3 -- because of the second limb of footnote 3?

MR PICKFORD: Footnote 3 certainly causes quite a lot of problems here. I'm not sure it's the sole source of the problem because, of course, there is to some degree an ambiguity in Article 1 itself, because the wording of that is quite broad, it seems. And yet when one comes back to the Decision and what we agree are binding

recitals 408 and 412, that makes it very clear at the very least that you can't read the Decision, Article 1, in the broadest sense because it is certainly chopping it down and saying that the CSS itself is not on the page, because that is what 408 and 412 say in terms. So already we need to narrow it from what Article 1 says. And what my submission is --

MR JUSTICE ROTH: Well, unless the alternative interpretation is correct because if the one box is part of Google Shopping service, that one box is displayed on the general search page.

MR PICKFORD: Well, in my submission, that wouldn't -- that is very hard to reconcile with 408 and 412.

MR JUSTICE ROTH: Oh, it is, I accept that, but you can read Article 1 that way, you can make sense of Article 1. 408 and 412 are clearly saying to the contrary, there is no doubt. As the General Court picks up, they refer to those two and say there is inconsistency between those recitals and some other recitals.

MR PICKFORD: Well, they are agreed to be binding. I hadn't heard Mr Moser seeking to resile from that. We had the submissions obviously yesterday in that context.

MR JUSTICE ROTH: Yes.

MR PICKFORD: They are binding in my submission because they are critical to dealing with the objective justification

point, because what Google were saying is: well, hold on a minute, these algorithms are really important, these are essential in delivering better results for users and surely you can't be criticising our application of algorithms that ultimately give users better results.

The Commission has to answer that question, and it does answer that question. It says: no, we are not challenging the application of algorithms that improve the quality of the results, the only thing we care about is the fact that you apply those algorithms in generic results, but you then exempt yourselves from them when you stick your results in one of the shopping boxes.

It has also just been drawn to my attention, just to clarify, I'm sure the Tribunal is aware of this, the OneBox was the predecessor of the Product Universal and so is not part of the infringement. So it begins with the Product Universal.

MR JUSTICE ROTH: Yes. I'm using OneBox as a sort of generic term for that kind of illustration that you have on websites.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I'm not sure if --

MR PICKFORD: I think it is possible --

MR JUSTICE ROTH: I mean, according to recital 28, they came at the same time. But it doesn't really matter.

A dedicated Universal or OneBox -- it is called Product Universal, but that is all I meant by OneBox.

MR PICKFORD: I understand.

MR JUSTICE ROTH: One sees here perhaps recalling other Google cases where they have referred to using OneBox as a method of presenting things on a website.

Yes. So I think that's clear. Okay. Thank you.

Yes, Mr Moser.

Reply submissions by MR MOSER

MR MOSER: Members of the Tribunal, Sir, I just want to comment briefly, as it were, in reply on what my learned friend has said about the law. I will be as brief as I can. He looked at the wording in h and i of our skeleton argument and he then commented on *Trucks*. I just want to turn very briefly, once more, back to *Trucks*, which is at A6, tab 7, page 223.

In relation to our (h) in our skeleton argument, Mr Pickford particularly criticised the words "peripheral or incidental", which appear in brackets in that subsection. It is something of a diversion, if I may respectfully suggest, because what matters if one looks at page 223, and particularly the quotation from *Enron* and Lord Justice Lloyd, is the emphasis in paragraph 65 and the quotation within it, the emphasis being on the former category should be regarded as

binding "because to challenge them would be tantamount to challenging the finding of infringement". I sense that that is what is meant when in 66 the Tribunal in *Trucks* went on to say:

"Even if *Enron No 2* is not binding as regards Article 16 and EU law, the force of [Lord Justice] Lloyd's observations clearly applies to EU decisions as much to domestic decisions."

We, respectfully, agree entirely with what is said in *Trucks*.

The other attack my learned friend mounted on our definition is in (i). He chose in particular to concentrate on this argument that, well, if you can appeal it, then it is binding.

He mentioned something I said yesterday about the fact that they are treating this as though it were an appeal before the General Court. Just to correct that understanding, I didn't make that remark in the context of the test, I made that remark in the context of the fact they seek to be overturning things that have been found as fact by the Commission in this court, which is not the function.

The point in paragraphs 67 and 68 of *Trucks* is, of course, a different one and there were two aspects to that. The first is in 67, that the Tribunal found in

the first sentence:

"If a finding in a decision cannot be challenged in proceedings before the EU courts, then it would ordinarily be a denial of justice for that finding to be binding in national proceedings."

I just want to underline the word "ordinarily" in that. As I said yesterday, it is not -- it doesn't have the same automaticity both ways round. So if you can challenge something in the EU courts, then it is binding; if you can't challenge it, it would ordinarily not be binding.

But as I said yesterday, there may well in context be some recitals that are nonetheless an essential basis or the necessary support for a determination in the operative part or necessary to understand the scope of the operative part. So I submit the Tribunal shouldn't be completely hide bound by this sort of finding, it has to be one or the other.

That is all I wanted to say in reply to that. As for the President's question, I'm going to say, with great respect, the difficulty that my learned friend found himself in, in answering the question, "What is Google CSS?", perhaps speaks volumes. He can't point to recital --

MR JUSTICE ROTH: Well, we have been over that, I think. We

have a lot --

MR MOSER: I said it all yesterday. I just wanted to remind the Tribunal that we didn't just look at footnote 3, we looked at recitals 421, 630 and 631.

MR JUSTICE ROTH: We have your point.

Submissions by MR MOSER

MR MOSER: Sir, with that introduction, I know that everyone is keen to get on with bindingness, and finally at 10.50 on day two, we move on. And that is not a criticism. This is all important stuff.

The first part of -- so the way I propose to do this -- and I hope I have got the order right -- is to go through the table, broadly speaking, sequentially. There will occasionally be lapses in that procedure, but only where I submit it is necessary because certain clusters of recitals are linked and important to be considered together.

The first one to look at, having dealt already yesterday with footnote 3, occurs in section 2 and that is recital 29; then in further course because of what they say, we also look at recital 411.

recital 29 is at page 602 of the table and the first part of recital 29 is accepted -- I think it was accepted yesterday on his feet by my learned friend, that the Product Universal comprised specialised search

results from Google Product Search, accompanied by one or several images and additional information, such as the price of the relevant items.

What is objected to is specifically the phrase "in most cases" in the second sentence:

"The results within the Product Universal, including the clickable images, in most cases led the user to the standalone Google Product Search websites. There was also a header link leading to the main website of Google Product Search."

You will see in the parties' comments that is where they disagree, where we disagree. In particular, Google says: ah, this is not correct, it is "internally inconsistent with recital 411". If we have a look at recital 411, which is at page 732, then. That's the recital that says:

"Contrary to what Google claims [in various countries] the majority of clicks on links within Product Universals, (including header links), led users to the standalone Google Product Search website."

That is confirmed by Google's own data.

The small point is those two recitals don't even use the same word; one refers to "most" and one refers to "majority". But substantively, there is also no inconsistency, we say, between 29 and 411. 29 -- sorry,

this is slightly user unfriendly, if we can somehow have a thumb in each -- 29 refers to search results -- firstly, the results, whether or not they generate a click. 411 refers to clicks on links. So there is an apples-and-oranges issue. They refer to different things. So we say that Google's objection -- sole objection to the findings in recital 29 is based on a false premise.

It is further, we say, not open to Google to challenge the accuracy of a factual finding made in a Commission decision, Google having exhausted its appeals to the EU courts, the Decision is now binding. It is contrary to Article 16. Again, as *Merricks* says, the decision that was made must be applied, not some other decision.

MR JUSTICE ROTH: I'm not sure actually how important this point is. It seems a very narrow point. As I understand it, if 29 said the results within a Product Universal, including clickable images and the header link together in most cases or the majority of cases lead to the main website, there would be no objection. The only question is whether you need to include, to get to your most cases, the header link or not.

MR MOSER: Well, yes, Sir, to some extent --

MR JUSTICE ROTH: Is that really important?
MR MOSER: We don't entirely know where Google wants to go with it. What Google --
MR JUSTICE ROTH: Well, they just think that's wrong, as a matter of fact at this point.
MR MOSER: They say the recital has to be read as suggesting most clicks in the PU led to the stand-alone website, excluding header links, whereas that is not what the second sentence of recital 29 actually says. It was first results within the PU, not clicks through to the PU.

So each product unit could contain, for example, several images of products, each of which is a result that would link through to Google's product search website, and also fixed descriptions underneath, again each of which would link to the stand-alone website, in addition to the header links, so there would be multiple results visible on the search page in the middle of the PU, each with links to Google's stand-alone website. But the thing would, at most, generate one click through to the product search website. So many results, one click. That's the difference.

That is also clear from 411. We broadly accept 411 is binding, it does not challenge its meaning.
MR JUSTICE ROTH: If you look at them, we have

an illustration which might make it easier, which I don't think is in the large schedule, but it is in the Decision on page 12. It is sometimes easier to actually look at the thing we are talking about.

MR MOSER: Yes.

MR JUSTICE ROTH: That is, as I understand it, a Product Universal -- or it may be a Shopping Unit, but I think the point is the same.

MR MOSER: Yes. As I understand it, that line "Shop for Canon70D on Google", that's the header link.

MR JUSTICE ROTH: That's the header link.

MR MOSER: So you can click on that as well.

MR JUSTICE ROTH: So in the Shopping Unit -- and they draw a distinction between Product Universal and the Shopping Unit. Just give me a moment. Yes, I think -- I think they say, if I have understood this, in this case which is a Shopping Unit, the click on the phrase at the top, "Shop for Canon70D on Google", if you click on that, you go through to the Google website. That's clear.

MR MOSER: Yes.

MR JUSTICE ROTH: If you click on the selected images below, you don't go through to the Google website, you go straight through -- generally, you go straight through to the merchant partner, and that is what is explained in the last sentence of recital 32. Unlike for

Product Universal,[…] the results within the Shopping Unit generally lead users directly to the pages of [the] merchant partners. That is my understanding of it. Unlike Product Universal.

And recital 29 is dealing with Product Universal and it is saying with that box there, the clickable images and those cameras are all -- rubric below are clickable images, which take you through in most cases to the Google website, not direct to the merchants, hence the distinction between Product Universal and the Shopping Unit explained in recital 32.

MR MOSER: Yes, that's the finding.

MR JUSTICE ROTH: And there is no inconsistency between recital 411 and recital 29, except that I think Google disputes that it was in most cases in Product Universal. But that is what the Commission said. Whether that is, however, a necessary -- that small distinction as to whether you have to include the header link or not is in itself an essential basis of the Decision, I rather doubt, speaking for myself. That is why I say that one can, sort of, seek to parse the language to see exactly what they meant, but I don't think the distinction is important for the question of what is binding.

MR MOSER: It is a distinction Google relies on.

MR JUSTICE ROTH: Maybe they do. I just don't for myself

see why it makes any difference to that point -- to the main thrust of what is binding, namely that this use of these boxes, whether it was Product Universal or Shopping Unit, and notwithstanding the slight change of the way they worked between -- as explained in recital 32, favoured Google Shopping Service. That is the point. Exactly what you include in the majority does not seem to me to matter.

MR MOSER: It may well be that it is not necessary. If one has the point that what matters is that the traffic was abusively diverted from the Claimants' CSSs to Google's own comparison shopping service, which is yesterday's point --

MR JUSTICE ROTH: That is the thrust of the whole Decision.

MR MOSER: -- whether the Commission has got it exactly right in relation to most and majority and the header link.

MR JUSTICE ROTH: Yes.

MR MOSER: So that's that point.

MR PICKFORD: Does the Tribunal need to hear from me on that?

MR JUSTICE ROTH: I am just looking. We then move to market definition. I think if we break it in the way that we suggested, that we will hear from you both on particular groups of recitals -- I mean, do you say, Mr Pickford,

this is a material distinction?

Reply submissions by MR PICKFORD

MR PICKFORD: We respectfully adopt the point, Sir, that you just made, that it is not material in the sense that it makes a difference to binding. It can't be binding, this minor difference, because the Decision stands either way. That is one reason why it is not binding; that is probably the most important one.

MR JUSTICE ROTH: I mean, the majority of clicks, whether you have to include the blue link at the top or not will go through to the main Google shopping CSS; yes?

MR PICKFORD: Yes, indeed. That's the point. That is what is stated in 411. It happens to be factual correctly stated in 411. It is slightly fumbled here because it doesn't make -- because the fact of the position is this, just to explain why we are even bothering to have this debate at all. It is only once you include the header link that you can say, factually, that the majority of the links went through to the CSS, because it was the header link that always went through to the CSS, whereas it was only in some occasions, but not the majority, that the result itself went through to the CSS.

Therefore, if you are just looking at the result itself, it would not be true that the majority went

to the stand-alone CSS. As soon as you include everything on the page, including the header link, then it becomes a true statement. That is what 411 makes clear, and 411 deals with it properly and precisely. And 29 in this bit, in my submission, does not make that so clear. A, that distinction cannot possibly be an essential basis for the Decision; and B, we generally have been reluctant to sign up to things where we know that it is just not factually correct. That is why we are saying: look at 411.

MR JUSTICE ROTH: There is apparently a change because of what is said in the last sentence of recital 32.

MR PICKFORD: Yes.

MR JUSTICE ROTH: And which you have accepted is correct.

MR PICKFORD: Yes. So what then happened is that originally in the Product Universal some, but not the majority, in fact, of the links from the result itself -- just putting aside for one moment the header link -- did take you to the CSS, but it is not true that the majority of those took you to the CSS.

What then happened with the advent of the Shopping Unit is, in fact, my understanding is -- (Pause)

MR JUSTICE ROTH: Well, it says "generally".

MR PICKFORD: 32 actually understates the position. In the Shopping Unit, the result always went to the merchant

because, by definition, at this point it has become commercialised and merchants are paying Google to appear, so merchants will have no interest in paying for an ad that doesn't lead to their website. So that is actually -- I mean, strictly speaking, that is what actually happened factually with a lot of points here, you know --

MR JUSTICE ROTH: Well, I think we have the picture. I think we are arguing about something that is not really relevant. Okay. Thank you.

MR MOSER: That is, of course, the problem with doing it sequentially. The first one wasn't necessarily the most sensational.

MR JUSTICE ROTH: I think we can all agree on that.

MR MOSER: Coming on to something that is actually interesting, market definitions. Mr Pickford is going to help me.

Submissions by MR PICKFORD

MR PICKFORD: So I mentioned to Mr Moser at the outset that, reflecting on matters pragmatically yesterday, we decided that there really wasn't going to be a need, perhaps in the spirit of the point that we just canvassed, for us to debate the finer points on the bindingness or otherwise of those matters in dispute on the general search market. That is the market in which

Google was found to be dominant. Whether certain recitals there are or aren't binding, if one steps back, I think it is fairly clear are not likely to be key to the progress of this case.

So there were a number of points where there was a dispute, where we say, well, technically that is not actually binding, but we are quite happy to not contest. We move the status of any which we said not agreed, because we say it is not binding, and we can put them all as not contested because we are not planning in this litigation to revisit those issues.

MR JUSTICE ROTH: Yes, that's very helpful. Have you got a list -- is it everything in market definition?

MR PICKFORD: No. No, it is everything in the general search part of market definition, so that is --

MR JUSTICE ROTH: 158 is the first, I think.

MR PICKFORD: 155 through to 190. Of course, to be clear, where we have already agreed that it is nonbinding, we are not removing our nonbinding sticker.

MR JUSTICE ROTH: Yes.

MR PICKFORD: We are just saying that the Tribunal does not need to have a debate about the remaining ones that we said were not binding when the Claimants said they were binding, because ultimately that debate is not going to take us anywhere.

MR JUSTICE ROTH: 155 to 190, the market for general search.
MR PICKFORD: General search. I can list out for you what the recitals are.
MR JUSTICE ROTH: I think we have them, but 190 itself is actually a recital that you said is binding and the Claimants said is not.
MR PICKFORD: Ah. Yes.
MR JUSTICE ROTH: That was the other way around.
MR PICKFORD: Well, quite. I mean, we were trying to cut through matters. Over to Mr Moser now, whether he wants to have the fight. If he wants to have that fight, we are actually going to have to go back to 186 because 186 through to 190 are all related. So we have a different approach to how those fit together. It is in Mr Moser's court whether he wants to take the pragmatic view we have or if he wants to have the scrap.
MR JUSTICE ROTH: Static devices, those are PCs and laptops, is that what is meant by "static devices"?
MR PICKFORD: Yes.
MR JUSTICE ROTH: Yes. As opposed to mobiles, yes.
MR PICKFORD: Indeed.

Reply submissions by MR MOSER

MR MOSER: Right. Well, I think I'm grateful for that. My learned friend did indicate to me beforehand that they would concede some. It is only now I have been told

which ones are being conceded --

MR JUSTICE ROTH: If they are conceded, you need not address them. So we were only left with 190.

MR MOSER: I'm not sure whether addressing 190 does require undoing whatever it is he is doing in relation to recital 186 and following. Our point about 190 is, very simply, that it is quite obviously the Commission addressing, dismissing summarily an alternative case, saying that even if general search on static and mobile devices had comprised distinct product markets, it would not have affected the assessment of dominance.

It is an alternative and hypothetical analysis -- I will come back to this. It is an echo of what is said generally about market definition, so perhaps the time for me to address recital 190 is after I have addressed you on what we say about market definition and Google's arguments on market definition, rather than taking it out of context.

MR JUSTICE ROTH: Okay, we will flag it and come back to it.

MR MOSER: Yes.

MR JUSTICE ROTH: So we then go to the market for comparison shopping services, starting at section 5.2.2, I think.

MR PICKFORD: Yes, that's right. Just to be clear, if, Sir, you were right to pick me up on point 190, it was the other way around as to who was making the running on it.

I'm going to have to go through 186 to 190 as a group if we are going to revisit 190 because they fit together as a package.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So the concession of things I have taken off the table basically takes us up to 185.

MR MOSER: That's very helpful. May I suggest in line with the President's suggestion yesterday, when I'm done with this my learned friend goes first on 185 to 190 and then I respond to whatever he says because that is his point.

MR PICKFORD: I'm very happy to do that.

MR MOSER: Before I kick off on whatever the next recital is, can I just make some few remarks. I don't know when you are planning the break, Sir. I'm in your hands.

MR JUSTICE ROTH: Well, where are we going now?

MR MOSER: Where are we going now, market definition, section 5. I'm going to talk briefly about the law on market definition and then I will plunge into comparison shopping services, starting at recital 589 and onwards.

MR JUSTICE ROTH: Sorry, recital? No, not --

MR MOSER: I don't mean that. 191.

MR JUSTICE ROTH: 191.

MR MOSER: Forgive me.

MR JUSTICE ROTH: Cover the law and then we will break.

MR MOSER: It is clear from what my learned friend has quite

rightly said, the two relevant product markets that the Commission considered in this Decision, one, market for general search services, which is now broadly agreed, the market on which Google was found to occupy a dominant position; and two, the market for comparison shopping services, and that's the market in which Google was found to be abusing that dominant position.

The disagreement now is in relation to the latter, and specifically the parties disagree about whether the Commission made a binding finding as to the scope of the relevant market within which CSSs lie.

In a nutshell, Google's position was that because the Commission found that Google's conduct infringed Article 102, even if one were to consider an extended product market mooted by Google, a product market that included merchant platforms such as Amazon and eBay, they say even if one were to consider that, it follows there would still be an infringement and it follows there was no binding finding as to the proper scope of the CSS market.

The answer to that rather surprising submission, in my respectful submission is, it is simply not a tenable reading of the Decision as we go through the recitals -- we eventually come to a recital, and quite clearly makes a finding on what the answer is; also not tenable in

light of how the General Court understood it and we say the General Court did not misunderstand the Decision in that way.

Just some relatively uncontroversial related principles. The core finding, Article 1 of the Decision, in which the Commission found Google's conduct, so the positioning of its own CSS, more favourably infringed Article 102 TFEU. In order to make that finding, the Commission had to establish there was a relevant market on which Google was dominant and that Google's conduct was at least capable of impairing effective competition on that relevant defined market.

MR JUSTICE ROTH: I don't think that Google is saying the Commission didn't seek to define a relevant market, I think what they are saying, as I understand it, is it considered the relevant market and said: we find our preference is this possibility, excluding merchant services, but alternatively it includes merchant services; either way, Google is dominant.

