IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1572/7/7/22 & 1582/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 8th May 2024

Before:

The Honourable Justice Marcus Smith
John Alty
Dr Maria Maher

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Ad Tech Collective Action LLP

v

Proposed Defendants

Alphabet Inc. and others

A P P E A R AN C E S

Robert O'Donoghue KC, Gerry Facenna KC, Julian Gregory, Nikolaus Grubeck & Greg Adey (Instructed by Humphries Kerstetter LLP & Hausfeld & Co. LLP) On behalf of Ad Tech Collective Action LLP

Meredith Pickford KC, Conall Patton KC, Natasha Simonsen and Warren Fitt (Instructed by Herbert Smith Freehills LLP) On behalf of Alphabet

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Wednesday, 8th May 2024

(10.30 am)

INTRODUCTORY REMARKS BY TRIBUNAL

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, good morning. A couple of housekeeping matters, one you'll expect, one a little bit more substantive.

First of all, these proceedings are being live streamed on our website and an official recording and an authorised transcript will follow by the tribunal's direction. It is otherwise strictly prohibited for anyone to make an unauthorised recording or transmit or photograph or otherwise record these proceedings. Breach of that provision is punishable as a contempt of court. That's the vanilla housekeeping point (the missioning something back there was vanilla).

The more substantive one is this. We have received a party agreed timetable for the hearing and we have looked at that. I have a few comments by way of response, because we are faced here with a wealth of material and in a sense rather too much material, given that the two issues that are before us are essentially arguability and blueprint to trial.

Now we don't want to pre-judge anything other than certification, and given the wealth of detail before us we consider that there is a real danger of getting sucked into making decisions which we should not be making. So we are very keen to avoid saying anything on the question of the merits. In a sense that goes without saying, but it does, I think, bear a degree of expansion.

When we are debating, as we will be, certain points, I think everyone should understand that the terms of our debate are against the background that if this matter

is certified, the matters that we are debating are going to be highly contentious at trial. I don't think anyone should be under any illusions there. So when, as I am sure we will be, we are saying to Mr O'Donoghue "Your case is this, your case is that" and we might be saying "We agree with it", that will be at the level of bare arguability. That's how we are quite deliberately going to try to see things. I don't want anyone on the Google side to assume that we are doing anything other than gauging the very low threshold of arguability, because that is the test that sits before us.

Now with that in mind, we are not sure that an issues based approach spread across three days is the way that we will best be assisted in dealing with matters. Although, Mr O'Donoghue, it will undoubtedly take you out of your way, I wonder if the following would work and certainly it would help us. What we have in mind for today is this. By reference to the pleadings in the first and ideally primary instance we wonder if you could take us through the key averments that make up your proposed claim and explaining why the point is argued and how you are planning on making good the points during the trial process. In other words, for each particular tectonic plate or element of your claim to focus very closely on the arguability and the case management issues and I am going to come back to three particular case management issues at the end, because they strike us even now as being matters we need to be thinking about very carefully.

So, as we see it, the claim that you have run can be broken down into the following portions. First of all, there is the general nature of the online display advertising market in context, that is the background against which the alleged abuses are taking place and clearly something needs to be said by way of general context.

We are quite confident that even that is likely to be factually contentious. There is an awful lot that the class representative probably doesn't know, which Google does,

and that is something which we are well aware of in terms of how the trial, if it takes place, needs to be managed. There is also -- and I will be coming back to this -- the question of handling of confidential material, because undoubtedly how this market operates is undoubtedly going to involve a high degree of intrusion into proprietary systems and information and we have that well in mind also, but that's the first tectonic plate or element which is general context.

Secondly, and arising out of that, I think the way the class representative sees it, and you can, of course, correct us, is that we have here a number of specific markets chained together involving the provision of an advertising product. As I understand it, what you are saying is that there are a series of markets and that Google is dominant in all of them.

Now it would be helpful I think to understand through the lens of market definition and dominance how you put each of those markets again to the standard of arguability, both the definition of the market and the question of dominance.

Then we have the question of whether in each market Google has abused its dominant position. As we understand it, the broad thrust there is one of improper preference of its own interests over those of competitors in the market and that that is the essence of the abuse, but in the case of each abuse you are going to have to at least show a satisfactory level of pleading in terms of the loss and damage arising, and that, as we see it raises the counterfactual question of what would have happened had the tort alleged not been committed. Here we see, I think, the failure to plead the counterfactual on which Google places considerable emphasis.

Those are broadly speaking four elements, as we understand it, of the cause of action as it is articulated but you may want, will want to break it down differently. That's absolutely fine, but what we do want is an ability to frame a judgment which focuses

on arguability and case management to the exclusion of all else, which is clear that it has arisen out of, not out of a mini trial -- we don't want a mini trial -- it has arisen out of the very narrow -- superficial is the wrong word, but you know what I mean. We are not deciding substantive issues. We are deciding procedural issues -- that the judgment reflects that fact and is appropriately long. We don't want to write a 100 page judgment. We want to write a 40 page judgment, if that, and we want neither party to be complaining at the end of it that we have fallen short in terms of approach when a judgment of that length emerges. The reason we think 40 pages is a good ball-park figure is because we are quite emphatically concerned here with the broad brush. The brush may have to become granular depending upon the points that Mr Pickford raises by way of killer points, but if there are no killer points going to arguability or blueprint to trial, then we are just not interested, and I think that is a correct response from the tribunal, not an incorrect response.

So that is what we would like I think you, Mr O'Donoghue, to deliver. We may from time to time seek clarification from Mr Pickford during the course of your submissions as to the extent to which the points you are running are controversial. Again we stress we will not be seeking admissions from Google. Obviously that would be inappropriate. We understand almost all of this will be controversial and controverted, but we are approaching that as through the lens of arguability and blueprint and that is the spirit in which we will be asking whether there is anything to gainsay what you are raising.

Now that leads me to three specific case management points which I want to read, because you will want to weave them into how the issues that I have articulated are going to be tried and by trial I mean not just the end points but also the process leading up to trial.

The three points are these. First of all, it is the extent to which we need to factor in from the very beginning the handling of confidential material. It seems to us plain that there is going to be a great deal of confidential material in play, mainly I suspect from Google, but it may go both ways and that material is going to have to be handled appropriately. Clearly where the material is relevant disclosure will have to be given. That's not really up for debate. It is how it is given, how it is used, by whom it is seen that I would want attention to be paid when you are unpacking how the trial process, by which I mean the process to trial works.

To give an instance of something which may arise, it is quite possible the way in which Google structured or interacted in one or more of the markets will involve the disclosure of proprietary information which will have to be considered by witnesses of fact on your side of the courtroom.

Now, Mr O'Donoghue, that obviously raises matters of massive sensitivity in terms of an in-house person seeing Google's proprietary data. As I say, it may go the other way, but that seems to us to be something which we are going to have to embed in the trial process going forward. It has a number of other potential ramifications. We would want to avoid a trial in private, so that needs to be considered, and we do not want to have an extended debate about redactions to judgments that we in the end publish after a trial, because in order to resolve issues of controversy we need to delve into questions of confidential material.

Now Mr Pickford you should not be alarmed, all of these points on confidentiality presume certification. Well, of course they do. That's the point about discussing blueprints to trial. We are concerned above all else with the manageability of the process. I am saying nothing about whether the arguability side is or is not met. Of course, if it is not met, then the blueprint does not have to be considered, but it is

important I think to air those points now.

The second blueprint point is whether this is a case that is appropriately tried in stages, in other words, one splits, say, liability from quantum or tries abuse first ahead of, say, dominance, or whether there are other ways in which one can structure the case. My gut feeling is that parsing matters by way of preliminary issue would be an error, because the likelihood is that the evidence that is relevant to abuse would also be relevant to dominance, would also be relevant to loss and damage and that we ought to be budgeting for a single trial at which all of these issues are live and where the experts giving evidence will actually not have a baseline, for instance, in terms of market definition or dominance from which to articulate abuse and they will not have a baseline of abuse from which to articulate quantum.

All of these points, if we don't separate out the issues, all of these points will be at large at the same time. It seems to me that the teams who are taking this to trial have to ensure that the evidence is configured in a way that will enable meaningful evidence to be given in circumstances where there is this lack of certainty. So that's the second big case management issue which we would like you to have in mind when you are unpacking the case for us.

The third is I think more manageable, but in a way provides a microcosm for the way we are minded to approach these questions and that's limitation. We see that issues 7 and 8 raise limitation. One of the questions that we will want to think about is do we decide this early on in the process or do we decide this late.

Now that raises in and of itself all kind of trial issues. Now let's assume that the limitation question in and of itself is actually an easy one that can be decided without factual evidence in the course of a day. If it requires factual evidence and takes two weeks to try, well, the question almost answers itself. So let's assume not an easy but

a short limitation question along the lines of as framed in issues 7 and 8. Do we schedule that for early resolution or do we say "No, let's deal with limitation at trial".

Now the questions there are, firstly, we anticipate that whoever loses the limitation preliminary issue is going to appeal it. You immediately have the question of whether that appeal has to delay the trial or whether one can continue preparing for the trial whilst the appeal is on foot. That is a strategic decision which it seems to us to be something for today.

Equally one has to ask oneself what, if limitation is decided, does it save? If it is going to lop off eight weeks from a 20 week trial, four weeks from an eight week trial, well, probably not a bad idea to decide it.

If, on the other hand, the data that is relevant to the period that is being struck out is going to be relevant whether it is struck out or not because you need the context, well, then, limitation doesn't actually bring anything by way of time saving to the party. It obviously has to be determined but maybe not until you get to trial if the whole period needs to be traversed factually for other reasons. So that's the third and I think most granular of the case management questions or blueprint to trial questions that we had. There will I am sure be others which we will raise during the course of your submissions. My suggestion is that you take a day over this, that we take careful note of where in the pleadings in particular the arguability case arises. By all means take us through the material, but it is really the pleadings that determine this. Then Google can take tomorrow to explain why non-certification in this framework is the answer and you will then have a day to reply.

Now I appreciate that's taking -- it is not really taking a fine pencil to your timetable. It is taking the broad axe and smashing up your trial timetable, but I hope you don't mind us at least putting it as a suggestion as to what would help us most, but if it is going to

seriously affect the way in which you want to address us, then we are not going to stand in your way doing it in your way rather than our proposed way, because I appreciate we have thrown an awful lot at you now.

MR PICKFORD: If I may, just one comment on that proposal, which is if we have an entire day's worth of reply from the PCR, I think in my submission it would be sensible to provide for a very short possibility of whether you call it reply or rejoinder at the end, because we potentially have an entire day of submissions, there could have been no response from Google.

MR JUSTICE MARCUS SMITH: That's a fair point, Mr Pickford. We have more than half an eye on Mr O'Donoghue only dealing with reply points, but you are absolutely right that issues take a different complexion. We certainly do not want you to be left feeling we should have heard from you when it was possible we did not factor it in.

MR PICKFORD: I am very grateful, sir. Also we came here I think assuming on either side a roughly equal division. Obviously the tribunal will organise things how it wishes, but again in my submission it would be sensible to arrange things with a roughly equal division between the parties otherwise there is an equality of arms issue.

MR JUSTICE MARCUS SMITH: We are very happy for that to be done. I mean, I have taken the view that three days is actually a generous timeframe in order to unpack the very limited issues that we have. Mr O'Donoghue, I have said a day, a day, a day. If you can confine your general submissions to a day and a half, look at parity of arms, certainly you don't need to use your every minute if you get to the end of unpacking your case in the manner I have suggested before today, then that's great, but I think there is an element of education of the tribunal that needs to be assayed. By education I don't mean educating us into how you are putting your case, because that is really the beginning and end of it.

That's why we feel that it is appropriate for you to take the time to set up, as it were, the target that Mr Pickford can aim for and that way we can ensure that we understand exactly where Mr Pickford's attack comes, but beyond that I don't think I am going to say anything more except that we obviously don't want anyone leaving this court feeling that there were things that they wanted to have said which were not listened to by the tribunal because there wasn't time.

MR PICKFORD: Thank you, Mr President.

Submissions on behalf of AD TECH COLLECTIVE ACTION

MR O'DONOGHUE: Sir, that's extremely helpful. Thank you very much. A few immediate reactions. First of all, I certainly will not treat the tentative allegation you have outlined as a target. I hope, sir, you will know from my appearance in front of you that I don't intend to say more than I think I need to. So I certainly won't be gilding the lily just to use up time for the sake of using time. That's the first point.

Sir, the schematic you have outlined I think to a large extent conforms with what I had intended to do in any event, so to that extent there is a measure of harmony.

The one thing I would say is that we have not, because no point is taken, focused, as you know, in the skeleton a great deal on market definition and dominance. We have made the points about the interconnectedness of the ad tech stack. They are important and I will come to those. We have not focused at least in granular detail on points of market definition and dominance. So I may take those maybe at a slightly faster clip, given that no issue as such is taken on those.

Thirdly, in relation to case management and blueprint, we have those points very well in mind. I think I will for the most part try to pick those up later in the submissions or later in the day than tackle them upfront.

On the issues other than issues 1 to 3, that falls in Mr Facenna's court. You very fairly, sir, raised the question as to whether we grasp the nettle on limitation. Now or later or something in between I will leave Mr Facenna to deal with that, I think probably later today, but we will see how we go.

In terms of rejoinders or replies rather than take up time now debating about time, we will see how we go. I know, sir, from appearing in front of you that you are not in the habit of shutting someone out based on formalistic who goes first or last. We will see how we go. I think these things will crystallise.

Finally, sir, if I may say so, the point you made at the outset about this not being a mini trial, about the tribunal being deluged or subjected to a visit of documents in which we played a part, I entirely accept, but our mantra in these proceedings for a long time now has been that interesting though most of the issues that Google raises are, they are quintessentially questions of case management, indeed active case management in cases, as you referred to, questions of trial and they are matters of fact, law and economics that will be hotly contested as these proceedings proceed.

We say that overwhelmingly they are simply not issues for the certification stage. We have made that point for a long time now. Indeed, you will recall, sir, at the time of the adjourned hearing we made that point in spades and one of the things the adjournment has achieved, of course, is that part of the blizzard has been diverted. A lot of issues that would have been surfaced in January have been taken off the table by Google. So to that extent the adjournment has perhaps achieved something. We say that even the issues that remain for the most part are not certification questions.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, two points arising out of that. First of all (inaudible), but even there we would like to assure ourselves that (inaudible).

Part of the reason for adjournment was we know where you wanted Google to be shut

out of taking points that it is considered appropriate. Now what points are or are not appropriate is itself an iterative process. It is entirely wrong to say at the outset you can't take these points because they may be too granular for certification. We entirely welcome Google raising points and then taking the view that they are actually for trial if the trial goes ahead rather than for certification, and we see all the process in effect, the culmination of that process. So by all means say "Google take this point. For these reasons it is a matter which will occupy the tribunal at the trial but is not a matter for arguability".

MR O'DONOGHUE: I will be saying that.

MR JUSTICE MARCUS SMITH: I am sure you will, but bear in mind that the virtue of Google raising it is that even if they are wrong, if they are taking points about arguability, there will be significant value in the point being raised in terms of managing these very difficult questions. In other words, even if it is not an arguability point, it is likely to be a blueprint point (inaudible).

MR O'DONOGHUE: I see that.

MR JUSTICE MARCUS SMITH: So that's helpful.

MR O'DONOGHUE: Sir, in terms of the schematic I will broadly follow the tectonic plates you have outlined, first with some context. I don't want to dwell on that unduly, then to unpack the market definition, dominance and abuse. I have quite a lot to say on counterfactual for obvious reasons and I will then deal with the methodology of at least the main points that Google has raised in writing and set out our position at this stage subject to then hearing what Mr Pickford comes back on.

So that, sir, is the broad contours of today and then Mr Facenna hopefully at some point in the afternoon will pitch in on issues other than methodology and blueprint to trial. That debate has narrowed in a quite significant way, becoming a question of

when rather than necessarily going through twists and turns today, but (inaudible).

Starting with context, these proceedings are the latest in the series of major self-preferencing abuse cases involving Google. The tribunal will, of course be familiar with Google shopping where a 2.4 billion Euro fine was imposed for self-preferencing with Google's price comparison services.

The tribunal will also likely be familiar with the android proceedings where a 4.32 billion Euro fine was imposed for a series of practices including the requirement to pre-install Google search and Chrome as a condition for licensing on the Google App store.

The present case we say is actually the most egregious of the abusive self-preferencing conducted by Google. It has, sir, as you will have seen in the skeletons, attracted regulatory and judicial scrutiny at the highest possible levels. Abuses have been found in France by the French Competition Authority. There have been market investigations by the CMA and the Australian Competition and Consumer Commission. There are pending abuse cases before the Commission and the CMA, and we understand the Commission case is close to reaching terminus, stating objections in the summer of last year, to which Google we understand has responded with a decision expected from the Commission I think in September of this year.

As the tribunal will have apprehended from our skeletons, there are major proceedings afoot before the US courts by the Department of Justice and US state attorney generals.

