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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1266/7/7/16, 1517/11//7/22

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

12 Wednesday 10 January 2024 – Thursday 11 January 2024

13
14 Before:
15 The Honourable Mr Justice Marcus Smith
16 Ben Tidswell
17 Professor Michael Waterson
18 (Sitting as a Tribunal in England and Wales)

19
20 BETWEEN:

21
22 **Merchant Interchange Fee Umbrella Proceedings**

23
24 **And**

25
26 **Walter Hugh Merricks CBE**

Claimants

27
28 v

29
30 **Mastercard Incorporated and Others**

Defendants

31
32 **A P P E A R A N C E S**

33
34 **Philip Moser KC, Philip Woolfe & Oscar Schonfeld** (instructed by Stephenson Harwood
35 LLP and Scott & Scott UK LLP) on behalf of the Stephenson Harwood and Scott & Scott
36 Claimants

37 **Tristan Jones** (Instructed by Hausfeld) on behalf of the Primark Claimants

38 **Mark Brealey KC** (Instructed by Mishcon de Reya LLP) on behalf of Ocado

39 **Ben Lask KC** (Instructed by Pinsent Masons) on behalf of the Allianz Claimants

40 **Daniel Piccinin KC** (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

41 **Matthew Cook KC & Owain Draper** (Instructed by Jones Day and Freshfields) on behalf
42 of Mastercard

43 **Mark Simpson KC and Anneliese Blackwood** (Instructed by Willkie Farr & Gallagher
44 (UK) LLP) on behalf of Walter Merricks CBE

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1 **Wednesday, 10 January 2024**

2 **(10.30 am)**

3
4 **Housekeeping**

5 **THE PRESIDENT:** Good morning, everybody, and welcome.

6 Before we begin with the housekeeping that has been put on the agenda, we have
7 a few housekeeping items of our own.

8 First of all, these proceedings are being live-streamed, and the transcript, by my
9 authority, is being taken and a recording made. However, it is strictly prohibited for
10 anyone else to record, transmit or photograph these proceedings, whether through
11 audio or visual means, and breach of that injunction is punishable as a contempt of
12 court.

13 I know I don't need to say it but I should nonetheless do so, and I have.

14 More importantly, we have a somewhat unusual set-up today. Our experts are
15 welcome. I hope you've been told that you should remain seated rather than stand
16 up. The microphones have been arranged accordingly. I think that will be easier for
17 you all. We want a relaxed and informal engagement and I hope we can achieve that.

18 But thank you very much for attending.

19 Counsel, behind you, I'm afraid you will have to stand, simply because we can't see
20 you if you don't. So you too are welcome and we will hear from you a little bit later
21 today and rather more tomorrow when hopefully we can invert the seating.

22 Could I ask everyone, however, the first time they speak, and perhaps after that, to
23 identify themselves. Not that we need any introduction, but the transcriber has
24 informed us that they would find it very helpful if you could do so, so that the right
25 comments are attached to the right person. So if you wouldn't mind doing that, that
26 would be very helpful.

1 Relatedly, we are not going to swear any of the experts. This is an informal hot-tub,
2 so we don't regard you as experts today giving us expert evidence in the traditional
3 sense. What you are doing is you are assisting us to case-manage what is a very
4 complex set of issues, the issues in Trial 2, but we frankly are expecting you to be
5 reflecting the concerns and interests of the parties that are instructing you and we are
6 not therefore expecting you to do more than assist us in managing the case from that
7 perspective.

8 Of course, later on you will be dealing with substantive matters and of course the full
9 obligations of the expert obligations will at that point tell. But we won't be swearing
10 you today. Of course you are here only because you are experts and we are expecting
11 the kind of independence and objectivity that only experts can bring but that is because
12 you are not very useful to us if you don't do that. That is the only reason I am saying
13 that.

14 So that is by way of procedural housekeeping.

15

16 **Introduction by THE TRIBUNAL PRESIDENT**

17 **THE PRESIDENT:** I would like to articulate in general terms how we see the
18 disposition of the pass-on question operating through the interface of experts and
19 through the interface of information-gathering. I'm going to try to articulate this, really
20 to give you, the experts, something to push back on.

21 I anticipate that there will be two areas which you are likely to want to push back on.
22 One is whether in principle what I am articulating works for you, and whether as
23 a matter of practicality it works.

24 We are of course, as a Tribunal, pretty familiar with regression analysis, system
25 analysis and the accumulation of data, but it would be wrong to say that we are so
26 expert that we can predict with confidence that what we are proposing will actually

1 work, even as a matter of granular practicality. And what we very much hope to
2 achieve by the end of the next two days is to have set out in very granular and firm
3 form exactly what it is the parties need to do in order to have an effective trial of Trial
4 2 at the end of this year.

5 We don't have very long, and I think we are very much in the last-chance saloon. If
6 we don't get this absolutely cracked today and tomorrow, then we are in some trouble.

7 So this is, for that reason alone, an extremely important hearing.

8 So what I'm going to say is some initial thoughts for you to take into account and push
9 back on when you make your presentations.

10 In terms of a model for how we think we should be seeing this and approaching it,
11 I was quite attracted to the analogy articulated by Visa in their reference to personal
12 injury cases and actuarial cases. I appreciate we don't have actuarial cases here, but
13 I have done a number of personal injury cases long ago as part of my aviation practice
14 and the application of individual factors to statistical life expectancies actually worked
15 very well.

16 To take claimant A, whose earning capacity has been affected by an accident, the
17 multiple and, the annual loss, is almost always fact-specific to the individual case. The
18 multiplier, on the other hand, the number of years that A will live and work, starts from
19 a solid statistical base, actuarial life tables, and then incorporates and is adjusted by
20 specific factors. For instance, is the claimant a smoker? Do they have heart disease?
21 And what you do is you take your working life expectancy and adjust it up or down by
22 reference to individual factors. And the courts are almost now unthinkingly taking
23 statistical evidence in personal injury cases into account and they do it automatically
24 and very easily.

25 Now of course, we have no such infrastructure here, but we think that that sort of
26 infrastructure ought to be our role model or objective in this case. And what we would

1 like to see is this sort of data approach being evolved, starting today, for use in this
2 and indeed in other later proceedings.

3 Tribunal cases, in short, should be based upon an evolving data set that is as
4 wide-ranging as possible. So for instance one starts with a data set that is able to
5 calculate a UK PLC general pass-on rate.

6 Now, that would produce a pass-on rate that would be, we anticipate, because of
7 the large data set, statistically quite robust. However, it would not be a particularly
8 helpful figure viewed purely and simply on its own, because we all know that
9 interchange fees are different to other kinds of pass-on of other kinds of costs.

10 The problem we have is that interchange fees, and indeed the overcharge, which is
11 a fraction of the interchange fees, are both so small that they are in themselves not
12 susceptible of statistical modelling, and that is why one has the debate that we are
13 going to be having later on about proxies. But it seems to us that there is real virtue
14 in having a data set that enables a robust UK-wide pass-on rate to be assessed
15 because it gives the experts something to disagree with.

16 If, for instance, the UK-wide general pass-on rate is X, we would then expect the expert
17 instructed to say, well, X may very well be the general rate but it is too high or too low,
18 for these reasons. And we would expect those reasons to be articulated by reference
19 to economic theory.

20 One would then say: and by the way, my economic thesis that the general pass-on
21 rate is too high or too low is supported by a regression analysis done by reference to
22 a subset of the general set. In other words, one looks not to the general UK PLC
23 regression, one looks instead to a set within that, and says, when one looks at this
24 one gets a different pass-on rate. No doubt one also gets a different level of statistical
25 reliability. But what we get as a Tribunal is a triangulated form of data where we can
26 say, when we are writing our judgment -- and that is very much what we have in mind,

1 | how we write our judgment on this -- we will be able to say a number of things out of
2 | this.

3 | We'll be able to say with a high degree of confidence that the UK pass-on rate is X.
4 | We will also be able to say that it is not a particularly helpful figure in and of itself given
5 | that we are talking about interchange fees.

6 | Next, we will be able to say that it is an unreliable figure in a particular direction
7 | because of the economic arguments advanced in your expert opinions. And your
8 | expert opinions will be buttressed by a narrower form of explanation based upon
9 | a narrower regression, which will, we would infer, support your expert opinion.

10 | And we get that from all of you and, that way, we will be able to articulate in a reasoned
11 | manner the pass-on rate that applies in any given case.

12 | So that is something which we are keen to articulate as a way forward. How one
13 | compiles the data set is of course something on which we are much more vague than
14 | we hope you will be. It seems to us that one ought to start from the top down. One
15 | ought to start with as much easily available data, perhaps as referenced by
16 | Mr Coombs, that one can. One then migrates down to a slightly different data set,
17 | Mr Holt. One then gets data that perhaps individual claimants who have the data
18 | readily to hand, like Allianz, can insert, and we proceed down other forms of data that
19 | are perhaps less easily obtainable but nevertheless important for this sort of exercise.

20 | We want to be very clear that we are minded to take an inclusive rather than
21 | an exclusive approach to data, subject to, I think, three very important qualifications:
22 | First of all, we will be minded to allow data to be included provided that it can be
23 | homogenised with the other data in the data set such that one can genuinely
24 | manipulate the entire set and run statistical enquiries across not just the entire set but
25 | across selected items of that set according to the criteria and parameters defined by
26 | you the experts.

1 So a degree of homogeneity and manipulability is a *sine qua non* for the insertion of
2 the data into this universe of data.

3 Secondly, the inclusion of data will be discouraged where it is either expensive to get
4 or expensive to homogenise. In other words, if you can get a data set of marginal
5 utility easily, well, in it goes, because provided it is easy to insert as a data set and
6 manipulable such that it can be excluded, there's no harm in including it because you
7 can easily exclude it from your calculations if that's appropriate.

8 If, on the other hand, getting the data set is going to be costly of time and effort, then
9 we would need to understand why it is needed. Equally, if the data is easy to obtain
10 but costly to homogenise or harmonise, again we would need some justification for its
11 inclusion because it involves a cost which does require justification.

12 But subject to those general parameters -- and we would want to control the insertion
13 of data quite carefully because we would want to know exactly what it is that we are
14 constructing in this process, but, subject to that, we are minded to take an inclusive
15 way forward.

16 We think that this is a harmonisation of what has been previously called the top-down
17 and bottom-up approaches. In effect one gets both. What one does not get is a form
18 of non-statistical sampling. And we ought to say that we are of course open to
19 persuasion on this but not persuaded as to what sampling, for instance to discern
20 individual pricing practice, is actually going to deliver.

21 Let me expand on that because it is important, I think, particularly for Dr Niels. We
22 don't think that one would be assisted by a form of disclosure indicating different
23 pricing strategies of, let us say, firms in a given market sector. The reason we don't
24 think that we will be assisted is because we understand very well that different firms
25 use different pricing structures that can easily be explained. And if and to extent there
26 is a black hole in the understanding of economists, why then it will have to be filled by

1 factual evidence, but not by sampling evidence; it will be filled by an industry expert or
2 by a factual expert. If you don't understand how a particular industry works obviously
3 you need to understand that.

4 But subject to that, the manner in which an industry works, the way for instance it
5 prices or structures its pricing or deals with its costs, those things are not to be subject
6 to a sampling exercise, they are to be subject to evidence as to how industry works,
7 which will then inform the opinion of the expert, who will say, well, for these reasons
8 the generic pass-on rate is wrong. And that is then supported by reference to the
9 granular statistical or the narrower statistical regression that will be conducted across
10 a part of the data.

11 So we don't see any need, beyond the general data set, to do any kind of specific form
12 of sampling. But on that, of course, we will expect a degree of push-back but we
13 thought it was appropriate that we articulate that as our initial thinking.

14 We think that this process is the key starting point in cracking Trial 2, and we very
15 much want to get beyond the argument of "let's try to get a complete agreement as to
16 what data we are going to get before we get any data". We don't really want to have
17 an argument of "don't get this data; it's going to be useless"; we want to get into
18 a situation where you can say: we've got a huge amount of data; it's in the database;
19 it's manipulable; it's there; these bits are very helpful, for these reasons; these bits are
20 completely useless, for these reasons, and this bit in the middle is of moderate
21 significance and we draw the following conclusions from it.

22 We want that data available. We don't want to be talking about how to get it; we want
23 to get it and talk about what it means.

24 So that -- and I have gone on for far too long -- that is our present thinking. We have
25 only had a brief period of time, because of train problems, to discuss this among
26 ourselves, so I'm going to invite first Mr Tidswell and then Professor Waterson to add

1 anything they want or to correct anything that I may have misspoken on. Otherwise
2 we will hand over to the barristers to deal with any housekeeping matters that arise.
3 And then we will go into the hot-tub.

4 **MR WATERSON:** Just to say that it should be clear that the data won't be gathered
5 by us, so it's the task of you experts to create and curate the database.

6 **THE PRESIDENT:** That is an entirely important point. It was, I hope, implicit in what
7 I said, but it does underline a key responsibility going forward, if we go forward in this
8 way, on the parties and particularly the experts.

9 It also underlines, I think, a key question on which we would need to be satisfied, which
10 is that a great deal rides on the ability to create a universe of data that is manipulable,
11 that is homogeneous, that can be traversed in the way that I've described. And if that
12 can't be done, then of course we are going to have to re-think altogether.

13 So I'm very grateful to Professor Waterson for that point.

14 With that, is there anything that counsel need to raise with us by way of housekeeping
15 before we proceed into the hot-tub?

