



Neutral citation [2024] CAT 20

Case No: 1589/5/7/23 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 March 2024

Before:

The Honourable Mr Justice Peter Roth
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

INFEDERATION LIMITED
("Foundem")

Claimant

- v -

(1) **GOOGLE LLC**
(2) **GOOGLE IRELAND LIMITED**
(3) **GOOGLE UK LIMITED**
(together "Google")

Defendants

Heard at Salisbury Square House on 26 March 2024

RULING: SPECIFIC DISCLOSURE

APPEARANCES

Gerard Rothschild (instructed by Hausfeld & Co LLP) appeared on behalf of the Claimant.

Jon Turner KC and Julianne Kerr Morrison (instructed by Bristows LLP) appeared on behalf of the Defendants.

1. In these proceedings, Foundem has applied for specific disclosure. The application, as issued on 5 March 2024, sought disclosure of three categories of documents. Two of those three categories have been resolved by agreement. The third category in itself comprises two aspects: the first concerns the costs relating to Google's comparison shopping site; and the second concerns the revenues of Google's comparative shopping site, in each case over specified periods.
2. The first of those, that is the cost data, Foundem is not now pursuing, on the basis that the question of Google's costs of its site will not be in play when it comes to assessment of damages. Foundem has made clear that if Google does seek to rely on any aspects of its costs, then Foundem will expect to receive full disclosure.
3. Therefore that is not something we are being asked to determine today, but the point has been clearly made and Mr Turner KC for Google has taken that on board. We have no doubt that Google appreciates that if it is going to rely on aspects of its own costs then it will have to make disclosure of those costs. At present, therefore, that aspect of the application is not before us.
4. What is being pursued, and pursued strongly, by Foundem is an application for disclosure of the revenues of Google's comparative shopping site during (and I quote):

"The periods 1 June 2006 to 31 January 2013 and 1 January 2017 to 30 December 2017 in each of Germany, Spain, France, Italy, the Netherlands, the United States and the United Kingdom on a monthly basis".
5. In particular for the earlier part of the application, that is to say the period from June 2006 to January 2013, given that the information is sought for seven distinct national markets and on a monthly basis, that is seeking disclosure of a very significant amount of data.
6. What is said by Google in opposition to the application is, first, that much of the data, particularly on the earlier periods, is irrelevant because of the way in which Google priced at that time, as explained in the witness statement of Sophie Lawrance of Google's solicitors. Moreover, obtaining that data, which is now

quite historic, would involve significant work and effort which is quite disproportionate at this stage. That is because at the moment there is no articulated case from the economist appointed by Foundem as to how Foundem intends to estimate its loss for which it is claiming. Google submits that the request for disclosure of this sort should be expert led.

7. Furthermore, Google points out that there are now four claims before the Tribunal against it. Those claims are now being case managed together as a result of the order we made this morning. Therefore, to deal with applications for disclosure concerning quantum piecemeal results in duplication of work and effort and is not a sensible way of conducting the litigation. In support of that contention, Google refers to what it has already had to do in revisiting data which it first had to scrutinise and collect on an application by Foundem, when faced with a subsequent application by one of the other claimants, Kelkoo.
8. We think there is a lot of force in the points made by Google. We do not think, contrary to the suggestion made by Mr Rothschild on behalf of Foundem, that this can be dismissed as a delaying tactic by Google. We are very conscious of the need to progress these cases and in particular of the considerable time that has elapsed since the Foundem case was initiated. In fact, the major part of that delay is due to the duration of the European proceedings: first the investigation by the Commission and now the appeals from the Commission's decision before the courts in Luxembourg. As regards the matters before the Tribunal, the rulings we made at the case management conference in all four cases this morning are indeed designed to progress these cases as rapidly as possible.
9. We think that Google is quite right to say that now that the four cases are being case managed together, disclosure should be considered for the four cases on a coordinated basis. That is the proportionate way of dealing with this matter and underlines the rationale of joint case management.
10. Mr Rothschild points out that Google simply says that producing the data for the longer period of 2006 to 2017 would just involve the work of a software engineer for three weeks, which he submits is not disproportionate in the context of the litigation as a whole. It may not be disproportionate considered in itself,

but it becomes disproportionate if that work then has to be repeated for the various different claimants and the same data has to be looked at again. And it is certainly inappropriate when the request does not appear to be founded on an expert view of Foundem's economist after consideration of the explanation given now by Google's solicitors as to the way in which Google priced in the early part of the period. When one looks at that, it is not clear in what way this information is, in fact, going to be useful.

11. We are not concluding, however, that it is necessarily not useful. But this underlines the overall point that applications for disclosure of this sort should be expert led. We therefore think that, as regards the major part of the data sought, it is not appropriate to grant the application for specific disclosure now.
12. That does not preclude Foundem from renewing it with the support of a report from its economist explaining the way in which Foundem intends to approach quantum for its claim. At the moment, Foundem's pleading, as re-re-amended, sets out a claim for loss only in the most general of terms and there is then a one page schedule of figures and it is not clear from either of those documents how Foundem intends to approach quantification.
13. Therefore, we expect Foundem, over the coming months, to instruct its economist to address in more detail the way in which Foundem intends to approach quantification and the method that he intends to use. Secondly, he should then discuss with the economists appointed or to be appointed by the other three claimants what methods they think should be pursued, so that the Tribunal can then address disclosure requests on either a common basis or at least avoiding unnecessary overlaps.
14. We are nonetheless prepared to make a distinction regarding the short period of nine months in 2017 because that will complete a run of data which Foundem already has as a result of disclosure from the Commission file and because that relates to a period when, as we understand it, Google's method of charging was on what we are told is now the conventional cost-per-click basis or something similar, which is the basis on which we are told Foundem would have expected to charge.

15. We do, however, exclude from that disclosure revenues regarding the United States. We do not see that revenues for the United States really assist at all, given that Foundem does not have data on traffic to Google's site in the United States.
16. But for those nine months, for Germany, Spain, France, Italy, the Netherlands and the UK, this data will supplement, as I have said, the data which Foundem already has. It will enable Foundem to calculate the average cost-per-click. And we note that in her witness statement, at paragraph 42A, Ms Lawrance does not suggest that there is any particular burden on Google in producing that revenue data.
17. Therefore, only to that limited extent, will we grant this application and we will hear from the parties as to the date by which that information can be provided.

The Honourable Mr Justice Roth
Chair

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

Date: 26 March 2024