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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos. 1160-65/1/1/10

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

8 April 2011

Before:

VIVIEN ROSE  
(Chairman)  
DR ADAM SCOTT OBE TD  
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) **IMPERIAL TOBACCO GROUP PLC**  
(2) **IMPERIAL TOBACCO LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

**CO-OPERATIVE GROUP LIMITED**

Appellant

- v -

**OFFICE OF FAIR TRADING**

Respondent

**WM MORRISON SUPERMARKETS PLC**

Appellant

- v -

**OFFICE OF FAIR TRADING**

Respondent

- (1) SAFEWAY STORES LIMITED  
(2) SAFEWAY LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

- (1) ASDA STORES LIMITED  
(2) ASDA GROUP LIMITED  
(3) WAL-MART STORES (UK) LIMITED  
(4) BROADSTREET GREAT WILSON EUROPE LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

- (1) SHELL UK LIMITED  
(2) SHELL UK OIL PRODUCTS LIMITED  
(3) SHELL HOLDINGS (UK) LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Mark Brealey QC and Mr. Tony Singla (instructed by Ashurst LLP) appeared on behalf of Imperial Tobacco Group plc and Imperial Tobacco Limited.

Mr. Rhodri Thompson QC and Mr. Christopher Brown (instructed by Burges Salmon LLP) appeared on behalf of Co-operative Group Limited.

Mr. Pushpinder Saini QC and Mr. Meredith Pickford (instructed by Hogan Lovells International LLP) appeared on behalf of Wm Morrison Supermarkets plc and Safeway Stores Limited and Safeway Limited.

Mr. James Flynn QC (instructed by Norton Rose LLP) appeared on behalf of Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited.

Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared on behalf of Shell U.K. Limited, Shell UK Oil Products Limited and Shell Holdings (U.K.) Limited.

Ms. Elisa Holmes and Mr. Rob Williams (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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1 THE CHAIRMAN: Good morning. I have some preliminary remarks. Many thanks to everyone  
2 for their helpful letters in response to the agenda that we set out. I thought it would be  
3 helpful to run through quickly the issues that have been discussed and indicate where we are  
4 currently with our thinking and this will highlight areas where you may wish to focus your  
5 submissions. Everything I say in these remarks is, of course, only our preliminary view and  
6 we are still certainly open to listen to everyone's submissions on all points.

7 **1 Interventions and consolidation.**

8 At the moment we are not minded to consolidate all or parts of these appeals. However we  
9 do now consider that this is the appropriate time to grant the uncontested applications to  
10 intervene that have been lodged by the parties. We do not propose to make any directions  
11 as to further pleadings in those interventions, certainly not as to the lodging of any  
12 statements of intervention.

13 In our view, the formal status of intervener will provide a framework within which any  
14 future directions can be made as to a particular appellant's involvement in another appeal.  
15 The effect of granting permission to intervene will in our view be as follows: it means that  
16 at least so far as legal submissions are concerned, we will treat a submission made by  
17 appellant A in appellant A's appeal as also being a submission made by appellant A in  
18 appellant B's appeal where appellant A is an intervener in appellant B's appeal.

19 The extent to which appellant A may need to provide the Tribunal with a document  
20 indicating either which submissions they want this rule to apply to or which submissions  
21 should be treated as exceptions to that rule may be something we need to address at a later  
22 stage.

23 If all the parties are agreeable to this, we will be looking for a volunteer, probably  
24 somebody other than ITL or the OFT, to take charge of drawing up an order setting out  
25 which of the appellants is being granted permission to intervene in which appeals.

26 **2 Timetable for written submissions.**

27 We note that there was no support for our suggestion that the appellants split their skeletons  
28 between legal and factual issues or that the retail appellants produce a joint legal skeleton.  
29 The Tribunal is prepared to leave this to the parties so we do not need today to hear  
30 submissions as to why those suggestions did not find favour.

31 We note Asda's comments on the intertwined nature of the law and fact in these appeals and  
32 we will return to the implications of that when considering the timing of the delivery of the  
33 authorities bundles.

1 As far as the time table for skeletons is concerned, at the moment we prefer the idea of  
2 having them lodged in sequence with ITL first, then the retail appellants and then the OFT  
3 rather than exchanging them all at the same time. We also have some sympathy with the  
4 retail appellants' need to have more than 7 days in which to digest ITL's skeleton in order to  
5 ensure that we reduce duplication to the minimum.

6 We can perhaps come back to dates when we have discussed other aspects of timetabling.  
7 As to the length of the skeletons we do want to set a maximum length. We propose 40  
8 pages each for the retail appellants, and for ITL and the OFT 20 pages plus 10 for each of  
9 the agreements challenged, and parties must realise that it would be more helpful to the  
10 Tribunal to have documents of that length rather than much longer documents.

### 11 **3 Bundles and documents.**

#### 12 **(i) Contemporaneous documents.**

13 Everyone seems to be agreed that it would be useful for us to have a single chronological  
14 bundle containing all the documents relied on by OFT and by the parties in relation to each  
15 challenged agreement.

16 At the moment, we see the great attraction in ITL's suggestion that these should be based on  
17 the existing annexes to the Decision for each agreement with the parties adding in any  
18 additional documents with supplementary numbers without disturbing the existing  
19 numbering. This would not only have the advantage that the existing pleadings and witness  
20 statement cross references would remain valid but it would also make it clear which  
21 documents in the bundle were originally there and which ones have been added for the  
22 purposes of the appeal in case that point should be relevant for any particular reason.

23 If this is how we decide to proceed, we need then to set a timetable for the parties to provide  
24 whoever is going to collate the bundles with copies of any additional documents they want  
25 to add into a particular bundle and then for that person to make up the bundles. It has been  
26 suggested that the OFT should take on this task and we will hear submissions about that no  
27 doubt. For the moment I am assuming it will be the OFT, but that is just for the purpose of  
28 these remarks; we have not made any decision about that.

29 The party who wants to add a document to the particular bundle should also indicate to the  
30 OFT after which existing document their new document needs to be inserted.

31 At the moment we think it would be useful for this exercise to be completed by the time the  
32 parties come to finalise their skeletons so that the correct cross references can be included  
33 and so the OFT's suggestion of 1<sup>st</sup> September date does not therefore appear to us to be the  
34 most useful way to proceed.

1 We also agree it would be useful to have electronic versions of the bundles in due course,  
2 and again this may be something that one of the retail appellants can usefully do to lighten  
3 the load on whoever is collating the bundles.

4 One concern which we have on which we would welcome submissions is whether the  
5 documents that the parties want to include in the bundles are likely to include confidential  
6 information belonging to third parties such as Gallaher and how we are to deal with this.  
7 We do not for the moment consider it would be appropriate for the OFT to take on a general  
8 role of protecting third party confidentiality, so we would welcome suggestions as to  
9 whether this is likely to be a problem and, if so, how best to deal with it. So as far as  
10 contemporaneous bundles are concerned what we need to consider now is:

- 11 (1) Are the parties happy to proceed on the basis that the OFT will put together  
12 the bundles along these lines?
- 13 (2) If so by what date should the parties provide the OFT with copies of the  
14 additional documents they want to include?
- 15 (3) By what date should the OFT serve the bundles in hard copy?
- 16 (4) By what date should another party provide electronic bundles?

17 Finally on the question of document bundles, we have seen the correspondence between  
18 Morrison/Safeway and the OFT in which Morrison/Safeway have tried to pin down the  
19 OFT as to what documents they intend to rely on in the course of the appeal and for what  
20 reason. At the moment we do not regard this as a useful approach. In a case of this nature,  
21 particularly where there is oral evidence, it is unfair and unhelpful at this stage to try to  
22 exclude particular documents from the Tribunal's consideration.

23 Whether or not the OFT seeks to rely on a particular document it is for the Tribunal to  
24 consider all the evidence placed before it when coming to its own conclusions as to liability.  
25 Further, as is apparent from this CMC and the orders that we are likely to be making, there  
26 is a great deal of work to be done by everyone before the start date of this trial; parties  
27 should therefore refrain from making further written demands generating extra work for  
28 individual appellants – it is now for the Tribunal now to decide what directions are needed  
29 to get this case ready for trial.

### 30 **Authorities bundles.**

31 We note ITL's offer to produce these. Given that the parties have indicated that they regard  
32 the legal and factual issues as intertwined in these appeals, we wonder whether it would be  
33 best to have the authorities bundle with the panel members when the last of the skeletons is  
34 filed so that they can be considered together when the panel is preparing for the hearing.

1 Parties can liaise about this, it may be that ITL can produce the bundles containing  
2 authorities that they and the retail appellants' skeletons rely on and the OFT will add to this  
3 if their skeleton relies on anything further.

#### 4 **4 Cross examination of witnesses.**

5 We note that the parties have said and no issue appears to us to arise for this CMC.

#### 6 **5 Penalty.**

7 We note that the parties are unanimous in wanting to leave any further step on penalties  
8 until after the liability issues judgment, and we concur with that approach for the moment.

#### 9 **6 Teach-in with the experts.**

10 We note that most of the appellants think this is a good idea and we for the moment agree.  
11 The Tribunal would like this to take place on 13<sup>th</sup> September if possible. Counsel need not  
12 attend if they do not want to so it should not interrupt too much with the preparation for the  
13 hearing.

#### 14 **7 The meeting of the experts and production of joint expert paper.**

15 We note that everyone agrees that this would be a good idea although questions as to who  
16 meets with whom and when may need some further work. We have some sympathy with  
17 the OFT's reluctance to contemplate a multilateral meeting between the appellants' nine  
18 experts and the two OFT experts. We therefore see some attraction in the OFT's suggestion  
19 that there be an initial smaller meeting, such as between Professor Shaffer and Professor  
20 Froeb and a resulting statement to which the other appellants could adhere or explain their  
21 non-adherence as appropriate. If further discrete bilaterals are useful such as a meeting  
22 between Professor Shaffer and Mr. Dryden then the parties can of course organise that.  
23 The issues that we would want to emerge clearly from any statement are:

- 24 (i) Is there agreement as to the right analytical approach to the issue so that the  
25 area of disagreement is how that approach works in the factual matrix of this  
26 market?  
27 (ii) What is the theory relied on in the Decision and what are the flaws alleged in  
28 that theory?

#### 29 **8 Structure and timing of hearing.**

30 We are very grateful to ITL for their recent letter which we understand sets out a timetable  
31 with which most of the parties are, for the moment, agreed. We should say that there are  
32 some days where the Tribunal cannot sit and at the moment you may wish to make a note of  
33 these, they are: 29<sup>th</sup> September, 12<sup>th</sup> October, 4<sup>th</sup>, 7<sup>th</sup>, 15<sup>th</sup>, 24<sup>th</sup> and 28<sup>th</sup> November and 5<sup>th</sup>  
34 and 14<sup>th</sup> December.

1 A couple of issues about the hearing: so far as the start of the case is concerned, we have  
2 had a request that we do not sit on Friday, 23<sup>rd</sup> September. Assuming that we are content  
3 with that, and seeing that ITL envisages that its opening will take a day and a half, it may be  
4 best to start on 21st and 22nd September to ensure that ITL's opening is complete and then  
5 sit again on the following Monday. In the week after that we would not sit on 29<sup>th</sup>  
6 September, so we would sit on the Monday, Tuesday, Wednesday and Friday of that week.  
7 The only other point is that we note that in the provisional timetable provided by ITL that  
8 all the appellants' experts have been listed one after the other to appear then followed by the  
9 OFT's experts. We wondered whether it would be better, both in terms of the manageability  
10 of the OFT's case and the proper testing of the evidence, to have ITL's experts, then the  
11 OFT's experts and then the retail appellants. We realise that that may mean that the OFT's  
12 witnesses need to be recalled shortly at the end of the hearing, but that may be a better way  
13 of dealing with it - we just throw that out as a suggestion at this stage.

#### 14 **9 Arrangements for transcripts.**

15 We still have an open mind about LiveNote versus a traditional transcript produced at the  
16 end of the day. It may be the need to strike a balance between the usefulness of having a  
17 real time record whilst witnesses are giving their evidence in court but at the expense of  
18 having the kind of clear, fluent and user-friendly version of transcript that is generally  
19 produced by those to whom the Tribunal gives this task, and which are very useful for  
20 future use. It may be that a compromise is that during the days when we are dealing with  
21 legal submissions we should have the more traditional transcript and reserve LiveNote for  
22 when we have witnesses. But, as I say, we have not yet come to any firm view on that.  
23 We have not yet decided whether we will be putting the transcripts up on the website. It  
24 partly depends on how much of the material discussed each day is confidential and how the  
25 logistics of doing that work out. In any event the transcripts will not be put on the web until  
26 some time after the day of the hearing, so parties should not rely on that as a substitute for  
27 ordering the appropriate number of copies that they need.

28 To conclude these remarks we will now hear submissions issue by issue to make sure that  
29 everyone has a chance to comment on all the points raised. At the end of the day it seems to  
30 us we will need to make orders as to:

- 31 (a) interventions;
- 32 (b) timetables for:
  - 33 (i) production of the experts' joint statement;



1 (ii) the preparation and lodging of the bundles of contemporaneous documents and the  
2 authorities bundles;  
3 (iii) for the lodging of the skeletons;  
4 (c) to set dates for the teach-in and finalise the actual date for the start and progress of the  
5 hearing starting in September.

