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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1054/1/1/05
1055/1/1/05
1056/1/1/05

Victoria House,
Bloomsbury Place,
London WC1A 2EB

9th December 2005

Before:
SIR CHRISTOPHER BELLAMY
(President)

DR. ARTHUR PRYOR
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

MASTERCARD UK MEMBERS FORUM LIMITED

and

**MASTERCARD INTERNATIONAL INCORPORATED AND
MASTERCARD EUROPE SPRL**

and

ROYAL BANK OF SCOTLAND GROUP

Appellants

Supported by

VISA (EUROPE) LIMITED AND VISA (UK) LIMITED

Interveners

and

OFFICE OF FAIR TRADING

Respondent

Supported by

BRITISH RETAIL CONSORTIUM

Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Nicholas Green QC (instructed by Lovells) appeared for the First Appellant, MasterCard UK Members Forum Limited.

Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Jones Day) appeared for the Second Appellants, MasterCard International Limited and MasterCard Europe Sprl.

Mr. Christopher Carr QC and Mr. Mark Hoskins (instructed by Ashurst) appeared for the Third Appellants, Royal Bank of Scotland Group

Sir Jeremy Lever QC, Mr. Jon Turner and Mr. Meredith Pickford (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Mr. Stephen Morris QC, Miss Anneli Howard and Miss Colleen Hanley (instructed by Freshfields) appeared for the First Interveners, Visa (Europe) Limited and Visa (UK) Limited.

Mr. Aidan Robertson (instructed by Dechert LLP) appeared for the Second Intervener, the British Retail Consortium.

1 THE PRESIDENT: Good morning ladies and gentlemen. Before we come to our agenda and work
2 through it in the normal way there are a couple of formal points that I would like to deal with. First,
3 there do not seem to be any formal objections to the two applications for intervention so unless there
4 are any further observations we will formally allow those two interventions on the part of Visa and
5 the British Retail Consortium so that we are properly constituted so far as today is concerned. We
6 will deal with the issues that arise from those interventions a little later in the day.

7 Secondly, and this is a point for the Royal Bank of Scotland, you are headquartered in
8 Edinburgh and you are a very large Scottish company, should your Appeal technically be
9 a Scottish Appeal or are you content for us to be a Tribunal sitting in England and Wales for
10 the purposes of your appeal?

11 MR. CARR: I must confess it is not a point I have previously considered, nor indeed have any of
12 those behind me considered it. (After a pause) We are quite happy for it to be treated as an
13 Appeal in England.

14 THE PRESIDENT: It is probably a convenient course in this particular case (Laughter) ----

15 MR. CARR: I would have thought so.

16 THE PRESIDENT: -- because there are other Appeals which are probably going to be treated as
17 Appeals in England and Wales and, although you are a very prominent Scottish Company, this
18 particular case has no obvious connection with Scotland in particular as distinct from any other
19 part of the United Kingdom, so probably that is a convenient forum from your point of view.

20 MR. CARR: I am sure it is. May we take it as read that that is what will happen?

21 THE PRESIDENT: As at present advised yes. Thank you. Very well, let us then deal with the
22 agenda. If we can just go through the various points which are all interrelated and I think it is
23 probably going to be useful to have a discussion amongst ourselves and then come at the end to
24 sort out questions of consolidation and timetable.

25 First, could I just establish who at the moment has got what in terms of which of the
26 three Appellants has actually seen the Notice of Appeal of the other Appellants? I do not know
27 if there has been any exchange of Notices of Appeal between the Appellants. Mr. Green?

28 MR. GREEN: All the principal Appellants have exchanged Notices of Appeal. There are some
29 redactions as between some parties because of confidential information between the parties,
30 but in principle they have been disclosed.

31 THE PRESIDENT: Thank you. Our initial impression, with one or two exceptions, is that the three
32 Notices of Appeal cover almost identical ground and obviously we are concerned to make sure
33 that we keep the mountain of paper down as much as we can and conduct this Appeal as
34 economically as possible. I suppose we have a number of options and may be the obvious one
35 is to consolidate the three Appeals together but make sure that the various Appellants, as far as

1 they can, simply divide up the work between them so that we do not get duplication in the
2 papers.

3 Another possible approach would be actually to take one of the Appeals – or perhaps
4 two of them – as “the Appeals” and either to put one or more of the other Appeals on hold, or
5 to treat one or more of the other Appeals not so much as Appeals but as interventions in the
6 lead Appeal, which is a course we followed in at least one previous case in order to cut down
7 the work. Can I just consider what is the best thing to do on that ground by starting first to see
8 if I can identify whether or not there are any real differences between the various Appeals?

9 Perhaps again, Mr. Carr, I could start, if I may, with the Royal Bank of Scotland. What is it in
10 your Appeal exactly that adds anything to the other Appeals?

11 MR. CARR: Well we have to confess that apart from a certain area of evidence, Oxera
12 material ----

13 THE PRESIDENT: Yes, there is an area of Oxera material, yes.

14 MR. CARR: There is an area there but apart from that there is no fundamental difference between
15 our Appeal and that of the other parties.

16 THE PRESIDENT: So what would be the best thing to do so far as that is concerned from your
17 point of view, and indeed from ours?

18 MR. CARR: I think everybody here would be conscious of the need to ensure there is no duplication
19 or repetition.

20 THE PRESIDENT: Yes.

21 MR. CARR: Efficient management of the conduct of the whole Appeal and certainly the hearing is
22 a high priority. But, having recognised that, what I would suggest is that it would be a little
23 early in the day to stipulate today precisely what the format of the oral hearing should be.

24 THE PRESIDENT: It is not just the oral hearing, it is cutting down the mountain of stuff people
25 have to read, because there are big files to read and the OFT has to plead to it. One does not
26 want to spend a lot of time searching to see if there is some point somewhere in somebody
27 else’s Appeal that needs to be thought about. So we were just wondering whether there was
28 some procedure whereby in some way – if I can use a rather loose expression – the Royal Bank
29 of Scotland could “tuck in behind” some of the other Appeals; or whether we can treat your
30 Appeal as actually raising nothing different from the main MMF Appeal except so far as the
31 Oxera evidence is concerned.

32 MR. CARR: Well we would not want to be confined in making submissions at the oral hearing to
33 the Oxera report alone, but naturally we will behave responsibly in ensuring that we do not
34 waste your time by repetition.

35 THE PRESIDENT: Yes.

1 MR. CARR: I would invite you respectfully not to limit our role formally or circumscribe it at this
2 stage, but rather to be prepared to trust in our good sense in pursuing our Appeal appropriately.

3 THE PRESIDENT: Yes, thank you. I think, before I come to you, Mr. Green, the next logical
4 person to come to is Mr. Sharpe for MasterCard International. Your Appeal again seems to
5 cover very largely the same ground as Mr. Green's Appeal and for a large part in the
6 administrative proceeding so far as we are aware you worked quite closely together. I can see
7 you have a separate angle in a way and a separate interest, but do you have any arguments that
8 are independent of his?

9 MR. SHARPE: Well, Sir, understandably after five years there is a good deal of coalescence
10 between the parties and it is true that for most of the administrative procedure the parties really
11 did work quite closely together. Understandably perhaps MasterCard's commercial interests
12 are distinct from the interests of its licensees and its members – its customers.

13 THE PRESIDENT: Yes, that we see.

14 MR. SHARPE: Therefore we have, I think, a legitimate interest in, as it were, advancing and
15 protecting those interests in our own way as we have attempted to do.

16 THE PRESIDENT: Yes.

17 MR. SHARPE: And that attempt, we submit, is not confined solely to the written phase but must,
18 I think, extend with due discretion – genuine discretion – to the oral aspect of the hearing.
19 What we favour, if I can be positive about it, is to adopt Mr. Carr's approach – and we are
20 conscious of our obligations to the Tribunal we have no wish to duplicate, and I think it might
21 be counter productive and alienate you, we have no wish to do that at all. We do have, as you
22 have seen, in our Appeal a number of matters which certainly overlap with those of our
23 customers and members in the United Kingdom, but also wider issues that it is essential for us
24 to advance in this Tribunal because they represent the Defence of an important aspect of the
25 MasterCard Scheme not only in the United Kingdom but worldwide. I think you are very
26 much aware – if I can put this in a neutral way – what this Tribunal does has influence
27 elsewhere and we are facing yet further proceedings with the EC Commission, who have
28 indicated they are going to stand behind the OFT in its approach and unfortunately there is
29 almost certainly going to be litigation in other parts of the world which will take what is said
30 here and ----

31 THE PRESIDENT: That we all understand, but what point is it that you make that is separate from
32 the points that the principal domestic Appellants make?

33 MR. SHARPE: Well the outline is recognisably the same. We have ordered our case in a different
34 way and we think it makes better sense logically and we want to stick with that if we may.

1 I think we do have separate and distinct issues in relation to the extraneous cost argument,
2 which are not advanced I would say as fully by MMF and by us. I think we also have a very
3 distinct set of arguments in relation to the no restriction argument, which is very much
4 MasterCard's argument in its distinctive contribution to the administrative procedure. In fact,
5 I should add that in the administrative procedure we were content to divide up the submissions
6 as between what I will call the "no restriction" argument, which I did, and the extraneous cost
7 and exemption arguments which Mr. Green's predecessor, Mr. Fowler, was content to
8 advance. So all along we have recognised a distinct approach to this case and we would be
9 most obliged if we could continue that relationship. Having said that we are acutely conscious
10 – we have no wish to duplicate – and when it comes to other proceedings I am sure there could
11 be economies effected and, as we put in our written outline, some co-operation could be
12 effected, but adopting Mr. Carr we would prefer that to be informal.

13 THE PRESIDENT: Thank you. Yes, Mr. Green?

14 MR. GREEN: There are some differences between the parties. You will have seen that our
15 application focuses upon what one might describe as legal submissions, submissions about
16 consistency, logic and so on within the Decision. It is less evidentially based. Mr. Sharpe's
17 clients have got a slightly more evidentially based ----

18 THE PRESIDENT: Would you be kind enough just to remind me who has got what evidence
19 exactly?

20 MR. GREEN: Yes, we have one short expert report from Dr. Jenkins about one small aspect of
21 extraneous costs and it is simply to put in issue an assumption which we say is implicit in the
22 Decision. It is a technical point and I will not go into it now – it is a five page report.

23 THE PRESIDENT: Is that the so-called "new" point?

24 MR. GREEN: The so-called "new" point. There are two witness statements which Mr. Sharpe's
25 clients have put in, one taking an overview of, as it were, the world position, and then there is
26 a specific one in relation to Sweden. Then Royal Bank of Scotland have put in further report
27 from Dr. Jenkins about aggregate merchant benefit, and that is a fairly substantial issue of fact.
28 MCE, MCI do of course have the expert reports which were before the Commission during the
29 administrative procedure which they do of course rely upon, that is absolutely right – Professor
30 von Weizsäcker.

