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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Wednesday, 19 March 2025

(10.00 am)

(Proceedings delayed)

(10.09 am)

MR JUSTICE ROTH: Sorry to keep you waiting. Yes, Mr Pickford.

Submissions by MR PICKFORD

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

Mr Moser yesterday was addressing the Tribunal on recitals 381 and 382, and 442, but he interspersed his specific submissions with some more general points, and also responded to a question from the Tribunal, so I would like to begin by addressing all of those general points and the exchange with the Tribunal on one matter.

So the first point was this. Mr Moser said that the starting point in the EU treaty is that a decision is binding in its entirety, every comma and every dot, on the addressee. That is, in fact, the opposite of the starting point in EU law. And if I could take the Tribunal, please, to the *Trucks* case, which very conveniently sets out the genesis of EU law in this area. That is in the authorities bundle, which is A6, tab 7, and the relevant page I would like to go to is 221.

MR JUSTICE ROTH: Can you give me a paragraph number?
MR PICKFORD: Yes, of course. It is paragraph 34, is where I am going to be taking the Tribunal to. (Pause)

Do you have that?

MR JUSTICE ROTH: Yes.
MR PICKFORD: So the Tribunal refers to this issue having been considered in *BritNed* and refers to the judgment of Mr Justice Marcus Smith, and quotes in turn the statement from the case of *Kingdom of the Netherlands* -- 211, I am sorry, I misspoke. Thank you.

Yes. So the quotation there is at (b):

"A recital constituting part of the essential basis for [the] decision. As [the] case *Kingdom of the Netherlands v Commission* makes clear, whilst generally speaking recitals are not acts capable of review by the courts [I will put in parenthesis there '(and thus binding)'], an exception is made in the case of those recitals constituting the essential basis for the operative part of that act."

And then the Tribunal goes on to quote at paragraph 36 from the *Dutch Banks* case, and if I could ask the Tribunal, please, to read paragraph 31 which is quoted in paragraph 36 of *Trucks*. (Pause)

MR JUSTICE ROTH: But isn't the simple point when the treaty says the decision is binding, it is the decision as set

out in the operative parts? That is it; that is what the treaty is dealing with?

MR PICKFORD: Exactly.

MR JUSTICE ROTH: And even in this case, as in all these cases, if one looks at the end of what we have called "the decision", in other words the operative part on I think our page 240, that is what is called "the decision" and the recitals are a sort of preamble, just as with a regulation or a directive. So, therefore, the starting point is: well, you could not challenge any recital, but in fact you can because for reasons that are explained.

MR PICKFORD: Quite.

MR JUSTICE ROTH: Isn't that the short point?

MR PICKFORD: It is a short point, Sir, but it is an important point because Mr Moser builds from that. His submission was: every dot, every comma, that is the starting point in EU law. It is not, it is the operative part as, Sir, you have said, and therefore --

MR JUSTICE ROTH: Well, that's the formal legal position, but the thing that is more difficult is that -- we all agree a recital constituting an essential basis for the decision can be challenged and is binding.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Then the question is: well, the reasons

most of these recitals are there in a contested case is to support and prove the findings that are the basis of the decision; that is where one gets into the difficulty.

MR PICKFORD: I understand that, Sir, but the point is it is -- that is an exception. So we start from it not being binding and then they get brought in to being binding, exceptionally, if they form the essential basis for the decision or if they are necessary to interpret the operative part where it is ambiguous.

MR JUSTICE ROTH: Yes.

MR PICKFORD: But my point is, as often in the law, it doesn't matter whether you are an exception to the general position or not. Mr Moser's stance was the general position is absolutely everything is binding.

The reason why I do make this point is because it helps to some degree to address a question from Ms Rose to Mr Moser yesterday, which is: well, might it not be -- logical just to say the whole thing is binding, essentially, apart from if they happened to have put in something irrelevant that they really didn't need to?

My submission in relation to that is, that does not reflect EU law. That would be effectively to rip up the starting point that it is just the operative part, and then you just go so far as you need , to support that

in terms of its essential basis, and then you stop.

If one was to go to the fully expansionist approach, which is: let's just say, basically, as long as they weren't doing something irrelevant and stupid here, surely it is all part of the decision. That is really not how EU law works. It is how Mr Moser described it, but it is not the starting point. That is one of the difficulties with that approach.

As much as it helps -- I see why it is potentially attractive, because we no longer have the difficulty really of where we draw the line -- or at least the line can be drawn very, very easily, but that isn't, in my submission, how EU law has ever approached these matters and, therefore, it can't be the right answer here.

MS RIEDEL: Can I pick you up on one point. I understand what you are saying; are you overstating it slightly by talking about it as "exceptional", "exceptionally"? Is it more -- that sort of suggests that it would be unusual -- so I just want to really understand quite what you are saying there.

MR PICKFORD: No, I don't mean it is unusual -- and thank you for picking up on that, so I can clarify. I think it would be almost always the case that there will be findings in the recitals that are binding because they are needed in order to support the operative part. You

will have heard what I said on Monday about how far we say logically one needs to go in respect of that, and I am not going to repeat those submissions because I took them as far as I could.

So you are quite right that I'm not saying it is exceptional in the sense of it being unusual, I'm saying that it is nonetheless taking things out of the starting bucket, which is that they are not binding. The starting basis, they are not binding, and then you find reasons to make them binding insofar as you absolutely have to, to support the Decision.

That is what I'm saying. I hope that makes it clear.

The second and related point is a number of submissions made towards the end of yesterday -- they were cast in terms of being about the need to interpret the operative part of the Decision. Now, I think the Tribunal -- Sir, you picked up on this and put to Mr Moser was he actually talking about the essential basis.

Just to clarify our position on that, you only adopt an interpretive approach when there is ambiguity in the operative part. So the two routes to bindingness are either it is necessary to support it, or there is some ambiguity in the operative part and therefore it is

necessary to go back to look at some of the other recitals to see what is meant by it. There is no wider, broader, interpretive approach.

The third point is a policy argument. So Mr Moser canvassed a policy argument, he said, in favour of a broad approach yesterday, and he complained that it would be wrong if the Claimants have to relitigate points in the Tribunal that were in the Commission Decision, because they should be able to take the benefit of the Commission Decision.

That's the essence of the point he made.

I would make three points in response to that. The first of those is that no one is requiring the Claimants to re-establish the infringement. The whole point of a follow-on claim is that the finding of infringement is binding. It is in the bag, they can take the full benefit of the Decision insofar as it goes, and what the Decision establishes is that we infringed competition law. They have got that, so no one is asking to relitigate any of the points that ultimately the Decision is concerned with.

Second, there is no real scope, I would say, for policy considerations of the type that Mr Moser at least referred to, to influence the test here, in any event, because as I was saying at the introduction of my

submissions this morning, the test comes directly from EU law and it is a test that was derived from what is challengeable in a Commission Decision. So it is about ultimately what are the rights of appellants before the EU courts, and so what is binding on the Tribunal is simply a corollary, I would argue, of that basic EU law question.

Put -- put in those terms, the EU law question is not directly concerned with follow-on actions at all, so it would be wrong to interpret the rule about what is appealable or not appealable and, therefore, what is binding or not binding in the context that we are considering it today by reference to considerations that are specific to this litigation.

That is what I say Mr Moser was urging on you.

The third point is this. If one is to go down a policy-driven more purposive approach, the real policy consideration, I say, is this: that the test that the courts are getting at when they are considering what is binding and what is not binding, and what is challengeable and not challengeable is about a demarcation between the jurisdiction of the EU courts and national courts. That is what this ultimately goes to.

So if one is to analyse that in the context of this

follow-on action, the issue that we are concerned with here, of course, is what, if any, loss did the infringement cause the Claimants. That is what we are concerned with. We are not concerned with liability because that has been addressed already.

We say in the context of the demarcation between the jurisdiction of the EU courts and the national courts the policy consideration, insofar as there is one, draws you to my minimalist approach, rather than Mr Moser's more maximalist approach. Because what is going to happen -- I'm illustrating it by reference to these Proceedings, but this would be true of any case where there was a potential tension between EU law and domestic law.

In these Proceedings, as an example, we are going to determine the causation of damage question by reference to English procedural law; we are going to hear live evidence from witnesses, et cetera, something that the Commission doesn't do; and the Tribunal is going to be applying English law on causation of damage.

The potential difficulty there is that the more that the Tribunal is absolutely bound by findings in the Commission Decision, even ones that we would say are not strictly essential, is that the more possibility there is of introducing artificiality into the process of the

Tribunal because the Tribunal will -- everything that has been found to be binding, the Tribunal will be forced to determine in the same way that the Commission did, irrespective of whether having heard the evidence and having adopted a full hearing under English law, it necessarily thinks that it would have agreed with that, had it been determining those issues itself.

MS ROSE: Why would it hear evidence on something that is binding?

MR JUSTICE ROTH: The evidence would not be admissible, would it, if it was seeking to challenge? Once a recital is binding, that is one of the reasons we are doing it as a preliminary issue, is it affects what evidence the parties need to call, and can call.

MR PICKFORD: Yes, but my point is obviously in a perfect world I agree that we would be able to create a procedure that was totally insulated from everything that had been decided was binding. The reality is what will happen in this litigation is there will be quite a lot of argument about the extent of read across. For instance, in relation to the effect analysis, we can see that beginning to take hold already when we were having the argument about what was the counterfactual and how far does it go -- and we will be having more of that argument at the first trial on the counterfactual.

My point is that in that context there is, at the very least, the risk of there being some overlap and the Tribunal's hands, if it adopts a very expansive approach, being more tied than they really need to be or would be sensible for them to be, when they are hearing the English law question.

MS ROSE: Can you give us a specific example?

MR PICKFORD: I think the best example probably is on effects. So I say that much of the effects analysis goes purely to potential effects and, of course, my submission will be none of that ultimately is going to matter in the context of the debate that we are going to have about actual effects, because that's a different test.

If I am wrong about that and Mr Moser is right, and actually there is more of an overlap than I am accepting, then in that world there really is going to be the potential, exactly the kind of problem I'm referring to --

MS ROSE: But that seems to be a different point, which is the question of distinction between potential effects and actual effects -- what I want to understand from you is an example of a finding in this judgment that you are wanting to re-open and that you are worried there is going to be an issue if this Tribunal finds that it is

binding, which will in some way wrongly tie your hands when you are seeking to argue about causation of loss.

Can you give us an example?

MR PICKFORD: Yes. My example -- my best example, proceeds in a world where I am wrong, so it is in an alternative world where I am wrong about my other argument which I will be making in due course --

MS ROSE: Can we have a world in which you are right? Can we conceive of such a thing?

MR PICKFORD: I wish. I think it is less likely to arise in a world that I am right in relation to those being separate questions about potential effects and actual effects. I would concede there is relatively little force to this point if I'm right on that question.

But we haven't got there yet, so what I'm trying to do is deal with a potential scenario in this litigation where Mr Moser is right, and actually the Tribunal is compelled to answer questions about causation of damage by reference to the approach that the Commission took when it was considering potential effects.

MR JUSTICE ROTH: Would an example -- would this help you? Recital 607.

MR PICKFORD: Could I have a page, please?

MR JUSTICE ROTH: 209 -- sorry, not in the schedule, in the Decision.

MS ROSE: It is 825.

MR JUSTICE ROTH: In the schedule. It is helpful, though, to look at 605, 606 and then 607.

MR PICKFORD: Yes. Yes, that would probably be -- that would be an example.

MR JUSTICE ROTH: Perhaps 605 says the -- 606 says:

"... not required to prove…" it has actual effect, sufficient and "capable of having, or likely to have, such effects".

Then it goes on to say:

but here, in any event, the Commission has found actual effect.

MR PICKFORD: Yes.

MR JUSTICE ROTH: So that would, if binding, read across to the very point you are making, I think.

MR PICKFORD: It certainly could. It certainly could. I'm obviously going to reserve my position as to what I'm actually going to be --

MR JUSTICE ROTH: If it is binding, it says the conduct decreases traffic to comparison sites -- it's not ambiguous.

MR PICKFORD: Yes -- I am not -- to be very clear, in this hearing, I'm not conceding that at the next hearing I am going to accept that this recital causes me problems, because I'm going to say all of this is actually all

within an overarching examination of potential effects -- and when one comes to examine what the EU court said about it, they said: yes, they did look at actual effects, but only really in a potential effects world, therefore you can't hold them to as exacting a standard --

MS ROSE: So obviously we have not yet reached this recital 607, but it is one where there is a disagreement.

MR PICKFORD: Yes.

MS ROSE: I suppose you might say in relation to this: this recital 607 in principle is not binding because it is prefaced by the Commission itself saying the finding we are about to refer to is not necessary for the infringement decision.

MR PICKFORD: Yes.

MS ROSE: We are only required to prove potential effects.

Now, as a matter of fact, they say: we have found actual effects. But I anticipate that you might seek to argue that the finding of actual effects in that context cannot be binding because it is expressly unnecessary.

MR PICKFORD: Quite. So that is right, but in my submission it doesn't ultimately remove my more general point that there is, insofar as there is a policy issue here, I say the Tribunal needs to proceed with caution in terms of what it ties its hands to in the future trial. Of

course, it is quite entitled to reach the same view. It might hear the evidence and think: yes, absolutely, we totally agree with what the Commission said here.

But it becomes problematic if you have adopted a very maximal approach and decided that huge swathes of the -- that everything you could possibly argue might be binding, is binding, in my submission, that may well cause artificiality because it may mean there are issues that the Tribunal is considering.

MS ROSE: But, you see, I think the example we are just looking at is a really good example, but if you are looking at the evidence that the Commission has made findings on in order to support its conclusion of abuse of dominance, isn't that a rather different situation? Because the finding of abuse of dominance is, of course, an essential part of the Decision, and the evidence on which that finding is based is also an essential part of the Decision because, putting it at its most basic, if the Commission had found abuse of dominance without evidential support, that would be appealable, and therefore in order to challenge before the General Court the finding of abuse of dominance, either you have to show they have applied the wrong legal test or you have to show that the finding is not supported by the evidence.

So I think that is where I'm puzzling here, because it is hard to see why the findings of fact that are used by the Commission specifically to support its finding of an essential part of the Decision are not essential to the Decision, because if they weren't there, the Decision would fall.

MR JUSTICE ROTH: I mean, your point about a, sort of, division of jurisdiction between EU courts, Commission EU courts and national courts, is exactly what the Grand Chamber was addressing in *Otis*.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Which is quoted in *Trucks*.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Which is about the only bit of EU jurisprudence we could find as at 2020. I am not aware of any since -- otherwise no doubt you would both be bringing it to our attention -- where they actually say anything about Article 16 and what it means. That is where the Grand Chamber of the Court of Justice makes the point that where the dividing line comes is not about the evidence for the infringement, but it is about the existence of loss and causation of loss to the individual claimant. This is in *Trucks* at paragraph 67. I don't know the page because I -- paragraph 67 of the *Trucks* judgment.

MR PICKFORD: It is page 224 of the bundle. Thank you, Sir.
MR JUSTICE ROTH: In the quotation, there is a bit just explaining the background of *Otis*, which was a reference in a damages action before the Belgium court; there was a reference to the Court of Justice; and then further down, there was the quotations of paragraphs 63 and 65 to 67 of the court's judgment.
MR PICKFORD: Yes. So my -- I am going to be relying heavily on *Otis* at Trial One because *Otis* is one of the cases that is going to underpin our argument that whatever was said about potential effects in the context of abuse, we are now dealing with a question of national law about causation of damage, and that is something that this Tribunal will be entitled to determine itself, fully, in accordance with English law.

But the problem that arises, I say, is that *Otis* is premised, I would say implicitly, on a fairly restrictive and minimalist approach to bindingness, because we can get into trouble on a very maximalist approach where many recitals are said to be binding because they all form part of an overall explanation of why the Commission came to the decision that it did.

Then -- and also if Mr Moser is -- so then I say, at any rate, there is a potential -- there is a risk for a problem there, as, Sir, you illustrated with recital

607. Then it gets worse: if I'm wrong about the application of *Otis* in our case, as Mr Moser's clients are going to want you against me.

MR JUSTICE ROTH: In *Otis* they actually say in paragraph 66, I note:

"…even when the Commission has […] determined the precise effects […], it still falls to the national court to determine individually the loss caused to each of the persons..."

