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4 **IN THE COMPETITION**
5 **APPEAL TRIBUNAL**

Case No: 1405/5/7/21 (T)

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7
8 Salisbury Square House
9 8 Salisbury Square
10 London EC4Y 8AP

11 Friday 14th July 2023

12
13 Before:

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15 The Honourable Mr Justice Butcher
16 (Chair)
17 Sir Iain McMillan CBE FRSE DL
18 Professor Anthony Neuberger

19
20 (Sitting as a Tribunal in England and Wales)

21
22
23 BETWEEN:

24
25 **Euronet 360 Finance Limited & Others**

Claimants

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27 **V**

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29 **Mastercard Incorporated & Others**

Defendants

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32
33 **A P P E A R A N C E S**

34
35 Jon Turner KC, Kassie Smith KC, Philip Woolfe & Clodhna Kelleher (Instructed by
36 Constantine Cannon LLP) on behalf of the Claimants

37
38 Helen Davies KC & Hugo Leith (Instructed by Jones Day) on behalf of the Mastercard
39 Defendants

40
41 Daniel Jowell KC, Daniel Piccinin KC & Khatija Hafesji (Instructed by Linklaters LLP) on
42 behalf of the Visa Defendants

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Friday, 14 July 2023

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(10.30 am)

Pre Trial Review

MR JUSTICE BUTCHER: Good morning, everybody. Some of you are joining us live-stream on our website, so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court.

Yes, who is going to start?

MR TURNER: May it please the Tribunal. I appear today for the Claimants, with Ms Smith on my right, Mr Woolfe and Ms Kelleher. For Mastercard, Ms Davies appears with Mr Leith. And to the right of me, there is Mr Jowell and Mr Piccinin and Ms Hafesji, who all appear for Visa.

The Tribunal should have two hard-copy pre-trial review bundles and an authorities bundle should have reached you too. Ours is split into two separate lever-arch files but we shan't be making extensive reference to it, I think.

The parties are using TrialView, an electronic platform, to provide the electronic bundles for the trial. The target date for finalising those, you may have picked up from the skeletons, is the end of this month, subject to some material that may come after that. I'll come to that. The TrialView platform is available on screen today, if all members of the Tribunal have that up and running, and it contains a separate section with the pre-trial review materials.

Finally, by way of housekeeping, there was one mis-copied document in your bundles. I don't know if that has already reached you separately this morning. There was a copy attached to the Claimants' skeleton of the protocol for hot-tubbing in one of the

1 hot-tubs in the Trucks case.

2 MR JUSTICE BUTCHER: Yes.

3 MR TURNER: I saw that that was only copied every other page, so we have a full
4 copy. I don't know if that was sent to you by email. It was unfortunate, because if we
5 are going to look at it, one of the pages that we would want to look at was missing.
6 But we have copies here to hand up to you just in case. These are hole-punched.

7 (Handed)

8 You will have seen from the skeleton argument that there are a number of items of
9 business today. The most contentious of those looks like it's going to be the mode of
10 taking the expert evidence and its knock-on consequences for the trial timetable.
11 Subject to the Tribunal's view, the order in which I propose we may take matters today
12 is as follows.

13 First, there is the Claimants' application for permission to rely on a group of further
14 witness statements which were provided to the Defendants on 1 June.

15 Second, there is Mastercard's application made in its skeleton argument for
16 permission to rely at trial on the written statement of Mr Michal Čarný, their former
17 general manager for the business in the Czech Republic and Slovakia, as hearsay
18 evidence, without him attending the trial to be cross-examined.

19 Third is the major issue of the mode of taking the experts' economic and accountancy
20 evidence.

21 Fourth, what follows naturally from that is the time estimate and the timetable for the
22 trial.

23 Fifth is the arrangements -- it's a small point -- for written submissions for the trial, in
24 particular the date and length of the skeletons in advance of the hearing.

25 Then there are a group of logistics issues: confidentiality, video link evidence for the
26 foreign law experts and the availability of interpreters. All of that is going to be dealt

1 with on our side by Ms Smith.

2 There was an issue, you will have seen from a supplementary note that we put in to
3 the Tribunal yesterday, that concerned Mastercard's legal representatives
4 commenting on draft text for a joint expert statement which, in their words, aimed to
5 "achieve clarity". That issue has essentially gone away, I'm happy to tell the Tribunal,
6 as a result of assurances that this was only very minor and it made no difference to
7 what Mastercard's expert actually did.

8 MR JUSTICE BUTCHER: I have to say I didn't understand what the issue was here.
9 I mean, if, as I understand it, a draft was circulated and there were comments on it,
10 then presumably everyone would see what those comments were.

11 MR TURNER: No, the issue is different. It was that prior to that, prior to its circulation
12 generally, there was a circulation by Mastercard's expert privately to Mastercard's
13 lawyers. Mastercard's lawyers --

14 MR JUSTICE BUTCHER: That didn't appear from your skeleton argument and isn't,
15 as I understood, what the position was.

16 MR TURNER: Ms Davies will therefore clarify. The issue has in any event gone away.
17 We were proceeding on the assumption that that is what had occurred, prior to the
18 general circulation to all legal representatives.

19 MR JUSTICE BUTCHER: Right.

20 MS DAVIES: Just so I can put this to bed, there was no such private circulation. The
21 draft was sent to all of the parties. So the Claimants can see the draft as we received
22 it and the draft as is signed.

23 MR JUSTICE BUTCHER: Right. Anyway, the point no longer arises, if it arose.

24 MR TURNER: Yes.

25 So we turn to the Claimants' application for permission to rely on the four further
26 witness statements. The application and the draft order are in the PTR bundle. I don't

1 believe that we need to take much time about this. We put the documents on the
2 pre-reading list for the Tribunal. The application is supported by a witness statement
3 from the Claimants' solicitor, Mr Pike, and you will have seen that that explains why
4 the material sought to be introduced is genuinely responsive to developments.

5 It's not understood that this is opposed by either Defendant, provided that the
6 Defendants are permitted effectively to take account of the material in the joint expert
7 statement process. There is no objection to that on our side.

8 All parties are essentially proceeding on the basis of the principle that, consistent with
9 fairness, if something new turns up, the other side must have the ability to put it in,
10 subject to the qualification that we put in our skeleton that if it's only a matter of just
11 trying to have the last word, you have to cut the process off. But certainly in the case
12 of the four witness statements from the Claimants, there appears to be no issue, and
13 we ask for permission on that basis.

14 MR JUSTICE BUTCHER: Yes. Well, as I understand it, there is no objection on that
15 basis.

16 MR TURNER: Yes.

17 MR JUSTICE BUTCHER: So, yes, permission will be granted.

18 MR TURNER: I'm obliged.

19 The second item is Mr Čarný. His statement you have on TrialView, if you wish to turn
20 it up. I shan't be going to it in detail. It's at C2 at page 15.

21 He was, as I say, the general manager responsible for Mastercard's business in
22 Czechia and Slovakia at the time when he made the statement in late 2022. He is
23 Mastercard's principal witness in one of the three territories at issue here, namely
24 Czechia.

25 The context is that Mr Čarný has apparently left Mastercard. We were informed of
26 that last week on 4 July, Tuesday. And we're told that he said he will not voluntarily

1 give evidence at this trial.

2 So Mastercard have asked us to agree to his statement being admitted as hearsay
3 evidence at the trial. Our position is that we're not, in principle, opposed to that. We
4 asked, however, to know about the circumstances of his departure in case those may
5 be relevant to questions of credibility: for example, was he dismissed for cause? And
6 we have remarked on the fact that there is no witness statement supporting this
7 application.

8 Now, again, it looks like there's going to be very little between us. I've spoken with
9 Ms Davies before court. Our position is that subject to receiving a clear assurance
10 that the circumstances of Mr Čarný's departure are not capable of bearing on his
11 credibility, then we have no objection to Mastercard relying on the written statement
12 as hearsay evidence.

13 Mastercard indicated in a letter yesterday afternoon that without a court order,
14 however, they are unable to give any further information on the circumstances of his
15 departure from the company. We therefore respectfully do consider that that step
16 should be taken. There should be a witness statement. And if the witness statement
17 of Mr Čarný is then admitted as hearsay evidence, we will propose to make
18 submissions at the trial about its contents and the weight to be attached to it.

19 So that is the basis on which the parties present this to the Tribunal today. The request
20 on the Claimants' side is that there should be an order, that Mastercard say they
21 require, so that they can provide a witness statement to explain the circumstances of
22 his departure.

23 MR JUSTICE BUTCHER: Yes, Ms Davies.

24 MS DAVIES: Thank you.

25 This issue of course only goes to the weight that might be attached -- if there is an
26 issue at all, it only goes to the weight that might be attached to the statement. The

1 application I formally make today is for permission to rely on the statement as hearsay
2 evidence pursuant to rule 55(5) of the Tribunal Rules. I don't actually discern that
3 there is an objection to me being permitted to do that; it's really a question of what
4 further information, if any, needs to be put before the Tribunal that's relevant to weight.
5 So far as that is concerned, my instructing solicitors, Jones Day, have already
6 confirmed in terms that the circumstances of Mr Čarný's departure are not related to
7 this litigation, nor Euronet, and have no bearing on his evidence in these proceedings.
8 My learned friend, in the course of his submissions, asked for an assurance that the
9 circumstances were not capable of being relevant to his credibility: I can give that
10 assurance as well. We haven't been asked for that before, but I can give that
11 assurance.

12 What I'm not able to do today, because it's confidential, is to give any information to
13 the Tribunal as to the reasons for his departure. But if, notwithstanding the assurances
14 that have been given both by Jones Day and by myself just now, the Tribunal felt that
15 it would like to have more information as to the reasons for his departure, because it
16 may go to the weight to be attributed to his statement, then if the Tribunal orders us to
17 provide a witness statement explaining that, we can of course do so.

18 In light of the assurances we've given, we don't really understand why that's
19 necessary. But if that's what the Tribunal would like us to do, we will do it. But we do
20 need an order.