16

17 **Discussion re hot-tub procedure**

18 **MR PICCININ:** One quick question about the hot-tub, which is that although the
19 experts are not being sworn, just to clarify whether you would like us to treat them as
20 being in purdah until the conclusion of the hot-tub?

21 **THE PRESIDENT:** No. Indeed, the reverse. It's a very helpful point, Mr Piccinin.
22 Thank you for raising it. But we think that there should positively be liaison between
23 experts and legal teams, not just within those teams but actually *inter se*, because we
24 are fundamentally concerned here with practicability.

25 Going forward, of course we want to have a form of process that is fair and appropriate,
26 but I think those are issues that we have well in mind. What we feel we have less of

1 a grip on, because it's very granular, is the mechanistic problems of making this
2 process or any other process actually work. And I think if someone spots a problem
3 and they want to talk amongst themselves about it, then we would very much
4 encourage that so that we can solve it, or, if it is insuperable, move on to something
5 else.

6 So thank you for raising it. Not in purdah. Do please feel free to talk as appropriate.

7 **MR PICCININ:** That's very clear. I'm grateful.

8 **MR COOK:** Matthew Cook from Mastercard.

9 Sir, what you have to some extent sprung on the experts -- and I don't mean that in a
10 negative fashion -- but you have suggested something, sir, that is rather different from
11 the work the experts have been doing and how they have been thinking about this.

12 I'm very conscious, as I'm sure everyone is, of the very limited time that we have in
13 this two-day hearing, but nonetheless I wonder whether it might be sensible to have
14 a sort of 20-minute break now, just for people to marshal their thoughts which are
15 shooting at a rather different target than I think people probably walked into the room
16 thinking they were shooting at.

17 **THE PRESIDENT:** That's entirely fair, and it's something we thought about.

18 Would that be of assistance? I'm looking at the experts now. I'm certainly more than
19 happy to rise for 15 minutes to enable you to gather your thoughts. But if there's no
20 demand for it then we won't supply it. Good idea. Well --

21 Mr Moser.

22 **MR MOSER:** Before we rise -- Philip Moser for Stephenson Harwood and Scott &
23 Scott claimants. I have listened with great interest, as have we all, to the suggestion.
24 One feels perhaps a little bit like David Kemp QC before he produced what
25 Lord Denning called the most useful reference book of our time. And if it starts now it
26 would be very useful to have the 20 minutes.

1 A thought occurred to me -- and I'm going to invite you to comment, and of course
2 I can't make you and you don't have to. I have understood the proposition as far as
3 the UK-wide and the generic is concerned. Of course, then when one comes in
4 a personal injury case to slotting the particular facts into what Kemp and Kemp
5 produce, you have your risk injury and you find the right page, and you see it's in the
6 region of 3,000.

7 At what stage and how, if at all, has there been any thought given to how that would
8 then play out in these proceedings? So after the big picture has been assessed, how
9 would the slotting in of the individuals happen? And again, I can't demand an answer
10 but it's just a thought that occurred to me.

11 **THE PRESIDENT:** No, it's very helpful, and we do have an answer.

12 Let's take insurance as an easy answer to the question you raise. We would
13 expect -- I started because it's intellectually at least for me easier to start from the very
14 generic and funnel it down to the more specific. But Allianz have already offered, and
15 we are minded to take it up, subject to the controls that we articulated, data for the
16 insurance sector. And that is both a big sector and Allianz are quite representative of
17 it.

18 Now, we would expect, provided it was homogenised and manipulable, their pass-on
19 data to be included in the general set. And one could then both insert it into
20 a regression which covers all of the data, and then one could say, well, actually, I'm
21 afraid it skews the UK PLC data and it needs to be excluded to create a generic
22 rate -- maybe that's an argument -- or if one is talking about insurance one might want
23 to focus exclusively on the Allianz data and so answer the question in regard to that
24 particular sector.

25 And subject to the question of control, we would welcome data coming in. So the
26 granularity is going to be answered by reference to the ease with which one can bring

1 in the data.

2 What we are never going to get to is the consideration of the individual case. That is
3 accepted by everyone in the courtroom. But how far one goes down to a narrow
4 subset, well, that will depend on the ease of incorporation of the data. If it is easily
5 manipulable then we will be prepared to consider really quite a small set. But we don't
6 anticipate that as being very likely. Suppose one had a sub-sub-sub-sector in respect
7 of which one had data that was manipulable in the database but it amounted to no
8 more than five cases. Well, you could do a regression, you could produce a pass-on,
9 and it wouldn't be worth the paper it was printed out on, because the uncertainty would
10 be so great in terms of the confidence interval that five data points would produce.
11 So that will be the control. What we are absolutely not sanctioning is a trial by
12 individual case. But the extent to which you can use statistical analysis to say, well,
13 the general UK rate is too high or too low for this particular sector or this particular
14 transaction type, why then if the data is in there your experts will be able to make the
15 argument.

16 So we are seeing this as facultative not as restrictive.

17 I hope that answers your question, Mr Moser.

18 **MR MOSER:** Thank you very much. We take that away, and we'll listen with interest
19 to how the experts see it.

20 **THE PRESIDENT:** I am very grateful.

21 Anyone else before we rise for 15 minutes? Very good. It's 11.00. We will resume,
22 then, at a quarter past. But if anyone needs more time we would be happy to
23 accommodate it. 15 minutes.

24 **(11.00 am)**

25 **(A short break)**

26 **(11.20 am)**

1 **THE PRESIDENT:** Thank you for listening so patiently.

2 We'll now hand over to you. We think that it is probably best if we ask Dr Niels, if you
3 don't mind, to begin.

4 The reason I suggest that is because the model we've provisionally suggested is
5 perhaps best responded to by those who feel that it is more widely away from what
6 they've been proposing. And Dr Niels, you are one of those. Dr Trento I think will
7 follow.

8 But Dr Niels, if you don't mind, would you like to kick off?

9

10 **Hot-tub**

11 **DR NIELS:** Thank you, sir. I don't mind kicking off.

12 Thank you for sharing the thoughts earlier this morning. I think I wanted to make three
13 points about that.

14 One is, it's a very interesting policy perspective, so beyond this case almost, if you
15 like. I can fully see there is always a trade-off between getting to the right answer and
16 procedural efficiency. However, for something like this on pass-on, and actually also
17 overcharges where we have parallel debates. When we advised the
18 Commission -- I led a study for the European Commission on quantifying
19 damages -- there was a similar parallel debate on overcharges. And based on that
20 debate I would actually advise very strongly from a policy perspective against going
21 down the route of having this sort of basis of -- the way you described it in the morning,
22 the actuarial approach, having a sort of a meta view of what pass-on is for UK PL and
23 then have some deviations from it.

24 And we had the discussions in relation to overcharges. There were these meta studies
25 on what do past cartel overcharges show, and can you not from there derive that if
26 the cartel is of this nature then the overcharge is X and if of that nature the overcharge

1 is Y.

2 I think most commentators at the time and over the years, most economists -- not all,
3 but many -- and other legal commentators and also the Commission did not go down
4 that route, and I think for good reasons, precisely because of this moving too far away
5 from the actual truth and giving too much into the need for procedural efficiency.

6 The second point, and it's related to the first --

7 **MR TIDSWELL:** Can I -- just to make sure I understand. I wonder whether perhaps
8 there might be a risk of analogy setting people off in the wrong directions.

9 I think principally the message that the president delivered this morning was that we
10 want to use data as reference points, supplemented by qualitative analysis where
11 that's appropriate, and the question of debate about where it's appropriate, and I'm
12 sure you are going to come on to that. I think the question of the personal injury tables
13 and how useful that is is secondary, at best, to what we are trying to do with this
14 case -- and I don't want to detract from the force of the points the president was making
15 more generally, and it came out also in the answer, I hope, to Mr Moser's
16 question -- but really what we are interested in here is having data reference points
17 that we can interpret with the benefit of your views on other qualitative factors.

18 But it seems to us that that's the better way than starting with qualitative factors which
19 don't give you any particular reference point other than a feeling, if I can put it rather
20 crudely like that.

21 So that I think is the principal message that we would try to give you. I don't know if
22 that is helpful.

23 **DR NIELS:** Yes, thank you for that clarification.

24 So indeed my second point is that the idea of working from a large data set in principle
25 sounds like an attractive idea, but you actually need data for it. So again, I hear your
26 point about the analogy but the actuarial table and the approach there is based on

1 probably tens of thousands of actual observations of what actually happens to people
2 who have these injuries, quite objective data and probably easier to interpret and
3 observe than what happens in real world markets. But you actually need the data.
4 For such a data set on pass-on you need to build the data set. And at the moment
5 there isn't any such data. And actually the data sources are, at the very top, the ONS
6 data, which is highly aggregated, and at the bottom the actual individual merchant
7 data, but there is nothing in between. There are no data sets and other things
8 in between.

9 And building up that data is actually precisely what we are trying to propose. What
10 I also try to propose in my method is, you need to get the data in a meaningful way.
11 So my third point is, I wanted to actually also at this hearing start with a reassuring
12 note that it is actually possible for economic experts to quantify merchant pass-on.
13 I've done it twice already, in Sainsbury's and in AAM, and that was all based on a
14 combination of three factors: an informed analysis of the factors that influence
15 pass-on; secondly, factual information on how merchants actually set prices and do
16 budgeting, and thirdly an econometric analysis of the relationship between prices and
17 proxy costs.

18 Now, to call that the gold standard is too pretentious, but that is for me the way how
19 one can go about assessing pass-on.

20 And of course for a case like this, an umbrella case, one needs to make pragmatic
21 compromises, and therefore the proposal that I am approaching is actually to actually
22 get to that data. Okay, you can't do it for all the thousands of claimants, but you need
23 to do it for a subset based on sectors and sampling. And the sampling is not meant
24 to sort of be representative or actually understand how an industry works, the sampling
25 is for just getting or narrowing down the number of merchants that you want data from.
26 But ultimately the actual data that you would fill the data set has to come from the

1 merchant, so you need their pricing and cost data to see how merchants
2 actually -- how pass-on actually works, and you need from them information on the
3 mechanism, on how does pass-on actually work in reality.

4 So those were the three points I wanted to make at a high level.

5 **THE PRESIDENT:** That's very helpful. Just -- I'm sure my colleagues will have
6 questions as well, but we obviously accept that we are at a more or less standing start
7 here. And we don't have a source that we can use. We are in the process
8 of constructing it. And that is what we must do. And we are very open to any
9 suggestions as to how this data set, this universe of information, can be populated.

10 What I'm troubled by is why you think a sampling approach, where one is taking
11 a statistically unrepresentative sample, why that helps. I mean, I can understand that
12 you need to be able to explain how an industry works. But if you sample a set of
13 persons, and the sample size is insufficient to extrapolate statistically from it, what
14 use is it?

15 **DR NIELS:** My starting point, what I describe as the gold standard, is, you actually
16 get all the data from all the merchants and you have all the data and then can you
17 build your data set. The sampling is purely a pragmatic compromise to say, okay, well,
18 we are not going to look at all merchants but we need to look at least at some, to have
19 some ideas of how in this sector what the pass-on picture looks like. Because without
20 sampling and without doing all the individual disclosure of merchants, what other
21 data -- maybe that's a question back to the Tribunal -- what other data do we have?
22 There is no data.

23 This is my practical proposal to actually get some data to start with and start building
24 the data set.

25 **THE PRESIDENT:** We are all in agreement that data needs to be obtained. But I think
26 where I'm cavilling is that one should describe the way in which one gets to the gold

1 standard as sampling, because unless the sampling is productive of a set of data
2 which, when you run a regression over it, will produce something which is statistically
3 reliable, well, come judgment we are just going to put your sample in the bin and not
4 look at it because it's not going to be probative.

5 **DR NIELS:** But the idea is for – again, the compromise in the debate is how many
6 merchants can we realistically sample? Ideally you would still have a large enough
7 number so that you can say it is representative of a sector. But even if you have one
8 merchant for one sector, from that merchant you do then need the really detailed data
9 so that you can do a statistically significant or meaningful, robust analysis of that data
10 and actually have a valid or robust conclusion from that data to say: this merchant at
11 least I know the pass-on rate is X, and that is statistically significant and robust.

12 And then it's all about interpreting, okay, is this then representative for the sector or
13 for the economy at large? But you need at least that data point. And that is what
14 I therefore propose as a sampling, as a realistic pragmatic way of getting that data in
15 the first place.

16 **PROFESSOR WATERSON:** You are faced with the difficulty, aren't you, that that tells
17 you about one individual claimant and what's the justification for relying on that and
18 not another individual claimant? You may have done the analysis and you have
19 an answer, but why does it tell you anything about the rest of the particular grouping
20 you might be looking at?

21 **DR NIELS:** That is absolutely correct, and therefore I would say ideally you have
22 a number of claimants in the sample for a particular sector so that you can extrapolate
23 with confidence.

24 **THE PRESIDENT:** But how many do you need to make a statistically representative
25 universe of persons in that sector? You need a hundred, don't you?

26 **DR NIELS:** I can't put a precise number on it but obviously the larger the better. It's

1 a whole debate and we have explored it with the other experts. First of all, how do
2 you cut the sectors and how do you cut – and so how you do you sample within the
3 sectors? But my question back –

4 **THE PRESIDENT:** Let's do as you are doing and start from the bottom up. You say
5 first of all you need a statistically representative aggregation of data out of the
6 individual merchant in order to work out what that particular merchant is passing on.
7 So you'll need a hundred-plus transactions just to work out that merchant's pass-on
8 rate. You are then going to need from that sector – and you are assuming that
9 merchants within the sector are homogeneous, which is an assumption that is not
10 justified, or at least not assessed as being justified at the moment. You are going to
11 need a statistically representative universe there, which from my understanding of
12 statistics has to be around the 50-plus. And you are going to have to do that for each
13 sector.

