



Neutral citation [2024] CAT 78

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1408/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

19 December 2024

Before:

BRIDGET LUCAS KC
(Chair)

Sitting as a Tribunal in England and Wales

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

Case No: 1378/5/7/20

AND BETWEEN:

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

Claimants

- v -

(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

Heard remotely on 5 December 2024

RULING (DISCLOSURE)

APPEARANCES

Sarah Bousfield (instructed by Hausfeld and Co. LLP) appeared on behalf of the Class Representative.

Colin West KC, Daisy Mackersie and Jagoda Klimowicz (instructed by Norton Rose Fullbright LLP) appeared on behalf of the Claimants.

Kassie Smith KC, and Luke Kelly (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Defendants.

1. This ruling relates to an application by the Defendants (“Google”) in these proceedings for disclosure from Claimants in the Epic Proceedings (“Epic”). By way of brief background, on 2 August 2024 Epic applied to further amend its claim form. The principal amendments were to plead a claim that the commissions charged by Google on purchases of in-app content for apps distributed via the Google Play Store on Android mobile device amounted to excessive and/ or unfair pricing, and that the Play Store is “an essential facility”.
2. The application to re-re-re-amend was heard at a case management conference on 7 October 2024 (the “October CMC”), at which Google confirmed that it did not oppose the proposed amendments on the basis that Epic provide further disclosure which Google suggested was necessary in order for the new allegations to be fairly determined. The October CMC therefore focused on Google’s disclosure requests which were set out in the fifth witness statement of David Cran (“Cran 5”). These fell into three categories: (a) the profitability of Epic Games Store (“EGS”); (b) Epic’s strategy and commercial arrangements in relation to the distribution of its apps and app store(s); and (c) the fees and commissions paid by Epic for the distribution of its apps and app store(s), and pass-on rates to consumers. The parties were able to reach agreement in the course of the October CMC as to the appropriate disclosure orders to be made. In broad terms, the agreed form of order (the “CMC Order”) provided for Epic to provide various categories of documents and related information in the form of witness statements, and for Google to disclose to Epic certain documents relating to the excessive and unfair pricing claim, and rates of pass-on of service fees, charges, commission rates and other costs to consumers.
3. Paragraph 9 of the CMC Order provided that: “The Parties will seek to agree the parameters of any further disclosure on the part of Epic (and/or possibility of mutual disclosure by Google) in relation to the categories of disclosure identified at paragraphs 35(a), (b) and (c) of Cran 5. To the extent the parties cannot reach agreement, the parties will write to the Tribunal on 18 November 2024, setting out any areas of disagreement. Any outstanding differences will be determined if necessary at a half-day hearing to be provisionally listed in the week commencing 2 December 2024, or by the Tribunal on the papers.”

4. A dispute as to the parameters of further disclosure has arisen. Google makes various further requests by reference to the three categories (a); (b) and (c) originally identified at paragraph 35 of Cran 5. Both parties filed witness statements in support of their respective positions: Epic relied on the first witness statement of Caroline Thomas, and Google relied on the sixth and seventh witness statements of Mr David Cran. Prior to a case management conference listed to take place on 5 December 2024 (the “December CMC”) to consider Google’s requests, the parties prepared a very helpful Redfern Schedule which recorded their respective positions in relation to each of them. Having heard submissions, I gave directions in relation to categories (a) and (c), and I reserved my decision in relation to category (b) which related to “documents and data relating to Epic’s app distribution strategy”. This Ruling sets out my decision in relation to category (b).

5. Before doing so, I should refer to events happening after the December CMC and shortly before handing down this Ruling. By letter dated 15 December 2024 from its solicitors, Google notified the Tribunal of Epic’s announcement dated 12 December 2024 of a “long-term partnership” with Telefonica. Google submitted that this is a significant development for Epic in connection with both the distribution of EGS on Android, and the distribution on Android of apps created by Epic including the gaming apps Fortnite, Fall Guys and Rocket League Sideswipe. Google stated that such a development is relevant and material to these proceedings for the reasons given in paragraph 35(b) of Cran 5, and supports Google’s Requests 5 to 7 and 9. Google maintained its request for disclosure of Request 6 and supplemented Request 9 to include a further search for documents from the “Relevant Custodians” responsive to the search terms “Telefonica”, “Telefónica”, or “O2” within the period 1 July 2024 to 13 December 2024.