So it rather assumes to be saying there that if the Commission has determined the precise effects, that's binding -- but the national court decides whether that effect was on this claimant before the national court and, of course, how much loss it suffered. So it seems to go further. (Pause)

So what they say the national court is looking at is the existence of actual damage and causal link of the damage to the infringement.

Then they say, indeed, even -- then it is what the national court looks at is the individual loss.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Clearly, there is nothing in the Decision that says Kelkoo has lost this much, or whatever.

MR PICKFORD: Quite, but one can imagine that if there were binding findings about effects in general and the

Claimants are urging the Tribunal to wield a broad axe, there may well be arguments that depend on whether the Tribunal is permitted to depart from something in the Decision or not.

I am very happy to be entirely candid about where we come from here. We want to maximise the room for manoeuvre for the Tribunal; what we don't want to do is find that we are boxed in in a way that we shouldn't be.

MR JUSTICE ROTH: You want to maximise the room for manoeuvre for your client, that is what you want to do. We all know that, and know that Mr Moser wants to minimalise it; we are not naive.

MR PICKFORD: Quite, but my point is the fact that there may be two arguments there doesn't mean that my first argument, which hasn't yet been determined -- the *Otis* issue, if I can call it that -- exactly how that applies in our case has not been grappled with by the Tribunal yet. That is for Trial One.

So all I am saying is -- it might be right -- I mean, I would say it is right, that the *Otis* point would give me a complete answer to any attempts by the Claimants to read across extravagantly from the Decision. But that hasn't been determined yet, and so naturally the point that I'm raising here is that, given that the Tribunal does not know what the answer is yet,

the Tribunal can't say, "Well, don't worry, you have all the protection you need in *Otis*", because we don't know how that plays out.

So what I'm saying is insofar as there is a policy concern here, it should be that the Tribunal should be careful about not over-tying its hands at this stage. That is the point. As compared to what Mr Moser was saying, which is: don't make us prove infringement again. Nobody is going to make them prove infringement again.

MR JUSTICE ROTH: Okay. We understand.

MR PICKFORD: There are just two more general points. One is quite short; the other may require more development.

The fourth general point made by Mr Moser was he said he was going to adopt the point that I had made, that inconsistency shouldn't be held against us. I'm not making that point. I don't accept that we have been inconsistent.

What I sought to explain to the Tribunal yesterday was the point that where we don't contest a point, that has nothing to do with bindingness one way or the other. That is purely because we are willing to say to the Tribunal here and now we are not going to contest the underlying facts here, so there is simply no point in the Tribunal having a debate.

MS ROSE: So shall we assume that everything that you are not prepared to say "not contested", you do intend to dispute?

MR PICKFORD: We are reserving our position to dispute -- I mean, you know, we are at a stage of the litigation where --

MR JUSTICE ROTH: You don't know yet.

MR PICKFORD: -- the answer is: I don't think you can make that assumption. What we've done is we have tried to go as far as we can, given the stage that we are at -- we don't have witness statements, et cetera, yet -- where we can safely say: okay, we can take those points off the table. I would be very surprised if, as the litigation continues, there are other points we might be able to take off the table, but we haven't done it yet.

MS ROSE: So you would anticipate that as you got closer to trial, more of these recitals might go blue?

MR PICKFORD: Well, I would anticipate that we -- I would hope we weren't going to repeat the exercise, but, yes, hypothetically were we to repeat the exercise, then one might imagine that more would go blue. But I'm not imagining that actually procedurally that is what is going to happen.

MR JUSTICE ROTH: Well, it may be equally that the Claimants won't rely on every one that they now think is binding

when they actually come to prepare their evidence because they discover they don't really need it for their case.

MR PICKFORD: I agree, because I would say they are not going to need -- there is a degree of artificiality about this whole exercise because we are willing -- we always agree that the higher level findings are binding. We just say you don't need to go beyond that.

I heard what the Tribunal said in response to me on that, but in my submission, our admission of the higher level points is going to do away with the huge amount of need for debate about any of these things, because there simply -- they can simply just point to the higher level admission and say: there you go, you accept the high level issue. They will realise that minute disputes about particular evidence under that very often isn't going to take anyone any further.

But we are not willing at this stage, unless we know that we agree to all those facts, to waive our right to potentially dispute those, because we don't know whether one or two of them might in fact matter. And so, like any competent lawyers, we want to ensure we haven't given away things unnecessarily that we may need in the future.

But it is -- in my submission, this is quite a protectionist exercise and I find it very hard to see how any of these points are ever going to make the slightest bit of difference -- the slightest bit of difference -- in the next trials, given the admissions that we are willing to make.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So that's the point on inconsistencies. We say, actually, we have sought very hard -- I clarified whether we had achieved it yesterday, but we sought to be consistent in our approach to bindingness. We have just removed some things we don't need to discuss. So I don't make the submission -- my inconsistency shouldn't be having -- I don't accept there are any inconsistencies.

What I would just add is we say there are inconsistencies in the Claimants' approach, therefore that is a point in favour of our principled approach and it is a point against their, we say, rather more ad hoc approach.

Then the fifth and final point -- general point is responsive to a question from the Tribunal to Mr Moser yesterday about the language in the Decision. The Tribunal asked whether there was a difference between the words "illustrated by" and "confirmed by". So it

may be helpful for me to give my answers on that general point before we consider specifics.

MR JUSTICE ROTH: Yes.

MR PICKFORD: What I would say is that the words "illustrated by" are a very good clue that what follows is, indeed, mere illustration and that one would not find that what follows in paragraphs -- such paragraphs is an essential basis for the Decision. But I would accept that one would ultimately still need to look at the substance of those provisions to see whether they are or aren't consistent with the very big clue that the Commission is giving us in the evidence.

Conversely, I don't accept that the slightly different words "confirmed by" don't -- sorry, that they do indicate bindingness. It is quite possible for the Commission equally to say "this is confirmed by" and then refer to low level matters that are not binding, and indeed it has done that in a number of instances in the Decision that we have already considered.

So if I could just illustrate that by reference to a couple of examples. If one picks up the schedule at page 650. I will just check that I have got the right reference there. (Pause)

Yes -- actually, it is probably very helpful to go back to 648, initially -- I beg your pardon -- I see the

critical words.

So the beginning of recital 220 begins with these words:

"The different purpose served by comparison-shopping services and merchant platforms for users is confirmed by the following evidence ..."

So I have two points to make about what then follows. Even the Claimants don't say that all of what follows is binding. So if one were to go down to (3) and (4), which are on page 650, one sees that they are not contended to be binding because they are not underlined. So that's the first point.

The second point is you had my submission that under (5), even if the Claimants are right that the first sentence of subparagraph (5) is binding, there then follows at (a) through to -- I can't remember what we got up to – (l), a huge amount of illustrative evidence which I say is very much the "in the weeds" material that, on any view, we say would not be binding.

So the mere fact there that that is all preceded by, "confirmed by the following evidence", does not tell you that what follows must be binding.

Another example would be a couple of recitals on --

MR JUSTICE ROTH: Well, I think one example is enough. You have made the point. They are not perhaps as precise in

their use of language --

MR PICKFORD: Yes.

MR JUSTICE ROTH: -- as one would wish.

MR PICKFORD: Thank you. If one wanted, there are many other recitals --

MR JUSTICE ROTH: I think we better get back to our actual recitals, otherwise we are going to struggle.

MR PICKFORD: I think we are going to be okay, but I understand. That was actually quite a lot of the debate yesterday and I thought it was quite important to --

MR JUSTICE ROTH: No, it is helpful.

MR PICKFORD: -- meet it.

MR JUSTICE ROTH: I think we have the point about that language.

MR PICKFORD: Okay. So back to the specifics --

MR MOSER: Forgive me. Before Mr Pickford -- I'm in your hands -- but before he goes back to the specifics and we get back into the weeds, can I just make a minute's remarks on one aspect of what was mentioned before we -- I don't want to get back into the metaphysics of how the law works and I don't demur from what I heard from you, Mr President, and the panel about how *Trucks* and *Otis* works. But it is the point that was made about evidence and admissibility, because I sense that that, is going to be the focus of the next stage of these Proceedings and

what my learned friend says.

We agree, respectfully, that those recitals that are held as binding ought not to be the subject of then further rebuttal, or clarifying or whatever evidence, but not be admissible, because that's the demarcation that my learned friend talks about. Of course, Article 16 is all about not making findings running contrary to what the Commission says.

I just wanted to note that I am heartened to hear my learned friend say that where they say "not contested", that is not somehow a reservation of admitting evidence about that because there is simply not going to be argument about it.

I say that because there was a slight concern from the way it was originally put in the skeleton argument that they would be seeking to admit, or reserving the right or however you want to put it, to admit the evidence in relation to “not contested”. We haven't heard any of that in this hearing, and that is welcome, but I thought I would expressly point that out, so that there isn't some ambiguity afterwards about this aspect.

MR JUSTICE ROTH: Mr Pickford, that is -- certainly speaking for myself, from my understanding, "it is not contested" means you are not going to contest it.

MR PICKFORD: That is correct. We did put a clear

reservation which does not undermine that, but so there is no ambiguity, as Mr Moser raises it. That doesn't mean that if it were important, we can't expand and say: well, that was a summary. But there is -- most likely to arise is in relation to how algorithms work. And we may need to get into some of that. There may be something that gives a broad summary, which we say we are not going to contest, that's broadly right. But nonetheless, here is more evidence on that that explains really how these things work, and you may want to know that.

What we wish to make clear is that we were not precluding ourselves from having evidence that even went into the same territory, we are just not going to contest the particular finding that we have said we are not going to contest.

MR JUSTICE ROTH: Yes, well, I don't think we can take it further now --

MR PICKFORD: No.

MR JUSTICE ROTH: -- if the particular point in a sort of conceptual sense, we will have to deal with it if there is an objection in Trial One.

MR PICKFORD: I respectfully agree.

So then back to specifics. We picked it up yesterday, I believe, at about 381, 380. This is in

a section dealing with Google's more favourable treatment, and in particular the first part of it is not subjecting its own comparison shopping service to the Algorithm A and Panda.

We agree with 378 and 379 being binding, which set out the essential complaint; we agree indeed with 380 being binding, which expands upon that in relation to the algorithms.

There is then the debate that begins at 381. So hopefully I can actually cut through this relatively quickly. You will see that is in red, in the schedule. The reason why it is in red is because of my primary position that where you have a series of recitals and you could strike through any one, then it can't be binding. But I am not going to cover that same submission again because we have had an extensive dialogue about it.

So that is our primary position.

But if we are wrong on that and there have been some possible indications in relation to the Tribunal's view, then we would accept that in principle the first sentence of 381 is binding, subject to the following qualification. It is a rather special case. The qualification is the reference to the Panda algorithm at the end --

MR JUSTICE ROTH: At the end of the first sentence?
MR PICKFORD: At the end of the first sentence, yes. So 381 -- the only part of 381 that the Claimants says is binding is the first sentence.
MR JUSTICE ROTH: Yes.
MR PICKFORD: In the ordinary case, if you have rejected my first submission, I would accept that they would be right about that, subject to the following somewhat esoteric point that relates to the Panda algorithm. The reason for that is as follows. What they say here is: in the first place Google's own CSS also includes a significant amount of -- oh, I can't remember now -- a significant amount of non-original content, one of the triggers for ... Panda algorithm.

The problem with that is that is inconsistent with the explanation that the Commission itself gives about how the Panda algorithm works, just a few paragraphs earlier, at ecital 357. So if one was to go back to page 702 in this schedule. This is a recital said to be binding, we don't contest it. If I could ask, please, the Tribunal just to read to itself because some of this is highly confidential because it involves the signals that Google uses. (Pause)

MS ROSE: So you are saying that non-original content is only Algorithm A?

MR PICKFORD: Yes, because this explains it is a different signal.

MS ROSE: Is that disputed? Do the Claimants dispute that, Mr Moser?

MR MOSER: We will just discuss it for a second. (Pause)

The difficulty is it is not our evidence. We are not really in a position --

MR JUSTICE ROTH: You probably don't know, I suppose, at the moment at least. Yes. Well, I think all we can say about that is there is a sort of reservation about that point and I imagine that at some point there is going to be some disclosure. The Claimants will then see.

MR PICKFORD: Yes. I mean --

MR JUSTICE ROTH: What is said in -- I don't know if -- have the Claimants seen the blue -- what for us is highlighted in blue in 357?

MR PICKFORD: Yes.

MR JUSTICE ROTH: They have? But only within a confidentiality ring?

MR PICKFORD: But there are people within that confidentiality ring, I believe, that the -- (Pause)

MS RIEDEL: Legal Eyes Only, blue, isn't it?

MR PICKFORD: Yes, it is Legal Eyes Only, but there are some exceptions.

MR JUSTICE ROTH: Yes. Yes. I think we can't -- I think we

note that point, which is a point of fact. There seems to be, certainly on one reading, an internal inconsistency.

MR PICKFORD: One might question how far appealing that alone would have got us.

MR JUSTICE ROTH: Yes.

MR PICKFORD: Because the court might have said: you are not appealing it on Algorithm A, so why does it matter that they are wrong for Panda? In the context of the abuse, they have a point, but in the context of the damages action, that may be very important as to what the signals in fact were and how different CSSs were affected by them. This is exactly an illustration of why I say the Tribunal needs to be very careful about not overcommitting to what is binding.

MS ROSE: On our general point, you flagged this as being a sentence that if you are wrong on your main point about alternative bases, you wouldn't dispute, apart from this point.

MR PICKFORD: Yes. Yes.

MS ROSE: Are you in a position to give the Tribunal a schedule of all the recitals to which that applies?

MR PICKFORD: I mean --

MR JUSTICE ROTH: Not today.

MS ROSE: Not today, but it would be very helpful.

MR PICKFORD: We could obviously follow up after this hearing and do that.

MR JUSTICE ROTH: That would be, as Ms Rose said, extremely helpful.

MR PICKFORD: Of course.

So that is all we have to say about 381.

382, the only part of that that is said to be binding is just a reference to Google's awareness of where its comparison shopping service would or wouldn't rank. We say that is not relevant to the objective finding of abuse.

MS ROSE: So this is 382?

MR PICKFORD: 382. Yes. So we dispute 382, even if, so for this purpose we are in the alternative world where I am wrong on my primary argument. Indeed, just pausing for a moment on that. It may be helpful generally for me to make the submission that I say my primary argument is what gets us home on the red in the entirety of the rest of this table, but I might as well generally just focus on, as far as I can, the bits that are the alternative, because obviously I will be repeating myself otherwise.

So here in that alternative world, the finding that is underlined is not, on any view, a necessary part of the Decision. You could just strike it through and the Decision would entirely stand because it is based on

objective considerations.

I am going to come on to that in a slightly broader context shortly.

Then 383, first sentence, that falls into the category where I would accept if the Tribunal rejects my primary argument, that would become binding, that first sentence.

But then 384 would not because, as the President said yesterday, that is merely expanding upon a non-binding part of 383. So if the other part isn't binding, nor can 384 be either.

Then 385 is agreed to be binding by both parties.

Then 386 is, again, about the rationale of Google as is after non-contested recitals 387 and 388, 389 -- which is back to Google's awareness -- so these are considering subjective factors, both rationale and awareness of what would happen. We say that these did not form any necessary part of the Decision and, therefore, of the operative part of the Decision.

One can actually see that relatively well from a point that is taken against me by the Claimants, because they say: ah, well look at your appeal, you appealed and in your appeal there was a reference to recital 386, which is one of the ones we have just been looking at; it is instructive to see what the General

Court said about our appeal.

So if we could go, please, to the A3 bundle and pick it up at page 168 -- I beg your pardon, it might be more helpful actually to go back to 167, that puts it in context.

So at paragraph 250 of the judgment, there is a summary of Google's argument where it is said that Google maintained "in essence, that the Commission misstated the facts. First:

"Google claims that it introduced grouped [results -- grouped] product results to improve the quality of its general search service, not to drive traffic to its own comparison shopping service. Google thus explains […]it was not pursuing any anticompetitive objective by introducing product results, contrary to what is suggested by the presentation of the facts in recital 386 of the contested decision."