The reason I raised this regulatory and judicial backdrop is not to make a jury point. It is we have set out in the claim form at 161 -- we don't need to turn it up -- is that the practices at issue have not materially differed between regions. We do say that meaningful things certainly at the certification stage can be gleaned from the proceedings in the UK and elsewhere. I don't say, of course, these are binding or

anything like it but they are part of the tapestry in our submission.

MR JUSTICE MARCUS SMITH: It also raises a quite acute case management issue in terms of how accessible background to the findings are woven into these proceedings in terms of their advance and their weight and that is in a sense (inaudible) quite closely related to the disclosure confidentiality question that I unpacked as one of the big case management questions in these proceedings.

MR O'DONOGHUE: Sir, that's absolutely right. One of the icebergs we know is coming is that there's been vast disclosure in the US proceedings, the Commission proceedings and no doubt the CMA, and one of the major case management issues, which I think will arise immediately assuming certification, is the oven ready, otherwise ready made material, low hanging fruit that can be accessed at this stage in a responsible manner by the PCR to crystallise this case. My short answer -- it may be slightly glib -- is that that must undoubtedly be the case on some level, but the details of working through this and particularly confidentiality will be very important of course.

Sir, you are absolutely right, there are parallel judicial and regulatory proceedings to which we as the PCR will want to tap into on some level. The details as to how that can be done, and if indeed it can be done and protected, and in particular in fairness to Google, will be matters of important case management debate going forward if this case is certified.

The second contextual point is the proceedings concern an enormously important and valuable sector of the economy where Google has an extraordinary vice like grip across multiple layers of the ad tech stack. Online advertising spend in the UK alone is in excess of £15 billion based on 2019 data. Therefore we are talking about hundreds of billions of advertising spend on a global level. The importance of online

display advertising will be self-evident to anyone using the internet. We are all extremely familiar with going on websites where ads pop up. The younger generations among us will be familiar with apps in which advertising is a popular feature as well. We all know these ads are ubiquitous, practically unavoidable for internet and smart device users.

Now, sir, picking up on one of the tectonic plates, Google does not at least today contest that it holds dominant positions in multiple markets within the ad tech stack. The first market -- I will take to you the pleadings, sir -- the first market -- I am just giving the contours -- the first is ad servers, where its DFP product has a 90% market share. This is on the supply side. I am working from the supply side to the buy side. Then we have the ad exchanges, which are also called supply side platforms or SSPs. Google's ad exchange platform is called AdX and it has a market share of 50% to 60%. Then on the demand side, through something called DV360 and Google ads, Google has a market share in excess of 50%. Sir, we will take you in the pleadings as to why we say these are markets in the anti-trust sense.

Finally, just to round off the panorama here, of course, it is a matter of public record that Google has an 80% to 90% market share in a market defined as search, and likewise in a browser market its Chrome browser has a market share which is I think close to 70% or 80%. Of course, android as a semi proprietary system is in effect a market in its own right in which Google has close to 100% share. So across the online display advertising sector and related markets we are talking about a very large number of significant monopolies or at least substantial dominant positions.

Now, third, sir, I accept, of course, that being dominant is not a recrimination. There needs to be abuse. Now we will come to the details, but taking a step back, the abuses we rely on we say are clear-cut. They can be stated in pretty simple and we say

consonant terms. In essence Google has engaged in a series of abuses whose purpose and certainly effect is across multiple aspects of the ad tech stack to favour its own services in an abusive manner and impose significant anti-competitive disadvantages on its competitors. In simple terms Google has tilted the playing field enormously in its favour. The angles are vertiginous, not level or anything approaching level.

Again I will come to the details in the pleading, but we say in their essential form the abuses are actually quite straightforward. On the sell side of the market, the ad tech sector, Google ensures, first of all that its ad server, DFP, favours its ad exchange, AdX, and secondly that AdX favours DFP, because, of course, DFP in turn favours AdX.

Then on the buy side of the market Google also favours its own ad exchange, AdX. I think the way that its ad buying tools, Google Ads and DV360, place bids on exchanges, for example, Google Ads was avoiding competing ad exchanges essentially completely and almost exclusively placing bids on AdX, thus making it the most attractive ad exchange.

In a nutshell, sir, Google is trying to ensure and has ensured that all roads lead to its ad exchange, AdX, on both the buy side and the sell side and that competing ad exchanges simply do not get a fair look-in.

Again I am going to show you the pleadings, but at a high level conduct we complain about, they are not exactly subtle.

One of the examples in the pleading I have shown you is AdX being informed in advance of the value of the best bid for competing supply side platforms, which it then had to beat to win the auction. We say this is akin to a form of insider trading. They get a sneak pre-view of what they need to beat and then can beat it by a marginal

amount.

On the buy side the conduct of Google's demand side platforms again is not exactly subtle. They impose a higher commission rate, up to 10% to 12%, when Google Ads are bought from a third-party ad exchange and nothing when it is intermediated through AdX. So there is in effect a tax on dealing with an ad exchange other than AdX.

Again at a high level we say that the impact of these abuses is rather obvious. If everything through abusive self-preferencing gets funnelled artificially towards AdX, the commissions paid to ad exchanges are higher as a result. Competition is artificially reduced and the yields made by Publishers, who are the members of the class, are lower, again because their competitive options are reduced.

I will come to the counterfactual for a significant part of my submissions. We say again at a high level it is rather obvious and intuitive as to what the counterfactual is. If Google cannot favour AdX through abuse of self-preferencing, Google would then in a counterfactual face substantially more competition which would allow, for example, rival ad exchanges and rival ad servers on the Publisher side to gain greater traction in the market. In other words, the playing field becomes level, or at least more level when the abusive self-preferencing stops.

This greater counterfactual competition would reduce the commission levels, the take rates, and ensure that Publishers generate higher yields, which we call the gross price effect. In simple terms there would be more competition from non-Google sources that would inure to the benefit of the Publishers through lower take rates and higher gross prices for ads, which are the essentially two components from the damages we claim.

Now given this high-level context we are frankly flabbergasted at the comment in

paragraph 7 of Google's skeleton where they say that Google's impact in the Ad Tech industry has been hugely pro-competitive. That's paragraph 7. Now, with respect, every regulator and court that has looked at this to date profoundly disagrees. No regulator that we are aware of has blessed these practices or indeed considered them innocuous.

Turning then, sir, to the pleaded case on abuse, for this I will refer very extensively to our pleading, which cross-refers to Latham 2 in particular. This, sir, is the B bundle for the most part. It is the first tab. Before we get into the individual conducts can we start at page 61, please? I just want to be clear as to what is the primary case we are putting, because Google has glossed over this. If you see at 157.

MR JUSTICE MARCUS SMITH: Page 61.

MR O'DONOGHUE: Page 61, sir. At the bottom right in bold.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: Two quick references. Sir, at 157 the primary case which is pleaded is you see at the end:

"... an overall anti-competitive strategy and single and continuous infringement ..."

So it is clearly a cumulative case. Then if we flip forward to page 96, 249, again a pleaded case on single and continuous infringement:

"... part of an overall strategy ... to entrench its dominance in the Publisher Ad Server, SSP and DSP Markets, and foreclose rivals ..."

and importantly -- this is highly relevant for the counterfactual:

"The actions all interact and contribute to that overall objective, and are therefore not only individual infringements, but also ... form a single and continuous infringement."

Now that is important for reasons I will come back to but we do, of course, at least as a matter of pleading identify three potential abuses as an alternative case and I want

to turn to those now on the basis of the pleading.

So the first abuse, sir, concerns the ways in which Google's Publisher ad server, the DFP -- I fear, sir, we have reached peak acronym in this case. I hope my use of acronyms does not obscure as much as it clarifies. It is helpful I think on the whole to have acronyms for at least some of these.

So the first abuse is self-preferencing by Google's Publisher ad server – or DFP – in favour of Google's ad exchange, AdX. We can pick this up, sir, at pages 44 and 45 of the pleading. This sir, actually overlaps with the contextual point you asked me to deal with.

So, sir, what we do starting at paragraph 94 back on page 39 is we explain in essentially chronological terms the evolution of the ad tech sector and in particular the transition towards online display advertising and a degree of real time bidding. So, sir, it starts at 94 essentially for the pre-claim period. Then, sir, at 101 you have the emergence of real time bidding, which was perhaps the most significant technological change.

MR JUSTICE MARCUS SMITH: Just for understanding, in 94 you refer to very significant changes over the time relevant to the claims. Are those changes capable of genuine segmentation in that you can articulate and try an abuse for one period of time without regard to what happened before? Is there a degree of connectivity between periods such that you can't draw a bright line between one period and another?

MR O'DONOGHUE: Sir, our case emphatically is the latter. The quantum leap in this market has been the emergence of online display advertising and in particular a transition towards a degree of real time bidding. Once one is in the realms of the emergence of real time bidding, to then say that one can hermetically seal different

incidents or micro incidents or developments within that we say is artificial. I will come to this.

I mean, one of the points we make is that the holy grail for Publishers is essentially as many ad exchanges as possible competing in real time. One of the reasons the concept of header bidding was of great interest to Publishers was that it would increase their yields, because it increased essentially the density of the auction to the benefit of the Publishers.

Now Google's abuse, which we will come to, essentially involves a series of cumulative counter measures to essentially undermine the prospect for anyone other than AdX to participate fully in real time bidding, and although the conducts have in descriptive terms, and maybe even on a certain technical level adapted over time, we say their essential purpose and certainly their effect has been to perpetuate the disadvantages to rival ad exchanges and to reduce the ability of Publishers to benefit from the fullest extent of real time bidding.

So we say there is essentially certainly a continuum or a standing degree of continuity. The reason, sir, I showed you the single contingency infringement pleading and the mutually enforcing effect is precisely to make that point because, of course, what Google wants to do, and you can see from their perspective why this is attractive, is to have the thinnest possible salami slices for each micro conduct within each micro period and then go down the mother of all rabbit holes in terms of counterfactuals and sub-counterfactuals essentially for each incident. You can see from their perspective why that is extremely attractive, because we will be here for the rest of our lives stuck down these rabbit holes, but, sir, I am take you to (a) that's not what the law actually requires and (b) in any event that's not the case we are putting. I will come to that.

MR JUSTICE MARCUS SMITH: Indeed, but essentially isn't that the point? If Google

are right and it is a series of discrete infringements and not a single continuous infringement as you have pleaded, then you will get your comeuppance at trial, not at certification.

MR O'DONOGHUE: Of course, there is no attempt, sir, to strike out the single continuous infringement pleading. Mr Pickford might be on less thin ice if he said this is not capable of being a single continuous infringement. There is no attempt to strike out that part of the pleading. Indeed, it is very hard to see at this stage how it could be struck out.

MR JUSTICE MARCUS SMITH: But it might lose, but that's --

MR O'DONOGHUE: That is for later.

MR JUSTICE MARCUS SMITH: Not for today.

MR O'DONOGHUE: We would have a lot of egg on our face at a later stage.

Sir, I was not proposing to go to the chronological evolution in nauseating detail, but there is, we say by the standards of the pleading, an actually pretty rich chronological description of how this sector has evolved.

The key really, sir, is at 101 of the pleading, on the emergence of real time bidding, and essentially what you have is you will see then at 104 dynamic allocation, 111 header bidding. I am just going to give you the broad contours. Then 120, dynamic revenue share. 125, open bidding and then something called unified auction, unified pricing in 2019 starting at 127.

So just to pick this up at what we say is the salient point in the chronology in terms of the evolution, if we can start, sir, at 111 -- sorry. Forgive me. If we start at 104, page 42, you see in 105 something called "Dynamic Allocation" was introduced as a feature within Google's Publisher ad server product DFP. You then see a description of how that operated.

Then too:

"DFP determines whether the impression can be sold to an advertiser under a direct deal. If it can, the dynamic allocation feature is not triggered.

"If it cannot", so no direct deal, "DFP identifies the highest estimated bid for rival supply side to the platforms based on their average historical bids ..."

Then at 106:

"... compared to rival SSPs, AdX alone was provided with the opportunity to bid on all impressions based on its real-time demand, resulting in a right of first refusal. Rival SSPs were only permitted to bid on impressions that AdX had not been able to sell."

So we say from the very get-go with this so-called dynamic allocation there was a bifurcation within the market where AdX gets to bid on everything, or at least gets the right of first refusal and the other SSPs are stuck with the dregs or the things that AdX did not want or couldn't sell.

Then we come to 111:

"To get around the fact that under dynamic allocation", which we have just seen, "SSPs did not compete against each other in a real-time auction, a new technological initiative, 'header bidding', was developed by publishers and others in the ad tech industry in around 2014."

Again, sir, the dates are important. I mean, header bidding has persisted since 2014 and it may indeed be relevant to Mr Facenna's limitation point, because in my submission it is obvious from this important context that the entire chronological period, whether it is articulated as a purely abusive period or not, would be highly material to the trial, because we will want to understand how the sector evolved and the state of competition in the before period, the during period and the after periods will need to be compared and contrasted. Indeed, as we will see, sir, in some of the

methodologies the before and after very much features and therefore we will need to consider the before in any event whether or not it is strictly speaking falling within the claim period.

So the backdrop and the context can't simply be airbrushed we say regardless of the way in which this case proceeds. It is at the very least material context.

So returning, sir, to header bidding, you will see 112, the technological method by which it is achieved. It is a piece of code in the web page. Then 115, header bidding, Publishers liked it. There was a strong uptake. Then 116, which is really the crux of our abuse case.

"... Google decided that AdX would not participate in header bidding, and imposes technical and contractual limitations on the use of AdX that prevents AdX from being put in direct real-time competition with rival SSPs (whether in heading bidding or otherwise)."

The last sentence:

"... the way in which DFP's Dynamic Allocation system used the results of the header bidding auction resulted in a new type of advantage for AdX."

So essentially what you have, sir, in the chronology is an emergence of real-time bidding that was skewed in Google's favour under dynamic allocation, a counter measure by the Publishers to bring forward header bidding, which is very beneficial to them, and then further counter measures by Google to essentially stymie or at least limit the scope for header bidding.

Just, sir, to show you one internal Google document on this which we say is quite important. It is in B1, tab 4. I think these are electronic only. It is B1, tab 4, page 848. The numbering I am looking at -- unhelpfully there are two sets of numbers in the bottom right. I am working from the one on the very bottom right, 848 in this context.

You will see 701, sir, and then 848. 352:

"By 2014, Google's exclusionary conduct had successfully suppressed competition in the exchange market. In response, publishers ... adopted ... header bidding, which increased exchange competition by circumventing Google's ad server monopoly and facilitating real-time competition" and so on. "Faced with this competitive threat, Google schemed to 'kill' header bidding. To illustrate, in an October 13, 2016 meeting Google employees discussed 'options for mitigating growth of header bidding infrastructure'. One Google employee ... proposed the 'nuclear option' of reducing ... exchange fees down to zero. The problem with that idea, according to another [Google] executive, is that 'This doesn't kill header bidding'."

So there is already even pre-disclosure contemporaneous evidence that killing header bidding was a mission within Google.

Sir, back to our pleading. Jump forward to 176, page 69. Again you will see the reference to "'kill' header bidding", which we have just seen. Essentially what you have in 176(3) and (4) is further contemporaneous documents from Google on its attitude to header bidding. (3) is important, because it links to our damages case. They recognise internally the 20% commission, the take rate:

"'... isn't likely to be justified by value' ... if header bidding continued to grow 'margins will stabilise at around 5%'."

You can see, sir, straightaway based on these internal documents Google had overwhelming economic incentives to kill header bidding, because it would ensure according to this document that a competitive commission of 5% would not emerge under header bidding. It would instead keep an extortionate 20% commission for its ad exchange services.

Pausing there, sir, it is easy to become a bit glass eyed about some of these numbers,

but imagine if a stock exchange or an estate agent said "For each £100,000 of transaction I want £20,000". These are eye-watering commissions and we see what a competitor commission, 5%, looks like, or at least that is one view.

Then, sir, back to the facts. If we go back to 165, back to the early part in the chronology, you will see sir, under (a), (b) and (c) we pick up a series of conducts. (a), essentially a right of first refusal given to AdX, allowing it to "'cherry-pick' impressions".

"(b) AdX was allowed to compete based on its real-time demand ... whereas [other] SSPs were [stuck with] their average historical bids."

Crucially (c):

"AdX had a right of 'last look' over the estimated bids of rival[s] ..." and so on.

So they essentially got a sneak preview of what they needed to beat and unsurprisingly they didn't need to beat it by very much to succeed. There was a two tier market, a bifurcation between AdX and other SSPs.

Now, sir, as we move on in the chronology there are, as we indicated, some superficial variations in the types of conducts we see on the Google side, but our case is in substance this was more of the same. It was a purpose and effect dressed up slightly differently for the outcome in terms of the exclusion of other ad exchanges to Google's benefit was the same.