6. By letter from its solicitors dated 16 December 2024, Epic requested the Tribunal reject the supplemental requests by Google. Epic consider the additional disclosure proposed by Epic is sufficient and Google’s requests are irrelevant, premature and disproportionate. Further correspondence from the parties in relation to these issues were received by letters dated 18 and 19 December 2024.

7. Five requests – Requests 5 to 9 - fall under category (b) which relates to “documents and data relating to Epic’s app distribution strategy”. These are:
- (a) Request 5: Agendas, minutes, slide decks, presentations and other records of meetings, relevant to Epic’s strategy for release of EGS on mobile devices, to include specific meetings groups Google had identified from documents already provided by Epic. Google sought disclosure by reference to various specific, named custodians. By the time of the December CMC the date range sought by Google was for the period from 1 December 2023 to the end of 31 October 2024.
 - (b) Request 6: Agendas, minutes, records of communications, heads of terms, agreements and strategy documents, related to Epic’s engagement and potential engagement with OEMs, developers, partners and potential partners in connection with EGS on mobile including various named entities, and by reference to the same named custodians. The applicable date range is for the period from 13 August 2020 to 31 October 2024.
 - (c) Request 7: Documents evidencing Epic’s strategy in relation to the release of EGS on mobile, and communications related to the preparation of the same, including certain slide decks, presentations or similar documents, again by reference to the same named custodians, and for the date range 13 August 2020 to 31 October 2024.
 - (d) Request 8: Copies of the documents related to certain surveys and related data, again by reference to the same named custodians, and for the date range 13 August 2020 to 31 October 2024.
 - (e) Request 9: Documents in the equivalent of the above four categories, that relate to Epic’s app distribution strategy and information relating to the key meetings and groups that address that strategy, and key custodians, again in the date range 13 August 2020 to 31 October 2024.
8. Google submits that the need for further disclosure arises principally as a result of the amendments to plead that Google Play Store is indispensable, and an

essential facility for the distribution of alternative app stores. The Re-Re-Re-Amended Claim Form (“RRRACF”) provides as follows:

“144B. On the grounds which Epic has already set out above, distribution via the Google Play Store is the only practical means by which alternative app stores (such as the Epic Games Store) are able to secure distribution on Android devices and thereby subsequently distribute apps independently and in competition with the Google Play Store. In particular, as pleaded above, the only other means by which such distribution could be secured are (i) pre-installation and (ii) direct downloading / sideloading. However, Google prevents competing app distributors from securing distribution via such means through the Pre-Installation Restrictions and Technical Restrictions. Distribution by such alternative means is therefore impossible or unreasonably difficult. While Epic has plans to attempt to launch the Epic Games Store on Android, as per paragraph 26.b above, Epic expects difficulties will arise as a result of Google’s actions to prevent such competition and the attempt may ultimately not succeed.

144C. As a result of the matters pleaded above, there is no effective competition to the Google Play Store, and such alternative means do not therefore constitute an actual or potential substitute for distribution via the Google Play Store. By the same token, and to the extent necessary so to aver, distribution via the Google Play Store is indispensable in order for a potential rival app store to gain access to Android devices and to introduce effective competition to the Google Play Store for the benefit of both developers and app users. In the premises, the Google Play Store is an essential facility for the distribution of alternative app stores.”

9. Ms Smith KC for Google submitted that the allegation that there is no other feasible way in which rival app stores can be distributed is relevant to the allegation of dominance; to market definition; to the essential facility allegation; and to the refusal to supply allegation. An important issue in these proceedings which the Tribunal will have to determine is whether or not Google Play Store is, as Epic alleges, indispensable, or whether there are other app and App Store distribution channels that are reasonable alternatives. This, she says, means that disclosure is required of documents relevant to Epic’s own strategy for distribution for both EGS and Epic’s own apps.
10. Epic has already provided some disclosure relating to its strategy for the launch of EGS pursuant to the CMC Order, including by reference to the disclosure on this issue made in proceedings between Epic and Google taking place in Australia (the “Australian Disclosure”). Google says that this is limited in scope. First, it relates only to the likelihood of a future launch of EGS on Android.