6 That is what I wanted to say by opening. I do not know whether it would be useful for us to  
7 rise briefly for people to digest that and then start in on where we are on interventions and  
8 consolidation. Mr. Brealey?

9 MR. BREALEY: A five minute break would sort things out.

10 THE CHAIRMAN: Yes.

11 MR. BREALEY: I am obliged.

12 (Short break)

13 THE CHAIRMAN: Yes, Mr. Brealey?

14 MR. BREALEY: I have not had a chance to discuss matters with anybody else in the room  
15 except Mr. Parr and my clients, so this is really ITL's suggested response.

16 Going through the issues by the Tribunal's numbers: consolidation: we are happy with the  
17 suggestion; that is point no.1.

18 Skeletons and timetable: we see the sense of ITL going first and then the retailer appellants  
19 and then the OFT, it is just a question of dates. If I could propose some dates and explain  
20 why we are proposing those and then they can be commented on later on. If I could propose  
21 for ITL's skeleton Monday, 13<sup>th</sup> June. Picking up the suggestion that the appellants need  
22 more than seven days it would give the appellants to 27<sup>th</sup> June (two weeks), and then 11<sup>th</sup>  
23 July for the OFT. Those are suggestions. Originally it was going to be 24<sup>th</sup> June for  
24 everybody although we had suggested 3<sup>rd</sup> June in our original letter, the reason we are  
25 pushing back slightly is because of the experts. ITL would like to put in its skeleton having  
26 had the joint experts' statement. We do not want to be in a position where the experts have  
27 not met and had an agreed statement and we have to put our skeleton in before the agreed  
28 statement.

29 If I could just highlight some dates for the experts. We have flagged this with the retailer  
30 appellants and I am not sure we have had a reply from the OFT yet but the dates where the  
31 ITL experts and the retailer appellant experts can all meet are 9<sup>th</sup> May and then the 19<sup>th</sup> and  
32 20<sup>th</sup> May. That is when they are all available to meet, and I will go on to the meeting of the  
33 experts in a moment, but that is why it is the 13<sup>th</sup> and 27<sup>th</sup> June and 11<sup>th</sup> July. If, madam,  
34 you think that is too late for the Tribunal and you want to bring it forward then we may have

1 to live with that but that is the reason, we do not want to be in the position where on 10<sup>th</sup>  
2 June we are getting an agreed statement and then two days later we have to put in the  
3 skeleton because obviously if the experts can agree some issues it is highly relevant to how  
4 we make our submissions.

5 Bundles: it was our suggestion that essentially the Tribunal used the decision or the  
6 statement of objection annexes. We would suggest that the OFT have carriage of that. I do  
7 not know, madam, whether they have already been provided to the Tribunal. I have an  
8 email of 28<sup>th</sup> May where the OFT said they were going to supply the annexes to the  
9 Tribunal ----

10 THE CHAIRMAN: Yes, we have those.

11 MR. BREALEY: So those bundles have already been copied, and they are phenomenally  
12 expensive to copy, so if we could use those and try and find a way that any extra documents  
13 can just be inserted I think that would save cost and time, and ensure that the relevant  
14 bundles get to the parties at a really early date.

15 If the OFT can ensure that any extra documents are lodged I would suggest that those be  
16 finalised by the end of April so we then have May to draft the submissions by reference to  
17 those.

18 The joint authorities bundle ITL will do I would suggest by 13<sup>th</sup> June if that is the date by  
19 which we lodge our skeleton, if not it would have to be earlier. Hopefully ITL will have  
20 agreed with the retailer appellants what authorities they intend to rely on and it may be that  
21 when it lodges its skeleton the OFT will put in its supplemental bundle, so at least by the  
22 end of the lodging of the skeletons all joint authorities are with the Tribunal.

23 Confidentiality: to be frank we have not really sorted it out yet. We are not sure at the  
24 moment how the confidentiality issue is going to be addressed, and it may well be that we  
25 will have to put in further submissions in the next couple of days as to how that is to work.  
26 There are two problems really, the first is the cross-examination of the witnesses, so if there  
27 is, say, an annex 17 which relates to Morrisons and that has confidential information in it  
28 relating to Morrisons, how is that going to be raised in open court when the rest of the  
29 parties are going to be in court and the OFT are cross-examining the relevant person for  
30 Morrisons or whoever it be. So there is an issue of confidentiality just on the witnesses but  
31 then also as to how we are going to get the statement of objection annexes, and at the  
32 moment I think we are just going to have to put some heads together. It may well be that as  
33 far as the witnesses are concerned, the OFT would at some stage, maybe in September flag  
34 up what documents it is going to refer to. It may be that that does not work, but dealing with

1 confidentiality is a real issue when there are so many parties. It is obviously fine for the  
2 Tribunal but the difficulty arises vis-à-vis the third parties when there is a common bundle  
3 and we really have to try and sort that out and at the moment I am afraid I just do not have  
4 an answer.

5 Cross-examination of witnesses: we have nothing on that.

6 Penalties: we have nothing to suggest.

7 The teach-in on 13<sup>th</sup> September: we are happy with that. The only request we have is if the  
8 issues could be clarified either by the Tribunal or by the parties so the experts know exactly  
9 what their remit is. I am reminded that we need to confirm availability on 13<sup>th</sup> September.

10 The meeting of the experts: I flag that by reference to our skeleton arguments. As I say, I  
11 do not know the position of the OFT but the experts are generally available on 9<sup>th</sup> May and  
12 19<sup>th</sup> and 20<sup>th</sup> May.

13 THE CHAIRMAN: It strikes me I should say straight away that that is much too late really for  
14 them, they should really be getting together as soon as possible, and they must make  
15 themselves available. Are you going to go on to the question about whether it needs to be a  
16 meeting of all of them? It may be that if there is an initial small meeting that that may help.

17 MR. BREALEY: I will be corrected if I am wrong, but 9<sup>th</sup> May was the first date that Professor  
18 Froeb could come over, but we will find out if there is a date in April.

19 THE CHAIRMAN: Yes, but I really think that the experts have been working on the matter for a  
20 long time now and they really must meet as soon as possible to get going on this.

21 MR. BREALEY: Well if that comes forward then obviously there may be room for manoeuvre  
22 on the skeletons. On the face, as a minimum we say it should be Froeb and Shaffer - if I can  
23 just use their surnames - and Ridyard and Walker with Haberman as well, because he has  
24 given some of the raw data upon which the reports ----

25 THE CHAIRMAN: Is Haberman in both of those or just with Ridyard and Walker?

26 MR. BREALEY: Yes, if Dr. Walker wants Mr. Haberman there - he may not want him there but  
27 it would seem sensible; he is the author of some of the data. So we would suggest as a  
28 minimum Froeb and Shaffer, Ridyard and Walker with Mr. Haberman, but we would not  
29 want, and I am sure the other retailer appellants do not want to see their experts somehow  
30 relegated to just commenting, they have obviously submitted detailed reports of their own,  
31 they have their own appeals. I see that Professor Shaffer may not want to tackle several  
32 experts in one room, but it may well be that they can meet on the same day. We do feel that  
33 when experts meet face to face it is much better than on the telephone or on a conference  
34 call, so we would urge the OFT and the Tribunal to order some sort of meeting face to face

1 and as a minimum I say it should be Professors Froeb and Shaffer, but the other experts  
2 hopefully can be there to meet Professor Shaffer on the same day.

3 I would also add that the experts should try and get the ball rolling now so they can do that -  
4 certainly the retailer experts have tried to do that, they have started the ball rolling so that  
5 when they do meet on whenever it is in April or May they have some idea what they have to  
6 agree and disagree.

7 THE CHAIRMAN: I would hope that they have all at least read each other's reports by now.

8 MR. BREALEY: I am sure they have - most of them have replied, so I am sure they have. We  
9 think a face to face meeting is preferable and we should try and accommodate the experts  
10 who are being called by the other retailer appellants, because they do have other things to  
11 add.

12 Timetable: we are happy with the timetable. I understand the OFT may have an issue with  
13 that, I am not sure at the moment. We can start a day earlier.

14 Transcripts: personally, I prefer the sort of transcript that comes in at the evening so you  
15 can read it, but also when you have witnesses LiveNote is very handy as well, so I do not  
16 know whether we can have a system whereby we have LiveNote but we also get hard copies  
17 in the evening - I think in Mr. Flynn's and my own experience you do get that from  
18 LiveNote, so you do get something at the end of the day.

19 THE CHAIRMAN: Yes, it is the extent to which it is possible to 'clean up' the immediacy of the  
20 LiveNote transcript so that it reads fluently as the transcripts that we get here at the end of  
21 the day do.

22 MR. BREALEY: Yes, I appreciate that. So the only real issue on which I am not able to assist at  
23 the moment is the confidentiality, and subject to anything the Tribunal ----

24 THE CHAIRMAN: Well let us hear what others have to say. Who is going to go next? Mr.  
25 Thompson?

26 MR. THOMPSON: I do not know whether it is alphabetical order, but anyway I am on my feet!  
27 Intervention and consolidation: At the moment we have only applied to intervene in the  
28 ITL appeal insofar as it relates to us and that seemed to us to be the minimum proportionate  
29 thing to do but it seems to us that it should be symmetrical and effectively we are all raising  
30 the same point, so either that approach should commend itself or else we should be given  
31 formal leave to intervene in all one another's appeals, but leave it to our good sense not to  
32 abuse that. I do not think either is self-evidently the correct answer, it just seems that it  
33 should be the same for each of the retailer appellants because essentially they are all raising  
34 the same point that they have a limited interest in the ITL appeal, and a possible interest in

1 the other appeals depending on how the hearing goes so I think it should be either  
2 everybody is allowed to intervene in everybody else's appeal but resting on their good sense  
3 that they will not waste everyone's time, or else the more limited approach that we have  
4 adopted, or it may be simpler just to take the *Hasbro* approach and just give everybody  
5 leave to intervene in one another's appeals.

6 THE CHAIRMAN: It may be then that there is an intermediate stage that we need which is for  
7 everyone to consider their position and if they have so far not applied to intervene in all the  
8 appeals but they wish to do so to make those applications - obviously they are out of time  
9 but we can grant permission to make that application out of time - and then in a  
10 compendious order we can grant whatever uncontested applications for intervention have  
11 been made. What we need is a timetable by which this will be achieved and a volunteer to  
12 co-ordinate it.

13 MR. THOMPSON: For my part if the procedural steps can be waived I am perfectly happy to  
14 make the intervention on my feet now - I do not know if the other advocates are happy to do  
15 it ----

16 THE CHAIRMAN: That is not what I had in mind! (Laughter) Given that this is not contested,  
17 we have said what we have suggested let us hear whether or not everybody is happy with  
18 that approach and then sort it out in writing amongst yourselves and we would hope  
19 someone would provide us with a draft order that we can then make.

20 MR. THOMPSON: I am sure that can be done, and if nobody else volunteers we are happy to do  
21 the paper work.

22 THE CHAIRMAN: Yes, well that was a rather grudging volunteering, Mr. Thompson, but we  
23 will make a note of it, nonetheless! We will see if anyone is more enthusiastic. (Laughter)

24 MR. FLYNN: We were going to volunteer without caveats, madam.

25 MR. THOMPSON: I can take instructions, I am sure we are very happy to do it, madam.

26 Skeleton date: we have no objection to the suggestion made by ITL, I think if anything we  
27 had thought it could be put back another week, but that is obviously subject to the  
28 convenience of the Tribunal as to when, as it were, the end date for receiving all the  
29 skeletons is.

30 THE CHAIRMAN: Well, I think our end date really is 30<sup>th</sup> June, we really want to get all the  
31 skeletons in. The timetable that we had in mind, based on what the parties had said in their  
32 written comments to us would be ITL by 3<sup>rd</sup> June as they had said, the retailers, who we  
33 agree need to have a little bit more time, by 16<sup>th</sup> June, and the OFT then by 30<sup>th</sup> June. I  
34 realise, as Mr. Brealey said, in an ideal world of course everyone would have had a chance

1 to look at the joint statement and that is why I think the experts are going to have to hurry  
2 up a little bit with producing their joint statement so that everyone can have a chance to see  
3 that before they finalise their skeletons, at least on a provisional basis to have an idea as to  
4 how much is agreed and how much is still contentious.

5 MR. THOMPSON: Yes, well perhaps I can make up any lack of enthusiasm in relation to the  
6 intervention issue by saying we have tried to take forward the expert issue relatively rapidly  
7 in that we have already been speaking to other experts and have prepared a schedule with  
8 the other appellant experts of propositions that we hope may in due course be agreed by  
9 everybody and those which we anticipate will not be agreed, and it has not been agreed even  
10 between the appellant experts, so I do not think it is something that is necessary to show the  
11 Tribunal at this stage, but it seemed to us that rather than Professors Shaffer and Froeb, no  
12 doubt with the best of intentions, to try and agree what they think the issues are that a more  
13 productive approach would be for the appellants to try and co-ordinate their position and  
14 then put it to the OFT and then for the OFT to see whether it does agree with the points that  
15 we think they will agree with and what it has to say about the points that we think they will  
16 not agree with. That was the approach we thought would be the best way to set the agenda  
17 and might lead to a relatively rapid identification of the main issues, and hopefully then a  
18 constructive debate either at the date Mr. Brealey has already identified or, if possible, at  
19 earlier dates, but that was the approach we thought would be the most efficient.