That's what they say. So it is not the Commission said nothing about the market, obviously it did, but they say that it didn't -- it's not essential for the basis of the decision of dominance -- or rather, abuse, because dominance is market abuse -- that it has to be one or the other. That is their point, as I understand

it.

MR MOSER: So they say --

MR JUSTICE ROTH: So what they would accept is binding, is that it is certainly one or the other, it is not some other market definition. That is their point.

MR MOSER: So they say. But my respectful disagreement is founded on the fact that, as far as Article 16 and *Trucks* -- the *Trucks* test is concerned, one has to look at what are the essential components of a finding of infringement.

MR JUSTICE ROTH: Yes.

MR MOSER: I do say that the finding of what the relevant market is, is such an elementary and essential finding, that the fact that there is a rather dismissive section that deals with Google's alternative market does not detract from the fact that the finding on the principal market is the prerequisite for being able to make the finding of an infringement.

I mean, we have cited a couple of -- we have cited, I think, one case in our skeleton argument, just because it makes the point so neatly about the fact that it is a necessary prerequisite, a logically prior finding to any finding infringement of a dominant position, to determine what the relevant market or markets are.

That's the case of -- the recent *Thames Water* case

of Kington. It is just interesting to look at, because perhaps one doesn't expect that there. It is in bundle A6, tab 17. That was a case in front of Mr Justice Trower. That is of course a case recently heard in the Court of Appeal in relation to Mr Justice Leech's decision afterwards. This was a preliminary skirmish about the production of expert evidence on an argument run in that case, that it was an abuse of a dominant position and/or a Chapter I infringement to essentially put forward the loan agreement that was being suggested.

We need not worry too much about the details. Mr Justice Trower had to deal with whether or not to let in the evidence at the last minute. And at page 807, paragraph 44, he explains the important question was whether the proposed evidence is reasonably required to resolve the competition law argument.

The parent company said that the evidence was, in any event, of such indeterminate quality that it wasn't going to assist with the point, but this interesting question also led Mr Justice Trower to make some fundamental points around what you need when you make a finding of an infringement. That is at paragraph 50, and although the first part of paragraph 50 talks about the submissions of the parent company, there is

an observation that is, plainly, the judge's observation, which anyway then carries through the thrust of the rest of the judgment, where he says in the second sentence of 50:

"This is of particular relevance to an alleged infringement of the Chapter II prohibition because it is impossible to come to a meaningful conclusion in the absence of […] market definition… [the] dominant position does not exist in a vacuum and cannot be determined without first identifying the relevant market."

That is in different words what we say translates into, essentially, a component. It is impossible to come to a meaningful conclusion if you haven't got your market definition --

MR JUSTICE ROTH: I don't find that, speaking for myself, very helpful. Of course you need a market definition, but the question is -- and you can sometimes, even on dominance, come to a sensible conclusion, saying, well, the market definition -- one side says the addressee of the decision says it includes this. We don't think it does, but it may do. Whether it does or not, on either definition, the company is dominant. Well, that is perfectly acceptable. And you will find that in a number of Commission decisions, as I recall.

So, yes, you need a market definition, but it

doesn't mean that it has got to be -- it can't be an alternative, as long as both alternatives support the conclusion.

So to say, "Yes, there has to be a market definition", I think that is fundamental and common ground. It seems to me your real point is: what actually do they say about their belief about the market definition and how that was treated on the appeal.

MR MOSER: Well, yes, save that we say that the two findings, when we come to look at the recitals, exist in rather different evidential circumstances. You have the detailed finding in relation to what we say is the binding market definition on the comparison shopping services, which has had the benefit of an extensive economic appraisal; then there is the rather more dismissive bit, well, it could be the alternative.

Of course in the position of the Commission you have to deal with the alternative, otherwise you would be appealed and say, "Well, the Commission failed to take into account the relevant point of the alternative market". They do it quite dismissively --

MR JUSTICE ROTH: I understand all that. That is not about legal principle, that is about what they have actually done.

MR MOSER: Yes. Can I just round off the legal principle

because there is a case that says much the same thing. Nonetheless, I would quite like to point to it. It is in A6 at tab 31, page 1580. I submit it makes good the same point with rather more venerable EU arguments. That's the case of *Sockel v The Body Shop*. That was a case where the Austrian franchisee of The Body Shop was being terminated and he sought an injunction for continued supply in his breach of dominance case. The argument was that Sockel was automatically dominant within its own franchise.

That part of it failed. Although Mr Justice Rimer found you can have an injunction in those circumstances -- I think that was the first time that was found -- it failed because no economic evidence had been produced.

The relevant bit is at 1588, where Mr Stanley Burnton QC, as he then was, for The Body Shop, contended Sockel didn't make out an arguable case. That is at F. "He submits that a dominant position cannot be presumed nor does it exist in a vacuum" -- interesting it's the same words as Mr Justice Trower -- "it can exist only in relation to a properly defined market, what is referred to in the Hoffmann-La Roche case as "the relevant market". The assessment of the relevant market involves an exercise in economic appraisal."

There was a reference to the Michelin judgment, well-known, and over the page, a reference to the notice published by the Commission -- that's B to C on 1589 -- which is in fact the same notice still used in our Decision in this case:

"Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission."

For the avoidance of doubt, at 1591 Mr Justice Rimer found Mr Burnton's submissions were right -- that's at 1591C. "One of the essential elements [that] needs to be considered in an assessment of whether or not a particular manufacturer or supplier is dominant in the market is the identification of the relevant product market and the extent to which the manufacturer or supplier enjoys market power with regard to the provision", and so forth.

Then the Hoffmann-La Roche test about acting to an appreciable extent independently of competitors, customers, and ultimately consumers. That involves an economic analysis.

So the essential element, reading it across into our test is: which market is it?

Now, I understand, Sir, your point. You say: oh

well, it could be either market. You know what I'm going to say about that, and I will do that after the short break, if I may.

MR JUSTICE ROTH: Very well, we will come back at 25 to.

(11.24 am)

(A short adjournment)

(11.38 am)

MR JUSTICE ROTH: Yes, Mr Moser.

MR MOSER: Thank you, Sir. Reflecting on the discussion we had before the short break, I submit that when we now come to looking at this on the recital-by-recital basis, perhaps a liberating thought is going to be that it may not matter so much what is the general legal principle about markets, it matters more what the Decision says, what the words in the individual recitals say, because in my submission it will make it quite clear that there are binding findings as to the market for comparison shopping services.

Bearing that in mind -- and I know we are going to start at 191 in a moment -- I submit it is necessarily briefly to turn ahead in the Decision to page 818 of the table -- or schedule and the section, which is I think Section 7.3, the Conduct has potential anti-competitive effect on several markets.

That is not agreed, however, all of the underlined

bits in bold are agreed. 589. That says:

"The Commission concludes that the conduct is capable of having, or is likely to have, anti-competitive effects in the national markets for comparison-shopping services".

That bit is agreed.

So whatever else one says, the question that must be answered is: what is the national markets for comparison shopping services?

Just for your note, members, there is similar wording at recital 592 and recital 608.

MR JUSTICE ROTH: Well, isn't the only issue between you really whether it includes the merchant sites, like Amazon and eBay, or whether it doesn't?

MR MOSER: Yes.

MR JUSTICE ROTH: That's what it boils down to, doesn't it?

MR MOSER: We say there is enough in the Decision to show the Commission quite clearly found that it doesn't include the merchant platforms.

MR JUSTICE ROTH: Yes.

MR MOSER: If we start, then, at recital 191, which is at page 640. That is a section that in the Decision is headed "The Market for Comparison Shopping Services". I think it is section 5.2.2. Here is where we part company with the Defendants.

So we begin with recital 191, that is all agreed; comparison shopping services are ... and that is defined there. There is a footnote. But then we don't agree on either the footnote or -- well, partially binding -- or 192. 192 says:

"The Commission concludes that the provision of comparison-shopping services constitutes a distinct relevant product market [and] this is because the [CSSs] are not interchangeable with [various other services, including] merchant platforms."

We say the plain language here makes it very clear that this is a statement of a conclusion, and even on Google's 1-2-3 tiered analysis this is at least a second order finding that is directly necessary to sustain the first order finding of the relevant product market, which is itself necessary for the finding of abuse.

So even if I'm not right that the market definition must be a first order essential finding, at least in their language a second order finding, something that is necessary either to interpret or to sustain the finding that we saw, for instance, in recital 589.

That is similar to what Google says in relation to other parts of the Decision. So, for example, by analogy, at paragraph 23 of Google's skeleton they say that "the Commission's finding that there existed

national markets for general search services (itself a necessary finding for the Commission's finding of dominance) is sustained by its second order findings that there was limited substitutability with other online services."

So Google itself recognises when it talks about the now agreed market for general search services that you can look at the second order findings and say they are binding.

If there was any doubt whatsoever, in my submission, that there is here a specific finding about a relevant product market for CSSs that does not include merchant platforms -- see also recital 246 at page 671, which plainly in a sea of agreement is not agreed, but at least -- well, anyway, we say at least the first sentence must be binding.

At 246:

"The Commission thus concludes that comparison-shopping services constitute a distinct relevant product market, which does not include merchant platforms."

All of the agreed bits that precede that are -- maybe not binding, but they describe what the conclusion is. The conclusion itself is --

MR JUSTICE ROTH: Yes.

MR MOSER: -- was somehow said to be not agreed.

MR JUSTICE ROTH: No.

MR MOSER: The support for that conclusion is particularly set out if one looks for reasons at 216 to 226, that is at page 647, which is, again, for that reason not agreed. We say it is binding.

If you look from 647 -- 216 onwards, you will see in those recitals the Commission sets out systematically and in terms the differences from a demand-and-supply side perspective between CSSs and merchants. The Claimants' position is that the majority of these recitals here are binding -- or at least binding in part. They set out different unique findings of fact to support the conclusion in recital 216 and -- no, sorry, recital -- the one I just mentioned, 246.

Specifically, just to sort of canter through it, 217 explains merchant platforms and CSSs serve different purposes for users and online retailers.

At 218 and 219, compare and contrast those purposes with regard to users.

Then there is recital 220, now partly agreed. Although it uses the words, "the following evidence", it clearly sets out a series of facts in support of there being different purposes for which users turn to CSSs and merchant platforms.

The Commission draws heavily on the facts that have

their sourcing from Google itself, which is why we say subparagraphs 1, 2 and 5 are binding, and we can't see any sensible basis for Google to contest them.

Then recitals 221 to 223. They start at page 654. They do the same thing, but looking at different purposes for which online retailers use CSSs and merchant platforms. We are not pursuing the bindingness of 223, but it also does that.

MR JUSTICE ROTH: Well, that's an example of just confirmatory evidence as opposed to just a finding, as it were. So that is why it is not -- one can distinguish that as not being binding.

MR MOSER: Of illustrative evidence.

MR JUSTICE ROTH: Yes.

MR MOSER: So we don't, as is being held against us, say everything is binding. This isn't.

Then finally, in this section, you have 224 to 226 and they start at 658. They do the same thing, looking at the different purposes for which online retailers use CSSs and merchant platforms -- sorry, that was 224 and 226. That is the same thing from the supply side use of different platforms.

So having set out the factual basis and explanation for its conclusion on CSSs and merchant platforms, what happens then is what we see happening starting at 227 on

page 659. Here, the Commission goes on to address and reject the points and arguments Google has made in favour of the wider product market that included merchant platforms within CSSs. These are matters that Google raised in the exercise of its right to defence in response to the SO and the SSO and the letter of facts.

Our position on these recitals is set out in the schedule at pages 659 to 671. We have sought to filter out those bits that we say, on proper application of the *Trucks* approach, are clearly not required to understand why Google's arguments were rejected, and the example is recitals 244 and 245 -- in fact, all of 243 to 245 from page 670 is agreed nonbinding, because they are just a more granular amplification of the same point that can stand by itself.

The point that can stand by itself in this case is the point at 242, that the Commission wasn't required to carry out a SSNIP test. But we say that these other recitals are binding because in order to reach its final conclusion that CSSs and merchant platforms were not substitutable, the Commission had to consider and reject Google's arguments to the contrary, which necessarily included having a factual basis for that rejection.

So that is how we get to the conclusion at 246.

So stepping back, in my submission, it is clear that

when one gets to the section of the Decision that deals with dominance, why Google argued that CSSs lay in a broader relevant product market, one can see that in the concluding parts of this Decision.

If one looks ahead at page 781, which is in the section of Google's arguments of the Commission's response, recitals 502 onwards, it can be seen here in these recitals that Google relied on five arguments, and the five arguments were that Google contested the proposition its conduct had decreased traffic from its general search result pages to competing CSSs, and had increased traffic to its own CSSs.

And a key aspect on its claims on this point is set out in recitals 505 to 506. The key aspect was exactly that the presence of merchant platforms was a more plausible reason for the decline in general search traffic to competing CSSs, and any decline due to the Product Universal or the Shopping Unit would have been, at most, marginal.

No doubt Google considered a broader product market definition would have been consistent with and supportive of those claims, and one can see how those claims would feed into any national court argument on damages down the line.

Importantly for these arguments, the Commission

rejected those claims at recital 515, which is on page 785. A number of reasons why the business model of the comparison shopping services in the presence of merchant platforms are not more plausible causes of the decrease in generic search traffic from Google's general search results pages to competing CSSs. So an agreed recital.

It found instead Google's conduct did decrease traffic from its general results pages to competing CSSs, and increased traffic from its general search results to its own CSS. And that is reflected in the table in various places, including, if we go back -- I'm sorry one has to go back and forth a bit -- to page 759 of this table.

At 452, another agreed binding finding. We see that reflected the finding of the Commission rejecting those claims. And there is a similar -- we needn't going to it now -- finding in recital 591, which also accepts is binding.

Google accepts, rightly with respect, those recitals are binding findings. They are of course findings the Commission reached on the basis of the findings about the relevant product market that I showed you before. So it founds upon those findings about the relevant product market on CSSs. Google says that is not

binding; we say it is because it is an essential element or, in any event, necessary to understand the finding.

Because -- and this brings me back to my discussion with the President before the short break -- Google had raised these alternative arguments around the merchant platforms being included, the Commission self-evidently felt it necessary to address those arguments.

Before I come to them, what I have already said, and I submit now that we have seen the conclusion on the definition of the CSS market, I will say it is incontrovertible, in my submission, I put it as high as that, the case, that there is a finding as to what the CSS market is.

And bearing in mind, as my learned friend, I think, said yesterday, one of the things that the Tribunal has to ask itself is: can I really make a finding at trial that is to the opposite effect? I say that finding about what is the relevant market for CSSs, that conclusion that I read out, that is one of those where the Tribunal cannot make a finding to what the Commission says.

What is said against us -- this is now the point -- is: ah, yes, but there was that alternative. Yes, there was an alternative, and I will even go so far as to agree with, respectfully, the President and say

sometimes one can find that there are two product markets. But there is, in my respectful submission, a difference in the quality and nature of the findings in relation to the principal market that we are dealing with, CSSs, and the rejected alternative put forward by Google.

This comes in a section that starts at page 825 of the table and it starts at, really, recital 608. There is -- again, the title of this section is missing from the table. The title of this section, which I believe is Section 7.3.2, is "Potential anti-competitive effects of the conduct in possible national markets for CSSs and merchant platforms".

So the very title of the section makes clear this was a hypothetical analysis that was carried out purely for the sake of completeness. It is belts and braces. If there were any doubt about my characterisation in that regard, that is well enforced, in my view, by the wording of the very next recital after 608, in 609, which is the bit we say is binding:

" Moreover, even if the alternative product market definition [suggested] by Google comprising both comparison-shopping services and merchant platforms were to be followed…"

So it is put in the hypothetical, and in the similar

vein – we need not turn it up -- but the same in recitals 246, 342 and 590.

If there were any further doubt or the need for any further help to be derived from something, I would add Google did actually challenge the Commission's relevant product market definition before the General Court, and the Tribunal can see that in the General Court judgment, which I will turn to in A3 at tab 2, page 209.

It's rather lengthy. I know that the Tribunal has looked at these. It is helpful to read -- or at least glance through paragraphs 462 to 463, just to get a flavour of the points Google was making.

MR JUSTICE ROTH: 461 is helpful, isn't it?

MR MOSER: That sums it up.

MR JUSTICE ROTH: That's the key.

MR MOSER: I don't propose to read it all out now. So these are all arguments that were raised in the context of Google's fourth plea, that was the plea by which Google alleged the Decision had erred, as you point out, in finding Google's conduct would have likely anti-competitive effects.

The relevant paragraphs of Google's pleading were clearly in substance a challenge to the finding of a relevant product market, and that is clear if one looks in particular over the page at 468 to 470 --

sorry, is that over the page? 212 at 468 to 470. I think a bit we have highlighted in our skeleton argument.

At 469:

"Google does not challenge the definition of the product market in which it was identified as being dominant, namely […]general search services[…] Nor does it call into question the existence of a market for specialised comparison shopping search services: it does, however, take issue with the fact that that market encompasses only comparison shopping services and does not include merchant platforms which also provide comparison shopping services."

There is then a technical discussion around whether it matters that it is in the form of a separate plea or not, and as my learned friend said, the court is always terribly interested in admissibility.

And the conclusion in 470 in the last sentence is:

"Google's argument that the Commission made an analytical error in defining the product market as the market for comparison shopping services is admissible and must be examined."

So they did that. I give away the ending, if I may. The reason -- and it goes over the following pages -- but the conclusion is at page 217 at 495 where the

General Court rejected that challenge, i.e. the definition of the market for CSS including merchant platforms:

"In those circumstances, the definition in the contested decision of the market for comparison shopping services on which Google operates must be considered to be correct, and it is on that basis […] the second part of the fourth plea should be examined, [while nevertheless] taking into account the fact that, in section 7.3.2 […] the Commission conducted an alternative analysis of the effects of the practices at issue if that market were to include merchant platforms."

Despite the somewhat orotund formulation of that, the finding of the court is the Commission was correct to limit its assessment of anti-competitive effects to an examination of CSSs. And that is what I have described as, as it were, the liberating thought, Sir, which is that regardless of where we are on the vacuum and the legal test, the question is, what matters is what did the Commission find in relation to the effect on the CSS market, the CSS market looked at without merchant platforms.

The General Court underlines the explicitly hypothetical basis of what it sees as the alternative case as opposed to the principal case, if one looks over the page at 218 at the findings -- the findings of the

court.

At paragraph 501, “Principally” -- and I emphasise that point -- "the Commission was correct to limit its examination to [CSS] when assessing the effects of Google’s practices”, i.e. to the exclusion of merchant platforms.

Then 502:

"For the sake of completeness, the court considers it appropriate to consider the extent to which the Commission was required to take account of [a] competitive pressure from merchant platforms in its alternative analysis of the effects of Google's practices..."

So you see here the General Court reading the Decision of the principal and the alternative in exactly the way that I urged upon the Tribunal is a principal finding that is binding as to what is the market and that is necessary to understand the findings as to effects on that market. Then there is an alternative, for the avoidance of doubt, much briefer finding about Google's arguments.

MR JUSTICE ROTH: Yes.

MR MOSER: So that is, in my submission, what needs to be said about comparison shopping services and the meaning of "in the national markets for comparison-shopping services", particularly in recital 589.

Unless I can help you further on those points?

MR JUSTICE ROTH: That really then takes in all the -- as I understand it, all the contested recitals in this section.

MR MOSER: Yes. I hope I haven't dealt with them too sweepingly, but I have given you our reasons and they apply to all of the red bits where we say they should be binding. It is always the same reason.

MR JUSTICE ROTH: Yes.

MR MOSER: We haven't been over-inclusive. We have tried to weed out those things that are illustrative, or duplicative or otherwise not necessary, where we have agreed nonbinding. If I really did it on a recital-by-recital basis, we would be here until Friday.

MR JUSTICE ROTH: That's clear. Over to Mr Pickford, I think.

Submissions by MR PICKFORD

MR PICKFORD: Thank you, Sir. So I have three levels to my submission on this section of the Decision. The first is what I'm going to call the macro point, which is the main point that Mr Moser has been addressing, which derives from the fact that there were two alternative bases for the Commission to make its findings about effects.

The second point I'm going to make assumes that I

lose on that argument and one needs to descend to the level of the recitals and I am going to say that, even then, Mr Moser's approach to bindingness is inconsistent and that when one looks at recitals that he accepts are nonbinding, there are others that he should also accept are nonbinding.

