Neutral citation [2024] CAT 67

Case No: 1606/7/7/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22 November 2024

Before:

THE HONOURABLE MR JUSTICE MEADE
(Chair)
JOHN DAVIES
ROBERT HERGA

Sitting as a Tribunal in England and Wales

BETWEEN:

NIKKI STOPFORD

Applicant/Proposed Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE UK LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 18 and 19 September 2024

JUDGMENT (CERTIFICATION)

APPEARANCES

Ben Lask KC and Mehdi Baiou (instructed by Hausfeld & Co. LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Meredith Pickford KC, Josh Holmes KC, Narinder Jhittay and David Gregory (instructed by Simmons & Simmons LLP) appeared on behalf of the Respondents/Proposed Defendants.

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A. INTRODUCTION

1. In this judgment we will refer to Ms Stopford as the "PCR". We will refer to all the Proposed Defendants jointly as "Google", there being no need to distinguish between them.

2. This judgment addresses the PCR's application for a CPO on behalf, it is said, of millions of consumers, for alleged abuses by Google of a dominant position in the UK market for general internet search services. The abuses are alleged to be breaches of UK and/or EU competition law. We summarise the alleged abuses further below but at this stage note that they are in two parts:

   (1) The "Android Conduct", which is a follow-on claim, based on a decision of the European Commission in 2018 (the "Decision", *Google Android* (Case AT.40099) Commission Decision C/2018/4761 [2018] OJ C402/19), which was the subject of a largely unsuccessful appeal by Google to the General Court, Case T-604/18 *Google Android* [2022] ECLI:EU:T:2022:541 (although one respect in which the appeal was successful is relevant to this judgment). Google is pursuing a further appeal to the CJEU on points of law.

   (2) The "iOS Conduct", which is a standalone claim.

3. The PCR says that the Android Conduct and the iOS Conduct have complementary effects and should be seen in the round because, in practical terms, those are the only two operating systems for mobile devices.

4. The issues have narrowed over time and the following matters remain for decision:

   (1) Google says that the allegations of abuse in relation to the iOS Conduct are so weak that they ought to be struck out or that summary judgment ought to be given in Google's favour on them.

(2) Google says that the counterfactuals put forward in respect of the Android Conduct and of the iOS Conduct are so deficient that the claim ought not to be certified.

(3) How to deal with the issue of limitation. This is really in substance a case management decision and is a very narrow dispute.

(4) Certain points about funding which Google raised for our consideration but without concretely or specifically arguing that we ought to refuse certification on the basis of them.

B. THE ABUSES ALLEGED

5. The PCR's skeleton argument for the hearing before us contained a useful summary of the abuses alleged (at paragraph 3). What follows is based on that. It must be stressed that we are using it only because it is a pithy summary of what the PCR *alleges*. These are not matters that are admitted or proven (save to the extent that such is necessarily the consequence of the Android Conduct being a follow-on claim), although Google accepts that many aspects of them must be assumed to be true for present purposes, given the context of a summary judgment/strike out application. We have edited the summaries of the abuses slightly to remove some more contentious matters and procedural aspects of the Decision and appeals therefrom, which have no bearing on our decision.

6. The abusive conduct is alleged to have been undertaken by Google in the online general search market and certain adjacent markets, allowing Google to secure the status of default search provider on practically all mobile devices sold in the UK. The PCR then says that the Android Conduct and the iOS Conduct are "*two components which target different mobile devices but are fundamentally similar and mutually reinforcing. Both of them in effect secure default status for Google on the relevant devices, thereby raising entry barriers to rival search engines and depriving them of the scale required to develop as effective competitors*."

7. Then the PCR characterises the abuses as follows (subject to the editing mentioned above):

> **The Android Conduct**: Under arrangements dating from at least 2009, Google permitted its "app store" (known as the Play Store) to be installed on Android mobile devices (i.e. devices with Google's Android operating system) only if Google's own search app was also installed, together with Google's own browser, Google Chrome (on which Google Search is the default search engine).
>
> **The iOS Conduct**: In parallel, Google has entered into agreements with Apple under which Google is awarded the exclusive default search engine status on the "Safari" browser that is pre-installed on Apple's devices (both mobile devices and desktops/laptops) in return for a share of Google's corresponding mobile search advertising revenues.

8. We understood Google to accept for the purposes of summary judgment/strike out that these arrangements did indeed secure default status and, in any event, that is the assumption on which we consider it right to proceed.

9. A complication in the context of the Android Conduct which it is helpful to mention at the outset is that the tying of the app store to Google's search app and browser was achieved by agreements known as **MADAs (Mobile Application Distribution Agreements)**, but other agreements called **RSAs (Revenue Share Agreements)**, which in return for a revenue share required mobile OEMs and mobile network operators to pre-install Google as the search engine on specific devices or portfolios of devices, were either not impugned in the Decision (device-based) or were impugned in the Decision but that was overturned on appeal (portfolio-based).

10. The payments to Apple are alleged to be very large (it is said that they may be up to 20% of Google's net income and $15 billion in 2021, although the specific numbers do not matter) so that no competitor could replicate them, in particular while they are deprived by Google's conduct, it is alleged, of the opportunity to operate search at large scale.

11. The PCR also said that only searches optimised by being used at very large scale can be as good as Google's. This is said to prevent effective competition for search and for search advertising.

C. LEGAL STANDARDS APPLICABLE

(1) Summary judgment/strike out

12. The certification process is not about a merits challenge, unless there is an application for summary judgment or strike out: *Mastercard v Merricks* [2020] UKSC 51. In the present case there is such an application, so we start by identifying the legal standards that apply to it (there was no submission by either side that there was any material difference in this case between summary judgment and strike out).

13. The proper approach to summary judgment is set out in the frequently cited decision of *Easyair v Opal* [2009] EWHC 339 (Ch) at [15]:

> "15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel [2003] EWCA Civ 472* at [8];
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550* ;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the

facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 ;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*."