Starting, sir, at 125, this is the introduction of open bidding. Page 48. Sir, you will see in 125 this was in April 2018. So this is four years into the claim period. So open bidding comes quite late in the day and, as I will show the tribunal, in any event the uptake was negligible.

Then, sir, you will see at 125 we unpack the operation of open bidding at 1, 2, 3, 4 and 5. I would ask you, sir, to focus in particular on 6:

"In order to participate in Open Bidding rival SSPs have to agree to pay Google

a revenue share of 5% to 10% ... As a result, if AdX and a rival SSP both charge a 'take-rate' of 20% and solicit bids of 1.00 for an impression, the net bids used in the Open Bidding auction would be 0.80 for AdX and 0.75 for the rival SSP."

That's my point on a tax being imposed under open bidding on the use of rival SSPs.

Then at 126 we say in addition to the penalty for dealing with someone who was not AdX there are other disadvantages for rival ad exchanges arising out of bidding. The tribunal can look at those in more detail.

Then if we jump forward to 191 on page 74, you have findings from the CMA and French Competition Authority and others on the purpose and effect of open bidding.

"The CMA [in its market study]" -- this is 191(1) -- "found that Google designed Open Bidding to 'avoid creating an alternative route directly competing with AdX and to disadvantage third-party SSPs."

Next sentence:

"... Google's internal documents revealed that its desired outcomes from the introduction of Open Bidding included that 'the industry would stop investing in header bidding' ...

(2), the French Competition Authority decision, which Google settled.

The third line:

"... slow down the development of header bidding", one of the purposes of open bidding.

Then at (4) the Australian Commission, second sentence:

"We consider that there is scope for Google's ... Open Bidding fees to harm competition between [different ad exchanges]."

So we say although the modalities of the self-preferencing may superficially have changed, the purpose and certainly the effect of open bidding is to continue and

perpetuate a series of self preferences in Google's favour to the detriment of other competitors in the ad tech stack.

That is the open bidding phase.

Finally, sir, we have something called the unified auction or unified pricing. We pick this up at page 76, paragraph 192. You will see, sir, again at 192 it comes quite late in the day. It is five years into the claim period. So for the bulk of the claim period we are not primarily concerned with either open bidding or unified auction, unified pricing. It is the other forms of self-preferencing I have shown you, and in particular this concept of last look and other references to undermine header bidding.

Then, sir, very quickly on the unified auction and unified pricing we identify three adverse effects on competition that were part and parcel of this roll out. You will see, sir, 193:

"... AdX buyers and open bidders provide ... AdX ... with a very significant data advantage over third-party SSPs that have opted not to work with open bidding ..."

Then over the page at 196:

"... the competitive disadvantage suffered by rival SSPs as a result of Google's selective provision of 'minimum bid to win' information is in addition to the numerous disadvantages which they experience as a result of the many objectionable features of DFP that remain notwithstanding the introduction of a Unified Auction."

Pausing there, sir, that's the point I made at the outset, that many of these features, they either co-exist in parallel, or at the very least are continuations of the same effect in terms of self-preferencing.

Then at 198, third point:

"The introduction of the prohibition of publishers setting different reserve prices for different bidders prevent publishers from trying to mitigate the numerous advantages

conferred on AdX by DFP by setting higher price floors for AdX."

Again the adverse effects on competition of unified auction, unified pricing are well documented.

If we go to 194, the Australian Commission:

"We consider that the unequal provision of 'minimum bid to win' information places ad tech providers participating in header bidding auctions at a disadvantage compared to providers participating in open bidding ... Making 'minimum bid to win' information available to a limited group of bidders may cause advertisers to select ad tech providers using Google's services rather than header bidding alternatives. In addition, it may provide an incentive for SSPs to use Google's Open Bidding, rather than header bidding, so they [can] access this information."

Then in the next paragraph you will see a reference to the 10% penalty for dealing with a rival ad exchange.

So that's the first abuse, sir, in the pleading.

The second abuse we can pick up at 219. This is really the other side of the same coin. So the first abuse is Google's Publisher ad service, DFP, favouring its ad exchange, AdX. The other side of that coin is the second abuse, which is AdX, the ad exchange, favouring Google's Publisher ad server, the DFP.

We can pick this up at 219.

"On the advertiser side, it is in the interests of advertisers to be able to bid for impressions from as wide a range of publishers as possible -- as different websites have different audiences, and being able to purchase impressions from a large number of publishers allows advertisers to reach their campaign objectives more quickly. Every leading SSP except AdX allows demand side platforms (and their advertiser clients) to bid in competitive real-time auctions on rival publisher ad servers.

AdX, however, does not."

Then you will see at 221:

"First, technical restrictions limit the ability of publishers to access ... demand via rival ... ad servers."

So again these are technical restrictions imposed by Google.

222:

"Second ... AdX does not return a bid price to rival publisher ad servers, simply returning a binary 'sell' or 'do not sell' response."

Then 223:

"Third, even were AdX to return a bid price, the contractual terms and conditions of AdX prohibit the result of the AdX auction from being placed in competition with other intermediaries, i.e., if the AdX auction makes it possible to beat the reserve price ... indicated in the bid request sent to AdX, then Google's contractual terms require that AdX must sell the impression."

Again, just to round this off, the effects of this abuse on the market are extremely well documented, even pre-disclosure.

If we can turn to 236, so these are the findings of the CMA, the French Competition Authority and the Australian Commission. I would ask you, sir, to focus in particular on (2) of the French Competition Authority in the case Google settled:

"... 'while third-party ad servers, i.e. other than DFP, can be used in conjunction with AdX, such use is only possible under very limited conditions of interoperability, since Google imposes technical and contractual limitations on the use of the AdX platform through a third-party ad server. The modalities of interaction offered to clients of third-party ad servers are therefore inferior both as regards the modalities of interaction between DFP and AdX in the context of dynamic allocation, and to the

modalities of interaction between third-party ad servers and third-party sources of demand, in particular in the context of header bidding. Consequently, they do not allow third-party servers to meet the demand from AdX under conditions equivalent to those offered by DFP'."

Then at (3) the French Authority found:

"... 'the ability to access as many sources of demand as possible has a significant impact on publisher's revenues ...'"

Then very quickly over the page at (4):

"'... AdX ... does not offer publishers ... the same technical contractual conditions ...'"

Then (5):

"... this conclusion was supported by evidence from publishers: 'All the publishers interviewed stated that the preferred interoperability between DFP and AdX is one of the main, if not the main, reason for the attractiveness of DFP. One publisher, for example, stated that Google's tools generate more revenue, especially given the exclusive demand for ... DSPs ... which are not available for header bidding'."

Then at (6):

"... 'By not allowing competing ad servers[s] ... to meet AdX's demand with equivalent conditions to those offered by DFP, Google significantly impairs their competitiveness and limits their ability to compete on the merits. This practice has therefore strengthened the dominant position of DFP on the market for ad servers for publishers of websites and mobile apps ... The more favourable treatment of DFP by AdX ... has already had significant anti-competitive effects. This practice, which does not satisfy the conditions of competition on the merits, does not appear to be objectively justified'."

Sir, I am about to move to the third abuse. I wonder is that a convenient time?

MR JUSTICE MARCUS SMITH: Yes. That looks fine. We will rise for ten minutes.

Thank you.

(Short break)

MR JUSTICE MARCUS SMITH: Mr O'Donoghue.

MR O'DONOGHUE: Sir, we have wrapped up the first and second categories of self-preferencing. To recap, so this is on the supply side. The first category is Google's Publisher ad server DFP, which has a 90% market share. This is more or less the only game in town. They are preferring Google's ad exchange, AdX. Then the other sell side, self preference is AdX in turn preferencing Google's Publisher ad server, DFP.

So we then move to the demand side, which is the final piece in the self-preferencing jigsaw. We can pick this up at paragraphs 238 and following of the pleading, which is on page 92.

So the co-allegations are encapsulated at 237:

"... [Google's] demand side platforms (Google Ads and [something called] DV360) have treated ... AdX more favourably than rival [ad exchanges] ... undermining competition in the [ad exchange or] SSP market."

The critical point to appreciate in this context is 238:

"Google's DSPs constitute a large proportion of advertiser demand accessible by [ad exchanges] in [online] display advertising."

Google is not merely powerful on the Publisher ad side and the ad exchange on the supply side. It is uniquely not only present but extremely powerful on the demand side as well.

Then 239, last sentence:

"... Google's DSPs are generally regarded by publishers as a 'must have' source of advertising demand."

Then, sir, 240 we distinguish Google Ads, on the one hand, and then 244 is DV360. So you have two subcategories depending on the relevant demand side platform on the Google side.

Starting with Google Ads, you will see the two main practices at 240, and the basic allegation is that Google Ads was avoiding competing ad exchanges and mainly placing bids on Google's AdX and, secondly, placing additional restrictions on advertisers that wished to use a rival ad exchange.

Then at 241 over the page we see the effect of this:

"... less than 5% of Google Ads impressions are bought via competitor [ad exchanges] ..."

So we see in very clear terms we say an overwhelming preference, a 95% preference, in favour of AdX to the detriment of rival SSPs.

Then down the page at 244 we have the equivalent for the second Google demand side platform, DV360, and in some ways this is almost worse. 244 (1):

"... gives and/or used to give ... exclusive access to DV360 ..."

Then (2):

"This feature is not disclosed to DV360's advertiser clients clearly or at all, with the result that many unknowingly make selections that result in DV360 only bidding for ad impressions through AdX."

Then at 245 again we see the same outcome as we see for Google Ads:

"... most of the demand represented by DV360 is served by AdX. DV360 sends a higher number of bids to AdX than other SSPs, and it is easier for publishers to access DV360 through Google AdX."

Just jumping back, sir, 244(3), again the FCA decision has something bang on point in terms of these abusive conducts:

"'... Google actively sought to direct purchases made via DV360 towards AdX. One of these documents, for example, states that DV360 allows for smarter buying when mediation or header bidding is detected, favouring AdX when possible."

So, sir, on arguability we say that on each and every one of the self-preferencing categories we have identified there is not only either extant findings of abuse, or at least very, very strong suggestions to that effect, but in virtually all cases the regulators have gone further and identified concrete effects of these conducts on the market, including in particular based on internal Google documents.

We say in some respects that it is in some respects an unusual certification case where a lot of the terrain we say has been covered by the CMA, FCA and a terminus is close to being reached on a number of important related proceedings, and we say that is at least relevant at the certification stage.

Sir, I want to move on now to causation and counterfactual, which I think it is fair to say is a significant part of the fire focused in our direction. Now before I get to the pleading can I just sort of give you the view from 30,000 feet of what we say is the causal mechanism at play? Now we say there is essentially a common causal mechanism between the three categories of self-preferencing I have outlined. We say it is devastatingly simple. In the first two categories on the supply side Google engages in conduct that abusively preferences its own ad exchange, AdX, and, as I indicated earlier, the first two abuses are really two sides of the same coin.

DFP, the Publisher ad server, has a 90% market share. Therefore it is by virtue of that position more or less uniquely able to direct the bulk of Publisher volume towards its own ad exchange, AdX. We say that self-preferencing in favour of AdX on a grand scale, 90% market share, makes AdX artificially strong and rival ad exchanges artificially weak.

Now the other side of that coin is that AdX itself as an ad exchange in turn favours DFP as a Publisher ad server. I have shown you the technical and contractual restrictions that essentially make it much more difficult for a Publisher to work with an ad exchange that is not AdX. So we say these are two different mechanisms that have the common effect of propping up AdX in a way that we say is artificial. So it is a sort of on virtue circle or feedback loop.

So that we say effectively locks up the supply side, or at least enough of it to make a difference. Then on the demand or buy side you have Google's DSPs again abusively favouring AdX on a massive scale. We saw for Google ads 95% of their volume simply will not go near a rival ad exchange. It is all directed and preferenced towards Google's ad exchange.

Other ad exchanges realistically do not get a look in when it comes to Google's own demand. There is de facto exclusivity in terms of Google's own demand in favour of its ad exchange AdX. Essentially all of that demand or 95% of it is tied up in the Google stack.

Now the end result we say is that Google acquires and strengthens various monopoly or at least dominant positions that rival ad exchanges and Publisher ad servers cannot get traction in the market. This leads to substantially less competition against Google than there would be in the counterfactual. The ad auction system is simply much less competitive as a result.

In simple terms the auction becomes biased through these favouring conducts and Publishers and other stakeholders in the market are deprived of the benefits of proper real time competition between competing ad exchanges.

The unsurprising effect of this in pounds, shillings and pence is that the commission rates taken by ad exchanges have been and are higher than they would be under

effective competitive, one, and, two, Publisher's yields, their returns on their impressions or inventory or the sales of impressions are lower than they would be in the counterfactual, since there is no realistic alternative to Google. We say this really is not rocket science. If you are selling your house, you have no option but to go through a single estate agent in the country and there are less competing bidders, you will pay more commission to the agent and realise a lower sales price. It really is as simple as that.

Now we will come on to some of the details, but again it is important we say at this stage that even pre-disclosure these significant adverse effects are widely recognised in contemporaneous Google internal documents.

Just to show you one more, it is in the electronic only bundle. It is in volume B1, tab 4. It is at page 855. It is paragraph 377. It starts:

"From the earliest days ..."

Do you have that?

MR JUSTICE MARCUS SMITH: Yes, we do. Thank you.

MR O'DONOGHUE: So this is the pleading in effect in the States Attorney-General case in the United States. It says:

"From the earliest days of header bidding, DFP let AdX peak at the winning net bid from the exchange using header bidding, then displaced the trade by paying one penny more. Industry participants called this practice Google's “last look", which we have seen in the pleading. "Other industries call it analogous conduct by intermediaries “insider trading” and “front running”. According to a confidential Google study" -- which has not been disclosed and we have not seen, "evaluating the effects on competition, last look significantly rerouted trading from non-Google exchanges to AdX and Google's ad buying tools, protecting Google's market buying power in both.

Google itself admitted last look is inherently unfair."

Now, sir, I don't show you this as a sort of jury point. It is simply to show that we can see from the reference to a confidential Google study evaluating the effects on competition that there appear to be quite a number of contemporaneous documents from within Google evaluating, as indeed you would expect, the purpose and effects of its conduct on the market.

Now we have not had disclosure yet. We are in a somewhat unusual position that through these pending regulating judicial proceedings we have had a sort of sneak preview into what is the potential scope of these internal documents, and in my respectful submission they don't make very happy reading.

MR JUSTICE MARCUS SMITH: There is a big difference between an infringement case and a civil damages case. When you are looking at a period of infringement, Day 1 to Day 100, if you are saying there has been continuous abuse, then you don't really need to be too granular in terms of unpacking the consequences of that. You just need to find infringement and you can talk about the harm more or less in the abstract.

When you have an extra layer of quantification or causality between the infringement and the loss it has caused, you are somehow going to have to untie the flows by which the infringement was done, which, as you have said, are operating in parallel and perhaps in series, but overlapping series, if that. How are you going to prove the nature of the harm? Almost to say, yes, harm has emerged, but how are you going to discern the quantum of that harm? Is it going to be a question of running a counterfactual model which would embed within it certain assumptions which would be key to the abuses found and the data found and what you'd get is essentially a pricing remodelling in terms of what was -- would have been paid in the

counterfactual world and you will use that to establish the difference between the actual world and the world of the torts committed. Is that how you envisage it working?

MR O'DONOGHUE: In part, yes. I will come on to the methodology shortly.

MR JUSTICE MARCUS SMITH: Sure.

MR O'DONOGHUE: At this stage I am really asserting what you call the (inaudible) stage of gist damage.

MR JUSTICE MARCUS SMITH: Right.

MR DONOGHUE: All I am saying at this stage is that based on the internal documents and other evidence there is a strong basis even pre-certification to apprehend that these conducts, these abuses had a causal effect on the market in terms of -- you see the words if we go back:

"Significantly rerouted trading from non-Google exchanges to AdX."

We say there is already in terms of gist damage reference to internal documents where Google itself in the confidential study said "Well, last look has been wonderful for us, because it has rerouted business to us and entrenched our market power". So at the stage of gist damage, in a sense the minimum legal causation, we say that based on this document and others I will show you there is more than enough to put forward at the certification stage.

You are absolutely right when we get into methodology there will be a further layer of the onion qualification, where the task for us will be to decouple factual and counterfactual effects, and I strongly apprehend in that context Google will be saying, "Well, some of this rerouting would have occurred in any event, because people like our brand or our product", but that is really a responsive point.

Our primary case on both gist damage and on methodology is that these abuses have artificially shifted huge proportions of supply and demand towards AdX and had

a significant adverse effect on commission rates, which would have been lower, and yields, which would have been higher, but the task for us, of course, sir, absolutely is to distinguish the factual rates and yields we see, with the counterfactual ones and to provide you with a methodology that you can be confident, and subject to adaptations, that that will be tried, but I will come to that.

MR JUSTICE MARCUS SMITH: What you are saying about gist or actionable damage is that you only need to establish one form of actionable damage at the outset in the case of a continuous single infringement, whereas if you had a series of discrete infringements then, irrespective of quantification, the establishment of an actionable harm would have to be done on a case by case basis, but it may be that the process of actual quantification is not that different from a continuous series of single gist torts, but virtually the same.