Then the third level is even if I'm wrong about that, there is one particular recital that I'm going to say, on any view, can't be binding. So that is the structure of the submissions that I'm going to make on this.

The majority of my time is going to be spent on the first point: that is the main one. But I do want to make it clear what the overarching scheme is.

So we agree with the Claimants that the Commission made a binding finding that there exists a relevant market for CSSs: so far so good. We also agree with the point that Mr Moser emphasised considerably: that the Commission made a finding as to the scope of the CSS market. It did make a finding and it found that it excluded merchant platforms: one sees that at 192(iv) of the Decision.

Where we part company from the Claimants is whether that latter finding, which there is no dispute exists, is a binding finding. Our position is, it is not binding

because the reason why this market is being considered at all in the Decision has nothing to do with dominance. Mr Moser's case is where he took you to the importance of making a market definition finding for the purposes of dominance are relevant for a number of reasons, but one of them is they are concerned with market definition for the purposes of dominance. That is not why the Commission defined the market for comparison shopping services. The Commission defined the market for comparison shopping services because it was interested in the effects of the conduct. So that is always important to remember: this has got nothing to do with dominance. Where we were found to be dominant is in general search and we are not debating that now.

In the context of its effects analysis, which was the only reason why they were defining a CSS market at all, the Commission concluded it made no difference whether you include merchant platforms in that market or you exclude them. Either way, it said we lose. In effect, it is a somewhat technical argument, you might say, whether the market includes merchant platforms or it doesn't, because however you take account of them what they are saying, when you read the Decision, is that the impact of them is not sufficient to let Google off the hook in relation to its effects analysis. That

is where all of this goes.

MR JUSTICE ROTH: You say one has to define a market for dominance.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Clear. But one also has to define a market when considering effects, so they had to define a market for effect.

MR PICKFORD: They had to define a market and I don't disagree with the fact that they did define a market. My point is it is not a binding finding, for the reasons I'm going to come on to explain. I would say in this context this is a good illustration, I would say, of my crucial point about how one analyses what is binding and what isn't binding, because of the nature of the finding of the effect and I am going to take the Tribunal through that.

So if we can start off, please, by looking at the recitals 590 and 609 which deal with the Commission's findings about effects. So we begin on page 819 of the table. So having made findings where they say, look, there are effects based on our view of what the market is, which is that it excludes merchant platforms, they go to say:

"Moreover, even if the alternative product market definition proposed by Google, comprising both comparison-

shopping services and merchant platforms, were to be followed, the Conduct would be capable of having, or is likely to have, anti- competitive effects in at least the comparison-shopping services segments of possible national markets comprising both comparison-shopping services and merchant platforms."

Then if one goes to 609 --

MR JUSTICE ROTH: So that's the sort of -- 589 is their first finding.

MR PICKFORD: That's correct.

MR JUSTICE ROTH: And that's binding.

MR PICKFORD: It is binding, yes, save for the words "in national markets for search" which both sides agree is not binding, because that part of the Decision was set aside.

MR JUSTICE ROTH: That is annulled. Yes. 590 is the alternative?

MR PICKFORD: And 590 is the alternative. Exactly. So it is a heads we win, tails you lose analysis.

One sees it again in 609, which is at page 826: the same point. So what I say is in the light of those alternative conclusions, it can't be right that the market definition excluding merchant platforms is a necessary component of the Decision, because it would be equally true if it included merchant platforms,

because the Commission says: we have got you either way.

Now, to be very clear, I do accept it has to be one or the other. So we couldn't come along to the Tribunal in the hearing, the substantive hearing, and say: well, actually, because it is not necessarily the first and it is not necessarily the second, therefore it is open season. It has to be one or the other, because that is the way that the Commission analyses it. So it is either you are right or you are wrong. We think we are right, in which case our analysis by effect stands and even if you are right about the (inaudible) market, we still win, because there is still in effect in a segment of it and, therefore, your point about market definition does not take you anywhere.

I say that is probably a quintessential example of the type of analysis I was talking about yesterday, where there are two routes through to the finding and what that means is that this Tribunal can't depart from both of them, but it doesn't have to accept any one of them. It could, the Tribunal could decide, that actually in the light of the evidence that it has received it is persuaded that actually it would be more sensible to regard the market as including merchant platforms. That is perfectly consistent with the ultimate finding that there were effects, potential

effects, that meant that Google had infringed its dominant position.

That is the nub of that point. I'm going to come back to deal with -- in fact, whilst we are on that topic, why don't I deal with the other points that were raised against me at that level.

So the first of them was the cases of Sockel and Kington.

MR JUSTICE ROTH: I don't think they take one anywhere.

MR PICKFORD: In which case, I don't need to detain the Tribunal.

MS ROSE: Can I just ask? So you characterise this as an alternative analysis. But in reality, what is happening here is that the Commission was rejecting Google's defence on two bases. First, it was saying: we reject your defence on the facts, because we do not accept that merchant platforms should be included in this market.

MR PICKFORD: Mm-hm.

MS ROSE: Secondly, we reject your defence because even if you were right on that question, it wouldn't affect the outcome because there would still be potential effects on competition.

MR PICKFORD: Yes.

MS ROSE: So this is not really an alternative analysis: it

is simply two alternative bases for rejecting Google's defence. If you ask what is the basis of the Commission's Decision, the basis of the Commission's Decision is there were potential effects on the CSS market, which is properly defined as excluding merchant platforms. Isn't that right?

MR PICKFORD: That's the primary position, but it is not the sole basis. I am going to come on to the General Court, because it is important. Actually, there is a slight misunderstanding. If you go and look at what we said in our appeal, which I'm going to come on to, there is actually a slight misunderstanding of the way our appeal is put and it is going to be slightly granular, but I am going to take you there.

MR JUSTICE ROTH: I think the point that Ms Rose is putting to you is that this is not a case where the Commission says: there has been a dispute raised by Google as to whether the relevant market includes or should include merchant platforms. We do not need to resolve that, because whether it does or it doesn't, on either basis, it has a significant effect in that market. They are not saying that. They are saying: we consider that it excludes merchant platforms, but out of an abundance of caution, even if we were wrong on that, just like a court sometimes says, we come to this conclusion for

1 our judgment. But in case we are wrong and there is
2 an appeal, we will deal with another point.
3 MR PICKFORD: Yes. So with respect, Sir, they are saying
4 both. They are saying both that -- they are not saying
5 alone that we are not going to decide the market
6 definition. They do decide the market definition.
7 MR JUSTICE ROTH: Well, they have to do that. But they are
8 saying what they think it is and they are rejecting your
9 alternative case in terms.
10 MR PICKFORD: Yes. I totally accept that.
11 MR JUSTICE ROTH: So it is not a true alternative finding,
12 that's the point.
13 MR PICKFORD: Well, in my submission, that difference is not
14 pertinent to the question of whether it is an essential
15 basis or not, because of the fact that they have
16 a second route through. Had we, and I am going to come
17 on to deal with this, had we come to the General Court
18 and said: here is our challenge and our challenge is
19 just to your market definition and that was a challenge,
20 then the General Court could have said: well, that ain't
21 going to take you very far, Google, because there is
22 an alternative route through here. You do not
23 challenge, you have not challenged, the view that there
24 is an effect even if you are right about what you say
25 market definition is and, therefore, your appeal is

ineffective.

Now, what we actually did was we challenged the effects analysis and I am going to come on to show you that. But in my submission the test that I explained yesterday is directly applicable here. It does not need to be presented by the Commission in terms of something that they haven't decided one way or another. They are allowed and they have expressed a preference; they have expressed their view. Their view is that they are right about version A and they reject our position on version A, but they go on to say: but even if we are wrong about that, you still lose.

That is why it would not be inconsistent, we say, with the operative part of the Decision ultimately for this Tribunal to take a view that the right market, from the point of view of their analysis, is in fact a market that includes merchant platforms. Because the Decision still stands.

Can I come on and deal with our appeal to the General Court?

MR JUSTICE ROTH: Yes.

MR PICKFORD: Because this does confuse things slightly, because of the way that the General Court dealt with the appeal. So if we could, please, pick up our appeal, which Mr Moser didn't take you to, which is at page 77

of bundle A3.

Does the Tribunal have that?

MR JUSTICE ROTH: We are just getting it. (Pause)

Yes.

MR PICKFORD: So there is a section of our appeal which is big II and it says "The Decision fails to take …" --

MR JUSTICE ROTH: Sorry, which page is it on?

MR PICKFORD: I beg your pardon: it is 77.

And so it begins, it is a section entitled, "The Decision fails to take proper account of the competitive constraint exercised by merchant platforms". So what this was, was a generalised attack in relation to the effects analysis, that the effects analysis didn't properly take account of merchant platforms. It was not a specific attack on market definition, in fact, if you read it.

So one sees at paragraph 307:

"Irrespective of the test […], the Decision errs because it fails to [take] account [of] the role that merchant platforms play as a driver of competition and innovation in product search and comparison shopping. Taking merchant platforms into account demonstrates that the Decision's speculation about potential anticompetitive effects [that is what it is all about] is unfounded. Their competitive power precludes anticompetitive

effects. The Decision's failure to consider the competitive constraints exercised by merchant platforms vitiates the Decision."

Then we see over the page at 308, the second sentence of 308:

"Even if that market definition were correct..."

In parenthesis, “which it is not”, but that is not the emphasis of the attack here:

"…ignoring merchant platforms entirely in an analysis of competitive effects (as the Decision does) is wrong, as case law and the Commission's practice make clear."

Then we go on to criticise again in 309: we say “the Decision [entirely] ignores merchant platforms”. Then in 312, we say “under both versions of its effects claim [i.e. whether merchants are in or out of the market] the Decision fails to establish that [they] can be ignored.”

Then, in subsection A of section (ii), we address the point:

"The Decision ignores evidence demonstrating the competitive force of merchant platforms in product search and comparison shopping."

We say, 313:

"The Commission has a large body of accurate, reliable, and consistent evidence on file demonstrating the strong competitive force that merchant platforms

exercise in product search and comparison shopping. The Decision errs by ignoring [that] evidence."

So that was our challenge. Our challenge was to effects. It was not specifically to the particular product market and what the General Court does, is, it then analyses our challenge and it effectively breaks it down into two and it effectively says: well, insofar as it is directed at the product market, here is what we say, we reject it; insofar as it is directed at the effects analysis, even on a different product market, well, we reject that too.

So the way it deconstructs our argument is to look at it as if it were a challenge to market definition, but that isn't actually the challenge that we brought. The reason why we have structured it in this way is precisely because we knew that if we just challenged market definition alone, we would get met with the response: your appeal is ineffective, because all you have done is challenge one route by which the Commission gets home and you have not blocked off or sought to challenge the other route by which the Commission gets home and, therefore, your appeal purely based on the narrow question of the product market definition ineffective and, therefore, to be dismissed.

MS ROSE: So you weren't actually challenging the market

definition, excluding merchants?

MR PICKFORD: Not per se, no. We had a higher level challenge which was saying however you come at this, you are ignoring merchant platforms. But we were not saying it is specific to the way that you have dealt with market definition. We were just saying you have just ignored them and effectively we would say it does not really matter where they come in the analysis: you are not dealing with them properly. That is ultimately rejected.

MS ROSE: But you could have challenged it. You could have said that the Commission had erred in defining the market in the way that it did.

MR PICKFORD: Yes.

MS ROSE: And, because of that error, going on to ignore merchant platforms. Or, alternatively, when purporting to include merchant platforms, in fact, ignoring the competitive pressure of merchant platforms. You could have put your ground of appeal in that way, right?

MR PICKFORD: Yes. So that is effectively a translation of what we did in that we attacked effects or -- yes. We could have put it that way. To be clear --

MS ROSE: But you didn't?

MR PICKFORD: To make sure I have understood what I am accepting, you would have to have two strands to it. We

1 couldn't have just said: your market definition is
2 wrong.
3 MS ROSE: No, but you could have relied on the error in the
4 market definition to support the contention that the
5 Commission had gone wrong in its reasoning. Because it
6 would be quite a plausible, assuming the facts stood up,
7 it would be quite a plausible way of putting it that the
8 Commission was led into error because it had adopted too
9 narrow a view of the market and that had led it to
10 ignore the competitive pressure of the merchant
11 platforms.
12 MR PICKFORD: Yes. But that alone would not have been good
13 enough --
14 MS ROSE: But the point I'm making is you could have made
15 that point, but you didn't. You accepted the market
16 definition, but your complaint was that having in
17 brackets "permissibly" -- I know you say it was wrong,
18 but you weren't challenging it -- having "permissibly"
19 defined the market as excluding merchant platforms,
20 nevertheless the Commission had erred by ignoring the
21 competitive pressure of the merchants.
22 MR PICKFORD: No. I have been unclear: I beg your pardon.
23 My submission does not go so far as to say we accepted
24 the market definition. It is just we didn't cast our
25 attack specifically in terms of market definition. What

we said is you are not sufficiently taking account of the competitive pressure from merchant platforms. That can basically -- in terms of the Commission's analysis in the Decision, that can come home in two different ways.

MR JUSTICE ROTH: Yes. I think we understand that. Ms Rose's point is: you didn't do that, but you could have. It is not that would have been ineffective, it would have been a powerful way of putting your first argument.

MR PICKFORD: Well, only if we had challenged all of it.

MR JUSTICE ROTH: No. You challenged the inclusion of merchant platforms is the point we are on. You have to also say, and further in the alternative definition, that you would have to cover both. But that would have been a powerful way of attacking the first finding of effects. You could have done it.

MR PICKFORD: We would have had -- yes. So I think there is not very much between us here. There is a considerable amount of commonality in that we accept that we could have attacked market definition, as long as we also attacked the alternative position in relation to the alternative view of the market. Had we done the two together, and we had said "you are wrong either way" which is, in a sense, actually what we were saying, it

was put in slightly different terms. But that doesn't really matter, because I'm willing to accept that we could have done it that way.

The critical point from the point of view of my submission is that it would only have worked comprehensively with the two elements and if we'd only have had the first element, that is just the bit about market definition, we would have been met by a "this is ineffective" response. Because we hadn't covered off the alternative route by which the Commission got home.

That is why I say, looked at as a matter of logic and as a matter of necessity, what is necessary in this Decision to uphold the operative part, you do not need to find that the market includes merchant platforms to uphold this Decision. You can equally uphold the Decision on the basis that it doesn't include merchant platforms, but there were still effects and that is my point.

Now, the Tribunal may or may not accept my position in relation to the logic, but that is what I'm saying.

MS RIEDEL: Just to clarify. In paragraph 314, it does seem to me that you are challenging market definition. So I just want you to, sort of, put that in context to what you have just been describing.

MR PICKFORD: Yes. I mean, I would say that is consistent

with the point I have been trying to make. That we put our argument at a relatively high level, which is you are not taking account of merchant platforms. What was said in response to that by the Commission is: aha, this is effectively a back door challenge to the market, but you haven't actually challenged the market definition. So, no, no, no, it is not admissible. What the General Court goes on to say is: well, actually, looked at in substance, this is a full attack on the approach to merchant platforms and the competitive impact of them.

Where does one find that analysis in the Decision? Well, it comes in in two places: it comes in in the market definition part, and so we are going to look at it as if it were an attack on market definition alone, and then it comes in in the effects part. I can show you that, if I may, by going to how the General Court structured its Decision. I think that would be instructive. So if we go, please, to page 209 of the bundle.

So does the Tribunal have (d) above recital 460?

MR JUSTICE ROTH: Sorry, 209? In the judgment, yes. The role of merchant was not taken into account.

MR PICKFORD: So, yes. So (d) of the General Court's judgment is dealing with what I showed you was (ii) of the appeal.

MR JUSTICE ROTH: Yes.

MR PICKFORD: And there, it is put at the level at which I explained we were essentially putting our appeal, namely the role of merchant platforms was not taken into account in the analysis of effects. So that is the way that we were mounting our challenge. We are saying however you come at it, you didn't look at effects sufficiently through the lens of taking account of the impact of merchant platforms.

Then you see, what the General Court does is it then deconstructs our appeal into two elements. It says elements of the second part of the fourth plea according to which the definition of the product market is incorrect.

MR JUSTICE ROTH: Well, before we get to that, there is 461:

"Google maintains […] that the definition of the market for comparison shopping services adopted by the Commission is incorrect."

That was your case, as they understood it. Or are you saying they just completely misunderstood the case?

MR PICKFORD: I'm saying there was a distinction without a difference from the point of view of how the General Court analysed the case.

MR JUSTICE ROTH: Well, nevermind that. Is that right, that statement:

"Google maintains […] that the definition of the market for comparison shopping services adopted by the Commission is incorrect."

Are you saying the Court is not there correctly stating what you were maintaining?

MR PICKFORD: I'm saying in substance you can interpret our appeal as having done that and, indeed, you saw in parenthesis we say the market definition is wrong. But --

MR JUSTICE ROTH: That is how the court looked at it.

MR PICKFORD: Yes.

MR JUSTICE ROTH: That is how they understood it and that is what they addressed.

MR PICKFORD: Yes, in substance but not in terms. That is the reason why there was any debate about this. I'm not going to take you through the whole of the General Court's judgment here, but the Commission were saying: look, Google hasn't challenged market definition. You can't see the concrete, clear, express challenge to market definition, therefore, all of this is inadmissible.

What the General Court says, in effect, is: well, basically, they are, that is basically what their attack is going to in part. It is going to effects, wherever they are analysed, and there are two routes where we

need to consider merchant platforms in that context.

So that is why at 462 and following it deals with the appeal in the way it does in relation to product market.

Then at 496, which is on page 217, it then goes on to deal with elements of the second part of the fourth plea. So it is the same --

MR JUSTICE ROTH: In 470 they say the same thing.

MR PICKFORD: Sorry, 470?

MR JUSTICE ROTH: Yes.

MR PICKFORD: Sorry, I will just get that.

MR JUSTICE ROTH: 470 in the judgment:

"Although Google raises that objection only in the context of its fourth plea, alleging, […] that the practices complained of are not capable of having had anticompetitive effects, it does, as is apparent from paragraph 313 […] of the application, call into question the Commission's definition of that market…"

MR PICKFORD: Yes. That is entirely consistent, Sir, with what I have been saying. Implicitly, yes. Because what we are doing is attacking the effects analysis and how do you analyse effects? Well, you analyse effects through starting with looking at market definition.

MR JUSTICE ROTH: Well, you could say we accept the market definition, but we say it had no effect in that market.

MR PICKFORD: As I was seeking to make clear to Ms Rose, that is not what we said. We said we are just attacking effects and that, in effect, had two strands to it. It is consistent with what I have been saying: there was, in effect, a part of that that was about market definition and, in effect, part of that was about even if the market definition is right, then we say merchant platforms haven't been taken into account sufficiently. But we didn't structure it really in that way, that is my point.

MR JUSTICE ROTH: Maybe you don't structure it that way, but they analyse it that way.

MR PICKFORD: Yes.

MR JUSTICE ROTH: That's clear, isn't it? And they state the question they are addressing in 472:

> "…the question, in the light of the arguments[…], is whether the Commission has demonstrated to the requisite standard in the contested decision that the comparison shopping services offered by comparison shopping service providers [have] particular characteristics […] so [as to] differentiate them from the comparison shopping services offered by merchant platforms[, so they are not interchangeable.]"

MR PICKFORD: Indeed. I don't think that any of this ultimately affects my argument. As I understand the

potential point of resistance, it ultimately just comes down to when the Commission has two routes by which it can get to an answer and it doesn't need any one of those routes, it is permissible for me to say: well, in that case, neither route is of itself binding. What is binding is that it is one of the two. So what we are bound by is that there were effects and what we are bound by is that the market must have been at least a market that included merchant platforms or a market that excluded merchant platforms but, nonetheless, there were effects in the non-merchant platform segment of that.

Those are the things that we are bound -- they are inescapable because as a matter of logic those are the points that are required to uphold the Decision.

My only point is that where there are two routes through on an issue such as this, then neither is of itself binding, even though taken together they are.

MR JUSTICE ROTH: I understand that point. But if we apply the test is it a finding that you could effectively challenge on appeal, clearly -- you did challenge this, we don't have to ask it hypothetically. You did challenge it on appeal.

MR PICKFORD: Yes.