20 THE CHAIRMAN: Yes, as far as what the Tribunal has to order is concerned, I do not think we  
21 were envisaging ordering the dates of the meetings or even who would attend the meetings,  
22 what we would order is the final date by which a joint statement has to be produced. The  
23 question for us then is whether it is going to be in two stages, whether we set a date for  
24 Professor Froeb and Professor Shaffer, and perhaps Messrs. Ridyard and Walker to produce  
25 their statements and then a slightly later date for the retail appellants' experts to produce a  
26 statement, each of them, as to which parts they adhere to and which they do not. It may be  
27 that that would be a more manageable exercise than to try and get 11 economists to agree  
28 one single document.

29 MR. THOMPSON: Yes, I think what we were hoping to achieve would be a measure of  
30 agreement that everybody agreed to certain propositions - possibly fairly elementary - and  
31 then for the individual experts to comment in writing, as it were, in the *quasi* Scott Schedule  
32 on propositions that they did not agree on or that the appellants did agree on but the OFT  
33 did not agree on. But obviously until they have all been round a table and discussed it then  
34 the extent to which a document in that form will be possible is obviously open to question.

1 THE CHAIRMAN: Well maybe the most we can do today is to set the end stop date by which  
2 this exercise has to have been completed in whatever form it ultimately takes and this  
3 obviously is for the parties of the experts to decide what is feasible and likely to be helpful.

4 MR. THOMPSON: So far as we are concerned I think that would be all the Tribunal needs to do  
5 and it sounds from what Mr. Brealey is saying that he would want that to be at least a week  
6 before he had to file his skeleton argument, whenever that ultimately was, otherwise the  
7 experts obviously have their duties to the Tribunal and all are extremely experienced in their  
8 fields, and I would have thought that, subject to the type of issues that have already been  
9 discussed, if they are working against a particular timetable they should be able to make the  
10 arrangements to make that possible.

11 In relation to written submissions, I think we have already said that we will comply with the  
12 40 page cap, and no doubt we will be able to do that without shrinking the font.

13 As far as the bundles, I do not think we had any problem with the documentary bundles. In  
14 relation to the authorities, as I understood Mr. Brealey he was suggesting that the joint  
15 authorities bundle should be served with the ITL skeleton and that seemed to us rather  
16 optimistic. It seemed to us that the joint authorities for the appellants would need to be  
17 served sometime, possibly two weeks after the retailer skeletons were served and then with  
18 the OFT having the opportunity to supplement that two weeks after its skeleton, that seemed  
19 to us a more realistic timetable.

20 So far as questions of confidentiality are concerned, we did not currently see that as a great  
21 issue given that there is already, as we understand it, a confidentiality ring. It would simply  
22 be a question of marking those documents as confidential and, if necessary clearing the  
23 court if and when confidential issues arose, but it seemed to us that that was a matter to deal  
24 with as we went along during the hearing or, if necessary, before the hearing, but that is  
25 how we see it at the moment.

26 In relation to the hearing timetable, I think the only caveat I would wish to put down, and it  
27 is one that we put down in para. 2.7 of our original letter of 30<sup>th</sup> September 2010 is that we  
28 have some concern that the timetable for the openings and the witness evidence will prove  
29 to be too leisurely and that the pressure will come on the timing for closings. For our part  
30 we do not want to be held back - we think we may well need two days in closing and we  
31 would not want it to be said: "You have had two days for your witnesses to be  
32 cross-examined by Mr. Lasok and therefore you should not have a full time for closing." It  
33 seemed to us that in reality the issues of law and fact may well become crystallised after the  
34 witnesses and the experts have been heard and it is at that point that it will be most useful to

1 make detailed submissions, whereas if we make extended submissions in opening and then  
2 in relation to the documents before the witnesses have been heard, and in particular the  
3 expert evidence, there may be a timing issue. We have discussed it with ITL but it remains  
4 an issue and at the moment we are simply putting a marker down that we think we would  
5 like to have at least two days allotted to us in the closing period and we think it may be  
6 possible to move rather more quickly in relation to openings and the witness stage. I do not  
7 know that it necessarily needs to be reflected in any order but it is simply a marker that we  
8 wish to put down.

9 THE CHAIRMAN: Well, as far as the timetable is concerned, the key part of it, of course, is  
10 some witnesses will only want to make themselves available on those particular dates, and  
11 they will ensure they are free on those dates and may not have any element of flexibility in  
12 that. Anyway, at the moment we note your concerns.

13 MR. THOMPSON: Yes, we have put down a suggested broad timetable week by week and I  
14 think it needs some modification because of Shell availability but we think at the moment  
15 that is a reasonable approach.

16 In terms of transcripts, we are very happy to go with the general group. We have raised the  
17 question of who should pay for them, and whether OFT and ITL should pay a larger  
18 proportion because of the larger share of the appeal, but otherwise we take no strong view  
19 between LiveNote and the transcript. As we understand it LiveNote provides an amended  
20 transcript as part of its service, so I think it is essentially a question of whether or not  
21 LiveNote is thought to be necessary, particularly for the opening and legal submissions or  
22 whether a written transcript is sufficient, and personally it sounds to me like the  
23 compromise position may be perfectly reasonable that LiveNote is needed only for the  
24 witness evidence.

25 I think those are the only points we wish to raise. Thank you.

26 THE CHAIRMAN: Thank you very much. Mr. Saini?

27 MR. SAINI: Madam, subject to two particular points, we respectfully agree with the way that Mr.  
28 Brealey puts the matter. The two particular points I want to address are the meeting of the  
29 experts and the teach-in. We submit that it would be appropriate for Professor Yarrow and  
30 Dr. Decker to have a meeting, either together with all of the other experts and Professor  
31 Froeb or separately because, as you will have noticed, there is quite a sharp difference  
32 between the approach taken by the various appellant experts, therefore, a meeting just, for  
33 example, between Professor Froeb and Professor Shaffer will not really help the Tribunal in  
34 dealing with the totality of the expert evidence. Professor Yarrow in particular takes a very



1 different approach in terms of his attack on the OFT's reasoning. We do not mind if there is  
2 a separate meeting, or if it happens altogether, but we do respectfully submit that there  
3 should be a date fixed for a joint report or agreed statement as between Professor Shaffer  
4 and Professor Yarrow.

5 Secondly, in relation to the teach-in, we agree that it is a good idea, unfortunately the date  
6 the Tribunal has identified, 13<sup>th</sup> September is the date of the annual conference of the  
7 Regulatory Policy Institute in Oxford and I was going to suggest that the experts and the  
8 Tribunal liaise and see if another date is possible - I do not know the availabilities of the  
9 other experts at the moment, I do not know whether anybody has been able to check - but  
10 13<sup>th</sup> is not an appropriate day for either Professor Yarrow or Dr. Decker I appreciate that  
11 may cause some difficulties, but ----

12 THE CHAIRMAN: What we were envisaging this date would be, would be really an explanation  
13 largely from the OFT as to what they did in order to come to the conclusions that they came  
14 to in the decision, that is one aspect of it.

15 MR. SAINI: Madam, may I ask, are you envisaging that Professor Shaffer would present that, or  
16 is it somebody else presenting it on behalf of the OFT?

17 THE CHAIRMAN: Well, I do not know. We are rather in your hands as to how best to deal with  
18 this, but what I am saying is it is not necessarily the case that everybody's expert needs to  
19 attend, but let us see whether it turns out to be fairly straight forward to find an alternative  
20 date, but if it is not then we may need to explore a little bit whether actually it is necessary  
21 for all the experts to be in attendance, it is supposed to be an entirely non-contentious,  
22 neutral presentation; it may be it need only cover the areas of common ground between the  
23 experts just so that we are sure that we understand them if they are not going to be gone  
24 through by the experts in evidence.

25 MR. SAINI: I am grateful for that clarification. May I just mention one last point which relates  
26 to the correspondence that my instructing solicitors have had with the OFT in relation to  
27 bundles and documents? I should make it absolutely clear that we are not seeking to  
28 exclude any documents for consideration by the Tribunal but there is a more basic point and  
29 I put this down as a marker now because we may get into deep waters when the Tribunal's  
30 substantive hearing begins, and the point is as follows: The Tribunal will be aware that the  
31 OFT in its decision relies upon what it calls "examples" of particular inappropriate or  
32 unlawful contacts between the manufacturers and the retailers, and it may pick a particular  
33 exchange and then it explains its case, but it constantly emphasises that these are just  
34 examples. Where the OFT has taken a particular example and explained its case as to what

1 is going on in a communication and what is inappropriate about that communication we  
2 have responded to it. Equally, the OFT in their defence have put in a response to our  
3 response. However, there are a large number of documents which are still in this category  
4 of examples relied upon where neither we, nor the OFT, have addressed in any detail what  
5 is going on in that particular communication, and in particular the OFT have not identified  
6 what they say is inappropriate about a particular communication.

7 The Tribunal may think "we do not need any further explanation because an email is an  
8 email, a letter is a letter, we can read it", but the Tribunal will have appreciated that each  
9 document has to be put in a context, one has to know what has happened before, one has to  
10 know, for example, has there been a Budget announcement, which explains the detail of the  
11 exchange? What is going to happen in the Tribunal if the OFT is allowed - and we are not  
12 trying to stop them at the moment - to refer to examples which neither party has dealt with?  
13 It is going to increase the length of the hearing and it may lead to various adjournments.  
14 Just to give you an example of the examples: one of the documents is a meeting that took  
15 place between my clients and a manufacturer. Each side has spent five pages explaining  
16 their case as to what was going on in that meeting. That is just one example. If that is  
17 repeated at the substantive hearing the hearing is going to drag on for a very, very long time.  
18 I am not asking the Tribunal to make any order in relation to that at the moment but it is  
19 going to be a problem.

20 In relation to interventions we have nothing to add, it seems that every party should be  
21 allowed to intervene in every other appellant's appeal. May I just take instructions?

22 THE CHAIRMAN: Yes.

23 MR. SAINI: (After a pause): Thank you very much.

24 THE CHAIRMAN: Thank you. Mr. Flynn?

25 MR. FLYNN: Madam, if I just run very quickly through the points from Asda's perspective as  
26 well. In relation to permission to intervene, as I interjected earlier, we were prepared to  
27 volunteer to co-ordinate an order if that would assist the Tribunal. As I understand what  
28 you are saying, those parties who have not, as it were, applied to intervene in all cases  
29 should now write to the Tribunal to say that that is their position if it so be. I think we have  
30 done that and it was our proposal that at a formal level you should admit Asda to intervene  
31 in all cases, the extent of that intervention to be determined as we go along and left not only  
32 to our good sense but no doubt also the Tribunal's good sense of what it needs as we roll  
33 along. If that is the proposal we are prepared to co-ordinate and if you need a timetable on

1 that perhaps you would indicate - I do not suppose it need be a very long one because those  
2 letters can be written pretty smartly.

3 In terms of timetable for skeletons we hear what you have said about that and we have heard  
4 what Mr. Brealey says. Obviously the end date, I suppose, will be one that the Tribunal will  
5 set. We had asked in our submission for a date of 20<sup>th</sup> for our skeleton if that were possible  
6 with the Tribunal because of availability of counsel, not only the Pay TV case which, as you  
7 know is interfering to an extent with preparation for this, but also Mr. O'Donoghue has  
8 other court commitments so if we could be indulged on that we would be grateful.

9 In relation to the bundles we very much agree with the idea that those bundles already exist,  
10 the chronological run, it is just a question of adding to those any further documents - I think  
11 we only have one additional document to add which is annexed to our notice of application,  
12 which is an ITL Asda trading agreement which, for some reason, the OFT had not put in  
13 those particular schedules, and I think it acknowledges in the defence that that was an  
14 oversight. I think that is our only additional document, and I assume there will not be  
15 anything else from the OFT, so it is actually not as complicated or as terrifying as it might  
16 have sounded, at least in our appeal and so we think that the way Mr. Brealey has suggested  
17 that should be dealt with seems to be the most appropriate and economical.

18 Cross-examination - I do not think any of us particularly have anything to say. If  
19 interventions are granted then if there is an application as we go along that will be made and  
20 dealt with then.

21 In relation to the experts, 13<sup>th</sup> September for the teach-in is all right for our expert but it  
22 sounds as if that date may move so we may need to explore, but if it is the 13<sup>th</sup> then Mr.  
23 Dryden can make it.