14. We were also referred to *Richards v Hughes* [2004] EWCA Civ 266 at [22]:

> "22. I start by considering what is the correct approach on a summary application of the nature of Mr. Richards's application at this early stage in the action when the pleadings show significant disputes of fact between the parties going to the existence and scope of the alleged duty of care. The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see *Barrett v Enfield London Borough Council [2001] 2 AC 550* at p. 557 per Lord Browne-Wilkinson). Lord Browne-Wilkinson went on to add:
>
> > '[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.'"

15. The two points from this decision, first as to factual disputes and second as to the desirability of developing the law on actual and not assumed facts, were not in dispute before us and have been stressed in a number of cases. Google meets them by arguing, first, that there is no relevant factual dispute for us to worry about because it accepts all the facts alleged by the PCR for the purposes of this hearing, and, second, that this is not a developing area of law because the

propositions of law on which it relies are beyond argument and entirely settled in the case law.

16. We also have in mind the principle explained by Butcher J in *Magomedov v TPG* [2023] EWHC 2655 (Comm) at [84]:

> "84. Moreover, I have also taken the approach that, in cases in which I have found there to be a good arguable case against a Defendant, it is best not then to give any much more detailed analysis of the strengths and weaknesses of the case made against that Defendant, unless necessary to deal with the position of another Defendant. Any such analysis would be likely to be overtaken by what will emerge during the course of the case and/or, as it was put by Knox J in *In Re a Company 005009 of 1987* [1988] 4 BCC 424, be such as 'merely [to] embarrass the judge who will have to determine the question at the trial'. That was said in the context of a strike out, and the relevant considerations are not identical, but it nevertheless appears to me to be apt in the present context, and to be, as was said by Lloyd J in *Bank of America Trust v Morris* (22 October 1988), 'wise guidance'."

(2) Counterfactuals

17. Two points of approach to the assessment of counterfactuals at the certification stage are relevant to our decision.

18. The first is that counterfactuals are important tools for analysing the market effects of alleged abuses of dominance and must be pleaded with enough detail for the defendant to understand the case against it but are not subject to any particular requirement as to form. See *Ad Tech v Google* [2024] CAT 38 at [22]-[26]:

> "22. We endorse all that has been said about the importance of 'counterfactuals', which are an important tool in competition cases for the reasons given above, and more generally in analysing the effects on a market of what are alleged to be anticompetitive practices. They must be pleaded with sufficient specificity. What constitutes sufficient specificity is a matter that turns on the case that has been pleaded. Thus, where (for example) an allegation is pleaded that a term in an agreement is anti-competitive, it is necessary to say something about what would have happened in a likely and realistic 'counterfactual' world, in the absence of this infringing term. It is a necessary averment to say that in this 'counterfactual world', the competitive situation would have been different on the relevant market. We accept that a counterfactual analysis is necessary in the context of an allegation regarding abuse of a dominant position (see e.g., *Socrates Training Limited v. Law Society of England and Wales, [2017] CAT 10 at [161]*).
>
> 23. As stated above, the Claim Form pleads a single and continuous infringement comprising three abuses, each of which are said to comprise

individual measures amounting to 'sub-abuses'. It states (at [265]) '[t]he counterfactual requires removing the infringing conduct and assessing how the relevant markets would likely have operated without it'. For each allegation of discrimination or preference, therefore, the pleaded counterfactual world is a world where the discrimination or preference did not take place, where all similarly placed participants were treated alike, and the market operated (in a good sense) indiscriminately. In a sense, the difference between the 'real world' (where there is discrimination and preference) and the 'counterfactual world' (where the discrimination or preference is obviated) is contained in the description of the abuse.

24. We accept the Claim Form could have more explicitly explained the relevant counterfactual(s), which are expanded upon in Dr Latham's reports. However, having regard to our comments in the paragraph above, we consider the PCR's counterfactual to have been sufficiently pleaded for Google to know the case it has to meet.

25. Google's suggestion – made in Google Skeleton/[20] – that it is necessary for Ad Tech to specify <u>how</u> the non-discrimination could have been avoided by Google is not, in our judgement, something that needs to be pleaded by Ad Tech. In our view, the authorities above support the contention that there is no requirement for a counterfactual to take a particular form.

26. Accordingly, we conclude that the Claim Form is properly pleaded, and sets out a case that is arguable within the *Merricks* test. We reject Google's contentions to the contrary."

19. The second is that unlawful conduct must be removed from the counterfactual: *Dune v Visa* [2022] EWCA Civ 1278 at [39]:

"39. The implication, according to Visa and Mastercard, is that the counterfactual endorsed by the CJEU in Mastercard Inc v European Commission (C-382/12 P) EU:C:2014:2201 and later adopted in the Sainsbury's litigation, is no longer the appropriate one or, at least, that that is arguably so. Mr Laurence Rabinowitz KC, who appeared for Visa with Mr Brian Kennelly KC, Mr Daniel Piccinin and Ms Isabel Buchanan, and Mr Matthew Cook KC, who appeared for Mastercard with Mr Ben Lewy, both emphasised that counterfactuals are used in 'determining whether, in the absence of the measures in question, the competitive situation would have been different on the relevant market, that is to say whether the restrictions on competition would or would not have occurred on this market' (to quote from *Groupement des cartes bancaires (CB) v European Commission* (T-491/07 RENV) EU:T:2016:379 . Plainly, a counterfactual that would itself breach competition law could not be an appropriate one. Subject to that, however, a counterfactual should reflect what would be likely to have happened if the measures at issue had not existed. Comparison between what would have happened in that counterfactual world and the position with the measures in place allows it to be determined whether the measures restricted competition. That will be the case if there would have been more competition in the counterfactual world. If, on the other hand, the competitive position would have been no better, it can be seen that the relevant measures were not restrictive of competition."

