



**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1408/7/7/21

BETWEEN:

ELIZABETH HELEN COLL

Class Representative

- v -

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

Defendants

(together **Google**)

and

THE COMPETITION AND MARKETS AUTHORITY

Intervener

(the **Coll Proceedings**)

Case No: 1378/5/7/20

AND BETWEEN:

**(1) EPIC GAMES, INC.
(2) EPIC GAMES ENTERTAINMENT INTERNATIONAL GMBH**

Claimants (together, **Epic**)

and

**(1) ALPHABET INC.
(2) GOOGLE LLC**

(3) GOOGLE IRELAND LIMITED
(4) GOOGLE COMMERCE LIMITED
(5) GOOGLE PAYMENT LIMITED

Defendants

and

THE COMPETITION AND MARKETS AUTHORITY

Intervener

(the Epic Proceedings)

ORDER

UPON to the case management conference which took place on 7 October 2024 (the “October CMC”)

AND UPON the Order of the Chair dated 7 October 2024 further to the October CMC (the “October CMC Order”)

AND UPON the case management conference which took place on 5 December 2024 (the “December CMC”)

AND UPON the first witness statement of Robin Noble dated 12 December 2024

AND UPON the Ruling of the Tribunal dated 19 December 2024 in relation to an application by the Defendants (“Google”) for disclosure from the Claimants in the Epic Proceedings (“Epic”) ([2024] CAT 78)

AND UPON the third witness statement of Susanna Rogers dated 31 December 2024

AND UPON the third witness statement of Iona McCall dated 31 December 2024

AND UPON the Order of the Chair dated 10 January 2025 further to the December CMC (the “December CMC Order”)

AND UPON reading the letter from Google’s solicitors to the Tribunal dated 17 January 2025

AND UPON reading the letter from Epic’s solicitors to the Tribunal dated 20 January 2025

AND HAVING REGARD to the relevant documents and inter-partes correspondence provided to the Tribunal in order to determine this application

IT IS ORDERED

1. Epic shall by 4pm on 7 February 2025, and save in so far as disclosure of such documents has already been provided, conduct a reasonable and proportionate search and provide to Google disclosure of the following:
 - a. Documents relating to the twice-yearly and ad-hoc pricing reviews referred to in paragraph 39(c) of the third witness statement of Susanna Rogers dated 31 December 2024 (“Rogers 3”).
 - b. The internal guidelines for pricing the cost in V-Bucks of in-app content available within Fortnite referred to in paragraph 39(d) of Rogers 3.
 - c. Documents relating to the basis upon which the original prices for V-Bucks were set in the US and elsewhere.
 - d. Documents relating to the basis upon which the prices for V-Bucks were raised on 27 October 2023.
2. Epic shall provide a witness statement by 4pm on 7 February 2025 setting out the basis upon which it has conducted its search, including the relevant custodians identified, any relevant search terms applied and the reason why such searches are likely to identify the relevant documents.
3. Liberty to apply.
4. Costs in the case.

REASONS

1. This application by the Defendants for disclosure by the Claimants (collectively and colloquially referred to as “Google” and “Epic” respectively in these proceedings) arises from Epic’s Re-Re-Re-Amended Claim Form (“RRRACF”). In brief summary, and so far as is relevant to this application for disclosure, the latest round of

amendments included:

- 1.1. a claim for excessive and unfair pricing (“the Unfair Pricing Claim”), based on comparisons with Epic’s 0% commission rate for in-app purchases where a developer uses a third-party billing service other than Epic’s own and commission rates charged by other distribution platforms. Epic seeks an order that Google should be required to charge a 0% commission, alternatively should be ordered not to “charge excessive and/or unfair Commissions above such rates as determined by the Tribunal” (RRACF paragraph 164 (c) and (d)).
- 1.2. An allegation that, in the counterfactual, Google’s service fee would be reduced materially below 30% and potentially “as low as 0%”, and that the benefit of the reduction would be “passed on (at least in part) to consumers” (RRACF paragraph 153).
2. Google argues that these amendments give rise to a need for further disclosure because Epic is effectively asking the Tribunal to impose a charging/pricing structure that reflects its own pricing through the Epic Games Store (“EGS”). In order for Google to meet this case Google says Epic should provide disclosure of its own pricing arrangements, and its financial arrangements relating to the use of other distribution channels for digital content.
3. The issue was first raised at the October CMC. The disclosure sought was identified in paragraph 35(c) of the Fifth Witness Statement of Mr Mark Cran (“Cran 5”), a solicitor at Reynolds Porter Chamberlain LLP (“RPC”), Google’s solicitors. Google submitted that Epic, as an app store operator and also as a developer purchasing App distribution, was in a position to provide documents and data relevant to the extent to which it passes service fees that it pays to third parties on to consumers.
4. Epic’s position at the October CMC was that it was prepared to discuss further disclosure in relation to rates of pass-on but that disclosure should be mutual. Epic considered the disclosure sought in paragraph 35(c) to be “far too broad a category to be said to be necessary and proportionate to the amendments”, but it did accept that the commissions charged by Epic and charged to Epic by other app stores are relevant because “we have put them in issue in our pleading”. Epic accepted that pass-on is very much in issue, but pointed out that although the latest round of amendments refer to

pass-on, it was also referred to in other paragraphs including in the original claim form. Epic had specifically pleaded that it charges a substantially lower commission to third party developers who were likely to pass on those savings to consumers in the form of lower prices. Epic submitted that it was Google who would be likely to have the most extensive and useful information relating to developers generally, and to pass-on, and that it would be appropriate to revisit this issue once any gaps in Google's own disclosure had been identified.

5. The October CMC Order included the following:
 - 5.1. Paragraph 9 provided that the parties would seek to agree the parameters of any further disclosure on the part of Epic in relation to the issues identified in paragraphs 35(a) to (c) of Cran 5. The parties were to notify the Tribunal if disclosure could not be agreed, and a further would be listed to take place early in December 2024.
 - 5.2. Paragraph 11 provided that Google would provide to Epic the disclosure it had provided to the Class Representative in the related Coll Proceedings, with which the current proceedings have been partially consolidated. In particular, paragraph 11(b) provided that Google should provide disclosure of documents “that evidence rates of pass-on of service fees / charges / commission rates (and other costs, including alleged overcharges) to consumers”. Google has provided that disclosure to Epic.
6. Consistent with what has regrettably become something of a pattern in these proceedings, the parties were unable to agree the scope of further disclosure, and a further CMC took place on 5 December 2024. The parties helpfully provided a Redfern Schedule for the purposes of that hearing which set out Google's outstanding requests under each of paragraphs 35(a) to (c) of Cran 5; the reasons why the disclosure was necessary; Epic's response; and Google's reply. Google's requests for disclosure in relation to paragraph 35(c) (“documents and data evidencing service fees and pass on”) were numbered Requests 10 to 13 in the Redfern Schedule.
7. In relation to Requests 10 to 13, Epic submitted that further disclosure was not necessary in order to fill any “gap” in documentation for the purposes of the Coll Proceedings. This is a reference to one of the reasons given by the Tribunal when

ordering partial consolidation with the Coll Proceedings. The Tribunal noted that, given that the Class Representative represented consumers, it might be of assistance in those proceedings that Epic was a developer who may be able to “plug” any evidential gaps there may be arising in relation to the role of developers in the supply chain. Epic submitted that Google was the dominant app store on Android devices; that it charges commission on apps sold via the Play Store, and on in-app purchases on apps distributed via the Play Store, and therefore Google that has the records of prices charged by developers for content sold on apps distributed via the Play Store. Epic submitted that Google needed to show a missing element in the documentary record which only Epic can fill. Epic pointed to the fact that the Class Representative in the Coll Proceedings did not consider that any further disclosure was required, and was relying on the disclosure in relation to pass-on already provided by Google.