14 **DR NIELS:** Yes, so my question back is, absent that, what else can you do? So my
15 point remains, you need to build it up bottom up, and many as possible, as feasible.
16 There is a cut-off point for practicality. But without any of that, what are you left within
17 the sector? You are left with – maybe that's my question back. How else do you then
18 know anything about a sector?

19 You know more about the sector at least from one or two or three robust analyses of
20 merchants than from knowing nothing or having some industry experts opine generally
21 on how people in the sector set these prices.

22 **PROFESSOR WATERSON:** Two issues arise, from my point of view.

23 Clearly when you were working on the Sainsbury's case – I don't know the Sainsbury's
24 case in detail -- but when you were working on the Sainsbury's case in a sense that
25 was quite a simple problem compared with the problem that we have here. So in that
26 case you would get data from Sainsbury's and that's your complete sample -- or

1 population, rather. That's your complete population from which you can sample data
2 in the various areas within Sainsbury's.

3 Here, we've got a very different problem, haven't we, that there are very many and
4 quite various sectors? And that leads me on to my second question. Something that
5 genuinely puzzles me is that -- you are working on behalf of Mastercard. You are
6 obviously doing your own work, but you are working on behalf of Mastercard. And
7 Mr Holt is working on behalf of Visa. And Mr Holt takes quite a different approach from
8 you and says, well, let's look at sectors where work has already been done and see
9 what we can get from that as a way of saying, well, there are some areas where really
10 there is a paucity of data or it's difficult for this approach to work.

11 But relying on past work seems to me to somewhat short-circuit the problem because
12 that work was done not for a particular company's point of view but simply done for
13 academic curiosity if you like. And therefore it has the merit of being unbiased,
14 hopefully, in terms of the information that it provides.

15 And so that might suggest that there are certain sectors that we can say, well, we have
16 pretty good idea of what goes on in those sectors already from that set of empirical
17 work. No doubt some of it will be better than others but there will be in some papers
18 of very high quality within that. Then there are other areas where perhaps we don't
19 have anything equivalent to that at all. I'm more open to your argument in those areas.

20 **DR NIELS:** In that sense I think we are on the same page because I acknowledge
21 and accept and would put forward that in some sectors there are these studies that
22 are available and can be informative.

23 Now, I have done a bit of homework on that and it's in the joint expert statement. We
24 have identified 100. It's a coincidence that it's 100, but it is 100 studies. There may
25 be more. But if you look at them with that criterion, like can they be useful? Yes, some
26 of them can, but it's actually only for a very small number of sectors, actually only two

1 sectors according to the criteria I provisionally applied. So only a few in retail, which
2 isn't even in the umbrella claim any more, and clothing retail.

3 So yes, that is one avenue but I would say it's quite a limited avenue. So therefore my
4 pragmatic approach was, where there is information and public studies that are
5 informative for the sector in question you can use that. You don't need to do sampling.
6 But for everything else, as you say, Professor Waterson, you do need the sampling.
7 I'm just saying that is actually still the majority of the sectors.

8 **PROFESSOR WATERSON:** Right. But then there is the question of, frankly, sort of
9 importance of these various sectors. If there is a sector where you have a real problem
10 but it amounts to 1 per cent of the total transactions, then I wouldn't be too worried
11 about that. I think, you know, at some stage you have to say, well, you know, I'm sorry
12 but this process is not going to go on for ten years.

13 So then there is a question of, of those sectors, which others may disagree, others
14 may think there are more sectors which are amenable to the use of past work.

15 So it may well be that there are some areas which are firstly important and secondly
16 where there is a genuine problem, where I would be sympathetic to what you suggest.
17 But I think an earlier stage would be to try to pass those cases and to see how big
18 a problem it is. There's no -- take the example of clothing, if you say there's a lot of
19 good work done already there, then there's no point really in collecting more data and
20 reinventing the wheel in that area.

21 **DR NIELS:** I think in that sense we are on the same page in terms of it is the same
22 pragmatic approach. Let's look at it sector by sector. But where you are in a place
23 where there isn't public data you do need some way of getting some data on the sector.
24 If there's a sector where there's only a few claimants then maybe the problem is then
25 easier because you only need to have disclosure on one or two claimants and it's
26 a small sample and you have everything you need for that sector.

1 That's a matter of judgment ultimately. But the fundamental approach of getting the
2 sample and the data for at least a number of sectors -- I think it's a large number -- but
3 a number of sectors of the 17 that I've identified, that is I think in line with what you
4 see as an approach or you describe now as an approach as well.

5 **THE PRESIDENT:** No, Dr Niels, I must say, what I was reading from
6 Professor Waterson's point about financially insignificant sectors was that he was
7 wielding, entirely appropriately, the broad axe. And I think we would be extraordinarily
8 reluctant to engage in any exercise involving cost where a sector was small. So we
9 are talking about economically significant sectors, by which I mean economically
10 significant, given the claimants before us.

11 Now, just to answer, because I didn't earlier, your question about where's the data
12 going to come from. Well, we have a number of claimants who are economically
13 significant and in themselves representative of a sector. I'm thinking of insurance and
14 Allianz, who are willing to assist, where we will get data, and that will meet to
15 an extent -- the question is to what extent -- your concerns.

16 So I go back to the question that you pushed to me and say the answer that we have
17 to it is this:

18 Where one has identified a sector that is material, in other words which is not
19 susceptible to being brushed out by way of the broad brush or the broad axe, we look
20 to see not who we sample but who we have before the court now to fill the gap. And
21 we see just how much data we get there.

22 Now, is that something that has been undertaken? Has there been conversation with
23 the Allianz team to see what they can provide by way of material to assist on
24 insurance? Has there been a conversation with Asda in terms of what they can
25 provide? I mean, oughtn't we to be exploring these questions before we consider the
26 question of sampling from a sector? Because if one is talking about sampling, then

1 by definition you are talking about people who are sufficiently small not in themselves
2 to be representative of the sector.

3 And that's where my problem with sampling comes from, because if you are saying
4 we need a sample of five or six people, and you are extrapolating from that, then you
5 are making an assumption which is not necessarily warranted and is not justiciable
6 because you don't have a big enough sample that you can extrapolate from the five or
7 so you are going for.

8 So my concern about your approach is that it proves too much. It just tilts us towards
9 the unmanageable.

10 **DR NIELS:** If we get from the parties that you just identified -- or there may be others,
11 and again the conversations that -- I haven't had those, but others can answer
12 that -- but if we are talking about what do we get from those parties, then ultimately I'm
13 after the same.

14 Sampling, maybe don't put too much weight on sampling as such as some sort of
15 statistical exercise. That is purely a pragmatic way of scaling down the number of
16 merchants you want data from. If through your approach, meaningful sector, large
17 merchants, they have all the data, that's exactly what I'm also after. So the rest of my
18 approach is still very similar.

19 But what I was also getting at, the data that you do need from these parties would be
20 the details of hundreds of transactions of prices and costs so that we can actually do
21 a meaningful econometric analysis of pass-on. Ideally you would also then get some
22 qualitative facts on understanding of how these companies set prices et cetera. And
23 I think indeed in the insurance sector Allianz put forward some helpful sort of
24 principles, and that sort of information is all helpful.

25 So I think in that sense I'm after the same type of information that you are after and
26 sampling is just a practical approach of narrowing down the number of merchants.

1 **MR TIDSWELL:** I think Mr Coombs has just told us and I don't know if this is to be
2 (inaudible word) or not, but he's done an analysis of the 1286 claimant merchants,
3 excluding some I think in administration or liquidation. And he says 1080 belong to
4 either the hotel sector, that's 493 claimants, or restaurants, 587.

5 Now, I do understand that there is going to be discussions about subsectors within
6 hotels. And some hotels might be very different from others, and one can see that.
7 But broadly speaking we have something like 80 per cent of the population claimant
8 population sitting in two sectors. Is that your understanding, Dr Niels?

9 **DR NIELS:** Yes, that's my understanding, certainly of the current active claimants,
10 yes.

11 **MR TIDSWELL:** If I were being very pragmatic about this, then starting with firstly
12 testing the proposition as to whether there's any public information that you think would
13 be reliable for those two sectors. That's the first point. Then secondly if that's not the
14 case then the question is, what's the sampling -- instead of using sampling what is the
15 data-gathering approach in relation to those two sectors that is going to get us to
16 a position where we have something meaningful to work with.

17 That seems to me to be probably the most important question we can resolve today.
18 If we can resolve that question -- obviously we still have 20 per cent of the claimant
19 group to deal with and I appreciate that's probably harder as you get through the
20 20 per cent. But is it really that difficult to answer those two questions in relation to
21 two sectors and that number of claimants? That's the bit that I would like to start --

22 **DR NIELS:** No, indeed, and Mr Coombs no doubt will come into this as well, but take
23 hotels. Precisely my approach is, first let's look at what public information there is.
24 But actually the cost and price indices for hotels doesn't work because there is no
25 equivalent cost index for hotels. The index that exists is actually the prices that
26 businesses pay to hotels, not the actual costs that hotels incur when they set prices.

1 So in my view -- but Mr Coombs may have a different view -- question one, is there
2 public data for hotels? That's gross, that's not net. Therefore you again come to my
3 "okay, what do I then do with the 500 or so hotels among the claimants?" I'm saying
4 let's do a meaningful sample. Let's pick five or three or ten out of them and do that
5 more detailed but still targeted disclosure, get their prices and costs and get some
6 understanding from them on how they set prices.

7 That's how I would approach the hotel sector, for example.

8 **MR TIDSWELL:** And restaurants, your understanding about the public information on
9 that, again I think it follows from what you said before that you don't think there is public
10 information that is available --

11 **DR NIELS:** I don't think so. I mean, there is a whole debate to be had on the ONS
12 approach, the CPI, PPI, how representative is the cost index. But it could be for some
13 sectors. For restaurants I would say the cost index also isn't representative of the
14 price index, or there's a mismatch between the two and therefore it's hard to do it at
15 that very high level. But that is a matter for -- I'm not disregarding that as
16 a possible avenue.

17 But again, if that avenue doesn't work, because the PPI and CPI are not meaningful
18 or informative you are again back to you need to have a sample of restaurants.

19 **MR TIDSWELL:** So if one plays this forward, because I think certainly Mr Coombs,
20 and I don't know what Mr Holt's position is in relation to hotels and restaurants, but just
21 for present purposes let's assume they say there is public data available and they are
22 going to turn up and say that produces a benchmark of some sort, a reference point
23 of some sort. Then of course your position, and no doubt others in the room will take
24 the view, well, actually we can do better than that and here are some reasons why that
25 benchmark might not be right. And we explore hotels and the way they price or
26 whatever it is.

1 But do we ultimately need some data in order to be able to validate any argument you
2 made about that, and you are saying that you would be satisfied with giving us
3 a selection of five or ten hotels and asking us to make a decision on that. We're then
4 back at the president's point of, you know, the risk then surely must be that we say,
5 well, actually that doesn't really tell us very much and we can't accept that.

6 **PROFESSOR WATERSON:** It would be depend, I think. In one sense we are lucky
7 in Britain -- in another sense we are unlucky -- in that both of these industries are
8 largely chains, chains of hotels and chains of restaurants. These are fairly significant
9 parties. There are a few hotel groups that would cover most of the sector, and a few
10 restaurant chain groups which would cover most of the restaurant sector.

11 **THE PRESIDENT:** To what extent have you identified in the claimant class a chain,
12 let us say, of restaurants that might be approached, not as a sample but as a proper
13 representative of the sector?

14 **DR NIELS:** I don't think any of the experts has looked into that detail, and probably
15 the claimant group experts are better placed to have a better picture of who the
16 individual parties are within that. But as a general point, again, for me, you need data,
17 and therefore if you have a particular sector, whether it's a sample sort of randomly
18 drawn or just a very pragmatic, "no, we just picked the largest because they are large
19 groups", they may also not be fully representative, of course, precisely because large
20 chains may price very differently from a family-owned small restaurant.

21 So you ideally maybe in sampling you pick one big chain and one small restaurant.
22 But if we end up in a scenario where we do have a few of the big chains providing
23 data, I would say in my approach that is a really good data set to have and to work on,
24 provided again that they give us that detailed price and cost data so that we can do an
25 econometric analysis on it and give us an understanding of how they generally
26 approach pricing.

1 **THE PRESIDENT:** Dr Niels, that completely transforms the nature of the question and
2 the way in which one assembles the data. You see -- I quite understand why, but you
3 consistently go back to the idea of "let's do a sample", which immediately involves a
4 degree of shooting blind, because you don't know who you are going to be
5 approaching, because it's not been agreed, and you don't know what that person will
6 provide and you don't know whether they can provide helpful data.

7 And immediately one gets an enormous problem in terms of getting reliable data, even
8 for that individual, let alone whether one can extract and extrapolate from that
9 individual to the wider sector. It's an altogether different question if one says, no,
10 sampling is out, but if we have someone who is already a claimant who is sufficiently
11 economically large that they can be expected to have reliable data that will be capable
12 of being produced quickly and which will, because of its volume, be representative at
13 least as far as that person is concerned, well, I would be inclined to say that the
14 minnows in that sector are painted over by the broad brush and one simply goes for
15 the data that is present in the large claimant who is already there.