31 THE PRESIDENT: That is MCE, MCI not you?

32 MR. GREEN: That is MCE, MCI.

33 THE PRESIDENT: Yes.

34 MR. GREEN: We have referred to some of that expert opinion report in our pleadings, but it is
35 largely their baby. So there are those evidential differences and, having said that, it is clear

1 that there is significant overlap in terms of the thrust of the arguments, but we are approaching
2 them from slightly different perspectives. My clients are obviously banks operating in the
3 United Kingdom, Mr. Sharpe's client is, as it were, the franchisor of the system worldwide, so
4 there are those differences. Can we suggest that the way forward is this, that as there seems to
5 be a certain amount of common ground between the parties we produce a list of issues in
6 relatively short order within the next two or three months and, if that is done, it will flush out if
7 there is repetition and it will simply be reduced to a single issue on a piece of paper and then at
8 a later stage we will be able to decide sensibly between us who deals with what. It is no doubt
9 a document which will be subject to refinement, but one could start work on that document
10 now so that everybody was beginning to work down the same tram lines – that may be one
11 way of ensuring that there is no repetition because we would all formulate the issue in a way
12 which would then identify points for determination at a later stage.

13 THE PRESIDENT: Yes.

14 MR. GREEN: But I think our preference would be to allow the three Appeals to go ahead. We are
15 all very conscious and obviously have already discussed the need for co-operation to ensure
16 that there is no unnecessary duplication. We are very conscious of that and we fully accept the
17 need to ensure that the Appeals run smoothly. We would echo Mr. Carr's submission that it is
18 somewhat premature to take a decision ----

19 THE PRESIDENT: Yes, thank you. I think I come to you next, Sir Jeremy, if I may. How do you
20 see the best way of saving costs and avoiding duplication in this case? Do we advance on all
21 fronts, or do we advance in some co-ordinated way? What is the best thing to do?

22 SIR JEREMY LEVER: The Office would hope that the Judgment would dispose of all the Appeals,
23 and the Office is equally willing to do what the parties I think to date have rather assumed that
24 it would do, and file a consolidated Defence to all three Notices of Appeal and, ideally in the
25 view of the Office, also to Visa's intervention, but I can deal with that ----

26 THE PRESIDENT: We will come to that in a moment.

27 SIR JEREMY LEVER: It appears to be a distinction without a difference as to whether the Appeals
28 are heard together or consolidated in those circumstances; we cannot see any difference
29 between them. That would be the Office's view. This is not a case as appeared where there
30 are very different interests on the part of the different Appellants, and so that seems to the
31 Office to be the most economical way of proceeding.

32 THE PRESIDENT: Yes, thank you.

33 (The Tribunal confer)

34 THE PRESIDENT: Yes, very well, we will order the three Appeals to be consolidated under Rule
35 17, unless there are any major objections it seems to us that a consolidated Defence to all three

1 Appeals by the OFT is the appropriate course. It is perfectly apparent from the discussion we
2 have just had that we will expect everybody to co-operate closely between themselves and with
3 the Tribunal to avoid duplication and save costs as the matter proceeds.

4 That, I think, then takes us to the question of timetable and in particular how the
5 Interventions – and particularly the Intervention of Visa – fit in with the timetable for the
6 pleadings. Let us deal with the timetable for the pleadings first. We seem to have two rival
7 suggestions, without for the moment talking about dates. The first suggestion is that the OFT
8 should now produce its Defence and the Intervention should follow subsequently, particularly
9 the Visa Intervention, and there should be later replies to those Interventions.

10 The alternative suggestion, at the moment preferred by the OFT, is that we should
11 have the Visa Intervention first and that the OFT should then respond by way of one
12 consolidated document both to the three Appeals and to the Intervention. That, as I understand
13 it at the moment, is the position of the various parties, though I do not think and Mr. Morris
14 – is Mr. Morris here?

15 MR. MORRIS: Yes, Sir. Good morning.

16 THE PRESIDENT: Good morning. I am not sure that I have completely got your position, and you
17 may be somewhat at a disadvantage at the moment because you have not actually got the
18 Notices of Appeal – at least I am assuming you have not got them, but maybe you have, I do
19 not know. What is the position?

20 MR. MORRIS: Sir, the position is, as you will have seen from our written observations, that we
21 have a different proposal of an overriding nature which will impact on the timetable, probably
22 more by reference to date than order. I can come to that at an appropriate moment. I suggest
23 that now might be an appropriate moment.

24 THE PRESIDENT: Yes.

25 MR. MORRIS: But on the limited issue of the order of batting we would prefer for the OFT to go
26 before our Statement of Intervention, but our overriding concern, which is one based very
27 much on the point that you have just made, is that we have sufficient time in either event. So,
28 if this case proceeds in full, by which I mean it goes ahead without the Tribunal adopting our
29 suggestions we would want a fairly substantial period of time for our Statement of
30 Intervention, and I can explain why that is in a moment. Whether that means that in the
31 meantime the OFT should go with their Defences really, as I say, ideally we would like it
32 before and it may be a better use of the Tribunal's time, but really our concern on that
33 particular issue is for us to have sufficient time. If you were to say that we should go first
34 before the OFT, to which there is some logic, then that would put the OFT back beyond our
35 sufficient and substantial time. So batting order is not our priority ----

1 THE PRESIDENT: But time is.

2 MR. MORRIS: -- but time is, yes. Obviously, as you see, we suggest an alternative route in the case
3 in any event.

4 THE PRESIDENT: The alternative route being?

5 MR. MORRIS: The alternative route effectively being that you should deal with what we have
6 termed the consistency issue as a preliminary issue in these Appeals and I can explain that to
7 you in a moment, and I would very much like to have the opportunity to address you on that.
8 We say Visa is in an extremely unusual position, a position which the OFT itself describes as
9 “exceptional”. In a nutshell we have everybody – certainly the OFT and probably also the
10 Appellants, saying “You have to fight this case in these Appeals”; and, on the other hand, you
11 would then have the situation where we are fighting the substance of our case in somebody
12 else’s Appeal against a background of somebody else’s administrative procedure, in
13 circumstances where we have not been involved in the administrative procedure and where we
14 do not even have any documents at all at the moment. That is the nub of the conundrum which
15 I think you will have seen.

16 We say, Sir, this, that actually logically what should happen is that this case should be
17 put on hold to allow the Visa case to catch up. However, we recognise that that, for other
18 reasons, may not be the most attractive option for this tribunal and we entirely recognise that.
19 The way we see going forward to deal with that is to deal with the consistency issue, which
20 will have to be decided by this Tribunal in these Appeals to decide that as a preliminary issue.
21 That, in a nutshell, is our position. I do not know whether you wish me to develop it, to
22 explain to you what the consistency issue is in a little more detail and why it is so important?
23 I am very happy to do that now should you wish.

24 THE PRESIDENT: I think, Mr. Morris, ladies and gentlemen, probably the most convenient course
25 at the moment is for us to indicate what our preliminary view is on how we should proceed
26 from here, and then we will give a chance for everybody to tell us why we cannot possibly do
27 what we intended to do.

28 Our preliminary view is that there is force in the OFT’s suggestion that they should
29 plead in one consolidated document both to your Intervention and to the three Appeals, i.e. that
30 the order of batting should be that we complete the pleading stage with the Interventions before
31 we have the Defence, largely because your intervention is likely to a considerable extent to
32 raise common issues to the issues that are already in the existing Appeals. The question is
33 therefore what would be a fair timetable both from the OFT’s point of view and from your
34 point of view, and other interests. Bearing in mind that there is time later in the case as we
35 envisage it for various points and positions to be further developed if necessary. What we

1 presently envisage by way of a timetable is that the Visa Intervention – and I will come to the
2 British Retail Consortium a bit later – should be in by the end of January and that the OFT’s
3 consolidated Defence should be in by the end of February, that is to say giving the OFT a bit
4 more time than they have presently asked for, but giving you some time to put in your
5 Statement of Intervention.

6 As far as your Statement of Intervention is concerned our preliminary thinking at the
7 moment is that, bearing in mind this Decision has already been in the public domain for quite
8 a considerable time – I think at least six weeks if not a couple of months – you should have
9 time by the end of January to put in proper logical form the principal points that you would
10 wish to develop and argue. The issues in this case are now familiar to everybody. They are
11 familiar to your clients. You have been through it once with the European Commission so you
12 are not exactly reinventing the wheel in all this. That would be, in our view, sufficient for you
13 to put in your statement of intervention, but we would of course be open to further applications
14 on your part if you wanted at some later stage in the case to develop further points if you can
15 persuade us that you have not had time in that initial stage to say all that you wanted to say. If
16 I can put it like this, what we are anxious to do is to get the formal stages of these proceedings
17 completed as soon as we conveniently can so that we have a basic procedural outline
18 framework and then we can see where we are, and if there are specific issues that people wish
19 to develop then they can make applications accordingly. That is how we are seeing it at the
20 moment, but you are very welcome to come back to us ----

21 MR. MORRIS: Can I give you my immediate reaction?

22 THE PRESIDENT: -- and persuade us that that is completely impractical. I think also, we have to
23 bear in mind that, important though Visa is, you are an intervener in this particular case ----

24 MR. MORRIS: Well that is the point.

25 THE PRESIDENT: -- and we cannot really allow the proceedings to be hijacked by the convenience
26 of the Intervener.

27 MR. MORRIS: Well that is precisely the point, Sir. We are an Intervener in name, but in practical
28 terms, as recognised by the Office of Fair Trading, in their opening observations, the
29 significant issues of principle in relation to setting of multi-lateral interchange fees will be
30 decided, certainly according to the OFT, in this case and will be applied to Visa and will bind
31 Visa. To that extent we must be effectively equivalent to a main party. This is recognised
32 specifically in I think it is para.11 of the OFT’s skeleton and so I will call ourselves a “quasi”
33 Appellant if I may, and we must be treated – we must be treated – on an equal footing with the
34 other Appellants if that is to be the route that this Tribunal is to take, because it is not ----

1 THE PRESIDENT: Well we have been working on the assumption that by the end of January this
2 Decision will have been in the public domain for three months.

3 MR. MORRIS: I accept that, Sir, and of course I recognise that point.

4 THE PRESIDENT: You must have known all along that this was coming.

5 MR. MORRIS: I accept that too, and I am not in any way seeking to underplay that factor, but the
6 fact of the matter is this. We have not had access to the file obviously in relation to the
7 MasterCard case. We have now had access to the file in relation to our own procedure, which
8 we did not get until 19th November but, of course, there are documents in the MasterCard file
9 which have not been taken across into the Visa file, which documents may or may not be key
10 to the debate and discussion in this case.

11 We are not at the present stage on an equal footing. Yes, we know what the OFT say
12 in the Decision, we have not seen the documents attached to the Decision. I gather there is
13 a Decision bundle, we have not seen those. We have not been involved in the administrative
14 procedure that has been going on for five years, save to the extent which we have already
15 indicated and if I may, Sir, I will explain this ----

16 THE PRESIDENT: I had the impression that you had been involved in the administrative procedure.

17 MR. MORRIS: Can I explain? We were given copies of the Rule 14 Notices and the Statement of
18 Objections – two Rule 14 Notices and a Statement of Objections. We put in submissions
19 through that process and those submissions were largely (but not wholly) confined to the
20 consistency issue, and one of the difficulties, of course, of us seeking to participate in
21 MasterCard’s administrative procedure was the fact it was not our procedure and we did not
22 know the facts – their facts – that it was being fought on, in particular the details of their cost
23 study in relation to how cost categories were to be allocated and what costs went into what
24 bucket.