21 MR JUSTICE BUTCHER: Right. (Pause)

22 We note and accept the assurances which we have been given. We are not going to
23 require a witness statement.

24 MS DAVIES: I'm obliged.

25 MR TURNER: The next issue, Sir, is the mode of taking the expert evidence at the
26 trial. This is a major issue. The parties strongly disagree on this matter. Essentially,

1 the Claimants consider this is clearly a case where there should be a mix --

2 MR JUSTICE BUTCHER: Well, I don't know whether this is going to help, but it is
3 unlikely to change.

4 We think that there are very likely to be areas, possibly significant areas, in which
5 hot-tubbing is appropriate. It also appears to us likely, or certainly possible, that there
6 will be areas in which it is less appropriate. It also appears to us that even if there is
7 hot-tubbing, there will obviously have to be the possibility of additional
8 cross-examination.

9 MR TURNER: Yes.

10 MR JUSTICE BUTCHER: But we do not think -- and I don't think it's reasonable for
11 anyone to think -- that we should be in a position now to say exactly where the line is
12 between those two things.

13 So what I think is likely to be the position -- of course, you can continue to address me
14 if you want to -- is that the parties should proceed on the basis that there will be
15 cross-examination on all issues, but that when we are in a better position to be able to
16 draw a dividing line, or at least have an indication as to which areas we are confident
17 will be best dealt with by way of hot-tubbing, we will let you know. And that will be at
18 some point either at or before the beginning of the trial.

19 That is, I think, where we are likely to end up in relation to this. I don't think you can
20 really expect us to be able now, especially given that not all the joint experts'
21 statements have been finalised, to go any further than that.

22 MR TURNER: Sir, I'm very grateful.

23 MR JUSTICE BUTCHER: I should add two things, which of course again I can be
24 addressed on.

25 I think it very unlikely that if there is cross-examination, we would be expecting you or
26 your team to put to both of the Defendants' experts the same point, which is one of the

1 concerns which you mentioned.

2 MR TURNER: Yes, it is. That is one of the important concerns on our side; it's by no
3 means the only concern. But the prospect of needing to cross-examine one expert
4 after the other on the same issue at length, where the first expert has been
5 cross-examined in the presence of the other taking notes, and then you have to ask
6 the same questions again, is inefficient and it's not obviously putting the parties on an
7 equal footing either.

8 The point beyond that which is of great importance to us is that if you have had the
9 opportunity to look at the text of the first joint statement, which was included in the
10 bundle --

11 MR JUSTICE BUTCHER: Yes.

12 MR TURNER: -- at least -- there was an annex attached to that as well.

13 MR JUSTICE BUTCHER: I have to say, I haven't studied the annex in great detail.

14 MR TURNER: No, but what you'll have seen and what I was going to develop, and
15 can do if the need arises, is that there are there a significant number of issues where
16 traditional cross-examination by barrister is not really appropriate. Because traditional
17 cross-examination in this sort of forum mainly works when you want to put to an expert
18 some document or factual evidence that they've overlooked in their opinion. But where
19 it's a question of rival economists having different opinions on the same facts and
20 needing to unpick it, it's so much more efficient, or can be, to have them there at the
21 same time to be able to be questioned and to comment on each other. It's better in all
22 the respects that we've set out in our skeleton.

23 MR JUSTICE BUTCHER: Yes. I don't think there is actually any disagreement in
24 principle that there might be some areas -- well, perhaps there is.

25 MR TURNER: There is.

26 MR JUSTICE BUTCHER: But I think there's an acceptance by way of at least

1 alternative that there may be some areas which are suitable for hot-tubbing. And what
2 I'm saying is, at least in our minds at the moment, the question is where the division
3 should be, rather than that there are some areas which are even more suitable for
4 each.

5 MR TURNER: Yes. I fully understand that.

6 If, on the Defendants' side, they are not going to be arguing now that there should be
7 no concurrent evidence, which was their primary position, then we are all agreed that
8 it is a question of where the line should be drawn. We fully accept that, sitting here
9 today, it's difficult for the Tribunal, not least for the reasons, Sir, that you've given: that
10 not all the evidence is actually in yet either.

11 You can potentially make a sort of estimate based on what there is available for the
12 purpose of the trial timetable, which is the knock-on impact of it. Because you will
13 have seen that one of the areas of dispute is that if there is only traditional
14 cross-examination, then the Defendants say that they will need four days with our
15 single expert. We've said that with their three -- although subject to the point, Sir, that
16 you've fairly made to me: I might not need to cross-examine them on the overlapping
17 issues twice -- for the three of them, six days. So we were working on ten days overall.
18 That would also need to build in, realistically, with this Tribunal, the ability for you, the
19 members of the Tribunal, to ask your own questions of these economists as well.

20 So that would be around ten days. We have put in our draft trial timetable a different
21 proposal, which at this point can only be an estimate, which involved three days for
22 the concurrent evidence, with an advance day for you, the Tribunal, to prepare for that;
23 and then three days following that for the individual cross-examination, which would
24 not be duplicative. It would have to cover other issues, for obvious reasons.

25 So perhaps at this point, unless my friends are going to persist with the application
26 that there should be only traditional cross-examination, I should make way for them.

1 MR JUSTICE BUTCHER: Yes. Well, especially you should make way for them if they
2 are going to persist.

3 Yes.

4 MR JOWELL: May it please the Tribunal. Let me make clear at the outset: it's not our
5 position that the Tribunal cannot order concurrent evidence and that's never been our
6 position. Of course we accept that fully, that it can do so.

7 Our concern is rather a different one, which is a point of principle. It arises from the
8 submission that Mr Turner made in his skeleton argument, which is effectively that if
9 there is to be concurrent evidence, then the parties are shut out from further
10 cross-examination on the matters that have been the subject of the concurrent
11 evidence. And that is allied to Mr Turner's suggestion that the concurrent evidence,
12 the hot-tubbing, should cover effectively all of the main issues, other than perhaps
13 quantum, that the experts cover.

14 We say that if that is the proposal, then it should not be accepted by the Tribunal,
15 because cross-examination is an inherent feature of a fair trial in this jurisdiction, which
16 the Tribunal rules do not displace. So where there is concurrent evidence, we should
17 nevertheless be given the opportunity to cross-examine thereafter.

18 That is not to say, of course, that there may not be considerable savings in time and
19 effort by reason of concurrent evidence in particular circumstances. One would hope
20 that thereafter cross-examination would be shorter, if the concurrent evidence is
21 appropriately useful, but it can't be guaranteed, of course.

22 What we do not wish to forgo is the right to cross-examine. If I could show you just
23 one authority: it's the Al Rawi case --

24 MR JUSTICE BUTCHER: Do you need to show us authority? I mean, I was just
25 looking at the Trucks protocol.

26 MR JOWELL: Yes.

1 MR JUSTICE BUTCHER: I'm looking at 9(ii):

2 "After the process set out in (i) has been completed, counsel for each of the parties
3 will be given an opportunity to ask questions of the expert."

4 MR JOWELL: Well, provided that is understood. Because that wasn't Mr Turner's
5 submission.

6 MR JUSTICE BUTCHER: "Any questioning must be limited to clarifying relevant
7 matters in relation to the topic under consideration."

8 One would assume that that would be the purpose of cross-examination anyway.

9 MR JOWELL: One would. But Mr Turner's approach is that we would only be given
10 the opportunity to cross-examine on what he calls "non-hot-tub issues", and that is
11 what we take objection to. Because we do say that there is a massive body of
12 accepted decisions that establish that in a civil trial in this jurisdiction, natural justice
13 requires that a party be given an opportunity to challenge by cross-examination the
14 witness called by another party on relevant issues. Those are not my words; those
15 are the words of Lord Edmund-Davies in the House of Lords in the case of *Bushell v*
16 *Secretary of State for the Environment*, which you find in tab 13.

17 So provided it is understood that we have a proper opportunity to thereafter
18 cross-examine, we have no objection, of course, to concurrent evidence, if the Tribunal
19 finds it useful. We are doubtful that the Tribunal will find it particularly useful in this
20 particular case, save possibly on the area of market definition and market power. I can
21 come on to explain why we apprehend that will be the case in a moment.

22 MR JUSTICE BUTCHER: Well, if you must. But we're not going to be able to take
23 a view about that now.

24 MR JOWELL: No, I understand that.

25 MR JUSTICE BUTCHER: Not least because we haven't seen joint experts' reports in
26 relation to two out of three.

1 MR JOWELL: I fully understand and appreciate that. I just wanted to make maybe
2 two high-level points on that, if I may.

3 The first is that concurrent evidence is likely to be perhaps most useful in those cases
4 where the parties' experts have not fully articulated their view or where there is a lack
5 of clarity as to their view, and where the Tribunal can then elucidate and perhaps, to
6 some degree, also seek to establish a greater degree of common ground between the
7 experts.

8 But what you will find when you look at the joint statements of the experts in this
9 case -- and you have already seen one, I think, but there are two to come -- is that
10 they are extremely comprehensive. So the experts have set out very clearly and very
11 extensively their points of agreement and their points of disagreement.

12 So we therefore suggest that there is perhaps less room for a beneficial concurrent
13 evidence process in this case. Of course we're entirely in the Tribunal's discretion, but
14 we suggest that's an important factor.

15 Another important factor is that it isn't the case that somehow in this Tribunal it has
16 invariably been the case recently that the Tribunal has chosen to take expert evidence
17 by way of concurrent evidence. There are many recent cases, important
18 ones -- including the Compare the Market case, which was mentioned in the expert
19 reports themselves, and indeed in the Hydrocortisone Proceedings -- where the
20 Tribunal has chosen recently not to go down the hot-tub route. Instead, one of the
21 approaches that has recently been used is to set aside perhaps an additional day in
22 the timetable for the Tribunal to simply ask additional questions of experts as they
23 appear in the ordinary way.