16 And it's really a question -- a question for Mr Moser's team, how quickly that material
17 can be pulled out. And so instead of having an enormous debate about how do we
18 sample, how many sectors are we sampling, what we do is we say let's look at the
19 weight of the claim or claims in financial terms. And we pick the big sectors and we
20 go for the big players in the big sectors, and we say, just like with Allianz, what can
21 you provide? And if you can provide it fast, and at minimal cost and in a homogeneous
22 way, why then we are happy to receive it.

23 Now, what is the problem with that?

24 **DR NIELS:** Well, subject to potential self-selection bias and where do you draw the
25 line between meaningful and large -- so meaningful sector and large enough company,
26 I mean, those are obviously practical questions. Are you going to be asking what do

1 | you have? Or are you going to put in a threshold and everyone above this threshold
2 | should be expected to have this data?

3 | Subject to that-- you know, that can create a bias in itself and it may not be
4 | representative for the minnows and how they pass on and set prices.

5 | But subject to that, I am happy with any merchant who can provide data and sufficient
6 | data that we can do a meaningful econometric analysis of pass-on.

7 | **PROFESSOR WATERSON:** Yes. After all, if we think about hotels, most of the large
8 | hotel chains have a variety of levels within the chain. You know, the ACCOR group,
9 | for example, or the group that controls Hilton et cetera et cetera, they have hotels from
10 | the quite frankly expensive through hotels which are relatively low budget. And
11 | similarly with restaurant chains, there are lower chains which cover the whole of the
12 | sort of you know, pasta, pizza et cetera areas, and sometimes you see, as with hotels,
13 | the actual brand of the specific hotel or restaurant changing but it's still the same
14 | group, it's just they think we'll try a different formula here.

15 | And similarly with restaurants like for example M&B who own a range of restaurant
16 | brands, from Harvester to the ones that you don't think are owned by M&B at all
17 | because they are called -- I forget what they are called now -- the country inn sort of
18 | thing.

19 | So I think, pragmatically, if amongst the claimants there are claimants of that nature
20 | then they are not just providing data about the top end of the sector but also about the
21 | middle end of the sector, the bottom end of the sector. So they can be very
22 | informative, assuming that they have the data. But that is something that the claimants
23 | would have to pursue in short order.

24 | I know from experience some years ago at the Competition Commission where they
25 | have six months to examine mergers, it turned out that six months meant the data had
26 | to be found very quickly in order that it could actually influence the decision. And

1 I think that's our concern.

2 **THE PRESIDENT:** Dr Niels, we are going to move on. I'm going to give everyone an
3 honorary doctorate because I can't differentiate between those who have or haven't.
4 So Dr Niels, do you have anything more to say before we move on to Dr Trento?

5 **DR NIELS:** No, I'm happy to chip in later into the debate.

6 **THE PRESIDENT:** That would be very helpful. Thank you.

7 Dr Trento.

8 **DR TRENTO:** Thank you, sir.

9 Just following up on the discussions had with Dr Niels, it's true we have many, many
10 hotels. I think it is more than five hundred. But five hundred of them only belong to
11 three groups. So that would be Kew Green, Hilton and De Vere. And so that I think
12 is something that is relevant to the possibility of extrapolating the results for one or a
13 few hotels to the other hotels.

14 Can I also discuss very briefly the issue of representativity. I think here, as
15 Professor Waterson was saying before, we have a complex exercise because instead
16 of having only one claimant for which we can estimate passing on using the data for
17 that claimant, we have more than 2,000 claimants. And then the question is, how do
18 we estimate passing on for these 2,000 claimants?

19 One possibility would be to estimate passing on individually for each of the 2,000
20 claimants. But that is obviously impossible. The other possibility at the other end is
21 to estimate one passing on in general that applies to all of the claimants. And that is
22 workable but it's not precise, because we would be attributing a passing on,
23 an average passing on, to claimants that may have pass-on rate between zero per
24 cent and 100 per cent and maybe we estimate an average passing-on of 60 per cent
25 and we applied indiscriminately to all of the claimants. So that is not possible.

26 So we have this trade-off that we need to group, to class, the claimants into groups.

1 And the groups can be called sectors or subsectors but the groups should have the
2 characteristics that all the claimants within the group are likely to have a similar degree
3 of passing on. And the trade-off is that if we go broader, if we define a broader group,
4 then this is more workable because we have a smaller number of groups, but then we
5 lose precision.

6 And I would like to give an example. So in the Merricks claim there is the definition of
7 entertainment sector. And the entertainment sector includes cinemas, restaurants,
8 betting companies, video game companies. And if we estimate passing on for the
9 entertainment sector as a whole, I think it may be fine for the Merricks claim because
10 they are looking for a passing on for the whole UK economy. But for the claimants,
11 imagine we have a passing on for the betting companies that is 10 per cent, and a
12 passing on for the cinemas that is 90 per cent. We estimate an average of 50 per cent
13 and then we apply to the betting companies. That is an overestimation of the passing
14 on, an under-compensation for the betting companies. And then the contrary would
15 apply to the cinemas.

16 So somehow there is this trade-off between workability and precision. And we are
17 proposing a methodology to address this trade-off that I think goes back to what was
18 discussed before, which is some of the claims are financially small. So what we are
19 proposing to do is, we are proposing to define relatively narrow sectors, such that for
20 instance we have cinemas and then we have restaurants and then we have betting
21 companies in the example of entertainment. And then we have video games. Then
22 we see how much of -- we order the groups from the highest share of the claim to the
23 lowest share of the claim.

24 And what we find is, we look at the top ten or top 15 sectors and those account for
25 between 80 and 90 per cent of the claim, and around 90 or even more per cent of the
26 number of claimants. So if we want to get the data from the claimants and estimate

1 passing on for some of these sectors I think that would be feasible. And it would
2 estimate passing on as accurately as possible for those sectors that account for the
3 vast majority of the claim.

4 And then the nature of the exercise we are doing is that we always will have some
5 imprecision, always, because for instance if we estimate, as the example I was giving
6 before, if we estimate the passing on for a broad entertainment sector then the
7 imprecision is how do you apply the passing-on to the many subsectors that are within
8 that broad sector.

9 So the methodology we are proposing is that we recognise that there is going to be
10 some imprecision and we somehow confine the imprecision to claims that account for
11 a smaller share of the claim and a small share of the claimants. So this is
12 a methodology that we are proposing and then we are very happy to discuss that with
13 the other experts and we are willing to take feedback from the other experts and we
14 will find the methodology. But the idea is there to concentrate our efforts on the sectors
15 or subsectors or groups, whatever we want to call them, that are more relevant for the
16 claim, and these are the 90 per cent of the claim and the number of claimants.

17 This is one thing that I wanted to say. Then going back to the proposal from
18 the Tribunal of having a data set or database that includes data from very different
19 sectors, I think it may be feasible. Just to manage expectations, it is not the case that
20 the same econometric model can be applied indiscriminately to all sectors. So if I do
21 an econometric model to estimate the passing on of insurance companies, that model,
22 if I then add to the insurance companies another sector, which may be hotels,
23 restaurants, something else, that model may not work. And you can test that with the
24 data. You will see the model doesn't work because it creates some problem with the
25 data.

26 So it's not the case that we have one model and then one database and then we apply

1 the same model for a different database and then we get different answers. This is
2 something I think it's important to understand from the outset.

3 **PROFESSOR WATERSON:** But at the same time, I think -- I mean, in a sense the
4 ball is in the claimants' court to supply the data that they have. But then you need to
5 allow the other side to interrogate that data.

6 **DR TRENTO:** I would agree with that. And can I also add that some of the sectors
7 that we have identified in the top ten and top 15 by amount of claim and number of
8 claimants, some of these sectors are relatively small in terms of number of claimants.
9 Which means for instance that we have betting, that accounts for 17 per cent of
10 the claim, there is only one group, which is Bet365, and there are four entities. So we
11 can actually get the data from the claimants, and that accounts for the whole subsector
12 of betting.

13 We have video games, which accounts for 7 per cent of the claim. There is Sony
14 Interactive Entertainment, same thing, we can get the data from the claimants. And
15 that is the estimation for whole subsector. Then we have airlines, which is also only
16 two claimants. And then we have two or three others, but we only have between one
17 and four claimants. So I think, you know, that goes in the direction of saying that for
18 some sectors it makes sense --

19 **PROFESSOR WATERSON:** So that points to specific identification of the parties from
20 whom you are going to get the data --

21 **DR TRENTO:** Yes, exactly.

22 **PROFESSOR WATERSON:** -- and an assurance that they have appropriate data.

23 **DR TRENTO:** Yes, exactly. And we don't have the problem of extrapolating the
24 results to other claimants. So I think that is convenient.

25 The other thing I wanted to say is, I don't see any problem in aggregating data that
26 come from the claimants. I don't know whether this is an intention of the Tribunal but

1 I see problems in aggregating data that come from the claimant and then
2 publicly-available data that can be CPI or PPI or any of the other, you know, publicly
3 available data.

4 And the reason for that is, the beauty of the claimants data is that it may come
5 transaction by transaction, so we would have information from the price and cost and
6 characteristics of each transaction and that gives us a lot of variability in cost and in
7 price, and that allows us to estimate, you know, more precisely the effect of
8 an increase in cost on price, so more precisely to estimate passing on.

9 I wouldn't know how to kind of homogenise these in a way that is compatible with CPIs
10 and PPIs, because the only thing that comes to my mind is because the CPI and PPI
11 may come at the monthly level or the quarterly level one could aggregate all of these
12 transactions together, for instance for one airline, all of the transactions that take place
13 in one month or in one quarter and then get an average, I don't know, price or revenue
14 and then get an average cost, for instance.

15 But by doing this we would be losing a lot of variability in the data, which is exactly
16 something that we would like to have.

17 **PROFESSOR WATERSON:** Certainly. What I was toying with the idea of is, in
18 a sense, just as you get within lawyers a group who are within a confidentiality ring,
19 I think you might want the same, in a sense, confidentiality ring amongst the
20 economists. In other words, to assure the claimants that their data is not going to be
21 used next month by someone who they happen to have as a client, you know, subject
22 to that sort of assurance, then I think the ball is very much in the claimants' court to
23 produce the information that they -- and to work on it themselves but to allow the other
24 parties also to work on it.

25 **DR TRENTO:** I fully agree with this. I think maybe there may be some very brief
26 additional work on agreeing on which sectors are relevant and which sectors we

1 should be getting the data, from which claimants. But I agree with you that it's our job
2 to get the evidence.

3 **PROFESSOR WATERSON:** So to be practical, presumably your client, Dr Niels,
4 would know which were the predominant sectors as far as Mastercard is concerned?

5 **DR NIELS:** I think between -- well, there is the question about the merchant claimants
6 who are currently in the claim and then there is the economy-wide. But I think between
7 the parties, yes, we can get a picture of which are the predominant sectors.

8 Again, as I said earlier, someone, it may be the Tribunal, needs to draw a line
9 somewhere and say this is significant and this isn't. And also maybe within each sector
10 then as well, like here are the significant companies and here are the minnows.

11 Of course, there may be a couple of sectors, as Dr Trento has said, where the large
12 players cover the entire sector, but I think again it's probably one or two or three, but
13 there are still many sectors where you do have lots of different parties.

14 **PROFESSOR WATERSON:** Yes.

15 **DR TRENTO:** Just to say that Dr Niels raised a very important point, which is what is
16 financially relevant for the UK economy may not be the same as for the merchants
17 claimants. So actually we heard that merchants are quite heavily concentrated in
18 a few subsectors, and so some of the sectors in the economy are relevant for the
19 Merricks claim because they are relevant for the UK in general but they are not
20 relevant for the claimants because no claimant is operating in that sector.

21 **PROFESSOR WATERSON:** Yes. And again, some companies have put themselves
22 forward as claimants. Others have stayed their claims on the basis that they will
23 accept whatever the outcome is. So I think that mismatch is not such a problem.

24 **THE PRESIDENT:** Dr Trento, let me just gauge the extent to which you are unwedded
25 to a sampling process and amenable to a 'let's pick a big claimant in a sector' process
26 to provide data. Let's suppose that we have a hypothetical sector comprising 50

1 | players, most of whom are present in the claim but some who aren't. But 50 is the
2 | number I'm plucking out of the air. You are not suggesting that we sample more than,
3 | what, three or four?

4 | **DR TRENTO:** Correct.

5 | **THE PRESIDENT:** Okay. So let's suppose that within the sector of 50 there is one
6 | who is larger than the others who happens to be within the claimant group and who is
7 | willing to assist. What's the harm in zoning in on that person and extracting the
8 | material they have and treating them as a representative of the sector as a whole?

9 | **DR TRENTO:** The harm goes back to the trade-off. Ideally I think we would do the
10 | analysis for each of the 50 claimants but we cannot do it so we need to choose
11 | a sample.

12 | **THE PRESIDENT:** Sorry to interrupt, but why do you say we need to use a sample,
13 | because a sample is only helpful if it is representative of the whole. And you don't
14 | know that.

15 | **DR TRENTO:** I agree we don't know that, but I think there are ways that we can
16 | reduce the risk that the sample is not representative. One way would be for instance
17 | to pick the claimants from which we get the disclosure randomly, and then it's
18 | possible -- imagine that these 50 claimants they have range of passing on that goes
19 | from, I don't know, 40 per cent to 60 per cent, and it is possible that by randomly
20 | picking three claimants we are on the 60 per cent end.