24 In relation to the experts' meetings, and I hear the Tribunal saying they need to crack on  
25 with them, but obviously they take some arrangement, and we have at least managed to  
26 identify some dates when the appellants' experts are available and it may be difficult to find  
27 many other dates in that form. If I may say, echoing what Mr. Brealey anticipated, we  
28 would not want Mr. Dryden to be relegated to, as it were, a second level expert. He has  
29 given his views on both Professor Shaffer and Dr. Walker's evidence and we think he  
30 should be treated in a sort of first level way. It may be that what you have is a series of  
31 meetings on the same day, it is not really as if everyone is ganging up on Professor Shaffer  
32 but everyone will have their points that they wish to discuss with him and see whether they  
33 agree or disagree. We think actually to sequence it, if you had a first Froeb/Shaffer  
34 meeting, and then follow on meetings with the others, it might actually lead to delay which

1 would then knock on into the skeleton timetable, and it would be better if it could be done to  
2 group them and I know that 9<sup>th</sup> May is a little far away - it may be that an earlier date can be  
3 found - but at least one is actually there when however many people it is available and  
4 one knows that can be hard to find. We do think there are dangers of both repetition and  
5 delay in having a layered approach, and that our expert should be treated as a primary expert  
6 and not a secondary expert.

7 We are content with the ITL timetable if that is how it works out and obviously we note the  
8 dates on which the Tribunal will not be sitting.

9 In relation to transcript, my understanding is that with LiveNote you get both. You get the  
10 "live" as you are going along and it is revised and there may be some mishearings and so  
11 forth, but at the end of the day someone sits down and edits it and you get a transcript much  
12 in the form that the Tribunal will be used to from the excellent service that is received up to  
13 now. So our understanding is that you would get both and whether it makes sense to have  
14 two systems, one for legal submissions and a different one for evidence probably not  
15 because you will get the same benefit, even when it is just legal submissions. The great  
16 advantage of it does mean that although these hearings will be going on for some time not  
17 all parties need to be attending at all times but they can actually follow back at the office,  
18 they can follow what is going on in the courtroom, and so be keeping themselves up to date.

19 THE CHAIRMAN: Oh, how does that work then, is it streamed through to the ----

20 MR. FLYNN: Now you are asking, madam! I would have to find out but it is available at  
21 terminals, yes, I think it must be a form of streaming.

22 THE CHAIRMAN: How does that work when one wants to sit in camera?

23 MR. FLYNN: Then I suppose if one is sitting in camera it will only be visible to people in the  
24 ring, one controls who the subscribers are.

25 THE CHAIRMAN: Well I understand that in the Pay TV case this is going to be used and that  
26 there is going to be a little demonstration of how it works.

27 MR. FLYNN: Yes, well I will probably learn from that, madam, I cannot pretend I have done it  
28 myself.

29 THE CHAIRMAN: We may be able to be a little wiser after that.

30 MR. FLYNN: It is a relevant question that you have asked and that is something that would have  
31 to be catered for.

32 Mr. Jones reminds me, we did say in our letter, much along the same lines as Mr. Saini has  
33 already mentioned, we do think it would be of assistance if the OFT would indicate the  
34 extent to which it wishes to rely on documents that it has not so far been clear about, and we

1 have made the point that they say they rely particularly on certain documents. That leaves  
2 what are they making, if anything, of the others in that category? We are just left in the  
3 dark.

4 THE CHAIRMAN: Are these other documents that are in those existing annexes?

5 MR. FLYNN: I believe so, yes, yes, they are and indeed we have commented on them. In fact, in  
6 our appeal we have commented on all the documents in the annexes based on what our  
7 understanding of it is. The only thing is if the OFT wishes to make something else of the  
8 documents that we have not understood it has not so far been put to us, so we should just  
9 like some clarity about that. I think the correspondence that you have seen led to a rather  
10 circular response from the OFT saying they were referred to in the decision, in the manner  
11 in which they are referred to in the decision, which did not to my mind answer the question  
12 that was being put to them.

13 THE CHAIRMAN: Is this the situation: that in the decision annexes then which are now going to  
14 be used as the building blocks for the contemporaneous document bundles for the  
15 appeal ----

16 MR. FLYNN: Which I think are the "SO" annexes recapitulated.

17 THE CHAIRMAN: There are documents in there on which the OFT broadly speaking says:  
18 "These are the documents that we rely on in respect of this alleged infringement", in relation  
19 to some of those there has been a narrative description by the OFT which has then been  
20 countered by the party as to what interpretation they place on that document and then so the  
21 party has said "That is the wrong interpretation". But there are lying in those bundles other  
22 documents about which there has been no exchange of views ----

23 MR. FLYNN: Yes, that is precisely the position.

24 THE CHAIRMAN: -- so that we know that the OFT says it relies on them in some way as it has  
25 included them in the annex, but we do not know what it is that they make of them, and your  
26 concern is that at the hearing something will pop up to say: "We interpret it as that" and  
27 then you will not have had a chance to respond to that.

28 MR. FLYNN: And if that is going to establish the infringement we have not had the opportunity.  
29 I think the aim of the correspondence was to flush that out. As I say, in our appeal we have  
30 actually taken the approach of commenting on the documents that are in those annexes, but  
31 that is not in all cases and in many cases it is not against the background of the OFT having  
32 said what it relies on the document for. That is the position and that is why the issue has  
33 been raised in our correspondence, in *Morrisons* and, for all I know, in others.

34 THE CHAIRMAN: Yes, I see. Yes, thank you, Mr. Flynn. Mr. Kennelly?

1 MR. KENNELLY: Thank you, madam. Taking your list in order, we are content with the  
2 Tribunal's suggestion in relation to interventions. On the sequential exchange of skeleton  
3 arguments, again we are content, and we are content with Mr. Brealey's suggestion provided  
4 it does not disturb the hearing dates which I do not believe it does. Again, we are content  
5 with the 40 page cap, we are sure we can manage that.

6 Similarly for bundles, we are happy with Mr. Brealey's suggestion in relation to the bundles,  
7 and we are happy with Mr. Thompson's suggestion in relation to the authorities bundles, we  
8 think that is sensible.

9 THE CHAIRMAN: What was that suggestion?

10 MR. KENNELLY: His suggestion was that it was not possible to have a full and final authorities  
11 bundle served with the appellants' skeleton argument, that would need to be done slightly  
12 later and then supplemented with the OFT's additional authorities if there were any.  
13 Similarly, in relation to confidentiality, we do not see that being a major problem, we expect  
14 the Tribunal to deal with it in the way it has in the other infringement appeals and, indeed,  
15 in the telecoms' appeals, where there is a ring and where confidential information is marked  
16 in colour in the bundles so that at the hearing advocates can see what ought not to be read  
17 out.

18 THE CHAIRMAN: That is not quite the point I was making, Mr. Kennelly. The point is that  
19 who is going to decide what information is confidential? Suppose that Shell wants to add in  
20 a lot of documents to the chronological bundle that is going to be made up and no doubt you  
21 will mark on those information which Shell considers to be confidential, but there may be  
22 some other third parties' information in there as well which Shell is not particularly bothered  
23 whether it is treated confidentially or not, but that third party would be concerned. Now,  
24 whose responsibility is it to ensure that that third party's confidentiality is respected?  
25 Would it make sense for us to say, or order in some way, that any additional document that  
26 one of the appellants wants to include in the bundle, they must - when providing that to the  
27 collator - attest that they have ensured that information confidential to anybody, including  
28 third parties has been identified and protected because otherwise there may be all sorts of  
29 information which is not coloured yellow, or whatever, but which actually is confidential to  
30 Gallaher or whatever, and it is not fair to expect the OFT to police that.

31 MR. KENNELLY: I can see the sense respectfully in that suggestion, and we would be happy to  
32 adopt that. In other appeals this has arisen, and the Tribunal has expected parties to act  
33 sensibly and they have done, where there are multiple parties and documents are put  
34 forward which contain information confidential to various other parties and in other appeals

1 again - in the National Grid infringement appeal, and in some of the telecoms' appeals -  
2 parties have in general been sensible and have anticipated this problem, and indicated in  
3 advance that there may be additional confidential information, but the confidentiality  
4 belongs to a party other than the person putting forward the document. But, madam, if you  
5 think it is necessary to deal with that formally we have no objection at all, we would do that  
6 in any event.

7 On cross-examination I have something to say but I will deal with it when we come to time  
8 table. We can skip penalty.

9 In relation to teach-in and the meetings of experts, Shell makes no submission because we  
10 have two very short expert reports which are not connected to the main expert reports and  
11 so we will not be asking our experts to attend those meetings, we do not see there is any  
12 need to do so and also we are trying to save costs.

13 The main issue for us, in fact, is the issue of the timetable. In our submission ITL has done  
14 a good job in accommodating the various commitments of counsel and witnesses in the  
15 timetable which it has put forward. It was the timetable attached to Ashurst's letter of 5<sup>th</sup>  
16 April.

17 THE CHAIRMAN: (After a pause): Yes.

18 MR. KENNELLY: As far as I am aware the OFT have not responded to object to this, but I  
19 understand that they do object, they are not content with this timetable, obviously it is for  
20 them to say why, but before they do so I think it is important from Shell's perspective to flag  
21 two things. First, Shell's availability is very tightly constrained because of the availability  
22 of counsel and witnesses, and therefore the dates which are given to Shell in the ITL  
23 timetable are in reality the only dates that Shell can do. The OFT have suggested in their  
24 correspondence that they wish to cross-examine each - they have said it is a very rough  
25 estimate, but they have said they want half a day for each factual witness. In our  
26 submission that does not make any sense in relation to the Shell witnesses, because the  
27 witness statements are very short, and one of the witnesses - Mr. Barry - will not be  
28 attending, he is not being called. We served a Civil Evidence Act notice when we served  
29 his statement. He lives in Australia, and it was considered disproportionate to ask him to  
30 attend to be cross-examined. The OFT have not responded to that, they have not dealt with  
31 Mr. Barry's attendance and that may be something they want to address the Tribunal on  
32 today. But if he is not attending, as we say he will not be, there will only be three witnesses  
33 of fact from Shell and so it ought really to be possible, we say, to accommodate them on  
34 one day for cross-examination.

1 THE CHAIRMAN: Well it is not just a matter of cross-examining them on their witness  
2 statements, it is a matter of the OFT being able to put the case to them.

3 MR. KENNELLY: Indeed, but even in relation to that and in relation to the documents where  
4 these witnesses may be able to assist the Tribunal we still say that there is half a day,  
5 certainly in relation to Mr. Moss. We will hear what the OFT says, but we cannot see any  
6 basis for needing half a day for cross-examining Mr. Moss, but again we will do what the  
7 OFT says. In fairness to the OFT they have said that their estimate for half a day per  
8 witness is very general, and it may be in relation to these particular Shell witnesses the OFT  
9 will say they do not need that much time.

10 Similarly for the experts, the OFT have given a general estimate. It seems on my reading of  
11 their letter to be approximately a day each and in relation to experts, Dr. Heard and Dr.  
12 Latremoliere again we say that is far too much, there is no reason why the OFT need that  
13 much time to cross-examine those particular experts on the very narrow issues that they  
14 speak to in the Shell appeal.

15 THE CHAIRMAN: But again that is not quite the point - or it may not be the point - it depends  
16 on how far Shell is adopting arguments made by other witnesses and other expert witnesses  
17 and insofar as they are adopting those how far the OFT then needs to put whatever  
18 arguments it has contesting those views to the Shell witnesses as well. Now, if you are  
19 saying: "We will not take any point about something not having been put to our witnesses  
20 when the OFT come to sum-up their case in relation to Shell", then that would be one thing,  
21 but that is something you need to discuss with the OFT that the scope of your actual witness  
22 evidence is not at the moment to my mind indicative of the scope of the questions that they  
23 need to be asked if Shell is relying on everybody else's case as well more generally,  
24 although their witnesses are focusing on their individual particular points.

25 MR. KENNELLY: Madam, I think it is important to distinguish between the evidence of fact and  
26 the expert evidence; the expert evidence is more easily resolved, because our experts, Dr.  
27 Heard and Dr. Latremoliere are not instructed to deal and will not be dealing at all with the  
28 main expert issues which are being discussed between the parties in relation to the meeting  
29 and the teach-in. They will not be in a position to say anything about the expert evidence  
30 and the expert issues in the main appeals. They are only here to discuss very narrow issues,  
31 and so they will not be able to assist the Tribunal at all in relation to the other issues, and I  
32 would not expect anyone to cross-examine them, and if they did all those experts could say:  
33 "I have not even read those other expert reports; I am not instructed to do so", so that issue  
34 will not arise for the expert evidence.



1 In relation to the evidence of fact, and again I am anticipating that the OFT will say maybe  
2 that my concerns are ill-founded, but even on the OFT's case there is a limit to how much  
3 they can put to our witnesses of fact because of the relatively limited knowledge they have  
4 and I am here taking the OFT's case at its highest, even assuming everybody puts its full  
5 case against Shell to these witnesses we say it will be possible to deal with the cross-  
6 examination of these three witnesses in a day, but again we will hear what the OFT has to  
7 say.

8 Our point is that it is important to distinguish between cross-examination of the major  
9 factual witnesses and the more minor ones. Shell is anxious that its case can be resolved in  
10 a fixed period so that we know when we can attend and limit our costs as much as possible  
11 because, of course, Shell's involvement in this case is relatively minor. Our penalty,  
12 although substantial, is relatively minor relative to the other penalties and we are very  
13 anxious to limit our involvement as much as possible so as to save costs.