8. As regards relevance, Epic submitted that the extent of pass-on is not an issue in the Epic proceedings (in particular, given it does not plead damages). In any event, it is said that it is not a new allegation raised by the recent amendments, and pass-on of the benefit of a likely reduction in developers’ costs has always been part of Epic’s case.
9. In relation to Requests 10 to 13, I ordered that (1) Google should file a witness statement from their economic expert identifying the documentation and data required from Epic for the purposes of Google’s pass-on analysis, explaining why it is needed, and (2) that Epic should file witness evidence in response addressing the availability of the documentation and data requested, and Epic’s position on whether such material should be provided. The parties were then to attempt to agree the extent and timing for disclosure with any dispute to be referred to the Tribunal. As a result of the exchange of witness statements, Google no longer pursues Requests 10 and 11 at this stage, but Requests 12 and 13 are still in issue.
10. Request 12 sought “Documents dating from 13 August 2020 to date which explain Epic’s pricing strategy for V-Bucks and digital content”. V-Bucks is a form of digital currency used in relation to the game Fortnite, developed by Epic. The significance of 13 August 2020 is that it was accepted early in these proceedings that Epic would initially provide disclosure by reference to the disclosure provided in other proceedings in the USA.

11. Request 13 sought “Documents dating from 13 August 2020 to date which evidence the type and magnitude of marginal costs incurred by Epic in connection with its sale of V-Bucks and digital content”.
12. In accordance with the December CMC Order, Mr Robin Noble, an expert economist instructed by Google, filed a witness statement dated 12 December 2024 which addressed how he considered the disclosure sought by Google in Requests 10 to 13 would assist his analysis of rates on pass-on to consumers. In particular, in relation to Requests 12 and 13, the documents Mr Noble states that “[f]actual information in relation to developers’ price-setting strategies for digital content provides insight into the actual pricing practices of those developers. Mr Noble states that he would be able to compare insights gained from these documents on actual pricing with the predictions of economic theory. Mr Noble explained that, in his view, material evidencing how Epic determines the prices at which it sets its products, including the factors it takes into account and the extent to which the pricing is liable to change, will provide material to inform his pass-on analysis, in particular in relation to transactions for in-app sales of digital content within gaming apps. He also states that disclosure from Epic that sets out the costs incurred by Epic as a result of selling additional units of V-Bucks and digital content would provide insights into the magnitude of marginal costs incurred by developers such as Epic, and that this is relevant because the expected-pass-on rate of Google’s ad-valorem service fee is, according to economic theory informed by the magnitude of such costs.
13. In response, Epic filed the first witness statement of Iona McCall, Epic’s expert on competition economics dated 31 December 2024, and the third witness statement of Susanna Rogers dated 31 December 2024.
14. Iona McCall confirms that, in principle, evidence on how developers set prices for digital content may be helpful in understanding what factors influence prices in practice, and the extent to which prices reflect the commission charged by app-stores, and that economic theory suggests that the pass-on rate will depend on the magnitude of developers’ marginal costs for digital. However:
 - 14.1. the type of document he seeks is unclear, and that it is necessary to know what documents Mr Noble already has access to, in order to determine how useful