24 So we say it's a much, much less sort of clear-cut picture of how the Tribunal operates.
25 It of course depends upon the Tribunal's particular preferences and also, we suggest,
26 the nature of the expert evidence and the extent of agreement.

1 | But that's all I would just say by way of high-level points. I fully appreciate that the
2 | Tribunal cannot --

3 | MR JUSTICE BUTCHER: We would have to have an idea of when and how we are
4 | going to decide this --

5 | MR JOWELL: Yes.

6 | MR JUSTICE BUTCHER: -- which I will canvas views on. But understood.
7 | Yes.

8 | PROFESSOR NEUBERGER: One question, Mr Jowell. When you're talking about
9 | the ability to cross-examine --

10 | MR JOWELL: Yes.

11 | PROFESSOR NEUBERGER: -- does paragraph 9(iii) of the protocol that was used in
12 | the Trucks case cover the point that you're worried about or does it not?

13 | Sorry, I haven't just been given -- I have looked at this before.

14 | MR JOWELL: Perhaps I could be given a copy.

15 | PROFESSOR NEUBERGER: I'm sorry.

16 | I wasn't clear whether your concerns would be met if a similar clause were in the
17 | protocol we use in this case.

18 | MR JOWELL: As long as it's understood that the cross-examination can traverse the
19 | same issues that the hot-tub traverses, then yes, subject to one point, which is that it
20 | states here: "in accordance with the agreed timetable".

21 | Now, Mr Turner's timetable that he mentioned sets aside three days between all three
22 | of us for cross-examination of experts. So if we assume that is split evenly, that would
23 | give Ms Davies and I a day and a half between us for cross-examination of
24 | Mr Coombs, which would give me three-quarters of a day, effectively, to
25 | cross-examine Mr Coombs. Now, that can be compared, for example, to the nine days
26 | that Mr Turner wants in order to cross-examine our factual evidence. We say that's

1 entirely unbalanced, because Mr Coombs' evidence is the central evidence in these
2 proceedings, certainly from our perspective, and we must be afforded a proper
3 opportunity to cross-examine him.

4 We also don't accept Mr Turner's suggestion that somehow the useful areas of
5 cross-examination are limited to those types he has mentioned. We believe it is often
6 useful to unpick the reasoning of an economic expert and indeed sometimes to get
7 into technical points. That is part of cross-examination of experts routinely in the
8 High Court.

9 So we suggest that on his timetable, that would not be ample. We are not being
10 greedy. We've proposed on our timetable that Ms Davies and I should have three
11 days or four days, depending on the two alternatives, between us. So that's not
12 a substantial amount, but that would, we believe, be a minimum.

13 PROFESSOR NEUBERGER: I understand the timetable point, but it's separate from
14 the question of whether you have the -- I was just wondering whether the protocol as
15 actually expressed there gives you what you need in terms of scope for
16 cross-examination.

17 MR JOWELL: Yes, provided that it is understood that an opportunity to cross-examine
18 the experts includes on all issues: that there is no restriction on the issues or types of
19 issues on which we can cross-examination.

20 PROFESSOR NEUBERGER: Thank you.

21 MR JUSTICE BUTCHER: Yes, Ms Davies.

22 MS DAVIES: There is only a short point I wish to add, which relates to the point raised
23 about how and when we're going to decide this, because we certainly absolutely agree
24 that it can't be decided today where the dividing line is.

25 But I just wanted to flag, so that the Tribunal has it at the forefront of thinking about
26 this, that this is a somewhat unusual competition case, in the sense that we have

1 issues of principle as regards market definition and market power, which are distinct
2 from then the assessment of whether there is a restriction exemption and quantum.

3 But as regards restriction exemption and quantum, because it is common ground
4 between the experts that the rules in question do not necessarily constitute
5 a restriction and you need to actually look at their effect in practice, there is actually
6 a very considerable degree of overlap between the analysis of restriction, the
7 consumer impact -- which is the 101(3) issues -- and quantum.

8 When the Tribunal comes to look at the three joint memos, when they are before it, it
9 will see, therefore, for example, cross-referring by Mr Coombs in relation to the
10 restriction to what he said on consumer impact; it will see -- as my learned friend
11 Mr Jowell put, they've dealt with it on a very detailed level -- a degree of the same
12 points coming up in relation to each, and that makes the division more complicated in
13 this case than it often is in many competition cases.

14 My learned friend Mr Turner accepts, as I understand it, for example, that some points
15 on quantum and some points on consumer impact are more suitable for
16 cross-examination. We certainly agree with that. But trying to work out where the
17 dividing line is is more challenging.

18 All I wanted to say in relation to that is: of course we're in the hands of the Tribunal,
19 but the parties may well have some submissions they may want to make to the
20 Tribunal in relation to that, because that's an important distinction with many other
21 competition cases.

22 MR JUSTICE BUTCHER: Yes.

23 Yes, Mr Turner.

24 MR TURNER: So far as Mr Jowell is concerned, I won't take time up on this point of
25 principle based on the Al Rawi case dealing with terrorism and closed material and
26 cross-examination being important, because I think it is accepted that in this

1 jurisdiction, the Tribunal -- rule 55 -- has a beneficial power to limit cross-examination
2 and to decide itself what is the most efficient way to take evidence. This is pretty far
3 removed from a terrorism case and it's only a question of what's going to be most
4 efficient and useful for the Tribunal.

5 So far as the point is concerned that he wants to have the right to cross-examine on
6 the issues which have been dealt with in the hot-tub, that is something on which
7 obviously the Tribunal will be flexible. But hitherto, as in the protocol before you for
8 the Trucks case and the earlier one, which was behind our skeleton on the 2019 Whistl
9 case, if something has been covered in the hot-tub, you don't go back over it in
10 extensive cross-examination. That is why paragraph 9(ii) of this protocol says that any
11 questioning "must be limited to clarification in relation to the topic under consideration",
12 and paragraph 9(iii) says that after that process has been considered, "insofar as
13 necessary", there is an opportunity to cross-examine.

14 MR JUSTICE BUTCHER: But you wouldn't be quibbling with directions like those two?

15 MR TURNER: No, we entirely agree. What we merely wish to point out -- and it's
16 going to be a question for the Tribunal to assess as it happens -- is that duplicative
17 cross-examination is simple pointless and shouldn't be permitted.

18 MR JUSTICE BUTCHER: Right. Well, then the Tribunal would doubtless regard that
19 as not necessary.

20 MR TURNER: Yes, absolutely.

21 I just wanted to make that clear, because in some of the previous cases -- for example,
22 Mr Justice Roth in the first of these, the Streetmap case -- made this point very clear:
23 that you don't, when you see counsel standing up to cross-examine again, allow them
24 to cover the same ground by reference to their right to cross-examine or anything of
25 that kind.

26 It may sound obvious, but that's the only point here, I think, that's at issue. In practical

1 terms, I trust it will be of no importance.

2 MR JUSTICE BUTCHER: Right.

3 MR TURNER: So far as the coverage of the issues is concerned, Mr Jowell
4 suggested: well, it shouldn't cover issues of quantum. Ms Davies a moment ago said:
5 well, detailed issues of quantum are not suitable for this. With respect, there are some
6 issues of quantum which have been picked out already in the materials you have
7 before you that are suitable for hot-tubbing and not suitable for cross-examination.
8 Can I give you perhaps just one example, just to show you this?

9 The basic submission is that the way that we are going to, I trust, organise the hot-tub
10 is by reference to these detailed issues that are listed out in the joint expert statements
11 as the basis for an agenda. You will see from that, looking at what the experts'
12 respective responses are, which of those issues are suitable for testing in that manner.
13 There is no clear division of liability, quantum or market power restriction of
14 competition; it all depends on the individual issues that the experts are debating.

15 I'll give you perhaps just one example relating to quantum. This is a technical point.
16 It's that in relation to assessment of quantum, a point has arisen about what are called
17 the drop-off rates, where you introduce charges for about the use of cashpoints: what's
18 the extent to which consumers avoid the cashpoints? The drop-off rate. That's one
19 of the points that's debated between the experts.

20 They use various approaches to try to get to the heart of it. One of their approaches
21 is a regression analysis. They look at what's happened in another jurisdiction, Austria,
22 and they try to use data from Austria in order to work out what would happen were the
23 same to apply in the relevant territories.

24 I'll give you an example. If you perhaps open up the annex filed by Mr Holt to the first
25 joint experts' statement. That's at tab C5. Do you have that? It's the 39-page
26 document.

1 MR JUSTICE BUTCHER: Yes.

2 MR TURNER: Although the annex was an accompaniment to the first joint expert
3 statement, some of its contents related to the quantum issue as well. This relates to
4 issue 1.7, I believe, of the quantum joint experts' statement.

5 If you go to section 4 in that, on page 235 -- do you have that?

6 MR JUSTICE BUTCHER: Yes.

7 MR TURNER: You see there the heading at the top is "The estimation of drop-off due
8 to the introduction of access fees". Then there is a summary. The top of the page
9 deals with non-econometric evidence. The bottom half of the page is econometric
10 evidence, immediately above paragraph 79.

11 Under the econometric evidence, just to take this quickly, if you go over the page to
12 79(d), you see that what's happened here is that one of the experts, the Visa expert,
13 has used a particular approach called the "difference in differences" approach, in
14 relation to domestic cashpoint transactions in Austria, and that this is an issue, the
15 way that he's done it and the appropriateness of using that approach, that arises
16 between him on the one hand and Mr Coombs, for the Claimants, on the other.