25 THE PRESIDENT: But that is not to do with you, you are not fighting their case, you are simply
26 putting your point of view forward on the principle.

27 MR. MORRIS: On principle, but ----

28 THE PRESIDENT: And we are not deciding a pre-emptive Appeal by you against a Decision that
29 has not yet been taken.

30 MR. MORRIS: Can I give you an example as to how the facts may have an impact? In the Decision
31 there is analysis of the different categories of cost and how they have been allocated on the one
32 hand to payment transmission and, on the other, extraneous and there is debate about that.

33 THE PRESIDENT: Yes.

1 MR. MORRIS: That analysis that the OFT makes is based upon materials which have been supplied
2 by MasterCard to the Office of Fair Trading. We have not seen that material the basis of that
3 analysis.

4 THE PRESIDENT: But what has it got to do with you?

5 MR. MORRIS: Well if I may try to persuade you ----

6 THE PRESIDENT: I am just seeking clarification and information, Mr. Morris.

7 MR. MORRIS: That is fine. The concern that Visa had is that this Tribunal will make a Ruling
8 about cost categories and types of costs and which “bucket they go into” is the way I have
9 framed in my own mind.

10 THE PRESIDENT: As between money transmission and other ----

11 MR. MORRIS: Extraneous, and it may be that the Office of Fair Trading and, indeed, your view as
12 to the analysis of what costs are referable to what, would be influenced by an understanding of
13 the way that Visa carries out its costs’ studies. Visa has a cost study methodology which it has
14 had for many, many years – 15 years – I understand. That methodology we believe may be
15 different and is likely to be different from that of MasterCard. We may have something very
16 substantial to say on that determination of principle in relation to what costs are allocable to
17 which of the categories. What we are concerned is that if we came in on a “sitting in the
18 wings” basis and just chipping in with the odd point, we are concerned that we will get
19 a Ruling from this Tribunal which will be binding in relation to categories of costs which we
20 would not then be able to do anything about once we got to our own procedure. To some
21 extent we are in the dark because we do not know what the position is, but we do say that there
22 is or may well be, depending on what we see in terms of when we get a slightly better
23 understanding of the case, there is or may be facts which are Visa related facts which would go
24 to those issues of principle. It is for that reason that we submit that as everybody is saying you
25 are going to be bound by this case we do need to have a full participation on an equal footing,
26 and that is the fundamental basis why, on the way you are thinking at the moment, Sir, we
27 suggest that we are going to need more time.

28 THE PRESIDENT: Let me try and explain again how we are looking at it – I am, just for the
29 moment, parking the consistency point which is another point that we need to address in
30 a moment. How we are looking at it at the moment is that your role is not just the role of the
31 Intervener sitting on the wings which might, with all respect to them, be a better description of
32 the role of British Retail Consortium in this particular case – we have to see – we are prepared
33 to give you a larger role but we must get this case off the ground. The case has to levitate into
34 an effective procedure. It should be possible by the end of January, which will have given you
35 three months at least – I think three and a half – for you to formulate your overall arguments of

1 principle, and the case very largely depends on arguments of principle, and indicate to us in
2 that document what further particular points you are concerned about which you would like
3 more time to develop. On that basis, having got a structured position from you, we can then
4 see how what you want to develop further fits in with the rest of the case, so that everybody
5 can see where we are, and we are not at risk of going down the road of deciding a sort of “Visa
6 Appeal” or Visa specific points that are not addressed at all in the Decision, but which you
7 want us to decide. That is how I am seeing it at the moment.

8 MR. MORRIS: Sir, I recognise what you are saying.

9 THE PRESIDENT: To take the costs’ point, well you may have a different methodology but, first,
10 insofar as the methodology was different it does not necessarily mean that anything we decided
11 in the MasterCard case was, as it were, binding on you if you were doing it differently and the
12 facts were different and we had not gone into those arguments. That is the first point.

13 The second point is that you may well want to draw to our attention that there is
14 another way of doing it, but that is a stage, as we see it, that we come to just a little bit later on
15 when we have the basic framework of the case going, because we have to bear in mind all the
16 time that at the moment this is a case between the Appellants and the OFT, and not between
17 you and the OFT.

18 MR. MORRIS: Well we understand that, Sir, but if I may say so, it is pretty plain that the OFT
19 recognises that it is a close case between us and them because in the sense of there being, they
20 would say, one case before this Tribunal dealing with this issue in respect of both parties.

21 THE PRESIDENT: Yes.

22 MR. MORRIS: They are suggesting that that is the way forward. Sir, if I may, I would like to take
23 instructions on the way that you have just put it, which is that we have to put in something by
24 the 30th with an outline of a case, or more than an outline, and that if we want more time to
25 develop other issues we can apply and you will consider that favourably?

26 THE PRESIDENT: List in that document what other issues you want particularly to ----

27 MR. MORRIS: But I would like to take instructions on that aspect, if I may.

28 THE PRESIDENT: Do you mind me going around the table seeing what other people’s views are
29 while you are taking instructions?

30 MR. MORRIS: Yes.

31 THE PRESIDENT: Yes, Mr. Green?

32 MR. GREEN: So far as we are concerned, we have seen what everybody has said in their skeletons,
33 we are happy with that timetable. It seems to us to be workable, as far as it goes at this stage.

34 THE PRESIDENT: Thank you. Mr. Sharpe?

35 MR. SHARPE: Would you allow me a moment just to take very brief instructions?

1 THE PRESIDENT: Yes.

2 MR. SHARPE: (After a pause) I am much obliged. Sir, I will be brief, we view some of the matters
3 we have just heard with some dismay, for two reasons. First, MasterCard has been waiting
4 five years for the resolution of this and, throughout that whole procedure, there were inordinate
5 delays, most of which were caused by the Office of Fair Trading.

6 THE PRESIDENT: But what about the timetable, Mr. Sharpe? (Laughter)

7 MR. SHARPE: Well the timetable has been unnecessarily long to date, and we see no particular
8 reason to protract it yet further. We accept in principle the notion of a consolidated Defence;
9 that makes sense with respect. It is the timetable that gives rise to the problems.

10 THE PRESIDENT: Yes, so what is your proposition on dates?

11 MR. SHARPE: First of all, the time given to Visa I would have thought depend entirely upon the
12 scope of their intervention.

13 THE PRESIDENT: Yes.

14 MR. SHARPE: The implicit assumption so far is that they should have free range to dwell over all
15 matters relevant to the Appeals.

16 THE PRESIDENT: Well the scope of their Intervention at the moment is up to them, and whether
17 we are going to take any notice of it is up to us.

18 MR. SHARPE: It is, and I suppose, Sir, that what I would like to do is to invite you to consider
19 placing some restrictions upon the scope of their Intervention.

20 THE PRESIDENT: I just want your view on the timetable at the moment, Mr. Sharpe.

21 MR. SHARPE: Well the timetable is that they should be given sufficient time to deal with the
22 narrow range of issues relating to their Intervention, and they should confine it to those issues
23 not adequately covered – that is to say their interests are not adequately protected by the
24 Appeals to date, and I appreciate they cannot respond to that because they have not seen them.

25 THE PRESIDENT: The suggestion is that they should have until the end of January and the OFT to
26 the end of February.

27 MR. SHARPE: Well if they have to do less they should have less time.

28 THE PRESIDENT: Are you disagreeing with that?

29 MR. SHARPE: If they have to do less they should have less time.

30 THE PRESIDENT: So what is your suggestion?

31 MR. SHARPE: They would have responded to the Statement of Objections by January 6th, their
32 ample resources would have been sufficient, and I would not be at all surprised if their
33 response to the SO was very well developed. Moreover, these issues are deeply familiar to
34 them, and they put in several responses, as my friend was obliged to concede, in the course of
35 MasterCard's administrative procedure.

1 THE PRESIDENT: There is an SO is there in the Visa case?

2 MR. SHARPE: Oh yes, indeed. It was issued on October 19th, and I would not be at all surprised if
3 my learned friend and those behind him have been working very hard on that. The deadline
4 for that, until it was suspended a couple of days ago, was 6th January. Now, they are dealing
5 with matters with which they are intimately familiar, and to give them until the end of January
6 seems, if I may say so, unnecessarily generous.

7 THE PRESIDENT: So that is excessive.

8 MR. SHARPE: Yes.

9 THE PRESIDENT: Thank you.

10 MR. SHARPE: The second point on timetable, and I go back to the Office of Fair Trading, we were
11 expecting their Reply at the latest 20th December – that would accord with this Tribunal’s
12 normal timetable. We have now read in their written submission that they are not ready, they
13 have got all sorts of problems and the case is terribly complex. The case is no more complex
14 than it has been for the last five years – they understand the case from beginning to end. The
15 volume of material may be great but none of it is unfamiliar to them. Moreover, the expert
16 evidence we put in they first saw in February of this year, so they have had 11 months to deal
17 with it and to address it. As for the need, that they rather plaintively add, to get two American
18 economists from Chicago for there is not an economist in Britain or Europe to deal with their
19 concerns is just laughable – there are dozens and dozens of economists, many of whom are
20 cited in our relevant documentation. It is just a bad reason.

21 In our view we see no compelling reason for them not to stick to the timetable. On
22 the other hand, if Sir Jeremy says that he cannot manage the Defence by 20th December then of
23 course I agree with him. However, I do feel that under all the circumstances they should be
24 given a much tighter timetable to respond to the extra material afforded by Visa. Therefore our
25 submissions are that Visa should be brought forward by a couple of weeks, but they are
26 important weeks for us, and the period of time should be reduced from a generous four weeks
27 to perhaps a reasonable two weeks for them to respond specifically in their documentation to
28 the arguments advanced as Intervener by Visa.

29 THE PRESIDENT: Thank you. Mr. Carr?

30 MR. CARR: We would adopt what Mr. Sharpe has said. The OFT currently is supposed to produce
31 its defence before Christmas, I think it is about December 20th, it varies by a day or two in
32 different Appeals. If Visa are required to put in their observations by mid-January that seems
33 to be appropriate and proportionate, given their historic familiarity with the matter. If the OFT
34 then, by the end of January, have to put in their overall Defence, that has given them probably

1 five to six weeks longer than they currently have and that would seem to be very generous to
2 them, so we would go along with what Mr. Sharpe suggests.

3 THE PRESIDENT: Thank you very much. Yes, Sir Jeremy, how do you see all this?

4 SIR JEREMY LEVER: The Office of course does not want these proceedings to be unduly
5 prolonged, but the Tribunal's suggestion will not result in any significant prolongation of these
6 proceedings as a whole and the Office therefore is fully content to accept them.