MR O'DONOGHUE: Yes. We will come to that. I mean, in a sense yes, because what one is practically doing is laying one's hands on all of the auction data. For example, if we take the gross price effect, you will try to get your hands available on all the auction data that is reasonably available and try to triangulate that to work out here were the actual bids and try to simulate the counterfactual bids.

Sir, you are right that in a continuum of self-preferencing conduct one would be looking typically at auction data during that period. That is absolutely right.

Our starting point is essentially that although the modality is slightly different, the single and continuous infringement was a series of conducts that while superficially or facially different, in fact, were simply different means of achieving the same result, which was to prop up AdX and disfavour other ad exchanges. So that is the -- in terms of the gist, we say that is it, that the artificial rerouting of substantial volumes of supply and demand has artificially propped up AdX and operated to the significant detriment of

rival ad exchanges and the class members in this case on the supply side.

Now, sir, back to our pleading on causation. It starts at 265. Sir, one of the points that is made in spades against us is "Well, we don't understand your case in causation. You haven't got enough or a proper counterfactual" and so on. Now I will go through this, but I would make the rather obvious point that we have several pages in a standalone section in this pleading on causation and there is no attempt to strike out these paragraphs. I would suggest on a quick perusal that would be pretty ambitious, but let's go through them.

Sir, 265 is the point you put to me. We recognise and fully accept that we are in a world where we need to remove the infringing conduct and assess how the market would likely have operated without that conduct relying on assumptions and approximations as appropriate and of course there will be an expert component to at least some of that.

Then 266 is important. Now I recognise, of course, sir, the pleading may be the alpha and omega, but there is substantial cross-reference in our pleading to Latham 2 in particular and we say that cannot be air bushed from existence. It is part of our case as well.

So Latham 2, as we say in 266:

"... gives detailed consideration to particular aspects of the counterfactual that would pertain in respect of each of the three abuses identified herein in the context of his analysis of the effects of each abuse."

Then we see the sections in the report. I will come back to that. I just want to make clear there is a linkage between pleading and Latham 2 in terms of causation and counterfactual.

267 is very important:

"... considers ... not only ... individual effects ... how they interacted and reinforced one another, creating collective dynamic effects that influenced how ad tech markets developed over time ... In particular, Dr Latham considers a scenario where there were no longer abusive self-preferencing arrangements ... ie, where the three ... abuses pleaded herein had not occurred. In this context ... he would 'anticipate quite profound differences in the working of competition within the ad tech stack'."

Then we unpack the considerations behind that.

(1) Wouldn't have this artificial self-preferencing diverting towards Google's associated operations.

"That ... playing field would result in more competition in publisher ad servers and a substantially less concentrated publisher ad server layer."

So what we are saying here is instead of DFP having a near monopoly you would have a more competitive Publisher ad server layer:

"(2) The reduction in AdX's advantages ... would result in a less concentrated SSP layer, making access to AdX demand less critical for publishers and making it more critical for AdX to ensure it interoperated broadly so as to maximise the number of publishers making use of it."

Again we say you would not have a world in which AdX has a dominant position. You would have a more competitive market that would inure to the benefit of Publishers and other stakeholders.

"(3) Increased competition, in the counterfactual, between publisher ad servers ... would discipline DFP and reduce its ability to engage in conducts that otherwise limited competition between SSPs or harmed publishers. Instead of outcomes being pre-determined or affected by Google's abusive acts of self-preferencing, publishers would switch to publisher ad servers who were catering more to their interests.

"(4) The reduction in AdX's advantages and . concentration in the SSP layer would result in more competitive outcomes among SSPs. This would involve SSPs operating at increased scale and thus [becoming] more competitive ..., which in turn would intensify price competition between SSPs and reduce the 'take-rates' earned throughout the ad tech stack."

Then you will see (5) and (6).

Then over the page we then -- so those are the general causal mechanisms. You will see, to round things off, at 268 there is again a cross-reference to Latham 2, where there is analysis of profitability and the market exit and marginalisation of competing ad exchanges and DSPs.

Then at 269 there is a cross-reference to harm to class members.

Then, sir, at 270 and following, it is 270 to 271 for gross price effect; 272 for take-rate effect; 273 for umbrella; 274 for overhang. We then go on to unpack causal mechanisms for each of the heads of damage we claim. Now I am not proposing we go through these line by line, but the tribunal will I hope have heard my point loud and clear that in addition to the general causal mechanisms that give rise to the gist for the methodological component of the case we further unpack with greater specificity the causal mechanisms in relation to each of those. I would invite the tribunal to read those at a convenient moment.

Now, sir, before I come on to Google's arguments on causation and the counterfactual there is one important point which is really an adjunct to our overarching point that this is a single continuous infringement. It links, sir, with the question you asked, which is are these conducts hermetically sealed in time or effect, or are they effectively a continuum over time? Our case is emphatically the latter.

But there is a further sub point in this context, which is practically important, including

potentially for limitation, which is that prior to disclosure there's actually a good deal of uncertainty as to when particular Google practices started and if they have truly ended and, if so, when did they end.

We can pick this up briefly in the claim form. It is at 135 on page 52. We say:

"It is difficult to be certain based on publicly available information", which I supposed is all we have at this stage, "how different features of DFP have interacted with each other over time, but the PCR's present understanding of the main DFP features is as follows:

1. Dynamic Allocation has been in place ... since the late 2000s ... and remains in place today."

So that is certainly one thing which has continued.

Then "last look" advantage under (2) seems to have come into existence at least not later than 2014 and has continued we think for at least five years until 2019. Again there is some uncertainty.

Likewise:

"Dynamic Revenue Sharing operated in parallel with Dynamic Allocation (and the 'last look' advantage over header bidders that resulted from it) from around 2014 ... until ... September 2019 ...

"(4) Open Bidding was introduced in April 2018 and continues to operate today ..."

"(5) The Unified Auction, Unified Pricing Rules ... introduced in September 2019 and continue to operate today."

You will see, sir, then 136, again something which may be practically important:

"It is also difficult based on publicly available information to understand what, if any, changes Google has made to the operation of DFP and AdX since September 2019, and the PCR will seek explanations and disclosure from Google in respect of this.

Among other things, as part of the French Competition Authority's Decision, Google committed to make certain changes to the way in which DFP and AdX operated and interacted with each other. The PCR is not aware of the extent to which, or in respect of which territories, these commitments have been implemented (or the extent to which any implementation has been satisfactory and/or effective)."

So putting it, sir, at its lowest, there is at the pre-certification stage in the absence of disclosure there is a high degree uncertainty as to when exactly things started or ended, but we strongly apprehend and we have pleaded that the bulk of them either overlap completely or overlap for a substantial period of time.

Now, sir, we have put this in graphical form, which may be helpful. It is at the annex to Latham 2, which I think is B1, tab 5, page 1831. It is figure 38. Does the tribunal have that?

MR JUSTICE MARCUS SMITH: Yes. Figure 38.

MR O'DONOGHUE: You can see the predominant feature of this is a series of rather long continuous lines. So we say, therefore, this is a single continuous infringement in a very real and tangible sense, because you will know, sir, from cartel cases that often what occurs -- the more classic single continuous infringement is where there is a series of meetings. Somebody attends one meeting and says "Well, I shouldn't be liable for the pre-existing and subsequent period" and the way the SCI operates in that context is if you attend a single meeting and are on board with a common aim, it doesn't matter that you were not directly participating before then or indeed after, whereas in this case what we say one has by contrast is for the most part either continuous conduct or at the very least substantially overlapping conduct for a substantial period. It is not an artificial single continuous infringement, if I can call it that. We say in a very real sense it is a single and continuous infringement. It is both

single and continuous and not disjointed in the way one sometimes sees in cartel context.

MR JUSTICE MARCUS SMITH: Is it also, though, muted (inaudible) as consequences of time which are felt (inaudible) case. It is continuous in the sense there is no delay.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: Then that element of repetition (inaudible).

MR O'DONOGHUE: We say substantially so in two senses. One, the acts themselves have either been continuous or substantially so. Two, in any event an act that occurs in period one has an enduring effect to subsequent periods. If I can just give you some references to the pleading -- I mean, our core case, and I have said this more than once, and it is not the last time I will say it, that although chronologically and superficially the conducts seemed to have modified, in reality they are simply different ways of achieving the same abusive self-preferencing end. I will just give you a few references in the pleadings to that. We start at 196, page 77, third line:

"... many objectionable features of DFP that remain notwithstanding the introduction of a Unified Auction."

So we do not accept that when one gets to September 2019 the unified auction is implemented and that airbrushes the past. We say that many of these past objectionable features and effects endure.

If we then jump to Latham 2, 375, which is in tab 5, 1754. This is open bidding. So we see:

"... Google has undermined header bidding by DFP ..." and so on.

We say:

"... header bidding ... would have been available earlier and on a higher share of

impressions."

Over the page at 376, fourth line, we say:

"... it", open bidding, "replaced one type of advantage AdX had over competing SSPs (the ability to bid ahead of them) with another (asymmetric fees)."

We do not accept that one gets to each micro conduct and then suddenly draws a line under everything that preceded it. These things are highly interlocking and enduring.

Then at 381 over the page:

"... Google made changes in the way the DFP and AdX services function through the unified auction and unified pricing rules introduced in 2019. The effects of the conduct set out above continue or are likely to continue despite these changes."

That is our case. Google, of course, strongly disagrees with that. We say as a pleaded case it is perfectly viable and sound. There is a strong basis in fact for the pleading.

On that theme a final point is you may have seen, sir -- you will be aware that there is a Google factual guide which was appended to their response to the claim.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: In our reply, if we can pick this up in the D bundle, D1, page 15, as part of our pleading we have a few pages dealing with aspects of the factual guide we say are simply wrong, or we otherwise do not accept, and again I am not proposing to go through those in excruciating detail, but it does go to the same point, which is our case is that these conducts are single, continuous, enduring and so on. Google, of course, does not accept that and it is trying to give the impression things started and ended on particular dates and are hermetically sealed.

We do not accept that and at the very least this will be a hotly disputed issue going forward but again the pleadings you see in the claim form we say are perfectly

respectable and proper things for us to plead at this stage and are strongly supported by our primary case, which is this is a single and continuous infringement.

I am going to move on to give you the plan for the rest of today. I am going to deal now at some length with the points on causation and counterfactual which have been raised by Google. I will then outline a methodology. I think on that, sir, I can be more brief, because to some extent we say it is up to Mr Pickford to do the running on granular methodological points, and we will hear what he says, but I will set out our stall.

I will come back then, sir, at the end to the question you asked about the road map for market definition and dominance, which I can take very quickly. Then if there's time, I may touch on the case management issues you raised and then hopefully hand over to Mr Facenna towards the end of the day.

Sir, on causation and counterfactual if we can pick up Mr Pickford's skeleton at paragraph 12, you see, sir, about halfway down the paragraph it says the claim should be struck out. It is in the A bundle.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: He then goes on to say, which is true, that we have not identified the paragraphs of the claim form they say should be struck out. He says Google's attack is that the claim as a whole should be struck out. So punches are not being pulled. The whole thing must be struck out according to Google. There is no middle ground. It is all or nothing.

The reason he says that, the pleading does not contain a properly pleaded and realistic counterfactual that articulates our case on how the conduct restricted competition, one, and two, how it caused damage relative to a situation absent the conduct, and you see that in paragraph 9 as well, and then the same theme is picked

up at paragraphs 29 to 31 of his skeleton where he says, "Well, you may have pleaded a counterfactual, proper causation for some sub components of the abuse, but not for everything".

Now sir, I am going to tackle these head on. These are ambitious arguments in my respectful submission, but before we get into the weeds can we just sort of remind ourselves of what was the legal position? If we can turn to Merricks, which is in the second authorities bundle. Today, of course, is not a trial or a mini trial, as you made clear, sir, from the very outset. It is certification and it arises in a context where we have had no disclosure whatsoever from Google.

The test of the certification stage we say at least seen in context is a relatively low one. Google's focus on the need for a large number of counterfactuals should not we say obscure that basic point. So if we pick this up in Merricks, it is at second authorities bundle, tab 50. It is at 1885. A couple of lines up from the bottom it says:

"For present purposes there were two relevant conclusions."

Then this is the analysis of the process.

"The first was the threshold test for establishing the pleadings disclose a cause of action which was equivalent of the strike-out test in English civil procedure. The second was that the threshold established that the other condition certification should be some basis in fact for a conclusion that the requirement was met. This low threshold derived from the Supreme Court's earlier decision in *Hollick* was not a merits case either the claim itself, but the question was whether the applicant showed there was some factual basis for thinking the procedural requirements for the class action were satisfied so that the action was not doomed to failure at the merits stage by reason of a failure of one or more of these requirements. The standard comes nowhere near a balance of probabilities."

Now our case in a nutshell today on both gist damage counterfactual and indeed methodology is that for the purposes of certification it more than meets the requirements at this stage and the solution, if there is any issue, is active case management of these issues and not the nuclear option of striking out the entire claim today, as Mr Pickford invites you to do.

Now again at the risk of stating the obvious one of the reasons for a relatively low threshold at the certification stage is that the PCR will not have had the benefit of any disclosure. I know, sir, in Gormsen 1 you described it variously as the "not my problem" fallacy, and there were elements of Saint Augustine as well, but in practical reality we have had no disclosure. A point is made in the skeleton "Well, one of the law firms and some of CRA were complainants before the French Competition Authority", but again we have not had disclosure of any documents in these proceedings.

We have, as I have shown the tribunal through the US proceedings and to some extent the French Competition Authority proceedings happened upon a series of Google internal documents and confidential studies that seem to be highly relevant to the issues in this case.

Now it was, of course, open to Google to say "Well, you are wrong about this document. Here is the confidential study" and to tackle the point head on. Instead what you have is essentially Jujitsu around the fringes of the issues essentially on an abstract level.

Now I will deal with all that head on. We say there were options open to Google. I don't criticise them for not taking them, but it was open to Google to say, for example, on the gist damage, for example, this point about significant rerouting of demand on a last look, it was open to them to say "Your gist damage case doesn't get off the

ground, because that confidential study doesn't go anywhere near as far as you would think".

Now I understand for tactical reasons why they would choose not to do that, but the cakeism, in my respectful submission, is something at least to be borne in mind, but I will deal with the points head on.

Now just to unpack the causation and counterfactual points in a more systematic way, because we have been faced with a bit of a blunderbuss. In my submission it is important to be quite precise as to what one means by causation and counterfactual in differing contexts. Now one, of course, is liability. One, of course, is gist damage and one, of course, is the counterfactual, which is an inevitable part of any sensible methodology, and with respect to Google these lines have been rather blurred in the submissions we face.

Now the first point which in my submission is either crystal clear, or at least not within an ass's roar of a strike out point, is the question of liability for abuse and is there a mandatory legal requirement in terms of establishing liability, that the claimant must have a counterfactual to prove the abuse.

Now I accept a counterfactual may be extremely useful in that context, but the strike-out question for today is; is there a mandatory legal requirement that our pleading does not meet on the question of liability to plead out a counterfactual? We say, in fact, we have, but one in our submission does not even get to that stage.

We say this emerges extremely clearly from the Court of Appeal in National Grid. It is in authorities bundle tab 26 is the first, page 659. Talking about liability abuse:

"There is no legal requirement for a counterfactual at all."

Indeed, Mr Pickford, he accepts the force of that point, because if one goes to his skeleton at paragraph 11, back in the A bundle, you will see, sir, he says in relation to

National Grid:

"Incorrect statement of law."

So the first plank of Mr Pickford's strike-out --

MR PICKFORD: I hesitate to rise, but what it actually says is:

"To the extent (which is not accepted) that National Grid can be read as dispensing with the need for a coherent counterfactual analysis in competition law cases, it would be an incorrect assumption."

This is a relatively important part of the sentence that is overlooked.

MR O'DONOGHUE: My submission is very simple. It is a correct statement of law and it is hopeless to suggest that is remotely suitable for strike out particularly at the certification stage. In a sense the proof of that pudding is in paragraph 11 itself.

The best Mr Pickford can do with the resources available to him is to dredge up a case from 1966, STM, to suggest -- which is not even about abuse. See the absence of the agreement in question. That's the best he can do to suggest the Court of Appeal got it badly wrong. In any event we are a very, very long way from strike out territory on this point.

So in terms of counterfactual liability in my respectful submission, we can forget about that.

The second point, even on causation and damage Google misstates the correct legal position. We can go back to Merricks in the authorities, bundle 2, tab 50, paragraph 46. It is on page 1887. At the bottom, sir:

"All they would need is individual claimants to establish a cause of action which would be proof that the breach caused them some more than purely nominal loss."

That is the gist damage point:

"To be entitled to a trial of that claim they would again individually need only to be able

to pass the strike-out ... summary judgment tests, i.e., to show the claim as pleaded was raised as a triable issue and they have suffered some loss from the breach of duty."