21 | And then there's going to be an imprecision because we are estimating 60 per cent
22 | and then we are applying the 60 per cent also to the claimants that are 40 per cent
23 | only pass-on, but ex ante we don't know -- there is no bias, say, so ex ante we don't
24 | know whether we are going to be on the high end on the average or at the low end.
25 | So this is the uncertainty I think that is inevitable in this kind of exercise.

26 | One other possibility, which I am open to is to send out a questionnaire -- possibly not

1 the one that you have seen because I think the current draft questionnaire is a bit
2 complex, but to send out a questionnaire to these 50 claimants and see whether there
3 is anything that they -- you know, that some claimants may be outliers in respect of
4 some of the factors that may be affecting passing on, and then use the response to
5 the questionnaire to sample the three claimants -- or four or five claimants that we
6 think are more representative of the whole group.

7 With the questionnaire, the sampling is going to be more precise possibly, but even
8 without the questionnaire, just picking randomly three to five claimants there is no
9 ex ante risk -- sorry, the risk is there, but there is no ex ante reason to think that we
10 are biased in the estimation towards and overestimation of passing on or
11 an underestimation of passing on.

12 **THE PRESIDENT:** You are never going to be able to know because you are not going
13 to be testing any of the others and you won't be able to robustly assess from a mere
14 sample of three whether the extrapolation is robust or not.

15 **DR TRENTO:** Correct. But can I add one point, which is if we take the
16 publicly-available data that is not a solution because, for instance, as I was discussing
17 before, we take the entertainment sector and then we estimate an average passing
18 on, that is not -- I mean it may go well for the Merricks case but it will not go well for
19 the claimants' case. I will not repeat myself but I think --

20 **THE PRESIDENT:** Dr Trento, don't misunderstand me. My alternative was not to
21 default to a generic informational source in this example, it was to jettison sampling
22 and to pick the largest willing claimant in that sector for the information.

23 Now, I fully accept that there is a degree of extrapolative uncertainty there too. But
24 since it exists in the sampling basis, why go through the whole delay and cost of
25 a questionnaire and then a sample based on the questionnaire adding months that we
26 do not have to the timetable to trial, instead of saying, well, we have a large and willing

1 claimant, with the information, able to produce it?

2 We know, from our experience in Trial 1, that if you send out questionnaires with
3 a fairly high strike rate you get inaccurate answers that are actually are not helpful, not
4 because anyone's trying to mislead but because the questions are actually difficult to
5 answer correctly.

6 So if we have -- and I'm using Allianz as the sort of example, but there will be others.

7 If one has someone who is stepping up saying, "Look we are a material player in
8 a material sector, and we want to help", well isn't that the answer? Why is sampling
9 better, given that you are accepting that there is an extrapolative uncertainty there
10 too?

11 **DR NIELS:** If I may just answer on this question, actually the merchant questionnaire
12 then -- and the experts have developed the draft, but at its simplest it is actually a very
13 basic and simple questionnaire. And one of the main things that I envisage getting out
14 of the questionnaire is actually the allocation of merchants to sectors. I think that
15 exercise you would have to do anyway regardless of the approach -- to say: where are
16 the sectors, where are the big players? You could think, well, the claimants can do all
17 that homework themselves. And it is true, a lot of the merchant questionnaire one
18 could think, well, the claimants can do all that homework themselves by speaking
19 directly to their claimants.

20 Ultimately you have to get the same answers. You have to have a categorisation of:
21 who are these claimants, which sectors are they in and roughly how big are they?

22 So in that sense my sampling approach is just the end of that but it's the same -- if we
23 comprise the same input from a questionnaire as picking the largest in a sector.

24 **THE PRESIDENT:** We will know -- I mean insurance may be a bad example, but we
25 are going to be able to work out without the benefit of the questionnaire who is
26 operating in the insurance sector and who is an appropriate target for provisional

1 information without a questionnaire.

2 **DR NIELS:** You would think so. I think that actually -- and probably for many that's
3 true, but there is a reason why we actually have the questionnaire. Also between the
4 legal teams and experts there is actually still some basic ordering and categorisation
5 to be done. I fully see that that can be done quickly and differently, maybe not
6 a questionnaire but maybe ask the claimants' group directly to categorise this.

7 **PROFESSOR WATERSON:** One way round would be to reverse that process, that
8 is you find the willing claimants, you get them to provide data, people are able to work
9 on that data, you then look to see whether there are holes in terms of, you know,
10 actually we thought they were in this sector but they're in that sector and we don't have
11 anyone else in that sector, et cetera.

12 **THE PRESIDENT:** Dr Niels, that does seem rather a sensible suggestion. In other
13 words, instead of debating in the abstract what is the best way of doing something,
14 when actually the best way of doing something, questionnaire followed by sample,
15 isn't that good, let's start with what we have, and work out once we have it just how
16 dire the situation is. My sense is that if we pick the big players, not only are we more
17 likely to get robust data from them, because larger entities are better organised than
18 small entities, you will also get range because large industries, like the restaurant and
19 hotel chains, have a variety within them, and we'll see that the universe of data then
20 might have very clearly identifiable gaps which we can then fill from a position of
21 strength, rather than, as I say, approaching matters from a blank sheet of paper which
22 has all the horrors that a blank sheet of paper has; namely, one doesn't know the
23 nature of the problem one is going to play with.

24 **PROFESSOR WATERSON:** It's the glass half full versus the glass half empty.

25 **DR NIELS:** That is ultimately the same answer because I do think that you do -- but
26 let's put it -- this for the claimants. If they could go through that exercise of speaking

1 to -- let's not call it a questionnaire but you are speaking to all their parties, get their
2 data or get a sense of what data they have, one caveat is that you mentioned the term
3 willing, I don't know, I would -- my inclination would be to be a bit more forceful than
4 that and say, "Tell us what you have", not willing or not, because then you get another
5 self-selection bias. But provided that exercise can be done quickly and it generates
6 the overall picture, "This is what we have", well, that's exactly what we wanted to get
7 out of the questionnaire again. So I would be happy with that.

8 There is a risk, though, that after that exercise we are still left with -- well, no, this isn't
9 enough or this isn't good enough, but we may not be. I don't think there's a saving in
10 time very much but it is another way of doing that, I accept that.

11 **THE PRESIDENT:** Dr Niels, half full/half empty glasses are mental states. What
12 I would hope is that if we go down a focused approach, in other words identifying the
13 data that could be got fast and at minimal cost, one ends up a glass that is not half full
14 but let us say 75 per cent full, then -- it is not a mental outlook but simply a response.
15 Then the 25 per cent emptiness seems to me to be a prime candidate for ignoring
16 under the broad brush regime that we are prepared to exercise.

17 So it does seem to me that if the outcome that we can strive towards is a collection of
18 the low hanging fruit, where there is data, a willingness to provide it from a reliable
19 source, then those who are unhappy with the 25 per cent emptiness that we end up
20 with would have to have a good reason for saying: we need to further disrupt the
21 process going forward. Now we are not saying no. What we are saying, though, is
22 that it will need to be justified.

23 Going the other way round, by saying, well, you get nothing, literally nothing, in terms
24 of data, until one has ticked all the boxes about an answer to your questionnaire,
25 an appropriate sample that is representative and unbiased -- if you want to take
26 decades over it, that's the way to do it.

1 So what we are really pressing you on, and I hope not unfairly, is that this use of
2 the word "sampling" is a profoundly dangerous one in the task that we have to ensure
3 that by the end of this year -- and we are already a third of the way through January
4 of this year -- that by the end of this year we are in a position to try this very complex
5 matter? And the information is only the starting point.

6 **DR NIELS:** I think there is a lot of common ground here that ultimately we do need
7 the information from the merchants -- that was actually my main concern and what you
8 are saying alleviates that concern, because if you do get information from these
9 merchants who are willing and able to deliver, that is a good way of getting data,
10 I absolutely agree. The only warning sign I would just put up here is what I said about
11 the self-selection, it has to be more than willing, and maybe of the 2,000 merchants --

12 **THE PRESIDENT:** Why are you worried about self-selection?

13 **DR NIELS:** It felt a bit sort of "are you willing to provide" and they could say no. But
14 that's not a matter for the economic --

15 **PROFESSOR WATERSON:** Well, make the question more along the lines of "do you
16 have" and "can we therefore have"?

17 **DR NIELS:** Yes. Potentially I would say, I'm hoping actually of the 2,000
18 claimants -- I don't know, I'm just plucking this out of the air -- there are several
19 hundreds among them who are serious reasonably large businesses who of course
20 will have data on costs and prices. But are we then saying all those hundreds of
21 companies need to -- I'm happy with that because we can then properly analyse, we
22 have lots of data. What I'm getting at -- you would still then at some point, but maybe
23 after the exercise, draw the line somewhere and pick -- well not using the word
24 "sample", but pick a subset of those people who are willing and say, "Well, now you
25 provide that data".

26 **MR TIDSWELL:** As long as we are talking about (inaudible). The whole discussion

1 is about where we draw the line.

2 Dr Trento, I'm looking at your summary on page 4004 in the J bundle. But this is your
3 ten industries, I think. You have given us the number of entities and the percentage
4 MIF(inaudible). And there are only four industries in which this is a problem, as far as
5 I can see, because most of them have a very small number of entities in the
6 population, and one would have thought it was pretty easy to decide firstly to know
7 what was in there and who they were, and secondly to decide whether there was any
8 need to produce data from them, particularly by reference to what might be
9 publicly available.

10 So the problem arises with hotels, which we've talked about a bit, fashion, which we've
11 not really talked about but interestingly I think was the area where Dr Niels thought
12 there might be some public information available that was useful. Restaurants we've
13 talked about a little bit. And then there is the supermarket and convenience stores
14 and pet products we've talked about.

15 Now, without wanting to get into the detail of all those, it seems that -- and perhaps
16 there's a slight variant on what has been suggested by the Tribunal just now. If there
17 was a proposal from the claimants that (inaudible) in relation to all of those categories
18 but particularly the reference to those bigger categories, what data seems to be
19 available to fit with the President's description of a process. Once that's available, and
20 presumably the lists of the names of the companies are available, if other parties have
21 things to raise about that they can raise it straight away. They don't have to wait for
22 the data to raise them. If we have to have a debate about whether we ask you to look
23 at small hotels based in provincial areas, then we will have that debate.

24 In the meantime, without wanting to create too much of a burden on one party on this,
25 it does seem as if it's a very obvious place to go to ask you to do that exercise of
26 digging into all those categories, but most importantly into the four with large claimant

1 numbers to come up with some sensible answers about where one might get some
2 data that was representative. Does that sound like a sensible --

3 **DR TRENTO:** Absolutely sensible, and we are very happy to do the exercise.

4 **THE PRESIDENT:** I think that is an extraordinarily helpful exchange.

5 I think it is Mr Moser, really, who needs to produce, let us say, a list of certainly no
6 more than five -- probably less, but let's say five -- claimants, entities, who would
7 be -- and I'm going to continue to use the word "willing". That's not because
8 the Tribunal is disinclined to exercise its powers to compel material, but we are keen
9 to have those who are keen to help us be permitted to do so. Obviously we will
10 exercise a control against the dangers of self-selection, but at the moment for my part
11 I can't see a problem. If a big player in let us say hotels was to say, "Out of the 507
12 entities, I'm a significant player and I'm willing to play", then why look a gift horse in
13 the mouth? I appreciate it didn't work out very well for the ancients, but we will inspect
14 the Trojan horse a little more carefully but nevertheless accept it, subject to that
15 inspection.

16 So can we get a list of five players who are willing to play who will cover the bulk of
17 the different sectors in play, we will leave out the minnows for later discussion, and
18 then maybe we have a template which either shortcuts or at least postpones the
19 sampling question and the questionnaire question and cuts straight to: what data do
20 the economists need from these people and how quickly can they provide it?

21 **MR MOSER:** Yes. Also, in some sectors there won't be five. For instance if you look
22 at gambling, it says four. That's all one group, Bet365.

23 **THE PRESIDENT:** Indeed.

24 **MR MOSER:** So it could be five -- I'm just being given a note. I took you to be saying
25 around five per sector.

26 **THE PRESIDENT:** No.

1 **MR MOSER:** Oh no, one per sector.

2 **THE PRESIDENT:** Five in total. You will jettison for the moment the smaller sectors.

3 I'm not making any kind of order. What I'm trying to do is get a sense of what

4 low-hanging fruit there is out there and how much of the totality of the claim those

5 providers of the low-hanging fruit cover.

6 **MR MOSER:** Indeed. What I propose to suggest is that we give you a beauty parade

7 of the largest – certainly in the top five. If we can give you options for the bottom five,

8 we could do that as well and then you could have look at that. It will be a rough

9 indication.

10 **THE PRESIDENT:** Mr Moser, that's fine. I mentioned five because I don't want it to

11 be – because I would like an answer around 2.00, if we can, on this. So there's

12 a reason for the limit. As I said right at the beginning, if you produce a list of willing

13 providers of information who can provide homogenised information at low cost and

14 low effort, then our inclination is to say in it goes.

15 **MR MOSER:** We will produce what we can by 2.00.