20. We did not understand these principles to be in dispute and the argument between the parties is as to how they apply in the present case.

D. BASIS FOR THE SUMMARY JUDGMENT/STRIKE OUT

21. Google argues that there is a distinction in the case law between the "AEC Principle" and the "AEC Test". It said that the latter is "the implementation of the AEC Principle via a specific numerical test". Google's position is that the AEC Test is optional: neither the competition authority nor the undertaking alleged to have abused a dominant position is obliged to carry out such a test, but if either does so then it must be assessed properly.

22. However, Google said that the AEC Principle is mandatory in all cases and that "it is no part of Article 102 TFEU to preserve on a market competitors that are less efficient than the dominant undertaking and thus less attractive from the point of view of, among other things, price, choice, quality or innovation; and that it is not, therefore, possible to ground a case of abuse on the basis of its alleged effect on such *less* efficient competitors; rather, whether exclusionary conduct is abusive depends on its capability to exclude *as* efficient competitors."

23. We will refer below to "AECs" (as-efficient competitors) and "LECs" (less efficient competitors).

24. As we will explain below, the PCR's primary case explicitly rejects, for reasons we will come on to, that there is a mandatory requirement for an analysis of effect on AECs. She says that, as a matter of law, there is no absolute rule requiring it. If she is right about this then Google's summary judgment/strike out fails.

25. If found to be wrong on the first point, the PCR's secondary case is to put forward an AEC analysis on two bases. Google says that both of these are hopeless because they do not in fact use an AEC at all. This limb of the analysis depends largely on how similar to Google itself the AEC has to be considered to be.

E. CASE LAW ON THE AEC PRINCIPLE AND AEC TEST

26. We were taken to a number of authorities on the AEC Principle and the AEC Test. Conveniently, all the key ones were considered by the Court of Appeal in *Royal Mail v Ofcom* [2021] EWCA Civ 669. The Court reviewed the cases in their chronological context and the consideration also touched on some of the key arguments before us. We therefore quote the main judgment (of Arnold LJ) extensively:

> "16. Article 102 TFEU (previously Article 82 of the Treaty establishing the European Community and before that Article 86 of the Treaty of Rome) prohibits 'any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it… in so far as it may affect trade between Member States'. The Article sets out a non-exhaustive list of types of abusive conduct, including (in paragraph (c)) 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. Section 18 of the Competition Act 1998 (referred to as 'the Chapter II prohibition') is in materially the same terms as Article 102 TFEU, save that it applies to conduct that may affect trade within the UK.
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> 17. The classic articulation of the concept of abuse is to be found in the judgment of the European Court of Justice, now the Court of Justice of the European Union, in Case C-85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities [1979] ECR 461 at [91]* :
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> > 'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.'
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> 18. The concept of 'normal competition' (or, as it is more usually termed nowadays, 'competition on the merits') means competition on price, quality, choice and innovation. Thus there is nothing wrong with a dominant undertaking competing with other undertakings on price, and a dominant undertaking may maintain or even increase its market share by doing so. But it is unlawful for dominant undertakings to adopt pricing practices which are anti-competitive, and in particular to adopt differential prices which place other undertakings at a competitive disadvantage.
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> 19. It is settled law that, where it is alleged that an undertaking in a dominant position has abused that position by a pricing practice, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose its sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting

competition: see Case 322/81 *NV Nederlandsche Banden-Industrie Michelin v Commission of the European Communities [1983] ECR 3461 at [73]* ; Case C-95/04 *British Airways plc v Commission of the European Communities [2007] ECR I-2331 at [67]* ; Case C-280/08 *Deutsche Telekom AG v European Commission [2010] ECR I-9555 ("Deutsche Telekom")* at [175]; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB [EU:C:2011:83] ("TeliaSonera")* at [28], [68]; Case C-209/10 *Post Danmark A/S v Konkurrencerådet [EU:C:2012:172] ("Post Danmark I")* at [26]; Case C-549/10 *Tomra Systems ASA v European Commission [EU:C:2012:221*] at [71]; Case C-23/14 *Post Danmark A/S v Konkurrencerådet [EU:C:2015:651] ("Post Danmark II")* at [29], [68]; Case C-525/16 *MEO – Servicos de Comunicoes e Multimedia SA v Autoridade de Concurrencia [EU:C:2018:270*] at [28], [31]; and Case C-165/19 *Slovak Telekom as v European Commission* [*EU:C:2021:239*] at [42].

20. Relevant considerations identified in the case law include: (i) the structure of the market; (ii) the extent of the dominant position; (iii) the nature of the conduct; (iv) evidence as to the dominant undertaking's intent; (v) the extent of the likely impact on the market, assessed at the time of the conduct; and (vi) the evidence as to any actual effects which eventuated.

21. It is common ground that there is no obligation on a competition authority considering whether a dominant undertaking has abused its position by a pricing practice to test the effects of that practice by reference to a notional competitor which is as efficient as the dominant undertaking and thus has the same costs ('an AEC test'). If the authority does rely upon an AEC test to establish that the pricing practice is anti-competitive, however, then it must carry out and apply the test correctly, and hence the conduct and application of the test by the authority can be reviewed for any error of law.

22. It is also common ground that, where the authority does not itself rely upon an AEC test, but the undertaking under investigation relies upon an AEC test as rebutting the contention that the pricing practice in issue is anti-competitive, the authority must fairly evaluate that evidence. RM contends that in such a case the authority must, unless it concludes for justifiable reasons that the AEC test had not been properly carried out by the undertaking, treat the AEC test as either determinative of, or at least highly relevant to, the question of whether the pricing practice results in a competitive disadvantage to competitors, depending on how much 'headroom' the AEC test shows there is for a less efficient competitor to enter the market. (Obviously the undertaking would not rely upon the AEC test if it did not purport to show that an AEC would be able to compete at the prices in question.) Ofcom and Whistl dispute this contention.