Secondly it was sought after the trial had already commenced, and a few days before the relevant witnesses were to be cross-examined which meant that the exercise was necessarily a limited one both in terms of the time period it covered, and custodians. Thirdly, it only covers the period between 1 December 2023 and 26 March 2024, and there have been a number of developments in distribution channels available to Epic (some of which fall outside that window) including the release of Fortnite on Nvidia GeForce Now and Amazon Luna, the removal of Fortnite from Samsung Galaxy Store in July 2024, and the launch by Epic of EGS itself (to which Google would now add the arrangements with Telefonica). Fourthly, it does not extend beyond Epic's internal documents relating to its strategy, whereas Google now also seeks documents relating to Epic's communications with third parties, on the basis that the latter will record the views of those third parties as to the feasibility of alternative distribution channels.

11. Google, having reviewed that disclosure, considers that there are other categories of relevant documents that should be disclosed. Google says that the documents it seeks in relation to requests 5 to 8 have been identified as likely to exist and to be of relevance from its review of the Australian Disclosure.
12. In relation to Request 5, Mr West KC for Epic argued that Google's requests were over-broad in their scope, and included custodians unlikely to have any strategic role in decision-making: to include all of them would result in significant duplication. Epic confirmed that it is prepared to make further searches by reference to focused search terms applied to a more targeted list of custodians.
13. A degree of progress was made in relation to Request 5 in the course of the hearing:
 - (a) Epic provided its proposed search terms to Google shortly before the hearing, and Google confirmed that they appeared to be workable but wanted to have an opportunity to consider them.

- (b) In relation to custodians, Epic's proposed custodians are Mr Steve Allison, Mr Kyle Billings and Mr Walter Somol. These are the persons that Epic regards as senior individuals of the relevant business unit or committee, and are those who would be most likely to have documents responsive to the proposed searches, including in relation to specific meetings, committees and groups identified by Google. Epic maintains that further disclosure from other custodians is likely to be duplicative. Epic does not propose to include Mr Sweeney, although he was a custodian for the purposes of the Australian proceedings, because he is not involved in the ongoing day-to-day strategic decision making in relation to the distribution of apps and EGS. Google indicated that if confirmation was provided that, for example, the chairs of the relevant committees were included in the custodians, and Epic's relevant witnesses in this case are also on the list, that may suffice.
- (c) There remains a dispute about the relevant date range: Google maintains that its proposed date: 1 December 2023 is important because whilst that is the same start date as was applied in the Australian proceedings, that exercise was more limited and documents have been identified as potentially relevant but which have not been disclosed. Epic submits that if that start date was adopted, then it is in effect a request for it to do the Australian Disclosure exercise again. Epic has already conducted searches relevant to identify documents relating to the launch against two named custodians: Mr Sweeney and Mr Allison. To require it to do the same again amounts to duplication. Epic disputes the suggestion that the Australian Disclosure was limited because the issue arose late in the day, or that, had circumstances been different, any wider disclosure would have been appropriate, or ordered.

14. In relation to Request 5, my decision is that the appropriate course is (1) for the parties to seek to agree the proposed search terms. For the avoidance of any doubt, those terms must be sufficient to identify documents which refer to the Telefonica arrangement; (2) for Epic to provide a witness statement setting out its proposed custodians and the basis on which it is suggested that those custodians are of a senior level and likely to have documents relevant to the

proposed search terms; (3) for Google to have an opportunity to respond; (4) for the parties to attempt to agree search terms and custodians; (5) for Epic to provide disclosure by reference to the search terms and custodians insofar as agreement is reached, and failing agreement, at least so as to reflect Epic's search terms and custodians; and (6) for any dispute as to further search terms or custodians to be referred back to me. The date range to be applied is from 1 December 2023 to 30 November 2024. It is appropriate to adopt that start date in light of the additional custodians and new search terms. The end date is later than either party proposed at the December CMC but is appropriate in light of the Telefonica announcement.