MR JUSTICE ROTH: You addressed it at length and the General Court in terms rejected that appeal and held that the

Commission's definition of the market was correct.

MR PICKFORD: Well, yes. But --

MR JUSTICE ROTH: So you were able to challenge it, you did challenge it, your challenge was dismissed?

MR PICKFORD: But the but, Sir, is twofold. On the facts, what we actually challenged was something slightly higher order. It was the impact of merchant platforms in the effects analysis. Now, that was analysed, I accept, in two parts. It is saying, well, insofar as that's a market definition challenge, here is what we say about it. Insofar as it is not a market definition challenge, here is what we say about that. You lose either way.

But actually if you do go back to our appeal, the reason our appeal was admissible is because we took it at the necessary point. We took it at the level in the analysis that we had to attack it in order to be able to have an effective appeal.

What we didn't do was just bring an appeal that attacked market definition and had we done that, had that been our appeal, that could have been met by the answer: your appeal is ineffective because there is a secondary route to the conclusion, to uphold the operative part of the Decision. That is the point.

MS ROSE: But at paragraph 470 where the appeal is declared

admissible.

MR PICKFORD: Yes.

MS ROSE: Isn't the General Court saying that although you have raised a challenge to the definition of the market by reference to the competitive pressure of the merchants, in substance you are challenging the product market and that is the reason why the Commission's argument that your appeal is inadmissible because you haven't challenged the market definition is wrong.

So your appeal is admissible because the General Court gave you the benefit of the doubt and said in substance you are challenging the market definition. Isn't that what they say at paragraph 470?

MR PICKFORD: My answer to that is that the point that matters here for the question of bindingness, according to my argument about alternative strands, ultimately is not confronted head on by the General Court. I say it might well have been a different judgment had we only been raising points that effectively went to market definition, without ever having challenged market definition.

However the General Court analysed it, that doesn't ultimately determine how this Tribunal should analyse it, because what ultimately matters is, the Decision and, of course, in this context we did have an admissible

appeal because we hadn't made the mistake of only focusing on market definition. Our appeal actually was at a higher level. So it is impossible to say, with respect, what the answer from the General Court would be, had we only brought a challenge based on market definition, because that is not what we did. We brought a higher level challenge based on effects generally.

So it doesn't, in my submission, particularly elucidate that hypothetical question that we are asking here to look at what the General Court did here in the context of an admissible appeal, because what I'm saying is it would have been an inadmissible appeal had we only challenged market definition. For a different reason, perhaps, than the Commission were saying. But the Commission, no doubt, would have made a different argument in that alternative hypothetical word. They would have said: your appeal is ineffective, because you have only challenged one route by which we get home.

But obviously the General Court is not going to be dealing with that, because that was not the nature of our appeal. That is why it doesn't take us really that far. We ultimately have to pose the question hypothetically ourselves and so it comes down to the simple question: is it binding if whilst it could -- a proposition could never have been challenged on its

own, nonetheless it could have been challenged if you challenged it in conjunction with other propositions.

MS ROSE: And, in fact, you did challenge it in conjunction with other propositions.

MR PICKFORD: Yes. So the answer is: do we look effectively at proposition by proposition, or topic by topic, or do we aggregate and say is there a world -- and that's what I say we do. The alternative view is you say: well, is there a world where you could have produced an admissible appeal that inter alia had challenged this particular recital and the problem, in my submission, with that world is it basically mops up everything logically that isn't entirely irrelevant. Because you could always do that.

So that is the heart of the debate. I mean, I don't think I can, obviously, take it further forward. I understand that the Tribunal might not be with me. What I have been trying to do is to pinpoint the point of departure effectively, which I say is actually quite narrow. I agree with a very large amount of what the Tribunal has put to me and I have tried to pinpoint where there seems to be a possible, who knows --

MS ROSE: It all comes down to the *Trucks* Tim Ward point.

MR PICKFORD: Yes. Exactly. But this, in my view, is a really clear example because one of the things that

was said to me yesterday about the *Trucks* Tim Ward point is that: well, how do we even identify sometimes whether these things are alternatives? Maybe there is a list and maybe they are all cumulative. What I'm saying is you can test my case, my primary case, quite neatly by reference to these recitals, because these are the ones where the Commission itself has made very clear: we have two alternative routes and either of them will do from the point of view of upholding this Decision, thank you. We have our primary route, which we believe is correct. But even if you are correct, we still win.

So I think I can, prior to the short adjournment, deal with my other two much more micro points.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Because that is the biggie.

MR JUSTICE ROTH: We understand your point.

MR PICKFORD: Yes. So the more micro level points, as it were, is if we go to page 641, please, of the bundle. I'm referring here, obviously, to the schedule. So we start at 192, where the parties are in agreement that all of it is binding, but for the argument about whether merchant platforms need to be in or not. Whether they are a necessary component. That is why that is the bit that is not in bold.

Then there is a finding at 193 about "limited

substitutability between comparison-shopping and other specialised search services" and we accept that is binding. That's a pretty core second order point that would need to be established in order for the first point to be binding about other specialised search services not being in the market.

Then at 194 through 195, we have the Commission's reasons for why it has come to the conclusion about limited substitutability in 193. The parties agree those are nonbinding, so by the time we are down to that level of the analysis, we are into nonbinding territory. Because all that we really need is the finding about limited substitutability in 193. The rest is detail.

We then get to 196. So that is, again, agreed to be binding. That is about limited substitutability between comparison shopping services and online search advertising platforms. So, again, we are knocking out another potential product that might be in the product market and the parties agree that is binding. Obviously there needed to be a finding about limited substitutability to be able to knock them out, but then what is nonbinding is the reasons for that and they follow at 197 all the way through to 206. All of that common ground, not binding, because that is -- to use my terminology, obviously I'm not saying that Mr Moser

agrees with this -- but in my world, those are third order findings. All nonbinding.

Then we get to 207 and that is, again, binding because it is about limited substitutability. Then 208, et cetera, all the way through to 215: nonbinding. Again, for exactly the same reasons.

Then we get to the interesting bit, because at 216 when the topic turns to merchant platforms, the reason why in 216 we have an argument, of course, is because of my primary point. Because I say, for the reasons that I have explained, merchant platforms don't need to be in the market at all. I accept that if I am wrong on the primary argument that the Tribunal has been entertaining then that would convert the 216 nonbinding into a binding by us. Because it is in exactly the same form as the other paragraphs that deal with whether there is substitutability or not.

But, again, maintaining the exact same analysis that the Claimants have agreed to in relation to all the other topics, when you then come on to all of the reasons that underpin that from 217 onwards, all of which are in the contested bucket, all of those, I say, are exactly the same level of reasoning which it is common ground is nonbinding in respect of all the other points of comparison.

Sorry: compared to all the other products that might or might not be in the product market.

So my second order submission, the second level of my submission, is that applying the logic that is apparently common ground between the Claimants and Google for the rest of this section, none of these contested recitals all the way up to -- I'm just trying to find where it is. I think it is 222. So shall I continue? It is actually 223, because that is nonbinding. It is all the way through. Well, the contested ones go up to 222 and then there is not actually a dispute thereafter, because we are, even on the Claimants' view, we are into agreed.

Then we continue again back into things that we say are nonbinding and they say are binding, all the way through to 226. Is that right? No.

MR JUSTICE ROTH: 242, I think. It goes up to the eighth point at 242.

MR PICKFORD: Yes. Thank you.

MR JUSTICE ROTH: Not everything is relied on, because there are examples and evidence and so on.

MR PICKFORD: Exactly. But I say by parity of reasoning for the first ones --

MR JUSTICE ROTH: Yes.

MR PICKFORD: So that is my second level argument. If you

don't like that one --

MR JUSTICE ROTH: Just while you are there. 246: is that then in the same category --

MR PICKFORD: I think it is in the same category.

MR JUSTICE ROTH: -- as what you said about 216? Namely, if you are wrong on your primary argument, then 246 would be binding.

MR PICKFORD: Bear with me one moment, I'm just getting to 216. Yes.

MR JUSTICE ROTH: It is the first sentence.

MR PICKFORD: Yes. So we only say the first sentence is and that's correct.

MR JUSTICE ROTH: Yes.

MR PICKFORD: It falls, if I'm wrong --

MS ROSE: What about 224? Isn't that the same point as your primary argument?

MR PICKFORD: No. No. So 224 is one step down into the weeds of why it was found there wasn't sufficient substitutability between merchant platforms and CSSs. In each case where we agree that there is a binding recital followed by nonbinding recitals for other points, it is just at the level of -- I'm just going to find an example.

MR JUSTICE ROTH: 224 is the sort of counterpart to 217. 217 is demand side and then it gives a series of

reasons, and 224 is supply side and then it gives a series of reasons.

MR PICKFORD: Yes. If you go back to, as an example --

MR JUSTICE ROTH: You say that that is -- I mean, it needs to be consistent. Then you say, well, that's the equivalent of 193, which is not said to be binding.

MR PICKFORD: So, yes. It is the equivalent to 194 and 195.

MR JUSTICE ROTH: Sorry. 194 is what I meant. 194 to 195: supply.

MR PICKFORD: Exactly. All that is required is the basic finding: limited substitutability between the two. Then go on to look at the demand side and the supply side separately. But for every single other area, it is common ground that that can't be binding.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So just applying the same reasoning, that is my only point there.

MR JUSTICE ROTH: I mean, I can see as a matter of consistency what you say is right. Whether, in fact, one should hold the Claimants to consistency when it may well be that they didn't bother with the others, because it is really not relevant to the case before the Tribunal and they are not seeking to establish some academic proposition of what is binding in this. It is only the ones that are important.

MR PICKFORD: Yes.
MR JUSTICE ROTH: So I'm not sure whether an inconsistency is necessarily a powerful argument in itself. We don't have to decide on the others. It may be we think they are binding, but we don't --
MS RIEDEL: It may not be entirely inconsistent, because 216 starts to "contrary to what Google claims" which seems to be a different comment from the other questions about what else isn't in the market. So it seems to have been a more disputed point.
MR PICKFORD: Well, I still say, notwithstanding those opening words, but ultimately if it were necessary to get into the weeds of looking at each of these points on the supply side and the demand side separately, if it were necessary to do that for the other points, they should have been binding but it is common ground they are not and it still carries across. But I take the point that they were different words. In my submission, it does not ultimately affect my point.
MR JUSTICE ROTH: Yes. And you have a third quick point?
MR PICKFORD: I can be very quick. The final point is even if you are not with me on my first two points, recital 220, which we considered yesterday, because a bit of it is cross-referred to in 439.
MR JUSTICE ROTH: That is confirmatory evidence, you said?

MR PICKFORD: That is correct. I say all of that is -- I accept that a bit of it, I had to accept yesterday a bit of it was binding, but that is because it served a different purpose elsewhere.

MR JUSTICE ROTH: Yes.

MR PICKFORD: That is the bullet in 220; the second bullet in 220. All the rest of that goes on and on, page after page: that is all confirmatory evidence and it is all of a piece with, for example, I think it is 235 where, again, there is a long list of confirmatory evidence.

MR JUSTICE ROTH: I don't think 220, and someone will correct me if I'm wrong, subparagraphs 3 to 6 is actually said to be binding.

MR PICKFORD: I beg your pardon --

MR JUSTICE ROTH: It is only (i) which is a quote from Google.

MR PICKFORD: Let's go back.

MR JUSTICE ROTH: Which I expect, I don't know if it is contested, I imagine it's accurate, and then the first sentence of (2). I don't think the rest; am I wrong?

MR MOSER: It is (1), (2) and (5).

MR PICKFORD: It is (5) however, which begins at the bottom of page 650. That is the bit that has got all of the majority --

MR JUSTICE ROTH: Right. I had missed that. Yes. Sorry.

MR PICKFORD: So my position is we are, apart from the bit that we had to extract, we are down in the weeds at this stage.

MR JUSTICE ROTH: Yes.

MR PICKFORD: And, on any view, this isn't binding and, again, you didn't particularly like my consistency point, but one can find other examples of being down in the weeds where the Claimants accept that those are nonbinding and 235 would be an example.

That is all I have to say on that issue.

MR JUSTICE ROTH: Thank you. We will return at 2 o'clock.

(1.05 pm)

(The short adjournment)

(2.00 pm)

MR JUSTICE ROTH: Yes, Ms Love, isn't it?

Reply submissions by MS LOVE

MS LOVE: May it please the Tribunal, I will be replying on the market definition without disparaging the creativity of Mr Pickford's three tiers of argument I anticipate being relatively brief in reply --

MR JUSTICE ROTH: Yes. Would you like to go to the third, the small point, about -- his last point just before lunch, about recital 220 and the first, while it is fresh in our mind. This was where there are, I think, it is (1), a bit of (2) and is it (5), that you say are

binding, and (5) is quite a long one.

MS LOVE: Sir, I am not sure how much more mileage there is in this debate. We say that 220 (1) and (2) refer explicitly to the facts. "The fact that Google itself distinguishes the different purpose and characteristics of, respectively, Google Shopping and of merchant platforms" and then (2), "The fact that Google allows merchant platforms, but not competing comparison-shopping services, to participate…" So they are both clearly referring to factual findings, not illustrative example sort of things.

MR JUSTICE ROTH: But it is all prefaced, isn't it, by the -- I am sorry to interrupt you -- but by the beginning of 220, "confirmed by the following evidence". So this is all evidence supporting that conclusion. You say that -- which is all a subset of the demand side. (5) is a lot more evidence or a whole lot of paragraphs; isn't that, going back to *Trucks* -- isn't that what *Trucks* sought to distinguish, between necessary findings and the evidential support?

MS LOVE: Well, Sir, as Mr Moser said, we do accept those words confirmed by the following evidence appear, but we say one has to look at it as a whole and look at the actual wording of (1), (2) and (5), which are very clearly stating facts and not merely reciting

illustrative examples of the sort that we saw in the *Trucks* decision of the meetings, for instance.

Also -- and here I'm trespassing into tier two of Mr Pickford's argument -- the critical point that the position on merchant platforms was contested by Google, so this is all in the context of addressing Google's claims and the words at the start of recital 216, contrary to what Google claims.

The other point that I would add, Sir, is that this is -- and we have sought to be selective in (1), (2) and (5). This is all based heavily on their material. (1) is essentially derived from their own web pages and policy -- I'm afraid they are not here but you could see that in the Decision from footnotes 146 to 147; and (2), from their response to RFIs; and (5), explicitly from their own documents.

MR JUSTICE ROTH: We are not deciding if it is right or wrong as such, are we? We are deciding if this is an essential basis for -- or essential or necessary for the decision that there is limited substitutability between 216, which stands or falls with a macro point, and that is why I get a little concerned about how far down you go. I mean, the evidence is always facts, in a sense.

MS LOVE: Well, Sir, I don't know how much further I can

take it. You have Mr Moser's point there, is the reference to these being facts; you also have our point they are in the context of a contested point and they are explaining why that contested point is to be rejected. It really is just a matter that we took because we were rather surprised that they seemed to be actively downplaying or disavowing their own material in the context of setting out the reasoning in support of a point that was clearly hotly contested, and if Mr Pickford has his way, is going to be hotly recontested in Trial One, it would seem.

MR JUSTICE ROTH: Yes. You see, the fact -- the conclusion is in 217, from the demand side perspective ... they serve a different purpose for users and for online retailers. That's the finding. Then 220 is just saying, well, this is confirmed by various extracts from a whole lot of things. It does seem to me that you may say 217 is the key conclusion and 224 is the key conclusion on the supply side. Really, that's it to support the Decision, otherwise unless one has to go to all the evidence that supports everything, then you go down, down, down, down, as Mr Pickford metaphorically put it, into the weeds.

MS LOVE: Sir, I don't think I can take it much further, save to say the words "confirmed by the following

evidence" are doing quite a lot of heavy lifting in 220 because it is clear at least some of these subparagraphs are individual facts that are not found in 218 and 219, and that go beyond them. To that extent, we say they are covered by the question of what is necessary to understand this.

MR JUSTICE ROTH: Yes.

MS LOVE: I don't intend to take up a great more time on three sub recitals of a recital, which is in a sea of much bigger, in Mr Pickford's words, higher level or higher order debate.

I think that leads me on to --

MR JUSTICE ROTH: Just a moment. (Pause)

Yes. Thank you very much, I don't think we need trouble you, Ms Love, on the other points.

MS LOVE: On tiers one and two?

MR JUSTICE ROTH: Yes. Thank you.

Mr Moser? Yes.

Submissions by MR MOSER

MR MOSER: As far as my further submissions are concerned, my next section would be sections 7.2.2 to 7.2.3 of the Decision, the first one being 7.2.2, the importance of user traffic, which starts at recital 444.

MR JUSTICE ROTH: Oh, I am so sorry, there was one other thing on market definition that I wanted to raise with

Mr Pickford and I forgot. Mr Pickford, it is 191. There is a footnote, 115 --

MR PICKFORD: Yes.

MR JUSTICE ROTH: -- which defines what a merchant platform is.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Is that contested? Because it does seem to be necessary to understand everything.

MR PICKFORD: I am happy to concede that one.

MR JUSTICE ROTH: Yes. Thank you. I thought you would. Yes.

MR MOSER: I am grateful.

MR PICKFORD: I don't wish to interfere unduly with what Mr Moser is planning to do, but he just said that his next topic --

MR JUSTICE ROTH: Just a moment. Just one moment.

MR PICKFORD: Sorry. (Pause)

MR JUSTICE ROTH: Yes.

MR PICKFORD: He said his next topic is the importance of user traffic, which is section 7.2.2. That obviously skips a lot of points that are in dispute, starting at the beginning of section 7. I had understood we were going to go through -- from front to back.

MR MOSER: He's right. He's right. I optimistically leapt forwards.

MR JUSTICE ROTH: Mr Moser has agreed with you.

MR MOSER: Nothing to see here. I am most grateful to my learned friend. It is like serving from the wrong side in tennis. I am not there yet. We are, indeed, I'm afraid, at section 7.2.1, which concerns Google's abusive conduct, and that begins on page 695 of the table.

There is no dispute between the parties that recital 341, save for the final words "and general search services", for reasons that are known -- there is no dispute that that is binding. To recap, 341, which we looked at in opening, summarises why Google's conduct was abusive, because it constitutes a practice falling outside the scope of competition on the merits, and 342 provides more granularity.

We have dealt with meaning; I won't go back to that.

As the Tribunal can see from the comments, there is the dispute on meaning, also including scope of the product market, including merchant platforms. That is also already addressed in what I did earlier today. So I propose to skip over 341 and 342 and move on to 343. Again, I addressed in opening the role that this plays in interpreting the term "Google's own comparison-shopping service", and that is why we say this is binding in its entirety.

We see from Google's skeleton argument at paragraph 78 that they don't object to the balance of 343 being considered binding. We think that is a reference to all but the first two sentences. So we say -- and it seems that it was only, et cetera, is not in dispute, which is fine. But we say that all these sentences are necessary to interpret the nature, objective and effects of Google's conduct because they encapsulate what has happened.

Google have been, with respect, a relatively unsuccessful entrant into the CSS market. It achieved what the Commission found was artificial success, in the sense that its CSS only began to do well, attracting traffic on a lasting basis by abusing its dominant position in general search services. So it makes no sense to slice and dice this recital. All of it is necessary.

MR JUSTICE ROTH: Why is it necessary? It may be helpful to understand things and as background, but the fact that Froogle didn't do well -- that is conceded -- no, they are not conceded. I think the first two sentences -- on an issue, yes.

MS RIEDEL: The first two sentences are "In summary" and "Google did not invent". (Pause)

MR PICKFORD: To clarify, it is just the first three and

a half lines. The first two sentences. Those are the bits that are in dispute.

MR JUSTICE ROTH: Yes. I would have thought that that is -- I don't think that is necessary to sustain the decision that Froogle didn't do well. It might have done well, it might have done badly. It is helpful to understand it, but it doesn't seem, does it, necessary to support the finding of abuse once Google started the conduct?

MR MOSER: Well, this is, I suppose, why some of these matters are a matter for debate and it is not mechanistic. We see it differently, with respect, it is part of the whole picture. If you want to understand the finding of abuse made by the Commission, you have to know where, as a matter of fact, you are coming from. You are coming from a position where Google didn't invent comparison shopping, and you are coming from a situation overall where there was an artificial reaping of benefits from the conduct.