7 If I may say a word or two first about Visa's position?

8 THE PRESIDENT: Yes, please do.

9 SIR JEREMY LEVER: It is common ground that the Appeal and the Visa procedure before the
10 Office raised similar issues of fact, law and economics, and that the Office of Fair Trading's
11 case in both procedures is virtually identical, and that is to be found in Visa's skeleton at
12 para.5. So there is a certain tension in my learned friend Mr. Morris's suggestion that
13 nevertheless theirs is such a very different case that they need a lot more time. They have, as
14 you pointed out, Sir, been in possession of the contested Decision for over three months past.
15 They received a substantially similar Statement of Objections on 19th October, which they
16 expected to have to answer by the end of January, although we have now put that on hold – it
17 seemed sensible to do that ----

18 THE PRESIDENT: I was given the date of 6th January a moment ago.

19 SIR JEREMY LEVER: I thought we had given them to the end of January to answer the Statement
20 of Objections, but we have said "You do not need to do it until the Tribunal has given a Ruling
21 in the first case."

22 THE PRESIDENT: Yes.

23 SIR JEREMY LEVER: Our position in relation to you should "make the Office hurry more" and
24 that some people have had a five and half year start, unfortunately some of us have not had
25 a five and half year start. Mr. Kenneth Parker was to have acted as Leading Counsel for the
26 Office of Fair Trading and so I have only just arrived on the scene. There are 11,000 pages in
27 the core bundles that are being put in with the Notices of Appeal. So we believe that the
28 suggestion made by the Tribunal for dealing with the matter is entirely sensible, and it avoids
29 what would otherwise be a really pretty crazy situation of our putting in a Defence, Visa
30 putting in its Intervention, their crossing on the way. It really makes much better sense to
31 proceed as the Tribunal has suggested and it will not prolong the procedure.

32 THE PRESIDENT: Thank you. Yes, Mr. Morris, have you had a chance to take instructions?

33 MR. MORRIS: Yes, I have taken some instructions. Can I make a couple of observations?

34 THE PRESIDENT: Yes.

1 MR. MORRIS: First, we only got access to our own file on 19th November. Secondly, it is correct
2 that our initial deadline for the response to the SO was 6th January. I can say that we were on
3 the point of sending a letter seeking an extension of time for that document along the lines we
4 have indicated in our skeleton in this case when we received the offer – or indeed more than an
5 offer – the putting on hold option letter from the OFT, effectively putting our SO on ice. We
6 would not have been in a position to respond by 6th January.

7 On your suggested proposal the position is this, in principle we are content to proceed
8 by way of putting something in by the end of January. The only observation I have on that in
9 terms of timing is we have availability problems in part of January but that is a matter of
10 fiddling with dates, but in principle we are content with that, subject, however, to being
11 satisfied that we will not meet resistance if and when we wish to put in further material
12 thereafter. Obviously I cannot invite the Tribunal to bind itself in relation to any such
13 application but the concern that has been expressed to me is that the dividing line between
14 what must go in by 30th January and what we may be permitted to put in by way of
15 supplemental or expansion is perhaps not sufficiently indicated. What I would have in mind
16 would be a Statement of Intervention dealing first, and perhaps very substantially with the
17 consistency issue, subject to anything else that we debate about the consistency issue during
18 the course of today and then indicating in outline Visa's position on some of the key issues
19 and, in particular, perhaps in outline the line we take on those key issues – certainly of
20 economic theory. But it may well be that those outline points will need flesh putting on them
21 after the SO. That is what we ask.

22 If the Tribunal wish to go down that route that is what we would want to happen. If,
23 however, we need to put more flesh on our case by the time of our Statement of Intervention
24 then we think 30th January is too tight.

25 THE PRESIDENT: Thank you.

26 SIR JEREMY LEVER: I wonder if I might add one point, Sir? Visa did play quite a considerable
27 part in the MasterCard administrative procedure. On 11th January 2002 it filed a 41 page
28 bundle, including an expert's report. On 30th April 2002 it gave an oral presentation to the
29 Office of Fair Trading with 49 slides. On 8th July 2002 it filed 146 pages in the aggregate
30 including an expert's report, and it also filed a copy of lengthy submissions by Visa to the
31 Reserve Bank of Australia, which Visa believed to be relevant to the United Kingdom inquiry.

32 On 16th May 2003 it filed 30 pages on the supplementary Rule 14 Statement, that was
33 indeed confined to the European Decision consistency point and on 25th February it filed
34 another 16 pages, the observations on the MasterCard Statement of Objection again primarily

1 (if not exclusively) on the consistency point. So it has not come as great a surprise to it as to
2 me to find myself appearing before you today! (Laughter)

3 MR. MORRIS: Can I add that I personally was not involved in those submissions either, so I am in
4 no different a position and would rely on the same arguments as made by Sir Jeremy.

5 (The Tribunal confer)

6 THE PRESIDENT: We have been discussing the issue of timing and the order of pleadings in this
7 case and in particular a special situation arises because we have three Appellants who are
8 appealing the Decision of the Office of Fair Trading but an Intervener – Visa – is closely
9 interested in the outcome of that Appeal and has itself recently faced a Statement of Objections
10 from the Office of Fair Trading on, as we understand it, closely similar issues.

11 Visa submits that they should be treated effectively as the equivalent to an Appellant,
12 or at least a quasi Appellant, and have as much time as an Appellant would normally have.
13 The first point to decide about which I think there is no serious disagreement is that it seems
14 convenient in this case for Visa to file a Statement of Intervention before the OFT files its
15 Defence so that the OFT pleads in a consolidated way to all three Appeals plus that Statement
16 of Intervention.

17 That takes us then to the timetable, and in the course of discussion the difference
18 between the parties has narrowed somewhat. The Tribunal has suggested 31st January for
19 Visa's intervention and a consolidated Defence by the OFT by 28th February. That proposal is
20 acceptable to MMF, if I may say so the principal United Kingdom Appellant. Both the two
21 other Appellants – MCE, MCI, and the Royal Bank of Scotland – suggest that the timetable
22 should be tighter, another couple of weeks should be excised from that timetable so that
23 everybody moves somewhat faster. We have considerable sympathy with the suggestion of
24 MCI and the Royal Bank of Scotland that these proceedings really now should get on as fast as
25 convenient; and that as Visa, in this particular case, has already been in possession of the
26 Decision for the best part of three months, the end of January is ample time to deal with it (so
27 they submit) and that in any event they would have had to respond to the Statement of
28 Objections either early in January or at the end of January at the latest. Visa, however, say that
29 they did not have access to the file until 19th November, that there is a great deal of work to do
30 and that the timetable is too tight. The OFT also points out that Visa did, in fact, participate to
31 a considerable extent in the administrative procedure.

32 Bearing all those considerations in mind, however, we are not persuaded that we
33 should depart from our original timetable, so we propose to say that the date for Visa's
34 Intervention should be 31st January and that the OFT should file a consolidated defence by

1 28th February. We do not expect to be invited to grant any extensions to that timetable
2 because, as we say, the proceedings must, as it were, get on.

3 The question, which we cannot resolve at the moment, because it is a matter for Visa,
4 is exactly what the scope of that intervention should be. We would very much hope that Visa
5 will have the time to cover as much ground as possible by the end of January but if there are
6 specific issues that they feel they have been unable to do justice to in the time available, the
7 Statement of Intervention should indicate what the issues are and make appropriate suggestions
8 as to how the Tribunal should deal with it. We will not necessarily be sympathetic to
9 suggestions that this case should be widened any further than it already is but we leave at least
10 open that possibility in the case that there is significant unfairness to Visa as a result of the
11 timetable we have decided. However, we very much hope that the essence of this case, which
12 by now should be familiar to everybody, can be dealt with appropriately in the time available.
13 So that is the timetable we settle on that.

14 Mr. Robertson, I have not forgotten you, I will come to you in a moment. Yes,
15 Mr. Morris?

16 MR. MORRIS: Can I just mention one point of fact? You referred to the fact that we had had the
17 Decision for three months. We have not had the Decision for more than two months, we got it
18 on 13th October.

19 THE PRESIDENT: Yes, I am sorry.

20 MR. MORRIS: Merely for the record.

21 THE PRESIDENT: Yes, I am sorry, it will be three and a half months by the end of January- is that
22 right?

23 MR. MORRIS: Whatever it is, it is not three months now. We got a non-con. version.

24 THE PRESIDENT: Thank you for that.

25 SIR JEREMY LEVER: I apologise, I misinformed you.

26 THE PRESIDENT: Thank you. Yes, Mr. Robertson, what are we going to do about your timetable?

27 MR. ROBERTSON: We would suggest that the BRC puts in its Statement of Intervention a week
28 after the OFT's Defence. We need just a bit of time after the OFT has put in its Defence to
29 ensure we do not duplicate inadvertently.

30 THE PRESIDENT: May I just explore briefly how you see the shape of your intervention, whether
31 there are likely to be particular points that you feel you need to develop in any detail, or
32 whether you are in fact providing very valuable but in practice largely moral support to the
33 position of the OFT?

34 MR. ROBERTSON: It is difficult to say at the moment because we have not seen any of the Notices
35 of Appeal. We had a relatively limited involvement in the administrative procedure as well.

1 Although we were the complainant our involvement consisted of answering requests for
2 information from the OFT. We were not shown either of the Rule 14 Notices. We only saw
3 a heavily redacted version of the Statement of Objections, so we have had less involvement in
4 the procedure than any of the other parties here today.

5 We expect that there may be issues of fact being raised by the Appellants that
6 members of the BRC would be better placed to respond to, because they have first hand
7 knowledge, than the OFT, but that is only a suspicion at the moment.

8 THE PRESIDENT: Yes.

9 MR. ROBERTSON: As you said, for Visa the scope of their intervention is for them, whether you
10 take any notice of it is for you, and the BRC are mindful of the guidance the Tribunal has
11 given on intervention and the role played by Interveners and we would make our Intervention
12 in accordance with that guidance.

13 THE PRESIDENT: Very well, we will say one week after the Defence from the OFT. Now, I think
14 we should press on, if we may. The next practical issue is the question of confidentiality,
15 because to a certain extent until everybody has a version of the various Notices of Appeal, it is
16 difficult in particular for the Interventions to take shape. What we are minded to say is that
17 non-confidential versions of the Notices of Appeal should be exchanged between all parties,
18 that is including the Interveners, within a week of today, unless there is some major objection
19 as to why that should not be possible. We have incidentally noticed that there seems to be
20 some quite wide claims to confidentiality. Again, I think Mr. Carr, that Royal Bank of
21 Scotland have made some rather wide claims to confidentiality, including claims to the
22 confidentiality of a large part of its own evidence which is going to put you in very
23 considerable difficulty if you want us to rely on it, so I would hope that any confidentiality
24 issues would be addressed by everybody in a very sensible and statesman like way, but that is
25 the order we propose to make. Are there any observations on that? Mr. Green?

26 MR. GREEN: No, Sir, we have already prepared a non-con. version and we can exchange it very
27 rapidly.

28 THE PRESIDENT: Yes.

29 MR. GREEN: That includes the annexes – I should make that clear – because BRC did not read our
30 skeleton. There is an issue, which I assume we will come to, which is the bundle, the core
31 bundle but I assume you are just dealing with the Notice applications at the moment.

32 THE PRESIDENT: When you say the “core bundle”, Mr. Green – when I say the “Notice of
33 Appeal” I mean the Notice of Appeal and its attachments.