23. The CJEU has considered the relevance of an AEC test in a number of cases. The earliest such case to which we were referred is Case C-62/86 *AKZO Chemie NV v Commission of the European Communities [1991] ECR I-3359* , but attention focussed on a series of five cases decided since 2010.

24. In *Deutsche Telekom* the dominant telecommunications undertaking in Germany was found to have abused its position by pricing which amounted to a 'margin squeeze' on competitors generated by an inappropriate spread between wholesale charges for local loop access services and retail charges for end-user access services. The Commission had analysed this conduct by means of an AEC test. On appeal to the General Court Deutsche Telekom argued, among other things, that the Commission was wrong to rely on the AEC test, but the General Court rejected that argument. On appeal to the CJEU Deutsche

Telekom argued, among other things, that the General Court had misapplied the AEC test to the instant case because Deutsche Telekom was not subject to the same regulatory and material conditions as its competitors, but the CJEU rejected that argument.

25. In that context the Second Chamber of the CJEU stated:

> ‘96. As to whether [Deutsche Telekom's] complaint is well founded, … the as-efficient-competitor test used by the General Court in the judgment under appeal consists in considering whether the pricing practices of a dominant undertaking could drive an equally efficient economic operator from the market, relying solely on the dominant undertaking's charges and costs, instead of on the particular situation of its actual or potential competitors.
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> 197. In the present case, … the appellant's costs were taken into account by the General Court in order to establish the abusive nature of the appellant's pricing practices where the spread between its wholesale prices for local loop access services and its retail prices for end-user access services was positive. In such circumstances, the General Court considered that the Commission was entitled to regard those pricing practices as unfair within the meaning of Article 82 EC , where that spread was insufficient to cover the appellant's product-specific costs of providing its own services.
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> 198. In that regard, it must be borne in mind that the Court has already held that, in order to assess whether the pricing practices of a dominant undertaking are likely to eliminate a competitor contrary to Article 82 EC , it is necessary to adopt a test based on the costs and the strategy of the dominant undertaking itself ….
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> 199. The Court pointed out, inter alia, in that regard that a dominant undertaking cannot drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them ….
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> 200. In the present case, since … the abusive nature of the pricing practices at issue in the judgment under appeal stems in the same way from their exclusionary effect on the appellant's competitors, the General Court did not err in law when it held … that the Commission had been correct to analyse the abusive nature of the appellant's pricing practices solely on the basis of the appellant's charges and costs.
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> 201. As the General Court found, in essence, … since such a test can establish whether the appellant would itself have been able to offer its retail services to end-users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for local loop access services, it was suitable for determining whether the appellant's pricing practices had an exclusionary effect on competitors by squeezing their margins.
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> 202. Such an approach is particularly justified because, as the General Court indicated, in essence, … it is also consistent with the general principle of legal certainty in so far as the account taken of the costs of the dominant undertaking allows that undertaking, in the light of its special responsibility under Article 82 EC , to assess the lawfulness of its own conduct. While a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are.

> 203. Those findings are not affected by what the appellant claims are the less onerous legal and material conditions to which its competitors are subject in the provision of their telecommunications services to end-users. Even if that assertion were proved, it would not alter either the fact that a dominant undertaking, such as the appellant, cannot adopt pricing practices which are capable of driving equally efficient competitors from the relevant market, or the fact that such an undertaking must, in view of its special responsibility under Article 82 EC , be in a position itself to determine whether its pricing practices are compatible with that provision.'

26. In *TeliaSonera* the dominant telecommunications undertaking in Sweden was alleged by the Swedish competition authority to have abused its position by applying a pricing policy under which the spread between the sale prices of ADSL products intended for wholesale users and the sale prices of services offered to end users was not sufficient to cover TeliaSonera's own costs. The Stockholm District Court referred various questions to the CJEU before reaching a decision.

27. The First Chamber of the CJEU said that the referring court should consider whether the pricing practice introduced by TeliaSonera amounted to a margin squeeze. As the Court explained:

> '31. A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU ….
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> 32. In the present case, there would be such a margin squeeze if, inter alia, the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users.
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> 33. In such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability.'

28. The Court went on to consider the prices and costs that should be taken into account when making this assessment. In that context the Court stated:

> '39. It must be recalled, in that regard, that the Court has already made clear that Article 102 TFEU prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors ….
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> 40. Where an undertaking introduces a pricing policy intended to drive from the market competitors who are perhaps as efficient as that dominant undertaking but who, because of their smaller financial resources, are incapable of withstanding the competition waged against them, that undertaking is, accordingly, abusing its dominant position ….
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> 41. In order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to

> pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy …..
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> 42. In particular, as regards a pricing practice which causes margin squeeze, the use of such analytical criteria can establish whether that undertaking would have been sufficiently efficient to offer its retail services to end users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for the intermediary services ….
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> 43. If that undertaking would have been unable to offer its retail services otherwise than at a loss, that would mean that competitors who might be excluded by the application of the pricing practice in question could not be considered to be less efficient than the dominant undertaking and, consequently, that the risk of their exclusion was due to distorted competition. Such competition would not be based solely on the respective merits of the undertakings concerned.
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> 44. Furthermore, the validity of such an approach is reinforced by the fact that it conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct, which is consistent with its special responsibility under Article 102 TFEU , as stated in paragraph 24 of this judgment. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors ….
>
> 45. That said, it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue in the main proceedings. That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it.
>
> 46. It must therefore be concluded that, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the undertaking concerned on the retail services market. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined.'