We don't really understand why it is necessary to salami-slice 343 -- forgive me, that was my error -- that the third sentence is also conceded. But that means they are happy to say that Google's first comparison shopping service, Froogle, was not gaining traffic as it didn't appear visibly in Google's search result pages. We don't see how that is qualitatively

different from the first two sentences.

MR JUSTICE ROTH: I see. I am sorry. I had missed the full stop. I am grateful. So it is the first one and a half lines, is it, that are in --

MR PICKFORD: I am sorry, I am looking at the electronic version. That may have been -- my electronic version -- it is from the words "in summary" to "Google's first comparison-shopping service". I apologise, in the electronic version, that is the first three and a half lines.

MS ROSE: On the schedule, it is two and a half lines -- in this version of the schedule, it is two and a half lines.

MR PICKFORD: Right.

MS ROSE: The first two sentences.

MR PICKFORD: Yes. I was trying to help, but I may have been unhelpful, but I am using an electronic version, which is obviously different.

MS ROSE: "In summary, Google has artificially reaped the benefits of the Conduct. Google did not invent comparison-shopping."

MR PICKFORD: Yes.

MR JUSTICE ROTH: That's it, that's accepted, but the fact Google's first comparison shopping service was not gaining traffic, that you accept is binding?

MR PICKFORD: I'm not sure we say it is binding, I think --
MR JUSTICE ROTH: You don't contest it?
MR PICKFORD: -- we don't have the heart to argue about it, because we don't contest it.
MR JUSTICE ROTH: Right. That solves that. Thank you. Thank you, Ms Riedel.
MR MOSER: I have to say, I barely have the heart to argue about it. I just don't understand why Google don't accept the first two and a half lines --
MR JUSTICE ROTH: Well, does it matter? Who invented the shopping service, I mean --
MR MOSER: It is one of those -- it seems to matter to them so they must mean something by it.
MR JUSTICE ROTH: Well --
MR MOSER: It is like Metternich's comment on, I think, was it, the death of Talleyrand when he said, "Oh, I wonder what he means by that?" So one is immediately suspicious. But there we are. We have already spent too much time on it.

Perhaps a more interesting point of disagreement comes next, and that is at 346 to 348. These are the recitals that concern Google's Webmaster Guidelines and Google insists they do not contain any findings, any findings that comprise the essential basis for the operative part of the Decision.

Now, we say: no, they are binding for the same reason that the agreed 345 is binding. They are a key part of the explanation of how Google ranks web pages, including the role that Webmaster Guidelines play in that ranking exercise. So they explain in simple terms how Google's underlying algorithms work. If I can put that in a different way, the algorithms were implemented to give effect to the Webmaster Guidelines. Insofar as we are talking about the algorithms, this is important.

Now, it appears from Google's skeleton -- and I am looking at paragraph 40 of Google's skeleton -- that their main concern is these recitals address manual demotions. That is probably what they are concerned about. Manual demotions are one of those things you might have noticed. It is a rather minor point, but they are in issue between the parties, and Google's position is that the Commission found only algorithms to be part of the abuse, and our position is it can be wider than that. I think I have dealt with that in opening. We say it is not a correct reading of the Decision to say manual demotions can't be part of the abuse.

If we look at 344, we see that it states the competing CSSs are prone to having their rankings in the Google SERP reduced by certain algorithms, so not -- so

not particular algorithms; and 345 refers to both algorithms and a variety of adjustment mechanisms. You will have seen that in the skeleton it is our case, a variety of adjustment mechanisms is wide enough to include manual demotions.

So if that is the concern, we say that there is nothing in that. 346 and 348, like 345 and 344, should be considered binding. It is all I want to say about those.

We then move on in recitals 349 and following to a description of the dedicated algorithms that the Commission found to be prone to demoting competing CSSs. Competing comparison shopping services --

MR JUSTICE ROTH: Sorry, you are --

MR MOSER: 349 of page 699 -- these are prone to being demoted by at least two dedicated algorithms, Algorithm A and Panda.

MR JUSTICE ROTH: Just one second. Sorry. (Pause)

Yes?

MR PICKFORD: I was going to suggest that it might make sense, it might be easier for the Tribunal, if we do this topic by topic. So there are a couple of points here that kind of go together. I could respond to those, then the Tribunal will have the points on those issues. The problem with going for quite a long period

of different recitals is there are different issues that apply in relation to different ones and I don't know if it is going to be helpful for the Tribunal.

MR JUSTICE ROTH: That's very helpful. I wasn't envisaging we will do the whole of abuse of dominance section because that is indeed the bulk of the dispute, and that we would take them at a certain point.

MR MOSER: I think we take them in the order in which the Commission divided them, so we do 7.2.1 first, and maybe 722 either with or without 7.2.3 and so on. It is just --

MR JUSTICE ROTH: That is probably the simplest, isn't it?

MR MOSER: I confess I myself -- I can comfort my learned friends if they are concerned I'm just going to bang on through the whole of section 7, I wasn't planning to, but I frankly can't say whether the next point is the same as the previous point or sufficiently different because, for instance, I'm about to say in 349 again we see at least two dedicated algorithms which is agreed to be binding.

MR JUSTICE ROTH: What is sensible, maybe, is if you do 7.2.1.1, which is display -- position and display of competing CSSs.

MR MOSER: Yes.

MR JUSTICE ROTH: And then we deal with that and then we go to 7.2.1.2, which is position and display of Google's

CSS. So that might be a sensible break. So before you get to the Google display --

MR MOSER: Yes.

MR JUSTICE ROTH: -- so that, in other words, you cover everything between 345 and 377 and then we hear from Mr Pickford.

MR MOSER: Yes.

MR JUSTICE ROTH: You have been referring to 346 to 348.

MR MOSER: It is agreed, but it frames the next bit of what I'm talking about.

MR JUSTICE ROTH: Then we have 349 to 351 are agreed.

MR MOSER: Yes.

MR JUSTICE ROTH: 352 is agreed and there is a dispute about the first sentence, I think, at 353; is that right?

MR MOSER: 352 is agreed. 353 to 355, 359 and 361 to 363 are the next cluster which Google describes in paragraph 41 of its skeleton argument as a "mixture of statements" and evidence in relation to Algorithm A and Panda. So looking then at those.

If we go back to page 700 and look first at what is agreed, recital 352 is agreed:

"Comparison-shopping services are prone to being demoted by the [A Algorithm] due to the characteristics of those services."

Agreed. Fine. But that is a completely bare

sentence that simply tells you what it says. What the characteristics were, why they rendered competing CSSs prone to demotion is another matter, is explained. For that, you have to look at 353 to 355. They are not matters of illustrative evidence, with respect, they are the reasons for the implementation of one of the integral parts of Google's abusive conduct, reasons or findings of fact, if you like.

We would add that we have been, again, careful to excise illustrative evidence where it actually exists, for example, the second to fourth sentences of 353, which says first -- and this is confidential so I can't read it out, but it says -- the first point it says in the underlined bits and then there is some obviously illustrative stuff in the next bit.

MR PICKFORD: I do hesitate to interrupt and hopefully this is going to help the Tribunal. I heard what the Tribunal said about 15 minutes ago about not needing to hear from Ms Love on my high order point. If the Tribunal is not with me on the essential core point that I was making about if there are different ways of getting through to the same result, then you are not going to be with me, I'm very happy to accept in relation to 353 to 355 or 359 to 370, which is the next set of disputed recitals, because that is the same

point.

Obviously for the purposes of this hearing I'm not giving up my point, I'm just accepting that if you didn't like it in its first incarnation, you are not going to like it any better here. So that I think should help Mr Moser. He doesn't need -- I accept 353 to 355 and 359 to 370 are all basically of a piece. So I will maintain my argument, but if you are not with me on that, then I'm not going to spend a lot of time arguing against it.

MS ROSE: But, I mean, this doesn't seem to be the merchant platform point.

MR PICKFORD: No.

MS ROSE: This is about algorithms.

MR PICKFORD: Yes. Okay. Well --

MS ROSE: So I am puzzled by that concession, quasi concession, contingent concession.

MR PICKFORD: Okay. It may be that I have over-inferred what the Tribunal's reasoning is. So maybe it would be helpful if Mr Moser -- I tell you what, I will let Mr Moser complete his submissions and then I won't interrupt again. I thought it was going to be helpful. I thought I was going to cut through. I may not be helping.

MR JUSTICE ROTH: There may, Mr Pickford, be a certain read

across to certain points that apply in the same way, but I think the merchant point was rather different, not least we had the appeal, the General Court and so on. It was a clear conclusion, we thought, by the Commission in the Decision. I think this does seem to me a rather different point.

MR PICKFORD: Okay.

MR JUSTICE ROTH: I think let Mr Moser finish this section, then we will hear you on it.

MR PICKFORD: Okay.

MR JUSTICE ROTH: It may be you certainly don't have to repeat the same argument as we work through on other points. Yes?

MR MOSER: Indeed. Well --

MR JUSTICE ROTH: So you say that 353 to 355 are really the facts that explain the conclusory statement in 352.

MR MOSER: Yes. My learned friend, Mr Pickford, is entirely right to say that the legal principles underlying my argument are the same as those that I deployed in the earlier section. So I would not repeat them. Indeed, it is a triumph of Ms Love's advocacy that even her not saying something has led to this complete success.

However, where perhaps I can still add some comments in relation to these coming on to 359 and then 360 and 363, in relation to the application of Algorithm A and

Panda, though 360 is not contested, here the Commission is addressing Google's claim about whether the impact of Panda was being overstated and the Commission was explaining the impact of Algorithm A and Panda on competing CSSs. Again, without these, we say you have an assertion -- a bare assertion in the earlier recital, but you don't have the factual basis or the explanation. So it does come back to the view you take of the hierarchy, as it were, and then also whether this falls within that view.

We say it does. The next cluster of contested recitals --

MR JUSTICE ROTH: Just pause a moment.

MR MOSER: Yes. Sorry. I don't want to take it too quickly. (Pause)

MR JUSTICE ROTH: I appreciate that 358, first sentence, is the equivalent of 352.

MR MOSER: Mm-hm.

MR JUSTICE ROTH: 352 applying to Algorithm A, 358 applying to Panda. They are basically saying the same thing for each of the two algorithms.

MR MOSER: Yes.

MR JUSTICE ROTH: But 353 to 355 is really explaining how they are being demoted -- the basis of the demotion -- whereas 359 is to do with impact; and 361 is, sort of,

evidence of impact, which seems to me a bit different, isn't it? They don't seem to me the same.

MR MOSER: It is one of those contrary to Google's claim points.

MR JUSTICE ROTH: Yes.

MR MOSER: Where they are meeting Google's claim, as it were, the defence that Panda was being overstated and they explained --

MR JUSTICE ROTH: Well, both, yes.

MR MOSER: Both -- they explained the impact of Algorithm A and Panda in that context. We say simply that without that you haven't got the full picture. So somebody who merely looks at what is left of the Decision isn't going to be able properly to understand --

MS ROSE: So 360 is not contested?

MR MOSER: No.

MS ROSE: Doesn't that give you what you need, because it tells you what the impact is?

MR MOSER: Possibly it does, because we are going for belts and braces so we really have the whole picture --

MR JUSTICE ROTH: You are really going down into 361, the Visibility Index; 362, calculations submitted by Kelkoo. This is all evidence, really. 363, visibility trends.

That is really once you go into the evidence, then there is a question: well, why not all the evidence and

what do you select?

MR MOSER: I'm not going to press you too hard on 361, 362 and 363. I do say that 359 is actual finding. That is not evidence.

MR JUSTICE ROTH: Yes.

MR MOSER: And that not contested 360 in fact refers back to 359. So it is odd in a sense that 359 is contested. What we say -- and I will say this respectfully and briefly because I can sense the Tribunal isn't entirely with me on this evidence -- but the focus is not actually on the source. It is not so much on this is the Visibility Index or this is from Sistrix or whatever; it is more based, say, on the facts in 361.

It indicates that during the period between August 2010 and December 2016 the vast majority or the most important CSSs in terms of traffic, their visibility in Google's general search pages was as, then the important but not binding actual evidence.

MR JUSTICE ROTH: I mean, bear in mind in terms of evidence. First of all, you have that statement, it is not excluded. It is still relevant and may be persuasive at trial; secondly, you can, you know, put in evidence the same visibility index. If this is what it shows, it is what it shows. So whether it is formally binding, if it is making factual statements, well, there they are. No

1 one suggests the Tribunal can't look at them at trial.
2 MR MOSER: Sir, yes. Well, you have my submissions that we
3 are looking at the facts, not the source. Some of these
4 are inevitably going to be stronger than others.
5 MR JUSTICE ROTH: Because you have 364 -- you have, as
6 Ms Rose points out, 360, 364, 365. I mean, there is --
7 (Pause)
8 I mean, I can see that you may want -- that perhaps
9 368, you may say, is of significance.
10 MR MOSER: Well, when we come to 368 to 370, that is where I
11 renew my more forceful submissions.
12 MR JUSTICE ROTH: What is important, you say, to you is 359.
13 MR MOSER: Yes.
14 MS ROSE: There is a slight puzzle here, because there is
15 not agreement on the evidence that supports the impact
16 of the algorithm on the weekly Visibility Index, but
17 there is agreement in relation to the impact on the
18 trigger rate and they are both sub arguments as to the
19 impact of the algorithm. So I am slightly puzzled as to
20 why those two different aspects are being differently
21 treated.
22 MR MOSER: Yes --
23 MS ROSE: The Visibility Index -- yes. I guess it's
24 a question for Google.
25 MR MOSER: Yes.

MS ROSE: So I do take the point that 361 seems to be saying the same in substance as, say, 366 and 365, which are not disputed. 365 and 366, they deal with trigger rate.

MR JUSTICE ROTH: 366 is --

MS ROSE: 361 is Visibility Index. They are both the fleshing out of the point being made at 359.

MR MOSER: Yes, indeed.

MS ROSE: So it is slightly puzzling.

MR MOSER: Well, we thought so, ma'am, with respect. That is why we said it's partially binding, trying to excise the bits that strayed too far into evidence, but for some reason that was not agreeable.

MS ROSE: I mean, we actually have three different ways of treating what is all the same material. Some of it is not contested; some of it is said to be binding; some of it is said to be not binding. It is all exactly the same category of material.

MR MOSER: We certainly see it as one sweep. Perhaps --

MR JUSTICE ROTH: Well, the way they have done it, they have stated a conclusion, as it were, in 359. Then they give a series of reasons and then for each reason, they give supporting information at some length. I think they have four reasons, if I have got it right.

MS ROSE: Yes.

MR JUSTICE ROTH: The first one is in 360, accepted; the

second one is in 361. Then there is a lot of supporting information --

MS ROSE: And that is not accepted.

MR JUSTICE ROTH: Which is not accepted. The third one is in 364, which is accepted.

MS ROSE: Yes.

MR JUSTICE ROTH: The fourth one is in 368, which is not accepted.

MS ROSE: That is exactly my point.

MR MOSER: What we said was that these are all critical facts about the impacts of the algorithms and that Google appears to be focusing on in each case saying: oh, this is -- the form it takes is citing some evidence from an external source or it is discursive. But we are saying the content is what matters. It is all about traffic. That each of these is focusing on facts that support the findings on traffic, which as we have explained is -- it is what the nature of the abuse is, is the diversion of traffic. Hence my original submission. I certainly make that very forcefully for 368 to 370. I maintain it for 359, 360 to 363.

MR JUSTICE ROTH: Just a moment. (Pause)

Yes. Ms Riedel makes the point the finding is at 349, that is supported by what follows. That is the basis for the Decision as regards the treatment of

competing CSS with the reasons set out. 359 and what follow, that goes down to 358, so 349 to 358, 359, and what follows is rebutting Google's, sort of, counter argument by saying that what we said in 349 is further supported by evidence on points one to four.

So perhaps there is a different level of significance for the Decision, because the Decision mainly rests on what is said between 349 and 358, and this is just saying, well, your arguments to the contrary don't stand up.

MR MOSER: Yes. That depends on the view one takes on these sorts of recitals.

MR JUSTICE ROTH: Yes.

MR MOSER: That rebuttal. The thing about rebuttals, as my learned friend, Mr Pickford, has been keen to emphasise, is if you are in the position of a defendant, you have to rebut, but you only have to succeed on one of your rebuttals for the decision to go the other way. Whereas the Commission had to reject all of the points of rebuttal. So every rebuttal point has to be dealt with by the Commission, it had to be -- it was contested and therefore it had to be proven, including why Google is wrong, on each of those points. Because if Google had been right on one of its rebuttal points, then that is obviously what it needed to get home.

So that is why I would say that contrary to Google's claim, that phrase at the beginning of 359, introduces the bindingness of 360 to 363. That is the way we say that works.

I should say, incidentally, we have noticed that in 361, the third column on the Claimants' position, partially binding as the first sentence, is correct on page 704, but technically the underlining on page 705 stops short of the end of the first sentence. The first sentence goes through to just above (a), so actually what should be underlined is all of (i): "was at its highest at the end of 2010[…] the beginning of 2011; (ii), was followed by a sudden drop after the launch of the Panda algorithm in the respected EEA country; and (iii), no sustainable recovery occurred afterwards". These are all important points in relation to the mischief, in relation to the infringement.

MR JUSTICE ROTH: Yes. Otherwise it doesn't make sense because it is an incomplete sentence.

MR MOSER: Indeed. Grammatically it doesn't make any sense either.

MR JUSTICE ROTH: It doesn't mean anything.

MR MOSER: So that is what I say about 359 to 360 and 363, and perhaps it is a good thing not to take it too quickly.

Would you like me to move on to 368 to 370?

MR JUSTICE ROTH: Yes. Because this is part of the taxonomy of reasons.

MR MOSER: Yes. That is fourth.

MR JUSTICE ROTH: That's the fourth one.

MR MOSER: 368 to 370 fall to be interpreted together. Google says, again, illustrative evidence, and says: oh, this is just data extracted by the Commission from Sistrix. But again, that is to focus on the source of the data. That is not very interesting. What is interesting is the factual finding. The factual finding is the average ranking in the Google SERP of the most important competing CSSs was low and in several markets. That goes right to the heart of what was wrong in this case and the nature of the abuse.

That's an important reason for the point that the Commission makes in recital 359 that starts all of this off, as to why Google is wrong to claim the Commission is overstating the impact of Algorithm A and Panda. Contrary to Google's claim that the Commission overstates, et cetera, fourth, based on, you know, whatever, but the average ranking in generic search results on Google's general search results page -- that's at 368 -- of the most important competing CSSs in terms of traffic in these biggest countries was low.

MR JUSTICE ROTH: Yes. And then I think you would accept you are not -- as I think as you have put it, you are not pressing hard on 369 and 370 if you get 368.

MR MOSER: That's true. I don't --

MR JUSTICE ROTH: Because those are just --

MR MOSER: I don't give them up.

MR JUSTICE ROTH: -- developing it.

MR MOSER: I don't give them up. They contain important matters. For instance, in 370:

"When they are displayed in generic search results on Google's general search results pages [the SERP], the [CSSs] appear generally on the second general search results page or beyond. [Once] the average ranking of certain sites improved slightly between the two dates, it remained low".

MR JUSTICE ROTH: Well, I mean, those are detail, but the essential basis of the finding that, as you say, rebutting the Commission's full argument is the finding in 368, isn't it?

MR MOSER: Indeed.

MR JUSTICE ROTH: These are just, sort of, expanding it out; is that right?

MS ROSE: I'm not sure. I think the fact it is on the second page is quite significant, isn't it?

MR MOSER: It is. It is sometimes described as "below the

fold". That's an important aspect of understanding the abuse -- we have seen the Decision, I'm not making submissions. When users look at the page, they tend to look at a first page. People don't scroll on or press the two or three or whatever. That was the mischief. It is not just detail. Because it shows how invisible we became.

Kelkoo would say we were the market leaders and they didn't have a CSS at all. Then they introduced this and suddenly we were nowhere. You look at the charts and the traffic just goes through the floor. That is the mischief that the Commission was talking about and this is what explains it.

MR JUSTICE ROTH: Yes. So I think at that point you hand over to Mr Pickford.

MR MOSER: At that point, yes. Mr Pickford says -- is 371 the next one?

MR JUSTICE ROTH: No. The next is -- well, it will be 371 onwards. 371 itself is agreed. But that is right.