Then importantly:

"Where in ordinary civil proceedings a claimant establishes an entitlement to trial in that sense, the court does not then deprive the claimant of a trial merely because of forensic difficulties in quantifying damages once there is a sufficient basis to demonstrate a triable issue whether some more than a nominal loss has been suffered. Once that hurdle is passed, the claimant is entitled to qualify their loss almost ex debito justitiae. There are cases where the court has to do the best it can upon the basis of exiguous evidence ... in many cases unashamedly resorts to an element of guesswork.

"48. ... resort to informed guesswork rather than (or in aid of) scientific calculations is of particular importance where, as here, the court has to proceed by reference to a hypothetical counterfactual state of affairs."

So we say the point is that once you establish liability and at least some gist damage, quantification of loss within very broad parameters, there is then a question of fact decided within quite broad legal principles.

Now the counterfactual I fully accept may, of course, be important in the latter context, but when one is at the stage of legal causation and gist, the counterfactual may not either arise at all or certainly to the same extent.

Sir, I am about to move on to something else. I wonder would that be a convenient point?

MR JUSTICE MARCUS SMITH: Yes. Just in terms of end date and time this afternoon. I have a meeting outside this building at 4.30. So we will have to rise hard

stop at 4.15. I am very happy to start at 1:45.

MR O'DONOGHUE: I am making good progress. Given my submissions on this not being a mini-trial, it would be a bit odd for me to insist on more airtime, so I am content to start at 2 o'clock.

MR JUSTICE MARCUS SMITH: Thank you.

(12.56 pm)

(Lunch break)

(2.00 pm)

MR JUSTICE MARCUS SMITH: Mr O'Donoghue.

MR O'DONOGHUE: Returning to the counterfactual, I have dealt with what we say are two important legal points in terms of the duty to plead a counterfactual.

The third point in some ways we say is the start and end of this debate, because we say we have plainly pleaded a case on causation, including counterfactual at the certification stage is we submit is more than adequate.

We have already seen this in the claim form. If we can just quickly reacquaint ourselves. It is at B1, 265, page 104.

MR JUSTICE MARCUS SMITH: B1, 265?

MR O'DONOGHUE: Volume B1, tab 1, the claim form.

MR JUSTICE MARCUS SMITH: I am grateful.

MR O'DONOGHUE: Page 104. Again just to recap on this, so we have -- first of all, it is a self standing section on causation, one. Two, it has two and a bit pages on the general causal mechanisms. Then at 270 and following for each of the heads of damage we claim there is a further section of pleading dealing with the causal mechanisms for each of gross price effect, take away effect, overhang and umbrella. This I think totals something like eight pages.

As I indicated before the lunch break, the idea that these eight pages should be struck out at this stage is, with respect, for the birds.

Sir, you will see at 266 I touched on this very briefly, but it may be useful to turn up the underlying documents. There is a cross-reference at 266 to Latham 2, where he deals with the counterfactual at some length. So we say that has been fairly and squarely incorporated in the pleading.

Just to quickly look at what Latham 2 says on this, it is in tab 5 and starts at 1740. You will see at 4.3 the heading "How might competition have evolved without the leveraging abuses". Again I am not going to go through this in excruciating detail but what you have, sir, in Latham 2 is 31 pages where he deals both generally and specifically in relation to the three self-preferencing categories with the counterfactual.

We say it is simply wrong to suggest we have not directly and indirectly pleaded to the counterfactual. We have done so, in my submission, in staggering detail, and indeed from my own experience what is set out in the claim form and in Latham 2 far exceeds anything I have seen in any collective proceedings I have been involved in to date.

Again the notion that this should be struck out now, that it cannot be case managed, that we cannot advance post-certification with further developments is in my respectful submission ambitious.

Now I have shown the tribunal a whole series of documents internal to Google from the regulatory side of things, where we see in quite some technicolour Google itself recognising the effects on the market that its conducts had. You remember, for example, the confidential Google study on the massive rerouting effect of last look. The tribunal will recall the document saying "20% seems to us unsustainable as a commission. 5% seems to us competitive".

So in terms of a factual basis for the counterfactual we say both as a matter of pleading

and unusually as a matter of contemporaneous Google documents to date, quite apart from the regulatory findings, we say there is a rich tapestry before the tribunal even pre-certification, which I would respectfully suggest ought to give the tribunal confidence that we are certainly very much on the right track when it comes to causation and counterfactual.

Now to look at the other end of the telescope, sir, one of the reasons why the tribunal is understandably strict on pleadings is that a defendant needs to know what is the case they have to meet, and one of the many areas of unreality about Google's submission is that they are on the receiving end of a very large number of regulatory and judicial proceedings in which there are either extant findings to which they have responded or, in the case of the Commission, a response to a statement of objections. It is no exaggeration to say that for the last several years one of the regulatory matters that has occupied a significant proportion even of Google's resources is abuses in ad tech, and we rely on a very large number of those findings and materials, but the suggestion that in the real world they are in the dark as to the case they have to meet, they don't understand where we are coming from, given the regulatory context as well, in my respectful submission is utterly unreal and lacking in common sense.

Again, even if there was a scintilla of a point here, the suggestion that the nuclear option of strike out is the appropriate answer we say is wrong in any event.

The fourth point on the counterfactual is in reality Google's case is not that we have not pleaded a case on causation counterfactual. It is that we have not done it in a way they say we should have done. Google in effect has its decision tree as to how they say we should plead the counterfactual. We can pick this up in their skeleton. It is in the A bundle at tab -- the second tab. It is at paragraphs 19 and 20. You can see from the heading "The approach the PCR should have taken to the claim form". It is

on page 6 of the skeleton, the heading to paragraph 19.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: So it is what they say we should have done. You see, sir, for example, in 19 and 20 -- they accept we have done something. They just say we have not done it to their satisfaction. So in a sense the debate is not about whether we have pleaded any causation counterfactual. It is about whether it meets Google's demanding requirements. Now the tribunal has my point. We have pleaded this in considerable detail, and I won't repeat that.

Now if we return to the skeleton and if you look at footnote 19, the cat is now out of the bag in terms of what Google say we should have done. What they say in that footnote, they say actually there are 15 separate abuses, maybe 17, and that should be divided into the three constituent components for 1A, giving 17. They suggest in paragraph 19 "Each of the effects claimed."

So what Google are saying, they are saying at the very least you should have 15 counterfactuals, maybe 17 if you split 1A into two, and potentially 34, because you have to have another mini counterfactual, each of the gross price effect and the take rate. So that is their demand as we see in paragraph 19 and footnote 19.

Now we say that is completely misconceived. One very simple reason is that is not the case we are putting forward. Our primary case is a single and continuous infringement where there is a common counterfactual. It straddles the three mutually reinforcing incidents of self-preferencing.

It is, of course, striking that Google cites no legal authority for the surprising suggestion that we need 15, 17 or 34 counterfactuals. The reason is there is no such authority.

Most of these cases will almost by definition involve multiple incidents that cumulate to give rise to either a single abuse or a single continuous infringement comprising

one or more abuses.

Just to give the tribunal a very good example of this, it is the Slovak Telecom case in tab 6 of the authorities bundle at 158. Now it is we say significant that Google has not come forward before the tribunal with any decision or judgment from Brussels, Luxembourg or this jurisdiction showing where a claimant or a public authority has been required to set out multiple counterfactuals and sub-counterfactuals on the scale they are suggesting. Indeed, as we will see from Slovak Telecom, the decisional practice we have says precisely the opposite.

So if we turn up Slovak Telecom and if we jump forward to page 8444, please, you can see it says:

"Slovak Telecom's unfair terms and conditions". It is quite lengthy but what you have in this case in a nutshell are two things happening. One, there were two abuses found to comprise single and continuous infringement. Then within the first abuse the unfair terms and conditions, there were literally dozens of what I would call micro conducts or micro abuses or micro incidents where Slovak Telecom was accused of having done or not done certain things.

The basic allegation was that in the context of giving rivals access to his local loop at a wholesale level, Slovak Telecom put forward a massive series of road blocks in the way of the requesting parties through information demands, bank guarantees and so on. The decision goes through these dozens of separate incidents in a sequential fashion.

Then crucially if we jump forward to 8576, when it comes to the assessment of the effect on the market and the effect on competition, this is all looked at in aggregated terms and essentially what you see in sections 9.2 before you. What you see, sir, is really quite a high level analysis saying this had an impact on the market, phased

barrier to entry. We then jump forward to 8580, the heading "Competition was probably not as effective as it could have been" and so on.

So what one doesn't see is what Google contends for is a series of micro-counterfactuals for each incident underpinning the abuse. It is all aggregated up at a relatively high level in terms of the impact on the market and the counterfactual effect. What you do not see is what Google contends for is a series of matryoshka dolls where you have a counterfactual within a counterfactual within a counterfactual.

Now just to round this off, if we then look at 1124, which is on page 8596, you will see in the last sentence -- the heading is "ST's counterfactual analysis" -- the last sentence:

"The Commission considers this analysis not only irrelevant but wrong in any event."

That goes back to the point I made earlier that when one is in the realms of liability, there is no legal requirement of a mandatory nature to plead a counterfactual. Obviously it would be useful, but it is not mandatory.

Then the final reference in Slovak is towards the end. It is at 8612. You will see this is another case in which there was a single and continuous infringement.

Of course, the two sub-components in this case were in a sense quite distinct, because the first set of abuses were unfair terms and conditions, so not giving information, insisting on bank guarantees and so on and so forth, measures designed to stymie the requesting party's ability to get access, but the second abuse in this case was a margin squeeze, a very technical squeeze in relation to price and costs, and in a sense you would think something quite distinct and yet these distinct elements nonetheless aggregated up within a single continuous infringement, as we see at 1507. We say in our case where the three self-preferencing conducts are highly interlocking and mutually reinforcing. It is a single and continuous infringement in the

truest possible sense.

Just to give the tribunal the references in our claim form 267 we speak of collective dynamic effects. Latham 2 at 541 he talks about the conducts being multiplicative. So the collective, reinforcing and dynamic effects of the conducts is a central part of our case in the single continuous infringement.

The penultimate point I want to make under this heading is we have made clear and Dr Latham has made clear that the methodology can, if necessary, in due course be adjusted to reflect a different constellation if certain types of abuses or certain types of conducts underpinning abuses or indeed types of damage are not found at trial.

If I can just quickly give the tribunal a reference to Latham 2, it is in the first B bundle at tab 5, 1776. It is at 461 and particularly 461(b). It mentions the tractability and adjustability of his methodology and that is something we have well in mind. I will come back to this when we come to methodology, but at the certification stage the PCR does not need to have a full suite of contingency or fallback positions or methodologies that assume partial failure of the claim or indeed all possible permutations. It is enough if we have a solid primary arguable claim and supporting methodology linked, where appropriate, with causation and counterfactuals.

The final point under this heading is if one takes a step back and considers the implications of Google's arguments for the certification stage, we say they are quite profound and troubling.

You, sir, said in a recent Boyle judgment -- you don't need to turn it up -- I will give you the quotation. It is Boyle, tab 74, paragraph 8(3):

"It might be said and fairly said that already too much encouragement has been given in overloading what is intended to be a straightforward test of triability turning the Microsoft Pro-Sys Test into something close to a mini trial. We agree with the

Chancellor that such an approach is to be discouraged."

In my respectful submission the suggestion that at certification stage we need 15 mini counterfactuals or possibly 17 or even 34, seeks to reverse and not merely swim against that tide. As King Canute found out, that is no easy thing. So we say this direction, the suggestion that we go down these 15, 17 and 34 rabbit holes at the certification stage cuts completely across the recent case law on certification both before this tribunal and indeed the Court of Appeal. It is a recipe for complexity on a grand scale.

Sir, you will quickly appreciate if one goes down the route of 15 counterfactuals interlocking, where you then need to adjust the subsequent counterfactual or permutations within the previous counterfactual, that's a warren of rabbit holes on an unbelievable scale and it would transform the certification process into something that couldn't even fairly be described as a mini trial but as something akin to an actual trial, and in our submission that is completely against the grain of all the recent certification case law and has nothing to commend it.

Finally, sir, before I move on to my penultimate question on methodology and I will then come back to the case management issues you raised before handing over to Mr Facenna. There is one final point in the counterfactual. We say there is a logical fallacy or error at the heart of the suggestion that we need 15 or however many counterfactuals, because the counterfactual world one in which all of the abusive conducts are stripped out. The question is what would happen the market in the counterfactual?

In my submission the fallacy in Google's approach is they essentially assume that all of the measures they put in place in the factual would either be identical or substantially the same in the counterfactual. What one needs to do in my submission is you rewind

the clock. You assume that all the abusive conduct is stripped out. Then you are asking yourself how would the market have functioned in the absence of the abuses? One of the reasons why we say their approach is misguided, that you can't simply bake in the subsequent 14 counterfactuals and say "Well, we assume the market would have been broadly the same as in the factual". That's a misconceived approach.

Our basic point is that these abuses had a mutually reinforcing and interacting effect and that the relevant market would have developed very differently but for these abuses.

I will come on to this in methodology, but in a nutshell that counterfactual market is not one in which AdX, which is 60% of the market, ends up either not participating in real-time bidding at all or participating on conditions that effectively permanently disadvantaged the other ad exchanges. Our counterfactual is a world in which the auction is real-time and is unbiased because of these conducts.

Just to give you references to the claim form, it is at paragraph 277(4). It is at B1, tab 1, page 111, 277(4), a cross-reference to Latham 2:

"... 'if some categories of abuse are identified and therefore removed from the counterfactual, then Google's incentives to engage in other categories of potentially abusive conduct will be reduced, or even removed, regardless of whether these other conducts are abusive or not. On this basis it would still be correct to base damages on the combined effect of the various conducts."

So, sir, in a nutshell we say we have a richly developed case on causation and counterfactual and, as we will see when we come to methodology, that is equally grafted on to the methodological approach.

Sir, turning to my penultimate topic on the methodology, to a certain extent we will

have to see what Mr Pickford says tomorrow, but I will show the court the pleaded case, the parts of Latham where the methodology is explained and at least deal with it at a pretty high level with some of the criticisms which have been made, at least in writing, and then I will move on to the case management points, as I indicated.

Now, sir, before we get into the methodology itself can we just remind ourselves of the legal requirements in terms of methodology at the certification stage. I can take this extremely quickly. I know, sir, this will be depressingly familiar to you at least.

We emphasise three points. First -- well, if we can perhaps turn to Gutmann in the Court of Appeal. That's probably a good place to get the greatest hits on the certification of methodology. It is in the third authorities bundle, tab 66 and it is at page 2860. Lord Justice Green. I can take this pretty quickly. It will be extremely familiar. I am not teaching anyone to suck eggs here.

"53. The Microsoft Pro Sys test not a statute ... no magic to it ... common sense approach ..."

We agree.

"... methodology [must be] based on a counterfactual ..."

Again we are in violent agreement with that.

The second sentence of 54 is important:

"It is quintessentially hypothetical and, for this reason, will use assumptions and models and, frequently, regression analysis. It is therefore not a fair criticism ... [to say] that it is hypothetical."

55. Methodology typically and certainly in this case arises pre-disclosure. That is important in terms of demands which can be reasonably placed on PCR.

56, important we say:

"... the methodology must identify the issues, not the answers. The CAT is concerned

to identify the issues and gauge whether the methodology proposed ... is workable at trial."

Sir, I would respectfully suggest that goes back to where we started today, which is if there is an arguable case how do we proceed in terms of managing this? What would be the shape of the trial?

57 again is the Merricks point. It may well be, depending on what data is ultimately available, that the quantification exercise is a bit rougher and readier than one might have hoped from the outset.

Then 58 and 59 go together. It is on the question of broad axe. 59 we say is an important point:

"The appellants argued that the broad axe did not apply to liability issues and that there was no authority establishing [this]. This misunderstands the purpose of the axe. It is not so much a substantive principle ... [but] a well-established judicial practice whereby judges eschew artificial demands for precision and the production of comprehensive evidence on all issues and instead use their forensic skills to do the best they can with limited material to achieve practical justice."

Then 60, which in a sense is back to the future of Merricks:

"The test is about practical justiciability."

Then, finally, the point we have also seen in Merricks. 61, the height of the bar is in context relatively low. That needs to be borne in mind.

So that really captures in my submission the core principles on methodology.

Two further points. We don't need to turn up the authorities, but they are worth mentioning. The methodology is not required to anticipate and address every conceivable issue of defence that the defendant say they may or will run. That's Court of Appeal Trucks, paragraph 102.

The final point is a pragmatic one, which has been made repeatedly by this appeal in Boyle and more recently in Gormsen 2, which is that certification is not a once and for all thing. As the case is actively case managed, in extremis something can be decertified. Issues can be hived off or shaved off and in principle at a later stage again in extremis a claim might well be struck out, even if it had been certified at an earlier point.