16 **THE PRESIDENT:** Let's get an idea of what low-hanging fruit is out there and how

17 quickly we can fill our glass to beyond the half empty into the 75 per cent full because

18 at that point we begin to feel much more comfortable about the process. We are

19 actually talking turkey here in the sense that we are talking not about who do we

20 approach and hopefully they'll be able to provide us information if they have it, we are

21 actually talking about people who can assist and who are willing to assist. And

22 a willingness does matter because I'm expecting these entities to have to engage with

23 a lot of questions about what it is they hold in terms of data pretty quickly. We'll talk

24 timetable tomorrow, but this is going to have to be done, in terms of the data compiled,

25 by mid-spring at the latest. And mid-spring is close.

26 **MR TIDSWELL:** One other point to clarify, I think we are just talking about data and –

1 **THE PRESIDENT:** We are only talking about data.

2 **MR TIDSWELL:** So I didn't think there is any presumption that people who are
3 participating in this process would be obliged to answer further questions other than
4 about the data. I appreciate Dr Niels has made a case for that and that obviously
5 needs to be discussed, but I wouldn't want there to be any misunderstanding that at
6 the moment we are opening up Trial 2 to the participation of all of these companies as
7 active disclosing or witness parties and therefore being cross-examined, because that
8 obviously would have significant implications. I think all we are talking about at the
9 moment is the collection of data, just so we are all clear about that.

10 **THE PRESIDENT:** Again, that is a point that is extremely well made. We are talking
11 about populating the universe of data that I started with. Instead of adopting a frankly
12 convoluted and, as I see it, not particularly helpful process of sampling, we are
13 identifying those who we think have got helpful information to provide, who will provide
14 the data and nothing more.

15 Let me not only endorse but add to Mr Tidswell's point, we are talking exclusively about
16 quantitative data. Qualitative data about how markets operate, that sort of thing, is
17 something that we are not at the moment talking about. I can quite understand that
18 there may be a need on the experts' part to understand how an industry works so that
19 the data can be better interpreted. But we are not talking about that at the moment,
20 we are talking purely quantitative econometric data that will be used for regressions
21 or other forms of statistical analysis.

22 That is very helpful, Mr Moser. I'm sorry to have thrown that at you at 12.40, but I do
23 think that the sooner we get a grip on what practically can be done, rather than
24 debating a theory of how to do this in the most perfect world -- I'm not a great fan of
25 Voltaire, let's try to do it practically.

26 **MR MOSER:** That's understood.

1 **THE PRESIDENT:** I am grateful, Mr Moser. Thank you very much.

2 **MR JONES:** Sir, just very briefly, if I may. Tristan Jones for Primark. I think you have
3 this point well in mind, but just to remind you that there is some self-identified
4 low-hanging fruit here because my client has said that they would wish to provide data.
5 Obviously they are a very large company in whatever sector they might be placed in.
6 My learned friends have said similar things for Ocado and for Allianz.

7 I also will come back after the adjournment with information about the kind of data that
8 we can provide so that that could be factored in too.

9 **THE PRESIDENT:** That would be helpful. It may be, because I do want us to finish
10 the economists today, that others apart from Mr Moser will have their time tomorrow.
11 Your intervention is extremely timely, Mr Jones, and I'm very grateful. Obviously we
12 are willing to look to the low-hanging fruit beyond Mr Moser. It's just that Mr Moser
13 seemed to us, or at least to me, and I say this in the nicest possible way, to be the
14 source of the problem rather than you. I would convert problems into the solution by
15 slicing away the question of sampling and making the answer: who has data, who is
16 willing to provide it?

17 Your clients, and Allianz and the others, are of course already putting your heads in
18 the noose, if I can call it that way, and I'm very grateful for that approach. Therefore,
19 we don't really need to ask you, , these questions now. But we certainly will want to
20 understand what you can provide, how quickly can it be provided for, and whether you
21 actually know what it is that the economists are going to need. That is in a sense the
22 fundamental question and it may be that overnight the economists can articulate more
23 clearly and more party-specifically what it is they would want by way of a data
24 dump -- by effectively yesterday. I mean we are very much at the business end of
25 having to move quite quickly in order to get this case up for trial.

26 So thank you very much, Mr Jones.

1 **MR JONES:** Thank you, sir.

2 **MR SIMPSON:** Sir, just one point, if I may, Mark Simpson for Merricks.

3 **THE PRESIDENT:** Mr Simpson.

4 **MR SIMPSON:** We have been talking about the active claimants in essence, but
5 Professor Waterson mentioned the stayed claimants as well and the fact that that
6 would lead potentially to some elision between the discrete nature of the sectors
7 involved in the merchant claims and the narrow conglomeration in some sectors and
8 the wider exercise necessary for the stayed claimants.

9 It's important in our submission to remember there are a significant number of stayed
10 claimants who will be bound by the outcome per your ruling in October and who are
11 obliged, if ordered, to give disclosure. That's relevant to two factors, we would say.
12 First, it supports the UK PLC approach, or UK retail sector PLC approach, you
13 mentioned in your opening remarks. Secondly, it means there may be potentially
14 some low-hanging fruit there that the economists may be able to use where, even if
15 not willing, they could be ordered to provide disclosure which might help with the
16 exercise.

17 **THE PRESIDENT:** Mr Simpson, that's fair. First of all nothing that we have been
18 saying about claimant specific data extraction should derogate from the importance
19 that we attach to UK PLC generic data. So you can take reassurance from that.

20 So far as the stayed claimants are concerned, it does seem to me, at least at first
21 blush, that if one has an active claimant who is willing to assist and who is good
22 enough, then we would be rather reluctant to disturb the slumbers of someone who is
23 stayed, no doubt stayed having considered matters. Of course I appreciate we have
24 a compulsory jurisdiction, the stays are in a standard form to enable that to happen.
25 But I repeat, these claimants have accepted that they are going to be bound without
26 participation for a reason, and that reason I anticipate is so that they avoid the costs

1 of involvement. And I for one would be unkeen, unless there was a good reason, to
2 disturb them with a disclosure request which could be dealt with as well by reference
3 to the production of data by active claimants.

4 **MR SIMPSON:** I understand why it would be a last resort to rouse them from their
5 slumbers, but it is there if one finds a gap.

6 **THE PRESIDENT:** It is there, of course. It seems to me that that would be a point
7 where, having extracted the data that we are talking about now, one discovers a gap
8 which is so significant that fairness would require us to explore it. If in that
9 circumstance there was no option but to go to a stayed claimant, why then of course
10 we would.

11 **MR SIMPSON:** Yes. I'm grateful.

12 **THE PRESIDENT:** Thank you.

13 **MR PICCININ:** One similar intervention, which is not about the claimants at all.
14 I recognise that in Trial 2 we're really dealing with pass-on insofar as it is relevant to
15 quantum. Visa has made the point at every one of these hearings and so I ought to
16 do it again, just to remind everyone that pass-on is also relevant, at least on our case,
17 to exemption.

18 The reason why I mention that is that when you get to the exemption stage, the
19 relevant pass-on is to merchants -- or from, rather, merchants as a group, as in all of
20 them, not the particular claimants who are in front of you. I just mention that because
21 of course if Trial 2 can be conducted in a way that provides an answer to that question
22 as well, at the same time, that will save us the trouble of having to go and answer that
23 further pass-on question again separately in trial 3.

24 So it's really just to make sure that, by focusing quite properly on the claimants, we
25 don't take our eye off the wider ball which is that we also need to know what the
26 economy-wide pass-on rate is.

1 **THE PRESIDENT:** Thank you, Mr Piccinin. One spends more time on the problem
2 areas than on the non-problem areas. The reason we are spending time on sampling
3 and claimant-specific data extraction is because that is the roadblock.

4 **MR PICCININ:** Yes.

5 **THE PRESIDENT:** As I understand it, the Coombs and Holt data is first of all not
6 regarded as unhelpful by anyone, easy to obtain or relatively easy to obtain, and we
7 know how we are going to do it. So the reason we are not talking about it is because
8 I'm not sure there's much to talk about.

9 **MR PICCININ:** No.

10 **THE PRESIDENT:** On the other hand, what is causing quite literally not just months
11 but in excess of a year's delay is sampling.

12 **MR PICCININ:** Yes. I'm grateful for that indication.

13 **THE PRESIDENT:** Your point is well made, but I don't think you should worry. Indeed
14 I think you should take some comfort from the fact that we are not talking about the
15 Holt/Coombs exercise, we are talking about something else, because it's showing that
16 that end of the spectrum is rather unproblematic.

17 **MR PICCININ:** I understand entirely and I hoped that was the case, but a useful
18 clarification.

19 **THE PRESIDENT:** I'm grateful. Dr Trento, had you anything more to say?

20 **DR TRENTO:** Only a clarification, which is that the table that is in the joint experts'
21 statement that was referred to before, that is based on only Stephenson Harwood and
22 Scott & Scott claimants, it does not include Ocado, Primark and Allianz. Allianz is not
23 in the top 10, it would be in the top ten or top 15 if it were included. Ocado and Primark
24 could be there in some of the already identified sectors.

25 The second one is that the table is not geographical, it is not limited to the UK
26 claimants. So it is including also claimants that are not operating in the UK.

1 I understand that this is an issue that is going to be discussed in the CMC. But if there
2 was a decision that the geographical scope is only UK, then the table would change
3 slightly.

4 **THE PRESIDENT:** I'm very grateful. Having been dancing at the sampling end of the
5 spectrum, we should hear from Mr Coombs next I think. I will promote him, if he hasn't
6 already been, to Dr Coombs. You will probably straddle the short adjournment. Then
7 we'll move on to Dr Holt.

8 Dr Coombs, if you have something to say, now is the time.

9 **MR COOMBS:** It is actually Mr Coombs.

10 **THE PRESIDENT:** I will promote you because I'm not going to be able to remember
11 titles with so many talented economists before me.

12 **MR COOMBS:** What I was proposing to do was to talk about my proposed approach
13 and how I propose to implement it, and along the way identify areas of agreement and
14 disagreement between the experts. Given what you said at the beginning this
15 morning, Mr President, I think a lot of what I've said might be rather redundant
16 because it would be essentially repeating what you've already said, because it seems
17 to me there is a great deal of correspondence, if not complete correspondence,
18 between what I was proposing and what you were setting out this morning. So I will
19 try not to be repetitive in that sense and maybe just focus on a few points.

20 The first point is that my approach, I think as you have already referred to, is essentially
21 a top-down approach, to calculate a pass-on rate by looking at data on prices, data on
22 costs and, using a costs proxy, calculate what the actual pass-on rate that we observe
23 is. What I'm not proposing to do is an investigation, a sort of forensic investigation, of
24 how individual companies went about setting their prices, what their pricing policies
25 were and so on. The reason for that is it seems to me that that more forensic exercise
26 is less likely to be helpful.

1 It's not clear to me how that evidence from different companies -- who no doubt have
2 different policies explained in different ways, it's not clear to me how that evidence
3 really could be combined and assessed in order to answer the question that we have
4 in front of us, because the question we have in front of us is a numerical question, it's
5 to come up with a number. Looking at the price and cost data and running
6 a regression or other empirical techniques will produce the number that we need to
7 answer the question. Reviewing all these documents, it is just simply not clear to me
8 how that would get us to that number that is the ultimate exercise here today, leaving
9 aside also the time that might be involved and the cost and complexity of gathering
10 that evidence.

11 So that is why my focus is on a top down approach. In terms of the implementation of
12 that, I wanted to talk briefly about the question of sectors. It has been sort of, to some
13 extent, discussed today, but I wanted to focus on one particular aspect of that. I think
14 it's acknowledged here that this is not going to be an exercise in perfection. There will
15 be a broad axe and the question essentially is how broad that axe is going to be.

16 The way I have approached that is in a very pragmatic way, by thinking about what it
17 is that I need to do for the purpose of Mr Merricks' claim. And what I need to do is
18 essentially two steps. The first step is to estimate a pass-on rate. That is the main
19 exercise here, that's the thing that's going to take the most time and resources and
20 disclosure and so on. And that's sort of what has been discussed already today.

21 But, for the purpose of Mr Merricks' claim, I will then need to do a second step, which
22 is actually much simpler but is still very important, which is that if I have a series of
23 pass-on rates for different sectors I then need to combine those in order to give
24 a single pass-on rate for the whole economy that can then be applied to the class in
25 Mr Merricks' case.

26 So this is analogous to what you were describing this morning as a UK PLC pass-on

1 rate, although to be very specific it would be, as Mr Simpson described, a UK retail or
2 a UK merchant PL pass-on rate.

3 In order to do that, I essentially had to calculate a weighted average of these different
4 sector pass-on reads to combine them together to produce one single number. So in
5 order to do that I will need data on the value of transactions for these different sectors
6 in order to calculate the weighted average. So that has been an important a crucial
7 part of how I've gone about looking at sectors.

8 In my report in March I set out a proposal for 12 sectors and those were chosen
9 because those are sectors which are used by the UK Cards Association, and the
10 Payments Council, and those organisations produce data which provides those values
11 of transactions for each of these sectors that would allow me to create that weighted
12 average.

13 So I just want to make sure that that point is not lost here, that for those 12 sectors
14 I know I can do that exercise. If an alternative set of sectors were proposed it would
15 be important, in fact crucial, for Mr Merricks' case that information existed that allowed
16 me to calculate that weighted average to combine those sector pass-on rates to
17 produce that UK-wide pass-on rate.

18 **MR TIDSWELL:** Is that dealt with in the questionnaire, is that information that you are
19 seeking or could seek in the questionnaire?

20 **MR COOMBS:** I don't really see how it could be sought from the questionnaire
21 because it is a macro question. The question is: what is the total value of transactions
22 in the sector?