17 If you go ahead to page 34 and look at the foot of that page, you see at the bottom the
18 heading "Difference in difference estimates", and he says, "Holt 1", which is his first
19 report --

20 MR JUSTICE BUTCHER: Where are you looking at?

21 MR TURNER: I'm sorry, page 244, C244. It's in the same document. Sorry, I was
22 referring to the internal numbering. C244, internal page 34 --

23 MR JUSTICE BUTCHER: Yes.

24 MR TURNER: -- at the bottom of the page.

25 He goes to the topic of the difference in difference estimates and he says what he has
26 done: he presents these estimates of the domestic drop-off rates in this other country,

1 Austria; he uses the trajectories of transactions at ATMs that never introduced access
2 fees, the free group; he's controlled for trends and unabsorbed time-varying factors
3 that would otherwise lead to admitted variables bias in the before and after analysis.
4 And he says in the next paragraph that for the method to provide reliable estimates,
5 you have to make an assumption: you have to assume that in the absence of access
6 fees, that the transactions in the pay group would have evolved in the same way as in
7 the other group.

8 So he identifies this as the big difference between them, and it is.

9 The point is then discussed over the following paragraphs in the document. I won't
10 take you to it in detail, but it leads to a conclusion on page C249 at paragraph 136.

11 My point is that here, this is a quantum issue. This is the sort of technical issue that's
12 better dealt with by concurrent evidence, with both the experts taking part, in my
13 submission, and the involvement of Professor Neuberger.

14 Following the same theme for quantum issues, if you look at the nature of the argument
15 between Mr Coombs and Mr Holt which is outlined in this same annex if you go back
16 to page 243, I just direct you to the sorts of debates between the experts there in
17 paragraph 113, where the issues relate to a form of heteroscedasticity into the errors,
18 and at paragraph 119 at the foot of page, where there's again a technical debate of
19 a similar nature there.

20 I draw that to your attention really because it's quite a good illustration of two things.
21 First, that there are certain questions that are going to be in the quantum area too -- by
22 no means all of them -- suitable for a joint session. Secondly, because although
23 Mr Jowell said a few moments ago that traditional cross-examination can take on
24 technical issues, really there are some sorts of issues where cross-examination by
25 a barrister really is less effective, and this is an example of one of those situations.

26 So I raise that really to come back to the point, in answer to Ms Davies as well as

1 Mr Jowell, that the way to deal with the structuring of the taking of evidence is
2 something that will need to be dealt with not on the basis of market definition as
3 a block, market power as a block, restriction of competition as a block, but by
4 reference to these sorts of issues raised at a more granular level in the joint
5 statements.

6 The only other important point I think relates to the balance of the timetable. Here
7 Mr Jowell made a point that we have said that we want what will be -- subject to
8 Mr Čarný now, if he's not going to be turning up, there are going to be 11 witnesses,
9 but otherwise 12. We've said nine days. We have built that estimate up at the moment
10 because of our appreciation that this is in one sense a very typical competition law
11 case, because at the heart of this case are the question of the purpose and the effect
12 of certain rules of the scheme.

13 You've seen from our skeleton that we say that these rules have a certain adverse
14 effect. On the other side, they say that their purpose and effect is beneficial. It's not
15 simply, in my submission, going to be a question of the cross-examination or even the
16 joint sessions with the economists. The bedrock for this case, as with so many, is
17 going to be with an understanding of what really is the purpose and effect of these
18 rules.

19 In that regard, they have 11 or 12 witnesses who will come forward: they will need to
20 be confronted with a large number of decision-making and strategy documents,
21 business documents at the time, revealing their thinking about these rules. They will
22 be asked questions about the compatibility of their witness evidence with those
23 underlying documents. That will take time. It is very important and it will set the scene
24 for, and inform, the expert sessions which follow.

25 So that is why, on the factual side, we say at the moment at any rate, as we're still
26 working for this trial in October, that's the responsible estimate.

1 So far as the hot-tub estimate is concerned itself, we've given our best view of what is
2 likely to be required, bearing in mind the point I made at the outset that there should
3 not be duplication between the hot-tub issues and then subsequent
4 cross-examination.

5 Therefore, Sir, I don't know if there is anything further I need to address in answer to
6 what has been said, but that is why we say that, first, there should be concurrent
7 evidence, which now appears to be common ground; secondly, as to how it's to be
8 addressed, the approach that I've outlined is optimal, is correct; and thirdly, for the
9 balance between that and cross-examination, that at least at this stage as we are here
10 today, our approach is right. (Pause)

11 MR JUSTICE BUTCHER: Right.

12 The position is that it is likely that this is a case in which it will be convenient to have
13 the expert evidence taken by both what is called hot-tubbing and, in some aspects at
14 least, conventional cross-examination without prior hot-tubbing. But as to the balance
15 or the borderline between the two, if both were thought to be appropriate, that is
16 a matter which we do not feel that we can rule on or decide at this juncture, but that
17 we will aim to decide that at or near the beginning of the trial. We can discuss the
18 practicalities of that in a little bit more detail if necessary.

19 We would expect the parties to continue to discuss between themselves whether they
20 come to any sort of agreement in relation to that, but we would regard it as likely that
21 we will make proposals at or near the beginning of the trial as to how we see the
22 division as likely to be most helpful to us. But as I say, if the parties have been able
23 to agree on various matters, we would like to know about that at any rate.

24 To the extent that there is to be hot-tubbing, as it is called, it is almost certain that it
25 will be subject to provisos or stipulations similar to those that are in 9(ii) and 9(iii) of
26 the Trucks protocol in relation to the possibility and limitations on further questions.

1 Insofar as there is conventional cross-examination, there will need to be time for
2 questions by the Tribunal.

3 As to the timetable, as I said right at the outset, it seems to me that the appropriate
4 way at the moment to proceed is on the basis that there will be cross-examination in
5 the conventional way on all issues, and that if and to the extent that it is decided that
6 there will be hot-tubbing, and if and to the extent that it is considered that that will lead
7 to a shortening of the trial timetable, that can be factored in when we make that
8 decision.

9 So that is the way forward as I see it, unless anyone has any specific points in relation
10 to that.

11 MR JOWELL: Well, simply this: I think the Tribunal has left open the issue between
12 Mr Turner and I as to whether, if there is to be hot-tubbing, whether we are then
13 precluded from cross-examining on the same issues.

14 MR JUSTICE BUTCHER: I thought that if you have 9(ii) and 9(iii) of the Trucks
15 protocol, then if you want to cross-examine on the same issues as have been already
16 dealt with, you would have to persuade us that that was necessary.

17 MR JOWELL: I see. Well --

18 MR JUSTICE BUTCHER: What's wrong with that?

19 MR JOWELL: Well, only that a party does -- it depends somewhat on this: it depends
20 on the extent of the hot-tubbing. And if we wish to then cross-examine on important
21 issues, we do say that there is a right to a fair trial under principles of natural justice --

22 MR JUSTICE BUTCHER: If it is not necessary for you to do it, then it won't be
23 necessary for the purposes of a fair trial; and if it is necessary, you will be allowed to
24 do it.

25 SIR IAIN McMILLAN: Just for clarity, if I may, is your point that you would want to
26 cross-examine on issues that you felt hadn't been fully explored in the hot-tub?

1 MR JOWELL: Yes, and to put our case in the way that we wish to put it to the witness,
2 and to elicit useful information, of course, for the Tribunal.

3 SIR IAIN McMILLAN: This is information that the Tribunal would not already have?

4 MR JOWELL: The difficulty is this: that the Tribunal will deal with a particular issue,
5 but it may not put the questions or tackle the particular points that we wish to draw out.
6 That's the purpose of cross-examination.

7 In a sense, I'm afraid that is a fundamental right of a party in any trial compliant with
8 natural justice. The --

9 MR JUSTICE BUTCHER: Well, natural justice is one thing.

10 MR JOWELL: Yes.

11 MR JUSTICE BUTCHER: A right to ask any question you like in cross-examination is
12 certainly not.

13 MR JOWELL: No, I accept that. But there is a right, on important points, for any party,
14 in a trial that's compliant with natural justice in this jurisdiction, to put their case, to
15 challenge the witness by way of cross-examination.

16 With respect to Mr Turner, to suggest that Al Rawi and the statements in the
17 authorities are confined to only certain types of cases is just wrong. There is
18 a mountain of authority that in any civil trial, there is a right to cross-examination on
19 the important points.

20 MR JUSTICE BUTCHER: Supposing what happens in the hot-tub is that the experts
21 agree completely on point A and there is no ambiguity about it: they agree on it. Are
22 you then saying that you can then go over all of that ground?

23 MR JOWELL: Of course, one would be an ambitious cross-examiner if all the parties
24 agreed, including their own expert, that then sought to put the points to the other
25 side's --

26 MR JUSTICE BUTCHER: To the other side's expert.

1 MR JOWELL: -- expert, because on that hypothesis, your own expert would have
2 agreed. So that would be --

3 MR JUSTICE BUTCHER: Then it wouldn't be necessary.

4 MR JOWELL: It would not be necessary, I accept that. But if the matter is still, if you
5 like, in the air still --

6 MR JUSTICE BUTCHER: Then it would be necessary.

7 MR JOWELL: It would.

8 MR JUSTICE BUTCHER: So what's wrong with proviso 9(iii)?

9 MR JOWELL: No, there's nothing wrong with what's in (iii). What's wrong is
10 Mr Turner's interpretation of it, which suggested that insofar as an issue is covered in
11 the hot-tub, then you're somehow precluded from cross-examining, or that there's any
12 presumption to that effect. There is no presumption there. As long as that's clear,
13 then we have no objection.

14 MR JUSTICE BUTCHER: Yes. It would be necessary for reference to be made to
15 whatever the rule was, something like 9(iii). But if you were asking perfectly sensible
16 questions which were not merely duplicative of something which had happened, then
17 you'd be likely to find the Tribunal agreed that it was necessary; and if you were not,
18 then they probably wouldn't.

19 MR JOWELL: I see that. But I wouldn't want to be in a position where I have to, if you
20 like, say, "I now apply to cross-examine and these are all the issues that I -- these are
21 the reasons", because that would then be effectively telling --

22 MR JUSTICE BUTCHER: These are things which one knows as they develop as to
23 whether there's a serious point. It's like many areas of cross-examination.