So in a sense everything we say remains up for grabs. The act of certification, while it is highly significant and consequential, it is not the be all and end all and is the start of a longer journey that includes case management and other techniques. That is all I wish to say by way of legal principles on methodology and certification.

Then, sir, to move to methodology itself, I will take this at a reasonably brisk pace, because I suspect much of this will be more in the nature of a reply than submissions today but I will try to develop this as fully as I can in the time available.

What I am going to do is to go through the two main parts of the methodology, which are the gross price effect and the take rate effect and I am going to split it into two parts. One is to give you the gist of the effect we have in mind and point you to some of the evidence and then deal with the methodology itself as set out in the claim form and more extensively in Latham 2 and Latham 3.

So starting with the gross price effect, we say the essential idea is a pretty straightforward one. If you have less competition because of abuse of self-preferencing between ad exchanges leading to supply being artificially directed to Google's AdX, Publishers will achieve lower yields for the sales of their impressions than they would in a world where AdX and the other ad exchanges compete in the absence of self-preferencing. So that is the basic notion.

Now the existence of the gross price effect is not merely we say intuitive, to put it in

pretty plain terms. If you have a more effective auction, high density of bidders, then the seller, all else equal, will do better. That's the basic idea.

What the self-preferencing abuses have done is they have either ensured that AdX is not competing at all, and again we are talking about half of the market, or 60% of the market, or at the very most they are competing on a playing field that is not level through various acts of self-preferencing, but either way the Publishers are not getting the benefit of the ad exchanges who have the highest valuation or particular impressions competing to the full extent. The competition is either impossible in many cases or at least is substantially gerrymandered in Google's favour.

Now just to give the court a sense of the scale of what we are talking about, the tribunal will remember that we explored before lunch the concept of header bidding, which was a Publisher initiative designed to introduce some measure of real-time bidding competition between SSPs other than AdX. AdX, as we know, did not participate in header bidding.

There is already a wealth of empirical data showing that limited form of competition, notwithstanding Google's attempts to kill it, led to a significant increase in Publisher yields and therefore a significant positive gross price effect. We can pick this up in Latham 2 in tab 5 of B1. It is at page 1789, paragraph 506:

"The existence of a gross price effect is consistent with publishers' experience following the introduction of header bidding ... header bidding was the most successful publisher driven initiative to introduce some" -- I emphasise some -- "real-time competition between SSPs that increased the revenues publishers were able to earn ... Google's own estimates indicated that following the introduction of header bidding some publishers saw a rise in their revenue of 40%, with some seeing an increase in revenue of even 70%. The CMA Market Study found that header bidding allowed for

a more efficient allocation process compared to the waterfall, which in turn led to increased price competition among multiple [ad exchanges] and higher price per impression. Meanwhile, Facebook" -- so this is a third party with no skin in this game at least -- "explains publishers who used header bidding saw an increase in their yields and also a revenue increase of 10% to 30% ".

So this gives one a small but important window into the rather obvious point that if you can get more ad exchanges competing the impressions, that is a good thing for Publishers and will lead to increases in their yields. So that is the gross price effect.

A couple more references before I move on to the methodology itself. If we go to the States Attorneys General pleading, which is at B4, 849, 357:

"... Google internally acknowledged, 'pitting multiple exchanges against one other fostered price competition, which was good for [publishers'] business'."

Then 373 on page 854, the last sentence:

"A Google executive advised colleagues internally, 'I would suggest being very careful here what we say to publishers. Remember, Jedi negatively impacting header bidding is a Google desired outcome. Publishers are likely fine with header bidding. They make more money with it'."

Then finally the French Competition Authority decision. It is at 1087. 1096. Forgive me. 177, the first sentence:

"... without the right of 'last look' third party SSPs would likely have won a significantly higher percentage of impressions."

Then there is a reference to a study involving News Corp where they say they would have been won in addition at a higher price.

Then 406 at 1144. You can see, sir, it says "Anticompetitive effects". The first sentence:

"... the ability to access as many sources of demand as possible has a significant impact on publishers' revenues."

I will just give you -- I will not turn them up. 448 and 450. Well, perhaps you can quickly look at 450. It is at 1151. Second sentence:

"... publishers ... have ... been deprived of the possibility of fully exploiting competition between the various SSPs. As a result, they have lost revenue which should have been linked to the sale of their inventories at the prices resulting from the auction to allocate them. In particular, publishers were not able to earn higher purchase prices from the SSPs and in particular from Google's AdX platform, which, already pre-eminent, saw the competitive pressure exerted by its competitors fall on account of the practices."

Something similar at 451 and 448.

So we say, one, gross price effect is intuitive. Two, it is extremely well documented already, including in particular internally within Google. There are regulatory findings from the French Competition Authority on the existence of a substantial gross price effect, and now we move to the methodology itself.

MR JUSTICE MARCUS SMITH: Yes. This is all rather conclusory, isn't it? I mean, going back to paragraph 506, what is there said is:

"The existence of a gross price effect is consistent with publishers' experience following introduction of header bidding."

Now that is precisely what we are going to be arguing about at trial --

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: -- and I am a little uncomfortable in, as it were, articulating a methodology which seeks to evidence an effect which the expert is already saying he is going to find. In a sense don't you need to have a methodology

which is looking at the world in which the abuse, assuming it is an abuse, didn't occur or the abuses, assuming they are abuses, did not occur and saying "Well, here is how we are going to ascertain the effects. We infer that there will be an effect, because actions have consequences", but it is for trial to work out what the effect will be, and here is an approach which, irrespective of intuition or instinct, the tribunal can have regard to, rely upon if properly carried through, to work out whether there is indeed an effect or not.

MR O'DONOGHUE: Well, sir, I quite agree, and to be clear, we are in the foothills of the point. I am going to come to the methodology. You are quite right, sir, it will stand or fall on its own two feet. All I am saying at this stage is there are extant regulatory findings which include references to internal Google documents which at least as a starting point provide some factual basis, and I put it no higher than that, that the gross price effect is something which may well not exist. I don't put it higher than that. Sir, let's move on to the methodology. I agree that's where the action needs to be.

MR JUSTICE MARCUS SMITH: Okay.

MR O'DONOGHUE: We say it is at least relevant background, but I don't want to over-egg that. That is all I am saying. To be fair to Dr Latham, the quotations I have shown you, apart from one, all come from the regulatory decisions. They are not him riffing on this, if I can put it that way.

MR JUSTICE MARCUS SMITH: No. It is simply that when one is talking about a methodology which one would like to be liable, it is rather stacking the deck to say "Well, here is what the methodology is being directed to find". It may well be that the way the market reacted to the abuses you are alleging would have been different in a different way to this. So don't you need to be articulating a methodology which will seek to model the world without your abuses in a manner that will inform the tribunal

as to the consequences, which you can then label them --

MR O'DONOGHUE: Yes, I quite agree. To put it another way, suppose the FCA decision said "We have looked at the gross price effect at some length and there is no such effect", would one airbrush that from history? In my submission probably not. I agree the methodology has to stand or fall on its merits. This is at least backdrop that in my submission, maybe if only in terms of gist damage, tells one something at least. Let's look at the methodology, sir. I think we may go round in circles on this.

MR JUSTICE MARCUS SMITH: We may. I think the point that I am pushing back on is -- and it is not unrelated to the question of gist -- the way we put it in BritNed was to say that the shift away from a workably competitive market, whether that was by way of collusion or abuse, was in and of itself the actionable damage.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: You then try to work out what the consequence of those are. I suppose all I am saying is that if you say no more than "There will be consequences of an abuse", then, of course, what whose consequences will be --

MR O'DONOGHUE: -- for the methodology.

MR JUSTICE MARCUS SMITH: -- rather less, of course. You may very well have an excellent idea, an intuition that is going to result in an award of significant damages. Well, obviously you are not going to get funding if you don't have that sort of intuition, but that's not our problem.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: Our problem is to --

MR O'DONOGHUE: Sir, I quite agree.

MR JUSTICE MARCUS SMITH: Okay.

MR O'DONOGHUE: Turning to the methodology, this is in tab 5 of B1. It might be

useful to start with the table of contents at 1641 so the tribunal can see the steps in Dr Latham's methodology. Section 5. Do you have that, sir?

MR JUSTICE MARCUS SMITH: Yes, I do. Thank you.

MR O'DONOGHUE: Step 1 is value of commerce, not for today. Step 2 is what I am coming to which is the gross price effect. Then 3 is take rate effect. 4 is umbrella, which is not for today. No point is being taken on that. 5 is overhang, where there are a couple of small points which I may need to deal with. That is the way in which the steps in the methodology work.

If we then jump forward to 1778, we see step 2, the gross price effect. Sir, if one looks at 470 and 471 certainly as the starting point, Dr Latham's approach is exactly on all fours, sir, with what you suggested the expert should be doing in terms of trying to laser in on the difference between the factual and the counterfactual. He says:

"... in a world without the ... leveraging ... Greater dynamic competition between SSPs and reduced distortion of competition between SSPs such that gross ad prices would have been higher without the conduct.

"My methodology is to decompose this gross price effect depending on whether an impression had header bidding in place or not. I then propose to use a combination of statistical analyses to assess how much higher gross prices would have been on each category of impression."

Then 472:

"... compute the difference between the gross ad prices that would have prevailed in the counterfactual and those that actually occurred."

Then 474:

"... difference between an actual and counterfactual price is a standard statistical problem analogous to what one would face ..." in a number of cartels.

So, sir, as a starting point in terms of the exam question we would respectfully suggest that Dr Latham is absolutely asking the question. Of course, that's not the end of it.

Sir, as we saw in 471, there is essentially a bifurcation methodology between impressions which used header bidding and those impressions or Publishers which did not. That bifurcation we say is necessary or at least useful, because we know that in the actual a certain proportion of Publishers did use header bidding, albeit they were to some extent stymied by counter measures by Google to kill header bidding.

Then there is a second category of impressions and Publishers in the bifurcated category which is impressions that did not use header bidding where a slightly different analysis applies.

We then go over the page. You will see the first step in the bifurcated analysis, 522. At 480:

"The gross price effect ... comes from the restrictions imposed by Google to shield AdX from real-time competition ..."

The three self-preferencing categories we referred to, in particular, the most enduring effect, which is the "last look" advantage, which persisted for many years.

You also see reference to the contractual restrictions that we saw in the context in the second self-preferencing category.

Then the second part of 480:

"In the absence of self-preferencing a credible counterfactual is one in which there would have been real-time competition across all SSPs and AdX. Therefore, while header bidding allows to have real-time competition between all rival SSPs, the counterfactual is one in which we would have had real-time competition between all SSPs including AdX."

So one of the key distinctions is in the factual AdX did not participate in header bidding

at all and in the counterfactual at the very least you have a head to head competition between SSPs, including for the first time or at least in a complete sense AdX.

Then at the top of 1781:

"This could have been achieved, for example, by AdX participat[ing] in a first-price auction ... Note that this counterfactual is compatible with Google enjoying some form of competitive advantage with respect to its rivals."

So Dr Latham is not saying that a counterfactual simply assumes a hypothetically competitive market. He is at least accepting the possibility that Google even in the counterfactual might have some competitor advantage and it is appropriate to factor that in.

Then, sir, in terms of the unpacking of the methodology or the brass tacks, he has three complementary methodologies in the context of impressions where Publishers used header bidding.

A.1 is:

"... the impact of Google's last look on publishers' yields based on a method inspired from the French Competition Authority's methodology."

You will see that:

"... [he] discussed some preliminary analysis [he] submitted to the French Competition Authority with CRA colleagues on behalf of a publisher ... to quantify the effect of Google's last look. The FCA later refined this analysis" -- and this is important -- "having access to Google's data to provide an estimate of the quantity of impressions that would not have been won by AdX in the absence of last look and to provide an estimation of the revenue loss of publishers. To do this, they considered the likely bidding behaviour of Google if AdX had competed in a first-price auction with other SSPs."

Then he unpacks this further:

"a) Assess the counterfactual absent this conduct. [The assumption is] AdX would have modified the functioning of its auction in the absence of last look and organised first-price auctions as opposed to second-price auctions."

He also assumed, second sentence:

"... AdX would have participated in a first-price auction in real time ... I will consider that Google would have participated in a first-price head-to-head auction if it had not been able to favour its own services.

"b) Determine AdX's bid if AdX had been competing in real time with other SSPs", again in the counterfactual.

Then at the bottom of the page:

"... I need to establish the likely bidding behaviour that would have occurred in this counterfactual. If AdX had chosen to hold a first-price action, the buyers ... would have had to adapt their bidding strategy by lowering their bid amount. This is typically called 'bid shading'. Indeed, while in a second-price auction the optimal strategy for buyers is to make a bid equal to their willingness to pay. In a first-price auction buyers have an incentive to incorporate a discount in the amounts they bid. This is the general result of auction economics. As the French Authority explains, it is possible to provide an estimate of the bids that AdX buyers would have made if they were to compete in a first-price auction with the other buyers biddings through other SSPs. I will seek access to data on AdX bid levels and bids received from demand side platforms. This information exists and it was made available in particular to the FCA for its analysis. This will allow me to know the amount AdX was able to return to pay for any given impression, which corresponds to the highest bid received from the DSPs connected to AdX. From this I can then infer the amount AdX would have paid in the absence of

any self-preferencing mechanism. There are many ways to do this. One of these is to replicate the FCA's approach: in the context of Google's switch to a first-price auction, Google offered buyers an 'auction translation' service aimed at adapting bids to the switch from second-price to first-price auctions. This feature significantly reduced the amount of the bid offered by buyers on AdX. I will seek access to data on AdX's own bid shading documents and information. This will allow me to define a counterfactual price that AdX would have submitted in the first-price auction ... This information exists and it was made available in particular to the FCA for its analysis."

Then in footnote 331:

"Another approach will be to compare average bid levels before and after AdX switch from a second-price to a first-price setting. Again, I know this information exists since it was retrieved from Google by the FCA."

Now at the risk of pointing out the obvious, neither Dr Latham nor the PCR has the information that Google or the data Google submitted to the French Authority in this context. That has not been disclosed, although we understand it is available.

Then c):

"Once I know AdX bids in the counterfactual I can compare this to the best second bid. Two outcomes are possible. Either AdX's bid is lower than the best header bidding and therefore Google would have lost the impression in the counterfactual ... or AdX's bid is higher than the best header bidding bid and therefore Google would have won the impression but paying a higher price (Google's conduct thus harmed publishers on these impressions). In sum, I will be able with Google's data to estimate AdX's bid in the counterfactual and compare this value to the actual publisher revenue -- the difference will represent an estimate of the publisher damages in the form of lower revenues for their impressions."

Sir, in a nutshell he is saying two things. One, based on the auction data one can essentially extrapolate a counterfactual bid price and, two, one of the ways this could be done, in fact, one of the ways this has been done, is this bid translation exercise, which was a commercial option that Google applied in real time for its own customers. It was not some bespoke analysis done for the purposes of the French proceedings. It was something which applied ...

DR MAHER: One question I have on methodology. Is it Dr Latham's position that he would use the same methodology throughout the claim period when the auctions were changing?

MR O'DONOGHUE: In essence yes, but, of course, with the bid data for the different periods the differences in actual bids and bids inferred from comparing to second price bids, they will also adapt over time. So there will be -- there will be a sense in which the data -- the auction bid data over time is itself revealing at least some of the preferences at change over time.

DR MAHER: My understanding, I might be wrong, is that Google's position, for example, in the unified price auction is that you no longer have the bid shading, so it is a different situation or outcome. So I am wondering if the methodology that Dr Latham is assuming to use, would that apply throughout in all those different formats? I was seeking quick clarification -- I mean, at this stage I don't expect you will have an answer to that because you don't have the data but it was just to get a feel.

MR O'DONOGHUE: As I made clear before the lunchtime break, we certainly do not accept that when unified pricing, unified auction came in in September 2019 that that was the sea change that Google pretends it has been. Our position is in effect this has continued in a slightly different manifestation or avatar, the tilting of the playing field in its favour that pre-existed and therefore the change is more apparent than real,

but I will take instructions from Dr Latham on that in particular.

Just returning, sir, to the exercise before the French authorities, again it is important to note that this is not some bespoke methodology that was put in by Google for purposes of the proceedings. It was a pre-existing commercial bid translation that they undertook for their own customers. We say, therefore, it is a particularly suitable methodology, because it is one that was not dreamt up for purposes of anti-trust proceedings. It was grounded in a real world exercise that Google considered useful in terms of bid translation for its own customers. Now that is one of the ways this could be done depending on the bid data that we ultimately received. There are no doubt other ways that this could have been done but the basic analytical approach we say is clear.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, is the model that you are working towards in terms of methodology the outcome that you are aiming for is where the tribunal is going to be presented shortly before trial with two rival methodologies, one from each expert, and basically we will have to choose between the two? Is that the end goal and all you are doing is putting your cards on the table very helpfully as to how your expert will do it?

MR O'DONOGHUE: Well, sir, we are at least doing that. We don't, of course, know what Google proposes at this stage.

MR JUSTICE MARCUS SMITH: No.