15. In relation to Request 7 the position is similar. Epic considers Google's requests to be too broad, and proposes that its search be conducted by reference to the phrase "EGS Expansion": being a phrase taken from a disclosed document highlighted by Google. Google submits that is too narrow, and I agree, given it will only disclose documents which use those specific terms in that precise order.
16. In relation to Request 7, the appropriate course is (1) for Epic to propose a set of search terms which is likely to produce documents (slide decks, presentations or similar) relating to the release of EGS on mobile including documents that do not use the precise phrase proposed by Epic; (2) the parties should attempt to agree the search terms and if there is any dispute in relation to them, that may be referred to me. Otherwise (3) those search terms should be applied to the custodians and date range to be used in relation to Request 5.
17. Request 6 seeks disclosure that goes to the issue of Epic's engagement with third parties such as OEMs and developers as regards the launch of EGS on Android. Google has identified some third parties by reference to disclosure already given by Epic, to which obviously they now seek to add Telefonica. Google submits that is plainly relevant to the newly pleaded case relating to the indispensability of Google Play Store and the essential facilities claim. So, for example, if third parties consider that EGS is a good route to market, or not a good route, that is relevant: as are the reasons they take that view and whether those reasons are related to the alleged anti-competitive conduct in this case.

Epic specifically pleads that its launch of EGS on Android might not succeed because of Google's anti-competitive conduct (and not, for example, for any other reason).

18. Epic submits that this request reflects the category which was rejected in Australia. Mr West drew my attention to the transcript of the hearing in the Australian Proceedings, and submitted that the Court did not order Epic to disclose documents concerning Epic's relations with developers or its relations with OEMs on the basis that, whilst the documents might be relevant, it represented a level of detail that was neither proportionate nor necessary to the particular exercise under consideration in those proceedings. Mr West submitted that the rationale behind this finding was that the detail of negotiations or agreements with third parties were not necessary to understand Epic's strategy for the launch of EGS. The implementation of the strategy, and how successful it has been, will be covered in the witness statement that Epic has been ordered to provide in February 2025, pursuant to paragraph 8 of the CMC Order. The sort of information sought relating to Epic's relationships with third parties is also highly confidential. Mr West submitted that this Request is unnecessary in the event that dealings with third parties may be reflected in documents disclosed in response to Requests 5 and 7.
19. I am not satisfied as to the necessity and proportionality of Request 6 in circumstances where documents produced in relation to Requests 5 and 7 may well provide information relating to Epic's engagement with third parties in relation to its strategy relating to distribution of EGS on mobile. The appropriate course is for Epic to provide its Request 5 and 7 disclosure, and for Google then to consider what has been provided, and then to explain in what way that disclosure is deficient or insufficient to enable the relevant pleaded issues in the case to be determined. I do not intend to make any order in relation to Request 6 now but Google has permission to renew it, if and to the extent that it is necessary to do so, after it has received disclosure in relation to Requests 5 and 7.
20. Request 8 is similar to Request 6, but seeks copies of documents "related to" a document identified as "EGS Global surveys" including the results of such

surveys and supporting data. Google submits that documents and data relating to this is likely to provide an insight into the relative quality and value of Google Play and EGS. Google submits that it is relevant to Epic's pleading that Google Play is an "essential facility", and the reasons why Epic pleads that even when it is launched, EGS on Android may yet fail (and in particular whether it is the result of Google's anti-competitive conduct as opposed to any other reason). It is also said to be relevant to the pleaded counter-factual that "The relative success of the alternative means of app distribution could then be decided on the competitive merits, including by reference to price and quality rather than distorted by reason of the restrictions imposed by Google" (paragraph 150, RRRACF).