29. In *Post Danmark I* Post Danmark enjoyed a statutory monopoly over a large part of the postal market in Denmark, but competed with other undertakings in the unaddressed mail market. The Danish competition authority found that Post Danmark had abused its dominant position in the unaddressed mail market by charging low prices to certain former customers of a competitor. Post Danmark challenged that finding before the Danish courts. The Danish Supreme Court referred questions as to the circumstances in which such a practice could amount to an abuse of a dominant position.

30. In the course of recapitulating the applicable principles the Grand Chamber of the CJEU stated:

> '21. … It is in no way the purpose of Article 82 EC to prevent an undertaking from acquiring, on its own merits, the dominant position on a market …. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.
>
> 22. Thus, not every exclusionary effect is necessarily detrimental to competition …. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.
>
> 23. … a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market ….
>
> 25. Thus, Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate ….
>
> 26. In order to determine whether a dominant undertaking has abused its dominant position by its pricing practices, it is necessary to consider all the circumstances …'

31. The Court noted at [28] that, in order to assess the lawfulness of a low price policy practised by a dominant undertaking, it had 'made use of criteria based on' an AEC test 'as well as on the [dominant undertaking's] strategy'. It went on to discuss a price-cost comparison which had been employed by the Danish competition authority, and to conclude at [44] that 'a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity'.

32. In *Post Danmark II* Post Danmark retained its statutory monopoly, which at the relevant time extended to over 70% of the bulk mail market. In 2003 Post Danmark had implemented a rebate scheme in respect of direct advertising mail at a time when there was no competition in the bulk mail market. In 2007 Bring Citymail entered the market for bulk mail, but it withdrew from the market in 2010 after suffering heavy losses. On a complaint by Bring Citymail, the Danish competition authority found that Post Danmark had abused its dominant position in the bulk mail market in 2007-2008 by applying rebates in respect of direct advertising mail which had the effect of tying customers and foreclosing the market. The authority held, contrary to Post Danmark's submission, that it was not appropriate to base the assessment of the anti-competitive exclusionary effect on the market caused by the rebate scheme on the AEC test. Post Danmark challenged the decision before the Danish Maritime and Commercial Court which referred questions to the CJEU asking

for clarification of (among other things) the relevance of the AEC test in assessing a rebate scheme.

33. The Second Chamber of the CJEU addressed this issue after holding at [21]-[50] that, in order to determine whether a rebate scheme such as that in issue was capable of having an exclusionary effect contrary to Article 82 EC , it was necessary to examine all of the circumstances of the case. The Court stated:

> '55. The as-efficient-competitor test has been specifically applied by the Court to low-pricing practices in the form of selective prices or predatory prices (see, in respect of selective prices,… *Post Danmark* , …, and in respect of predatory prices, … *AKZO v Commission* … and *France Telecom v Commission, C-202/07 P, EU:C:2009:214* …), and margin squeeze (… *TeliaSonera* …).
>
> 56. As regards the comparison of prices and costs in the context of applying Article 82 EC to a rebate scheme, the Court has held that the invoicing of "negative prices", that is to say, prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebate scheme operated by a dominant undertaking is abusive (… *Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221* …). In that same case, the Court specified that the absence of a comparison of prices charged with costs did not constitute an error of law ….
>
> 57. It follows that, as the Advocate General stated in points 61 and 63 of her Opinion, it is not possible to infer from Article 82 EC or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor test.
>
> 58. Nevertheless, that conclusion ought not to have the effect of excluding, on principle, recourse to the as-efficient-competitor test in cases involving a rebate scheme for the purposes of examining its compatibility with Article 82 EC .
>
> 59. On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.
>
> 60. Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.
>
> 61. The as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.
>
> 62. Consequently, the answer to the third and fourth subparagraphs of Question 1 is that the application of the as-efficient-competitor test does not

constitute a necessary condition for a finding to the effect that a rebate scheme is abusive under Article 82 EC . In a situation such as that in the main proceedings, applying the as-efficient-competitor test is of no relevance.'

34. In *Intel* the Commission found that Intel had abused its dominant position in the semiconductor industry through a combination of conditional rebates and of payments to customers intended to cause them to cancel or delay orders from Intel's main competitor AMD. In its decision the Commission held that the rebates in issue were by their very nature capable of restricting competition so that an AEC test was not necessary in order to find an abuse of a dominant position, but nevertheless carried out a very detailed analysis of the AEC test which led it to conclude that this supported the finding that the rebates were exclusionary. On appeal to the General Court Intel argued that the Commission's analysis of the AEC test was flawed. The General Court held that it was not necessary to consider whether the Commission had carried out the AEC test correctly.

35. The Grand Chamber of the CJEU allowed Intel's appeal. Having repeated at [133]-[136] what it had said in *Post Danmark I* at [21]-[23] and [25] (quoted above), the Court went on:

'138. [The Court's earlier] case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

139. In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market ….

140. The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU , may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer …. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.

141. If, in a decision finding a rebate scheme abusive, the Commission carries out such an analysis, the General Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings concerning the foreclosure capability of the rebate concerned.

142. In this case, while the Commission emphasised, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and,

> in particular, an AEC test were not necessary in order to find an abuse of a dominant position …, it nevertheless carried out an in-depth examination of those circumstances, setting out … a very detailed analysis of the AEC test, which led it to conclude … that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor.
>
> 143. It follows that, in the decision at issue, the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.
>
> 144. In those circumstances, the General Court was required to examine all of Intel's arguments concerning that test.
>
> 145. It held, however, … that it was not necessary to consider whether the Commission had carried out the AEC test in accordance with the applicable rules and without making any errors, and that it was also not necessary to examine the question whether the alternative calculations proposed by Intel had been carried out correctly.
>
> 146. In its examination of the circumstances of the case, carried out for the sake of completeness, the General Court therefore attached no importance … to the AEC test carried out by the Commission and, accordingly, did not address Intel's criticisms of that test.
>
> 147. Consequently, … the judgment of the General Court must be set aside, since, in its analysis of whether the rebates at issue were capable of restricting competition, the General Court wrongly failed to take into consideration Intel's line of argument seeking to expose alleged errors committed by the Commission in the AEC test.'