34 MR. GREEN: Yes, there are two discrete categories of document. There is the Notice of Appeal
35 plus documents specifically annexed to that pleading.

1 THE PRESIDENT: Yes.

2 MR. GREEN: Then there is the body of material which all four principal parties have agreed is or
3 maybe relevant to the Appeal, which is the core bundle. In that body of material there are
4 discrete issues which arise because we have only got a redacted version of that, but there is no
5 real confidentiality between the four main parties, but even that is a partial set of documents.
6 But as between the rest of the world – in particular the Interveners – there are some quite acute
7 issues, but perhaps that can be dealt with separately.

8 THE PRESIDENT: The way that I think we were looking at it at the moment is that there should be,
9 within 7 days, an exchange on as full a basis as possible. If there are then remaining issues of
10 confidentiality that are critical they need to be sorted out, if they cannot be agreed, as quickly
11 as possible.

12 MR. GREEN: Yes.

13 THE PRESIDENT: And I would anticipate the possibility of the Tribunal convening at some point
14 early-ish in January to deal with any disputes that there may be on confidentiality.

15 MR. GREEN: So in the first instance we will supply the formal pleading, as it were, but then the
16 core bundle, which is the ten or so lever arch files which you have had, would not be disclosed.

17 THE PRESIDENT: Well we are not necessarily completely on top of the lever arch files at this
18 stage.

19 MR. GREEN: That is why I was limiting it to the actual pleading, which we are happy to disclose
20 forthwith.

21 THE PRESIDENT: Can you help me as to what there is in the lever arch files that is thought to be
22 confidential?

23 MR. GREEN: Yes, the lever arch files will, in relatively short order, be supplemented by the OFT's
24 Defence, where the OFT will be annexing to their Defence their consolidated Defence
25 – a series of documents which will have a higher degree of confidentiality. So in due course
26 the bundle will have a series of confidential documents in it. There are documents which are
27 confidential as between the principal parties. There are some documents we have not seen, or
28 have only seen in redacted form, and there are other documents which are sensible and
29 confidential to third parties – the Swedish material, for example, which will be introduced by
30 the OFT is quite a problematic series of documents. There are documents which third parties
31 submitted to the OFT which are partially in the bundles at the moment, which may come in in
32 a fuller form in due course. We have taken the pragmatic point of view to date that it is
33 unlikely we are going to need to see all of the fully confidential versions of these documents
34 for the pursuing the Appeal, so we do not want to set a hare racing if it is not necessary to run
35 after it. We suspect that we can deal with it pragmatically – certainly as between the main

1 parties. The greater difficulty arises in relation to a number of those documents and the third
2 parties – Visa and the BRC. If they have documents which they have had produced to them in
3 the course of the administrative procedure they can use them. If they are public documents
4 and, for example, the Australian material is public documents, then there is no difficulty, they
5 can ask us for it or they can get it off the website, but the remaining documents may well be
6 confidential either to one of the parties or to one of the banks and create problems vis-à-vis the
7 third parties. There were really quite a range of complex issues concerning the core bundle.

8 We are very happy to provide copies of the Notice of Appeal and the annexes to all parties.

9 THE PRESIDENT: Are there significant documents in the core bundle that are not confidential?

10 MR. GREEN: There are some, for example the publicly available material about Australia. It is
11 a mixture of confidential and non-confidential. If it is non-confidential and it is in the public
12 domain there is no difficulty. Can I suggest this, that we will serve the formal pleadings in
13 very short order. That will then identify documents which the third parties may or may not
14 have seen. If there is a real difficulty with some of those documents they can come and ask us
15 for them and we can then decide whether there is a problem with that document. It may be
16 better that we try and deal with it pragmatically rather than as a point of dispute or principle at
17 this stage, and if there were real problems that cannot be resolved then we come back to the
18 Tribunal in the New Year.

19 THE PRESIDENT: Thank you. What I think we had in mind was that so far as possible there would
20 be as liberal an exchange of documents as can now be done, if necessary utilising the
21 confidentiality ring or whatever. Insofar as anyone is unhappy with that initial exchange,
22 which we hope can now take place almost immediately, they should come back to the Tribunal
23 by, say, 15th January with an application to be allowed to see documents for which
24 confidentiality is being claimed, or challenging the confidentiality that has been claimed if they
25 need to challenge it. That is what we were envisaging. From your point of view does that
26 sound a practical suggestion?

27 MR. GREEN: I think possibly there are two mechanisms. We could adopt one of them. The first
28 mechanism is that we provide the index to the core bundles so that everybody can see what is
29 in those bundles, and they will have an idea of whether or not they need to see it at all.
30 Secondly, we simply extend the confidentiality ring which has been working *de facto* between
31 the parties but is going to be formalised, we hope, in the course of today.

32 THE PRESIDENT: That is as between the parties, do you envisage extending that to the
33 Interveners?

34 MR. GREEN: That would be for the third parties. Between the four principal parties we have
35 largely seen each other documents, and there is a limited category of documents as between

1 each of the parties that we have not seen, but that is not something we are going to have to
2 trouble the Tribunal with we hope.

3 THE PRESIDENT: No.

4 MR. GREEN: So there are, I think, two solutions vis-à-vis third parties: First, which I think we
5 would prefer, that we show them the index, and documents which they feel they need to see we
6 can then consider on a case by case basis. The alternative is that the confidentiality ring is
7 extended to cover all legal advisers and we take it from there.

8 THE PRESIDENT: Including those advising Interveners?

9 MR. GREEN: Yes absolutely, that is the purpose of the extension.

10 THE PRESIDENT: Let us see what Mr. Morris says.

11 MR. GREEN: Can I just clarify one point, external legal advisers is the extent of the ring at the
12 moment, otherwise it becomes extremely broad.

13 MR. SHARPE: Forgive me for intervening ----

14 THE PRESIDENT: Are there internal problems as between the various Appellants?

15 MR. SHARPE: The Appellants got on famously in relation to ring of security, as you would expect,
16 and there is no difficulty there, but for one minor point my friend alluded to, which I will not
17 dwell on now. I can foresee major, major problems in MasterCard being obliged to divulge
18 sensitive commercial economic data to Visa, its external advisers, on this. I have some
19 difficulty in knowing how to resolve it. We can put it off until January, or we can say now that
20 we are not in a position to divulge some information, and some of it should not go anywhere
21 near Visa, they are our most important competitor worldwide. I am going to register that point
22 and so we will see how we can deal with it.

23 THE PRESIDENT: Yes. Any other points the Appellants want to register before I ask the
24 Interveners?

25 MR. SHARPE: No.

26 THE PRESIDENT: Yes, Mr. Morris?

27 MR. MORRIS: A number of points. First of all, to some extent I echo Mr. Sharpe's concerns about
28 exchange of information between MasterCard and Visa, but unfortunately that is an issue the
29 Tribunal is going to have to grapple with one way or another somewhere down the line in this
30 case.

31 Secondly, if I may add, one of the reasons for our concern about timing was this very
32 issue. We have seen nothing remember, none of those files, we do not even know what is in
33 them.

34 Thirdly, we think that this is one of the reasons why the consistency issue as

1 a preliminary issue might be a good idea because it might avoid all this; and fourthly, on the
2 practical suggestions, at the moment my instructions are that a confidentiality ring based on
3 external legal advisers only is unlikely to be satisfactory because we would want to take
4 instructions on material, which takes us back to Mr. Green's initial suggestion and, subject to
5 the remarks I have just made, all I can say is let us see what there is and why it has been
6 withheld and we will take a pragmatic view on a bit by bit basis. We cannot say whether or
7 not we need to see this material until we know what it is and so the idea of an index I suppose,
8 if that is the route you are going down is the first and best route, perhaps with an explanation
9 as to why, by the sound of it, all these items in the ten bundles are so confidential that we
10 cannot see them. Of course, I should add that in our quasi Appellant status, or whatever you
11 wish to call it, we need to see as much as possible and, despite Sir Jeremy Lever's remarks
12 about us putting material in at the administrative stage, the very reason that our participation
13 was effectively with at least one hand tied behind our back is that we have not seen any of the
14 basic material in the MasterCard case for obvious reasons, because it is not our case. So that is
15 where we are on that.

16 THE PRESIDENT: Thank you. Have you got any views on this, Sir Jeremy?

17 SIR JEREMY LEVER: Mr. Green's suggestion seemed very sensible. I doubt that this case is
18 actually going to be determined by whether somebody has seen one of these documents or not.

19 THE PRESIDENT: Yes.

20 SIR JEREMY LEVER: I think the issues are much bigger than that.

21 THE PRESIDENT: Of course.

22 SIR JEREMY LEVER: And so if one is still allowed to use Latin in Her Majesty's Courts ----

23 THE PRESIDENT: In this Tribunal you are. (Laughter)

24 SIR JEREMY LEVER: *Solvitur ambulando* – see how one goes along, which was really what
25 Mr. Green very sensibly suggested.

26 THE PRESIDENT: Yes, very well.

27 (The Tribunal confer)

28 THE PRESIDENT: On the issues of confidentiality we feel we need to tread relatively carefully
29 because it is obviously highly difficult to envisage any exchange of commercially confidential
30 information as between Visa and MasterCard. On the other hand we have to do our best to
31 ensure that these proceedings proceed as fairly as possible. What we think should now occur is
32 that the Appellants between themselves and in so far as they can the Appellants and the
33 Interveners, there should be disclosure of the Notices of Appeal and as many of the other
34 relevant documents in this case as possible with as full an indication as is practical in the time
35 as to why particular documents that are not being disclosed are regarded as confidential. We

1 would suggest that if by 15th January there are concerns on the part either of a particular
2 Appellant or on the part of one of the Interveners about the extent of the disclosure that has
3 been given and that there might be reasons for asking for further disclosure then the correct
4 course is for that party to write to the Tribunal stating the problem and we will decide what we
5 will do from thereon and it may be that issues of confidentiality need to be argued but we hope
6 not. In particular, as the OFT submits, there are obviously large parts of this case which
7 depend on issues of principle and do not necessarily depend on internal confidential
8 information so we can hope that this becomes a problem that is not really a problem, but let us
9 see how we get on on that basis.

10 MR. CARR: May I mention one other matter connected with confidentiality?

11 THE PRESIDENT: Of course, Mr. Carr.

12 MR. CARR: I do not know if you have noticed it, Sir, that attached to or accompanying our skeleton
13 argument was a draft form of order directed at confidentiality as between the three Appellant
14 parties. We formally ask you to make that order by consent.

15 THE PRESIDENT: Oh, there was a small point about extending the ring, was there not? Is that the
16 one?

17 MR. CARR: Well this is about defining the ring, but that is a different point.

18 THE PRESIDENT: Yes, thank you.

19 MR. CARR: I do not know if you have had a chance to glance at that.

20 THE PRESIDENT: Just let me remind myself. Just take me back to what this is, because I have
21 already made one order, have I not?