these additional documents might be; and

- 14.2. Mr Noble has not explained why he considers it would be appropriate or reliable to infer other app developers' pricing strategies and marginal costs on the basis of Epic's information.
15. In addition, in relation to Requests 12 and 13, Susanna Rogers states that Mr Noble has not particularised the types of documents required, making it challenging for Epic to undertake inquiries as to what may or may not be available. In relation to documents explaining Epic's pricing strategy and marginal costs for V-Bucks, Ms Rogers explains that the position is that the pricing does not change frequently (and has only changed twice over the years). Prior to 13 August 2020, the price was USD 9.99; On 10 September 2020, in connection with the Fortnite Mega Drop, the price changed to USD 7.99; and on 27 October 2023, the price changed to USD 8.99. Disclosure already provided by Epic shows that it ensures that there is pricing parity between platforms. Price reviews are undertaken twice a year, to consider alignment between US pricing that of other jurisdictions, and on an ad hoc basis such as launching a gift card in a new country. In deciding the cost in V-Bucks of in-app content within Fortnite, the merchandising teams within Epic rely on internal guidelines for pricing which set out the approach to be followed in relation to the types of in-app content.
16. As I indicated at the December CMC, it seems to me that Epic has put pass-on squarely in issue in its RRRACF. In my view, it does not matter whether pass-on was pleaded prior to the latest re-amendments. Google is not precluded from seeking disclosure of categories of documents that its expert considers may be needed for his analysis just because Google did not seek them at an earlier stage in these proceedings and prior to the RRRACF. In any event, pass-on has been pleaded specifically in relation to the remedy sought, in the latest amendments. Nor do I consider that it is necessary for Google to identify gaps in its own disclosure. Whilst the ability to plug gaps in disclosure was one of the potential advantages mentioned in the context of the partial consolidation order, that does not remove the obligation from Epic to provide disclosure relevant to its own case. The fact that Epic's expert, Iona McCall, acknowledges that, at least in principle, the documents sought by Requests 12 and 13 may be helpful to a pass-on analysis supports the conclusion that disclosure ought to be ordered.

17. The two main objections to making a disclosure order in relation to Requests 12 and 13 relate to a failure adequately to identify “the type or nature” of the documents required by Mr Noble, and a failure on Mr Noble’s part to explain the basis upon which it would be appropriate to draw wider inferences relating to app developers generally from Epic’s information.
18. Taking the second objection first, it will be for Mr Noble to decide whether it is appropriate to draw wider inferences from the documents disclosed in relation to Epic. If he concludes such inferences can be drawn, and Epic disagrees, that can be tested in the evidence in due course. I also accept Google’s submission that, even if no wider inferences can be drawn, disclosure will enable Epic’s own pleaded case to be tested against Epic’s own documents.
19. As regards the first objection, in light of the evidence, Google has sought to reframe its Requests 12 and 13 and now seeks and order that, to the extent not already in Epic’s disclosure, including in particular for the period post-dating Epic’s US discovery (i.e. from 13 August 2020 onwards), Epic should provide the following:
 - 19.1. Documents concerning the twice-yearly (or ad hoc) price review exercises, and action taken by Epic in response to recommendations made in these price review exercises.
 - 19.2. Epic’s internal guidelines for pricing (by which I infer Google means to refer to the internal guidelines referred to by Ms Rogers which are applied when considering the cost in V-Bucks of in-app content available within Fortnite).
 - 19.3. Disclosure which evidences and explains the factors that Epic took into account in setting original prices for V-Bucks and how it set those prices in the US and elsewhere.
 - 19.4. Disclosure which evidences and explains the factors that Epic took into account in setting its raised prices for V-Bucks on 27 October 2023 and how it set those prices in the US and elsewhere.
20. Epic complains that these requests simply paraphrase Google’s earlier requests. I do not agree. Google’s revised requests appear to me to be narrower and more focused than its

original requests when construed (as it seems to me they must be) in light of the information provided by Ms Rogers in her witness statement. Whilst Epic suggests that these requests are unreasonable and not proportionate, it does not explain what would be involved in the exercise, and why it would be disproportionate.

21. On the basis that pass-on is in issue; that Mr Noble has explained the prima facie relevance of this sort of information to his analysis; that Iona McCall accepts its relevance, at least in principle, I consider that disclosure should be ordered. It is, however, important to retain a degree of proportionality to this exercise. For that reason, I shall allow Epic to conduct its search in a way that it considers to be reasonable and proportionate. Epic should provide a witness statement explaining the approach that it has adopted and why it considers that its approach is reasonable and proportionate, and likely to have identified the relevant documents.
22. In addition, Google seeks responses to a number of information requests relating to Epic's approach to pricing taking into account sales taxes such as VAT made by letter dated 10 January 2025. On receipt of that information, I am told that Google will consider whether or not disclosure is required. It seems to me that the first step is for Epic to respond to those requests. If, on receipt of that response yet further issues for disclosure arise no doubt the parties will inform the Tribunal.