24 MR JOWELL: Indeed. And we're not intending to waste anyone's time, but nor do we
25 wish our hands to be tied in relation to -- I mean, Mr Turner understandably wishes to
26 insulate his principal witness from as much cross-examination as possible, and we

1 don't think that's acceptable in a civil trial in this jurisdiction.

2 MR JUSTICE BUTCHER: Mr Turner, do you want to say anything more?

3 MR TURNER: I think I have made the point. It is just that we don't envisage there
4 should be duplicative submissions in cross-examination.

5 MR JUSTICE BUTCHER: No.

6 What that does slightly leave over, because part of what we're doing today is putting
7 off these questions, is how we are going to resolve these. It seems to me likely that
8 we're going to need perhaps half a day at or very near the beginning of the trial to
9 determine this, if there is not consensus.

10 MR TURNER: Yes. There's a number of moving parts here to be borne in mind.

11 The first is that -- I've alluded to it and, Sir, you referred to it as well -- all the evidence
12 isn't in yet. Without going through it, there are bits and pieces arising from the joint
13 expert statement process where, certainly on the Claimants' side, they consider that
14 there is new evidence that's come in, notably on the consumer impact modelling that
15 has been revised and which we haven't even received, as I understand it, the data
16 packs for yet to interrogate the material that's come.

17 Our expert considers that, faced with this material, and working on the basis that he's
18 going to be concise and savagely limit anything that needs to be put in by way of
19 response, merely to ensure that the Tribunal has something from both sides on it, that
20 he's looking at late August or early September in order to be able to do that.

21 This is what I've been told is necessary. It takes into account it's obviously August as
22 well. But this is what it's felt they can achieve. That's for quite a range of material.
23 That's the end date. It means getting things done sooner, but that's the date when it
24 can all be done by. I have no further definition than that.

25 MR JUSTICE BUTCHER: What exactly are you saying that date applies to?

26 MR TURNER: This is for our expert, if necessary, to put in any further brief response

1 to the annex material that's come on the other side, with which they have not yet had
2 an opportunity to deal. So the longstop for that, they're thinking, is the end of
3 August/early September.

4 So that's one issue. It's after that that the evidence will all be in.

5 At the other end, there are the skeletons for the trial. At the moment you have
6 a reading list that's agreed. I think it's a week prior to the start of the trial is all you've
7 been allowed, and that's the week of 25 September. Is that right? Yes.

8 It occurred to us -- one of the other issues on the agenda today will be the date for the
9 parties to put in their opening skeletons for the trial. And insofar as the Tribunal will
10 find it helpful to see what the parties are saying to make decisions of your own, that
11 now becomes a factor as well, because we had provisionally envisaged that if you are
12 going to be starting your reading week on 25 September, potentially the parties might
13 put in their skeletons simultaneously on the Friday before, 22 September. But the
14 debate that we are having today suggests -- or it may suggest -- that they will need to
15 be done slightly earlier than that.

16 So those are the considerations that we have in mind, which bear on, Sir, what you
17 were saying about indicating to the parties what the mode of taking evidence will be
18 and on what issues.

19 Partly I'm now making a plea for all of the legal representatives in this room, which is
20 that to prepare the cross-examination and to prepare for the trial, it is very helpful to
21 have clarity for all of us as soon as the Tribunal can manage it. Therefore, Sir,
22 although you've said very shortly before the trial you would provide clarity -- and that
23 may be inevitable -- that's a third factor which I think on behalf of all counsel I would
24 ask you to bear in mind.

25 Therefore, if one takes it as the case that in practical terms it will be difficult to get all
26 the expert evidence in before the end of August/beginning of September, we will all

1 need to read it and assess it. Then we have a fairly short time in the month of
2 September in which the Tribunal will do, Sir, what you have outlined, and on the
3 parties' side we'll be preparing the case.

4 So if I am to make a recommendation, provisionally I would say that our skeletons
5 ought to be, if not on Friday, 22 September, within that week. I will be contradicted if
6 my friends disagree, but I would say as late in that week as possible would be helpful.

7 And we, on the Claimants' side, would ask that the indication that the Tribunal can give
8 concerning greater definition on the timetable and the mode of evidence, what will be
9 subject to a hot-tub, ideally should precede the filing of the skeleton arguments.

10 MR JUSTICE BUTCHER: No, that can't possibly be right, not least because the
11 skeleton arguments may help inform us as to what the important issues are and what
12 the division will be.

13 MR TURNER: Yes. Sir, on reflection, I see that in that case it may be that the skeleton
14 argument should come earlier in that week. You'll then read them and take a view.

15 MR JUSTICE BUTCHER: Yes.

16 Ms Davies.

17 MS DAVIES: Sir, if I can deal with the first point first: the assumption that my learned
18 friend asked the Tribunal to draw that we will not get the expert evidence process
19 closed until the end of August or early September. On this side of the court, that is
20 regarded as totally unacceptable. I cannot emphasise how unacceptable.

21 What has happened here is that Mr Coombs, the Claimants' expert, has significantly
22 amended his calculations in relation to quantum. My experts and Mr Jowell's experts
23 received the data pack in relation to that on Sunday, 2 July, so the Sunday before last,
24 and then received a tweaked and matched data pack last Thursday, 6 July.

25 In the intervening period, our experts, as part of the joint expert process, have
26 managed to consider that and produce the annexes to the expert statements to which

1 my learned friend referred. The reason this all arises, just so the Tribunal understands,
2 is that both Mr Biro and Mr Holt are using the assessment by Mr Coombs of quantum
3 as part of the consideration of consumer impact of the rules. There is an issue
4 between the parties as to whether that is appropriate or not, but that is what has been
5 done, on the basis that one expects the Claimants' case on quantum to be their best
6 estimate as to what might have happened in the counterfactual.

7 What, as I understand, my learned friend is now asking is to give his expert and the
8 expert team -- of course it's not just Mr Coombs, he has a considerable team behind
9 him -- a period of maybe six or possibly seven weeks to look at those annexes, which
10 our experts respectively managed to produce in a period of less than ten days, outside
11 the joint expert process, for the purpose of, if necessary, producing additional reports.
12 We do not accept, certainly from my part, that there is anything new in Mr Biro's
13 analysis that merits a response. If my learned friend is suggesting that the Tribunal
14 should direct that they have the ability to put that in at this stage, we would resist that.
15 Of course, if they want to come to the Tribunal, having had a proper opportunity to
16 digest it, and say there is new material to which Mr Coombs has not had a fair
17 opportunity to respond, then we can consider that. But what we don't think is
18 acceptable, with respect, is a blanket permission granted in advance.

19 We certainly don't think it is acceptable to assume that that exercise, if it is to be done,
20 carries on until end of August/beginning of September, which will make preparation
21 for this trial by all parties impossible in a fair way.

22 We also don't accept that it should be done outside the constraints of the joint expert
23 process. In other words, the constraints that my learned friend was so keen to ensure
24 we had complied with, which led to his supplemental note to the Tribunal, ought to
25 apply with equal force to any further material that comes from Mr Coombs.

26 MR JUSTICE BUTCHER: So what you are suggesting we should order or say?

1 MS DAVIES: If there is to be any further material produced by Mr Coombs, it should
2 be produced by the end of this month and not later. That's two weeks and that's plenty
3 of time. Then all the parties can start properly preparing for this trial. Leaving it until
4 the beginning of September causes all sorts of issues. And given that our experts
5 have managed to do this process within a less-than-two-week period, there can be no
6 reason at all why Mr Coombs can't do the same.

7 MR JUSTICE BUTCHER: Mr Jowell?

8 MR JOWELL: Can I just echo that and just emphasise that it should be by the end of
9 the month; and also, as Ms Davies said, subject to the same strictures that have
10 applied to the joint expert process, so no lawyer involvement.

11 MR TURNER: Sir, if I may then deal with those points.

12 Mr Coombs made adjustments to his quantum calculations -- you've seen that
13 indicated in the skeleton arguments -- on 16 June, then on 2 July. What he did was,
14 in certain respects, to take on board points that had been made by the other experts.
15 That is actually, although it's said to have been remarkable, how the process is meant
16 to work. That is what the narrowing of the issues between experts in a trial is meant
17 to achieve. It related to those particular issues essentially, as you will have seen from
18 my friends' skeletons, to concessions essentially made and reductions, and it related
19 to very specific areas.

20 What we are talking about now -- and I'm not sure if either of my friends appreciate
21 this, to be fair -- is that there are much wider annexes, modelling, assessments that
22 have come forth from the joint expert statement from their experts, which have just
23 arrived or in some cases are still in the course of being delivered. I have been given
24 a list of at least six things: I'll simply mention them, so that you're aware of what's on
25 the slate as far as our expert is concerned.

26 There are updated consumer impact assessments modelling shared by both the

1 Defendants' experts. I've referred to those. That's key to the case. They have the
2 burden on that; it's obvious that on our side we should be able to assess it. It goes to
3 one of the fundamental questions of justification of restrictive rules.

4 Second, there's an analysis provided by Mr Biro, on behalf of Mastercard, of
5 something called -- I think it's pronounced "gminy", which are the rural areas in Poland,
6 areas where there are no or very few ATM machines. This goes to the question of
7 whether there are unserved areas where, if you could charge a fee for installing
8 cashpoints, you would see more convenient access. The new analysis has come from
9 Mr Biro on that.

10 There's an analysis of the diversity of ATM deployment in Austria and Greece which
11 has come from Visa's expert, Mr Holt, the areas there where these machines are
12 deployed.

13 There is an updated analysis of incremental ATM deployment provided by Mr Holt as
14 well.

15 There is an updated analysis of the application of what are called off-us or foreign fees
16 provided by Mr Holt, Visa's expert, again. These are fees charged by banks when
17 their customers use other parties' cash machines. One of the issues in this case is
18 whether, if you start using the access fee approach, there would be an impact on the
19 charging by the banks of these off-us fees. So you need to take into account the
20 balance between them. So we have another analysis by Mr Holt of that, or at least an
21 updated analysis.