22 MR. CARR: Yes, which is, if I may so describe it as a sort of “encouraging order” to everybody to
23 do the best they can. But this proposes a formal order. Under the operative part it is ordered
24 that against the three main Appellants – MasterCard UK, MasterCard International and Royal
25 Bank of Scotland – and what it is saying is that as between those three their external legal
26 advisers and economists should be allowed to see effectively all documents. They are defined,
27 if you go over the page there is Part B which lists and defines the legal advisers and expert
28 economists, and then if you turn again, Part C, there is there the definition of the information in
29 question that is to be the subject of this particular ring of confidence.

30 THE PRESIDENT: Just remind me how this advances things from the orders we have already
31 made? I made some orders the other day about confidentiality rings, I thought – did I not?

32 MR. CARR: Not that I am aware of.

33 THE PRESIDENT: I am sorry.

34 MR. CARR: That was the OFT.

35 THE PRESIDENT: Yes, you are quite right, yes.

1 MR. CARR: So Part A, in fact, defines the protected information and that is the Notice of Appeal
2 plus the accompanying core bundle.

3 THE PRESIDENT: Yes.

4 MR. CARR: Part B defines the personnel who are to belong to the confidentiality ring, and then Part
5 C.

6 THE PRESIDENT: Well if there are no objections we can make that order by consent.

7 MR. CARR: Thank you.

8 THE PRESIDENT: Thank you. Right, how are we getting on? I have the impression we are getting
9 on not too badly. I think next we come more or less to the question of witnesses and evidence,
10 and that also raises in a very general way how we see this case unfolding once the pleadings
11 are complete.

12 Let me talk around that for a moment. One of the problems for the Tribunal in a case
13 like this is that if we bring it on for hearing before we internally have really had a chance to
14 marshal and summarise for ourselves what the facts and arguments are, there is some risk of
15 a delay of some time between the hearing and the Judgment and we would like to do our best
16 in this case to minimise the period that elapses between the hearing and the Judgment. We
17 have to build into the timetable a certain degree of flexibility partly to cope with the emerging
18 Visa intervention, partly – and this is a point we need to come to in a moment – to allow for
19 the possibility of some role or other by the European Commission, and generally to give us all
20 time to get on top of the details of this important case.

21 There is also the question of how we deal with the expert evidence. On the basis that
22 the pleadings are more or less closed by the end of February, which we cannot entirely assume
23 because there may be some Replies, the broad timetable that we are envisaging, to be as
24 practical as possible, is that we have some kind of structured discussion with the experts if
25 there remain disputes on the expert evidence, at some period before the summer vacation
26 which would probably be in July and that we should probably aim to have the hearing in the
27 second half of September in this case, rather than try to get it all on before the summer break.
28 One of the problems with trying to do it before the summer break is that it adds to the time in
29 which one can produce the Judgment – unless one is going to give up one's summer break
30 which one is not in this particular case. That approach would give us all the chance to, as it
31 were, absorb what the experts have said before we get to the hearing. It would give the
32 Tribunal a chance either to work internally on a draft of the factual background and arguments,
33 because the arguments have to be dealt with with the care that they merit, the possibility of
34 producing a report for the hearing along the style of the CFI or the European Commission

1 – a matter I will mention in a moment – while also allowing for any role that the European
2 Commission may wish at some point to play. So that is how we are seeing the overall case
3 unfolding from hereon, basically in two stages – a structured discussion with the experts and
4 then a hearing, and that we hope that the hearing can then take place on the basis of a fairly
5 reduced number of issues and certainly not take up a great deal of time in oral argument. As at
6 present advised I would have thought on that basis that a week is the outside limit of the likely
7 length of the hearing in this case.

8 So having shared with you how we see that unfolding, would you like to comment on
9 it, or would you like us to rise for just a moment or two so that you can reflect and see whether
10 there are any further points you would like to make on how we see it developing?

11 MR. GREEN: I think we would welcome five minutes, if that were convenient.

12 THE PRESIDENT: Yes, well we have made good progress, why do we not rise for ten minutes and
13 just see how we are?

14 (The hearing adjourned at 11.55 a.m. and resumed at 12.05 p.m.)

15 THE PRESIDENT: Yes, Mr. Green?

16 MR. GREEN: The suggested structure seems sensible to us. Can I flesh out our perception of
17 perhaps what you are thinking and how it might operate?

18 THE PRESIDENT: Yes.

19 MR. GREEN: Pleadings will end some time in March, there may be replies depending upon what is
20 served.

21 THE PRESIDENT: Yes, we would rather hope not really because the paper work can multiply and
22 multiply if we are not careful.

23 MR. GREEN: Well I think if we served replies it would be on an as strictly necessary basis in the
24 event of a new point or a new factual issue arose which we had not contemplated, otherwise
25 I think we probably agree.

26 THE PRESIDENT: Yes, I think we will say no replies without permission – I think that is the
27 normal rule under the Rules anyway – and then we will see if they are really necessary.

28 MR. GREEN: Following that, we still think there is some merit in the parties seeking to identify, at
29 least in broad terms, the legal issues because that may help educate and direct the experts. If
30 there were a CMC sometime in April one could then have an idea as to how the expert process
31 would operate, and there are probably two stages to it. The first is that the experts would meet
32 and try and identify areas of common ground and areas of dispute, and that can take from bitter
33 experience quite a lengthy time. We have experts from a number of different jurisdictions who
34 will have to meet and agree, but it is probably a valuable exercise to see where the areas of
35 disagreement are.

1 THE PRESIDENT: In such a meeting you are talking about a meeting organised by the parties at
2 this stage ----

3 MR. GREEN: At this stage, yes.

4 THE PRESIDENT: -- and not a meeting in which the Tribunal is involved?

5 MR. GREEN: Yes. In certain trials I have been involved in the process has been that the experts
6 meet and they produce schedules on a series of topics that they themselves believe to be
7 relevant and they set out where they agree and where they disagree, and sometimes they put
8 short comments explaining why. Once you have that in your hand you can then say "So far as
9 the areas of disagreement are concerned there are eight, but we can easily see that only four of
10 them are relevant to the legal issues." Once we have got to that stage, which is a stage of
11 refinement, the Tribunal would be in a position to know how it wished to address those areas
12 of dispute and it may be that you would call the experts in to make a presentation, or through
13 legal representation or possibly through cross-examination, but that could be considered in the
14 light of an iterative process as between the experts.

15 THE PRESIDENT: Yes.

16 MR. GREEN: We would suggest some putative CMC at an appropriate point to consider how that
17 may best be dealt with.

18 THE PRESIDENT: Yes.

19 MR. GREEN: And that would then take place, as you have suggested, some time in July.

20 THE PRESIDENT: Yes, very well. Mr. Sharpe?

21 MR. SHARPE: The key exchanges here are likely to be between the two sets of economists, Carlton
22 Franco and Professor von Weizsäcker. What we envisage, and my friend will no doubt
23 confirm, we are expecting to see their reports attached to the OFT's Defence ----

24 THE PRESIDENT: That would be our expectation too.

25 MR. SHARPE: -- on 28th February. What we envisaged after that, and I think this is a reasonable
26 proposition, is that the experts, as it were, informally exchange their evidence and
27 communicate with each other.

28 THE PRESIDENT: That is quite close to Mr. Green's suggestion.

29 MR. SHARPE: It is, yes, and then we try and rationalise what differences lie between the parties,
30 but only come to you once we have refined that process to the point of only things which are
31 relevant to you are going to be exposed to you. We see that as a relatively easy process in
32 principle. I think the same process could be engaged with MMF's witness, Dr. Jenkins, who
33 put in a brief statement, and that could be dealt with.

34 THE PRESIDENT: Yes, thank you.

35 MR. SHARPE: So think we are agreed.

1 MR. CARR: It sounds as though my two predecessors are agreed, we agree as well.

2 THE PRESIDENT: Good, thank you very much.

3 MR. SHARPE: May I just add one point? You made a ruling a moment ago, or at least indicated

4 your intention regarding replies. We have the utmost sympathy of not adding to the paper, but

5 I think an order that says we have to justify a reply on matters which have been raised, and

6 which are new matters, which are most likely to arise in relation to the Interveners at least, and

7 also in relation ----

8 THE PRESIDENT: I think it is just in the Rules, Mr. Sharpe.

9 MR. SHARPE: You have a discretion.

10 THE PRESIDENT: I will not make any ruling in advance.

11 MR. SHARPE: We may have to come back to you then?

12 THE PRESIDENT: Yes, you may, indeed you may. Sir Jeremy, does this sound a reasonable way of

13 proceeding so far?

14 SIR JEREMY LEVER: Yes, we agree that a list of issues could be very valuable. It was found to be

15 so – and I sound like a dinosaur when I say this – in the Restrictive Practices Court, and that

16 was a way they found helped to focus the hearing much better – to what issue is it relevant?

17 I do not know exactly when after the close of the written procedure we should attempt it, even

18 if it shows that somebody thinks something is an issue and somebody else does not think it is

19 an issue it is still useful to have it, so that seems sensible.

20 Yes, probably to have a meeting first of all of the experts by themselves.

21 THE PRESIDENT: Yes.

22 SIR JEREMY LEVER: We are mindful of spending public money in bringing people across from

23 Chicago, but there you are. Then a structured discussion of experts was, I understand, helpful

24 to the Tribunal in the *Genzyme* case, and that seems a sensible way to proceed. So I think there

25 is very broad agreement between us about the best way to bring this on in a well focused way

26 that will assist the Tribunal.

27 THE PRESIDENT: Yes. Mr. Morris, you have probably do not have a great deal to contribute at

28 this stage?

29 MR. MORRIS: I think you will be pleased to know that I do not. The timetable seems to us to be

30 a good one.

31 THE PRESIDENT: That, incidentally, has deliberately left a certain amount of scope in case we

32 need to take your particular situation into account.

33 MR. MORRIS: The thought had occurred to us too, and we bore that in mind when we considered

34 what you were proposing. The only thing I would add is that it is very likely that we too will

1 have an expert and that this process of exchanges and meetings between experts we would
2 suggest should also include such expert as we have.

3 THE PRESIDENT: It sounds likely – and that is evidence you can put in with your Statement of
4 Intervention?

5 MR. MORRIS: I do not know the answer to that question. It very much depends upon what we get
6 to see in terms of disclosure.

7 THE PRESIDENT: Well you must know by now what the issues are, it cannot be that difficult to
8 have a view of principle. This does not depend on the particular facts of the case, it depends
9 on ----

10 MR. MORRIS: No, but it may depend on seeing everybody else's expert reports which we have not
11 seen.

12 THE PRESIDENT: Yes, very well. Mr. Robertson, I am sorry, I keep forgetting ----

13 MR. ROBERTSON: The timetable seems fine to us. If we have an expert report to serve it will be
14 served with our Statement of Intention.

15 THE PRESIDENT: Yes. There seems to be broad agreement that after the close of pleadings there
16 will be an attempt to collaborate between the parties on preparing a list of issues. Can we
17 make sure that that list, at least in the first instance, is relatively short and does not go on for
18 pages and pages and pages, because we shall probably – as a Tribunal – have our own views as
19 to what issues are relevant and what we want to hear argument about. There should be
20 a meeting of the experts that will take place between the experts and the parties, not involving
21 the Tribunal – a structured discussion between experts – probably in July and a main hearing
22 probably in the second half of September. We can, I think – not perhaps today, but quite soon
23 after today in correspondence – try to be a bit more definite about particular dates because
24 I think the sooner the dates are in everybody's diary that concentrates the mind.