23 **MR TIDSWELL:** In that sector, yes, I see. So if we aren't looking -- it's quite likely
24 there are some sectors that are not represented at all by the claimants. How do you
25 deal with that? We can't help with you that, can we?

26 **MR COOMBS:** When I looked at the list of claimants I found that, all of those 12

1 sectors, there are claimants in those 12 sectors. So each of those sectors has
2 claimants within the sector. I mean the distribution is very skewed, we know, towards
3 two sectors in particular. But none of those 12 sectors has no claimants in them, they
4 all have some claimants in them.

5 **MR TIDSWELL:** Can you just help us with how do you get to that total transaction
6 number, how do you actually calculate that? What is the input that you need in order
7 to do that?

8 **MR COOMBS:** The input that I need is the value of transactions in each sector and
9 then that is the weight --

10 **MR TIDSWELL:** How do you get to the value of transactions?

11 **MR COOMBS:** The two organisations I mentioned, the Payments Council and
12 The UK Cards Association, they produce those statistics. So those numbers are
13 publicly available from publications from those organisations.

14 **MR TIDSWELL:** I may be missing something, but I'm not sure why this is a problem
15 of any sort. If you have that information already, I'm not sure why this matters in the
16 context of the discussion we are having.

17 **MR COOMBS:** I'm only making the point just to say it's not a problem if I were to use
18 those 12 sectors. If a different set of sectors were to be used, then some data source
19 for these transaction values would need to be available.

20 **MR TIDSWELL:** I see. If you are carrying out your exercise for your 12 sectors
21 anyway, it doesn't make any difference.

22 **MR COOMBS:** No.

23 **MR TIDSWELL:** So the point is if we ask you to do something different from that.

24 **MR COOMBS:** Yes.

25 **MR TIDSWELL:** I understand.

26 **MR COOMBS:** Okay. The only other point I wish to make is in terms of the data on

1 | prices and costs. I probably don't need to say much on this because I think you
2 | already aware of it. I looked at the data that's publicly available, in particular the data
3 | from ONS. I found that for most of these 12 sectors that data is available and that
4 | covers about 65 per cent of the value of card transactions. Where that public data is
5 | not available then it would be necessary to rely on the data that would be disclosed
6 | from individual merchants. For reasons which I've already discussed, I view that as
7 | a second best.

8 | I think the public data would be, first of all, easier to obtain, I think as already has been
9 | discussed. It would be more representative because it would cover the entire sector
10 | rather than just be some selection, if I can use that word, of merchants from within
11 | a sector. And it would be more robust in the sense that it would be assessing the
12 | market-wide changing costs, which is the changing costs which is relevant here
13 | because the MIF overcharge would have been a market-wide cost for all of the
14 | merchants that accepted cards within a sector.

15 | I think those were the main points that I wanted to make, but obviously I'm very happy
16 | to answer any questions.

17 | **THE PRESIDENT:** Mr Coombs, thank you very much and thank you for not repeating
18 | back, however nice it is to hear it. I'm grateful for the efficiency.

19 | We see the time. We will resume after the short adjournment with a short update from
20 | Mr Moser, if he has managed to do the impossible and answer the very hard curve
21 | ball we threw at him. After that it will be Dr Holt.

22 | We will resume at 2.00. Thank you very much.

23 | **(1.00 pm)**

24 | **(The short adjournment)**

25 | **(2.00 pm)**

26 | **THE PRESIDENT:** Mr Moser, good afternoon.

1 **MR MOSER:** Good afternoon. I'm going to address the sectors in the order in which
2 they are listed on page 4004 of the bundle; that's bundle 3, tab 132.

3 **THE PRESIDENT:** Yes, thank you.

4 **MR MOSER:** Can I, before I do that, say something about the table we have on
5 page 4004. It's been hinted at or partly explained by Dr Trento. The figures here are
6 EU-wide and therefore might change if we are looking at only UK, although not
7 significantly. They don't, as it happens, include Marks and Spencer for historical
8 reasons of when the data was made available. And of course they don't include
9 Primark, Ocado and Allianz because they are separate. So that could change the
10 shape of the list. Perhaps Allianz is likely to move into the top 10, I think so.

11 Then, as far as the available top claimants, the big players, are concerned, from whom
12 one might obtain the data, two things in advance. The first is in the time available,
13 which was essentially lunchtime, it hasn't been possible to contact them and get their
14 confirmation. But what I have been given instructions about is giving you an indication
15 of the ones who are likely to be in the frame. That is partly based on the ones who
16 are the biggest, or the only in some cases, and partly based on the ones who are also
17 active in Trial 1, fully active with evidence and data -- and disclosure rather - or on the
18 steering committee for Trial 1.

19 Looking first at hotels, we can offer two obvious candidates. One is the Hilton Group
20 and the other is the Intercontinental Hotel Group which also includes brands such as
21 Crown Plaza and Holiday Inn. There are others, there is the Maybourne Hotels, that
22 is a large claim, that's The Connaught, Berkeley, Claridge's, that type. So there is
23 definitely at least one there.

24 On betting, which is the next one down, it's easy, Bet365. Bet365 is active in
25 Trial 1 -- I'm sorry, I should have said Hilton is active in Trial 1 and so is
26 Intercontinental.

1 Fashion, we have active in Trial 1 Dr Martens and M&S. M&S, it must not be forgotten,
2 is probably the largest fashion retailer. There are others and of course there's Primark
3 here, to my left, separately represented. There's, for instance, Hermès, very large and
4 others, I won't list them all, but Boohoo, Levi's, Superdry. It's quite a large group.
5 Digital products, again more straightforward, I think there's only one or two and Sony
6 is the biggest, video games.
7 Health retail: there are only two, and they are iHerb -- I don't know whether they are
8 a familiar brand. They are actually very large -- and Holland & Barrett. Neither of
9 those two nor Sony are involved in Trial 1.
10 Travel agencies and tour operators: Jet2. And Jet2 is in Trial 1.
11 Telecoms: Vodafone. And they are active in Trial 1. And there are others, like Three
12 and Lebara, to fall back on.
13 Restaurants, takeaways, fast foods: the client active in Trial 1 is Caprice Holdings.
14 There are large clients here. TGI Friday's, Soho House, Nobu, Wagamama. Subway
15 is enormous. So there will be someone.
16 Airlines: Jet2 again, active in Trial 1. There's also Flybe but they are in administration
17 so we don't know.
18 Then supermarkets: the ubiquitous M&S, we know active in Trial 1. And then of course
19 there's Ocado, here present to my left. There are others, Bestway and so on. We are
20 quite well served already.
21 I've given you the top ten. I know you asked for the top five. We do think -- this is
22 a little bit of submission -- that five is a bit meagre. But we can without great difficulty
23 stretch to ten, which was done in other cases. The number ten. So I leave that as
24 an indication. Obviously there will be submissions about these things tomorrow and
25 I don't want to stretch my part this afternoon.

26 **THE PRESIDENT:** Mr Moser, that's very helpful.

1 Just by way of indication before we move to Dr Holt, and this is by way of an indication
2 of where we feel this matter is going, because it may cut short what is being said by
3 counsel tomorrow. And it's this: we are inclined to be extremely pragmatic about this.
4 If this is a data collection process that is hedged around with delays due to
5 questionnaires and sampling and arguing about samples and working out who from
6 a somewhat unwilling provider of data will extract data, which, let's face it, is going to
7 be intrusive and in need of consensual co-operation processes.

8 It isn't an ordinary disclosure line where you say give me the documents. Data is
9 intrinsically very difficult to manipulate. But if we are going down the sampling route
10 then you are going to get a very small sample, if anything.

11 On the other hand, if you come -- and I appreciate you may not have information
12 regarding this even by tomorrow and it would be unreasonable for us to expect very
13 much -- but if the position is that -- and I'm disregarding the Coombs/Holt stuff; we
14 know what the position is there -- but as regards the individual players in market they
15 are up for providing material which is going to be done quickly in a manner that is in
16 no way going to derail time to trial or cause costs to be high, and will result in
17 a manipulable database -- and we heard what Dr Trento said about the fact that it
18 might not be a single universe of documents it might be multiple. But provided one
19 has material that can be manipulated in a way that we can triangulate from so we can
20 do different regressions, explore different reasons as to why pass-on might be different
21 in different circumstances, then you are not going to get very much push-back from us
22 in terms of this material coming in.

23 And we don't regard the debate about five or ten particularly concerning tomorrow. It's
24 not a debate I particularly want to have.

25 What we would like in the course of tomorrow to debate is just how aggressively the
26 extraction of the data and the creation of the universe of data can be achieved,

1 because if you come back and say, look, 10, 15, 20 isn't a problem, we can do this -- let
2 me pick a very unrealistic timetable, just to show people how we see this -- we can do
3 this by the end of February, not a problem, then we are going to become pretty relaxed
4 about this.

5 If on the other hand doing an exercise of 20 is a problem but five is quicker, then we
6 are going to be much more interested in the five than the 20, because getting the data
7 in a manipulable form is just the starting point. We then get to the hard yards, which
8 is, what, in the opinion of the experts, does the data tell us in conjunction with other
9 economic learning?

10 So if the parties have an inclination to do any thinking overnight, that is what we want
11 them to think about. What are the milestones in terms of getting an analytical data set
12 and then the analysis done comfortably before when we begin Trial 2. And the greater
13 the comfort that you can give us the less push-back you are going to get from us in
14 terms of the ability.

15 And we'll want to hear, obviously, from those who are concerned about costs. But the
16 beauty of going to willing claimants for the provision of data is that they are not going
17 to be saying with their first touch of the ball: it's expensive, we don't want to provide
18 this, it's a problem. They are going to be saying: no, we want to help. Just as Mr Jones
19 said on the part of his client: we want to help, we are here because we have a claim
20 that we want to vindicate. And the question then becomes -- just to ensure that the
21 concerns quite rightly raised by Dr Niels, namely is there a danger in self-selection -- is
22 the unrepresentative nature of these things. Well, of course we will keep a very clear
23 focus on that and we will expect those interested parties -- and that will be the
24 defendants -- to ensure that we are not being sold an unrepresentative pup and that
25 we can control for that as well.

26 So that's how at the moment we see this. We obviously haven't heard from everybody.

1 But if it works, and it works quickly and at proportionate cost, then we are much happier
2 than we were when we were debating just how the questions and the questionnaire
3 should be framed and just how many we would be sampling from and how many
4 sectors there are or there are not.

5 These things are matters which are, as we've seen, productive of the most enormous
6 delay. And that was the concern that I had -- and I think I speak for my colleagues -- in
7 the run-up to this hearing. And that concern is, at the moment, and I will touch wood
8 now, that concern is at the moment receding, but I'm sure something will happen to
9 turn it around and increase our concerns. But that's where we are coming from.

10 And it's been very, very helpful, but if the parties can begin to align as to how to make
11 that process work, and articulate not in principle objections but practical objections as
12 to what might cause difficulty. And the main difficulty that I see is the identification of
13 exactly what it is that needs to be provided in order to enable the economists to do
14 their job. That, it seems to me, is tricky. That's where the work should be focused.
15 And if we can do that, then my issues about the triability of Trial 2 move into the zone
16 that most of my cases are in, which is, you know, watch and be careful but don't worry
17 too much.

18 **MR MOSER:** That is very helpful.

19 If I may just reflect back, as it were, some of those points. Absolutely, if we do it the
20 way that I've read it out, then there would be no need for a questionnaire and there
21 would be no need for sampling. And if it's said, ah, yes, but it might be self-selecting,
22 well, we as claimants can only offer the claimants we have, and the data that they
23 have. And once you start looking at each claimant group, it's not so much that we are
24 carefully selecting Sony as the biggest or Hilton or Bet365. It's pretty obvious in these
25 cases who the big ones are. And as soon as you go beyond the list that I've read out
26 you are going to get a lot of names nobody has ever heard of.

1 So it is self-selecting in that sense. It's self-selecting in the ones that there are that
2 are likely to have decent data. And they are for the sectors that we've identified -- you
3 are right, of course, to point out that, well, if one looks at Mr Coombs' sectors he has
4 slightly different sectors because he wants to do it differently, then there is a difference
5 there. But we can only offer, again, the sectors that we are in and that mean something
6 to us as claimants rather than putting all our claimants into one sector which no longer
7 means anything.

8 So how aggressively that is pursued or not I don't know. We are not trying to shut out,
9 of course, whatever Mr Coombs and Mr Holt want to do. And that's fine. We are not
10 going to, frankly, try to assess ten sectors that none of us are in. That's not what we
11 are in the market for.

12 So there we are. I will leave that there and work on milestones.

13 **PROFESSOR WATERSON:** Can I just add, I think it will be important when contacting
14 the companies for them to make it clear what data they have in terms of the time frame,
15 as well as which variables, and also for them to explain -- and to be allayed -- any
16 concerns they have about who might be working with the data.

17 I mean, ideally we would hope that it wouldn't just be your economists working with
18 the data, but other economists as well, and so there would have to be some protocol
19 for sharing the data.

20 **MR MOSER:** Absolutely. There will be. And it's not unusual, of course, in these
21 cases.

22 **PROFESSOR WATERSON:** Thank you.

23 **THE PRESIDENT:** Mr Moser, I'm very grateful to you. Thank you very much.

24 We'll resume, then, Dr Holt, with you.

25 **MR HOLT:** It's Mr Holt. That's fine.

26 Thank you to the Tribunal for sharing the vision you had for the next phase of the data

1 collection and how Trial 2 could work. I think, rather than going through a detailed
2 exposition of my intended approach, what I propose to do is just to sort of relay my
3 understanding of what you are proposing and identify any particular thoughts that
4 come to mind and particular issues that I think might need to be clarified.