14 On the transcripts: we would prefer the cheaper option if it is cheaper, but I can see the  
15 weight of opinion is against me, so we would go along with LiveNote with the transcript at  
16 the end of the day if that is what everybody wants.

17 THE CHAIRMAN: Thank you. Ms. Holmes?

18 MS. HOLMES: Madam, on the issue of interventions, the OFT has no objection to any of the  
19 appellants intervening in the other appeals. The OFT is, of course, to limit any unnecessary  
20 involvement of each appellant in the other appeals, and I think that is probably a matter that  
21 can be dealt with throughout the hearing on a case by case basis, as each appellant wishes to  
22 be involved in any way in any of the other appeals.

23 Skeleton arguments: you will have seen, madam, from the OFT's letter that it was the  
24 OFT's preferred position that there be simultaneous exchange of skeleton arguments. The  
25 reason for that, in short, is that it seems to the OFT that the battle lines are, as it were, drawn  
26 well and truly now and that with respect to my learned friends, and without wishing to be  
27 unfair, it seems to us unlikely that there will be too much repetition avoided, if any, by  
28 taking that approach, particularly in light of what the appellants each say about the  
29 intermingling, if you like, of fact and law in this case. It is indeed quite difficult to separate  
30 those issues. So from the OFT's perspective we consider that it is not at all clear that much  
31 repetition would be avoided, particularly in light of the fact that the appellants are confined  
32 to 40 pages save for ITL.

33 Certainly, from the OFT's position in the relatively tight time frame envisaged in between  
34 the provision of ITL's skeleton argument and then subsequently the other appellants, and

1 then the OFT's, it seems to us relatively unlikely that our skeleton will be terribly responsive  
2 in that way, given I think it is envisaged something like a week in between each round, if  
3 you like.

4 In summary we think it is more likely to be helpful if these documents are not composed in  
5 such a way as to be either responsive or documents which are intended to be responded to  
6 but merely a more helpful summary of the key points of each party. Having said that, it is  
7 of course a matter for the Tribunal and we, of course, want to assist the Tribunal and be as  
8 helpful as we can, so ultimately it is a matter for the Tribunal but that is our submission on  
9 the manner in which the skeleton arguments should proceed.

10 The issue of bundles, I understand it to be the case, as has already been discussed to some  
11 extent by the appellants and the Tribunal, the Tribunal and each of the appellants has the  
12 OFT's decision and the annexes that are the SO annexes and that contains the documents on  
13 which the OFT relies.

14 I also understand that I think pursuant to an earlier order of the Tribunal I think on the date  
15 of the last CMC perhaps modified, as far as confidential information contained in those  
16 documents go that has been dealt with in that the OFT has approached third parties, whose  
17 information is contained in those documents, and there is an agreed bundle which is open to  
18 everyone in the confidentiality ring. In our submission this has two consequences. One is  
19 that in our submission the most appropriate way to proceed in relation to, if you like,  
20 completion of those bundles because I think we are at the stage where we can start with that  
21 core bundle, rather than the OFT being the inbetween person that each appellant is  
22 responsible for providing its additional documents on which it intends to rely and I say that  
23 follows the submission on confidentiality because it seems to us quite clear that it should be  
24 the primary responsibility of each appellant to be concerned with any potential third party  
25 confidentiality issues, and in our submission by each appellant being responsible for the  
26 addition of its documents and also the issues of confidentiality which arise from the addition  
27 of documents, that that is probably the most efficient way to proceed; it is also simply a  
28 matter of resources, madam, because the combined resource of the appellants is  
29 significantly larger than that of the OFT alone. We would envisage each appellant  
30 providing probably quite a slim bundle to be added behind the relevant annex and page  
31 numbered appropriately, and that could be done by way of provision both to the Tribunal  
32 and to each of the other parties.

33 THE CHAIRMAN: So what you are saying is that as far as the OFT is concerned those bundles  
34 remain the documents that you want before the Tribunal ----

1 MS. HOLMES: Yes.

2 THE CHAIRMAN: -- and that each appellant should then produce its own bundle using that  
3 pagination but adding in with the supplementary pagination what documents they want to  
4 add in ----

5 MS. HOLMES: Yes, and ----

6 THE CHAIRMAN: -- and they can then be responsible for attesting that any confidential  
7 information of theirs or third parties in those additional documents that they have ensured  
8 that it has been properly protected?

9 MS. HOLMES: Yes, indeed. I think it has been suggested by one of the parties, I think perhaps  
10 Ashurst on behalf of ITL, that the page numbering be such that you do not have to alter any  
11 of the page numbering, so that behind each annex use perhaps an A, B, C, D, system.

12 THE CHAIRMAN: Yes, that would work provided that none of the appellants wants to add any  
13 documents into any bundle other than the bundle relating to its agreement. Every agreement  
14 has two parties obviously and in relation to some of these agreements both parties are  
15 appellants, and in some of them only one party is an appellant.

16 MS. HOLMES: It might be that in relation to each agreement and in relation to which there are  
17 two parties, so let us say ITL/Asda as an example, that those representing ITL and Asda get  
18 together to agree any supplementary documents they want behind the relevant annex. They  
19 are best placed to do that and best placed to consider those documents. Madam, I am not  
20 sure how many such documents there are going to be, whether we are talking about a  
21 handful or whether we are talking about a much thicker bundle, but there does not seem to  
22 be ----

23 THE CHAIRMAN: Am I right in thinking that there will ultimately be 15 of these bundles?

24 MS. HOLMES: I have to confess I have not counted but that seems about right. Yes, that is  
25 right.

26 MR. BREALEY: There are 29 bundles.

27 THE CHAIRMAN: How does that work out?

28 MR. BREALEY: Broadly half is Gallaher and half is ITL and then there are a few bundles, just  
29 general bundles.

30 THE CHAIRMAN: How many agreements are there – how many alleged agreements are there –  
31 which are the subject of these appeals? There may be 29 bundles, but there are quite a lot of  
32 agreements between Gallaher and retailers who have not appealed, which are not the subject  
33 of these proceedings and which we do not therefore need a bundle for.

1 As I understand it, the ITL appeal covers ten agreements, five of which are with the retail  
2 appellants and five of which are with other retailers. As far as the retail appellants are  
3 concerned, they are appealing in each case, I think, two agreements, their agreement with  
4 ITL and their agreement with Gallaher.

5 MR. BREALEY: Yes, correct.

6 THE CHAIRMAN: Which I think means that there are altogether 15 agreements which are the  
7 subject of this appeal. I think that must be right. I see the attraction of Miss Holmes'  
8 suggestion that everyone should be responsible for producing their own bundle. If that is  
9 the case then if we need to decide in relation to the bundle in respect of an agreement  
10 covered by both the ITL appeal and by the respective retail appellant, it probably makes  
11 sense for the retail appellant to be responsible for that because ITL will have to be dealing  
12 with the five agreements that they are appealing with retailers who are not also appellants.  
13 We can work out the logistics of that.

14 The other question is if, say, Asda – not Asda because you say you have only got one  
15 document – suppose ITL wants to add some document to the bundle dealing with the  
16 agreement between, say, Asda and Gallaher, is that likely to happen, that there should be  
17 such a desire, or is it not?

18 MR. BREALEY: Famous last words: I do not think the additional documents are going to prove  
19 much of a problem. I do not think there are going to be many documents that are going to  
20 be inserted.

21 THE CHAIRMAN: We may need to draw up some kind of matrix. Yes, Miss Holmes?

22 MISS HOLMES: Thank you, madam, I am grateful, I can confirm there are 15 agreements.

23 Madam, my learned friend Mr. Saini in particular has raised the issues of the documents on  
24 which the OFT relies. The OFT certainly has not endeavoured to be unhelpful. The OFT  
25 has published a decision. It refers to all the documents in the annexes in one way or another  
26 in that decision, and sometimes they are referred to as a group as supporting a particular  
27 proposition, and on some occasions in some instances they are discussed more widely and  
28 in more detail.

29 It is also right that in the OFT's defence it has discussed some other documents in more  
30 detail. The reason for that, we say, with respect, is quite obvious because in its defence it is  
31 responding to the points put by the appellants. So when the OFT writes to say the OFT  
32 does indeed rely on each of the documents and it does say the manner in which it does so in  
33 the decision and in its defence in response to the appeals.

1 In this respect, I should also say that we are not talking about bundles and bundles and  
2 bundles of documents. In relation to most of the agreements I think there are at least 20  
3 documents in each of them. I think the lowest number is 20, and it goes up to about 80  
4 documents in relation to each agreement, so we are not talking about ten bundles of  
5 documents for these agreements. We are not talking about too much for each of the  
6 appellants to consume.

7 My learned friend Mr. Saini I think said that he was not asking the Tribunal to make an  
8 order on this, and indeed there are pleaded issues on the use the OFT can now make of  
9 various documents in the light of the way that it has relied upon them in its decision, and it  
10 seems to us, with respect, that this is a matter which can be dealt with by submission as and  
11 when it arises during the hearing or indeed in closing submissions. In other words, madam,  
12 it seems to us that this is not particularly a matter which should be, or indeed reasonably be,  
13 dealt with in any way at this point by way of an order from the Tribunal.

14 THE CHAIRMAN: I think what we need to brush out is whether there may be a problem of the  
15 parties being taken by surprise. If one of the parties' witnesses is being cross-examined and  
16 they are taken by you or by Mr. Lasok, or whoever, to a particular document in the bundle  
17 and some interpretation of that document is put to them as being the interpretation on which  
18 the OFT relies, and they had not realised that that was what the OFT was going to say that  
19 document meant and they are unable at that point to deal with it, they say, "There must be  
20 some explanation", or, "I don't remember it meaning that, I can't remember", whether that  
21 is going to cause hiccoughs in the process of the trial which we can somehow avoid by the  
22 OFT giving some thought, at least by the time of filing its skeleton, as to whether it does  
23 rely on other documents which have not so far been the subject of exchanges in a particular  
24 way which it is appropriate the witness should have advance warning of in order to be able  
25 to respond to it properly.

26 MISS HOLMES: Madam, that is certainly something the OFT is willing to give thought to. It  
27 occurs to me that in the course of cross-examination it might be, for example, that a witness  
28 gives a particular answer and that gives rise to the OFT then saying, "Hang on a moment",  
29 and there is another document which the OFT would then put to that witness. These sorts of  
30 things cannot be anticipated in advance.

31 THE CHAIRMAN: They cannot, and that is certainly why we indicated that to say at this stage,  
32 the OFT is bound by any particular interpretation or bound not to take any particular point  
33 that the document means something, still less that the Tribunal is thereby bound, is not  
34 helpful, as we have indicated. I think perhaps we have said enough on this. We have

1 identified the potential problem and the extent to which it may be possible to ensure the  
2 smooth running of the proceedings, given the inherent unpredictability of witness actions.

3 MISS HOLMES: We certainly take the concern on board, madam.

4 Next I think there are a number of issues in relation to experts. The first is the teach-in.  
5 There are a number of matters that the OFT wishes to raise at this point. The first such  
6 matter is, and we are grateful for the Tribunal's indication that one of the issues for this  
7 teach-in is that the Tribunal be assisted in understanding the OFT's processes in arriving at  
8 its decision. The concern we have with that as things stand at the moment is that although  
9 one of the OFT's experts for the purposes of these appeals, Professor Shaffer, did provide a  
10 short advisory report in relation to the decision at the investigation stage, neither of the  
11 experts were, if you like, involved in formulating the OFT's response, so they would be in  
12 many sense – they are in a different position in some respects to other experts or the  
13 Tribunal reading the decision, but they are not in an entirely different circumstance to  
14 everyone else reading the decision, so I am not sure ----

15 THE CHAIRMAN: The teach-in is not necessarily anything to do with the experts particularly.

16 One aspect of it is to help us to understand the issues between the experts, but the other is to  
17 understand the decision and how it was arrived at, and whoever is able to explain that in a  
18 neutral way is the person to send along. Whether that person is ultimately going to be a  
19 witness in the case I do not think necessarily matters.

20 MISS HOLMES: We have not considered that in relation to anyone other than ----

21 THE CHAIRMAN: I think the important thing is to try and get a date in the diary. What the  
22 content of this will be, and therefore who needs to attend, is something we can decide nearer  
23 the time. I was not envisaging it as exclusively being something which the experts would  
24 attend, which all experts would attend or which would cover anything particularly  
25 comprehensively in the experts' evidence.

26 MISS HOLMES: We are grateful for that indication, madam. We certainly have no objection in  
27 principle to something like that occurring.

28 As to the date of 13<sup>th</sup> September, having decided who it is that the OFT would send along,  
29 we would need to obviously confirm, but we will of course do our best to make sure  
30 whoever it was was available.

31 Perhaps I should raise one other matter before I deal with meetings between experts. That  
32 is, as you may have seen from the OFT's letter, there are a relatively small number of  
33 issues, but there are a number of issues which have been raised for the first time in the  
34 appellants' supplementary expert reports which have recently been filed. The OFT does

1 seek the Tribunal's permission to prepare and file very short expert reports in response to  
2 those which, at least in the case of one of its experts, it has yet to decide whether that is  
3 necessary because it has only just received the underlying data of the new analysis that has  
4 been done in relation to Mr. Walker.