MR MOSER: Yes. Can I just make some comments before Mr Pickford makes his submissions, because I just wanted to point out that as far as 371 is concerned, that is agreed.

MR JUSTICE ROTH: Yes.

MR MOSER: And you see what it says there. Likewise, the

start of 372 is agreed. Indeed, it is described in paragraph 42 as foundation --

MR JUSTICE ROTH: Paragraph 42?

MR MOSER: Sorry, of their skeleton argument. But then it is just interesting to note that there is then a patchwork of different views being taken by Google of the rest of this section, because we are going up, I think, to 377. So up to recital 375, the next bunch of recitals which essentially explain what difference it makes not to display competing CSSs in rich format are not binding or not contested in the case of 373 and 374.

Again, I just want to point out we disagree with certainly the not agreed. The Commission finds in recital 371, that is agreed. The competing CSSs can be displayed only as generic search results in the search and unlike Google CSS, cannot be displayed in rich format. This reduced click-through rates and thus traffic. That was the effect it had; it reduced the rate of people clicking through to the competing CSSs, to us, and it diverted user traffic from us to Google CSS.

That diversion of traffic was an absolutely critical part of Google's abuse of conduct. So it is necessary here to understand why Google's abusive conduct diverted traffic. The underlying reasons for one aspect of that,

namely the reduced click-through rates associated with generic results as opposed to rich format results, they are provided in 373 to 375, including 375, which are introduced by the second sentence of 372. So this is confirmed by the following evidence, which is the bit that -- where Google and we part company.

They seem to dismiss this because they say it is evidence, for instance, 375, eye-tracking studies. But that is again to focus on the sources -- the studies in this case and not the facts. The point is not that it was studies, the point is what it showed, which is in the case of 375, which is not agreed, considerably impacted on user behaviour and consequently click-through rates.

MS ROSE: Sorry, I don't understand this because 375 is contested, but 376 down to 378 is not contested and that describes the results of the eye-tracking studies.

MR JUSTICE ROTH: I think 376 and 377 are not alleged to be binding.

MS ROSE: I see. Everybody says they are not binding.

MR MOSER: We haven't given them up, we have just conceded for reasons of economy they are nonbinding. We do insist on 375. It is not to be held against us we are being economical and saving time --

MS ROSE: So there is an inconsistency there?

MR JUSTICE ROTH: I think 373 and 374 is not agreed to be binding, it's just Google is not going to contest them because it is accepted --

MS ROSE: Because it is -- (overspeaking).

MR JUSTICE ROTH: Yes, but it is not accepting it is formally binding and therefore it is not inconsistent for it to say that 375, which --

MS ROSE: No -- yes. So it may be that the inconsistency is yours.

MR MOSER: Well, it may be, but that depends on what weight you attach to not contested. If they can say, "Oh, we don't contest this", and therefore it gets an argument that I'm being inconsistent, if they had not contested 373 and 374 we would have been quite consistently arguing that 373, 374 and 375, the first, second and third, are all binding.

MS ROSE: I think what is puzzling me is why you would treat differently 375 and 376 to 377, because 376 and 377 are simply explaining what is said at 375.

MR MOSER: Yes. If I may say so, that's an excellent argument to redesignate them as binding. We just haven't and I have a plea that not too much is to be read into. If for the sake of consistency to get 375, I also need 376 and 377, I (inaudible) have them. But we just haven't gone there because there was a sort of a

wash-up procedure before we came to this hearing, where we tried to reduce the ones that were in dispute. And sometimes it is not terribly scientific, it is just, well, we don't need that one.

376 and 377 are two supporting pillars for 375. They are not quite the same as 373 to 375 because they support what goes before. They are not a fourth and fifth. They describe the eye-tracking -- but as I say, my learned friend, Mr Pickford, would have a word to say about it, no doubt. If the Tribunal felt we were overgenerous, I will happily have 376 and 377 back.

It is difficult because you are slightly caught, as the party, between the desire to be reasonable and not argue about things for reasons of economy or otherwise, and avoiding being criticised for not having asked for more.

My learned friend, Mr Pickford, his helpful intervention was an illustration. He said in that case maybe we can concede this, but --

MR JUSTICE ROTH: And you rather, it appears, have taken the approach that where there's a statement such as in 372, if they give them, the Commission does a first, second, third sub statements, as it were, those are binding, but you are not going to push the argument out to the supporting material on which when it is done in separate

recitals on which the first, second and third rest. So 376 and 377 are the supporting material for the statement in 375. That seems to be --

MR MOSER: That seems to be --

MR JUSTICE ROTH: -- the approach you have taken in general.

MS ROSE: The issue that I'm grappling with here is the question is whether the Tribunal ultimately can reach a different conclusion, albeit permissible for the Tribunal to reach a different conclusion on this point from the conclusion reached by the Commission. But if the Tribunal is bound by 375, then it is bound to find that the eye-tracking studies and research indicate that such features have a considerable impact on user behaviour. If it is bound by that, then it cannot depart from the findings at 376 and 377, can it?

MR MOSER: No, it can't.

MS ROSE: So logically, either 375, 376 and 377 are all binding or none of them are.

MR MOSER: I completely agree. As I have said, our concession in relation to 376, 377 was not based on principle or not, it was just a concession. What I do say is that even on Mr Pickford's analysis, 375 would be a second order matter that would fall to be binding. But this is -- this demonstrates, in my respectful submission, why Mr Pickford's one size fits all first,

second, third tier analysis doesn't always work. Because here we are. You will find things that will very easily fall into Mr Pickford's third tier that must be binding facts. This is an illustration of it.

MR JUSTICE ROTH: It is just the way they have chosen to draft it. You could rewrite it slightly differently -- say the same words, but split the paragraphs up differently, in some of these cases.

MR MOSER: Sometimes, as in the case of recitals 360 and -- 630 and 631 yesterday, you suddenly get thrust into a completely different part of the Decision while we are dealing with recital 421. As you said in *Trucks*, it is not to be read like a statute or even literally. You find the relevant parts of the Decision where you find them.

It is difficult when we are trying to interpret it, well, look, it says third, then it says in the first place, so that must be. But actually all they are saying is: here are the facts and here is the finding. We have tried to focus on what is needed to sustain and interpret the finding of abuse as economically as we can.

It is an interesting one that I find myself saying, well, 376, 377, we said were not binding. I can -- without waiving privilege, I can tell the Tribunal that

a great deal of discussion went into -- no doubt on both sides, went into which of these recitals are to be considered binding and which are to be conceded. There were an awful lot of recitals. Will we have got it right 100 per cent of the time? Probably not -- put your finger on one of them, probably not.

But in the end, without wishing to downgrade the importance of the parties and counsel's argument, it is of course the Tribunal that is in the unenviable position to decide what is and isn't binding, and what it can and cannot rule counter to in the Article 16 sense, and so it may well be that the Tribunal will alight on the recital that both parties have agreed is not binding, whether this one or another one, and said: actually, what about this one? I don't think we can make a finding contrary to this.

MR JUSTICE ROTH: Don't expect us to spend time going through all the other recitals that neither party has referred to.

MR MOSER: I'm not. It may be that there is something that strikes the Tribunal as an egregious lapse and it may be the note will reach the parties after the hearing, saying: what about recital X? But maybe not.

MS ROSE: It is an adversarial process. If you are not choosing to make an argument, I don't think we will make

it for you.

MR MOSER: No. No. In the end we will have to think about how it is going to work at trial.

MS RIEDEL: I had a question and this goes to, I think, some of the discussions the parties have raised in their pleadings in relation to HSBC. So if, for example, 376 and 377 had been appealed and one of them was held to be, you know, not, sort of, wrong, would that mean that 375 would still stand? So are both 376 and 377 necessary for the finding in 375, or could 375 stand with only one or the other?

MR MOSER: I might have to think about that one. My junior wants to say something to me. (Pause)

I think, it is a hypothetical and therefore I may not need to answer it. I say that with respect. The reason I say that is if we were at the receiving end of such a decision, as they were, and we wanted to appeal this bit, I would be appealing all of 375, 376 and 377 together. I wouldn't just be appealing 376 and 377, that would be odd. So we would have the answer --

MS RIEDEL: So they either fall or stand all together, is your point?

MR MOSER: Yes.

So, as I say, 375, important. If that makes all of 375 to 377 binding, which I think we are gradually

deciding it must, I will change our designation to not agreed and await Mr Pickford's answer.

I don't know whether I can help further on the points, which is plainly interesting.

MR JUSTICE ROTH: Yes. Shall we then hear from Mr Pickford on these three points? I think this is the kind of analysis that we are going to face again and again, as we work through.

Yes, Mr Pickford.

Reply submissions by MR PICKFORD

MR PICKFORD: Thank you. If I could just begin by addressing the point that Mr Moser has been making for a few minutes now, which is where he is opportunistically seeking to renege on the position that was set out in the schedule that was agreed for this hearing, because he senses that there might be something to be gained from doing so.

In my submission, that is not acceptable. There are, I think, over 700 recitals that both teams have gone through very carefully, preparing their submissions on, on the basis that, as Ms Rose says, this is an adversarial process.

I can also say without waiving privilege in preparing for this hearing I noted the odd point where I thought: did we actually need to concede that was

binding? Well, whether we did or we didn't, we have done it now. We can't go back on it because if we unpick the table, in my submission, that would be unfair; if I had done it, it would be unfair on Mr Moser; and it is unfair on my clients to seek to do it in reverse.

We took instructions on these issues, we have done our best to concede factual points where we can concede factual points, but where we have come to this hearing anticipating that points aren't going to be binding, we are entitled to rely on the position that was adopted by the Claimants. And so my submission is neither side should be permitted opportunistically to put things in issue that weren't in issue.

If I could go back then to -- we began this with recital 343, which was the first contested recital. It is actually just the first two sentences. I hopefully don't need to say a great deal about it because I think the Tribunal was giving a fair indication of what its preliminary view was.

But 343, the first two sentences, are Google having artificially reaped the benefits of the conduct and Google not having invented comparison shopping; neither of those points is remotely the essential basis for the operative part of the Decision. They are effectively a

rhetorical flourish by the Commission and none of it is required, either individually or together.

That is my position on that: not remotely binding.

The next point of contention between us is 346 to 348. Now, these are recitals that refer to the Web-master Guidelines. We agree that 345 is binding. That is the finding that "In response to a user query in Google's general search engine, Google uses generic search algorithms to rank web pages, including those of competing comparison-shopping services. These algorithms include the PageRank algorithm […]. Google also applies a variety of adjustment mechanisms to the results of the PageRank algorithm to improve the user experience."

Now, that is agreed to be binding. That is the essential finding there. The fact that Google then issued Webmaster Guidelines that are its attempt to put into words the essence of what it is trying to achieve with its algorithms, we say is neither here nor there. Again, either individually or collectively, you can strike through all of that and the Decision would still stand.

So those points are not binding either.

There is an additional reason why 348 is not binding; that is because 348 is referring to manual

demotions that don't comply with the Webmaster Guidelines. That is not something that the Commission complains about as part of the abusive conduct. It is quite clear from the references to Algorithm A and Panda throughout the Decision, which go in a pair and of which there are many, and the analysis that is conducted in relation to the impact of Algorithm A and Panda that the conduct -- or at least one element of the combination conduct, to be more precise, that the Commission was concerned with was the application of those algorithms.

It is not anything to do with manual adjustments. There is no finding in the Decision that CSSs were particularly prone to manual adjustments any more than any other type of website. So in my submission, manual adjustments cannot remotely be binding.

That is just a for-completeness reference, effectively, by the Commission explaining, for completeness: we don't only rely on algorithms, we do also rely on manual demotions. But the only things that ever concerned the Commission in terms of discriminatory impact was Algorithm A and Panda.

MS ROSE: Is the main point here that it's the demotion of websites with little or no original content, and that is what Algorithm A hits and that is what tends to demote the competing CSSs?

MR PICKFORD: Yes. Because the whole point is being made -- they are saying, "Look, there is this particular feature of CSSs", and they are saying, "Well, look, if insofar as that is a feature which applies to the rivals, you can't say it doesn't apply to you either".

MS ROSE: And you concede that is binding at 353, first sentence?

MR PICKFORD: Yes -- bear with me, I will have to check.

MS ROSE: No, you don't concede that, so logically, shouldn't you? Shouldn't you concede 353, the first sentence, because that is the burden of the complaint, really, isn't it?

MR PICKFORD: Yes. I mean, as always with these questions, it depends how far one wants to go down. There is a logical question about where one stops in terms of what is necessary to support what is ultimately sitting there in the operative part.

MS ROSE: But that seems quite a key finding because that is one of the obvious points where the algorithm is demoting the competitors and the same point can be made about Google's own services. So Google is not penalising itself for having little original content, but it is penalising the competitors.

MR PICKFORD: I accept that. You are going to find from me that my submissions always run in a waterfall of

alternatives. Obviously, for my point of view, I stop as high up in the chain as I say is credible, and that is what we have set out in the schedule. The Tribunal may be with me or not with me on that. If the Tribunal is not with me, then necessarily one goes down to the next level and everything that is in the level below that then effectively becomes where the Tribunal draws its line.

Again, if the Tribunal isn't with me, that then again it is the next level down.

Unfortunately, the way the Decision is structured actually allows us to see that pretty clearly because it always has the headline point, then the first, second, third, that support that headline point and then in the first place, in the second place, in the third place, that support each of the first, second, thirds.

So I don't want to -- I mean, if I keep giving in the alternative, in the alternative, for a day and a half the Tribunal will probably start throwing the White Book at me. But that is the essence of the position we are going to be taking.

So, yes, I am prepared to concede. If you are not with me on being able to stop at 352, naturally the next place one would stop is the next sentence of 353. I accept that's a reasonably substantial finding.

MR JUSTICE ROTH: Indeed, it could have been --

MS ROSE: Sorry, the same points apply to 354 and 355, which I think are in the same category?

MR PICKFORD: Yes.

MS ROSE: Okay.

MR JUSTICE ROTH: All I was going to say is that you could almost have put the first sentence of 353 into 352, "due to the characteristics of those services" because, because it is --

MS ROSE: Yes, what characteristics?

MR JUSTICE ROTH: This is just talking about the characteristics.

MS ROSE: And, in fact, then you get more characteristics at 344 and 345, which is the same point as 353.

MR PICKFORD: Indeed. So I'm not going to push back, particularly hard, other than to say my primary position would be to stop in the schedule, but I hear where the Tribunal is coming from.

MR JUSTICE ROTH: Yes.

MR PICKFORD: I can't actually remember from the Tribunal's comments whether it was here, we are about -- I'm about at 357, another point was raised. You made a point, you were suggesting that we had been inconsistent in how we had approached certain recitals. If I can explain, we have tried to be consistent, in fact. I'm not

guaranteeing that we have always achieved it. But it may help to explain the process that we went through.

MR JUSTICE ROTH: Yes. It was in respect of this helps -- you see it very clearly in the 360 and 361, where you have first and second: the first is accepted and the second isn't.

MR PICKFORD: Yes. But at 360, did you say?

MR JUSTICE ROTH: 360.

MR PICKFORD: 360. Yes. But that is because the Claimants wrote to us and said: where information has come from you, are you really going to contest those points or can you please take them off the table and make everybody's life easier? So in relation to 360, I believe that that is information --

MR JUSTICE ROTH: Yes. I see.

MR PICKFORD: -- that comes from us. So we went through --

MR JUSTICE ROTH: So you are not contesting it -- (overspeaking).

MR PICKFORD: Exactly.

MR JUSTICE ROTH: I understand. So you are not, as a matter of principle, you are saying it is not binding but you are not going to -- it is the same approach. Yes.

MR PICKFORD: To be clear, there is no recital here that we have taken off the table, because we say it is binding but we are not going to bother to argue about it. We

have tried to take a principled approach -- sorry, we are not going to argue about it because -- sorry, I will get it right -- we are only taking things off the table where factually we say it doesn't matter or we are not going to be able to dispute it factually: that's the best way of putting it.

So we take it off the table so the Tribunal does not need to reach a judgment on it. It's not us accepting it's binding. Where we accept it is binding, that should be in green.

The reason for the difference between 360 and 361 is the Sistrix Visibility Index. That doesn't come from us, so we are not in the position to make the same concession. Indeed, we weren't asked to make the same concession by the Claimants: they only put a limited request to us.

MR JUSTICE ROTH: Yes. That is very helpful. The same is clearly true, I think, in 364/365 which comes from you. So it is not contested, but you don't accept it is formally binding.

MR PICKFORD: Quite.

MR JUSTICE ROTH: It is the same point.

MR PICKFORD: That's right. Yes. So I hope that meets the concern that there was an inconsistency here. There shouldn't really be, albeit no doubt we will be tripped

up at some point.

We say that save for the core findings that have been pointed out to me by Ms Rose that I will be willing to, as my first fall back, accept, the rest of this is again lots of very, very detailed evidence -- to use my previous phrase -- down in the weeds and it is just not binding. Indeed, often it is accepted as not binding by the Claimants. So certainly when we get to 366 and following, that section is accepted as not binding. But we say actually a lot of this is really of a very similar nature.

MR JUSTICE ROTH: The exception to that approach, if one actually looks at substance, which was pointed out by Ms Rose is when you get to 368 which is a conclusionary statement based on data, this is what we find. But actually, 370 may be particularly significant because it shows it is not just that the ranking was low, but it is actually not on the first page at all which we know has a particularly striking impact.

MR PICKFORD: Yes. Well, my primary position is that all of this, of course, is going back to a point where we say none of what follows in the first, second and third is required, because it all goes back to 359 where there is --

MS ROSE: It is the fourth sub point under 359.

MR PICKFORD: Yes. And we don't accept even that 359 is necessary. This is embellishment.

MS ROSE: Your first fall back position would be you accept 359?

MR PICKFORD: Exactly. But the substance of 359, not the implication that we need to then go on and review all the rest of the evidence. Because it is talking about the position of the Commission being further supported beyond what it has already told us in this part of the Decision by these other points. So, yes. So that is my first level of fall back.

MR JUSTICE ROTH: Yes. Would that be a sensible moment? Do you want to finish this section?

MR PICKFORD: Just if it is convenient and -- thank you. Just a couple more minutes, because I can then close off everything that responds to Mr Moser's submissions.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So I think that analysis basically takes you through to everything apart from there were three recitals that were discussed particularly towards the end at 372 and following.

So we accept the basic point as binding that adding images, price and merchant information to product search results increases click-through rates. It is hardly a very surprising assertion, perhaps. That is obviously

making them richer and, funnily enough, people are more interested in them if that is so. We say that is so far as one needs to go and that the following evidence, which is 373, 374, 375, all the way through to 377, is all very much third order material that, again, either individually or collectively could be struck through and the Decision would still stand.

MS ROSE: So you don't contest 373 and 374 because it comes from you. You say that in fact the consistent approach to 375, 376 and 377 is that none of it goes in?

MR PICKFORD: Yes.

MS ROSE: Or none of it is binding, rather. It goes in, but it is not binding.

MR PICKFORD: Exactly. I'm not going to make a massive point of it, but we say the 376 and the 377 analysis, that where it was agreed it was nonbinding, we say that actually applies back to the others.

That was it on that first tranche of recitals, in terms of submissions that I had to make.

MR JUSTICE ROTH: Yes. So that does take us then to turning to the positioning of Google service, which is 7.2.1.2 and that is where, I think, take our break and we go back to Mr Moser. So we will come back just after 20 to.

(3.32 pm)

(A short adjournment)

(3.47 pm)

MR JUSTICE ROTH: Yes, Ms Love.

Reply submissions by MS LOVE

MS LOVE: Members of the Tribunal, only one short specific point we would like to come back on in that exciting cluster of recitals, and that concerns recital 348 -- to be more precise, I think it only concerns one sentence of paragraph 348.

MR JUSTICE ROTH: Is this the manual demotion?

MS LOVE: Yes. Now, members of the Tribunal, it is instructive to start with what the actual conduct was that the Decision established was abusive. And I apologise, this is a bit of a paper chase around, but if we go back to page 595 of the chunky A3 and recital 2, which is, obviously, the definition of the Conduct with a capital C, as it came to be described thereafter. It is the more favourable positioning and display by Google in its general SERP of its comparison shopping service compared to competing comparison shopping services. There is obviously no reference there either to algorithms or to manual demotion; it is simply framed in terms of positioning and display.