36. It should be noted that the Court did not refer to *Post Danmark II* , although it was mentioned in the Advocate General's opinion, three members of the Chamber in *Post Danmark II* were members of the Grand Chamber in *Intel* and Judge da Cruz Vilaça was the rapporteur in both cases. If the Grand Chamber in *Intel* had considered that the Chamber in *Post Danmark II* had been in error in ruling that it was not necessary to carry out an AEC test in order to find that a pricing practice was abusive, it is probable that the Grand Chamber would have said so, particularly given the convention that earlier decisions of the CJEU should only be overruled by the Grand Chamber.

37. It is clear from this case law that an AEC test may be relied upon by a competition authority to establish that a pricing practice is anti-competitive, in particular in cases where it is alleged that the practice amounts to selective pricing, predatory pricing or a margin squeeze. It is also clear that one of the advantages of an AEC test in such circumstances is that it can provide legal certainty for the dominant undertaking, in particular because the dominant undertaking will know its own costs, but may well not know the costs of any competitor.

38. In my judgment, however, the case law does not establish that an AEC test which is relied upon by the undertaking under investigation must be treated as highly relevant to, let alone determinative of, the question of whether a pricing practice is anti-competitive. On the contrary, it is clear from *Post Danmark*

II at [61] that the AEC test is one tool among others for the purposes of assessing whether there is an abuse of a dominant position. It is also clear from that case at [59]-[60] that there may be circumstances in which carrying out an AEC test is either impracticable or inappropriate. I do not consider that those statements are only applicable to rebate schemes, in particular because the statements at [59]-[60] are consistent with what the CJEU said in the context of a margin squeeze in *TeliaSonera* at [45]-[46].

39. I do not accept the submission of counsel for RM that it is only legitimate to disregard an AEC test where the emergence of an AEC is practically impossible, which is contradicted by what the Court said in *TeliaSonera* at [45] and *Post Danmark II* at [60].

40. Nor do I accept the submission of counsel for RM that *Post Danmark II* has been silently overruled or qualified by *Intel* . Not only did the Grand Chamber in *Intel* not cast doubt on *Post Danmark II* , but also there is no inconsistency between the two decisions. The essence of *Intel* is simply that the General Court was wrong not to consider whether or not Intel's criticisms of the AEC test carried out by the Commission were well founded."

27. Males LJ gave a judgment on very similar lines, see in particular at [79] and [83-84].

28. Google sought to avoid engaging with *Royal Mail* during the hearing before us (coming to it only in reply submissions) on the basis that it was only a case about the need or otherwise for an AEC Test and was not about whether there is a general AEC Principle. We do not agree with such a limited view. A key decision in the line of cases is, in our view, *Post Danmark II* (Case C-23/14 *Post Danmark A/S v Koncurrencerådet* [2015] ECLI:EU:C:2015:651) which makes the points (1) that analysis in terms of an AEC does not work when the market structure prevents the emergence of an AEC at all, and (2) that LECs may have a beneficial effect on competition. Admittedly the Court's statements were largely in the context of the AEC Test, but it seems strongly inconsistent with the decision (or at least very arguably so in the context of the present application) to say that the Court's reasoning in terms of an AEC Test "is of no relevance" but that the AEC Principle is nonetheless mandatory in all cases.

29. Sensing the difficulty with *Post Danmark II*, it was argued for Google in opening oral submissions that the paragraphs in the judgment quoted by the Court of Appeal in *Royal Mail* were *obiter*. This is clearly incorrect since the paragraphs in question run up to and are the basis for the conclusion on Question 1 at paragraph 62 ("Consequently, the answer to the third and fourth

subparagraphs of Question 1 is …"). The Court of Appeal plainly also considered those paragraphs to be important. We also understood Google to submit that those paragraphs were wrong or overtaken by later decisions, but the Court of Appeal explicitly rejected such a submission, at least based on *Intel* (Case C-413-14 P *Intel Corp. v European Commission* [2017] ECLI:EU:C:2017:632) at [40].

30. To be fair, Google's argument that *Post Danmark II* was wrong partly depended, it said, on what the Court was saying. Google said the decision was wrong if it was saying that it was the objective of Article 102 to protect, or always to protect, LECs.

31. We think this way of seeking to put matters is illuminating of the basic problem with Google's argument. The Court in *Post Danmark II* was not saying that it is the object of Article 102 to (always) protect LECs. The PCR is not saying that either. We agree that behaviour likely to exclude LECs from the market *without more* will not make out a case of abuse of dominance since their lack of efficiency may itself lead to their exit. However, the PCR's case goes further (see e.g. paragraph 121 of the Claim Form) and includes the assertion that it is not possible for an AEC to emerge, because of Google's behaviour in its dealings with Apple, in particular because that behaviour prevents potential competitors from achieving the scale of search that could enable them to be as efficient. On the strength of *Post Danmark II* and the other cases in the lines of authority considered by the Court of Appeal in *Royal Mail*, we consider that to be at least arguable.

32. We also note that Google was unable to point to any authority that says in terms that application of the AEC Principle is mandatory in every case, even in situations where the AEC Test is not merely not deployed by either party, but not meaningfully capable of being done. We have not dealt explicitly with all the cases cited by Google in this judgment, but we record that it relied heavily on Case C-680/20 *Unilever Italia Mkt Operations v Autorità Garante della Concorrenza e del Mercato* [2023] ECLI:EU:C:2023:33 for the proposition that exclusive purchasing obligations (which it argued were the best analogy to the present case) are not presumptively unlawful, a proposition which we do not

think is relevant one way or another to our decision. The same case also contains a recent restatement of the AEC Test, but we do not consider it addresses the question of whether application of the AEC Principle is mandatory even where the AEC Test is not workable. That was not in issue.