5 In relation to Professor Shaffer, there are a number of discrete issues which, as I say, have  
6 been raised for the first time. They are very discrete issues which the OFT and  
7 Professor Shaffer are dealing with or considering at this stage, and in relation to which the  
8 OFT would seek to put in a supplementary report. As I say, it will of course ----

9 THE CHAIRMAN: I do not wish to anticipate any dispute or whatever about this, but I wonder  
10 whether this is something that could usefully be covered by the experts when they meet and  
11 postpone the decision about whether any supplementary reports are needed until after that.  
12 This is something they can all chew over when they meet up.

13 MISS HOLMES: That is possible, madam. I can say that our experts are considering it as we  
14 speak, and therefore will be in a position to act very quickly, because in effect the  
15 supplementary reports will be prepared. We were minded to ask the Tribunal to have until  
16 the end of April. In the light of that, I think we are content with that approach, because, as I  
17 say, our experts will have done what they want to do by then. As I say, they are confined  
18 issues. We are content with that approach, to prepare it and see what happens when the  
19 experts meet.

20 In relation to the meeting between the experts, and having obviously heard what my learned  
21 friends for the appellants have had to say, we have no objection to further face to face  
22 meetings. Like my learned friend Mr. Brealey, we certainly do not seek to relegate any of  
23 the appellants' experts to be of subsidiary importance in that respect. Our proposal is  
24 merely to avoid wasted costs and duplication of effort.

25 I think in relation to the Tribunal's order today, it seems to us that perhaps the best way  
26 forward is, in relation to Professor Shaffer, for him to meet with Professor Froeb in the first  
27 instance, but with a view to producing something which can then, perhaps in conjunction  
28 with one or two further face to face meetings, be used in order to arrive at either other  
29 statements or a combined joint statement. It seems to me that this approach his going to  
30 have to be a bit flexible at this stage because it is very difficult to tell what is going to come  
31 out of these meetings. We are certainly content with that approach, subject to being able to  
32 fit it all in, if you like.

33 We may, however, be in a slightly different possibility in relation to Walker. In relation to  
34 Walker, three or four of the appellants' experts – the ones which most obviously come to

1 mind are Derek Ridyard, Dryden, Dr. Jenkins, Professor Yarrow and Dr. Decker, together  
2 obviously in the case of the last two. Three of them conduct adherence analyses. They do  
3 so in a different way. We can certainly see that it may be most helpful for Mr. Walker to  
4 meet with each of those separately. It seems to us in the case of the evidence with which  
5 Mr. Walker deals, it may indeed be quite difficult to, and almost pointless, try and have a  
6 combined endeavour because of the different approaches to the analyses which are done.  
7 We raise this. I am not sure of the kind of order which you envisage making at the end of  
8 this, but certainly we are prepared to accommodate flexible arrangements in that respect.  
9 I should briefly address availability. Ashurst, I think having consulted with each of the  
10 appellants, gave a series of proposed dates for these meetings. We have discussed the  
11 matter with each of our two experts. On the basis of those proposed dates only, Professor  
12 Shaffer, who is based in the US, but equally I should say we can see the benefit of a face to  
13 face meeting and we will try and facilitate that. He is not available until the later dates, and  
14 I think they were 19<sup>th</sup>, 20<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26 May, so the later dates in May. That is quite  
15 late in the day, we can see that.

16 On the other hand, Mr. Walker is available in the earlier part of May, so he can certainly get  
17 on with his meetings. In particular, he is available on the 9<sup>th</sup>, for example.

18 What we have not done, as I understand it, is approach either of our witnesses to see if they  
19 are available on any other dates that were not listed in Ashurst's letter.

20 THE CHAIRMAN: At the moment I do not think the Tribunal can try and micro-manage this  
21 process. You all know much more about what would be useful to do than we do at the  
22 moment. I envisage that what we will do is set a date by which what is going to be  
23 produced is produced. How much will be produced may depend on how many meetings  
24 can be arranged by that time. I would just indicate that we expect that the experts who have  
25 been instructed in this case to give this matter priority, and ensure that the process between  
26 now and the hearing and during the hearing proceeds smoothly. Of course, we will, as far  
27 as we can, take into account people's engagements, but they have known that this is coming  
28 up this year for quite a long time. If they are going to be putting themselves forward as  
29 witnesses then they obviously have to make the time available.

30 MISS HOLMES: I am grateful for that indication. Madam, we will of course discuss the matter  
31 with our experts accordingly. I am sure, with co-operation with the appellants' experts, we  
32 can arrive at appropriate arrangements.

33 I think that deals with the matters in relation to expert witnesses. My learned friend  
34 Mr. Williams is going to deal with the issue of the timetable, and I am going to skip briefly



1 to the issue of transcripts. The OFT, similarly to the submissions made by my learned  
2 friend Mr. Kennelly, is similarly concerned with cost. From the information that the OFT  
3 has at the moment, it is concerned that the cost of LiveNote is considerably higher than that  
4 of the cost of the traditional transcript arrangements. The OFT will need to make more  
5 enquiries about that in order to be sure just how much difference there is between the costs  
6 of the two.

7 Save for that, the OFT is of course willing to co-operate with any arrangements, but it is  
8 very concerned to confine the costs of these proceedings, which ----

9 THE CHAIRMAN: I think what would be useful for the Tribunal would be for somebody to  
10 provide us with some information about the respective costs, a bit more of a description of  
11 what LiveNote produces, and also some indication of when we would need to make a  
12 decision about what we were going to have on particular days. I do not know whether they  
13 need months' notice, weeks' notice or days' notice. It may be possible that we can see how  
14 things work in Pay TV and learn from their experience. I do not know how quickly one has  
15 to put these arrangements in place. I just have no idea, but it would be useful if somebody –  
16 you can discuss this amongst yourselves afterwards ----

17 MR. FLYNN: We have already started making those inquiries, so we will share that, as it were.

18 THE CHAIRMAN: Yes, thank you.

19 MISS HOLMES: I am grateful to my learned friend for that indication. Madam, I think those  
20 were the matters for me to deal with, and Mr. Williams will deal with the issue of timetable.

21 THE CHAIRMAN: Yes, indeed.

22 MR. WILLIAMS: Madam, if I can start with the Tribunal's proposal that we start on 21<sup>st</sup>  
23 September. We have got no difficulty with that.

24 The next question we have asked ourselves, madam, is whether the appeals can be properly  
25 dealt with within the window which the Tribunal allocated at the CMC in October, and we  
26 believe that it can. We have thought about that again in the light of the various  
27 representations that appellants made on 25<sup>th</sup> March, and since. We think that the proposal  
28 we made in our letter of 25<sup>th</sup> March needs a bit of tweaking, but, broadly, we still think that  
29 it is the right approach. That is essentially a week for opening, a chunk of time for  
30 witnesses of facts, a chunk of time for expert evidence, a week off for the preparation of  
31 written closing and then a week for oral closings.

32 THE CHAIRMAN: A week of written closings and then a week of ----

1 MR. WILLIAMS: A week off to allow the parties to prepare their written closing submissions  
2 which would then be presented to you in a week of oral closings in the last week of the  
3 timetable.

4 THE CHAIRMAN: Yes.

5 MR. WILLIAMS: We have been thinking about this question, madam. We do have in mind that  
6 although ITL proposes an increase from 40 to just over 50 days of hearing time, that is an  
7 increase of 20 per cent, and it is obviously an increase in costs of the hearing of 20 per cent.  
8 We do think that it is important that proper consideration is given at this stage to whether  
9 the additional time is needed.

10 If I can really start with the factual evidence.

11 THE CHAIRMAN: I am not quite sure where this is heading, Mr. Williams. I do not think that  
12 today we are going to go entirely map out exactly what days of the month are going to be  
13 allocated to which particular witness. I am not sure that ITL was asking us to.

14 MR. WILLIAMS: I think ITL is proposing that we run on for another two weeks after the  
15 window that has been allocated in October. I was dealing with that point first, madam. We  
16 think that the hearing can be accommodated in the period the Tribunal allocated in October,  
17 and I was going to explain how we get there.

18 Madam, we say that it is inevitable that the majority of this hearing is going to be focused  
19 on witness evidence. It is an extremely witness heavy action. The appellants have put  
20 forward evidence from 20 witnesses of fact. ITL has indicated an intention to cross-  
21 examine another four witnesses of fact, although whether all of those will attend the hearing  
22 we do not yet know. There are then 11 expert witnesses. That is a total of 35 witnesses.  
23 That evidence is obviously at the heart of the case. We say that that evidence can only be  
24 dealt with through cross-examination of the witnesses and proper time does need to be  
25 allocated to cross-examination of witnesses at the hearing.

26 The reason that I make that point is that ITL propose that relatively less time should be  
27 allocated to cross-examination and relatively more time should be allocated to oral  
28 argument, and I will come to their proposals in relation to that in just a minute.

29 In building up our time estimate, madam, we have taken very much a rule of thumb that  
30 each factual witness may take half a day. Some witnesses will obviously take longer than  
31 that, or we anticipate some will take longer than that. Some will not take half a day, and  
32 that may be the position in relation to Shell's witnesses, to whom Mr. Kennelly referred  
33 earlier on. On that basis, we have built up an estimate of around 15 days for the cross-  
34 examination of witnesses of fact, including re-examination and some time for an element of

1 over-run. To that one may need to add some time for the additional witnesses whom the  
2 appellants wish to cross-examine, and we have provisionally allocated a figure of about  
3 three days for that. That will take one to 18 days.

4 THE CHAIRMAN: So 15 days is for the OFT's cross-examination, is it?

5 MR. WILLIAMS: Well, the OFT's cross-examination and any cross-examination by the  
6 appellants of other parties' witnesses.

7 THE CHAIRMAN: So 15 days for cross-examination of the appellants' witnesses?

8 MR. WILLIAMS: That is right, madam, yes, and re-examination.

9 THE CHAIRMAN: Yes, and some over-run. So who are these additional people then?

10 MR. WILLIAMS: There is a witness from Sainsburys, Fiona Bailey, and the OFT confirmed  
11 yesterday that they would be calling Miss Bailey. There are a small number of other  
12 witnesses, possibly three, whom ITL and perhaps other appellants have indicated a desire to  
13 cross-examine. The OFT is not calling those witnesses, so it remains to be seen where that  
14 issue will land, madam. I simply flag the point.

15 THE CHAIRMAN: Have those witnesses produced statements?

16 MR. WILLIAMS: Two of the persons are not named witnesses. ITL has said that it wishes to  
17 cross-examine the persons who wrote certain corporate submissions which were made to the  
18 OFT. They are not witnesses so far as the OFT is concerned at all. The other person is a  
19 witness for Somerfield, who produced an unsigned witness statement, or Somerfield  
20 produced an unsigned witness statement, which was provided to the OFT. That is referred  
21 to in the decision. The OFT is not going to call that witness, Liz Smith. As I say, it remains  
22 to be seen whether the appellants will maintain their desire to cross-examine her, or indeed  
23 either of the persons that I have referred to. Provisionally we have allocated three days for  
24 that.

25 I think it is right to say that a number of the appellants want to cross-examine Miss Bailey.  
26 That, of itself, might take some time.

27 Moving from factual evidence to expert evidence, madam, there are, as I have said, 11  
28 expert witnesses, two for the OFT and nine for the various appellants. We have estimated  
29 12 days in total for the cross-examination of experts. We have provisionally said that that is  
30 two days for each of the OFT's experts. In relation to the appellants' experts, we anticipate  
31 that some will require more cross-examination than others. Again, that is an answer to my  
32 learned friend Mr. Kennelly's point. Some of the evidence is obviously more substantial  
33 than others. We get to a number of 12 days for 11 witnesses.

1 Madam, our proposal is that essentially around 30 days of the hearing should be devoted to  
2 cross-examination in that week, with a week at the beginning to open, and a week at the end  
3 to close, albeit with the benefit of written closings which will have been provided to the  
4 Tribunal beforehand.

5 THE CHAIRMAN: So a week to open, a week to prepare closing and a week to close.

6 MR. WILLIAMS: On that basis we think that the hearing can be dealt with within the window  
7 the Tribunal allocated in October.

8 THE CHAIRMAN: That makes 45 days altogether. When you say a week, you mean just a four  
9 day week?

10 MR. WILLIAMS: You are right, madam, it is 45 days. I think we anticipated that we would have  
11 quite a lot of four day weeks in that period, but the opening and the closing weeks might be  
12 full five day weeks. Although now that we are starting on the 21<sup>st</sup> they are not going to full  
13 weeks, so precisely how this will work will require some working out.