So what one then sees is how the General Court deals with that contention by Google. If one goes to paragraph 259, what the General Court says is:

"…it is not apparent from the recitals of the contested decision cited by Google [namely recital 386 amongst others], that the Commission took into account, at least as such, for the purposes of establishing the existence of the abuse concerned any 'anticompetitive

objective' on Google's part in 'developing' the technologies that led to the introduction of Product Universals. On the contrary, it is apparent from the wording of Section 7.2.1 of the contested decision [so looking at it more broadly] that the Commission took the view that the abusive conduct consisted of objective elements".

Then it goes on at paragraph 264 on the next page to recall the law on abuse of dominant position being an objective concept.

Then at 265, it says this:

"Consequently, while the Commission was entitled to comment on Google's business strategy in the context of the launch of Product Universals and to refer in that regard to subjective factors, such as the concern to correct the performance of Froogle, arguments alleging distortion of the facts concerning the reasons for Google's introduction of [the] Product Universals must - insofar as they concern grounds that were not used by the Commission as constituent elements of the infringement (the latter being summarised in paragraph 260 above)- be rejected as being ineffective in the context of the analysis of the infringement (see to that effect *Servier*."

So what is being said here is: sure, the Commission

does refer to Google's subjective intention; it was perfectly entitled to do that. There is nothing wrong with that in principle, but it doesn't rely on it for the purposes of its Decision, which is purely based on objective factors; that is, the discriminatory imposition of the combination abuse and its potential effects.

So we say that proves the opposite of what the Claimants say our appeal proves, because the General Court tells us in terms it is ineffective, therefore, those recitals cannot be binding.

Then if we go back to the schedule -- so we are back around page 720 of the schedule -- we see that 387 is not contested; 388 is not contested.

389 is an awareness point again, and we would say that's the same -- that falls into the same category as 386 because it is about subjective issues, not about objective issues.

Then from 390 through to -- well, the next two that are contested would be 390 and 391. I would accept that if I'm wrong on my primary argument, then the underlined part of 390 and 391 would be binding. 392 --

MR JUSTICE ROTH: But would 390 be necessary in part for the duration of the infringement or not? I know the duration --

MR PICKFORD: Well, the difficulty I have, of course is, my primary position is you don't need actually any of this, then I am trying to anticipate, well, if I am wrong where does one get to in terms of a cutting off point --

MR JUSTICE ROTH: No -- sorry, you misunderstood me -- it is clearly binding that the infringements start in different countries on different dates.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I am just wondering whether the fact that Google was putting Product Universal at the top as of 2009 was necessary to support some of the start dates.

MR PICKFORD: No, I don't think so.

MR JUSTICE ROTH: It doesn't? Right.

MR PICKFORD: I am applying a much more general rule, which is I am, sort of, seeking to extract potentially against myself that we are in the next order down here.

MR JUSTICE ROTH: Yes.

MR PICKFORD: That's -- but, of course, my main point is I would say you don't need to go here. I would accept that in that world, if I have lost on my primary position, that essentially would apply to 391. The recitals 392, 393, 394 and 395 then are not contested.

Then 396 would be -- in the first sentence would be in the same category again and we would agree, respectfully, with the Claimants that then when we get

to the illustrative evidence, we are back in non-binding territory.

So after that, we go into the next section of the Decision, which deals with the next main difference between the way in which Google's own CSS and competing comparison CSSs are displayed is that the specialised results from Google's CSS are displayed with richer graphical features, including pictures and dynamic information. That is at recital 397. That is agreed to be binding.

398, likewise. The first sentence.

Then obviously we, on our primary position, part company at the following points: the first, second and third that appear respectively in 399 to 401.

399 and 400 don't actually matter because we are not contesting them.

401 is, we would say, a pretty low level evidential issue and I would submit even on my alternative case could be struck through and there would be no problem with the Decision.

Then at 402 and following, we have -- it is 402 all the way through to 443. This is the Commission's addressing of Google's counter arguments regarding the prominent position and display of results from its own CSS relative to rivals.

The first section here is all agreed to be non-binding. That simply explains what the arguments were. We agree that it must be binding that they were rejected in 407, and we agree that it must be binding that each one of them was rejected for the reasons that are summarised in each of 408, 412, 424, 425, 439, 441.

I am going to come back, but I will just explain the structure of what we accept.

I can deal very quickly with the first point on footnote 463. We took the position that it wasn't strictly binding. However, we have no problem with footnote 463. I have looked at it. We are not really arguing about whether it is true or not, so I am very happy to take that one off the table. That is not contested.

So we then go on to 409, 410 and 411, which are all accepted as binding. Mr Moser raised a point of inconsistency here. He said: aha, I have got them, I have got Google here, because here is an example of where the formula that they generally rely on as indicating on their primary case, that recitals aren't binding, they have slipped up.

And it is 410 and 411.

So we accept 409, which is rejecting -- one of our basic points, is binding. Then we have also accepted

that 410 and 411 are binding. They say: given those are alternatives, surely that is inconsistent with your general rule.

The reason why we accepted that 410 and 411 were binding is because we didn't actually read 410 and 411 as really being separate points. They basically could have all been contained in one recital, because what they say is there was a header link on the page and once you take it into account, most clicks led to the CSS.

So we read those recitals as not being separate points; they are all part of the same point. So that is why we accepted that they were binding, because on our approach there would be no alternative way of supporting the higher-level point in 408 through 409.

So for what it's worth, that is why they are green. Then, again, I would accept that if -- from 413 onwards which is the next section of disputed recitals -- if I am wrong on my primary position, then subject to one exception I'm going to come on to, 413 through to 423 are insofar as they are claimed to be binding, they would be binding. So they are not all binding, because the Claimants only say, for example, in 416, it is the first sentence --

MS ROSE: I think Mr Moser's point is that 409 in relation to Product Universal is pretty much identical to 413 in

relation to the Shopping Unit; and that then the following paragraphs, down to 423, are at least in their opening sentences, performing exactly the same function in the Decision --

MR PICKFORD: Mm-hm.

MS ROSE: -- in relation to the Shopping Unit.

MR PICKFORD: Yes.

MS ROSE: That 410 and 411 are performing in relation to Product Universal. I think that is what he identifies as the inconsistency in your approach. The same thing you accept in relation to Product Universal you don't accept in relation to the Shopping Unit.

MR PICKFORD: Yes. So I have obviously not been clear. I have not been clear.

MS ROSE: Yes.

Mr PICKFORD: I will come back to that. I will take 409 and 411 together.

If one reads 409 through to 411, what they are doing, I say, is giving one single reason that supports 408. So, although there are three paragraphs there, the first one is -- the first recital is just introductory, it's just introductory words which in other parts of the Decision those words would actually often appear in a recital. So the fact that is a separate recital does not mean anything.

Then 410 and 411 are not independent reasons. So what I was accepting by 409 through to 411 all being

binding is that there is one single thing, ultimately, that is relied upon to substantiate 408 at that point. On my approach, that makes it binding because if you take that away, you lose.

MR JUSTICE ROTH: Where there is a conclusion, a finding that everyone agrees is binding, and it is supported by one reason and only one reason, then you accept that reason is binding?

MR PICKFORD: Yes.

MR JUSTICE ROTH: And you say 410, 411, are really one reason?

MR PICKFORD: Yes.

MR JUSTICE ROTH: Where it is supported by two reasons, let alone, whatever it is, with the Shopping Unit, where the Commission has 12 reasons or something, ten reasons, then none of them are binding?

MR PICKFORD: Yes, it is the --

MS ROSE: I understand. It is the Tim Ward point. But just coming back to that factually. In fact, aren't there two reasons at 410 and 411? 410 is saying it is more favourable in two respects: one, there is a header link; two, the majority of clicks take you to the website? Factually.

MR PICKFORD: The way that we read it was that the one on its own tells you very little -- 410 on its own -- if

the header link is just -- without explaining what function the header link is having, which is that if you click on it and you take account of clicks in the header link as well, they take you through to the CSS, then it doesn't really mean a lot.

I am happy -- I am quite happy to accept that I might be wrong about there being one basic reason here. I would say, consistent with what I said yesterday, I probably would still have to be held to the concession that I made, but it would be the illustration of where we had made a mistake on our applying our approach if, Ms Rose, you are right that, really, there are two separate reasons.

If you are correct about that, then this shouldn't be binding for exactly the same reason --

MS ROSE: So you are nuancing it further to say if there are two reasons, but one of the reasons is in some way dependent on the first or linked to the first, then they are both binding. So you would say it is whether two independent reasons that neither of them is binding; is that what you are saying?

MR PICKFORD: Yes, I think broadly that is true, although ordinarily -- I think this is quite an unusual example. Ordinarily, when we have these in the first place, in the second place, in the third place, they don't depend

on each other in this way. I would say one would have to analyse in the specific case whether something was or wasn't binding when you have this kind of relationship.

We took the view, we thought generously, that arguably this was just one point and, therefore, we weren't going to apply our principle objection to it. But if I'm wrong, then I'm wrong. But I'm not saying that, you know, we got it wrong in that case and I would accept we should be held to having got it wrong.

MR JUSTICE ROTH: Yes. Would that be a sensible moment to take a break?

MR PICKFORD: Yes.

MR JUSTICE ROTH: Can I just ask, not for today, but we have, which I found very helpful in the Decision itself, an illustration of the Shopping Unit --

MR PICKFORD: Yes.

MR JUSTICE ROTH: -- on page 12 of the actual Decision document. If Google at some point would have an equivalent, as it were, photograph of a Product Universal, which was slightly different, I would find that very helpful, just to see what it looked like.

MR PICKFORD: Quite. So I hope I can assist on this. One actually finds a lot of helpful illustrations in the General Court's judgment, so this has been done by the

General Court. I can take you through them after --
MR JUSTICE ROTH: Well, it is just if there's a picture.
MR PICKFORD: Yes. So from page -- it is from paragraph 8 onwards of the General Court judgment. One sees pictures of, firstly, a Product OneBox, then an enriched Product OneBox; then over the page, a Product Universal, an enriched text ad, et cetera.
MS ROSE: They are tiny -- would it be possible to have slightly larger formatted versions of these pages?
MR PICKFORD: Of course, yes.
MR JUSTICE ROTH: Then obviously Google supplied them, presumably, as part of their submissions.
MR PICKFORD: Yes, we will ensure the Tribunal has that.
MR JUSTICE ROTH: It is a case where the old saying, that a picture is worth a thousand words does rather ring true.
MR PICKFORD: Quite.
MR JUSTICE ROTH: Very good. 11.40.
(11.30 am)
(A short adjournment)
(11.42 am)
MR PICKFORD: So we are at page 733 of the schedule, about to go on to recital 413 and following. So we have had in recital 412 the Commission's binding finding where it says its case isn't that the "Shopping Unit is […] itself

a [CSS]. Rather […] [it is] the positioning and display of the Shopping Unit [that] is one means by which Google favours its [CSS]…".

Then you will well have by now the reason why we said that the ten reasons and evidence that followed are, on our approach, not binding, but I accept that, subject to one point I'm going to come to -- I have become much louder and more echoey -- the parts of the recitals all the way from 413 to 442, which was the final recital that Mr Moser took you to yesterday, that the Claimants contend are binding would be, if I am wrong, save for one that I'm going to come to.

So if I could go to 420, please, which is found on page 736 of the bundle -- when I say "binding", obviously I'm just referring to the ones that are contested.

MS ROSE: Yes.

MR PICKFORD: Some of them are non-binding, some of them are non-contested.

MS ROSE: And the sentences that are highlighted.

MR PICKFORD: Exactly. What I'm saying is we wouldn't argue with what they say. It was inelegant shorthand.

MS ROSE: No, we understand.

MR PICKFORD: If one goes to 420, which is the - "in the seventh", there is the statement that "…Google presents the

Shopping Unit and […] standalone Google Shopping website as a single service or experience to […] merchants and users." Then there is the sentence:

"This is confirmed by the following ..."

You already have my submissions on "confirmed or illustrated by".

We say that what then follows in (a) through -- all the way to the end of that recital is very much the down-in-the-weeds illustrative evidence that even if we are wrong on our principal point, still shouldn't be binding.

MS ROSE: So you wouldn't dispute the first sentence if you are wrong on your alternative, but you dispute the rest of it anyway?

MR PICKFORD: Correct.

MR JUSTICE ROTH: Although you say it is illustrative, but if the first sentence is binding, isn't the necessary -- it is not an illustration that the necessary support for that first sentence is in what follows, otherwise how is that established?

MR PICKFORD: Well --

MR JUSTICE ROTH: It does not seem to me to be -- I accept that the Commission may not always be so precise in its language, but it doesn't seem to me that this is used as an illustration, I think these are used to establish the

statement in the first sentence.

MR PICKFORD: Well, you have my submission, Sir. I do say that it would have been hard for us to have brought an appeal at this kind of very, very granular level. The Tribunal may reject my position on this, but that's my -- my secondary position is that if I'm wrong, this is the only one of the recitals that I would still seek to argue to the contrary on.

MR JUSTICE ROTH: Can I just ask you about 416?

MR PICKFORD: Yes.

MR JUSTICE ROTH: 414 and 415, I fully understand why you say they are not binding, but they are not contested.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I am just curious. It is only the first sentence.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Why that is contested. I mean, is it wrong? I would have thought it would be something that -- unless it is wrong, that you wouldn't contest. I just don't quite follow why that has been treated differently from 411, 415.

MR PICKFORD: I am happy to take instructions.

MR JUSTICE ROTH: Don't take them now. You can come back after lunch. You take the point, I think.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Thank you.

MR PICKFORD: So that actually takes me to the end of all the points that Mr Moser addressed yesterday.

MR JUSTICE ROTH: Yes. Thank you. Ms Love?

Submissions by MS LOVE

MS LOVE: Members of the Tribunal, I am not going to go through all of the theological debate about if Mr Pickford was right or not right, I am just going to focus on a couple of individual recitals. Firstly, going back to this reservation on recital 381 insofar as it applies to Panda -- and I will be corrected, but I believe that I am entitled also to read out the yellow and the proposition.

MR JUSTICE ROTH: Just a minute.

MS LOVE: Sorry, that is in page 717 of the schedule.

MR PICKFORD: In the underlined part of 381, certainly, because I also referred to that.

MS LOVE: I am grateful. As I understand it, what is said --

MR PICKFORD: But not the blue.

MR JUSTICE ROTH: Yes, but not the blue.

MS ROSE: But you can call that Algorithm A?

MR PICKFORD: Yes.

MS LOVE: But, as I understand it, the assertion that is made is that the suggestion about the relationship

between amount of ""non-original" content" and Panda is at odds with the fuller description that is given in 357, and I am not even going to dream of trespassing into yellow or blue on that.

Mr Moser has already said, and I repeat, that neither we nor, with respect, the Tribunal are in a position to say that anything is wrong about that. But for what it's worth, we do invite the Tribunal to look at what is said in 358 about what the introduction of Panda was intended to achieve. You will find that starting at the bottom of page 702.

"…change that primarily affects sites that copy others' content and sites with low levels of original content". We see the blog post of 28 January 2011. "[Net] effect is that.." -- sorry, I'm now over the page in 703 -- "that searchers are more likely to see the sites that wrote the original content rather than a site that scraped or copied…".

(c), another reference there -- sorry, I'm taking this at a pace -- to "…rankings for low-quality sites […] copy content from other websites or sites…". Then one also sees in (d), original content.

So we say that that simply reinforces our point that we are not in a position to accept there is any inconsistency there.

MR JUSTICE ROTH: Yes.

MS LOVE: I am not sure any of us is in a position to take it much further at this juncture.

The only other recital specific point on which I wanted to respond was Mr Pickford's discussion of the General Court and of 386 and 389.

Now, what Mr Pickford said -- and I think at this point we need to take up bundle A3 and begin at the finding on page 168. He took you to -- sorry, I will give you a moment. He took you to paragraph 259.

MR JUSTICE ROTH: Yes.

MS LOVE: In which the General Court commented it was "not apparent from the recitals [being relied on] […] that the Commission [had taken into] account, […] for the purposes of establishing the existence of the abuse, […] 'anticompetitive objective'".

He then took you across the page to page 169, 265:

"Consequently, while the Commission was entitled to comment on Google's business strategy in the context of the launch of Product Universals and to refer in that regard to subjective factors, such as the concern to correct the poor performance of Froogle [apologies, tongue twister] [...] must – in so far as they concern grounds that were not used by the Commission as constituent elements of the infringement (the latter being

summarised in paragraph 260) - be rejected as being ineffective…".