25 What that I think suggests to the Tribunal is that we should aim to have a second
26 CMC in this case at some point when the pleadings are closed and when the experts have had
27 a chance to have a preliminary discussion, so that armed with the list of issues we can then
28 focus on any points that may arise. The question on the timetable is exactly when that is likely
29 to be practical. We had amongst ourselves provisionally been considering the third week of
30 March (w/b 20th March). It may be that that is slightly early – it may be a bit difficult to have
31 got the experts together for their first talk by then. We would not however, want it to flip too
32 far into April. (After a pause) Mr. Summers points out that Easter is 15th April. Is before
33 Easter a practical proposition? I suppose your reports will not be available before the end of
34 February, will they, Mr. Lever?

1 SIR JEREMY LEVER: I gather not. I gather that we should get a grant, with luck early in February.

2 Of course, our objective will indeed be to append the expert's report to our consolidated
3 defence.

4 THE PRESIDENT: Yes, well I think you must try very hard to do that, otherwise everything will
5 slip, and that is what we would expect.

6 We may not be able to fix a date at the moment, but it sounds to me like something in
7 the week before Easter for the second CMC.

8 MR. GREEN: Friday the 7th?

9 MR. SHARPE: It is not a convenient date for me.

10 THE PRESIDENT: April is not particularly convenient for anybody I do not think, Mr. Sharpe. We
11 will not actually fix a date now at this moment, but we will fix one soon after today, but that is
12 our general intention. Is there anybody who strongly objects to that general approach? (After
13 a pause) Right, we will proceed along those lines, CMC to be fixed at a date to be
14 communicated.

15 That, I think, takes us on to the question of the relationship between this case and any
16 proceedings that are or may have been taking place at European level and how we handle
17 Article 15 of Regulation 1 of 2003 – which I think is wrapped up together with Mr. Morris's
18 consistency point – and how we handle that. I do not know whether you have the advantage of
19 actually having Regulation 1 of 2003 to hand, but Articles 15 and 16 would appear to us to be
20 relevant and I suppose also Article 11.4 which is the one that would have required the OFT to
21 pre-notify their proposed Decision to the Commission which I understand was done.

22 It seems to us at the moment that it may be quite difficult to avoid inviting the
23 Commission to tell us whether they have any observations that they may wish to make on this
24 case and indeed whether they wish to make any written submissions or indeed any oral
25 submissions on the case. That I think would involve as a practical matter forwarding to the
26 Commission at least some version of the Notice of Appeal – perhaps not necessarily with all
27 the supporting documents – so that they are sufficiently aware of what the issues are so that
28 they can see what they are. I would be glad to know, as a first reaction from the parties,
29 whether they have considered this aspect of the case and, if so, whether they have any views on
30 what, if anything, the Tribunal should do vis-à-vis the Commission. I think our first step might
31 be that the Registrar simply writes to the Commission to say that “These proceedings have
32 happened, here is a copy of the Notice of Appeal, this is the expected timetable for the
33 proceedings, please let us know whether you want to make any observations and, if so, we
34 would be glad to have them by ...” whatever date is appropriate. Can we now perhaps just go
35 around the various parties and see what their point of view on this is. Yes, Mr. Green?

1 MR. GREEN: We have a certain diffidence about the involvement of the Commission for the simple
2 reason that they do have ongoing proceedings primarily directed at Mr. Sharpe's client but, of
3 course, affecting my clients as well, and our nervousness stems from the fact that we wonder
4 about the propriety of the Commission involving itself and expressing views in these
5 proceedings whilst it should be keeping an open mind at the Community level. On the other
6 hand, we recognise that the Commission will need to be aware of these proceedings and, of
7 course, they are, and the Tribunal may need to notify them of the state of these proceedings.
8 Quite what the Commission does in relation to that notification is, I think, uncertain.

9 THE PRESIDENT: Yes. Perhaps Mr. Sharpe knows the detail – what is the actual state of play on
10 the European front at the moment, Mr. Sharpe, in terms of timing and so forth?

11 MR. SHARPE: A Statement of Objections was issued, I think it is September 2003, which was
12 responded to in the ordinary way. It is worth mentioning that Statement of Objections
13 departed substantially from the Visa exemption decision in relation to broadly the same subject
14 matter. We are now expecting a supplementary Statement of Objections and that will be with
15 us, we are promised, some time in the New Year.

16 THE PRESIDENT: Yes.

17 MR. SHARPE: As to the principle of Article 15, we could have absolutely no objection at all to the
18 Tribunal seeking factual information regarding the state of those proceedings, but we do also
19 share some diffidence at the Commission being invited to offer its opinion on matters in which
20 we are intimately involved and making submissions. Their opinions will be expressed in the
21 Statement of Objections sent to us.

22 THE PRESIDENT: How do we cope with the second sentence of Article 16.1, which apparently
23 enjoins us to avoid giving decisions which would conflict with the decision contemplated by
24 the Commission in proceedings it has initiated?

25 MR. SHARPE: The Commission itself draws a clear distinction between the intra-regional
26 interchange fee, and the domestic interchange fee, which is the only matter of concern to us,
27 and that must be a view that is shared by my friends at the Office of Fair Trading. Whatever
28 the position may be in relation to the international interchange fee both, according to the
29 Commission, which expressly distinguishes that fee from the domestic one and made very
30 clear in the Visa Decision that that decision related only to the international – the intra-regional
31 rate to be more accurate – it is the view of the Commission and the Office of Fair Trading that
32 it in fact offers very little to us.

33 I wonder, Sir, if you have had an opportunity to read the Visa Decision?

34 THE PRESIDENT: Not in the detail I would have wished, Mr. Sharpe.

1 MR. SHARPE: When the moment should arise you will see express references to distinguishing
2 from the domestic, and also the reasons why. Whether we accept or reject that, that is their
3 view and as I say it is the view, I think, which is supported by the Office of Fair Trading. In
4 the Decision you will recall the Office deal quite extensively with the question of this at
5 para.73 to 136, and that was virtually exclusively in response to the intervention of Visa,
6 because as we said this is not a live issue for any of the Appellants.

7 THE PRESIDENT: Well the focus is perhaps on Article 15.3, second sentence which says:

8 “Where the coherent application of Article 81 or Article 82 of the Treaty so requires
9 the Commission acting on its own initiatives ...”

10 – so it is up to them, though I suppose they could be prompted and I suppose if we prompted
11 them they might feel that they should act on their own initiative, but it may not be appropriate
12 for us to prompt them – “... may submit written observations to courts of Member States.”
13 I suppose what we are conscious of in this case is that the Decision under appeal does apply
14 both to domestic law and Articles 81 and 82, and an issue about coherence vis-à-vis the
15 application of 81 and 82 to domestic interchange, presumably arises.

16 MR. SHARPE: In the abstract it certainly does, though to date the Commission had ample
17 opportunity to bring proceedings to any party in relation to domestic interchange fees and
18 plainly had the jurisdiction to do so. If they have not done so it would be a revelation to see
19 what they have to say. But whether it is necessary for the coherent application to do that when
20 we have no view as to where the Commission are coming from in relation to that, and where
21 their published decisions and Statement of Objections expressly distinguished the two
22 situations. I suspect this would be a new venture for them.

23 THE PRESIDENT: Well I suppose, as a first step, we inform them of the proceedings and ask them
24 whether they would wish to submit any observations and without at that stage really knowing
25 what the observations were and then see where we went from there.

26 MR. SHARPE: I do not think we can resist that, Sir.

27 THE PRESIDENT: Yes. Yes, Mr. Carr, have you had a chance to consider this?

28 MR. CARR: Yes, Sir. We would certainly accept that the Commission should be informed of these
29 Appeals. Of course, they have the right on their own initiative to submit written observations.
30 They may also, if they see fit, apply for permission to participate orally. So they can act in
31 accordance with the powers and the rights that they have. My only concern is that if you say
32 “Please indicate to us if you wish to be involved, or intend to be involved ...” that might
33 appear to be an implied invitation, or even request that they do so. It might be better to remain
34 purely factual: “Here is information about the state of our proceedings” – full stop.

1 THE PRESIDENT: But we would have to at least, I think, tell them what the time table for the
2 proceedings was?

3 MR. CARR: Of course.

4 THE PRESIDENT: And that would involve, I think, saying to them “If you would like to put in any
5 observations we need to have them by ...” a certain date, basically, do we not? We cannot just
6 have some observations turning up in the middle of August when the case is very far advanced.

7 MR. CARR: I quite follow that, and it is entirely a matter for you obviously as to how you choose to
8 phrase it, but it might be desirable not to formulate it in a manner which might seem to appear
9 to be ----

10 THE PRESIDENT: -- encouraging them to do so! (Laughter)

11 MR. SHARPE: If this is going to go ahead and we are going to inform the Commission that these
12 proceedings are ongoing and whatever may be relevant we would ask that you insist that the
13 Commission respond quickly – in the course of January I think would be appropriate, so we
14 know exactly where we are.

15 THE PRESIDENT: Yes. Yes, Sir Jeremy?

16 SIR JEREMY LEVER: I think people may be worrying themselves unnecessarily on this account.
17 The Commission has had the Decision – it has had the contested Decision – it has had a copy
18 of the Notice of Objections, or the formal document that has gone to Visa, I am right about
19 that, that is in accordance with the standard procedures.

20 THE PRESIDENT: Yes.

21 SIR JEREMY LEVER: The Commission knows about the proceedings. I can say that the
22 Commission has not to date expressed any great enthusiasm for participating in these
23 proceedings, having somebody here. The Commission will, of course, respond to any
24 questions that may be asked of it by the Tribunal under Regulation 1, and it will be open to any
25 party who wants to suggest to the Tribunal that a question be asked, to put it to you and invite
26 you to ask them to do it. But at the moment I think that, as far as I can gather, the Commission
27 is expecting that if you want help from it you will ask it for that help. I think that is a fair
28 description of the position of the Commission to date, and we can, of course, undertake
29 ourselves to inform the Commission of all the procedural steps that have taken place, send
30 them copies of procedural orders and at the moment I am not envisaging that we would send
31 them copies of the Notices of Appeal, but it would be open to any of the parties to do so if they
32 thought it was appropriate to do so, but that is up to them. I rather doubt from what has been
33 said today that that is something they will want to do.

34 THE PRESIDENT: Well just thinking aloud for the moment, under Article 15.1 we could do two
35 things, namely, we could ask the Commission to transmit to us information in its possession or

1 its opinion on certain questions. Now, as far as information is concerned, I would anticipate
2 that we can probably obtain from the parties all the information that we need, including
3 information about the state of play on any parallel proceedings.