MR O'DONOGHUE: It also seems to me inevitable that, depending on the data that is, in fact, available, Dr Latham's own methodology, at least at a more granular level, will adapt perhaps materially going forward. What we are saying at this stage, this aspect of the gross price effect it has a solid methodological basis. We know the data, for example, either exists or was provided to the French authority or both, and as things

stand this is a self-contained methodology which we say is workable at this stage. Now, of course, it may well evolve. It may well be that the tribunal is in the unhappy position it often finds itself in in these cases where the two experts are ships in the night. It may be that the two methodologies are more complementary than one certainly finds in most cases. In a sense we say all that is up for grabs. We have set out our stall based on methodology that we say has a pretty firm grounding in terms of factual basis.

MR JUSTICE MARCUS SMITH: I think that's a very helpful point you have just made there. In a sense are we putting the cart before the horse? You have quite rightly indicated that your expert's approach may well have to differ depending upon the data that is available, and I understand that makes sense.

MR O'DONOGHUE: It may do.

MR JUSTICE MARCUS SMITH: Equally there is no single established method of assessing the consequences of the abuses alleged and that, as you again very fairly said, is the hallmark of competition cases but perhaps is particularly so here where one has got allegations of multiple abuses in either overlapping series or in complete parallel where you need to have a methodology that is going to be robust enough to cater for the outcome where you may win on one abuse and lose on another.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: So you are going to have to have something which is methodologically robust enough to deal with those sorts of outcomes.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: The way in which the tribunal and the parties are all proceeding is the standard way of each expert questing for the data they need and producing in due course their method of resolving the quantification question, which

shortly before trial is presented to the tribunal on effectively a take it or leave it basis without really very much opportunity for the tribunal to have input into the process.

My question really is ought we instead of talking about methodology when one has all these uncertainties, we ought to be talking about a methodology for getting to a methodology, in other words, what you need to be telling us is doable is that we can get to a situation, assuming certification, where there is a substantive hearing before trial between experts at which the methodology is thrashed out so that the parameters of the quantification approach, what the tribunal wants to look at, what it doesn't want to look at, can be nailed down, the data assembled and the tribunal in effect presented with a manipulable model that it can use when considering the judgment that it reaches on the substantive questions; in other words, ought we not to be talking about how Dr Latham thinks he is going to do it now? Instead we ought to be working towards a quite significant hearing before trial at which the experts say "We have converging but nevertheless divergent views on to how this can be done. There is violent disagreement about the question of abuse". That's a matter for trial but assuming a greater or lesser success on the substantive questions, here is how we think you can model the process. What do you, the tribunal, think? What would you want to know about in order to quantify the losses so that one has come to trial with a methodology that is in effect not merely embodying the views of the experts but also the input ex ante of the tribunal.

Is perhaps the question for you not so much "Here is how we are going to do it" but "Here is how we can assemble the material to enable the tribunal in due course to do it, and with a high degree of certainty we can be confident that one way or another it can be done".

Now I accept that's a complete reframing of the way in which these things usually are

done, but the point is we are really approaching quantification in competition cases with a mindset of, well, a personal injury lawyer where you have your life tables. Everyone agrees that they are statistically accurate and you use an established process of multiply and multiplicand to get an outcome which is generally established, so you don't need to have this conversation.

Here it is much harder -- I am not saying it is undoable, but it is much harder and we need to think about how we are going to do it rather than being presented with "This is my solution now but it may change because we are at the beginning of the process".

MR O'DONOGHUE: Well, sir, I fully agree. I would say two things at this stage. First of all, we are the applicant for certification and the approach where we say "We don't have a methodology. We will sort of suck it and see" is not likely to get us very far. In fairness to Dr Latham what he is saying loud and clear is "Here is the methodology. It has been used concretely, including commercially. I understand the data exists and therefore has been done and can be done". So that's stage one and we say if the tribunal is broadly content with the methodology, it can be certified on that basis, but, sir, I entirely take your point that that certification is not once and for all, including in particular methodology.

In my submission the logical order of events as a second stage is we need to understand extremely quickly what data on the auctions Google does and does not present.

Now I will not dwell on this today. It may be more for reply. One of the problems we face to date is Google has been very quick to tell us what it does not have by way of data. It will not tell us what data it does have. Now I would suggest the way forward is case management. We have Latham 1 setting out his stall. He says "This works. We have the data as a commercial basis". We then need to hear from Google in terms

of what data they do and don't have, and depending on what terminus we reach on that, there may need then to be a more detailed hearing where these things are front loaded to some extent with the tribunal's input to ensure that all parties, including the tribunal, are working towards a common goal and avoiding to the fullest extent possible the ships in the night problem.

I know, sir, from appearing in front of you on countless other cases that the last thing you want is to turn up at a trial where there are literally ships in the night. In principle we would fully endorse active case management whereby if there are data gaps in what we contend can be done through cooperation between the parties and strongarming from the tribunal we can get to a point sooner rather than later in the proceedings where enough of the cards are on the table that we can see, the experts can see, the tribunal can see where this is heading.

What we don't want is the sort of form of Jujitsu where we never sort of get clarity on what exactly is available, because it is in everyone's interests that the best evidence that is available surfaces. We would therefore suggest, sir, that we fully endorse taking this in a two-stage approach whereby there is some regard to what Dr Latham has done and whether that is sensible at this stage, but we keep under very active consideration very, very quickly what data are available, what implications does that have for the methodologies, and it may well be that the adaptations are not significant. I suspect the adaptations may well be significant, but we would say that second stage is something which does need to happen, because we want to flush out these issues well before trial. Getting to a trial where there is a data car crash or a car crash of some other nature is in no-one's interests.

MR JUSTICE MARCUS SMITH: No. So I think, if I may say so, that's very helpful, Mr O'Donoghue. What you are really saying is that the articulation by Dr Latham of

a methodology is really in the form of an insurance policy. In other words, what you are saying is "Look, there are many ways of killing a cat. Here is one".

MR O'DONOGHUE: Quite a good one he says.

MR JUSTICE MARCUS SMITH: He says he may well be right, but we don't need to worry about that. What we need to worry about is doability, because that's intrinsic to a blueprint to trial. If you say "Look, this is what others have done. We are confident we can do this. We are also confident that there will be known unknowns, unknown unknowns going forward, and we will ensure that the case management process is informed by these uncertainties so that we can get something which is ideally better or at least agreed by the parties so that at trial one has a quantification process that doesn't come as a complete surprise to the panel trying matters".

MR O'DONOGHUE: I fully agree. Indeed if we go back to Dr Latham, if you see the middle of page 133 he says and I quote:

"There are many ways to do this."

One way, of course, is the bid translation that he is aware of.

Now what you have from Google instead of active engagement with the many ways is really an unbelievably narrow approach whereby they say "Well, the particular bid translation exercise that Google did that the French Competition Authority relied on, that doesn't go as far as you would like for the following 57 reasons", but in my respectful submissions that's looking at the wrong end of the telescope at this stage.

What we are interested in at this stage is what is the objective -- I think we know what the objective is -- what data are reasonably available and where does that take us? Dr Latham has set out, we say, something which is tractable and where the data is available but it may well need some modification, but this should be tribunal led, expert led and it should be cooperative. We should not have this exercise of pulling teeth

where people are very coy in terms of telling us what data they do have -- they don't have and quick to tell us what they don't have.

Of course, this arises in the context where we have had the French proceedings. The Commission proceedings are almost at an end. There has been vast disclosure before the DoJ proceedings, the French authority, the Commission, the CMA. We would want to tap into the data which is available, the low hanging fruit as quickly as possible. The tribunal in my respectful submission needs high levels of visibility, what is available and tractable and that we actively case manage this in an effort to get to the best available evidence well in advance of trial rather than ships in the night we unfortunately see in far too many of these cases. That's in my submission.

We will see what Mr Pickford says tomorrow, but the idea of staring down the microscope at bid translation before the French Competition Authority in my submission is a completely sterile exercise. It is not where the debate should be at the certification stage.

Sir, would that be a convenient moment?

MR JUSTICE MARCUS SMITH: Yes, indeed. Thank you very much. We will resume in ten minutes' time.

(Short break)

MR JUSTICE MARCUS SMITH: Mr O'Donoghue.

MR O'DONOGHUE: I will be ten or fifteen minutes. In view of our exchange before the short break I was not proposing to get into all the wheels on the other methodologies. Just for your note, sir, we have been through A1 in Latham 2, then B1 is a regression and C1 is essentially a simulation technique. Then two pages on the second category, impressions that did not use header bidding. It is a combination of the three methods used for header bidding. Then at 492 and 493 before and after

econometrics and difference and difference econometric approach.

I was then going to move on to the take rate effect quickly. In a sense this is more traditional ground. Our case in a nutshell is what the buyer auction system has done is prevented SSPs who were not AdX from either competing at all or at least from competing in a complete sense. What that has done is inflate the commission rates that can be charged to the class members.

So essentially the exam question for the counterfactual is if he has stripped out the biasing effects of the abuses what would be the competitive commission for take rate? In a sense that might be something you are instinctively more familiar with.

If we then go back to Latham 2, it starts at 1791, step 3, take rate effect. Again there are three methods. I will take these out of sync. C.3 on page 1795 is comparators, which will be very familiar to the tribunal; B.3 at 537 is before and after; and then A.3 is trying to use class plus at least as an indication of a competitive benchmark. So those methods I think will be instinctively more familiar terrain to the tribunal. So that's what he proposes on the take rate effect.

Then, sir, just to round off a couple of miscellaneous points, again rather than go through market definition and dominance in detail can I just give you the references to the claim form? Let's quickly turn it up. It is at B1, 1, page 53. It essentially starts, sir, over the page at 138. You will see the three markets we define. We say at 139 essentially we are not reinventing any wheels. These markets and dominance have been found in a whole series of decisions in the context of ad tech.

Dominance is at 141 to 152 and we say the findings of dominance are well trodden ground, given the regulatory backdrop. I emphasise the point I made at the outset which is that no point has taken for at least today, only the market definition and dominance.

MR JUSTICE MARCUS SMITH: Just comparing the points that you define, articulate in 138 and the chain of persons in your written submissions above paragraph 9, we have a helpful chain of six persons. I wonder just so that I get it right whether we could superimpose or elide the persons and the markets.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: It may be you can do it after the event.

MR O'DONOGHUE: I think we can largely do it now. So 138(1) Publisher ad server, so that's the second box. Sir, are you looking at figure 1 of our skeleton?

MR JUSTICE MARCUS SMITH: I am looking at figure 1 in your skeleton and I am trying to superimpose --

MR O'DONOGHUE: 138(1) is Publisher ad server.

MR JUSTICE MARCUS SMITH: And SSP.

MR O'DONOGHUE: Yes. 90% market share. Then 138(2) is SSP.

MR JUSTICE MARCUS SMITH: And the counterparty in the market is DSP.

MR O'DONOGHUE: DSP is the demand side, 138(3), yes. The fourth box we don't need to fret about too much today. Then on the buy side at the extreme left you have the Publisher -- the sell side you have the Publisher and then on the buy side you have the advertiser.

MR JUSTICE MARCUS SMITH: Thank you.

MR O'DONOGHUE: One other thing before I sit down. On the case management topics you also raised at the outset very, very quickly, on confidentiality there is a ring in place which is carried over from the pre-carriage dispute period. As it happens, it is effectively in an inner ring only at this stage because there is nobody else at this stage who is relevant.

We entirely accept, sir, as we proceed there will be difficult questions to be resolved

quickly as to -- which are trying to balance two things: one, the interests of the class in a fair and public prosecution of this case and, two, to the extent justified and proportionate dealing with legitimate confidentiality concerns of Google and then wrapped up in both those points a trial that is practical, that does not result in either lots of private sessions or a series of musical chairs with people proceeding in and out within sessions. That is to be avoided.

So we would say that the way forward is we have the existing ring. As we move forward to a CMC if these proceedings are certified, again in the theme of front loading it will need be a cards on the table approach whereby Google makes clear at an early stage what are the disclosure things of extreme sensitivity from its perspective and then, having made that clear, we then grasp the nettle in terms of what protections, if any, do we think are justified and proportionate as a matter of case management and as we proceed to trial. So again it is a staged approach.

At this stage in the absence of any disclosure we simply have no idea what Google will contend is the ultra-sensitive and therefore we have a ring in place that can be adapted and will almost certainly need to include an outer ring.

We, of course, have a practical concern that in relation to witness evidence we should not be ham-strung through witnesses not being able to see materials which may be relevant to their evidence, but there is a pretty well trodden path before this tribunal, these nettles being grasped at an early stage in a way that balances these competing interests.

MR JUSTICE MARCUS SMITH: I mean, normally one has an understandable but not very edifying dispute about the extent to which non in-house or rather in-house people can see material that they need and there's a need in order to give instructions and there is a need in order to give evidence. Now the latter is really quite important. The

need in order to give instructions, I confess one ought to be able to give instructions without seeing too much confidential material, but if one is giving evidence as to what might have happened, for instance, to price in certain circumstances, which may very well be the case here -- I don't know, but it looks like it is on the cards -- then it may very well be that one would need to see quite confidential material about market participation in order to do that. That's something which needs to be controlled at a fairly early stage. I am not saying it can't be done, but it is something that needs to be thought about.

MR O'DONOGHUE: Yes, there is a balance. The only other point I would make is that, given the complex technical nature of the ad tech stack, the asymmetry information we face is unusually acute. It is something that needs to be factored in.

MR JUSTICE MARCUS SMITH: Unusually acute even in the context of competition cases where usually the defendant, entirely understandably, has material that the claimant needs to see?

MR O'DONOGHUE: Well, sir, I put it no higher than this. There are factual and technical issues and developments that have been obscured certainly from the Publishers' side of the market and where there has been we say a certain lack of transparency. We think that needs to be factored into confidentiality generally.

The final point in ten seconds. We fully concur that in this case at least this notion of pitting up dominance (inaudible) likely to be highly (inaudible).

MR JUSTICE MARCUS SMITH: I am very grateful.

Mr Facenna.

MR FACENNA: Sir, I get the graveyard slot on Wednesday afternoon. I am conscious of the hard stop at 4.15.

In relation to the miscellaneous non-methodology issues the parties had agreed that

since they were essentially complaints that Google is raising or pot shots it is throwing at the claim, it would make sense for the tribunal to hear first from Google on those and really for us to respond to the extent necessary.

That's still broadly an approach we should follow, but given where we are and the indications this morning, what I thought might make sense is just to identify what each of the issues are, for me to set out broadly what the PCR's position is on them and what we understand the debate to be, and in particular having regard to your comments on case management, whether we think they are points it is sensible and appropriate to address at this stage, and then, if necessary -- I might be able to do that all before 4.15, perhaps a little bit of time in the morning, and then, if necessary, I can deal with the more specific detail of Google's complaints and alleged concerns once the tribunal has heard from my learned friends.

So you will have seen from the list of issues that there are five non-methodology points. Two of them relate to the class definition. So there is a complaint that there is a potential conflict of interest that arises within the class between the opt-out sub class of Publishers and a very small opt-in sub class of Publisher Partners. On that basis Google seems to suggest that the opt-in class of Publisher Partners, which are effectively ad agencies, should be excised from the claim altogether.

The second point, which is issue 5 in the parties agreed list of issues, is whether the class definition should be amended effectively to reflect the wording of rule 82(4), which is to the effect that claimants who have other claims which overlap with this claim need to be excluded from the class unless they stay, or in Scotland sist, the other claim or discontinue it.

Issue 6 in the list of issues we have identified for the hearing relates to a series of complaints about the size of PCR's team. Google's position on that is that as a result

of the amalgamation of the previous two claims we now have an unwieldy team where inefficiency and so on is baked in and that it is not in the interests of the class or the tribunal or Google's legitimate interests, and there is a specific point which seems to be raised about having one set of solicitors on the record, although, as I will come on to explain, it is not exactly clear to us what that means in practice.

Then there are two limitation points, which are perhaps the most meaty. Points 4 and 5 do, as you indicated this morning, sir, raise questions about when it might be sensible to deal with those in the course of the proceedings.

If I can then -- I think it will probably make sense to deal with them in that order. Although the meaty points come at the end, I think we can deal relatively swiftly with the PCR's position in outline on the earlier points.

So on the conflict of interest Google's complaint is that the class is too broad essentially because there is a potential conflict of interest between Publishers and Publisher Partners. They say this is not just a problem that will arise at the distribution stage, because, as we understand it, what they say is prior to distribution some methodology will need to be identified to allocate revenue which relates to the group of Publisher Partners and to exclude that from the overall affected revenue, overall affected commerce for those who have not opted in.

Now just to give you the outline of what we are talking about here and the context, the definition of Publisher Partner is in paragraph 29 of the claim form and it means a natural or legal person that sells online display ads on behalf of Publishers other than a series of more complicated types of ad servers and ad exchanges.