22 Then on quantum, we now have proximity analysis for Czechia and Greece suggested
23 by Mr Huitson-Little.

24 I have a note also that there is an illustration of conducting a proximity analysis; in
25 other words, what happens when a cash machine is in proximity to a free-to-use cash
26 machine in Poland as well.

1 So a lot of this stuff has just come or is coming, and this is why the responsible
2 estimate of our expert -- and he's not seeking to pad this out at all, so it's a genuine
3 practical problem -- is that this needs to be done in the timescale that I've indicated.
4 To say, "Oh, they must do it by the end of this month", is simply unreasonable. And
5 I trust that now that my friends understand what is at play, they will take that on board.

6 MR JUSTICE BUTCHER: Now you understand that.

7 MS DAVIES: With respect to my learned friend, we still do push for the end of this
8 month, in terms of the sensible preparation of this trial; and bearing in mind, as I've
9 said, that our experts have responded and been able to respond very quickly to the
10 material that's been coming out in an evolving nature from Mr Coombs.

11 These are all issues that the experts are already familiar with because they've already
12 done -- pick, for example, the gminy analysis by Mr Biro. I can show the Tribunal that
13 in an annex if I need to: it's about two pages in the annex by Mr Biro. But it's
14 responsive to an exercise that Mr Coombs has already done and he's sought to rely
15 on the gminy.

16 So the idea that he should be given now maybe seven weeks to provide what ought
17 to have been dealt with actually, in our submission, in the expert process, is, with
18 respect, impossible to understand, notwithstanding what my learned friend says.

19 We do have a really large concern about the knock-on impact in terms of preparing for
20 the trial, because the Tribunal will obviously understand that in considering what areas
21 of the factual evidence need to be challenged, the expert evidence is extremely
22 informative. Because all the experts are, certainly for the purposes of considering
23 restriction and consumer impact and quantum, drawing quite heavily on the factual
24 evidence and what one can detect from it, and whether the assumptions that are made
25 in relation to some of the factual evidence, particularly on the Claimants' side, is
26 reasonable or not. So in considering, certainly for us, what we need to cross-examine

1 in relation to on the Claimants' side, it's very important to have the expert process
2 closed.

3 PROFESSOR NEUBERGER: It would be really helpful if I could have some
4 clarification on one issue, which is the relationship between this ongoing debate
5 between the experts and the joint expert reports.

6 MS DAVIES: What has happened, if I can just respond, Sir, is that Mr Coombs in
7 various places has said, "I haven't had time to consider this", and so he's not
8 answering issues in the joint expert report. So the expert reports are being signed
9 with Mr Coombs just saying that.

10 What I apprehend my learned friend is keen to ensure is that Mr Coombs now gets
11 a further seven weeks to consider points and seek to try and supplement -- of course,
12 if there are points which are properly new and he hasn't had a fair opportunity in the
13 course of the process to address, an application will be made to the Tribunal and one
14 can apprehend it will be rather difficult for us to resist it.

15 We're not clear at the moment really whether that is the case, which is one of the
16 reasons why I said earlier we don't want a blanket permission and we would oppose
17 a blanket permission being given, because we do submit in relation to certain -- we
18 would be submitting into some of the areas that he has had a more than fair
19 opportunity to deal with it.

20 But that's how essentially, as I understand it -- the consumer impact joint statement,
21 there's a draft that actually went into the Tribunal's bundles overnight. It isn't yet
22 signed, but it is very close to being signed. The quantum joint statement is due to be
23 signed by the 17th of this month, if I have that date correct, so next week.

24 But there are going to be annexes to it from both Mr Biro and Mr Holt because of the
25 reason I addressed, which is obviously Mr Coombs has made concessions in relation
26 to his quantum analysis, and they are quite significant concessions, as the Tribunal

1 will have seen, and Mr Biro and Mr Holt obviously need to take that into account in
2 their quantum analysis. That's exactly what the Tribunal would expect. So that's why
3 there are some annexes that are going to go into that statement well from our side.

4 SIR IAIN McMILLAN: So we'll be faced with three joint expert reports, plus some
5 annexes, plus some subsequent responses?

6 MS DAVIES: Sir, yes. In order to try and get matters as advanced as possible before
7 today --

8 SIR IAIN McMILLAN: Yes.

9 MS DAVIES: -- it was agreed between the parties that the joint statement should be
10 split into three parts.

11 SIR IAIN McMILLAN: Yes.

12 MS DAVIES: The first two are nearly complete, but the quantum one, they need a bit
13 more time, in particular because of the late delivery of the data packs and so on, which
14 I've already touched on.

15 Those three joint statements are all accompanied by some annexes. And what, as
16 I understand it, my learned friend is indicating is that Mr Coombs may wish to respond
17 to what he suggests is new reasoning in some of those or new material in some of
18 those annexes. As I said, if it is genuinely new and he hasn't had a fair opportunity to
19 deal with it, well, of course one can understand where that is coming from. All we are
20 therefore then debating is how quickly he should be required to do that, without
21 disrupting the process of preparation of the trial.

22 Everyone had anticipated that the entire expert process would be complete before
23 today. That was the original timetable. There has been slippage, and quite
24 considerable slippage, and it's really a question for the Tribunal how we try and get
25 ourselves most effectively back on track so this trial can be properly prepared and
26 opened on 2 October.

1 PROFESSOR NEUBERGER: But there is no intention that there should be a new
2 joint expert report? That's not part of the story?

3 MS DAVIES: That is certainly not an expectation at the moment.

4 PROFESSOR NEUBERGER: Okay. That's what I --

5 MS DAVIES: What might or might not be necessary depending on what Mr Coombs
6 produces is a different issue and obviously we will have to see. At the moment we
7 don't know what's coming, obviously. They know what we are producing because
8 they've seen drafts of it. But we'll have to see. Obviously if the Tribunal, having seen
9 all the annexes, felt it would be helpful for the experts to meet again to discuss any
10 points, then of course the Tribunal can direct that in any event.

11 But we do, however -- I would reiterate, and Mr Turner didn't address it, the point about
12 the process. Whatever timing the Tribunal applies in relation to anything further that
13 comes from Mr Coombs, the process should respect the integrity of the joint expert
14 scheme. So it must be not done in the same way as original reports, which may or
15 may not have been exchanged with parties and comments made; it must be done in
16 exactly the way that my learned friend has indicated needed to be done in relation to
17 joint experts.

18 MR JUSTICE BUTCHER: We were planning to have a break for the transcript writers
19 now. I think we will do that for eight or so minutes. We will then resume and we will
20 decide what we're going to do about this issue.

21 (11.58 am)

22 (A short break)

23 (12.14 pm)

24 MR JUSTICE BUTCHER: Yes. What we are minded to say is in relation to Coombs'
25 additional material, that must be produced by the end of the month. Of course that is
26 subject to the fact that if there is a specific area which he is facing where there is new

1 material and he simply cannot be in a position to deal with it by then, there can be an
2 application on paper to me in relation to it. Do not expect a great deal of sympathy in
3 relation to any such application unless there is a very good reason.

4 We need, the Tribunal considers, a final joint expert report, or reports in the three
5 areas, without annexes. We would like to know when that can be produced. That
6 should just be a question of a distillation of the material that there already is, but we
7 recognise that it is going to probably require a further meeting of the experts to produce
8 it, so I would like to hear when that can be done by.

9 The whole of this process will be subject to the, as it were, joint expert rules; in other
10 words, the solicitors will not be involved in shaping the content of these additional
11 documents.

12 As to skeleton arguments, we want them by 18 September.

13 MR TURNER: Sir, I'm very grateful.

14 I do need to say on the first point that it is a certainty that there will need to be
15 applications, and I need to talk about the implications of that for the other points that
16 you've made.

17 If one takes, for example, the consumer impact modelling, we haven't yet even
18 received the underlying materials, as I say. I'm told that merely running the codes will
19 take several days, let alone interrogating it and looking at variations. And the
20 suggestion that they can do everything by the end of the month, I can say: with the
21 best will in the world, it can't be done.

22 MR JUSTICE BUTCHER: Well, it will need to be justified. You will need to set out
23 exactly what it is. We are all very familiar with the fact that if additional time is given,
24 it is often taken. Many things can be done much more expeditiously if there is a clear
25 deadline.

26 So the deadline is by the end of the month. As I say, if there are particular areas where

1 | there is a good case, then I will consider it. But the deadline is as it is.

2 | MR TURNER: I understand, my Lord.

3 | The next point is the second stage: the distillation of the material into the joint expert
4 | statements. This is something that we shall attempt to achieve.

5 | I'm not sure whether your intention is that if we take, for example, the existing annex,
6 | like the one that was attached to the first joint expert statement and that I took you to
7 | a few minutes ago, earlier this morning, whether your intention is that that should be
8 | dispensed with as well, and that all of the material should be compressed and distilled
9 | now into these joint expert statements without annexes. Is that the ...?

10 | MR JUSTICE BUTCHER: What I had in mind is it's not as if the annex has
11 | disappeared from the record; it's still there.

12 | MR TURNER: Yes.

13 | MR JUSTICE BUTCHER: But what we want to have is a finalised version of the
14 | experts' areas of agreement and disagreement, which has no, as it were, "I can't
15 | respond to this", but is finalised. Of course it may refer back to material which is
16 | already there, or the experts may refer back to material which is already there, but that
17 | it shouldn't have annexes itself. It should be a distillation of the areas of agreement
18 | and disagreement as they are finalised.

19 | MR TURNER: Yes. Can I take one example, just to pick up on what
20 | Professor Neuberger was saying before the short break.

21 | MR JUSTICE BUTCHER: Yes.

22 | MR TURNER: Let's take the second joint expert statement, which was agreed just the
23 | day before this hearing. You should have that beginning at C250 in the PTR bundle.
24 | I have it filed behind tab 6, 6.1.

25 | MR JUSTICE BUTCHER: Yes.

26 | MR TURNER: So this is "Joint expert statement on economic issues liability, part 2".