4 As far as the Commission's opinion on questions is concerned I would not, at this
5 stage, see any major reason why we should ask the Commission to opine on the matters that
6 are going to be argued with great skill and in considerable detail by extremely competent
7 persons in the Tribunal. So that, I think, probably just leaves us with the possibility which we
8 perhaps ought to guard against, as to whether these proceedings pose any risk to the coherent
9 application of Article 81 or Article 82 under Article 15.3 and that appears to be something that
10 the Commission itself would take a view on, i.e. once they are informed of the proceedings it is
11 rather up to them to tell us whether there is any problem in that regard and, if so, persuade us
12 that we should take account of it. So, beyond informing them at the moment, probably in
13 a fairly neutral way including informing them of the timetable, that is probably as far as we
14 need to go at the moment. How does that sound to you?

15 SIR JEREMY LEVER: I respectfully agree with that. The Decision, as my friend, Mr. Sharpe has
16 said, devotes quite a lot of space to saying why there is not a conflict and if the Commission
17 feels it necessary to come along and express a view it can take the initiative, you can always
18 ask it to, but at the moment, as I say, I think the anxieties that an elephant from the
19 Commission are going to come in and trample on us all are misguided. There does not seem to
20 be any risk of that and we can again deal with it, if and when it arises.

21 THE PRESIDENT: Yes. We might at some point need a little help on why Article 81 applies at all
22 in this case. I am not completely clear on what basis that it does, these are domestic
23 transactions and they are involving, as I understand it, purely intra-United Kingdom
24 transactions.

25 SIR JEREMY LEVER: I suppose quite often when one uses one's credit card one is buying goods
26 imported from another Member State.

27 THE PRESIDENT: That is the argument, is it?

28 SIR JEREMY LEVER: I do not know, I am just saying ----

29 THE PRESIDENT: Let us not go into it now.

30 SIR JEREMY LEVER: I do not anticipate that that is going to be a major problem in these
31 proceedings, it would not make a material difference.

32 THE PRESIDENT: Well it would only make a material difference if there was some risk of
33 incoherence in different parts of the Community in relation to the various points that are being
34 made.

1 SIR JEREMY LEVER: Well we will keep the Commission broadly informed of the state of the
2 procedure, and the Commission presumably keeping a general eye open on how credit cards
3 are being dealt within different parts of the Community, but at the moment we do not see any
4 need for action by the Tribunal or by ourselves in relation to the Commission. They are aware
5 of everything that is going on.

6 THE PRESIDENT: I think we at least need to write to them and say “These proceedings are going
7 on”, i.e. the Tribunal rather than the OFT needs to write to them – “Here is a shortened version
8 of the Notice of Appeal, this is the timetable for the proceedings”, and I think probably not
9 much more than that at the moment.

10 SIR JEREMY LEVER: We could not have any objection to that and have no comment to make on
11 it.

12 THE PRESIDENT: Something like that, yes. Yes, Mr. Morris?

13 MR. MORRIS: Sir, a couple of observations at the outset. The first is that we would sound a note of
14 caution in respect of a practice whereby parties are communicating with the Commission and
15 passing information back to the Tribunal rather than the Tribunal ----

16 THE PRESIDENT: No, I see this as a dialogue between the Tribunal and the Commission.

17 MR. MORRIS: Paragraph 19 of the co-operation notice encourages that process – it to be the court
18 here, the Tribunal and the Commission.

19 THE PRESIDENT: Yes.

20 MR. MORRIS: Secondly, this has two aspects to it. One is what we call the consistency issue, which
21 is the issue of the consistency of the Decision under appeal with the Visa EU Decision looking
22 back, and that is an issue which we major on, and which I do not propose to develop in any
23 way whatsoever, save to say this, because it links into what I am going to say about Article
24 16.1.

25 It is our case, and it is a keystone of our case that whether as a matter of construction
26 of Article 16.2 or, more widely under Article 10, the fact that the Visa EU Decision relates to
27 intra-regional MIFS and that the Decision here relates to domestic MIFS does not make any
28 difference in relation to the duty of consistency. Now, there is, obviously a point of
29 construction under Article 16.2 on its wording in relation to rules on agreements, decisions or
30 practices which are already the subject of a decision, and on its face it might be argued that that
31 must mean the same agreement between the same parties.

32 We submit that, even as a matter of pure literal construction, Article 16 itself
33 (or Article 10 more generally) has to be applied in such a way that the fact that – to take the
34 Visa position – the parties are the same but you are talking about domestic intra-regional, it
35 makes no difference to the duty upon both the NCA under Article 16.2 and the duty upon this

1 Tribunal under Article 16.1 not to take a decision running counter. The support for that
2 proposition in a nutshell is the case of Masterfoods upon which Article 16 is expressly based,
3 and you will see when you look at the case of Masterfoods that the agreement is being
4 considered by the National Court – in that case the Irish Court – and the agreements being
5 considered by the Commission were not the same agreements. They were between the same
6 parties but they were at a different period of time and concerned different terms.

7 That point is further supported by the conclusions of the Court of Appeal in *Courage*
8 *Ltd v Crehan* where the agreements which were effectively the subject to the Commission
9 Decision were in fact the agreements of different parties. So that is in response to
10 Mr. Sharpe's point that 16.1 does not apply. If you apply what I have just said then to 16.1 we
11 do suggest that the second sentence:

12 "They must also avoid giving decisions which would conflict with a decision
13 contemplated by the Commission in proceedings it has initiated."

14 applies, looking prospectively, to the European Commission's current consideration of
15 intra-regional Mastercard MIFS, if I am right on 16.2 then the duty must apply in the same way
16 in relation to 16.1. That in turn means that we do say that that sentence applies now in respect
17 of those proceedings and, although it is a discretionary matter, the next sentence: "The
18 National Court may assess whether it is necessary to stay the proceedings" is a matter which
19 we submit you as a Tribunal may wish to consider and should consider. That in turn means,
20 we suggest, that this is something which you do need to write to the Commission about in
21 terms of information, at the very least.

22 THE PRESIDENT: In order to discover in particular what, if any, proceedings the Commission has
23 initiated and whether any decision is contemplated and whether, if so, there is any risk of
24 conflict?

25 MR. MORRIS: Yes, effectively, yes.

26 THE PRESIDENT: And is this point, apart from establishing those matters, is this point in itself
27 a point on which we might want a view from the Commission i.e ----

28 MR. MORRIS: The point about?

29 THE PRESIDENT: Well when Article 15.1 refers to the opinion on questions concerning the
30 application of the Community Competition Rules would it at some stage become appropriate
31 for us to ask the Commission whether, in the Commission's view, upholding the OFT's
32 Decision would be to take a Decision running counter to a Decision adopted or contemplated
33 by the Commission.

34 MR. MORRIS: That is a question you may wish to ask?

1 THE PRESIDENT: I am not saying we should at this stage ask it but it may be a question that we
2 need to think about later on.

3 MR. MORRIS: We would say whatever their opinion is, similarly whatever their opinion might be
4 under Article 16.2 they may have a view, but ultimately it is a question for the Tribunal to
5 decide.

6 THE PRESIDENT: Absolutely.

7 MR. MORRIS: And so to that extent, we to some extent echo what has been said thus far, but we do
8 submit that 16.1 is an issue that really is on the table for you, the Tribunal, and if you think that
9 you will be assisted by requesting information and an opinion from the Commission then who
10 am I to stop it? I think the information point is important, because it is one thing for the
11 Commission to be telling people what is going on, but you as a Tribunal may wish to know
12 more formally where they are going and what their timetable is and the like, but really I cannot
13 say more than it is a matter for you as to whether you want the further opinion as to whether
14 there is a conflict.

15 THE PRESIDENT: Well it is probably too early in these proceedings to have any view on that, and
16 we probably cannot deal with it until we have your submissions in the Statement of Intention.

17 MR. MORRIS: On consistency, because they are interlinked.

18 THE PRESIDENT: It is all interlinked.

19 MR. MORRIS: 16.1 and 16.2.

20 THE PRESIDENT: Including the Article 234 point?

21 MR. MORRIS: Yes, indeed, and these are all considerations which led us to suggest right at the
22 outset, Sir, which has obviously gone by the wayside as I envisaged it might, taking the
23 consistency issue as a preliminary issue, but there we are.

24 THE PRESIDENT: Well I think on that point, we have not overlooked it, Mr. Morris, but we can
25 see difficulties ----

26 MR. MORRIS: I understand that and I have gone with where we have gone today.

27 THE PRESIDENT: -- in that course.

28 MR. MORRIS: Yes. Can I also suggest one other possible piece of information you may wish to
29 find out from the Commission which is their understanding of the position in relation to other
30 Member States and other NCAs in relation to interchange and domestic interchange and where
31 investigations are.

32 THE PRESIDENT: Yes, well very well. I think it is now up to the Tribunal ----

33 MR. MORRIS: May I just take instructions?

34 THE PRESIDENT: Yes, of course.

1 MR. MORRIS: (After a pause) The suggestion, and I will put it to you, Sir, would be to allow me to
2 seek to persuade you as to why you should deal with the consistency issue as a preliminary
3 issue in this case. I understand your thinking at the moment, but if I were allowed to develop
4 that for a moment, I do not know whether that would be something which you would be
5 amenable to?

6 THE PRESIDENT: I do not think it is something that we would want to decide at this stage. I think
7 we would want to have the Defence, we want to have your Statement of Intervention, be
8 thoroughly on top of all the features of the case, and then see whether at that point ----

9 MR. MORRIS: Very well. If I may say so I am grateful for that indication because it may be
10 something which we will consider again raising at an appropriate time.

11 THE PRESIDENT: Well we will have to cross that bridge when we get to it.

12 MR. MORRIS: I am grateful.

13 THE PRESIDENT: I think it is just up to the Tribunal to decide now what we do vis-à-vis the
14 Commission. Very well, I have the impression we have got on reasonably well with the
15 agenda, are there other points now that we have not covered? I think there is one small consent
16 order the OFT is inviting us to make re your confidentiality ring. Are there any other points
17 from the OFT's side, Sir Jeremy?

18 SIR JEREMY LEVER: No, none at all. Paragraph 23 of our skeleton, you are absolutely right, Sir,
19 that that is the point – perhaps I should have mentioned it ----

20 THE PRESIDENT: Not at all. Well we make that order by consent if there is no objection.
21 Mr. Green?

22 MR. GREEN: There is nothing, save only that in relation to the Commission and since this Tribunal
23 now works in Latin we say *Quieta non movere* roughly translated “Let sleeping dogs lie”.
24 (Laughter).

25 THE PRESIDENT: I am not quite sure whether they are asleep at the moment, that is the problem.
26 I will have to ask them whether they are asleep! Mr. Sharpe?

27 MR. SHARPE: Am I right in thinking you are going to prepare a report?

28 THE PRESIDENT: That is our present intention.

29 MR. SHARPE: Thank you. No further matters.

30 THE PRESIDENT: Mr. Carr?

31 MR. CARR: We have no other matters?

32 THE PRESIDENT: Thank you very much. Mr. Morris?

33 MR. MORRIS: No, Sir.

34 THE PRESIDENT: Mr. Robertson?

35 MR. ROBERTSON: No, thank you.

1 | THE PRESIDENT: Very well, thank you all very much indeed. We will rise now.

2 | (The hearing concluded at 12.45 p.m.)