Now, that is broken down in a slightly more fulsome way if we turn forwards to page 842 where we see recital

650. This, like recital 2, is agreed to be binding.

If I could ask the Tribunal to pick it up about halfway down, with the words "As indicated":

"As indicated in recital (379): (i) Google's own [CSS] is not subject to the same ranking mechanisms as its competitors, including adjustment algorithms such as [Algorithm A] and Panda; and (ii) when triggered ..."

And we then have the more favourable, the highly visible positioning.

So there is nothing that limits the abuse to algorithmic demotions. Indeed, even as far as algorithms are concerned, it is framed in terms of including.

Just to complete this, if anything further were needed, we can pick up the reference to 379 which we find -- and I do apologise for the paper chase -- on internal page 716 of this document, which describes the main differences in the positions and display. And we see there (i) -- sorry, are you -- have I given you time to flick through?

"Google's own comparison-shopping service is not subject to the same ranking mechanisms as […] competitors, including adjustment algorithms ... such as", but not limited to those two.

And again, we see the same language in recital 380.

I have taken these from recitals that are agreed to be binding: "Google's own [CSS] is not subject to the same ranking mechanisms as competing [CSSs], including adjustment algorithms such as" ... and then we have the two that were of particular focus.

So we say there is nothing in the Decision if you focus on what the actual conduct is that indicates a limitation to algorithms, let alone to the two specific algorithms, A and Panda, on which we have focused.

If any further confirmation were needed as to what the problem was viewed as, that can be found in recital 700(c), I think -- I hope this completes the paper chase -- on page 856, which is explaining what has to be done in any measure that is chosen by Google and Alphabet. It "should subject Google's own [CSS] to the same underlying processes and methods for the positioning and display in Google's [SERP] as those used [in] competing comparison-shopping services. Such processes and methods should include all elements that have an impact on the visibility, triggering, ranking or graphical format of a search result in Google's general [SERP]".

So we say that the suggestion that there is really nothing here about manual demotions and that 348 is some

sort of for-completeness thing that didn't really interest the Commission, isn't reflected in the language in which the conduct is described.

MR JUSTICE ROTH: Maybe the second bullet under (c) makes that point.

MS LOVE: Indeed.

MR JUSTICE ROTH: Because it says "ranking algorithms", comma, "adjustment or demotion mechanisms".

MS LOVE: Exactly, Sir. We therefore say that if we are right and 346 to 348 should be in because they in effect turn into prose the Webmaster Guideline that explains the working of this, there is no particular basis to excise the second sentence of 348.

Mr Pickford made a point about there being nothing to show that CSSs were more or less prone to manual demotions than any other kind of website. But that is not the conduct; the conduct is about the discrimination between Google's CSS and other competing CSSs. It is not about the universe of potential types of websites that might be hit by manual demotions.

Members of the Tribunal, unless I can assist further on that, I think back to Mr Moser.

Reply submissions by MR PICKFORD

MR PICKFORD: With the greatest of respect --

MR JUSTICE ROTH: Yes.

MR PICKFORD: -- if the Tribunal will permit me, I think it should be back to me. That wasn't really a reply point, that was a new point Mr Moser could have made. The submission being made was that you won't find any indication in this Decision that the conduct is confined to the discriminatory impact of the algorithms.

I literally, as Ms Love was speaking, have gone through and found nine recitals that show that the discriminatory impact of the conduct are about the two algorithms, and only the two algorithms, and if I may, I would like to take you to those references that make good that point.

If we begin at 344, which is the core recital. So that's on page --

MR JUSTICE ROTH: Well, I think, just on your first point, you said there is no finding that manual adjustment is any aspect of the discrimination. So I think it was a permissible reply, but I'm not going to stop you from responding.

MR PICKFORD: Thank you.

So at 344, that is the essential binding recital that sets out the essence of the more favourable treatment, and in that it refers to the fact that:

"While competing comparison-shopping services can [only appear] as generic search results and are prone

to the ranking of their web pages in generic search results on Google's [general] search results 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."

So that's the core paragraph recital dealing with the conduct, and it is exclusively phrased in terms of the impact of the algorithms.

One sees it again in 349 where we see "Competing comparison-shopping services […] are prone to being demoted by at least two dedicated algorithms". We see it again -- and I can give you probably --

MR JUSTICE ROTH: It does say "at least".

MR PICKFORD: Yes, but at least two dedicated algorithms. Algorithms -- I mean, the "at least" in my submission qualifies the algorithms there.

MS ROSE: It is right that there is nothing in this Decision that suggests that competing CSSs are being manually demoted; I think that's right, isn't it? There is nothing -- there is no evidence cited in this Decision anywhere to the effect that competing CSSs are being manually demoted?

MR PICKFORD: Not that I would --

MS ROSE: However -- however -- when you come on to recital

700, which is about the remedy that should be adopted -- the features of the remedy; yes? The Commission is at pains to identify not just the equal application of the algorithms, but equal treatment of the competing CSSs and Google's CSS in every respect, including manual demotion.

MR PICKFORD: Of course.

MS ROSE: So the relevance of the finding about manual demotion is not this is a form of conduct which we have evidence is now being applied to CSSs.

MR PICKFORD: Yes.

MS ROSE: What it is, is because Google is excluding its own CSS from all of its demotion processes, it is treating its own CSS more favourably. The algorithms we have identified are particularly disadvantaging the competitors and in order to remedy the situation, everyone has to be treated the same way. Because what the Commission is -- one of the many things it is concerned to prevent is a future in which Google says: okay, everyone is subject to the same algorithm, but then manually demotes competing CSSs. That would be not acceptable.

So that's the relevance of manual demotion, isn't it?

MR PICKFORD: Exactly. In that context when we are in the

remedy section, it is a belt and braces to make sure that the remedy is effective because it would be pointless, as, Madam, you point out, if we dealt with the algorithms and then --

MS ROSE: And they use another measure.

MR PICKFORD: -- we employ a thousand people to do the same thing in a manual way. But it is very important. That is about -- that's an anti-circumvention point. It is not about what the abuse of conduct was --

MS ROSE: I don't think the Claimants have identified any recital in which there is a finding of fact that manual demotion was being applied to the competing CSSs. I'm sure they will tell me if I'm wrong.

MS RIEDEL: Could I just ask one question while we are on 700(c). When the Commission refers to ranking algorithms, is it referring to all the algorithms that it mentions in the Decision or specific ones, as far as you are aware? I'm trying to understand if ranking means something specific.

MR PICKFORD: I'm -- just because that is potentially a context dependent question, I'm going to read the whole --

MR JUSTICE ROTH: Although 379 says, ranking mechanisms […] including adjustment algorithm such as ..."

MR PICKFORD: Yes. I think that in the same way as I

responded to Ms Rose, that these were effectively anti-circumvention, yes, it should be read broadly at that point, because for the same reason it is no good us addressing Panda and the other one, Algorithm A, if we then need to do something else. We introduce the kill the CSSs algorithm. Obviously that would be impermissible.

But it is important to distinguish between the fact -- that's a forward-looking thing, which is saying: you have done a bad thing and now you need to make sure that you treat the rival CSSs equally in all conceivable ways that we can think of.

But what we are concerned with here in relation to Article 1 is what was the bad thing that we did, and that is very firmly focused on the two algorithms. So there is no finding in this Decision -- and I was just going to list without taking them to you another seven of the recitals that are put entirely in terms of the problem being the discriminatory impact of the algorithms on rival CSSs, given that we had the box and we didn't apply them to ourselves. So just for your note -- I'm not going to take the Tribunal to every point -- but 352, 358, 359 --

MR JUSTICE ROTH: Just a minute.

MR PICKFORD: I beg your pardon. (Pause)

359. 380. 503. 512 and 611. Those all refer to, effectively, the nature of the conduct being the discriminatory application of the algorithms and rival CSSs being prone to demotion by them and Google escaping them, because it has the privileged box.

MR JUSTICE ROTH: But is that right of 380, which was one of the recitals which Ms Love, I think, referred to? If we look at 380.

MR PICKFORD: Okay. (Pause)

MR JUSTICE ROTH: I mean, it does use the broader phrase, "ranking mechanisms […] including adjustment algorithms such as [A] and Panda", so it seems to be saying in terms it is not subject to the same ranking mechanisms. That's a broad category. Within that category are the two -- are adjustment algorithms, and arguably within the category of adjustment algorithms, the two most significant -- but there may be others -- are Algorithm A and Panda.

MR PICKFORD: Yes.

MR JUSTICE ROTH: So you are quite right to say nothing is -- it is never -- the Commission never develops what it means by other ranking mechanisms beyond those two, but it does state ranking mechanisms in a broader sense, which includes those two. So it suggests there may be others.

MR PICKFORD: So my answer to that, Sir, is, what the impact of that is, is as follows. It doesn't shut out -- it is not a finding by the Commission that there are only two algorithms that Google has ever deployed that could ever possibly have been the problem. It is not saying that. It is saying: we have identified two; and we are not shutting the door to the possibility that there might be others, but we are making no finding about that either.

So that would permit my learned friends and their clients to advance a stand-alone case where they say: actually, we have found another one, it is Algorithm B. It was -- you know, it was hidden away, but we have rooted it out and discovered actually Algorithm B is the same --

MR JUSTICE ROTH: Or manual demotions.

MR PICKFORD: Or manual demotions. But critically, that would be a stand-alone case. That would not be a follow-on case. They can't -- they cannot establish a follow-on action based on manual demotions because they are not part of the abusive conduct, as defined and as found by the Commission. This is where this point goes.

MR JUSTICE ROTH: Yes. Yes. That is very clear.

MR PICKFORD: Thank you.

MR MOSER: I submit that the battle lines are clear.

MR JUSTICE ROTH: Yes. I think we have covered that. We have a reply and a reply to reply, so we move on.

MR MOSER: I have to admit that I'm not where I hoped to be at 4.05 on day two. I'm not vastly behind, but just to give you a little -- but then there have been a few twists and turns.

MR JUSTICE ROTH: Yes. It does seem to us -- we may be overoptimistic -- what we have debated about hierarchy and what one takes into account will be sort of replicated as we go to the other sections of the Decision.

MR MOSER: Perhaps. We will see how that goes. We can test that now by looking at the next bit, the differences in the way that Google's own CSS is positioned in its general search result pages, and that is starting at recital 378 on page 716 of the schedule.

That is an agreed recital, but where we start disagreeing is after recital 380. That is perhaps an example of what we were just discussing.

So 378, Google's comparison shopping service displayed and positioned differently, that is despite having similar characteristics. There we have discrimination and the fact about positioning. Two main

differences at 379. 380, first -- so where 379 ends, sorry, is, it says, there is -- it has similar characteristics. "(i) Google's own [CSS] is not subject to the same [rankings]"; and "(ii) when triggered, Google positions results from its own [CSS] on its first […] page in a highly visible place".

Then the next, 380, "First, Google's own shopping service is not subject to the same ranking […]despite the fact that Google's own [CSS] exhibits several of the [same] characteristics…".

The next bit, 381 to 383, are recitals where we say the first sentences are binding, save in 384 we say the whole recital is binding. We have excised the illustrative material in that way by only looking at the first sentence, the core finding, and the reason that we say we need these is that, again, they are an essential basis for and provide necessary support to the finding of the infringement because they explain the Commission's conclusion above, that Google's own CSS was not subject to the same ranking mechanisms as competitors despite exhibiting several of the same characteristics. We saw that several times in 378 to 380. In other words, why the adjustment mechanisms were applied in a discriminatory way.

But without those recitals, without the building

blocks of 381 to 384, the reader is simply told that Google's own CSS has several of the characteristics that make a competing CSSs prone to demotion, but there is no explanation as to what those words mean. So each of these recitals set out a different fact to support the conclusion that the adjustment mechanisms were discriminatory.

Just for good measure, I add that these are, again, recitals that derive in very large part from Google's own evidence and submissions. We have explained that in the column of the schedule itself.

MR JUSTICE ROTH: I see that for 381, the first sentence, 382, first sentence, 383, first sentence. Not so sure about 384, because that is really a response to a bit in 383 about the ComScore, which you are not saying is binding anyway.

MR MOSER: Well, that is one way of reading it. We read it as being one of those where it is important to see -- and I think I can say this without breaking confidentiality -- it is a contrary one. We see what the first phrase is: it is usually not confidential. So, again, I have made some submissions before on why there is a specific reason to rely on rebuttal points, in the same way that you remember I made my remarks about recital 359 which started contrary to Google's

claim. So that is why we felt 384 also falls into that category.

MR JUSTICE ROTH: Mm. But it is only the first sentence of 383, am I right, that you say is binding?

MR MOSER: Yes.

MR JUSTICE ROTH: I think 384 is dealing with a rebuttal to what was said in the later part of 383 and the table.

MR MOSER: It may be, but it makes the explanatory point, albeit in rebuttal to something else, that the number of users that click -- I can't read it out.

MR JUSTICE ROTH: No.

MR MOSER: Well, there it is. I can't say much more about that one, Sir. It is a question, I suppose, of how inclusive one wants to be in these things. That the principles in *Trucks* are largely agreed between the parties and it includes the principle that you include matters that are necessary to interpret the operative findings. It includes the fact that in paragraph 75 of *Trucks*, it was pointed out that, that was a settlement decision and -- as the President pointed out yesterday -- it means that in this case one has to be a bit more inclusive, because it is necessary to have more by way of evidence and more --

MR JUSTICE ROTH: The thing about *Trucks* is the Commission didn't have to really prove anything, so it is a very

different kind of decision and it could just state the conclusions on the basis they have been accepted by the addressees of the decision. So it didn't need to support those conclusions by evidence. It illustrated them, but because they were supported by the fact that the addressees had agreed to them and that was it.

MR MOSER: Yes. Yes. But also there is then perhaps a wider point around the general policy of private enforcement of these decisions where you are not dealing with a settlement decision and there was a full disputed procedure before the Commission and, indeed, the general court and as high as the CJEU. The litigant in the national court should be entitled to rely on all the necessary supporting facts in the Tribunal without having to prove them afresh, unless absolutely necessary.

The facts that are found by the investigating and regulatory authority are because they have access to things that we simply don't and rather than after years having to prove it again and be told, "Oh, that will have to be proved as a freestanding point" we say that the Tribunal should be astute to be as inclusive as is fair and possible in relation to the private enforcement rights that my clients enjoy. It is not an entirely even playing field, as it were. Google as the party has

been found to have infringed by the Commission and they have to face consequences. It does not mean that we have a right to rely on every comma and word.

But it does mean, I say, that we are entitled to go as far as is necessary in order to interpret the operative findings, according to all of these evidential findings of fact that the Commission has already found. We shouldn't have to reprove more than is absolutely necessary.

My learned friend, Mr Pickford, addressed you -- I say, with refreshing directness -- when he said he would stop as high up the chain as is possible. Of course he will. But I respectfully disagree that is the correct approach, particularly in a contested decision.

So, sorry about that digression.

MS ROSE: I can see the policy rationale for that, but if that's right doesn't it imply that, in fact, almost all of the findings of fact made here are binding because the Commission would not have included extraneous findings of fact in its decision? All of the findings of fact that have been made here are made to substantiate the finding of an infringement and all of these first order, second order, third order points are simply the process of reasoning that the Commission has gone through to establish each element of the

infringement by looking, you know, what has to be proved, what is the conduct, how do we define the conduct, what conduct can be established?

That then gets broken down into more and more granular points, but each of those granular points is a part of the foundation of the finding that there has been abusive conduct. To say, well, this point is higher up the hierarchy and therefore is binding, but this one is not binding, I struggle a bit to see what is the conceptual, in principle, justification for that. Because the higher hierarchy point can't stand, unless it is supported by the findings of fact at a lower point on the scale.

So, for example, you have a finding that Google makes its own CSS more prominent in the search results, but that finding does not make any sense unless you understand that means demotion of others and promotion of its own. Then you have to ask: well, in what ways demotion; in what ways promotion? And that takes you into the weeds on the operation of the algorithms.

So why do we stop halfway down the hierarchy? I mean, you have conceded that we do stop at some point.

MR MOSER: We do stop because that is what the case law tells us. If we go right back to the genesis of all of this, we are told in the treaty that a decision is

binding in its entirety upon the person to whom it is addressed. So that is where all of this started. So in principle, it is binding in its entirety, every comma and dot, on Google.

Then the courts looked at this and eventually you had the introduction of Article 16 and you have an approach that has been developed that means that you look at what is necessary to sustain the operative part of the Decision.

MS ROSE: But aren't all the findings necessary to sustain, otherwise why are they there?

MR MOSER: Well, plainly not in that sense. But it is right, ma'am, with respect, what you say about the direction from which we approach this. So in opening I have, perhaps rather fancifully, said that we approach it in the way -- I'm not sure I went that far -- but in the way that Michelangelo approaches a block of marble. You look at the block of marble and then you chip away what is not necessary until you have revealed the statue. That is how we approach it, as opposed to, as it were, the Lego figure of just taking the basic blocks and developing the most basic, which is what we say Google is doing.

That is because that's how the courts in the cases culminating in *Volvo* and the others, that are analysed

and on which *Trucks* is based, which is why we're using *Trucks* as a shorthand. This is the quintessence of everything that has developed in this area. That is why the case law has landed in this place where you say: all right, you can't say that absolutely everything is binding. So you look at what is necessary and that is what we have tried to do.

But it is absolutely right, in my respectful submission, to start from a maximalist point of view, which is where I started yesterday morning: what is necessary to interpret these operative findings? Not just the most basic building block that is required in order to make it stand up, but also findings of fact that are necessary to interpret it and provide, therefore, the necessary support for the necessary pillars in full. You don't just stand it up until you have enough pillars for the whole thing to just about be sustained. You put in all of the pillars that the Commission has found, until you reach one that you find, well, okay, now it is really just an illustration. Then you stop. That is how we have sought to approach it.

That is, I'm afraid, a rather, sort of, grand digression, but the everyday application of this is how I have sought to explain why we think that not only 381 to 383, but also 384 is one of those pillars. By the

way, the sort of fact that we shouldn't be made to prove afresh.

To maybe illustrate it further, the position is similar in relation to the next block of recitals, which is 386 to 396. These are ones where -- although some are now not contested, for the reasons my learned friend has explained -- these are ones, starting at page 719 going to 724 where Google says, well, all you need, all you need to understand why the Commission considered its conduct as regarding the positioning of its own CSS to be abusive, all you need to know is Google has generally positioned it at or above the first level of the generic search results. You don't need to know anything more about what the rationale for that prominent positioning was, how the positioning has evolved during the relevant period or why it has evolved. We say that is insufficient to interpret adequately the relevant element of the operative part of the Decision.

So putting all the right pillars in place, the discriminatory positioning and display of Google's CSS on its general search results page was an integral part of the abuse and these recitals explain the why and they explain the how of how Google positioned and displayed its own CSS and what the consequences were.

So we see in particular if we look -- I will come

back to 386 -- but if we look at 387 and 388, now not contested, but for a different reason. These are basic facts about how the positioning of Google CSS evolved. The same applies to 390, not agreed, to 395.

So 387, first of all, is initially "the Product Universal was positioned mainly on the top", could also be positioned on the top of other Google general search results pages and then we see what happened in the course of 2008.

Then at 390, we see what happened as of 2009 through to -- in each case going chronologically -- the development of the different kinds of Product Universal Shopping Unit, always positioned at the top of the first general search results through to 395. Shopping Unit was always positioned there.

All of that, we say, is binding because it explains how the positioning of Google CSS evolved over time. Important to know and to understand the findings in Article 1 and for good measure we have pointed out that parts of these recitals were also challenged in the General Court.

Similarly, if we look at 386, go back to 719. Here we have the Commission confirming that the rationale was to divert traffic from competing CSSs by leveraging its dominance in search and absolutely going to the heart of

the abuse. I think self-explanatorily so.

At 388, we see that Google changed its methodology so that the Product Universal would appear at the top and so on. These are important details and they set out the impact of all this abusive conduct in the next recital: 389. We see some aspects of how that abusive conduct had an effect on ranking and we see there that Google was aware that if Product Universal was positioned at the bottom, it would attract limited traffic. Google was also aware positioning PU in the middle instead of at the top would result in a loss of traffic, there being no change in the content displayed. So we know there what Google knew and why it knew it, which goes to its motivation.