What Mr Pickford seemed to take from that is you can sort of go through from 385 onwards and wherever you see reference to "Google was aware", "Google intended", that was all part of the subjective intention bucket, so an appeal would have been ineffective. So you can sort of slice and dice those recitals out of the picture.

If I could just invite the Tribunal to go to page 719, back in the mega schedule.

We say -- actually, if you look at the text of 386 the whole way through to, I suppose, 390, when we are out of this territory, said to be territory of awareness, that these are not -- 386 and 389 are not just recitals that are talking about subjective intention. They are recitals that form part of the narrative of factual findings, recording what has happened with positioning and how it has changed.

They are recitals that are explaining the how and the what, and there are words in them that may refer to subjective things, aspects of the why, but it does not follow you can put them all in some separate bucket and say: well, they are all to do with subjective intention and they fall outside it.

Perhaps it is illustrated most clearly if we go to

389, which I had but have now lost, which I think is in 721. "Google was, however, aware that, if the Product Universal was positioned at the bottom of the general [SERP], it would attract limited traffic..".

Then there is a quote:

"Google was also aware that positioning the Product Universal in the middle (above the fourth generic search result) instead of at the top […] result in a loss of traffic…".

I ask rhetorically, if that recital were exactly the same but for the words "Google was aware" and it just began "if the Product Universal was positioned", it would still be the factual finding, the point would still hold good and the quote that is cited would still support it. So we are passing somewhat artificially what are, in my submission, clearly factual findings.

MS ROSE: But that's not a factual finding this would be the result, it is a factual finding what Google thought would be the result.

MS LOVE: It is a finding of what Google was aware of and the fact of which Google was aware is then recorded, I respectfully say, Madam, in the text that follows. So in my submission, this is overly narrow. You can't just take recitals and say: well, this is all an awareness bucket, so can't bind.

If one looks at what the General Court described in 260 as being the constituent elements of the infringement. This is page 168 of your bundle A3. Sorry, it clearly was put away prematurely.

There isn't some sort of specific thing of that nature. It is apparent from the wording of section 7.2.1 of the contested Decision and I don't think I can take it much further. My point is simply that these recitals read properly are not dealing solely with Google's state of mind. They are making findings about the chronology of what has happened, interspersed with the odd language on the reasons for it and, as such, we say they are still binding.

MR JUSTICE ROTH: The recitals, they say, they specifically identify in the plea, don't include 389. They refer to 386, which clearly is about the rationale: there is no question of that. This is paragraph 259 in the court's judgment at page 168. So it doesn't refer to the 390.

MR PICKFORD: I think, Sir, that's because that is the recital that was part of Google's appeal. The other one wasn't.

MR JUSTICE ROTH: But Google's appeal was that the Commission has misstated Google's intention.

MR PICKFORD: Yes. So it may be that Google should have been more comprehensive.

MR JUSTICE ROTH: Well, I have little doubt that Google thought very hard about what it was going to challenge. They are saying here that the whole point of this appeal being ineffective is that insofar as this was dealing with Google's objective and what it was trying to achieve, that is not necessary for the finding of abuse. I think that is different, it seems to me, objective from just awareness of the result. They are different things. I do see a distinction between 386 and 389, the first sentence.

MR PICKFORD: Yes. My submission was that 389 followed by analogy. 386 is the General Court point about our intentions. I say by a parity of reasoning also points about our awareness are also subjective and not part of the objective basis for the Decision. That is my submission.

MR JUSTICE ROTH: Yes.

MR PICKFORD: I'm not saying the General Court dealt with it. I am saying by parity of reasoning.

MR JUSTICE ROTH: Yes.

MS LOVE: Sir, I think this only reinforces -- if I may respectfully say so -- my point that quite a lot is being read into a few words in 265 of the General Court's judgment and we are drawing some fine linguistic distinctions. In my submission, in the Claimants'

submission, it is very clear that the finding -- the primary finding, sorry, I (inaudible) to get into Mr Pickford's hierarchies and waterfalls -- is recital 385, which is at page 719:

"[S]ince the launch of the Product Universal until today, Google has positioned results from its own [CSS] on its first [general SERP] either: (i) above all generic results; or (ii) within or at the level of the first…".

One then follows with 386, explaining the rationale for the positioning. We do respectfully endorse your view that the language of awareness if anything makes the point more clear. If Google was aware of it then Google knew it and it is, therefore, a true fact and a finding. But we do respectfully say that the exercise for 386 and 389 is equally not one that is required. It is all binding.

MR JUSTICE ROTH: Yes. Yes.

Submissions by MR MOSER

MR MOSER: Sir, if that is concluded, I would propose to move on to the next section, if I may.

MR JUSTICE ROTH: Yes, please.

MR MOSER: Which is section 7.2.2 of the Decision. In our table, it is page 753 and it is recitals 444 to 451, which are about the importance of traffic. Now, the parties agree that the first sentence of recital 444 is

binding; that is on page 753:

"The Commission concludes that user traffic is important for the ability of a comparison-shopping service to compete in several ways."

The Claimants consider the basis of this bindingness to be that it is an essential component of the constituent element, 1.4.4, that we have put in our constituent element column, "Positioning and displaying more favourably Google's own comparison shopping service in Google Inc.'s general search results pages, compared to competing comparison shopping services".

The second sentence of recital 444 is a useful example of something that is illustrative evidence. It is agreed it is not binding. We say that contrary to the way that Google overuses that term, this is legitimate illustrative evidence. As the confidential company puts it, "traffic is the most important "asset" of a [specialised] search engine; it increases the relevance [of such] services for a variety of reasons". This is a sentence that effectively restates the conclusion in the first sentence: nothing is added to advance the operative part or elaborate on its meaning. It is illustrative.

MR JUSTICE ROTH: Yes.

MR MOSER: Compare then the second sentence with the not

agreed sentences in recitals 445 to 451. These are recitals that list the "several ways" in which user traffic is important, as referred to in the binding first sentence of recital 444. Thus, I say, it is not illustrative evidence. It is part of the necessary or essential underlying facts.

I am aware of my learned friend's argument in what he calls the "Tim Ward point" and the Tribunal, I think, has these arguments as to why each of these recitals, or parts thereof, is binding. In summary, 445 to 451, we say, set out the factual bases for the conclusions set out in recital 444. Without these bases, and I say each of these bases, the first sentence of recital 444 has ambiguous meaning and effect and in particular, if one looks at recital 445, the first sentence explains the connection between traffic and freshness of a CSS's product offering, of which traffic is an integral part. We have omitted the illustrative evidence that underlies this, but we say the first part is essential.

Recital 446, then, is at page 755. That sets out the conclusion that traffic generates revenues. It is noted, although we have located this recital under constituent element 1.4.4, it is also an essential basis for the conclusion that Google's conduct had the potential to harm competition. That would be

constituent element 1.5: anti-competitive effects. Again, we omit the illustrative recital 447, explains the connection between traffic and machine level effects and the impact in turn on user offerings --

MS ROSE: There are interesting examples here of the Commission saying "confirmed by" when it means "illustrated by".

MR MOSER: That can happen. I listened with interest and attention to what my learned friend said about that this morning. I did find myself nodding against perhaps what was said. It got rather brief towards the end of yesterday. Yes, generally, where it says illustrative, it is illustrative.

MS ROSE: You have to look at the substance.

MR MOSER: You do have to look at the substance occasionally – that's the Tim Ward point.

Recital 448. Again, the first sentence:

Connection between traffic and further product improvement.

Illustrations omitted. Recital 449:

The scope for user traffic that is at 757 to CSSs to be turned into clicks on the website, contributing to greater user traffic in a possible feedback effect.

We have seen how important clicks are.

MR JUSTICE ROTH: Can I interrupt you just to ask

Mr Pickford. You have very sensibly and helpfully taken the view of saying: well, we have got your primary point. If you are wrong on that, then you accept various recitals will be binding. Does that apply to these?

MR PICKFORD: It does. So hopefully -- I jumped the gun a bit yesterday, but I think I can safely say on this occasion that with one exception, 452 to 538 is --

MS ROSE: Sorry, we were at 444.

MR JUSTICE ROTH: We stopped at 451.

MR PICKFORD: I beg your pardon.

MR JUSTICE ROTH: We are looking at 444 to 451.

MR PICKFORD: I beg your pardon. It is 444 through all the way to 538. I maintain my primary position, but if I'm wrong on that, there is only one fall back point that I need to make and it concerns recital 512. So it could potentially very much speed things up if Mr Moser addresses 512. That's the only one I'm going to make any further submissions on.

MR JUSTICE ROTH: Thank you. That's very helpful.

MR MOSER: Well, that is all very helpful and that has already taken a leap into the next section, which is 7.2.3, as the President has pointed out.

Can I just for the sake of completeness say the same obviously applies to 450 and 451 and that brings me to

the end of section 7.2.2.

There is that difference between us of principle which is now, it seems, forever going to be the Tim Ward point. One reason, fine.

MR JUSTICE ROTH: I am sure he will be very entertained to know that he was featuring so strongly in this case, in which he's not instructed.

MR MOSER: Indeed. He will probably ask for a percentage! The traffic to his website will make up for it.

So one reason, good; two reasons, bad. We say, I am just going to spend a minute on it because I haven't actually come back on that. As a matter of principle, there is no principled reason why that should be so. If you have one supporting reason, then it must be binding. If you have two, it can't be.

The Tim Ward point, of course, arises out of paragraph 85 of *Trucks*: a cartel decision that was a settlement. So in the cartel decision --

MR JUSTICE ROTH: I don't think you need address us on that now. I think if you want to say something at the end, but let's continue getting through.

MR MOSER: That's fine. It is just the difference between a cartel which involves a meeting, at least one, and a multifactorial finding of many reasons, what I described as the pillars. Each pillar is going to be

necessary and I have made my submissions on that and I submit nothing my learned friend said about the sort of theological difference between us affects that. Apart from that, we do agree, I sense, on what *Trucks* says.

So that brings us to section 7.2.3 and recitals 452 to 538. Now, my learned friend has invited me to concentrate in particular on one. It is, in my respectful submission, perhaps useful just to discuss this section a little bit more, because if one looks at 452 on page 759 -- and you will stop me if this is not helpful -- but 7.2.3 starts at 452 and the parties agree that is binding. That's the recital that sets out the finding that it is "the conduct" as it were from way back at page 1 of the Decision. That is what diverts traffic from competing CSSs to Google's own CSS.

The parties then start disagreeing, because the following recitals summarise the essential factual propositions as we see it underpinning the conclusion in recital 452. Now, we, of course, say: well, this is all binding for the same reasons as well rehearsed and the rest of the recitals and parts thereof are binding.

In our view, one of those examples where you really have to view recitals on their own merits, not according to any purported orders. If we look for instance at recital 454 on page 760, that explains the result of the

Commission's analysis of user behaviour, but indicates significant traffic to websites within the first three to five generic search results on the SERP. That is described by Google as illustrative evidence and/or unnecessary, which we simply don't understand and we say illustrates why their view of illustrative evidence must be wrong. It is a statement of fact which contributes to the explanation of why the conduct diverts traffic: because there is a heavy predisposition among users to results at the top of the SERP.

That's the important point Ms Rose put to me, I think it was yesterday. So it is not illustrative evidence, it is not by the by like the comment discussed in *Trucks* and it is not inessential. It is the basis of the Commission's conclusion regarding traffic diversion, which is the core component of constituent element 1.4.4.

I just wanted to spend a little bit of time on that because it is a good illustration of how our argument works and why we say we are right.

There is then a group of recitals which is where the same logic applies. That is 455 to 459. They all explain --

MR JUSTICE ROTH: Well, hang on.

MR MOSER: Yes.

MR JUSTICE ROTH: 454 to 457, the first -- 454 is the statement, 455 is the first ground, 456 the second. 457 the third.

MR MOSER: Yes.

MR JUSTICE ROTH: The table is illustrative and you don't say that is binding. Isn't 458 and 459 just a comment on the table? I don't quite see why you are saying the part of 458 is binding when the table isn't binding. I see your points on 454 to 457. (Pause)

MR MOSER: It wasn't our view that the second part of 458 commented on the table, so much as putting forward a point that supports 453. So we say that's a comment that stands on its own.

I can't help much more with that point. But that's our view.

A similar point applies to 459.

MS ROSE: But I thought all of these were accepted by Google, subject to their Tim Ward point. I think it is everything except 512.

MR PICKFORD: Yes. I mean, it would not be unfair if the Tribunal had a point to put to Mr Moser on these, because he has come to meet them because I am disputing them. But it is true that the point that the President is putting is a point from the Tribunal; it is not one that I'm putting myself. But I don't say -- it is

a legitimate thing for Mr Moser to have to address.

MR MOSER: I am happy to address any of these. Indeed, I have prefaced my remarks that I am making at the moment with: I hope it is helpful to look at them.

I am not going to talk Mr Pickford out of his concession, his contingent concession. My contingent meaning.

The recitals at 458, 459, we say do essentially the same thing.

I don't know whether you want me to address you on recitals 462 to 488?

MR JUSTICE ROTH: No, because I think that they all stand or fall with the one point.

MR MOSER: Yes. Factual basis provides essential support, et cetera.

MR JUSTICE ROTH: Ms Riedel reminds me, the only one that's singled out is 512.

MR MOSER: I am just double checking if there is one we think falls into a different category. We think not, but I will be told if ...

MR PICKFORD: I can say in relation to 512 it is a very, very narrow point, even that.

MR JUSTICE ROTH: Yes. Well, perhaps it is better then that you develop it.

Just a moment.

I think it might be sensible, Mr Moser, if everything else is accepted, that it stands or falls with the overarching point about multiple reasons. We have heard you both on that. There is nothing more you need say. Mr Pickford has singled out 512, last sentence, and it is probably better then if Mr Pickford explains what it is about that last sentence that gives rise to objection, separate objection, as it were. Then you can respond to it.

MR MOSER: That's a very good idea, with respect. I just point out that there are some of the recitals on the way that aren't just reasons for supporting recitals I have already read out. There are recitals, like recital 462, which are an actual finding where part of it was in dispute. You can see what we have said about that in our comments section.

MR JUSTICE ROTH: Well, 462 is accepted, isn't it? I thought 462 -- it is only when it says "this is confirmed by" --

MR MOSER: Oh I see.

MR JUSTICE ROTH: So the conclusion is accepted.

MR MOSER: I recall we did have a dispute about the meaning of 462, but I think we dealt with that on the first page. So I will let Mr Pickford explain 512 and then I will comment.

MR JUSTICE ROTH: Yes.

MR PICKFORD: It is an incredibly narrow point. It is very short. Basically a footnote point. Strictly speaking, the finding about what was in the SO and the SSO can't be binding, because it is not necessary for the findings in the operative part. Insofar as it is argued that it is necessary for the findings in the operative part, then we disagree with that.

Actually, we are not going to disagree, as I understand it, with the substance anyway. But, in terms of the principle of bindingness, my only point is very short -- is that even if I'm wrong on my first order point, strictly speaking, that sentence isn't binding. It is merely for consistency, really, that I raise that. It's a tiny point. Otherwise I accept all the way through to 538 it is the same logic.

MR JUSTICE ROTH: But is it contested even?

MR PICKFORD: No. In fact, it isn't. But the only reason -- it was in the table as red.

MR JUSTICE ROTH: Yes.

MR PICKFORD: It wasn't one that got picked up as blue. I don't think we were asked to concede it, it stayed there as red. All I am doing -- it is a tiny footnote point -- is defending the consistency of our position. That's it. Otherwise --

MR JUSTICE ROTH: But it could be blue?
MR PICKFORD: Yes.
MR JUSTICE ROTH: Yes. You are not contesting the accuracy?
MR PICKFORD: The truth of it, no.
MR JUSTICE ROTH: No. So that's the basis of blue, isn't it?
MR PICKFORD: I am happy that it be changed to blue.
MR JUSTICE ROTH: That is very helpful. Thank you.
MR MOSER: Well, that was perhaps the incredible disappearing point. Just to explain why there was even an issue, it is probably back to me because this is one of those recitals where the parties read various things into it. Google construes 512, in paragraph 55 of its skeleton, as:

"... affirming the essence of the Commission's case against Google was the combination of abuse ..."

Of course, we take a different view because the recital contains no words to that effect. The disagreement about the second sentence was that we said it was binding because, as set out in the schedule there on page 784, we say this is an essential basis for understanding, the continuation of Google's abuse, the conduct beyond the SO and the SSO, so that was an essential part of the abuse as found by the Commission.