The reason why they are an opt-in sub class is set out in paragraphs 35 and 36 of the claim form. It might be worth just briefly looking at those. So they are at Bundle B1, 1, page 17. If you have that, sir, you can see 35 describes the opt-in sub-class and

refers to the fact that:

"... most of the publishers falling within the opt-out class are expected to have a direct contractual relationship with Google or with other publisher ad servers, SSPs", and so on. "... there [will be] a small proportion of publishers that lack the size and scale necessary to contract ... directly", and they will be using ad agencies effectively.

"Other businesses help them do that ..." They are within the definition of Publisher Partners.

"[They] will also have suffered loss because [the abusive] conduct reduced the revenue achieved from the sale of [the] ads, thereby reducing the remuneration to ..." those Publisher Partners.

That's why you have an opt-out class -- sorry -- an opt-in class which has been added in.

You will see just at the end of paragraph 36 in the claim form:

"The PCR anticipates that the number of intermediaries falling within the opt-in class is likely to be relatively small."

Dr Latham suggested that it is most likely in the dozens, and by contrast I think the estimate for the number of Publishers within the opt-out class is somewhere around 100,000 to 130,000.

So in the overall context of the claim, the opt-in class is there essentially to try to facilitate access to justice for that small group of Publisher Partners who will also have been affected. Without enabling them to be part of the claim it is not going to be practically possible for those parties to receive compensation and we say it is right that they should have the opportunity to join the proceedings if they wish to do so.

The size of that have sub class is extremely small relative to the size of the opt-out sub-class. Given that they will have to actively opt in, it is quite likely that not all of

them will. So there will be many of them probably won't take part in the proceedings at all.

Aside from the numbers, Dr Latham has also indicated in Latham 2, paragraph 467, that he suspects that their share in the total value of commerce is very limited, but it is something he will be able to confirm post disclosure.

So first point is to the extent that there is even a potential conflict of interest at all, it is likely to be a relatively peripheral issue in the overall context of the proceedings as a whole.

Now the specific proposals have been made by Dr Latham as to how he is going to address the question of allocating revenue between the Publishers and Publisher Partners. If you have a look at Latham 2, which is in the same bundle, tab 5, 1671, you will see at paragraph 66 he explains that he:

"... would be able to use data on these partners' average commissions to partition the damages award as between publishers and publisher partners."

Then if we go forward to paragraph 467, which is on page 1778, you will see there that Dr Latham describes what Publisher Partners are, that he will:

"... need to identify the ad revenues associated with [them] and then use information on [their] fees to apportion the ad revenue between the publisher and publisher partner."

That's why he says he doesn't think it is going to be very significant overall.

In other words, just to determine what the issue is here, Dr Latham has considered how to account for the existence of the opt-in sub-class, although there are likely to be a small number of them. He plans to do so by identifying the volume of affected commerce that is associated with Publisher Partners and he will do that essentially using information about the fees that ad agencies charge, which the opt-in members

will themselves be able to provide.

Then on an aggregate basis there will be an apportionment of the relevant advertising revenue appropriately between the Publisher and Publisher Partners. So the total value of affected commerce in the claim will be calculated based on the affected ad revenue of all Publishers excluding any ad revenues which relate to Publisher Partners and then adding back in that portion of the Publisher Partner revenue that relates to those who have opted in.

It is pretty similar actually on that same page of Dr Latham's second report. You will see that there's a proposal at 468 and 469 for dealing with any Publishers who decide to opt out of the class.

So the PCR's team has acknowledged and anticipated the need for a mechanism to do the apportionment and there is a description of the broad approach that will be used to do so based on objective market data about the Publisher Partner fees.

In relation to this point without going into any more of the detail we say it is difficult to see that there will actually be a meaningful conflict. Publishers and the ad agencies share a clear common interest both in relation to establishing liability and overall quantum. They have a common interest in ensuring that the aggregate value of commerce within the claim, including the opt-in claims is as large as possible.

There is not going to be any need for some detailed investigation of the value of commerce associated with individual Publisher Partners, because the assessment can be done, Dr Latham says, on an aggregate basis and in practice identifying that aggregate value of commerce will simply be a matter of using relevant market data on their fees.

So we don't think there actually is going to be a meaningful conflict of interest. Even if there is one that might arise at a later stage, broadly we say it is not a certification

issue. It can be dealt with if and when it arises. There is some helpful Canadian authority on that, and moreover, the tribunal obviously has the power under its broad range of powers particularly in relation to distribution to determine what should happen if there is any conflict which actually crystallises and, indeed, under rule 92 any affected Publisher Partner would be able to make their own submissions.

So that's the PCR's position in relation of outline in relation to that point. To the extent that the tribunal needs further assistance from us after you have heard what people have to say about it, perhaps I can deal with that in reply.

Now issue 5, which is the other class definition point relates to overlapping claims. Now Google's contention seems to be that the class definition itself should be amended effectively to reflect the wording in Rule 82(4) about overlapping claims. There are two issues the tribunal needs to consider in relation to that. Does the legislative scheme require the class definition to be amended in that way to give effect to the rule? We say no.

If it doesn't, then what is the best way to deal pragmatically with this issue, assuming it is a problem that's even going to arise in practice and again so far as we are aware, Google has identified only one potential Publisher, that's Associated Newspapers, who is involved in a claim in the United States, but so far as we can tell based on authority and our understanding at the moment, that claim would not be overlapping within the meaning of rule 82, in particular because it is not going to allow Associated Newspapers to recover any revenue related to the UK market or which is covered by this claim, but that will have to be dealt with again on an individual basis if and when it turns out that there are any other overlapping claims which need to be considered.

So we say you don't have to import the wording of the rule. You are not saving anyone any time or achieving anything in practice by doing that. The rule is the rule. It

operates in the way that it operates. If Google identifies that there are individual members of the class, represented persons who are involved in overlapping claims, then we have set out the proposal in our reply as to how we'll deal with that. We will write to them. They will have an opportunity to make submissions on whether they are affected by the rule and so on.

So in relation to that point we will say there is a pragmatic approach for dealing with it. It is not a class definition issue and not a certification issue.

Issue 6 then relates to the complaints about the PCR's team and so on. It probably makes more sense for you to hear those from Mr Pickford and then to the extent you need me to respond to them, I will. Broadly, as you would expect, as you will have seen in our skeleton argument, we say these are not certification issues. Moreover, they are simply wrong. There is a fixed budget for this litigation. It doesn't really matter what the budget was for the previous claims, because the issue before the tribunal today is certification of this claim. The fact that there are 20 odd solicitors frankly on both sides it appears looking at the present confidentiality order, doesn't mean that everyone is always working on every issue. There is no reason to think there is going to be any more duplication or inefficiency on our side than there will be on the other side. We assume that not every lawyer in Herbert Smith is going to be involved in drafting every email and it is not a fair assumption to make in the other direction.

That then brings me to the two limitation points. Now we certainly have sympathy with the concern that was expressed this morning that one possible danger of hiving off limitation points is that doing so does not ultimately save you any time often in the main trial, because the evidence and issues have to be fully investigated anyway and up end up with satellite appeals, which take up time and resources and can delay the efficient termination of the main claim.

Now there are two limitation points that Google raises at the present hearing. The first actually formally is a strike out application. It will be a matter for my learned friends to say whether they are pursuing that application and that's certainly something you ought to hear from them first before I respond on the detail, but essentially it raises the legal question -- the substance of that is that Google says that the claim insofar as it relates to harm suffered before the first --

MR JUSTICE MARCUS SMITH: It is a partial strike-out application, though, isn't it?

MR FACENNA: It is a partial strike-out application, yes.

MR JUSTICE MARCUS SMITH: That's the reason it's -- if it was a strike-out that went to the whole claim, (inaudible) hearing.

MR FACENNA: No, no, it doesn't go to the whole claim. It is a partial strike-out application in relation to the period prior to 1st October 2015. Google says that part of the claim is time-barred because of the strict wording of the rule which applies, which is the old rule 31, means that any such claim had to be brought within two years, ie by the end of 2017 irrespective of whether claimants knew that they had suffered harm or knew they had a claim or knew that Google was the perpetrator.

On the other side we say that's not correct, because there are now these tricky questions which the tribunal has been grappling with and which are now before the Court of Appeal in relation to the relationship between EU law on the right to remedy under article 101 and 102 and national limitation rules.

So it raises a legal issue about the effect on domestic limitation rules of that EU case law and the so-called knowledge requirement and cessation requirement.

The tribunal, as you know, sir, has already considered those issues in interchange umbrella proceedings in Merricks, and indeed granted permission for the points to be pursued to the Court of Appeal, including on the basis that in those proceedings they

have a realistic prospect of success on those arguments in the Court of Appeal. That, as you will understand when I will come to make my submissions, we say is sufficient reason alone why you could not strike out those arguments in this case, having already decided that they have a realistic prospect of success in another case.

So it involves that legal argument. It also by its nature involves a series of detailed factual questions subject to the determination of that legal point that would need to be considered and determined if the claimants succeed on a legal argument. So broadly it related to the date of relevant knowledge. When did the class members know they had a claim? When did they know they had a claim against Google and so on, and potentially also questions about the date of cessation.

As Mr O'Donoghue showed you this morning by reference to the claim form there is a real uncertainty and lack of transparency in this claim as to when each aspect of the infringement started and ended and, indeed whether they have even ended today and to what extent.

Those issues, those factual issues will all have to be the subject of disclosure and evidence in the claim, because concealment is an aspect of the alleged abuses. Those specific issues about knowledge are also going to have to be explored separately from this point anyway, because the PCR relies on concealment under the Limitation Act in relation to the period after 1st October 2015.

So just leaving aside for the moment the merits of the strike out application, we say in terms of case management it is exactly the kind of limitation point that raises novel and difficult issues of law, which are now pending before the Court of Appeal. It would raise a series of factual issues that are going to have to be explored anyway in the main trial, whose determination will involve detailed argument at considerable cost without the prospect of any material time being saved at the main trial, and which is

obviously a sufficiently significant and controversial point that it is likely to give rise to an appeal either way with all the potential problems that might cause.

So our position on that question is that it is not a strike out question for today. In terms of overall case management it is not sensible to hive it off at all as a preliminary issue but rather to address it in the normal way as part of the overall single trial. I will come back again, as I say, to deal with the merits in more detail, if you need me to, having heard what Google says, assuming it is pursuing the application.

The second limitation point is the point that we all had some debate about earlier last year at the amalgamation hearing as to whether the commencement date for the third aspect of the related abuses should be the same as the date of the first and second abuse in the Pollack claim or should be a date four months later for the Arthur claim.

It is simpler in the sense that it essentially involves a comparison between the original Pollack claim and the Arthur claim to determine whether the aspect of the present claim that relates to self-preferencing of Google AdX by demand side platforms is a new claim at all, ie was it in the Pollock claim form, and if it is, to determine the question of relation back, ie does it as a matter of overall impression arise out of the same facts or substantially the same facts as those pleaded in the Pollock claim form.

Now on the merits we say it clearly does arise out of the same facts or substantially the same facts, in particular Google's dominance in the relevant markets, the nature of the self-preferencing abuse, the effect and so on. It is based on all of the same essential facts that are part of the first and second abuse.

Again importantly in terms of case management we would say it is not an issue that requires to be determined at certification and it is not -- again not an issue which could be said to be suitable for determination on a preliminary basis on the expectation that it will potentially save you lots of time and trouble at trial, because the factual

allegations which underlie the PCR's case on the third abuse are all or substantially all matters which Google would have had to investigate and obtain evidence on purely as a result of the first and second abuses in the Pollock claim form.

It is not going to be materially prejudiced by that four month period in relation to the third abuse and it is certainly not going to have any material effect on the overall trial or the nature of what the tribunal will have to consider at trial in relation to that time period.

Moreover, on this second limitation issue it is actually not yet possible to determine the period for which the claims can be pursued until that first limitation issue of knowledge and cessation is determined. So depending on the outcome of the resolution -- if, for example, the law actually is that time has not even begun to run because the abuses have not ceased or at least did not cease until, say, 2021 or 2022, then this issue will not arise at all.

So for that reason on both the limitation issues we say they are bad points anyway. They are not certification points and to the extent there's a question of case management that arises now, they are actually not points that it is sensible or would be sensible to deal with separately.

My Lord, having a look at the clock, that basically is the outline that I wanted to give on those non-methodology issues. I will have a think about whether in the light of anything else which has happened today I need to say anything briefly in the morning, but it may be sensible on those issues, subject to your views, to hand over to Google to make the running and then deal with them in response.

MR JUSTICE MARCUS SMITH: No. Thank you very much, Mr Facenna. That's very helpful. We have eight or so minutes.

I don't know, Mr Pickford, whether you want to make a start or if we should rise.

Submissions on behalf of ALPHABET INC and others

MR PICKFORD: I think probably the most productive thing I can do in those eight minutes is to address you on some of the case management issues you asked about. I think it is probably not so helpful to begin my submissions on everything in the dying embers of the day.

So on the first of those, which was confidentiality, there will be a need to develop the confidentiality ring that is currently in place. It was an interim ring and it only has one tier and, as I think was probably accepted by my learned friend, we are going to need a two tier ring. The most sensible way in our submission of going about dealing with that is for the parties to liaise in the first instance and to come up with a proposal that they can then present to the tribunal and the tribunal can scrutinise it and take a view on whether it is suitable, but it seems to be very much in the first instance something that's sensible for the parties to seek to collaborate on.

MR JUSTICE MARCUS SMITH: That is sensible. I think the point that I would want to make clear is that looking at confidentiality rings and documents that go in them is a dynamic and not a static process. I have no difficulty in there being a generous insertion in two rings provided that when one is approaching trial there is a recognition that, and this is in particular, they are asked about documents, but it is more general than that, a need to be able to reference those materials without the tribunal having to go into private session.

Equally, there will be questions of access to documents by factual witnesses on the other side. Again that's an issue Mr O'Donoghue raised, which is completely uncommon but less common than experts looking, and there is the final point, which is I really would want to avoid the problems that do occur where one has confidentiality

rings of the judgment, which obviously has to set out the reasons for the determination, being subject to redactions on confidentiality grounds.

None of these are really certification issues in terms of arguability. They are, I think, the sort of questions that need to be raised from a case management perspective. I absolutely accept that they are matters that can be dealt with later on, but we would want the process clear so that the parties know what needs to be delivered and when in terms of handling confidential material.

MR PICKFORD: Those sorts of points are well understood should we get that far.

MR JUSTICE MARCUS SMITH: Of course.

MR PICKFORD: I am not seeking to persuade you otherwise. The first and the third I think go together. That's preparations for trial and making surely that the trial can be effective and heard in open court as much as possible, and then similarly the judgment is one that can be promulgated generally.

Obviously we take on board that there is a need to approach that sensibly. It may nonetheless be the case that there is some confidential material that can't simply be -- a pragmatic view can't be taken to say "We have got this far? Do we really need to protect that?" The answer may be very much "yes". So we can't at this stage rule out the possibility of having some limited material that might have to be heard in private. Obviously everyone would seek to avoid that and typically, certainly in my experience what can often happen is that the material can be there in black and white and you can still cross-examine a witness potentially and they can look at things without actually having to go into the details, for instance, of the numbers in a table. It very much depends on the circumstances.

MR JUSTICE MARCUS SMITH: Well, it does. Two points. First of all, these are emphatically case management and not does the case go forward issues and

obviously we will hear you tomorrow that these are, in fact, academic points which don't need to be discussed. That is obvious, but we raise it now because it is something that I think your client will be particularly sensitive to and I want to flag that we are sensitive to that sensitivity. It is why I have made a point of articulating it, because there are, I think, pressures in this case which are perhaps more acute than in other cases because of the likely extremely sensitive nature of the material that Google will have to produce, assuming the case goes forward.

It is something which I think merits early consideration clearly first by the parties, but I think we would be very keen to be quite actively involved in ensuring that what are likely to be large tracts of confidential material don't derail what is at the end of the day is supposed to be an open process.

MR PICKFORD: That's what I understood and I am sure it is very encouraging to those behind me that the tribunal is so clearly on top of that issue already.

If I may just respond on the second point, sir, that you raised on that, which was the need for witnesses of fact of the proposed claimants' representative to see material. Obviously we can deal with that matter as it arises. For our part we are actually not clear when that's really likely to arise. Certainly no example was given by my learned friend. It is one thing obviously for the experts to see it and that can generally be dealt with very easily.

It is not clear that there will be many occasions on which witnesses of fact where information would be particularly sensitive will need to grapple with it, but we can deal with that, as I said, case by case.

MR JUSTICE MARCUS SMITH: I am grateful.

MR PICKFORD: I am cognizant of the time and what, sir, you told us at the beginning, I propose to pause there.

MR JUSTICE MARCUS SMITH: Mr Pickford, that seems like a good time to draw stumps. So thank you for that. We will begin tomorrow at whatever point you choose, but I imagine it will be the certification arguability questions rather than the case management questions, which seems very sensible. So 10.30 tomorrow morning. Thank you very much.

(4.15 pm)

(Court adjourned until 10.30 am on Thursday, 9th May 2024)