1 If you go in it to C255.4, the first substantive page, you have a heading, 4.1, under the
2 overall theme "The consumer groups affected by the Contested Rules":

3 "Are (a) the Cardholders who may suffer harm from the Contested Rules in the
4 Potential cash withdrawal markets, and (b) the Cardholders in Existing cash
5 withdrawal markets to whom any benefits may accrue, substantially the same?"

6 This goes to a point that the law is that the people who are harmed by restriction, if
7 you're to point to benefits, they should be left no worse off. So there needs to be
8 substantially the same group of people who gain as who are affected negatively by the
9 restrictions.

10 If you look at Mr Coombs' box which is the first one, and look at the top of the next
11 page, C255.5, that's where he says:

12 "Lastly, I note that Mr Biro and Mr Holt provided as annexes to this JES updated
13 versions of their [consumer impact models] along with some sensitivity analyses.
14 I have not had time within the process to evaluate this and to interrogate it. That said,
15 it appears that Mr Biro's and Mr Holt's updated CIMs do not address the fundamental
16 issues ... Similarly, I have not been able to evaluate Mr Biro's gminy analysis or
17 Mr Holt's new assessment in relation to incremental deployment."

18 So what you see there is that he's saying, "I haven't been able to deal with these
19 things". That is exactly the sort of thing that he proposes now to do, as fast as he can.

20 The suggestion that I've received is that he will therefore complete this, but the first
21 thing he must do is do the work. He was then proposing to produce an output for the
22 work.

23 If he can't do it by the end of the month, which I imagine he won't be able to do, there
24 will need to be an application. But that shouldn't hold up, I am presuming, a process
25 whereby the experts still sit down and consider anything that he produces, which will
26 be his final entry, therefore completed, for this part of the joint expert statement.

1 May I just confirm that that, Sir, is what you have in mind as to how the process will
2 work? (Pause)

3 MR JUSTICE BUTCHER: That is how we envisaged it will work.

4 MS DAVIES: Can I just clarify in relation to that, because I am afraid certainly for my
5 part I am not suggesting what Mr Turner is suggesting.

6 My experts can't meet with Mr Coombs to discuss anything further that he produces
7 until they've had a chance to consider what he produces. If the process that's being
8 proposed is that Mr Coombs produces the material he produces in accordance with
9 the Tribunal's direction, the experts then meet and then these joint expert statements
10 are updated, that's fine. But if something else is being proposed, it won't be workable.

11 MR JUSTICE BUTCHER: I understood that was what was being proposed. That is
12 what we had in mind should happen.

13 MR TURNER: Yes.

14 MR JUSTICE BUTCHER: So the material should be produced. The experts should
15 then meet again with a view to producing a final version of the joint experts' report,
16 which will of course embody a lot which is already there, but which will tie down these
17 additional points.

18 Mr Jowell.

19 MR JOWELL: There is just one practical matter I should draw the Tribunal's attention
20 to. Mr Huitson-Little, the quantum expert on our side, has an operation, which will
21 mean that he will be indisposed until the middle of August. Therefore, from the point
22 of view of him meeting, it will not be possible until that time.

23 MR JUSTICE BUTCHER: No, I understand that.

24 Right. So in terms of when these final joint expert reports can be produced by, I want
25 a proposal. When is that likely? I know the question of exactly when Mr Coombs will
26 produce all of his stuff, but there has to be a meeting as well.

1 MS DAVIES: Sir, we are trying to check with Mr Biro when he's -- on the basis that
2 we're going to get the material from Mr Coombs by the end of July, in accordance with
3 the Tribunal's direction, we're just trying to check with Mr Biro whether there's any
4 reason that the meetings couldn't happen relatively quickly thereafter, for our part, in
5 relation to the first two parts of the joint expert statement. Obviously the quantum joint
6 expert statement might need to be on a different track.

7 I'm afraid we don't have that information. We are trying to find it. I suspect all parties
8 just need to speak to their experts, bearing in mind we're going into the August period
9 and no doubt everyone has some plans that need to be accommodated.

10 MR JUSTICE BUTCHER: Yes.

11 MR TURNER: Yes, I would echo that, with the qualification that, as I say, it is a racing
12 certainty that Mr Coombs will not be able to finish this work by the end of July, for the
13 reasons I've given. We are going to do absolutely everything we can to work around
14 existing immutable commitments.

15 MR JUSTICE BUTCHER: Yes.

16 MR TURNER: It's difficult, I think, to go further than that at this hearing.

17 MR JUSTICE BUTCHER: Yes.

18 I think it is inconceivable that I will be permitting delays until, let's say, the end of
19 August. That seems to me to be completely out of the question. People just have to
20 work to a shorter timescale than that. So I think that message needs to be understood.

21 Right. I'm not sure that we can take that any further now, can we? Or can we?

22 MR TURNER: I don't believe so, Sir.

23 MR JUSTICE BUTCHER: Mr Jowell.

24 MR JOWELL: I have just been asked to double-check one thing, which is that we
25 understood from your order that the process of creating Mr Coombs' third statement
26 will be subject to the same rules that have applied to the meetings of the experts. I just

1 wanted to clarify that that was --

2 MR JUSTICE BUTCHER: Of course. That was what I said.

3 MR JOWELL: Yes, that's what we need. Yes.

4 MR JUSTICE BUTCHER: Right.

5 MR TURNER: There is only one other small point that I was going to address you on.

6 Then if we turn to the logistics issues, Ms Smith will take over.

7 That was the length of the skeleton arguments. You've given the date, which is

8 18 September. I believe that in relation to the skeleton arguments --

9 MR JUSTICE BUTCHER: 75 pages apiece.

10 MR TURNER: -- 75 pages apiece is agreed.

11 MR JUSTICE BUTCHER: Everyone agrees with that.

12 MR TURNER: Yes, yes.

13 MR JUSTICE BUTCHER: As to closings, isn't it a bit early to determine what the

14 length of the closings is going to be?

15 MR TURNER: Yes, we're content with that.

16 MR JUSTICE BUTCHER: Can I just raise one point before I forget it. I would very

17 much welcome if on 26 October we sat only until 2 o'clock. So we could do what, at

18 least in other contexts, is called Maxwell hours in relation to 26 October.

19 Yes.

20 MS SMITH: Sir, thank you. Turning then to the logistics issues, which

21 I think -- I hope -- are generally agreed.

22 Sir, from the indication you gave earlier, I understand that the Tribunal would prefer us

23 to work to a timetable assuming the time that we will take would be the time that would

24 have been taken if everyone was cross-examined?

25 MR JUSTICE BUTCHER: Yes, because no one is suggesting that hot-tubbing will

26 add to that timetable. So if there is going to be a change, it will be a contraction, which

1 I hope can be built in.

2 MS SMITH: Sir, on that basis, I think our latest proposal -- if I can ask you to turn to
3 the pre-trial review bundle, tab 4.1, page B38.2.

4 Sir, this has changed somewhat from our -- well, there is still an issue, as I understand
5 it, between the parties as to how long we should have to cross-examine the
6 Defendants' witnesses. Mr Turner explained why we have proposed we need nine
7 days. This timetable is on that basis and then gives enough time for cross-examination
8 of the economic and accounting evidence.

9 You might see that the foreign law experts have been moved to come after the expert
10 economic and accounting evidence --

11 MR JUSTICE BUTCHER: I'm sorry, I must be looking at the wrong document.

12 MS SMITH: This may only have gone on again overnight. It's the PTR bundle B,
13 tab 4.1, page B38.2.

14 MR JUSTICE BUTCHER: Yes.

15 MS SMITH: The heading at the top of that is "Alternative timetable if no concurrent
16 evidence of economic experts".

17 MR JUSTICE BUTCHER: Yes.

18 MS SMITH: With various footnotes, 5 through to 8.

19 MR JUSTICE BUTCHER: Yes.

20 MS SMITH: So what has changed here is the foreign law expert evidence, which has
21 been subject to correspondence between the parties.

22 You'll be aware that the Claimants have one expert for each of Greek, Czech and
23 Polish law, and the Defendants have together instructed one expert each. We have
24 agreed, subject to the Tribunal, that those experts should be cross-examined -- no
25 suggestion of hot-tubbing for those experts -- and that it can be done in relatively short
26 order: the Greek and Czech experts in a single day, and the Polish experts in one day.

1 We had discussed, and it was on the agenda for the Tribunal, as to whether the Czech
2 and Greek law experts could give their evidence by video link. Visa's solicitors, I think,
3 have checked the position under local Greek and Czech law whether that might be
4 possible, and we understand unfortunately that it is not. So we will have to have all of
5 the foreign law experts giving their evidence in person.

6 MR JUSTICE BUTCHER: Right.

7 MS SMITH: As to the timing, I indicated that we've had to change that.

8 You may have seen in the skeleton arguments the Defendants indicated that their
9 Polish law expert wasn't available on the original date that we had proposed for him of
10 Monday, 6 November, and so we should switch them round and he should go on
11 Friday, the 2nd. But unfortunately our expert is not available on that date.

12 So what we have proposed -- and I believe the Defendants' solicitors are checking
13 that, I don't know whether we've reached an agreement on that -- is that we move the
14 foreign law experts to come after the economic and accounting evidence. We don't
15 think that will have any real disbenefits for the Tribunal.

16 I think we're probably not going to try to set this timetable in stone today, but just to
17 give you, Sir, an indication of where we are on that. So that gives you some idea of
18 how long it's going to take, the timetable overall.

19 MR JUSTICE BUTCHER: Yes.

20 MS SMITH: We need to keep that final twelfth week in reserve still on that basis.

21 Unless there's anything else on that, I was going to move on to some logistical issues
22 arising from the factual evidence.