So each party has read something into each bit of this recital 512. It probably goes to meaning not bindingness. But that is why there is even an argument. There is a bit more here than just: let's make it blue.

As long as we are all aware of what is going on, I'm content, of course, with them not contesting it.

Well, that is a welcome outbreak of a form of contingent agreement. I can't remember now whether Mr Pickford said that that takes us all the way through to the end of this section.

MR JUSTICE ROTH: I think to 538, if my note is correct.

MR MOSER: Right. Good. Well, in that case, let's go to page 797 and what is a sub silentio in the table. Section 7.2.4, starting at 539. That's the section that has the subheading:

"…the traffic diverted by the Conduct […] accounts for a large proportion of traffic to competing comparison-shopping services and […] cannot be effectively replaced by other sources […]currently available to comparison-shopping services…”"#.

And that's 539 to 588. This is a section of recitals following on from the previous section. It builds on that previous section, it adds two important points and they are summarised in the binding recital 539. First, that generic search traffic from Google's

general search results pages accounts for a large proportion of traffic to competing CSSs. That's the first point.

The second point is that the decrease of traffic to competing CSSs could not be replaced by other sources of traffic available to the CSSs, namely "AdWords, mobile applications, direct traffic, referrals from partner websites, social network sets, and other general search engines…" other than Google.

The whole remainder of this section explains what is meant by these two important points and which recitals relating to those points must be binding. We begin with the detail of the first point, which concerns the largest proportion of the traffic of CSSs coming from Google's SERP.

The parties are actually agreed, if one looks at page 798, the bindingness of most of recital 540, which is the next one. The dispute is in relation to table 24. Table 24 is in the Decision: bundle A2, page 179. That's the table to which recital 540 refers and which recital 541 describes.

Now, we generally haven't said that tables are binding. There is no reason I can discern in principle why a table can be binding. Mostly it is illustrative. But if we look at table 24, this one is not

illustrative, we say, but an essential part of the finding. You can't understand the finding unless you have the table 24.

Table 24 sets out the basis of the conclusion in recital 540 regarding the "large proportion" of traffic to competing CSSs through Google's generic SERP. Notably, if one looks under sources, at page 182. The table goes on --

MR JUSTICE ROTH: Sorry to interrupt you. When you say you can't understand 540 without looking at the table, I think you can -- apart from obviously the open words set out -- it seems to me you can understand. Makes perfect sense: it is not ambiguous. But isn't it not under the head of necessary to explain or interpret but it is to establish it. This is the basis on which that statement is made.

MR MOSER: Yes. I accept that.

MS ROSE: In table 24 where it talks about traffic from generic search results, is that only Google's generic search results?

MR MOSER: Yes.

MR JUSTICE ROTH: Yes, it must be.

MR MOSER: We see if we look at 182 there is a little footer that says "sources". This comes from reply to the Commissioner's request for information, as compiled and

calculated by Google. So that is certainly how we have understood it.

MR JUSTICE ROTH: Yes.

MR MOSER: I note in passing that the basis for the complaint relating to the table is harder to understand when you realise that it's their own evidence and data. But, putting that aside, they of course say that this is illustrative, although interestingly in Google's skeleton, paragraph 60.1, they do seem to row back from that. They remove the word "illustrative" and instead merely claim that it is evidence that is not essential.

We say it is essential, for the reasons I have just accepted and, therefore, consider it to be binding. It is part and parcel with recital 540.

MS ROSE: So this potentially could be relevant to the calculation of losses, couldn't it, for the individual competitors? Insofar as there were differences between them.

MR MOSER: Yes. But the bindingness -- I will come back to that point in a moment -- the bindingness derives really from the fact that you might say that table 24 contains a series of facts that are all a basis for the finding in 540: lots of little pillars to make good and establish the finding.

Like other aspects of the Decision, I entirely agree

that this could go to loss and damage and let's not forget that that's what's really going to matter in this trial. We are not doing this as an interesting academic exercise and we will absolutely say that recitals can go to loss and damage, even if that wasn't the primary purpose for which the Commission made a finding. Because the Commission makes findings for its --

MS ROSE: Could these be the subject of an appeal to the General Court, these figures?

MR MOSER: As part of 540. If they appealed 540, they would of necessity be appealing at least the interpretation of the data contained in table 24. They would be in difficulty saying the data is wrong, because it's their own data. But if they appealed and said: no, you can't say what you say in 540 --

MS ROSE: And you would include the footnotes, would you, as well as the table? Because the footnotes express various qualifications and inconsistencies and defects in the data.

MR JUSTICE ROTH: You can't really rely on the table without interpretation in the footnotes.

MS ROSE: Yes.

MR MOSER: I am not going to insist that every word in the footnotes is required. But, yes, we do see table 24 as a whole. That is essentially what we are talking about.

It is pages 179 to 182 of the Decision.

MS ROSE: So, I mean, that involves an acceptance -- a binding acceptance, of these particular percentages and figures on which Google would have had no opportunity to cross-examine the particular claimants listed here, and which could have a very significant impact on damages.

MR MOSER: Well, they didn't -- they didn't appeal those aspects as being wrong, so we say that's not an objectionable consequence.

MS ROSE: But there is a difference, isn't there, between them not appealing the general proposition that generic search traffic accounts for a large proportion of the overall traffic of competing websites and them accepting that all these individual percentages and figures are correct. Because if they felt that they couldn't appeal the overall conclusion, then they wouldn't have been in a position to challenge the particular outputs of each individual competitor?

MS RIEDEL: Could I just clarify this source is compiled and calculated by Google's advisers? So is it that the third parties provided the data and then Google's economists then had the opportunity to compile that and present the table?

MR PICKFORD: I am not sure whether we necessarily can

answer that question straightaway. I certainly wasn't, myself, involved in the administrative procedure. I'm just going to see.

(Pause)

Is it a particular footnote you are referring to?

MR JUSTICE ROTH: It is the source at the end of the table. At the bottom of the table, there is a source, or sources, not a footnote.

(Pause)

It does rather suggest --

MS ROSE: You can see, at footnote 657, that each of the competitors replied to the Commission's questions and Google then compiled their replies into a table.

MR PICKFORD: That is certainly what it looks like, yes. I don't think I can take it further than what we can infer.

MR JUSTICE ROTH: That was the point Ms Riedel was making.

MS ROSE: But Google would not have had access to the underlying data. There would not have been disclosure to Google of the underlying data.

MS RIEDEL: I think it was disclosed to its advisors.

MS ROSE: But they wouldn't have had an opportunity to challenge it. Or would they?

MR PICKFORD: I really can't say. I mean, I can make some higher level points in relation to this, if it is

helpful?

MR JUSTICE ROTH: I suppose the thing that sort of slightly concerns us: you could have challenged that it is not a large proportion. But you couldn't do that by saying, "Well, actually, for the first company in that group, looking at the table ..."

You will need to have the table open, which is on page 179 of the Decision. I think the actual names of the companies are confidential.

MR PICKFORD: Yes.

MR JUSTICE ROTH: But the first one, to say: well, in 2012, it wasn't 82 per cent; it was actually 78 per cent.

MR PICKFORD: Exactly. This is one of those occasions where that would -- it would not have been challengeable because in the context of what the Commission was concerned with, and what the court had been concerned with, had I quibbled about some of these percentages I would have been told to sit down because I'm not challenging paragraph 540 and, therefore, this takes me absolutely nowhere.

But, of course, in this litigation, these numbers could really matter. And this is a clear example of where it would be wrong for the Tribunal to overcommit to bindingness because we are going to come back and look at these things. If the Tribunal's view is,

"Actually, this is a mistake here", it would be very unfortunate if we were bound by something that we could never, in reality, challenge.

MR JUSTICE ROTH: You could challenge it if the true numbers were 25 per cent because then --

MR PICKFORD: Yes.

MR JUSTICE ROTH: -- then you accept this is just completely wrong. But the specific percentage ...

MR PICKFORD: I might add as a matter of consistency --

MR JUSTICE ROTH: No, no, it is not a consistency point.

MR PICKFORD: Okay. Well, there might be a consistency point. You might reject it. But when recital -- when table 24 is mentioned later on, it is exempted by the Claimants as being binding. So they only say it is binding here. Later on they say it is not binding, when they discuss it. That's the only -- the only point I had.

MR MOSER: We haven't pursued duplicative cross-references, but that shouldn't be held against us.

I mean, the only point I can really add to this is that the table does feature in the appeal to the General Court. It was mentioned in Google's own application. Not in the sense that they challenged it, but in the sense that they relied and implicitly endorsed -- relied upon and implicitly endorsed its contents, which is

perhaps why it is one of those aspects that is a bit surprising they seek to disavow.

MR JUSTICE ROTH: That might have been.

If it was wildly wrong, the table, then clearly 540 couldn't stand and, therefore, to that extent it is binding in general. But, in the specific figures broken down by individuals, it is hard to see that degree was necessary. It wasn't relevant to the finding because it wouldn't have made any difference, but it might be relevant on damages.

MR PICKFORD: On the footnotes, we have already seen examples in this Decision where the Commission says slightly contradictory things about whether something should be included or excluded when it's working out its numbers. It may be these footnotes are all correct; it may be there is a slip-up in them. Again, the Tribunal should not be binding itself now to something where we would have been shot down had we said, "your footnote isn't quite right", when it was said: that makes no difference, you still lose.

But it does make a difference, potentially, to damages.

MR JUSTICE ROTH: Yes.

(Pause)

MR MOSER: So all I can add to that is our basic point that

it is necessary to understand, without table 24, the phrase, for instance, "large proportion" in recital 540 becomes imprecise. It is table 24 that provides the substance. It is used in that way -- I will just give you the references, I won't take you to it.

If one looks at the General Court judgment in file 2, then table 24 is cited at 365, and at 447 and at 448 of the judgment. At 447 and 448 of the judgment, that is in the context of effects. They say things like:

"It is apparent from table 24 that the generic results were quite variable."

Then they cite the percentages.

So it is a recital that refers to the information in table 24 to explain why, for instance, the mobile channel is a minor source of traffic.

Again, I can't improve on the submission that the reference to table 24 is more than illustrative. There is an accusation in the skeleton, I think, that we are being inconsistent to other tables. But we have singled out table 24 as being particularly significant in that way.

So we do say that table 24 is binding. And we say, for similar reasons, that recital 541 is binding. 541 is at page 799, which cross-refers to and makes

a finding about the figures in table 24, not altered by the fact the figures in 24 regarding generic search traffic include navigation queries. So here is a rebuttal that is all about table 24. Table 24 is part of, inextricably, we say, recitals 540, 541 and, therefore, necessary for that to be understood.

MR JUSTICE ROTH: Are you saying table 25 is binding?

MR MOSER: No, I don't believe so.

MR JUSTICE ROTH: No.

MR MOSER: We have explained, I think, why we have ceded out table 24, because of the way that it interacts with 540 and 541.

That concludes the table 24 points.

MR JUSTICE ROTH: Yes.

MR MOSER: The next points are another important point about generic search traffic from Google's SERP not being capable of being effectively replaced by other sources. That begins at 542, which is the agreed summary. None of the existing alternative sources of traffic available to competing CSSs can effectively replace generic search traffic from Google.

The parties agree this is binding. Although I do point out there is a phrase for the reasons set out below, which on Google's logic, on their first order or their primary argument, would be meaningless because

they don't consider any of the reasons to be binding. That is by the by.

Now, the first grouping, recitals, within this point concern AdWords, and they are recitals 453 to 567. They start at page 799, which has 543. It explains for most CSS it is traffic and AdWords is the main alternative to generic search traffic. I have explained why we don't say, again, table 24 needs to be binding here, because it is duplicative.

I think it is known AdWords was the precursor to Google ads.

MR JUSTICE ROTH: You see, pausing there, if table 24 is not binding, nonetheless this statement may be important, which is a more general statement supporting the first sentence. That, one can see, is -- you know, it is put in general terms, just as one can sort of summarise a column of table 24 in general terms, and say: well, it varied between 37 per cent to up to over 80 per cent.

One can see why that might be important, but not the specific percentages for specific years and so on. That is where we get a little concerned.

MR MOSER: I understand. Of course, if I'm wrong on table 24 -- and I am happy with having the first sentence of 543 being binding --

MR JUSTICE ROTH: The second sentence, you mean?

The second sentence being binding? The first sentence you say is binding anyway.

MR MOSER: Yes.

MR JUSTICE ROTH: But, if table 24 is not binding, then you would want the second sentence, I think.

MR MOSER: Forgive me. I misunderstood the point. Yes, quite.

MR JUSTICE ROTH: Yes.

MR PICKFORD: I don't wish to cut Mr Moser down in his prime at all. But, for reasons of efficiency, the only real debate I was proposing to have here beyond my primary point that we all know about was about table 24 and the specific references to table 24, in 540 and 541. I.e., anything that basically says table 24 is fully correct. Other than that, we would concede that if I'm wrong on my primary argument, the rest of this, there isn't any further argument between me and Mr Moser, I think.

MS ROSE: Is that down to 567? How far does that go?

MR PICKFORD: Even further than that. That goes all the way to 588, because, firstly, we are dealing with AdWords, to 567, so that's correct. But then by parity of reasoning it would also then apply from 569 through to 579, and then 581 to 583 and 584 to 588. It is all exactly the same structure.

MS ROSE: Yes, yes.

MR PICKFORD: So --

MS ROSE: Yes.

MR PICKFORD: I only have one additional point and I have already made it: all the way to 588.

MR MOSER: That's very helpful. We agree it is all the way to 588 and we agree it is all the same point. So that's very useful.

I am also grateful for the President's suggestion, saving me from my own reasonableness, that, yes, if I'm wrong about table 24, then we do need statements like the second sentence. But the reasoning does not become different; it is for the same reasons as ever because then that is the pillar that I need.

MR JUSTICE ROTH: You just delete the words "As indicated in table 24", but you have the statement.

MR MOSER: Yes. One could put square brackets around.

MS RIEDEL: Could I just check: Mr Pickford, did you agree that point in relation to the second sentence of 543 if table 24 is not binding?

It is a new point that the President has raised.

MR JUSTICE ROTH: In other words, one would be saying that the second sentence, apart from the words "as indicated in table 24", but the words thereafter:

"…for some comparison shopping services, more than 30% of their total traffic stemmed from

AdWords…".

But that is binding?

MR PICKFORD: That is a slightly tricky one. It is almost certainly the case that even if there are mistakes that would remain true. But I can't -- I think it was right to pick me up on that.

I think, strictly speaking, if our position is table 24 is not binding, the particular numbers in it, then we would be reluctant to concede. And I am grateful for that having been picked up and pointed out. The reference to "more than 30% " is binding. It seems incredibly unlikely that it is going to ultimately be disputed because it is at such a broad level. But, strictly speaking, that is correct. Thank you.

MR MOSER: I mean, it even says "for some comparison shopping services", but --

MR JUSTICE ROTH: Yes.

MR MOSER: -- I understand entirely Mr Pickford's position. I maintain my submission, obviously. I am grateful.

In that case, I don't know whether the Tribunal want me to add anything in relation to the recitals up to 588, which takes us to the end of Section 7.2.

(Pause)

MR JUSTICE ROTH: Just one moment.

(Pause)

Yes. So then we go to section 7.3?

MR MOSER: Then we go to section 7.3. That starts at page 818. "The Conduct", this time we have the heading:

"The Conduct has potential anti-competitive effects on several markets."

So we are moving on to a new topic, "effects".

Beginning with recital 589, it is noted the parties agree about which parts of this recital are binding. You may recall from the first day -- which now seems quite a long time ago -- that there was a difference on meaning in relation to this recital, specifically, the meaning of -- well, the market.

It would be remembered the alternative market definition issue on which you have our submissions and we say, well, not a reasonable reading to conclude that the alternative -- because -- the alternative market definition is --

MS ROSE: Is the merchant platforms?

MR MOSER: Exactly. That the merchant platform is the market. My learned friend said: well --

I think he alighted in the end on the point where he said: one of them has to be binding and it is not the primary one.

So I suppose he is saying it is the alternative one. But there we are.

MR JUSTICE ROTH: No. I don't think that was his point. I think he said the fact that it is one or the other is binding.

MR MOSER: That was it. Forgive me. Yes.

MR JUSTICE ROTH: It couldn't be something else, some other definition that -- so it is confined to those two possibilities.