14 THE CHAIRMAN: Yes.

15 MR. WILLIAMS: Madam, one of the differences between our proposal and ITL's proposal is  
16 that they say the hearing should be structured on an agreement by agreement basis with a  
17 mixture of argument and evidence in relation to each agreement, starting after the opening  
18 submissions. In fact, before one gets to the agreements they are proposing that witnesses  
19 who deal with general issues, issues that do not relate specifically to one agreement, those  
20 witnesses ought to come before the treatment of each agreement. Essentially, we do not  
21 think that is practical because we think the hearing really needs to be organised by witness  
22 rather than by agreement, because a number of ITL's witnesses in particular deal with more  
23 than one agreement. We say that when a witness is being cross-examined it is both fairest  
24 and most efficient for that witness to be cross-examined on their evidence as a whole. I do  
25 not know whether you have got ITL's letter of 5<sup>th</sup> April to hand?

26 THE CHAIRMAN: Yes.

27 MR. WILLIAMS: I can perhaps illustrate the point. If you turn to the proposed trial timetable at  
28 the end of the letter, in the week commencing 3<sup>rd</sup> October one can see Ken Culham will be  
29 cross-examined in relation to ITL. I should perhaps pause to say that obviously we accept  
30 that when we put together a detailed timetable, the availability of particular parties, their  
31 counsel, that will need to be accommodated. We are not inflexible about that, we are  
32 simply dealing with how to build the timetable up at this stage. So Ken Culham in the week  
33 commencing 3<sup>rd</sup> October.

1 Then going to the next page and moving down, in the top right one sees Paul Matthews,  
2 then Ken Culham again. Underneath that, Graham Hall, and in the bottom box there is  
3 David Cheyne, Cynthia Williams and Ken Culham. I think that is Ken Culham's third visit  
4 to the box.

5 Over the page, top right, David Cheyne again, Cynthia Williams again, Graham Hall again,  
6 Paul Matthews again and then Ken Culham again. We are just concerned that that is going  
7 to introduce inefficiency. It is going to introduce complexity in terms of making  
8 arrangements for people to come and go, and actually it is not going to help the Tribunal  
9 when the OFT wants to say, "In your evidence last week or the week before in relation to  
10 that agreement, you made this point". We think that it is really most sensible and most  
11 efficient and also fairest for witnesses to be cross-examined in one go.

12 We have got no objection to the witnesses being organised as far as possible so that after the  
13 relevant ITL witness one hears from the relevant retailer witnesses. The evidence can be  
14 dealt with on an agreement by agreement basis as far as possible. What I mean by that is  
15 that if one hears from the ITL witness that deals with the Asda agreement then one might  
16 next hear from the relevant Asda witness so that the Tribunal gets the evidence on the same  
17 issues of fact as close together as possible. We have got no difficulty with that as a matter  
18 of scheduling.

19 THE CHAIRMAN: How would you deal with the fact that Mr. Culham seems to be dealing with  
20 a number of different agreements?

21 MR. WILLIAMS: In relation to Mr. Culham it would be possible for all of the retailers to go  
22 immediately after him, but we would simply suggest that Mr. Culham give his evidence and  
23 then he is followed by the relevant retailer witnesses one by one. We do say that it is going  
24 to be much more practical and helpful if Mr. Culham gives his evidence in one go rather  
25 than split across four separate occasions.

26 Madam, that is one difference of approach between the OFT and ITL. The other difference  
27 of approach is that ITL proposes in relation to each agreement two hours, or nearly half a  
28 day of argument in relation to each agreement before one gets into the evidence. Our view,  
29 our position, is that the key documents in the case are those that the OFT relied on in the  
30 decision. That evidence is dealt with in detail in the pleadings. Some of it is dealt with in  
31 the witness evidence, and inevitably a great deal of it will be dealt with in the cross-  
32 examination of the witnesses, so the Tribunal will see the material and it will hear from the  
33 witnesses about the material. We say that it is not a good use of time for the Tribunal to be  
34 shown the documents by way of oral presentation by counsel and then to be shown the

1 documents – and we are talking about a large number of detailed documents – again in  
2 cross-examination. The Tribunal will hear the evidence from the witnesses. We say that  
3 that is the sensible way in which to deal with this material.

4 Of course ITL is not going to be shut out from making submissions about documents. It  
5 will be able to do so in its opening, it will be able to do in its closing. It does occur to us  
6 that if the factual witnesses are dealt with in less than the time we have suggested then it  
7 might be possible to allocate extra time at that stage for ITL to make submissions in relation  
8 to documents the Tribunal has not seen in the course of cross-examination. We do say that  
9 really the priority has to be to deal with the cross-examination in the time available rather  
10 than to engage in oral argument about the evidence which is then going to be dealt with in  
11 cross-examination in any event.

12 THE CHAIRMAN: One of the points, Mr. Williams – and I do not know if you are going to deal  
13 with this – that the Tribunal was very concerned about right at the very beginning of this  
14 case, and which we are still concerned about, is the possibility of there being a difference of  
15 opinion, or a difference of factual evidence, in relation, say, to the ITL/Asda alleged  
16 agreement, not only between ITL and the OFT and Asda and the OFT, but as between Asda  
17 and ITL. There may be factual issues that the Tribunal has to resolve as to where the truth  
18 lies in relation to those issues as well. We are very concerned that the way the hearing is  
19 structured enables those issues, if they exist, to become apparent, and I am not quite clear at  
20 the moment whether your proposed structure is more likely or less likely to lead to that  
21 result than ITL’s proposed structure.

22 MR. WILLIAMS: Just so that I am clear, madam, it is issues between, for example, ITL and  
23 Asda rather ----

24 THE CHAIRMAN: As to the nature of terms or the alleged agreement between them. I do not  
25 pick that pairing for any other reason than convenience. I do not know whether they are in  
26 all respects marching in step as to what was agreed or not agreed between them.

27 MR. WILLIAMS: I think the answer to your question, madam, is that the issues can be identified  
28 and dealt with on either approach. I think all of the appellants, or a large number of them,  
29 have reserved the right to cross-examine ITL’s witnesses. I think ITL has also reserved the  
30 right to cross-examine the appellants’ witnesses. It is anticipated that, at a minimum, all  
31 parties will be in court when agreements to which they are party are being dealt with in  
32 evidence or argument.

33 Whether one organises this by witness or by agreement, and whether one deals with, if you  
34 like, argument in relation to each agreement one by one or not, I think every party is going

1 to have ample opportunity to deal with the issues because they will be in court when they  
2 are dealt with in cross-examination and they will have the opportunity to cross-examine and  
3 they will have the opportunity to make submissions in relation to them. So I do not think it  
4 is a difficulty on either approach.

5 I think, madam, that really deals with the key differences in the way that our structure is  
6 built up.

7 The other differences that ITL has proposed, I think nearly three weeks, or three weeks, for  
8 oral closing submissions, we have taken the view that that is not necessary. If the parties  
9 have the opportunity to prepare written closings during a week off, that will give them the  
10 opportunity to pull the evidence together and to provide the Tribunal with a useful  
11 document which pulls the strands together. We say that on that approach it should not be  
12 necessary for the parties to then take three weeks orally to close their case when the  
13 Tribunal will obviously have been living with the case at that stage for something like ten  
14 weeks or more.

15 THE CHAIRMAN: That is less crucial in a way, because everybody is presumably going to have  
16 a bit of flexibility that if ITL actually does not take as long as it intended then people can  
17 shuffle up and come a bit earlier. That aspect of the timetabling is not so crucial as the  
18 expert for the factual witnesses aspect where it may be difficult to fill up gaps if gaps  
19 appear. You say that is being rather over-generous. I think you have two weeks down – is  
20 that right?

21 MR. WILLIAMS: Two weeks for what, madam?

22 THE CHAIRMAN: For your closing submissions.

23 MR. WILLIAMS: No, two days.

24 THE CHAIRMAN: I see, it is only part of the week – two days, yes. ITL has got five days, the  
25 appealing retailers have got six days to share among them, the OFT has five, and then there  
26 is some time for reply. Was it Mr. Thompson who was concerned that he wanted two days  
27 for his closing. So there seems to be a difference of opinion as to whether six days would  
28 be enough if you take that route. What you be proposing as a realistic time for closing  
29 submissions?

30 MR. WILLIAMS: What we said in our letter, madam, is that we mirror the approach that we  
31 proposed to openings, that the OFT should have a day and a half and the appellants should  
32 have three and a half days. As I say, this would be elaborating on a written submission. We  
33 think that in a case like this, a written submission which pulls the strands together, pulls the  
34 evidence together, is really going to be key.

1 I think there is one other point that I should make in terms of the detail of ITL's proposal.  
2 What they have said about each agreement is that there should be two hours of introductory  
3 submissions from ITL, half a day of cross-examination by the OFT in relation to that  
4 agreement, and that is, if you like, irrespective of how much evidence there is, and then 30  
5 to 60 minutes for further cross-examination by the appellants, and we say that does not  
6 strike the right balance in a case like this where (a) the OFT obviously will need to cross-  
7 examine the relevant witnesses thoroughly in order to put the documents to them, but also  
8 the suggestion that the OFT might have half a day but the other appellants might have 60  
9 minutes just does not seem to us to strike the right balance. Realistically, in relation to the  
10 appellants' witnesses, the majority of the time is going to be occupied by cross-examination  
11 by the OFT, and the timetable needs to recognise that.

12 We are not being prescriptive at this stage about how long the appellants might want to  
13 cross-examine each other's witnesses for, what we are saying is that the specific proposal  
14 put forward by ITL seems to us to strike the wrong balance. What we have proposed is a  
15 broader timetable within which there is a degree of flexibility. What we would propose, if  
16 the Tribunal were to agree with us, is that we would take that away and then build up a  
17 detailed timetable, much like ITL's, taking into account the availability of witnesses and  
18 counsel and all the rest of it, but built and structured in the way that we proposed. We  
19 simply thought it was most sensible to do that once we have a clear steer from the Tribunal  
20 as to how they want to deal with this.

21 THE CHAIRMAN: What you are asking us to indicate today is really whether we prefer your  
22 approach of witness by witness or the ITL approach of agreement by agreement, whether  
23 we at this point think it would be helpful to have a mixture of evidence and opening  
24 explanation or submission or description or something to deal with the hearing in chunks  
25 like that rather than the more conventional opening, all the evidence rattled through, then  
26 closings pulling it all together.

27 MR. WILLIAMS: Yes, I think in relation to that latter proposal by ITL, whether effectively half  
28 a day for ITL to open it and half a day for us to cross-examine, whether that would be the  
29 right balance, because it seems to us that it would not, madam. Yes, madam, as you say,  
30 our proposal is the conventional format really against the background of very extensive  
31 written pleadings, submissions, and so on and so forth, which really will entirely bring to  
32 the surface the issues before the Tribunal starts the hearing.

33 To add to your list, madam, the other issue is whether the Tribunal anticipates running on  
34 after 9<sup>th</sup> December, whether the Tribunal anticipates that is going to be necessary, just in



1 terms of people organising their diaries, and so on. As I say, we do not think that is  
2 necessary.

3 THE CHAIRMAN: As to the point that I raised in my preliminary remarks about the order in  
4 which the experts should be called, do you have anything to say on that?

5 MR. WILLIAMS: The only point that occurs to me immediately, madam, is that Professor  
6 Shaffer is based in the United States. At the moment, I have not quite thought when he will  
7 be here. He will need to be here for the expert evidence generally, so it may not make very  
8 much difference to his arrangements. I do not know if we have a strong view. Can I just  
9 take instructions? (After a pause) I think we had anticipated that the appellants would go  
10 first, but if the Tribunal thinks it would be more useful to adopt the sequence that you have  
11 described, madam, then I do not think we feel strongly about that.

12 THE CHAIRMAN: Yes, thank you very much. Is there anything that any of the appellants wants  
13 to say in reply to anything that the OFT has said?

14 MR. BREALEY: Can I just have a few minutes on three issues. The first is the timetable, if it is  
15 still before you, madam. I think the Tribunal has the rationale for why we have proposed  
16 what we have proposed, but I could quickly go through it and flag a few things. The  
17 opening submissions are going to be quite short per appellant. It is one and a half days for  
18 ITL and then short opening submissions for each retailer appellant, and I think that the week  
19 for opening submissions is broadly accepted by the parties.

20 The reason for day 6, if I can call it day 6, Geoff Good and Roger Batty, was to give the  
21 OFT the opportunity to cross-examine the authors of these trading agreements. They  
22 explain in their witness statements what the purpose was. We have given a day there. The  
23 OFT say they want half a day per witness, and so that is why it is a day. We propose to call  
24 them. The OFT want to cross-examine them. It seemed to us that they were not retailer  
25 specific, they are more general evidence.

26 Then if we go to Shell, days seven and eight, in my respectful submission, to structure an  
27 appeal like this on a witness by witness basis when the decision is essentially agreement by  
28 agreement, with the greatest respect it is not a sensible way of pursuing this at all.

29 If one takes Shell, for example, the way that we have tried to structure it is that on day seven  
30 that is ITL's appeal, and we do think it is of benefit to the Tribunal that we at least flag for  
31 an hour or an hour and a half what are the key issues as far as ITL is concerned in the Shell  
32 appeal. The nature of the trading agreement may be different to other retailers. There may  
33 be certain documents that we say have been taken wholly out of context. We just want to  
34 emphasise certain key points to put the Shell appeal in its context.

1 We have got a day there, so we have got an hour and a half, two hours, however long it  
2 takes, and then Mr. Culham is half a day, which is exactly what the OFT want for  
3 Mr. Culham.