23 MR JUSTICE BUTCHER: Yes.

24 MS SMITH: There is, first of all, the possibility of the video link for a factual witness.

25 Again, I think this is simply just by way of information for the Tribunal.

26 It is currently proposed that all factual witnesses give their evidence in person.

1 Mastercard, however, has indicated in the skeleton, you may have seen again, that its
2 witness Mr Rychlinski is due to have a medical procedure in the middle of September,
3 which will prevent him from travelling for a period of time. It is currently anticipated he
4 should be able to travel by October, in time to give his factual evidence. If that's not
5 possible, Mastercard indicates it would seek a direction for his evidence to be given
6 by video link.

7 We are very keen that Mr Rychlinski gives his evidence in person. His evidence is the
8 most substantial of all four of Mastercard's witnesses and his evidence is also likely to
9 be controversial. For example, there is a dispute on the facts between him and
10 Euronet's witnesses as to what happened during various meetings between them,
11 which is relevant to the issues in this case; at the very least, the question of fault under
12 national law.

13 In those circumstances, I'm just putting it on the record now that we would very much
14 prefer to have the opportunity to cross-examine Mr Rychlinski. So if at all possible, we
15 would propose that the timetable in due course be jiggled around so that
16 Mr Rychlinski's evidence comes towards the end of the factual evidence, so that he
17 can travel to give his evidence in person.

18 MS DAVIES: Sir, if I can say in relation to that, it's very much our hope that
19 Mr Rychlinski will be here as well. The medical procedure he's having in
20 mid-September is, however, serious and significant, and it's going to depend on the
21 medical advice that is given. Our expectation at the moment is that he will be able to
22 travel in order to give his factual evidence, on the assumption that he comes towards
23 the back end of the Defendants' factual witnesses.

24 Given that we had anticipated, on the Defendants' side in any event, that at least
25 a number of Visa's factual witnesses would come first because they set out matters
26 more of general background, before the Mastercard witnesses, we don't think that will

1 affect actually any issue. But we are going to have to keep it under review and will be
2 driven by, obviously, the medical advice that is given to Mr Rychlinski.

3 MR JUSTICE BUTCHER: Right.

4 MS SMITH: Sir, I can't take matters any further than that.

5 MR JUSTICE BUTCHER: No, I don't think so.

6 MS SMITH: I am grateful for the indication.

7 Sir, there is one point that again I think was on the agenda, which was interpreters.
8 Again, I think the parties have reached -- subject, of course, to the views of the
9 Tribunal -- agreement on that.

10 From our point of view, our witness Mr Szafirski you'll see provided his witness
11 statement in Polish and it was then translated. However, he is able to communicate
12 in English, he does conduct business in English, but it's his second language.

13 He's content to be cross-examined in English and he'll seek to give his answers insofar
14 as he can in English, but he would prefer to have an interpreter on hand to assist if
15 necessary, so if he needs a question to be clarified or he needs to express an answer
16 that he wants first to express in Polish and it can therefore be translated into English.
17 He doesn't, therefore, need simultaneous interpretation, but we propose the approach
18 that he has an interpreter sitting next to him to assist if necessary.

19 I think the Defendants have agreed that that approach can be taken to his witness
20 evidence, and in fact they have requested a similar -- or at least Visa has requested
21 a similar approach could be taken for four of their witnesses who also don't have
22 English as their first language. Mastercard, however, I think all their factual witnesses
23 are content to give evidence in English without interpreters.

24 Subject to the Tribunal's view, we have no objection to taking that approach.

25 MS DAVIES: Sir, that's right so far as my witnesses are concerned. And as Ms Smith
26 said, in relation to the other witnesses for whom English is not their first language, of

1 course if they feel it will be helpful to have an interpreter present to deal with particular
2 questions, that's fine. What we would be concerned about is any move to effectively
3 consecutive translation, which will just slow things down. But we're being assured that
4 Mr Szafirski -- if I pronounce his name incorrectly; I'm sure I have -- will not do that,
5 and that it's just going to be the odd question.

6 I should just perhaps touch on the question of how many days are necessary for
7 cross-examination of the Defendants' factual evidence. As we understand it, the
8 suggestion of nine days was made at a point when they thought Mr Čarný was going
9 to come to give evidence, but of course he's not. There should, one would have
10 thought, be some scope for shortening that.

11 MR TURNER: Yes, he was half a day in our estimations. It comes down to eight and
12 a half.

13 MR JUSTICE BUTCHER: Right. Well, certainly as far as the interpreters go, that all
14 sounds very sensible, perfectly feasible and normal. Yes.

15 MR JOWELL: I would just add to that that eight and a half days does seem rather
16 luxurious for the factual evidence.

17 MR JUSTICE BUTCHER: What are you asking me to do about that, Mr Jowell?

18 MR JOWELL: We wondered whether -- and also somewhat imbalanced, given that
19 we have rather more to cross-examine on and we're trying to do it in six days.

20 So what we would propose is that it comes down ideally to seven days, but at least
21 eight, from eight and a half. That would have the advantage that there would be
22 two days in reserve in the eleventh week, which might even mean that the Tribunal
23 feels that it can dispense now with the twelfth week, because you'll have two days in
24 reserve. (Pause)

25 MR JUSTICE BUTCHER: I think you ought to just talk to Mr Turner about cutting down
26 the number of days. I'm not going to dispense with the twelfth week at the moment

1 because I think that's just too risky.

2 MS SMITH: Sir, the final logistical issue that I was going to address was that of
3 confidentiality.

4 As the Tribunal will be aware, there are confidentiality rings in operation in this case:
5 an inner confidentiality ring essentially comprising the parties' lawyers and expert
6 economists, and an outer confidentiality ring.

7 Three issues arise for your Lordship today on confidentiality. The first is a very brief
8 point of which I was helpfully reminded by my learned friend, which is that there has
9 been reference to confidential annexes during the course of this hearing. We would
10 ask the Tribunal to make an order that that does not lift the confidential status of those
11 annexes.

12 The second --

13 MR JUSTICE BUTCHER: That's agreed, is it? Yes. Certainly, yes. That's ordered.

14 MS SMITH: The second and slightly more substantial point, although not much more
15 substantial, was raised in a letter from Visa's solicitors received yesterday. They have
16 proposed amendments to the confidentiality ring order that I will show the Tribunal.
17 They are, I think, agreed. They are certainly agreed by our side; I think they are
18 agreed by Mastercard.

19 If I could just take the Tribunal to those proposed amendments. They are in the
20 pre-trial review bundle B, tab 8, pages B46 through to B56. That's the proposed draft
21 amended confidentiality ring order.

22 The amendment that's proposed is to paragraph 2.6 on page B48 and then over to
23 B49. You will see the language that has been added there. But simply it's a proposal
24 that the order be amended so that support staff who are under the supervision of the
25 inner confidentiality ring members, counsel and solicitors, be automatically included
26 within the ring without needing to provide signed undertakings, but having been

1 warned of the confidential nature of the material so confidentiality safeguards are in
2 place.

3 The purpose of the amendment is simply to enable support staff, counsel's clerks,
4 secretaries, to help with printing and producing documentation as we get closer to trial.

5 There is going to be a substantial amount of that work to be done.

6 So, subject to the Tribunal's views, I think that amendment has been agreed and we
7 would ask the Tribunal to make an in order those terms amending the confidentiality
8 ring order.

9 MR JUSTICE BUTCHER: Yes.

10 MS SMITH: Then the third and final point on confidentiality is simply to update the
11 Tribunal on work that is being undertaken by the parties' solicitors to seek to reduce
12 the amount of material that is designated as confidential.

13 I think everyone in this hearing room will have had experience of how difficult it can be
14 to deal with confidential material when you're trying to cross-examine, for example, or
15 run a hot-tub. And so as to ensure that the Tribunal can conduct the trial in the autumn
16 in public as far as possible and that any necessity to sit in private is reduced, every
17 party is currently going through their documents over the summer and seeking to
18 de-designate any material that they have previously designated as confidential so far
19 as possible, so really to have a second go.

20 I understand the parties have agreed a deadline of 8 September to complete that
21 exercise, which leaves us time for any necessary applications to be made to the
22 Tribunal if there is any disagreement at that stage about confidential status of the
23 material. Obviously we all hope to avoid any such applications having to be made.
24 That's simply just to update the Tribunal that we are going to try to be as sensible as
25 possible about confidentiality.

26 I think, unless there is anything else, those are all the logistics points I was going to

1 address. I think that addresses everything on the agenda and in the skeleton
2 arguments.

3 MR TURNER: There is just one point which arose as a result of your ruling on the
4 joint expert statement.

5 MR JUSTICE BUTCHER: Yes.

6 MR TURNER: It is our proposal -- I don't think we can deal with it at this hearing -- that
7 we will confer with all the parties and their experts to try to get information to you about
8 what can feasibly be done as soon as possible. The hope and expectation is we will
9 write you a joint letter setting out where we have reached.

10 MR JUSTICE BUTCHER: Yes. We would be hoping to have that joint letter in the
11 first half of next week, I should think.

12 MR TURNER: Yes, absolutely.

13 MR JUSTICE BUTCHER: Yes.

14 Now, as we said at an earlier stage, we will endeavour to give you input in relation to
15 what we think are the areas in which hot-tubbing might be most beneficial as soon as
16 we can after we've had an opportunity of reading the skeleton arguments and so on,
17 but it seems to me likely that we should be recognising that there may be some time
18 taken at the start of the trial to determine any such issues which remain. So I think
19 that should be, as it were, built into consideration. Because I don't think there is any
20 realistic chance of having an argument on that before the start of the trial.

21 MR JOWELL: Perhaps we could then add half a day to the openings and take that
22 away from the half a day of the factual cross-examination that Mr Turner indicated he
23 would concede.

24 MR TURNER: This is getting a bit silly. I will discuss this with Mr Jowell after the
25 hearing.

26 MR JUSTICE BUTCHER: Yes. Right.

1 | So is there anything else we need to discuss?

2 | MS DAVIES: Nothing from us, Sir.

3 | MR JUSTICE BUTCHER: Right. Thank you very much. That concludes the hearing.

4 | (12.46 pm)

5 | **(The hearing concluded)**

6 |

7 |