MR MOSER: All right. I'm not going to make his submissions. But that was the discussion around that and we have dealt with that.

The first supporting part of 589 is really one that begins at 591. Because, again, the difference, I think, in relation to 590 is the same difference of meaning. So it is "Potential anti-competitive effects in the national markets for comparison-shopping services". That is the next bit. That is 591, at 820.

Sorry, do you want to say something?

MR PICKFORD: Yes. It had been agreed earlier that I was going to be the person that had to make the running where we said something was binding.

MR JUSTICE ROTH: Which is 590.

MR PICKFORD: Which is 590. Mr Moser's client said it was less binding. So we need help here. But I think probably I can do it now or, begin it now, or I can --

MR JUSTICE ROTH: Is it going to take more than five

minutes?

MR PICKFORD: I don't think it will take more than five minutes.

MR JUSTICE ROTH: Can you help me also?

MR PICKFORD: Yes.

MR JUSTICE ROTH: I don't understand why it is said the first clause is binding, which is what seem to be said in the --

MR PICKFORD: Yes. No, I don't understand either. That is the Claimants' position.

MR JUSTICE ROTH: Ms Riedel is correcting me. That's the Claimants' position.

MR PICKFORD: Yes.

MR JUSTICE ROTH: So it is not for you to explain that. No. You say it is all binding, yes.

MR PICKFORD: So we don't understand what the Claimants are saying on 589 or 590. We thought we were in agreement on 589, namely that the first part of that sentence is binding:

"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…".

We say it is binding. They say it is binding. We have taken out national markets for general search, they now accept that. They originally agreed this was green

and then they went back and put it as red. I don't understand why.

On 590, we don't understand what the position is that is being adopted. We say it is all binding, the alternative. They say that just those initial words are binding from "moreover" down to "followed". That is not a meaningful proposition to be binding. It is not a grammatical sentence.

So our position is all this is, subject to the exclusion of the reference to the national markets for general search services, binding, because that's the essential basis of the Decision. We say either we have you on effects on the market as we define it or we have you on effects in the alternative.

It is really that simple.

MR MOSER: On 589, I have to repeat, I don't think there is anything really between us other than what it means.

MR JUSTICE ROTH: 589 is not -- I think it is 590 is the point.

MS ROSE: There is a difference between the parties on 589 which is the inclusion or exclusion of the words "section 7.3.1". That seems to be the only difference between the parties' position.

MR MOSER: I will just take instruction on that.

MR JUSTICE ROTH: Which does not make sense --

(Pause)

MR MOSER: It is they who don't want those words.

MS ROSE: It is the only issue between --

MR JUSTICE ROTH: Just the cross-reference.

(Pause)

MR PICKFORD: Right. If that's -- if that's the difference. I don't think there is a material difference here. I think this may have been a sort of computational thing that someone very, very diligently noticed we had marked it up slightly differently and had noted there were differences.

(Pause)

So it relates to a point on which I will confess I don't think we have been wholly consistent all the way through. The point is we don't accept that by cross-reference everything in 7.3.1 therefore becomes binding. I don't think anyone is going to say against us that we do, to be totally frank.

MR JUSTICE ROTH: No.

MR PICKFORD: So it really doesn't matter.

MR JUSTICE ROTH: It doesn't matter. It is clear what you do accept once you get into 7.3, yes. So we need not, as it were, worry about that.

So, Mr Moser, I think we don't follow -- either 590, it seems to me, is binding or it isn't. But I don't

understand how the first clause could be binding because it doesn't actually really say anything. Or not --

MR MOSER: The first clause, insofar as we are conceding it is binding, is supposed to be binding in telling us that there's an alternative point on market definition, i.e. it is an alternative. It is not the primary or actual finding.

As far as what was found in relation to the alternative is concerned, we say it is not binding because conceptually, we say, it can't be part of the operative finding because no operative finding has been made in relation to an alternative market. So that's where we object to the rest of 590.

The alternative way of viewing this is, as I indicated, through the lens of meaning, back to what we discussed on the first day. Which is provided everybody understands that what is binding is that this is an alternative and what would have happened in the alternative and, as we say, that does not detract from the principal finding of what the actual market is, then our concerns rather melt away.

MR JUSTICE ROTH: Yes. I think, if I may say so, you have both been rather oversensitive about the word "section 7.3.1" in 589 or the first clause of 590. You are concerned you might be giving something away. I

think we have the point what you are really saying.

MR MOSER: Indeed. I don't resile from oversensitivity. I think I said something along those lines on the first day, which is particularly before we -- when my learned friend and I were both in the room, and through the mediation of the panel these things are explained, it is much easier than when you are effectively corresponding at a distance and wondering: oh, goodness, are they going to say because it says "(7.3.1)" that's all in, or are they going to say if we agree this is binding we have admitted their case on the alternative market?

Neither of those are sensible, but it is how this exercise has panned out.

MR JUSTICE ROTH: Yes. I think we can record it is not involving any admission on either side.

MR PICKFORD: I will have about one minute response, now we understand what the Claimant is saying. But I see it has gone 1 o'clock. You can have the one minute now or afterwards.

MR JUSTICE ROTH: Well, give us your minute.

Reply submissions by MR PICKFORD

MR PICKFORD: Okay. So the minute is: our position on 590 being binding is, of course, part and parcel of the submission that I made to you -- I think it was yesterday, but it might have been Monday afternoon -- on

the market definition.

If I am wrong on my primary case about how none of the market definition, ultimately, is binding because there are two alternatives, and the Tribunal were to find that actually there is basically just one route, and the second route is somehow subordinate and it is not really what the Decision is about, then that would change the status of this. I would then agree with Mr Moser at that point that this then becomes non-binding. So it is part and parcel of that primary submission that I made yesterday.

That is all I have to say on it.

MR JUSTICE ROTH: Yes. Thank you.

MR MOSER: That's very helpful. It was a minute and he didn't hesitate or repeat.

MR JUSTICE ROTH: We will come back at 2.00 and I think we are making good progress to complete today.

MR MOSER: We will finish today.

MR JUSTICE ROTH: Without any problems.

(1.05 pm)

(The short adjournment)

(2.00 pm)

MR JUSTICE ROTH: Yes, Mr Pickford.

MR PICKFORD: Thank you, Sir.

So the reason why I'm still standing up is because

I was going to suggest a means of efficiently going through the next tranche of recitals because I am able to explain in relation to the recitals from 591 onwards through -- all the way until we get to the remedies section, what the only recital we say we need to discuss is in the alternative world that we are wrong on our primary case.

MR JUSTICE ROTH: Yes.

MR PICKFORD: And that recital is one that has already been referred to, it is recital 607, because my position will be, if I'm wrong on my primary case, then we don't demur from the way that it is put by the Claimants in relation to this whole tranche of recitals, on what is binding and what isn't.

So if the Tribunal is content --

MR JUSTICE ROTH: Yes.

MR PICKFORD: -- and also I think it would be helpful if I began on recital 607 to explain there is quite a complication on this one.

MR JUSTICE ROTH: Let me just remind myself of what --

MR PICKFORD: It is on page 825 of the schedule.

MR JUSTICE ROTH: Yes. This is on anti-competitive effects in the national market for --

MR PICKFORD: That is correct. It is a section that is -- yes, potential anti-competitive effects.

MR JUSTICE ROTH: Yes. This is in rebuttal of your claim, set out at 605.

MR PICKFORD: That is correct. That's right. So "…the Commission's conclusion is not called into question by [our] claim that [they] failed to demonstrate as part of its analysis of anti-competitive effects, a causal link between. […] the Conduct and the decrease in traffic to competing comparison-shopping services…".

They say in the first place they are not required to demonstrate the actual effect; it is rather sufficient for the Commission to demonstrate the conduct is capable of having such effects. And in any event, they have demonstrated by tangible evidence that the conduct decreases traffic to competing comparison shopping services and increases traffic to Google.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So --

MS ROSE: So those are the findings in the previous section that we were looking at before lunch?

MR PICKFORD: That's right -- the reason why I have alighted upon this is arising out of something you said, Madam, before lunch. I want to make it very clear the basis on which we are conceding in the alternative world that this is binding. So the submission I'm going to make is

not that if I am wrong on my primary submission, this is non-binding. That is not -- that's not what I say. But it is very important to understand the basis on which we accept it would be binding in that world. And also I have to go on to say if I am wrong about the premise for why it would be binding, then it is non-binding. That is going to need some unpacking.

MR JUSTICE ROTH: Yes.

MR PICKFORD: So it was suggested by Ms Rose before the lunch adjournment that perhaps this might be one of those situations where there was a recital that wasn't strictly necessary because it was actually looking at actual effects, as opposed to potential effects.

My primary submission on that is that is not really what it's doing, because what it refers back to is analysis that is all in the potential effects section, and that analysis of potential effects is all conditioned by the counterfactual that is used by the Commission when considering traffic diversion.

The Court of Justice had something to say about that. I think I did actually take the Tribunal to it before, but it is probably helpful to go back to it, to really understand what is going on here in the Decision.

So if I may --

MR JUSTICE ROTH: Just one minute, sorry. Can I just go

back for a minute. 7.2.3.2. (Pause)

But what I'm slightly struggling with is this is just a cross-reference paragraph, really, 607.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Referring back. 7.2.3.2 is summarised in recital 462.

MR PICKFORD: Yes.

MR JUSTICE ROTH: Which, as you may have gathered, I'm working off the Decision more than the schedule. So I haven't got the page number, but it's -- someone will have it. It is page 172 of the schedule.

MR PICKFORD: Yes.

MR JUSTICE ROTH: And you agree the first sentence is binding.

MR PICKFORD: Yes.

MR JUSTICE ROTH: I mean, that's not a statement of potential effect --

MR PICKFORD: Well --

MR JUSTICE ROTH: That's a statement of a fact that has happened, isn't it?

MR PICKFORD: It is not of itself a statement of potential effect, but this is very, very important and I am going to have to go back to the Court of Justice's judgment here to explain what is going on here.

MR JUSTICE ROTH: But this is not just about recital 607, it

is about recital 462.

MR PICKFORD: Yes.

MR JUSTICE ROTH: And similarly, about, equally, the impact on Google.

MR PICKFORD: Yes, and 489.

MR JUSTICE ROTH: 489.

MR PICKFORD: That is correct.

MR JUSTICE ROTH: So really what we are talking about is not so much 607, but the meaning of 462 and 489, isn't it?

MR PICKFORD: Yes. So we did cover those on Monday and I sought to make our position clear then. The point I am about to make in relation to 607 is no different. The reason I was about to emphasise it was because of the point that Ms Rose made when she alighted on it particularly, and said: aha, this is an actual effects finding.

What that alerted me to is that possibly the meaning point that I made on Monday, I needed to make sure that the Tribunal fully understood what it was that I was saying about that, because it conditions one's understanding of all of these points.

That was the point that I made on Monday, but I think I need to come back to it, to make sure that there isn't a misunderstanding about our case.

MR JUSTICE ROTH: Yes. All I am saying is it is not really

a point regarding 607.

MR PICKFORD: No.

MR JUSTICE ROTH: It is a point regarding 463 and 489.

MR PICKFORD: Yes, and indeed that is how I put it on Monday. It is about the meaning of this part of the Decision.

MR JUSTICE ROTH: Yes. Yes.

MR PICKFORD: But that's an entirely fair way of putting it, Sir.

What I explained then and I need to emphasise is a somewhat subtle point, but it is going to be very important as we go forwards. So what, Sir, you have put to me is you said fairly, based on the words in 462 and the words in 489, isn't this is a finding of actual effect?

And that is true, but only in the following context. One, where the counterfactual by which that actual effect has been found is one where you take away both the algorithms and the box. The reason why the Court of Justice says that is legitimate is because the context in which the traffic diversion was being considered by the Commission was, ultimately, all for the purpose of demonstrating potential effects.

So they say when you have got a potential effects analysis and you are going back to the first step in

that potential effects analysis, which is traffic diversion, it was perfectly legitimate for the Commission to have a counterfactual that took away both elements.

But that is a finding about impact in a very specific context. It is potentially a bit confusing because on its face, you would think, well, surely that's just a fact. But it is not really a fact, it is actually a comparison of a factual world against a counterfactual world, and in the counterfactual world that is legitimate there is conditioned by the context in which it is being considered, namely potential effects.

I can show you that in the Court of Justice's Decision. If that is convenient, it would be helpful, I think, if we picked that up.

MR JUSTICE ROTH: Yes.

MR PICKFORD: If you go to A3 and turn to page 337.

(Pause)

One sees at paragraph 221 an explanation of how the Court of Justice understood what the Commission was doing, and they say:

"The evidence concerning the variation in traffic from Google's --"

MR JUSTICE ROTH: Shall we start at perhaps the paragraph

above? It might be helpful.

MR PICKFORD: Of course.

(Pause)

So may I make submissions on those paragraphs, is that convenient?

MR JUSTICE ROTH: Just a minute, I am trying to understand the context. (Pause)

I mean, your complaint seems to be that 211 of this judgment, page 335.

MR PICKFORD: Yes.

MR JUSTICE ROTH: "…the appellants [-- that's you --] assert that the General Court unlawfully departed from the decision at issue in finding that the decision had identified potential anticompetitive effects and not actual effects."

You are saying Google's case was that the Commission was setting out actual effects.

MR PICKFORD: We were saying they were purporting to, but they hadn't actually done a proper job because there was a problem with their analysis.

MR JUSTICE ROTH: They were saying they had actual effects, but that couldn't stand because they hadn't done a counterfactual analysis; is that -- that's what you are --

MR PICKFORD: Yes. There were quite a few strands.

MR JUSTICE ROTH: I am looking at the first complaint. Then you say whether it is actual or potential, that is your second complaint. But your first complaint -- and you may recall this, the appellants -- (Pause)

So you are interpreting Section 462, saying: well, what the Commission is there saying is actual effects. And you say --

MR PICKFORD: It hadn't established that properly because underpinning all of this was an argument about what the right counterfactual was to establish causation in this context of potential effects -- of anti-competitive effects, I beg your pardon.

MR JUSTICE ROTH: So have I understood it correctly? Your complaint was the Commission have said there are actual effects in 462, but they weren't entitled to do that because they hadn't conducted a counterfactual analysis, and if you don't conduct a counterfactual analysis, you can't say that it had actual effect --

MR PICKFORD: That was part of it. We also said insofar as there is a counterfactual analysis, it is not the right one.

MS ROSE: And the Court of Justice said they didn't need to do a counterfactual analysis?

MR PICKFORD: No, the Court of Justice effectively said they do need to do a counterfactual analysis, but implicitly

they have done one, effectively. So there was no explicit counterfactual analysis to be found in the Decision, but the way that the Court of Justice interpreted what the Commission had done was that implicitly there was a counterfactual by which it had made its assessment, and the counterfactual, as I will come on to show you, in the Court of Justice's view was a legitimate one in the context of establishing potential effects.

MS ROSE: Where do they say that?

MR PICKFORD: That's at 245.

MR JUSTICE ROTH: 245. That is dealing with a different part of your appeal.

MS ROSE: I mean --

MR JUSTICE ROTH: On the appeal that is 211, the first complaint, that is answered at 220 to 222.

MR PICKFORD: Yes.

MS ROSE: But then the second complaint which is about the counterfactual --

MR PICKFORD: But my point is all of this fits together as a coherent puzzle -- as a jigsaw. You have to understand the way in which the General Court is getting to the reasons that it does.

MS ROSE: I mean, aren't they saying at 228 to 231 that the Commission doesn't have to have a systematic

counterfactual; it is enough for it to infer a causal link?

MR PICKFORD: Yes. Well, they don't say -- they say -- the Commission did not set out an express counterfactual and they were not criticised by the Court of Justice for that. They said -- you can see basically what the counterfactual they are using here is and you see that from their explanation at 245.

Can I make a point, which is where these submissions were ultimately going to lead. This is all bound up, Sir, with the point that when we canvassed it on Monday, you said that we could basically hold over until the first trial. Because I was saying this is where I'm worried about where this is going, and Mr Moser said: this is where we are worried about where it is going. And very, in my respectful submission, sensibly, you, Sir, said: we don't really need to get into any of this now. This is all -- this is a very fine, difficult point and we can come to it when we come back to Trial One.

In my submission, that would be by far the best time to come back to that because then we can properly focus submissions on unpacking all of this, because it is all bound up with what was the counterfactual, what was legitimate and whether the same counterfactual applies

in the damages context or a different one.