4 We cannot then hide behind the fact that Shell are also appealing and they have got to have  
5 their say. This time it is only one day and it may well be that they will make short  
6 submissions but there should be enough time for the OFT to cross-examine the Shell  
7 witnesses and for Shell to put forward its case on the Gallaher appeal.

8 That is the way we have tried to structure it. Mr. Williams says it is not fair to Mr. Culham  
9 and the witnesses. They are our witnesses and we are quite content for them to come on  
10 one, two or three days, depending on how many retailers they were concerned with. We  
11 just feel that it is going to be far more beneficial to the Tribunal for the parties to be able to  
12 put the separate agreements in context, emphasise certain documents and then the Tribunal  
13 have the witnesses specific to the appeal.

14 The OFT say they want 15, 20 days to cross-examine the witnesses. That is exactly what  
15 this structure gives them. They are not losing out on time to cross-examine. They are, to be  
16 fair, losing out on time on their expert evidence, the ability to cross-examine on the expert  
17 evidence. We have got eight days, whereas I understand the OFT want 12 days. It may be  
18 that that can be accommodated ----

19 THE CHAIRMAN: I think those 12 days included their own witnesses.

20 MR. BREALEY: It may be that I have got that wrong.

21 THE CHAIRMAN: What I understood Mr. Williams to be concerned about is what is this two  
22 hours that you are going to have at the outset of tackling each agreement. You have got  
23 time for your opening submissions, you are going to have extensive closing submissions.  
24 Are you to be effectively allowed a third chance to put your case in respect of each of the  
25 agreements or is it going to be a more neutral setting of the context?

26 MR. BREALEY: Essentially, what we are trying to do is open the case on each retailer. The  
27 opening submissions right at the beginning, I do not believe will really concern the guts of  
28 each retailer appeal. It will be dealing with object, theory of harm. We have got one and a  
29 half days to open. It is very unlikely that we will touch on the nuances on each appeal.  
30 Normally, if a party is found guilty of infringing the Act it would open its case on the  
31 documents and then call its witnesses for cross-examination. We do feel that it is fair to  
32 Imperial and will be of benefit to the Tribunal if we can set the scene. If the OFT want to  
33 reply in the time available it can certainly do so. It can manage whatever time it wants. If  
34 we look at, for example, the Co-Op, where there three days, days 9, 10 and 11, the OFT is

1 going to have the lion's share of those three days. It has got four witnesses to cross-  
2 examine. It can, if it wants, spend half an hour replying to any opening we make. I do  
3 repeat the point, it is not a sensible way of approaching it just simply to call a witness as if,  
4 "That is the witness, we all know what the case is about". I am sure that some of the  
5 nuances will be lost on why the appeals are slightly different.

6 That is why we have tried to structure it as we have.

7 Just two more points. On the confidentiality issue, I was a bit vague about that, I think we  
8 do see the sense of each party sending the other parties a small bundle of documents and  
9 redacting them, if necessary, and then those redactions can form part of the ring. If we have  
10 got any other confidentiality issues we can try and sort them out at a later date.

11 Lastly, on the skeleton and the experts, I am missing the end date by which the experts have  
12 got to prepare their joint report, but I would say that a week for ITL to submit its skeleton  
13 after the joint report, I would ask for a bit more time than that.

14 THE CHAIRMAN: Very well. I see what the time is. It may be a good idea to break there and  
15 come back after the short adjournment. What I envisage doing is that over the short  
16 adjournment we will put together the kind of dates that we envisage including in an order of  
17 the various things that need to be done, and we will then propose those on the basis that  
18 unless someone has a really, really serious problem with them, that is our conclusion as to  
19 what the best way to proceed is. I am not talking there about the 13<sup>th</sup> September date, I am  
20 talking about the setting of the timetabling at the moment.

21 Mr. Kennelly?

22 MR. KENNELLY: Madam, if I may, just before you rise, stress one further point. Obviously,  
23 again in the interests of costs, this may be something that the Tribunal is going to consider  
24 over the short adjournment, from Shell's point of view it would be very useful if we did  
25 have specific dates on which we would be told that we make our closing submissions. So  
26 we are looking for specific dates not only for our witnesses, but also for the particular date  
27 allocated to us for our closing submissions. Otherwise it will be necessary to ask Miss  
28 Rose, for example, to attend over a five day period when only one day is necessary. That  
29 will have a significant effect on the costs. As I said earlier, that is of great importance to  
30 Shell.

31 THE CHAIRMAN: We are not going today to set the detailed timetable for the actual hearing. I  
32 was talking about the timetable for the lodging of the skeletons, the bundle and that kind of  
33 thing, leading up to the hearing. As far as the timetable for the hearing is concerned, what  
34 we envisage doing is to indicate where we are as to some general principles and then leave

1 it to the parties to work further on producing a draft which would make those dates more  
2 specific. I think, with the witnesses of fact – the expert witnesses may want to be present all  
3 the time anyway – it may well be advisable for them, if possible, to keep clear the day  
4 before and the day after the specific date on which they are supposed to appear so that there  
5 is some flexibility built into the timetable.

6 We will rise for the moment and then come back at 2.15.

7 (Adjourned for a short time)

8 THE CHAIRMAN: This is where we think we have got to, subject to people really being very  
9 unhappy. On the interventions point the parties will notify the Tribunal, copied to all the  
10 other parties, if they wish to apply to intervene in any appeal in respect of which they have  
11 not yet made an application, and those letters should come to us by close of play on 15<sup>th</sup>  
12 April.

13 Asda's legal representatives will kindly then draw up an order for the Tribunal to make  
14 granting the existing uncontested applications, extending time for the new applications and  
15 granting them, and to provide a draft to the Tribunal, preferably agreed amongst the parties,  
16 by close of play on 6<sup>th</sup> May.

17 As far as the experts' joint statement is concerned, the parties should lodge with the  
18 Tribunal a statement or statements setting out the matters on which the expert witnesses  
19 agree and on which they disagree by close of play on Monday, 23<sup>rd</sup> May. We are not going  
20 to specify the scope and number of any face to face meetings. We agree with those parties  
21 who say that it is definitely preferable there are face to face meetings amongst the experts in  
22 whatever permutations you think would be helpful, and we hope that their other  
23 commitments will make that possible, but in any event the statement must be available by  
24 23<sup>rd</sup> May in order to allow enough time for the appellants to take it into account in their  
25 skeleton arguments.

26 So far as bundles are concerned, as regards the bundles of the contemporaneous documents  
27 in relation to each agreement, we are attracted by the idea that the parties bear responsibility  
28 for preparing their own bundles based on the statement of objection annexes. ITL should  
29 produce the five necessary bundles relating to its agreements with First Quench, Somerfield,  
30 Sainsbury, TNS Stores and TN Retail; and each of the retail appellants will be responsible  
31 for the two bundles relating to their agreements with ITL and Gallaher.

32 So by 22<sup>nd</sup> April all parties should notify any other appellant if they wish to add any  
33 documents into a bundle which that party is collating, and also provide a copy of that  
34 document. Every party which adds or asks to add to a bundle is responsible for identifying

1 its own or any third party's confidential information in that document and ensuring that that  
2 information is appropriately protected.

3 Hard copies of these bundles should be produced by 6<sup>th</sup> May. Whether you do this by re-  
4 copying the lot, or by providing each other only with the additional documents within  
5 instructions to the recipient as to where to insert them is up to you, and you will need to  
6 liaise with the Tribunal Registry about access to the Tribunal's copies of the statement of  
7 objections' annexes in order to add in the documents. So that is to be all sorted out by 6<sup>th</sup>  
8 May. Each party is also to produce electronic versions of the bundles for which they are  
9 responsible by 13<sup>th</sup> May.

10 For the authorities bundles, ITL will produce these by 30<sup>th</sup> June. The OFT is to supplement  
11 those bundles, if necessary, by 7<sup>th</sup> July to refer to any additional authorities which appear  
12 for the first time in their skeleton.

13 There will be core bundles as well, including the pleadings and the witness statements  
14 without any appendices, and these should probably be produced by ITL and lodged by 7<sup>th</sup>  
15 September, if that is acceptable. All appellants are then responsible for producing any  
16 additional bundle of any documents that they want specifically to refer to in their  
17 submissions, but we do not want a complete re-copy of all the annexes to the pleadings and  
18 the witness statements, we have access to those in our own files which you have already  
19 provided. So any additional bundles that need to be in court should really only be those  
20 annexes or documents that you are going to take us to, or the witness to.

21 Skeletons: we do want exchange of skeletons to be concluded by 30<sup>th</sup> June. We, therefore,  
22 propose that ITL lodge their skeleton by 10 am on 3<sup>rd</sup> June, the retail appellants lodge their  
23 skeletons by close of play on 17<sup>th</sup> June, and the OFT by close of play on 30<sup>th</sup> June. We  
24 would also like, by 30<sup>th</sup> June, please, electronic Word versions of the main bodies of the  
25 pleadings and the skeletons and probably the witness statements as well, if that is not too  
26 difficult – as I say, by 30<sup>th</sup> June.

27 The teach-in date: having consulted amongst ourselves, I am afraid the 13<sup>th</sup> is the only day  
28 that we can really do, so Messrs. Decker and Yarrow will have to, I am afraid, divide their  
29 forces between the Tribunal and Oxford.

30 The hearing will start on 21<sup>st</sup> September, and in the order that we are going to produce we  
31 will attach a schedule of precisely which days we are going to be sitting in each week.

32 On the structure of the hearing, we greatly prefer ITL's approach of dealing with one  
33 agreement at a time, even though this involves calling witnesses more than once. We are  
34 not convinced that this, in fact, will result in the hearing being longer than it would using

1 the OFT's approach. We also agree that it would be useful for each appellant to open  
2 briefly, or for ITL to open briefly the case on each agreement as we go along, especially  
3 since there is going to be no evidence in chief and each agreement is allegedly different  
4 from the others.

5 On the length of the closing submissions, we do not regard the number of days proposed by  
6 ITL as untoward. If the parties are able to speed up then we will finish sooner, as everyone  
7 will be expected to follow on from the previous speaker, but we would prefer at the moment  
8 not to limit this in the manner that was suggested.

9 We, therefore, would ask the parties to firm up on the timetable for the hearing using the  
10 ITL structure once we have made the order setting out the exact days when we are going to  
11 be sitting. This will enable counsel and witnesses to make arrangements. However, we  
12 expect witnesses, if at all possible, to be available the day before and the day after their  
13 allotted days so as to incorporate some flexibility in the trial progress so that there will not  
14 be any gaps or delays if things fall short or over-run.

15 As to transcripts, Asda has kindly agreed to provide us with some information on the  
16 relative costs of LiveNote and the more traditional transcripts, give us some clear idea of  
17 exactly what is involved, and also how soon we have actually to make a decision about what  
18 we are going to have, and we will then take it on from there.

19 I think that is about everything. Are there any further submissions that people want to  
20 make?

21 MR. BREALEY: Not from Imperial, thank you.

22 THE CHAIRMAN: Mr. Thompson?

23 MR. THOMPSON: The one area of slight concern we have is about the nature of the teach-in.

24 As we understood it from the exchange with the OFT representatives, it is now envisaged  
25 that it may be more of a presentation by the OFT, and obviously that raises some concerns  
26 as to how, without in any way criticising the OFT, objective such a presentation would be,  
27 and also what forewarning we might have and whether what is envisaged will actually be  
28 put in a witness statement, or who it might be who would make such a presentation.

29 THE CHAIRMAN: I think the answer is at the moment, let us just get the date in the diary and  
30 we will decide when we are a little bit further on as to what is likely to be involved. The  
31 only comfort I can give you is that on the one occasion when we have done this in past,  
32 which was in the Telecoms context – I do not think you were involved in that – which  
33 involved just being shown how the model had been produced. It was actually extremely  
34 helpful for everybody who attended. It was not done at all in a contentious way. In fact, the

1 case settled so it did not come to any final decision. It did work out as being helpful for  
2 everybody and not at all problematic, although those sorts of concerns were also expressed  
3 as to how it was going to work.

4 MR. THOMPSON: I do not think we want to do anything that would hamper the preparation of  
5 the hearing. It is just a marker.

6 THE CHAIRMAN: I know these things raise these sorts of concerns and we are alive to that but,  
7 closer to 13<sup>th</sup> September but in advance of 13<sup>th</sup> September, I am sure we will be able to  
8 come up with a useful day's events which whoever wants to attend in listening mode can  
9 attend from amongst counsel and the other witnesses, and we will see what is most useful to  
10 do.

11 MR. THOMPSON: I am grateful. The other issue I had was about the core bundles, but I think  
12 that has already been touched on. Issues such the decision and common documents that are  
13 referred to in the decision, but not in relation to any specific agreement, that is a matter that  
14 ITL or the OFT can sort out.

15 THE CHAIRMAN: Yes, that must be right.

16 MR. THOMPSON: I am grateful.

17 THE CHAIRMAN: Very well. Thank you very much everybody. We have got through a great  
18 deal, I think, and we are now hopefully on train for an exciting autumn.

19 \_\_\_\_\_  
20