33. In reaching this conclusion, we are not passing judgment on the strength of any part of the PCR's case. We are merely holding that the summary judgment/strike out standard is not met by Google. It may well be a rare case where consideration of the position of LECs is enough, but what the parameters of such a case may be is, we think, "developing" or subject to "development" in the sense used by Lord Browne-Wilkinson in *Barrett* (*Barrett v Enfield London Borough Council* [2001] 2 AC 550). So, an additional reason for our decision is that that development should take place against the background of real and not assumed facts.

34. This conclusion makes it unnecessary for us to consider the PCR's alternative case, which is that if application of an AEC Principle is mandatory, the claim can still succeed. This was pleaded in paragraphs 121 and 122 of the Claim Form and (as paragraph 122 said) developed further in the expert report of Dr Latham at sections 6.3, 6.4 and 6.5. We agree with Google that it is not really satisfactory effectively to make whole sections of an expert report part of the pleadings by reference in this way, but it did not say we should reject the PCR's case for that reason. Although we do not have to decide it, we will say that the arguments were complex and subtle, and the questions relating to the capitalisation and aptitude for monetising search on the part of the notional AEC, and the issue of the extent to which the AEC need not be a clone of Google (Google accepting that it did not have to be such) were quite unsuitable for summary determination and clearly of a kind which would need a trial to resolve. So if we had had to go into it, we would have held that the PCR's alternative case based on an AEC analysis ought not to be dismissed summarily or struck out.

35. We note that the PCR relied on the Decision, the Commission's Draft Guidelines on the application of Article 102 to abusive exclusionary conduct by dominant undertakings, a judgment in proceedings in the US by the Department

of Justice against Google, and a report by the CMA (the latter two both covering Google's behaviour in relation to iOS) as lending general credence to her case. These are of course not inconsistent with our conclusion on summary judgment/strike out but nor are they necessary to it and we have not relied on them.

F. COUNTERFACTUALS

36. We have identified the relevant legal standard above.

37. We will deal with the Android counterfactual and then the iOS counterfactual.

(1) The Android counterfactual

38. As we have mentioned above, the finding in the Decision was that Google's MADAs were wrongful in their anticompetitive effect. But there was no such finding against the device-based or portfolio-based RSAs (in the latter case only following the appeal).

39. Google's key point at this certification stage is that the counterfactual requires the postulating of a situation in which the MADAs do not exist, but where the RSAs, not held to be unlawful, *must* be factored in. Google accepts (see the reference to *Dune*, above) that the counterfactual must be non-abusive, but it says that the RSAs that existed in the actual cannot be considered to be abusive, since they were not condemned in the Decision (or on appeal). Although Google maintained a degree of ambiguity about its position, it is clear to us that it intends to make a case in due course (assuming certification) that absent the MADAs it could nonetheless have achieved much the same, or even exactly the same, result via RSAs, in a non-abusive way.

40. The PCR's counterfactual, developed through the evidence of Dr Latham, postulates, at a very high level, a scenario in which the abusive conduct would be removed and where default arrangements with equivalent effect would not be in place either. In such a situation, Dr Latham says, competition would increase. In terms of the concrete, he considers two scenarios in which Google

would adopt measures which it did in fact adopt in the real world in response to regulatory challenge. The details do not matter, but one example is a "choice screen" where consumers are given the choice of search functionality when they first start using a device, rather than having it decided for them by way of default status.

41. None of Dr Latham's analyses, however, factor in a degree of continued use by Google of RSAs.

42. Dr Latham explained in his report that he was instructed that the counterfactual could not include abusive behaviour, or behaviour of the same effect as that found to be abusive, and it was on that, as well as the omission from the counterfactuals of any role for the RSAs, that Google focused its fire.

43. On the first point (no abuse in the counterfactual), we think it is right that Dr Latham was directed to exclude abusive behaviour by Google from the counterfactual. We agree that at times he referred to behaviour with essentially equivalent effect to the abusive behaviour, but to the extent that is a different thing, we consider it is not a difference that can fatally undermine the PCR's case if it is otherwise sound.

44. On the second point (no role for the RSAs), we can see that a coherent counterfactual could in principle be put together in which Google had contractual arrangements that gave it a material degree of default status and was not abusive. Google is free to do that. But that is not the same thing as saying that the counterfactual must necessarily consist in the historical, overall pattern of agreements with OEMs and the like with the abusive MADAs removed and the same RSAs still in place. It is not apparent to us that that would make sense, or that that is what would have happened if the MADAs had not been in place. The OEMs might have behaved quite differently. What would have happened is a matter for evidence in due course and will quite probably be affected by disclosure.

45. We make two related general points as well.

46. First, both of Google's points really have the effect of saying that it is the PCR's obligation at this early stage to predict how Google could and would have reacted in a counterfactual where it could no longer rely on the MADAs, and what Google's counterparties would have done, or accepted, in that situation. It is no doubt a question of degree, and some sort of prediction is inherent in any counterfactual, but in the circumstances of the present case we think that the task sought to be loaded on the PCR by Google at this stage is unreasonable and impractical.

47. Second, we think that the PCR's efforts in relation to the Android counterfactual have been serious and considered, both at a general level and in relation to the concrete situations with the choice screen etc. Declining to include the RSAs in a concrete way at this stage is not a sign of the PCR trying to say that the counterfactual analysis is "not my problem" (the expression used in *Gormsen v Meta Platforms Inc* [2024] CAT 10).

48. Overall, it will be an important matter of case management to consider how to deal with counterfactuals in which different RSAs were in place and whether what is put forward by Google would itself have been unlawful, but that is for the future and does not provide a reason not to certify at this stage.

49. Finally, we note that the points of criticism made by Google were not supported by expert evidence. This fact is not necessary to our decision and Google's position was that its arguments are matters of principle not requiring expert evidence.