That is how I had assumed that we were going to approach it, following Monday, but the reason why I raise it, is because of the point Ms Rose raised about, is this an actual effects finding. My point is it's not --

MS ROSE: Is a simpler point for you that when you read paragraphs 462, 489 and 607 together with what the Court of Justice says --

MR PICKFORD: Yes.

MS ROSE: -- what the Court of Justice says is: actually, these paragraphs are simply the Commission by the use of tangible evidence making a finding that justifies its finding of potential effect.

MR PICKFORD: Yes, that's what I'm seeking to say.

MS ROSE: And even though the Commission talks about an actual effect on traffic, if you are talking about anti-competitive effects it is simply a finding of a potential anti-competitive effect, which is demonstrated by what is plausibly, by tangible evidence, an effect on traffic.

MR PICKFORD: Yes.

MS ROSE: And therefore you say that is not a finding of whether there was actually an anti-competitive effect and, if so, the extent of the anti-competitive effect.

MR PICKFORD: Yes, that is where this is headed.

MS ROSE: And that doesn't really open up the question of what is the right counterfactual for the second exercise.

MR PICKFORD: No.

MS ROSE: Because your point, whether it is right or wrong, is that the right counterfactual for the second exercise may be different from the counterfactual used by the Commission in this exercise, as explained by the CJEU.

MR PICKFORD: That is correct.

MS ROSE: So even though on the page at 607 and the earlier paragraphs it looks like a finding of an actual effect, we are to read it as tangible evidence of a potential effect on competition.

MR PICKFORD: Exactly, that is the point I'm seeking to make, and you have obviously made it much more succinctly and more clearly than I have.

So that's the reason why it is binding. It is because it is binding in the same way as all the other points are binding. Were the Tribunal to decide otherwise, were the Tribunal to say, "Actually, we think 607 is a finding of actual effect", which is what you were canvassing with Mr Moser before --

MS ROSE: Yes. Yes, that's the point that the CJEU said "no".

MR PICKFORD: Yes. We would say -- A, we say, no, it is

not; and, B, if you decide it is, well, then it wouldn't be binding in that world because that wouldn't be necessary.

MS ROSE: Yes. Yes.

MR PICKFORD: And I am sorry it has taken a while to get there, but my point is one does need to be very careful about what these -- what we are understanding these recitals to mean. You have to look -- you have to take a step back and understand the context in which these findings are made and interpret them by reference to what the Court of Justice said.

MS ROSE: That, in this context, not being binding, but highly persuasive?

MR PICKFORD: No, it's not highly persuasive.

MS ROSE: Okay.

MR PICKFORD: It is counterfactual.

MR JUSTICE ROTH: Well, we can get to it in Trial One.

MS ROSE: Okay.

MR JUSTICE ROTH: So --

MS ROSE: Sorry -- I meant their interpretation of the Commission.

MR PICKFORD: Yes. Yes. Well, I think -- on this issue, it might go beyond that because, of course, we challenge this aspect of the reasoning and we were knocked back, and it was said: well, here are the reasons why you are

wrong. So I think it might go further than being highly persuasive, I think. I haven't fully thought that through, but I don't think it matters for the submission that I have made and which you very helpfully encapsulated in your point.

MR JUSTICE ROTH: Just to complete your references, as I'm still looking in the earlier part, you say in the Court of Justice decision -- it is also at -- 245, is it?

MR PICKFORD: Yes. So it is 245. I also gave you a series of other references, I think on Monday, if my memory serves -- correct me, if I'm -- if I adhered to my note, which I may have done, there are a series of other references, but I can just list briefly the recitals that I believe are relevant; would that assist?

MR JUSTICE ROTH: 247, I think you referred to.

MR PICKFORD: Yes. So it was -- well, there is a list. It was 107 -- sorry, 97, I beg your pardon, is the first one; then 107, 108, 140, 206, 241, 244 and 246.

The panel has it. The counterfactual applicability point does not need to be decided now. I just want to make it clear the basis on which my concession about binding is made. I'm not accepting that there is a binding finding of actual effects.

So, members of the Tribunal, but for that qualification I don't have any other points that I need

to raise until the remedies section.

MR JUSTICE ROTH: Do we get any help from the Advocate General on this?

MR PICKFORD: There is some help. So the Court of Justice itself referred to the Advocate General's Opinion in 244, I think it is. So she explains why she says the counterfactual is a legitimate one, in the context in which it arises. My submission would be I don't think, from recollection, the Advocate General really adds anything to the Court of Justice's analysis here. It is consistent with it. They adopt an analysis which, certainly on the counterfactual point, reflects her analysis.

And one of the things that she says is that you do need basically some sort of counterfactual. One of the arguments -- one of the main arguments before the court was the Commission was saying: you don't need a counterfactual at all, but this is all new fangled nonsense. And what the Advocate General effectively says is: well, you do need some sort of counterfactual, broadly speaking, but what the Commission did is actually fine, because implicitly this is what they were looking at.

I can't say that I have come on to deal with the Advocate General's Opinion more fully than that.

MR JUSTICE ROTH: Yes. (Pause)

Yes.

MR PICKFORD: So as I said, for our part, we would be willing -- subject to whatever Mr Moser has to say obviously about that precise point and others, to then move on to the remedies section.

Submissions by MR MOSER

MR MOSER: Thank you.

I am obviously grateful to take the invitation, and I sense the Tribunal agree that it is sensible not to, sort of, try and persist in a kind of virtual victory lap on the bits where there has been an albeit conditional concession. It does mean I have to deal with the most difficult parts, but that's fine. That's what I'm here to do, rather than cashing in the low-hanging fruit.

607, then. What emerged once my learned friend got to the destination of his journey around the Court of Justice was that in fact this isn't, in my submission, a debate about bindingness at all, it is back to meaning.

So really we had a maybe fuller revisit of what was already said, certainly about 462 and 489, and to some extent 607, which I have marked up from the meaning section on, whenever it was, Monday or Tuesday.

Insofar as it is a debate about meaning, I respectfully agree with the way this has been put by Ms Rose, which, to us, in my respectful submission, is a sufficient analysis of the matter.

It is a bit of shadow boxing about the counterfactual again, harking forward to Trial One.

We are, of course, entirely confident in our counterfactual scenario that the only one that Google can properly put forward, in any respect, is one in which no element of the conduct was implemented. That will mean that 607 will serve us nicely, we say, but then that is for another day and that is me.

As far as the bindingness of it is concerned, once we have understood whatever they said it means, I say it clearly is binding in the sense that it goes to the explanation of the -- well, of the previous fourth point in 605. It says "and in any event". In a way it provides the real meat to the supporting pillar, if that is not a terrible mixture of metaphors, in that it says, in any event, this traffic has decreased.

My rhetorical question is: is this one of those findings where the tribunal at trial could say, "Well, we find the contrary". I say "no". In fact, I say that whether you understand it the way we do or they do. But there we are.

So really that is all I have to say on 607. We insist on bindingness. Indeed, we say it is a fortiori once my learned friend has explained how he sees it as a matter of meaning.

Reply submissions by MR PICKFORD

MR PICKFORD: So --

MR MOSER: It was not particularly an invitation for my learned friend to get up but --

MR PICKFORD: It was very brief. I can wait.

MR MOSER: Does the Tribunal have anything for me before he appears? Please.

MR PICKFORD: Just very briefly in reply, the reason we say it matters on our case is because the effects analysis that was conducted by the Commission took account of the impact of the algorithms. That is what is driving the numbers. When they say, "Oh, these CSSs lost lots of traffic", it is because they say, "Well, you applied algorithms to them in general search".

What we will be saying is, "Fine, that may be true", and if one has a counterfactual scenario where you take the algorithms away and you take the box away, which is what the analysis of traffic diversion is based on, then you will see the kind of effects that the Commission was looking at. But we will be arguing that it would have been perfectly lawful, just as it was before and just as

it is now, to have those algorithms and, therefore, there is a different counterfactual.

Now, obviously, that is all I really need to say because I will just start repeating myself otherwise. But this is why it is going to be an issue in the future. It is all about does one take into account the impact of the algorithms as part of the counterfactual for the purposes of damages. They were taken into account for the purposes of the counterfactual for potential effects and then we are going to have a debate about the other point in due course.

But that is why whenever they talk about the tangible evidence of effects, you always need to think: what is the context in which they are saying this and what is the counterfactual they have used to come to that conclusion?

MS ROSE: It is not just the algorithm, is it? What it is is Google privileging its own CSS by always putting it at the top of page 1.

MR PICKFORD: Yes.

MS ROSE: Then having the boxes.

MR PICKFORD: Yes.

MS ROSE: But the first item is always actually the header link.

MR PICKFORD: Yes --

MS ROSE: So Google takes itself out of the algorithm -- if you like, it awards itself first place in the algorithm without looking at any of the factors that would normally be relevant to demotion in the algorithm; then also has the text rich boxes; and then everybody else goes through the meat-grinder of the algorithm. So that exacerbates the effect of Google privileging itself, at the head of the limit.

MR PICKFORD: Yes.

MS ROSE: Now, if Google stops sticking its own CSS at the top and stops discriminating in access to the text boxes, your argument is that simply operating an algorithm does not have anti-competitive effects.

MR PICKFORD: Yes. So our argument will be --

MS ROSE: But it has to be premised on Google not putting itself at the top of the search.

MR PICKFORD: No. What we will be saying in the next trial is that the realistic counterfactual is basically what the remedy is, namely, that you still have the algorithms, because the algorithms were doing something really sensible --

MS ROSE: Yes -- but the question is not having the algorithm, it is how they are applied.

MR PICKFORD: Yes, exactly. So the difference would have been what we did in the remedy world, which is we would

have given competing CSSs access to the same privilege box that we had. The problem --

MS ROSE: What about the header?

MR PICKFORD: And all of it --

MS ROSE: But there can only be one header.

MR PICKFORD: No, what we created was a world of multiple links. So the full header stopped having any click-through.

MS ROSE: So there's no longer a click-through to Google Shopping? There's no Google Shopping click-through?

MR PICKFORD: There was no longer any favourable click-through to Google Shopping. So what there used to be was a header where you click that and you go through to the Google Shopping page. In the remedies world that was got rid of, and what one had instead was a product ad and underneath it, it said "by Google" -- and still does -- or "by Kelkoo".

MS ROSE: That's a paid for ad?

MR PICKFORD: It is an ad operating as a separate unit Google CSS competed for, as well as rival CSSs competing for --

MS ROSE: So your argument will be everybody has equal access to that ad --

MR PICKFORD: To that cross --

MS ROSE: -- that is the argument?

MR PICKFORD: Yes, and they do indeed appear in it --
MS ROSE: Yes -- but leaving aside the merits, your argument is everybody has access to that box.
MR PICKFORD: Yes.
MS ROSE: Then the algorithm applies -- so let's say that Google fails -- if Google's bid to get in that box fails; yes?
MR PICKFORD: Yes.
MS ROSE: Is Google then subjected to the algorithm?
MR PICKFORD: Google is subjected to the harsher algorithm that it would never get into generic results.
MS ROSE: Yes. So subjected to it in the same way as Kelkoo?
MR PICKFORD: Well, it is subjected to something worse. So as regards generic results --
MS ROSE: Google is never in the generic results.
MR PICKFORD: Apart from navigational queries, as I explained on Monday.
MS ROSE: I see. So if Google fails to get its ad in the box --
MR PICKFORD: Yes -- it just won't appear at all, whereas there is an opportunity --
MS ROSE: They can be page 2 --
MR PICKFORD: Yes. They may be there, they may not be there, but they are in no way disadvantaged --

MS ROSE: Vis-a-vis Google.

MR PICKFORD: Yes. We say by the existence and the application of the algorithms because we are in no better position. The thing we did that was a bad thing is that we --

MS ROSE: It is the conjunction of the header and the text boxes with the algorithm -- that moves yourself up and everybody else down.

MR PICKFORD: Yes. It is a special box and only we appeared in it. We address that by saying: okay, the special box is still good, you can see that, but everyone else can appear in it too on a non-discriminatory basis. In that world the algorithm still exists. So if it is the case there is a CSS who does not want to bid to appear in the box because it has a business model that is, say, just based on free traffic and they are just not interested in doing anything that involves any expenditure, say -- this is just a hypothetical -- they may still well find because of the application of the algorithms, they are not placing particularly highly in generic results. But then, of course, nor is Google. It is not appearing in them at all.

In that world we say: we haven't caused you any harm because --

MS ROSE: Well, your point would be there is no

discrimination.

MR PICKFORD: Yes, exactly. Obviously, I'm not asking the Tribunal to decide any of this now, but the reason we explain it in quite concrete detail is hopefully because -- the more concrete it is, the easier it is to understand why it is that we care about the meaning of these parts of the Decision, and in particular why one has to be very careful to understand what is being said when they talk about the words that are used in terms of the tangible evidence. It is tangible evidence in a very particular context.

MS ROSE: It is in a context in which there is both the header and the algorithm.

MR PICKFORD: Yes -- imagine a world with none of that --

MS ROSE: But that makes sense.

MR PICKFORD: Yes -- well, that is -- what the Court of Justice has held is certainly legitimate for potential effects for abuse. There is then a question that we are going to have an argument about as to whether that is legitimate for damages.

MS RIEDEL: Just while we are on that point, I thought I heard you say yesterday or the day before -- and I think you just sort of said it again -- so Google apply an algorithm to take themselves out of the general search results; is that right?

MR PICKFORD: Or they just don't put themselves in. I mean, they don't -- as I understand it, as I have just been instructed -- we are not in the index that is used to compile those results. So we just wouldn't appear.

So what happens is there is an index of all the pages that could appear and rival CSSs, pages from their web pages that might have been responsive to a particular query could percolate up and there could be a link to them. But because we don't have equivalent pages in the index from ourselves, that is never going to be the case for Google. So you will never find Google's answer to -- the page that would have been the answer to the query in the generic results.

MR JUSTICE ROTH: Thank you.

Submissions by MR MOSER

MR MOSER: I confess, I am slightly bemused as to how we got back into the counterfactual as a result of what I said --

MR JUSTICE ROTH: I think Mr Pickford was explaining by looking at it why the point about, as at 606 -- sorry, not 606, 607, plus the other two on which 607 rests, 462, 489, is important how it plays in. Personally, I found that helpful.

MR MOSER: Good. I would like to put that into some context because to some extent what we have been treated to,

helpfully or otherwise, is a bit of a propaganda trailer as to what they will be arguing in Trial One.

MR JUSTICE ROTH: It does not mean we accept the argument, but we understand why the point is of significance.

MR MOSER: Yes. In our world, which we say is the only logical world, is that the effect of all of the conduct at issue of competing comparison shopping services have to be removed in any counterfactual. It is not limited to the impact on which the appearance of the results in Google's comparison shopping service and so on is dealt with, it also, of course, has to include the demoting algorithms.

Just a few basic points.

Google is not subjected to any demoting algorithm at any time, whether during the currency of the Decision period or in their purported Shopping Remedy. As far as the box is concerned, you are being told it is all fine, nothing to see here. The box is no longer discriminatory because anybody can get into it.

But the way the Shopping Remedy works is that Google, in its separate iteration, pays Google to be in the box; Kelkoo has to pay Google to be in the box. I submit it is fairly obvious why that is not non-discriminatory.

MR JUSTICE ROTH: Well, I can see that argument, but I

really don't think we need to get into it --

MR MOSER: It is not for now. The problem is -- forgive me, but the problem is so laughably obvious that however long one spends in saying that the remedy is fine, and this is all the same as the remedy and it is all going to be okay at Trial One, it simply cannot get away from what seems to us the obvious proposition that in any counterfactual, you would have to remove these demoting algorithms which only demote us.

MR JUSTICE ROTH: Yes, we see that. But bear in mind, Mr Pickford for Google had conceded that the 462 and 489 are binding, and I think he is now also effectively saying, yes, 607 can be read with them. Then he is explaining, therefore, it was right he should explain the basis of that concession and how far it goes. It is not that we want to hear his argument on the counterfactual, it is really to understand what concession is being made. And as I understood it, on that basis he is not saying that 607 is not binding, he is saying: if you read it the way we say 462 and 489 are to be read, then it goes with them as long as it doesn't go any further. That is the point.