21. Epic submits that these documents are really relevant to its plea that Epic should be able to compete on the merits, and not to its amendments, but submitted that if I was minded to make an order, it should be limited to the specific documents referred to (i.e. the EGS Global surveys, the results of such surveys and the supporting data).
22. I will make an order limited to copies of the EGS Global surveys themselves, their results and the supporting data. I consider that the surveys are likely to be relevant to the issue identified by Google, but a broader, unparticularised search in order to capture any document of whatever nature relating to these documents appears to me to be potentially disproportionate. Again, I consider that Google should consider what is produced in response to Request 8 first, before seeking further supplemental disclosure.
23. As regards Request 9 – disclosure relating to other distribution channels for EGS and Epic's apps – by the time of the hearing, Google had proposed that Epic:
 - (a) Identify relevant meetings and groups that address Epic's app distribution strategy other than in respect of EGS on mobile, and collate and disclose relevant agendas for, slide decks or notes presented at, and minutes of such meetings for the time period 13 August 2020 to 31 October 2024;

- (b) In respect of the release of Fortnite on Nvidia GeForce Now, documents from the relevant custodians responsive to the search terms (“Nvidia” or “GFN” or “GeForce”) within the period 1 January 2023 to 31 October 2024.
- (c) In respect of the release of Fortnite on Amazon Luna, documents from the relevant custodians responsive to the search terms (“Amazon” or “Luna”) within the period 1 January 2023 to 31 October 2024.
- (d) In respect of the removal of Fortnite from the Samsung Galaxy Store, documents from the relevant custodians responsive to the search terms (“Samsung” or “auto blocker”) within the period 1 October 2023 to 31 October 2024.

Google reserved the right to make further disclosure requests once it had had the opportunity to review the disclosure provided, and clearly it now wishes to add Telefonica.

- 24. Epic says that it has already disclosed around 400 documents relevant to this issue and that thousands of documents in relation to the distribution of Nvidia GeForce Now have also been disclosed. Epic submits that Google has not explained why that disclosure is inadequate. Epic also submits that there is no pleaded issue that relates to the removal of Fortnite from the Samsung Galaxy Store, and disputes its relevance.
- 25. Google submits that its proposal is appropriate. It says that it is in the process of reviewing the disclosure in relation to Luna, but is not aware of substantial disclosure having been made in relation to Nvidia GeForce Now, and suggests it is not good enough for Epic to rely solely on an assertion that this is the case without explaining the position. Subsequent to the hearing it has become clear that the thousands of documents relating to Nvidia GeForce Now was a reference to disclosure previously made in 2022 in the US Proceedings, being documentation that is now obviously not up to date. In relation to the removal of Fortnite from Samsung Galaxy, it submits that this is relevant, because it is

important to know why it was removed, and whether it was due to Google's anti-competitive conduct or for another reason.

26. I do not think that it is appropriate to reach a conclusion on Request 9 without giving the parties an opportunity to consider properly the disclosure that has been provided on these issues, to which will be added the disclosure made in relation to Requests 5 and 7. That was a decision that I had reached before the correspondence between the parties and the Tribunal after the hearing. That correspondence serves only to reinforce it. This is plainly a controversial category, and to my mind it was the category that was challenging in terms of articulation at the December CMC and proceeded on the assumption that the documentation would not be forthcoming in response to other Requests. Whilst documents may be relevant, it does not mean that it will necessarily be proportionate to order that they be disclosed. That will turn to at least some degree on disclosure that has already been made.

27. In relation to Request 9, therefore, I will direct (1) Epic shall write to Google identifying which documents already disclosed relate to the release of Fortnite on Nvidia GeForce Now; and the removal of Fortnite from the Samsung Galaxy Store; (2) Google shall then have the opportunity to respond identifying, by reference to the RRRACF and the documents already disclosed (including pursuant to Requests 5 and 7), the basis upon which it is alleged that the disclosure is deficient; (3) the parties shall have the opportunity to agree further, targeted searches, failing which (4) Google may renew its application, but not before Request 5 and Request 7 disclosure has been provided.

Bridget Lucas KC
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 19 December 2024