(2) The iOS counterfactual

50. Had we agreed with Google in relation to summary judgment/strike out on the iOS Conduct then it would not be necessary to consider the iOS counterfactual at all, as the claim would be dismissed or struck out. To put it the other way around, Google's attack on the iOS counterfactual only falls to be considered if the PCR is (arguably) right that an effect on LECs is relevant, preventing them from obtaining any scale and any foothold on Apple devices. It did not seem to us that Google had really thought through the consequences of our not accepting

the mandatory application of the AEC Principle on their iOS counterfactual case. We asked both Mr Pickford and Mr Holmes about it in the course of oral submissions, and Mr Holmes accepted that "this argument in relation to the iOS counterfactual heavily depends on the submissions that Mr Pickford has made [on the iOS Conduct]."

51. We think that our conclusion that Google's summary judgment/strike out fails also disposes of its attack on the iOS counterfactual at this stage of proceedings. We will explain why.

52. The PCR's iOS counterfactual was characterised in her skeleton as "involv[ing] rival search engines having a genuine opportunity to compete for market share", competing to be the default provider on at least *some* Apple devices (even if not all), referring to paragraphs 115 and 134 of the Claim Form, with some specific scenarios mentioned by Dr Latham at paragraphs 412-413 and 417 of his report. The PCR's counterfactuals included the possibility of Google making lesser payments to Apple, for example to be included in a choice screen, but consistently with this opportunity for rivals to compete.

53. Google however argued that the PCR's counterfactual case had fatally overlooked a situation in which Google still paid Apple for default status in a lower amount, yet one at which competitors were still entirely excluded, not because they could not match Google's payments, but because they were less efficient (the main lower efficiency of relevance being search quality, which of course the PCR says would be a result of the competitors not having any scale). But if Google were wrong about summary judgment/strike out and the PCR was right in its case (which we have found arguable), then paying Apple with the effect of excluding LECs could still be abusive, and the PCR says it would be. So Google's attack just amounts to saying that the PCR has not dealt with a counterfactual which on the PCR's main case would be abusive.

54. We did not think that Google had any real answer to this. After accepting the dependency on Mr Pickford's arguments, Mr Holmes postulated an "adjusted AEC Test" which would allow Google to pay for default status and still succeed through competition on the merits, but we did not see how this resolved the

problem we have explained and anyway it could not amount to a fundamental problem with the PCR's position on the counterfactual so as to prevent certification. We remark in passing that we did not entirely understand the economic and commercial logic behind the situation Google was saying the PCR had not addressed, but that is an issue with Google's argument, not the PCR's case.

55. In any event, apart from the problem we have just identified, it was artificial for Google to focus purely on price in the way that it did: the abuse alleged includes in particular (as we have touched on) an allegation that the iOS conduct is abusive because it precludes competitors from obtaining any market share on any Apple device. While Google is free to make an argument in due course that it could have achieved similar or identical results with a lower payment (or by other non-abusive means), that does not mean that the PCR's counterfactual is fatally deficient in not anticipating the argument, and certainly not bearing in mind the relatively modest standard required of a counterfactual at the certification stage. Furthermore, we think the other points we have made above in relation to the Android counterfactual apply here too: the PCR has put forward a serious case at both the general and specific level (the choice screen-type arguments are made here too, as mentioned above).

G. LIMITATION

56. A limitation argument arises in this case because Google alleges that both the Android and iOS claims are time-barred in respect of causes of action which accrued between 1 October 2015 and 7 September 2017. The PCR responds that, on the basis of Case C-605/21 *Heureka Group v Google LLC* [2024] ECLI:EU:C:2024:324, the limitation period does not start to run until the infringements have ceased. However, the position in UK law and the impact of EU law on it are the subject of an appeal to the Court of Appeal (in *Umbrella Interchange Fee*).

57. In *Ad Tech v Google* (*supra*) at the CPO stage, the Tribunal held that similar limitation issues were a matter for trial. However, as we think is common

ground, there are issues of fact as well as law at play there on the limitation points.

58. The PCR argues that we should follow the same approach as in *Ad Tech* because limitation cannot prevent the making of a CPO or remove any issues from the case, and because whatever we decided would inevitably be sought to be appealed at least on a protective basis pending the Court of Appeal's decision.

59. Google, on the other hand, invites us to grasp the nettle and decide what is a point of law. It also says that doing so would, or at least might, give the losing party the opportunity to participate in the Court of Appeal in *Umbrella Interchange Fee*. Google's fallback position is that if we do not decide the issue, we should not put it off all the way to trial, which might be several years away.

60. We think this is really a case management decision, as indeed Mr Holmes accepted in the course of his submissions. We conclude that deciding the point now and the ensuing applications for permission to appeal, and any appeal itself, would be a distraction from the many more important issues in the case. We are confident that the appeal in *Umbrella Interchange Fee* will be thoroughly argued on both sides and there is no benefit to having the litigants from this case in the picture as well.

61. However, we agree with Google that it would be wrong to put the point off to trial when there do not appear to be any factual issues, and we will consider it again in the course of case managing this litigation once the decision of the Court of Appeal is known.

H. FUNDING

62. Google drew our attention to a number of points about funding in section F of its skeleton argument for the hearing. It did not positively submit that they posed an obstacle to certification and recognised that the points raised were in our discretion. The PCR said that the points had all been addressed in a letter from Hausfeld & Co. LLP of 3 July 2024. We have re-read that letter in the

light of Google's skeleton and do not consider any action or comment is required.

I. CONCLUSION

63. We will make the CPO sought by the PCR. This decision is unanimous.

Sir Richard Meade Chair	John Davies	Robert Herga

Charles Dhanowa O.B.E., K.C. (*Hon*) Registrar	Date: 22 November 2024