MR MOSER: That's the final irony, that we are all in fact ad idem --

MR JUSTICE ROTH: Yes, and it's clear 607 does not seek, I

think, to go further. I don't think it seeks to state what they say was found in 489 and 462.

MR MOSER: In the end, all of these recitals only sustain 1.4, the finding of anti-competitive effect, as far as it goes in the Decision. But certainly we will rely on it in a number of ways, including strongly persuasive authority where this is commented on in the Court of Justice. All for another day.

MR JUSTICE ROTH: Yes.

MR MOSER: I am grateful for that concession. Unless you want to hear more from me on 607, then I am not sure what more I can possibly say.

MR JUSTICE ROTH: No.

MR MOSER: The rest of section 7, which is before one gets to remedies in section 12, has been effectively treated as being along the same lines. You will recall that there is 7.3.2 at 608, which is about the relevant product market. We had on the first day a discussion around what "relevant product market" means, so that has in effect already been dealt with, including the non-agreed recitals 608 and 609.

This is all about relevant product market, CSS, with or without merchant platforms. I think you recall and I don't -- I sense I don't need to say anything more about that.

That includes, of course, the two -- 630 and 631 at 833 and 834, also dealt with on the first day. At 630, the only place that mentions or that explains how clicks on links lead the user directly to a web page of a merchant should be counted as visits to Google Shopping and why. I have dealt with that, again, in our submissions on meaning.

I have made the point it does not matter where you find what you need for supporting the operative part. In this case, you happen to find the explanatory bit for 421 in 630 and none the worse for it.

All of that has been dealt with. That takes one on --

MR JUSTICE ROTH: Just a moment.

MR MOSER: Yes. (Pause)

MR JUSTICE ROTH: 630 and 631.

MR MOSER: Yes.

MR JUSTICE ROTH: Although they come in the -- under the sub-heading of section 7.3.2 --

MR MOSER: Yes.

MR JUSTICE ROTH: -- they are making a rather different point, aren't they?

MR MOSER: They are.

MR JUSTICE ROTH: A more general point about what is the Google comparison shopping service.

MR MOSER: That's right.

MR JUSTICE ROTH: That is why you say they are relevant.

MR MOSER: That's why they are relevant.

In summary and to recap what we said I think on Monday, these recitals must be read in conjunction with the recitals at 412 to 423 to be properly understood, and go directly to that fundamental issue of whether the shopping boxes are part of Google's CSS. They underpin the Commission's conclusion in that way on abuse and anti-competitive effects because you have to understand what Google's CSS means.

Even if sometimes, like in 421, there is a recital with a conclusion in one place, sometimes the exegesis is to be found in another section, and that is not abnormal. And in line with *Trucks*, where the Tribunal said exactly that, that you can find reason in other places. It does not have to be read sequentially all together or literally.

MR JUSTICE ROTH: Just a moment.

MR MOSER: Yes. (Pause)

MR JUSTICE ROTH: Yes. We will carry on.

MR MOSER: It's a mystery. It will no doubt reappear as soon as it is no longer needed.

MR JUSTICE ROTH: Yes.

MR MOSER: That takes one on to objective justification and

efficiency gains, on which I sense there was also nothing between us, other than depending on which view you take. That is Section 7.5, 653 to 671. In any event, the dispute between the parties here is minor.

I can assist, I hope, by saying that we no longer insist or resist Google's position on our recitals 666 to 670, which are largely setting out points of law, save insofar as the Tribunal finds them of assistance.

MR JUSTICE ROTH: Sorry, so 653 is agreed.

MR MOSER: Yes.

MR JUSTICE ROTH: 660 is agreed and down to 665.

MR MOSER: Everything is agreed up to 666. I am indicating that in the spirit of cooperation I'm not dying in a ditch over 666 to 670. Possibly the most helpful bit is the mixed bit of fact and law in 670, but that is also contained in other recitals, in 437 and 599.

MR JUSTICE ROTH: Yes. You say -- (Pause)

MR MOSER: 599, for instance, is one of those which, if we are right, is binding on the new dispensation.

MR JUSTICE ROTH: So 666 to 670 are really the reasons for rejecting Google's ECHR argument; is that right -- or the Charter argument, rather, Charter of Fundamental Rights argument?

MR MOSER: Yes.

MR JUSTICE ROTH: Effectively the same as the ECHR.

MR MOSER: Yes.
MR JUSTICE ROTH: They are not relevant, really -- once the argument has been rejected, they are not relevant to this trial.
MR MOSER: I can't see it arising. I don't think Google is about to run the Charter argument.
MR JUSTICE ROTH: Well, the Charter argument has been rejected. These are the sort of analysis of why. But, yes, I see.
MR MOSER: Of course, we never know --
MR PICKFORD: I am happy to confirm it is not.
MR JUSTICE ROTH: I think it is precluded by the finding and the reasons aren't material to anything else. Yes, so we don't have to worry about them.
MR MOSER: Excellent.
That takes us on to the remedies section and in the remedies section, there were two disputed recitals. The remedies start at 693. 698 was the first one.
MR JUSTICE ROTH: 698 is a Google one, I think.
MR MOSER: Yes. But I do seem to recall that on the first day we said there is nothing more to see here. We have -- I think that's a concession that I have made. I said something along the lines of: I don't expect to have to revisit 698 as long as we all understand that it doesn't mean what we feared Google might want it to

mean, which is somehow 698 is an absolute justification for their existing Shopping Remedy.

Do you remember that -- I'm afraid I don't have the reference to the transcript. We have definitely discussed that and I seem to recall we had reached the landing that, no, that is not how it is going to be understood, so we no longer cared whether it was binding or non-binding. It is really a fairly vanilla statement.

MR PICKFORD: I don't recall I made any concessions one way or the other --

MR MOSER: Not you, me --

MR PICKFORD: -- as to meaning --

MS ROSE: I have written down Mr Moser saying he accepted this is binding on the basis it does not mean the remedy is lawful. 3 pm on day 1.

MR PICKFORD: Yes, I --

MR MOSER: Thank you. I am grateful for Ms Rose's recollection being better than mine as to what I say.

Now, that leaves at 3.05pm, I think I'm right in saying, the last recital.

MR JUSTICE ROTH: 702?

MR MOSER: 702. That is one we say is binding.

Now, this is a recital about the compliance mechanism and the notification of the compliance mechanism. The first two sentences which they say

aren't binding, they set out Google's obligation to notify the Commission about how it intends to bring the infringement to an end. We all agree on the bindingness of that. It is the third sentence which is not agreed, the one that reads:

"Any statements by the Commission to Google or Alphabet or silence on the part of the Commission between the 60 day deadline and the 90 day deadline should not be interpreted as an indication that the intended measures communicated by Google and Alphabet will ensure the infringement is brought to an end effectively."

Now, we consider, I'm afraid fairly obviously, without needing much explanation, that this third sentence is also binding. It clarifies the point it is for Google, and Google alone, to choose its proposed compliance mechanism as per Article 3, and also article -- sorry, also recital 698 now.

The third sentence notes that it is not for the Commission to impose or influence the measures adopted by Google as it makes proposals within the relevant time limit. In that way, the Claimants consider that the third sentence is necessary to understand what we have put in our constituent element column, 4.2: notify the Commission within 60 days of the notification of the

Decision of the specific measures by clarifying, importantly, the Commission's non-existent role during this process, so that 4.2 is not read as an automatic answer: as long as you notify us and we don't say anything, it'll be fine.

I showed you in opening on the first day, I think, Kelkoo having gone to the trouble of writing to the Commissioner that that is, as it happens, of course, the Commission's view as well.

That is all this goes to. Again, it's one of those in terrorem points, we are afraid they are going to seek to rely on it to say, as my learned friend likes to say: aha, our Shopping Remedy must be fine because part of, but not all of, 702.

So that is really it, I'm afraid.

MR JUSTICE ROTH: Yes.

So, Mr Pickford, what do you say about 702?

Reply submissions by MR PICKFORD

MR PICKFORD: I say that the final sentence, which is the only bit that is in dispute between us, is not the essential basis for any of the articles. I think the article that this is said to go to is Article 4. There is no sense in which the essential basis of Article 4 is that final sentence in 702.

Indeed, I don't think Mr Moser put his case on

essential basis; he put it on an interpreted basis. He said it is needed to interpret Article 4.

As I said at the outset of this morning, the interpretive obligation -- or sorry, the ability to rely on a recital from the point of view of interpretation only arises where there is ambiguity in the relevant recital. There is no ambiguity in Article 4, we say.

MR JUSTICE ROTH: Is this contested, whether it is -- because we have solved a lot of the problems, by your formulation -- it is very sensible and proportionate -- of saying not contested even if it is, you say, not technically binding because of the criterion for bindingness. Is this contested? Are you going to say: well, because they didn't respond, that means that the measure -- the remedy is effective and should be treated as showing that the remedy is effective?

MR PICKFORD: What we are, I think, going to say is that the -- ultimately, it will be for this Tribunal to decide whether the post-remedy period is infringing or not. That is obviously something that is not going to -- is not determined by what the Commission has done.

However, we will be pointing to the fact that this was the absolutely flag ship decision of the European Commission and it has never sought to challenge, at any point, or open an investigation into the compliance of

Google with its decision.

That is not going to be a point that we say is determinative, but we are going to say you can -- you should take notice of the fact that the Commission itself no longer appears to have any interest in this particular market in terms of our compliance with their decision. That should give the Tribunal some comfort that what we say about the nature of its decision and whether we complied with it is right.

That is all we are basically going to be saying. I understand Mr Moser wants to cut me down on that by inferences that he is going to draw from this sentence.

MS ROSE: I'm not sure this is a finding of fact at all. This is simply a statement by the decision-maker -- and, you know, this is not a court, this is a statement by the decision-maker --

MR PICKFORD: Yes.

MS ROSE: -- that essentially no estoppel or legitimate expectation will be set up by its future silence or comments.

MR PICKFORD: Yes.

MS ROSE: It is effectively saying any future decisions will be for the courts, not for us.

MR PICKFORD: Quite.

MS ROSE: And our future statements cannot be determinative.

Now, the fact they have said that is obviously uncontested because it is there on the face of the Decision.

MR PICKFORD: Yes.

MS ROSE: The question of what weight that statement should carry in the Tribunal decisions isn't about whether this is a binding finding at all.

MR PICKFORD: I agree. I agree.

MS ROSE: It is a different type of statement where a public authority is saying: the fact that I'm silent is not to be held to constitute consent. You can say: oh, well, it may not constitute consent, but the reality is if they had serious beef with it they would have said. And Mr Moser will say: well, there could be all sorts of reasons why they didn't say anything, resources, et cetera, et cetera, feeling the matter had taken up too much time and it needed to go to the national courts for resolution. All sorts of reasons.

MR PICKFORD: Yes.

MS ROSE: At the end of the day, the likelihood is that the Tribunal is just going to have to decide the matter on the merits. Whatever the Commission thought of the remedy might be interesting, but it is certainly -- who cares, in a sense?

So I'm not sure if this is really a binding or not

binding topic at all. The statement is there; it is what they think and it is up to the Tribunal to decide what significance that carries.

MR PICKFORD: I agree with all the points, Madam, that you just made. Ultimately, all we are dealing with in this recital is: is it binding or not? We say it is not binding.

MS ROSE: It is not a finding of fact at all. It is not a finding of fact.

MR PICKFORD: Not contested because what we did in relation to facts.

MS ROSE: This is not a fact.

MR PICKFORD: Exactly. We only had two --

MS ROSE: It is a declaration of the legal significance or lack of significance of any future silence or statement on their part.

MR PICKFORD: Indeed, and there are only two types of concession we can make here: either it is binding -- and we say no, it is not binding, it is not necessary to support any part of the operative part -- and, secondly, is it a fact that is not contested? Well, no, it is not really, for the exact reasons you have just given, something that falls into that box, therefore we are not going to apply either a green or a blue to it --

MS ROSE: It is there, and the parties will make whatever

submissions they want to make on it.

MR PICKFORD: But it is not binding --

MR JUSTICE ROTH: Your concern, as I understand it, is if you say it is binding, then that might be said by the Claimants to preclude you from making the argument that you've just indicated you want to make --

MR PICKFORD: Exactly.

MR JUSTICE ROTH: -- namely that the Tribunal can have regard to the fact that they haven't at any point said this remedy is inadequate.

MR PICKFORD: Quite.

MR JUSTICE ROTH: And you don't want to be shut out from making that submission.

MR PICKFORD: Exactly.

MR JUSTICE ROTH: Yes. I think we have the point. (Pause)

MR MOSER: Sir, if it assists?

MR JUSTICE ROTH: Just one moment. (Pause)

Yes, Mr Moser, do you want to say anything in response to that?

Reply submissions by MR MOSER

MR MOSER: If it assists, we are not going to seek to use it to say Google can't advance such arguments, but we say it is binding in a sense to assist us in considerably weakening the force of any such arguments.

It is a small point -- I mean, there is a chance

that Google may shift its position on the importance of what the Commission thinks, because I'm told that about 40 minutes ago the Commission sent two sets of preliminary findings to Alphabet, one of which is a preliminary view that Alphabet self-preferences its own services over those of third parties by treating its services, such as shopping, more favourably in Google search results than similar services offered by third parties, and more specifically, gives its own services more prominent treatment compared to others by displaying --

MR JUSTICE ROTH: Yes, I think that's under the DMA.

MR MOSER: That's under the DMA.

MR JUSTICE ROTH: Anyway, I'm sure we will hear a lot more about that -- you can refer to it -- you know, it is not that it is eliminated. It is there. You can make reference to it --

MS ROSE: It is undoubtedly something the Commission said about the significance that should be attached to its own silence or statement. That is about all you can say about it.

MR MOSER: Yes. And there it is. Perhaps it is another storm in a teacup that has grown out of an overabundance of caution.

MR JUSTICE ROTH: Yes -- I can understand why Google were

concerned that should not be binding and I think you see the point that was made. But clearly, you can refer to it and say: well, that assists in what weight one should give to --

MR MOSER: I am grateful. That's all we need.

On that bombshell -- I'm sorry, did you want to come back?

MR PICKFORD: No, not on that.

MR MOSER: I submit those are all the recitals that we have got for you today, unless someone disagrees? No, no one disagrees.

MR PICKFORD: So we have some homework. We have to give you some picture illustrations that can actually be seen; we are going to give you a list of the recitals, but in the alternative on my secondary case we still contest or we prepare to concede; we also owe you -- we are going to give you a table which shows you the updated redactions to the confidentiality that we --

MR JUSTICE ROTH: Oh, yes.

MR PICKFORD: -- homework we set ourselves. I was going to suggest, if we could provide those by early next week.

MR JUSTICE ROTH: Yes, that's fine.

MR MOSER: It perhaps goes without saying that obviously we would like to see them as they go in.

MR JUSTICE ROTH: Yes. Clearly, they will be sent to you as

well.

MS ROSE: What does "early next week" mean?

MR PICKFORD: By the end of Tuesday.

MR JUSTICE ROTH: I think what we will do is we have made very good progress. We will rise for ten minutes, which we would be doing now anyway, just to see if there is anything we think we want to ask you before you all disappear. We will come back at half past.

(3.20 pm)

(A short adjournment)

(3.30 pm)

MR JUSTICE ROTH: Well, yes, Mr Moser, is there anything?

MR MOSER: I am going to ask whether there was anything more.

MR JUSTICE ROTH: No, there is nothing more we wish to ask from the Tribunal. We look forward to receiving additional material from the Google side. So it's just for us to thank you all, counsel, and the teams behind you. We know they have worked very hard preparing the schedule and all the thought that has gone into that, which has enabled this hearing to finish indeed in less than three days, which we are very appreciative.

MR MOSER: We are grateful for all the sitting early and late and, of course, the reading in.

May I say, we are in receipt of letter from counsel

in which it is brought to our attention that you, Sir, will be attending a meeting of the User Group this evening, and it is very fairly asked whether this presents any sort of difficulty or objection. And no, I can say immediately that there is no question of there being objection to that.

MR JUSTICE ROTH: Yes, I am grateful for that. Yes, it is one of the solicitors in this case is a member of that group.

I would also like on behalf of the Tribunal, and I think probably on behalf of everyone, to thank Ms Jones for her extremely efficient and helpful transcribing. She has been of great value to all of us.

And that concludes this hearing. You will get of course our decision in due course.

(3.32 pm)

(The hearing adjourned)