Turning on in the same vein to recital 396, which is part of this group of recitals at 724:

"Moreover, contrary to Google's claim that the Shopping Unit is triggered in the general search results pages for a limited percentage of […] queries, the trigger rate of the […]Unit exceeds[…] in most instances the trigger rates of all […][the] Response Aggregators (taken together) [and] […]in all instances the trigger rate of all […] Response Aggregators taken together in the first generic search result[s]."

This is granular but it is important detail. It is

not illustrative, it's a finding of fact and you will see that in particular in the approach that we have taken to recital 396 because halfway down 396, you get this sentence which is:

"This is illustrated by the following".

And there we stop. We don't say that that's binding. That is illustrative evidence and that is not within the binding part of the Decision.

That is one of the bits of marble that are discarded and, as explained in the schedule, several of these recitals -- in particular, 386, 390 and 395 -- were challenged by Google in its annulment application to the GCEU unsuccessfully and one can see that in the pleadings. I'm not going to go to them, but just for your note, they are in bundle A3, tab 1, page 23. We see paragraph 73, 74 and 76 are a challenge to these.

It was part of Google's first plea that the Commission erred in finding Google had favoured its own CSS by showing Product Universals and Google singled out 306. So what the Commission found to be Google's rationale for introducing group (inaudible) results say the Commission was wrong. I know they say: well, the General Court rejected their case on this point so the relevant parts of the Decision are not necessary. They make similar points elsewhere in the skeleton argument

saying, you know, actually we appealed because we said the recital was irrelevant or similar.

But we don't think that's a fair reading of the relevant parts of the General Court's judgment. Again, in view of the time, I'm going to give the court a reference simply: if the Tribunal looks at paragraphs 259 to 262 of the General Court judgment, they show that the General Court rejected Google's interpretation of recital 386. So, in other words, insofar as Google was holding these recitals out as suggesting the Commission had wrongly focused on the question of anti-competitive intent instead of objective elements, Google was wrong.

But anyway, the point I make for present purposes is that Google itself considered these recitals to be ones that could properly be subject to an appeal and, again, we have made these points.

Now, that brings me to the end of a subsection. The next subsection is 7.2.1.2.2 and I can either complete that tomorrow or my learned friend Mr Pickford responds to what I have said so far tomorrow. I'm in your hands. I suppose you don't want to sit beyond 4.30 now.

MR JUSTICE ROTH: Just a moment. (Pause)

Well, because we are keen, if it is possible, to finish tomorrow we will carry on until 5.00, for another half hour. We will have to stop at 5.00 today.

MR MOSER: Shall I carry on then until the end of section 7.2.1 and see where we are by the time I get to the end?

MR JUSTICE ROTH: Yes.

MR MOSER: There is not very much more left. Because of time, I have taken this last cluster rather swiftly. It may be the Tribunal has questions for me on what I have just said. Otherwise, I would be moving on now to 398.

MR JUSTICE ROTH: Yes. Yes. I think you can go on. Yes. All right. Carry on.

MR MOSER: I am grateful.

MR JUSTICE ROTH: 398.

MR MOSER: We move on in the table. We are now at 728, page 728. Section 7.2.1.2.2 starts at 397 actually, which is an agreed recital. It is the different ways that Google's CSS is displayed in the SERP. It is about the question of what exactly was different -- that is unequal and discriminatory -- about how Google's CSS and competing CSSs were displayed. Once again, you can see from the schedule, Google is happy to have the bare wording about what the main difference was -- richer graphical features and the effect of richer graphical features that lead to higher click-through rates -- and they agree that in 397. But no further explanation.

Once again, for the reasons explored, we say it is

inadequate to understand why Google's abuse of conduct diverted traffic. We need to understand not only that the Commission found that Google's CSS was displayed differently and preferentially, but how it was displayed differently and preferentially which is what is described in 398 to 401.

MR JUSTICE ROTH: I think the first sentence of 398 is accepted.

MR MOSER: Yes.

MR JUSTICE ROTH: So, again, it is almost the same point. Perhaps it is, indeed, the same point. You have the conclusion and then you have the confirmatory evidence.

MR MOSER: Yes.

MR JUSTICE ROTH: And then again we have the approach from Google that if that evidence comes from Google it is not contested, but if it comes from someone else, it is and so 399/400 are not contested. They are not agreed to be formally binding, but they are not going to resist them. But 401, because it is not from them, they object to it. It is the same point?

MR MOSER: I won't belabour that. All the same points apply. Is it necessary in order to understand the operative part? Is it necessary to support 397, 398? We say yes.

MR JUSTICE ROTH: Well, there are two different questions.

Is it necessary to understand the operative part? I would have thought not, because you understand the operative part from 397 and 398. It really comes to the question --

MR MOSER: If I misspoke, I meant to say necessary to interpret the operative findings, which is the language of *Trucks*.

MR JUSTICE ROTH: Yes. But, I mean, you interpret it by 397 and 398. That tells you what it means. But if you -- it is more a question of is it necessary to substantiate it.

MS ROSE: It is sustain.

MR JUSTICE ROTH: Sustain. Yes. It is that limb, as my colleagues correct me: is it necessary to sustain it. That's what we are facing.

MR MOSER: Indeed. Is it necessary to sustain, as we say, not just by the barest pillar that could hold it up --

MS ROSE: Just looking at 398.

MR MOSER: Yes.

MS ROSE: The sentence that is controversial says this is confirmed by the following. What is then said by Google is the second sentence contains a reference to illustrative evidence. Now, it doesn't actually seem to me at the moment to be about illustrative evidence. It is saying this is confirmed by; in other words, this is

the material that proves the point and, therefore, arguably, is necessary to sustain not merely illustrative.

MR MOSER: The court would almost read it as this is sustained by the following. It would be odd, but it has the same meaning for present purposes.

MS ROSE: Confirmed means proved, doesn't it?

MR MOSER: It is proved by it and it is an integral part of what is the finding. That has certainly been our consistent interpretation of where the Commission says things like "this is confirmed by", as opposed to "this is illustrated by" or "for example".

Sir, with that, I can turn, I think, to subsection 7.2.1.3, which starts on page 730 and starts with 402, Google's arguments and the Commission's response. This, again, is something of a theme. It explains not only the basis on which Google contested before the Commission the findings of more favourable positioning and display of its own CSS, but critically, as per previous submissions, why that basis was rejected.

Both parties agree helpfully that the findings in recital -- if I can turn over the page -- 408 at 731 through to 412 are binding. I will come back to the footnote. So the Commission's case is not that the Product Universal is in itself a comparison shopping

service. We visited this in the meaning submissions, so it will be slightly familiar from yesterday.

The first dispute concerns footnote 463 to recital 408, and then also recitals 413 through to 423, although some of those are no longer contested.

As to these, so we have already addressed all of these in, you know, yesterday's submissions. They are part of a suite which also includes footnote 3, footnote 604, recitals 29, 630 and 631, all that bit that are required to understand and interpret the phrase of Google's own comparison shopping service.

Sir, I have really covered these. Google's arguments here are in the same vein as ever. Google says they sit underneath the findings in 412; they simply contain a description of reasons and points of evidence and so on. Our response is, as before, we can't understand what the preferential and discriminatory positioning and display consisted of without the findings in these recitals. Without them, you have the assertion of the Commission's case with no explanation as to the reasons.

I have made the point that the discussion we had about these recitals yesterday and the meaning of "Google's own comparison shopping service" does rather illustrate why they are -- these recitals are necessary

in order to understand the Commission's findings on this point. We spent a great deal of time yesterday looking at this, cross-referring, in order that we can finally understand what it was that was Google's own comparison shopping service.

MS ROSE: So which recitals are you addressing as a group here?

MR MOSER: I'm of course particularly addressing 408, but then in not agreed, starting with footnote 463, generic search results leading to competing comparison shopping services are not comparison shopping services in themselves in the way that that is to be understood -- see yesterday's discussion. I'm addressing all of the recitals 413 to 423.

MS ROSE: Down to 423?

MR MOSER: Yes. I know some are now not contested, but that is from --

MS ROSE: So you say these are necessary to understand the Commission's reasons?

MR MOSER: Yes. And the Commission's reasons also in relation to why, which is what this section is principally about, Google's own comparison shopping service as properly understood is favoured. We see that in 413. Again, we have the language in 413. "Google favours its comparison-shopping service [and that is

confirmed by --]confirmed by -- the following." I will refer you to the discussion we had two minutes ago.

414, "in the first place"; 415, "in the second place"; 416 "in the third place". And we have stopped after the first sentence because we think that's the necessary evidence and the rest is then more discursive.

417, all the same points: fourth place, fifth place, sixth place, seventh place. All of these are confirmation of what is found. We take this through to ninth place, 422, and the tenth place at 423. And I will move on to a different one --

MR JUSTICE ROTH: (Overspeaking) -- is that in 420, I think you say, is that right, that it is all binding?

MR MOSER: Yes.

MR JUSTICE ROTH: Including the subparagraph?

MR MOSER: Yes.

MR JUSTICE ROTH: But in 416 --

MR MOSER: That's because in 416 --

MR JUSTICE ROTH: -- you don't.

MR MOSER: I will have to be reminded of why.

I am going to rely on the same point my learned friend, Mr Pickford, relied on. Without again giving away privileged matters, but where we have conceded matters, it should not be held against us. I say that we are not pursuing these points in 416, so that we

wouldn't have to argue over them, but in principle -- we are not about to change our designation, but in principle where it says the following, as it does in 420 as well, we say those are facts we should be entitled to rely on, particularly because we are largely talking about internal Google materials.

I think there is some discussion going on to my left as to what the rationale was -- if we hit upon a better rationale than simply it was pragmatism, no doubt somebody will tell me.

MR JUSTICE ROTH: The fact it is internal Google material, that would be a basis for Google not to contest it; it does not in itself make it more or less binding.

MR MOSER: No, what makes it binding is the Commission says it is confirming its seventh place point, that "Google presents the Shopping Unit and the standalone Google Shopping website[…] service or experience to merchants and users."

MS RIEDEL: We are just trying to understand what is illustrative evidence and what isn't, and when they look the same and one is in the category of evidence and other is illustrative, it makes our lives rather difficult.

MR MOSER: I know. What I was saying, also Mr Pickford was saying, is I'm afraid the parties' decisions on what not

to pursue aren't always going to be --

MS RIEDEL: Logical -- but can you crystallise why it is evidence in 416 and -- illustrative evidence in 416 and evidence in 420; what is the difference?

MR MOSER: As far as I'm concerned, my submission is that it's not illustrative evidence in 416, it is just that we are not pursuing it. I suppose we might have said not contested if we followed their line, and it would look better, but we don't say that there is a conceptual difference, I think, between 416 and 417.

There is no particular magic to --

MR JUSTICE ROTH: So you have not sought to, as I understand it, in other words assert every recital as binding, which you think as a manner of principle will meet that test. You have asserted every recital is binding that you think is important for this litigation and sometimes not bothered with others that really are not relevant to the case going forward, even though the logic of your position is they should be binding as well; is that a fair summary?

MR MOSER: Correct. The position became overt right at the end, with a cluster of recitals where we invited Google to not contest them. But before that, the parties had the more broadbrush or whatever -- you know, the big hammer -- a sledge hammer approach of just saying:

all right, not binding.

So I am sorry, the parties' pursuit of some and not others should not be taken to any point of principle. It is an attempt to narrow the issues. It seems to have had the opposite effect, at least on this one. It would have taken me less time simply to say: and this one is like that one.

It is explained, I'm told, in paragraph 31 of our skeleton, which is at page 883. We decided not to contest the bindingness of certain recitals even though we consider they are binding because in light of Google's pleaded case or whatever. A variety of factors went into these decisions beyond principle. (Pause)

Am I all right to move on?

MR JUSTICE ROTH: Would we be right to see any distinction of substance between the Commission using the expression, as in 396, after its, as it were, declaratory statement? This is illustrated by the following and then we have all the subparagraphs, as opposed to its statements in other cases, this is confirmed by the following?

MR MOSER: Yes.

MR JUSTICE ROTH: And one does see those two formulations being used.

MR MOSER: So --

MR JUSTICE ROTH: Where it says, "This is illustrated", then that's an example. It is not proving it.

MR MOSER: That's --

MR JUSTICE ROTH: Is that a fair distinction to make, would you say?

MR MOSER: Yes, it is. That is a distinction that matters, as opposed to whatever the parties have or haven't pursued. That is the same formulation that was used in the decision in *Trucks* that I showed you yesterday, which was the foundation of the discussion with Mr Ward, where the Commission said in terms, "This is illustrative"; that is very clear.

Whereas when it says, "This is confirmed by", we say that is a pillar for understanding the finding. That is evidence that we are entitled to rely on, for instance, 413.

413 was the recital at page 733 that leads on to 414 to 421. It is again important to note that Google challenged recitals 414 to 421 in the General Court. Now, they say, "Oh, it is irrelevant to our case", and so on, but we have explained why we say that is not the right answer when we say: you have challenged it. What matters is that Google considered it appealable, and it was.

It is particularly misconceived in the case of 414

to 421. If we can just turn briefly, please, to the General Court judgment in A3, tab 2, page 181, we will see at paragraph 337 of the General Court's judgment the General Court found that -- I will skip a bit – "in relation to Shopping Units [-- this is the penultimate line] specifically, the Commission pointed out in recitals 414 to 421 of the contested decision that the Shopping Unit was based on the same database as the specialised page, [so that technically] the seller relations infrastructure was very largely the same, the sellers had to accept their offers would be displayed in both and were not informed as to which of the two clicks for which they [would be] came from […] the system of payment by sellers was the same […] the internet links in the […] [issue] and the specialised page both led to the same web page on the seller's site.

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."

Then there is the discussion around 408 and 423 being ambiguous. They don't affect the general analysis, and in particular recital 423 must be read as following on from 414 to 421, intended to show that

these are components of a whole and must be noted what recital 422 indicates. The Commission was fully entitled to find what they found.

Consequently, 340, the second part of the second plea, must be rejected.

So the case was not only -- the appeal was not only against recitals 414 to 421, but Google's case was also rejected.

Finally -- putting away now the General Court, finally, what we have noted in our skeleton argument is an inconsistency in Google's approach to this cluster of recitals. If we look back again at the recitals and at page 732, if we look at the agreed recital 409, the fact the positioning and display is one by which Google favoured, its comparison shopping service is confirmed by the following. Binding, binding, binding; agreed, agreed, agreed.

Then we look at recital 413, the fact that positioning of a spare "Shopping Unit is one means by which Google favours its comparison shopping service is confirmed by the following." -- not agreed; not contested; not agreed; not agreed.

There is literally nothing, we say, between these two groups of recitals, save that one refers to the Product Universal and one refers to the Shopping Unit.

We can't see any analytical or principal basis for saying the first records the Commission's primary findings and the second is somehow tertiary or sits underneath; both are equally necessary and binding.

That brings one almost --

MR JUSTICE ROTH: Sorry, I am being a bit slow. You are contrasting, what, 492 and 493 with 490; is that it?

MR MOSER: 409 at 732.

MR JUSTICE ROTH: 409?

MR MOSER: 409.

MR JUSTICE ROTH: And you are contrasting that with ...?

MR MOSER: With 413, which we say is literally the same finding, only in relation to the other thing, the Shopping Unit. One is agreed to be binding and the other is not. We don't know why, but we say it can't be a principled reason. (Pause)

MR JUSTICE ROTH: Well, it may be because 413 logically takes in 414 to 41 -- whatever. Well, all the first place, the second place and so on, all the way up to the eighth place. Not all of those are accepted.

MR MOSER: No, indeed.

MR JUSTICE ROTH: Because clearly, as you point out, the language at the beginning of 413 is identical to 409. So it is confirmed by the following, which is --

MR MOSER: That looks like cherry-picking because 409

equally takes in 410 to 412, and true it is that 410 to 412 are relatively short, but the principle is the same. I submit you can't say "Oh, well, 414 and following have a great deal more facts in them and so they can't be taken in"; we would say that's a good thing, not a bad thing.

MR JUSTICE ROTH: Yes.

MR MOSER: It is 5 o'clock. I'm almost at the end. Shall I try to finish in five minutes?

MR JUSTICE ROTH: Yes, but no longer because I have a professional commitment.

MR MOSER: The final part of the debate in relation to more favourable positioning and display concerns recitals 426 to 438. This starts at page 744. At 426 and 428 to 435 are not contested, so in reality this is all about 427, 436 and 438. So if we are still on page 7 -- 744, the relevant finding is 425. "paid products result in the Shopping Unit are not an improved form of AdWords results." Google says that is all you need to support the finding of abuse. You don't need to know why the Commission found that to be the case and so on. Again, we disagree.

Perhaps I can take this very shortly because it is all the same arguments again. We say there are 12 reasons the Commission gave for why AdWords and Shopping

Unit are not equivalent, and they are essential to understand 425, otherwise there is simply a statement in 425, nothing more, to interpret or understand that what an improved form of AdWords results means, which is quite an obscure statement, or why that conclusion was reached.

We have explained in the schedule in the last column why this isn't illustrative evidence. This is a description of an integral part of the abuse. 425 is the integral part and then the others are a description, and that includes in particular 427 which is still not agreed.

MR JUSTICE ROTH: Can someone help me on 427. It is said not to be contested, but then it is for some reason coloured red, so I don't know if that actually should be blue.

MR MOSER: I can't help you, I'm afraid. I can check for tomorrow. (Pause)

It is a question, I think, for them --

MR JUSTICE ROTH: Yes, it is.

MR PICKFORD: I think there is a typographical error in the Google column. So the red is correct, it is not agreed --

MS ROSE: It should say "not binding".

MR PICKFORD: -- because it should say "not binding".

MR MOSER: Thank you.

Well, you have my point on this. Again, noteworthy, Google challenged recitals 426 through to 438 on appeal, and they say, "Oh, we are missing the point on that". I won't go to it now, but if one looks at the General Court judgment, in particular 305, 310 and the end of 316, it is clear the General Court was supporting the Commission's view and reasoning, and rejected Google's case that the comparison between Shopping Unit and AdWords was wrong.

You have our submissions on appealability.

So we say even the three remaining not agreed bits, which are just three of the 12 reasons, then otherwise in our view, entirely the same as the agreed or not contested, they should all go in here.

I would go to 439, but that is agreed and it has already been addressed.

So the final point for today is recital 442 on page 752, which is not agreed. We say illustrative evidence, and again it comes down to, we say, an overly narrowly approach. They say 441 is enough.

441 says: "Google has not demonstrated it held [PU] to the same relevance standards that it applied to all of the generic search results on [the SERP] […] it holds the [SU] to the same relevance standards that it applies to all

product [terms]".

441, we say, however, cannot be understood without any explanation at all why the Commission didn't think that Google had demonstrated its assertion about the same relevant standards being applied to Products Universal as to generic results, and to Shopping Units as to product ads.

recital 442, not an overly long recital, explains simply what Google put forward to seek to demonstrate its claims and why the Commission found it not to be probative.

Again, Google seeks to downplay the fact that it appealed against recital 442 under its first plea, Part 2B, and there is a reference in its skeleton to the GCEU, the General Court judgment -- and we think by the way the reference in paragraph 48.8 of Google's skeleton should be to paragraph 294. For your note, you will find that in bundle A3, tab 2, page 174.

MR JUSTICE ROTH: Was it the General Court reference, you say, is 294?

MR MOSER: Yes, we think, but for 204 is what you said --

MR PICKFORD: Yes. That's a typo, it should be 293 to 294. That's a typographical error.

MR MOSER: I'm grateful. So we agree. Anyway, our point is not about that, it's that Google clearly considered the

recital to be appealable as per.

That is my five minutes.

MR JUSTICE ROTH: Thank you. If we start at 10 have we a reasonable prospect of completing tomorrow?

MR MOSER: I would hope so.

MR PICKFORD: It depends a little on the speed on which we go.

MR JUSTICE ROTH: We can all agree with that.

MR PICKFORD: Because much, I think, in terms of principle would be established -- at least hopefully once you have heard my argument on the points that I'm going to come back to Mr Moser, we then will be into repetition of very, very similar principles --

MR JUSTICE ROTH: Yes.

MR PICKFORD: -- it might be overstating it, but in my view, we could actually start at 10.30, but if the Tribunal would like to start at 10.

MR JUSTICE ROTH: No. We will start at 10. We can't go on beyond 5 tomorrow, not even five minutes, so we will start at 10 o'clock tomorrow.

(5.08 pm)

(The hearing adjourned until 10 o'clock on Wednesday, 19 March 2025)