5 So I think the first point, your starting point, was essentially a UK-wide perspective on
6 passing on. And I can see the merit and benefit in that, not only for Mr Coombs in the
7 Merricks claim but also for the article 101(3) type of analysis, and indeed possibly for
8 a broad-axe approach in the context of any claimants that otherwise would not have
9 any specific evidence that relates to them, so there might be some benefit in that
10 regard.

11 I think the next question is what is meant by a UK level data set. I think this was clear
12 from the subsequent discussion, but in my view the data set should encompass both
13 sources of actual data, so price and cost data, for example, but also the results from
14 some of the existing studies.

15 I find that those two would be complementary forms of evidence and I don't see any
16 particular reason to narrow the definition of data to only the price and cost data without
17 referring to evidence that has been carried out or studies that have been carried out
18 using data of that type.

19 But I think that is broadly consistent with what I understood the message to be.

20 And just to point out that there are a number of studies which actually look at the
21 UK PLC level. In fact Dr Neils has done the latest aggregation of some of the studies
22 that the experts have been looking at. And something of the order of 15 to 20 appear
23 to refer to multiple sectors or at least are not sector-specific. I have not gone through
24 in detail to identify whether those are necessarily economy-wide but certainly they may
25 well be.

26 Another point on the economy-wide or the UK PLC perspective is whether one wants

1 to do that type of analysis directly, ie looking at data at the UK level, for example
2 general CPI or RPI type index on the pricing side, and some form of a PPI, producer
3 cost index, on the cost side, or alternatively to allow that to be built up by a weighted
4 average of otherwise sector-based analysis.

5 Personally I'm agnostic as to which of those two approaches you might adopt.

6 I think then the third point is going to the next layer, which is the sector level analysis.

7 And I think that's absolutely correct that that is an appropriate level of the analysis to
8 focus on during these proceedings.

9 Again, I think that there is quite a lot of evidence both from the existing studies and
10 public domain price and cost indices that would be useful for this exercise. My
11 preliminary look, which is not exhaustive, suggests that that would cover a majority of
12 the sectors. I am aware that some of the other experts considered that a smaller
13 subset of the sectors might be covered, for instance, by existing evidence.

14 I think there might be two reasons why that difference in view might arise. One might
15 be a view that some of the studies might encompass cost proxies that may not be
16 treated in the same way as MSCs are by merchants. I disagree with that as being
17 a relevant criterion, and I will come on to that in a moment.

18 I think the other potential reason is that some of the studies might not perfectly match
19 the sectoral definition or the time period or indeed the geography that is the focus of
20 these proceedings. In my view we don't really have the luxury of letting perfect be the
21 enemy of good in that regard. I think there is an approach that can be adopted to
22 assess the materiality of any such distinctions and one can weight those findings
23 accordingly.

24 I think it's perhaps worth noting that in relation to the two sectors where there seems
25 to be a large share of merchants, so the restaurants and the hotel sector, in my view
26 there is both existing study evidence and public domain evidence for each of those

1 two sectors.

2 I think there is something like four or five existing studies relating to hotels and there
3 is a smaller number relating to restaurants. In terms of public data there is some public
4 data on pricing cost indices relevant to the restaurant sector. I set out some of that in
5 one of my earlier reports, I think the seventh report.

6 I recognise that Dr Niels has raised a concern about the availability of cost data for the
7 hotel sector, and there is some merit in that particular point.

8 At the same time I think there are other ways of going about that exercise, such as by
9 looking at factor inputs, labour, commercial property and so on and using PPI indices
10 for those types of attributes. Of course you would also need weights to apply, but that
11 I think can be obtained from public domain information.

12 So moving on, then, to the individual level of data. I think there is one question I had,
13 which is what the meaning of homogenisation meant in that context. I think Dr Trento
14 expressed a view with which I think I agree, which is that it doesn't seem clear that
15 evidence that would be collected at the merchant-specific level would necessarily be
16 able to be integrated into a wider data set for which you could do a broader regression
17 analysis. So I certainly would agree with that.

18 I think the way I see this is that it would be a potentially alternative or complementary
19 form of evidence on which you could do alternative empirical analysis.

20 So then the question that would be --

21 **THE PRESIDENT:** If I can interrupt there. You are actually right, one can't force
22 apples into oranges or vice versa. And we or I at least quite understand that if you
23 have data that is in a sense generic that will be rather qualitatively different to the sort
24 of data that Mr Moser's clients and the other individual claimants like Primark will be
25 producing. And the idea of forcing the two to sit in one identical system would be folly.
26 That I understand.

1 The point I think I was making about homogenisation -- and it's probably not the right
2 word -- is that what I wouldn't want to see is a form of siloing of expert argument. In
3 other words it would be highly unfortunate if we ended up with -- I'm just counting the
4 number of experts -- eight or nine irreconcilable forms of analysis of pass-on in
5 this case.

6 What we very much do as judges when one is deciding complex questions of fact is
7 that one triangulates. And if one has methodologies or analyses which just are siloed,
8 in that they can't be compared one with the other, then one has a problem in rationally
9 deciding why it is the outcome is X rather than Y or Z.

10 And so what we see as one of the virtues of this process is that you will get a pass-on
11 argument from your process, just as Mr Coombs will get one from his, which will be
12 self-evidently at the more generic level. And it may, subject to those qualifications, be
13 accepted as a reliable form of pass-on, subject to those qualifications.

14 What we would find helpful -- and I'm anticipating, and it may not happen, who
15 knows -- but what I'm anticipating is that the rate is not one that other parties will
16 accept. What we would like to see is an explanation as to why in economic theory it
17 doesn't apply to a specific type or class of case.

18 And that, to our mind, is an extremely valuable piece of evidence. It's opinion
19 evidence. It won't intrinsically or necessarily be supported by data, but it is something
20 which enables us to understand this very peculiar economic phenomenon which has
21 these very difficult legal implications, for us to be able to resolve them.

22 Equally, it may be that a critique of your data -- and I'm taking you as a hypothetical
23 example here -- says not only is the Holt analysis wrong for this particular class of
24 case, whatever its other merits, for these reasons, but I can actually support that
25 opinion by reference to a different form of regression analysis based upon a different
26 form of data. And immediately we are able to say: we are not reaching an outcome

1 just on the basis of what a black box regression analysis says; we are able to look at
2 different forms of data interpreted differently by different experts and reach
3 an intellectually defensible view as to what the correct outcome is.
4 And equally it will help the parties on any appeal. The losers will be able to say, well,
5 here's the evidence. It wasn't just a black box print out saying pass-on rate is
6 whatever. It will be a judgment that will be capable of reasoned criticism by capable
7 legal teams who can explain to any appellate court, if it gets that far, look, the court
8 got it wrong and here's why. There is a misstep in their reasoning.
9 And that is the framework within which we want to work. And it's not surprising it's just
10 that when one is talking about forms of statistical analysis the enormous danger for
11 the Tribunal is that they become the prisoner of the regression rather than using the
12 regression as a tool to reach the right result.
13 So that's what I mean by homogeneity, and it's not the right word. What I mean is,
14 let's have an interactive set of evidence, streams of evidence that relate to each other.
15 They don't accord with each other and we see as much virtue in differences as in
16 similarities. Give us the material; we will try to understand it; you will help us do that,
17 and we can then reach an outcome that is hopefully right.

18 **MR HOLT:** Sir, I think that certainly clarifies the issue greatly, and thank you.
19 I understand that obviously the benefit of the experts having transparency as to the
20 data sets they will need to be using and the ability to critique each other. And it may
21 be, for example, that one expert says, well, they have particular reasons why
22 a regression based on a single claimant has certain issues with it, for example it might
23 be that a particular merchant had a lot of merchant-specific costs and that might
24 influence the results that you might get from the regression. But of course I think what
25 you are saying is that that is the sort of debate that can be narrowed out if that type of
26 analysis is made available.

1 So I think then it just remains in relation to that data discussion to offer some points or
2 suggestions as to what the experts might need in that regard, or at least some notes
3 of caution as to what are the challenges that might arise.

4 I think one point is the complexity of the information that might be obtained. Obviously
5 this is a fairly quickly formed thought, and I think you have asked the experts to reflect
6 on this possibly by tomorrow, and certainly I would be happy to do so to a greater
7 extent, but just taking the example of the hotels, one might imagine that they have
8 prices at all sorts of different hotels and it will vary by seasonality, standard of room,
9 all sorts of things. They will also have prices for the drinks in the bar and all sorts of
10 things. So there's one definitional point I think that will need to be considered, which
11 is what is the degree of disaggregation that you need to think about when talking about
12 a merchant-specific price. Is it the full matrix of what they charge or is there some sort
13 of an index that they use themselves. I don't know the answer to that. But it's
14 something that we will have to address in due course.

15 I think the other issue is what is the relationship between this data-driven approach
16 from the claimants and any qualitative information that might be made available. So
17 I wasn't quite sure what your proposal would entail in that regard. It seemed quite
18 clear that you didn't necessarily see a case for detailed disclosure by individual
19 claimants as to issues such as their pricing strategies and where they put MSCs in in
20 their accounting and so on. And that is obviously a position that I have agreed with in
21 the sense that I have found that to be hopefully not a meaningful source of evidence.
22 But I wasn't sure whether the main reason you thought that that was inappropriate was
23 primarily a practicality in terms of how you are going to run the sample as opposed to
24 whether that type of information would be meaningful and would instead be still
25 collated, for example, from industry experts. And I had some thoughts on than if that
26 would be helpful.

1 **THE PRESIDENT:** It's a fair point.

2 It was Mr Tidswell's intervention this morning. I don't know if you want to respond to
3 that.

4 **MR TIDSWELL:** I think first of all it was an observation by you, Mr Holt, that one would
5 expect the data to disclose -- if the data was sourced from the right group it would
6 disclose the behaviours of the group. So in a way asking the group what they did was
7 rather futile because the data would show the answer.

8 That obviously is in the theoretical sense. I'm sure others may challenge it but it
9 seemed to me to make sense. So I think that is why we go back to starting with the
10 data.

11 Now, I don't think that excludes the possibility that somebody might come along and
12 say, well, there are reasons why that data may not fit particular circumstances. One
13 of them, of course, may be that we know that the sector groupings are not entirely
14 homogeneous and actually there will be some outliers.

15 Now, that, I think, in the discussion we have had, wouldn't necessarily justify going to
16 the extremes of those groups because of the cost-benefit analysis and our ability to
17 reach a conclusion without doing that.

18 So the answer in that case -- I'm just putting this as a hypothetical rather than a big
19 argument -- would be that I don't see any need to do that, but I certainly wouldn't want
20 to foreclose the possibility that somebody might come along and say, well, actually
21 I do need to know more about the behaviours or documents of a particular group of
22 claimants in order to understand better whether the data reflects the reality, if one can
23 put that it way, or, if it doesn't, why it doesn't.

24 I think, in order for us to agree to that, we would need to see a fairly advanced or some
25 sort of proposition advanced that would justify that. So that's where I think we leave
26 it. We leave it on the basis that if people want to come forward and say, "I need this",

1 they need to justify it, and it needs to be done not because we want to see it because
2 it might be interesting but because they have a particular theory that I am looking to
3 support and in order to do that I need the information that's not data but actually more
4 qualitative information.

5 **THE PRESIDENT:** I think that has put extremely neatly what is our thinking. If I could
6 just add, I think, three reasons why we are not saying "no" but saying "not yet" to the
7 qualitative data.

8 First of all it is undoubtedly true that we don't want to get into a massive disclosure
9 exercise. We will if we need to. But secondly we don't need to, for the reasons that
10 you and Mr Tidswell have just articulated. The data ought to do the heavy lifting.

11 And the idea of a sampling process that gets you not just quantitative but qualitative
12 data doesn't work because the problem with the sample here is that it is not
13 representative. You can't safely extrapolate from it. That's why we are so interested
14 in data rather than documents.

15 However, it is, I suspect, almost certain to be the case that there will be the need for
16 targeted disclosure in order to understand the data. There may be a peculiarity in the
17 way an industry operates which creates an idiosyncrasy in the data that needs
18 exploring. And there we absolutely will be supportive of a party seeking to understand
19 why that is.

20 Now, how the informational gap is resolved it would be irresponsible to speculate. It
21 may be that documentary disclosure is needed. It may be that factual evidence is
22 needed. It may be that a witness is deposed early so that you get the information that
23 you need. It may be that there's an industry expert. Who knows? But we are
24 absolutely up for ensuring that the data is explained and we are therefore not saying
25 no, but we do not envisage it being any part of the exercise that ought to be occupying
26 the parties in the coming weeks.

1 **MR HOLT:** Thank you. I think that is very clear.

2 Just to reiterate my thinking on this, I just don't see how information relating to
3 treatment in accounts and/or pricing strategies would have an impact on long-term
4 pass-on, given that we are I think agreed that over the claim period it's a long time
5 frame and it's a permanent change. And in my view I think one of the key things
6 coming out the joint expert process was a recognition firstly of what Mr Tidswell has
7 just identified, that the empirical analysis will in a sense encapsulate both the
8 observable and unobservable factors that might otherwise influence pass-on.

9 And I think I also agree with your point that it's not clear how one can adopt a sampling
10 based approach and then sort of reach a view as to how other claimants would have
11 treated a particular cost.

12 So I think those are really my main points in that regard. I'm happy to address any
13 questions.

14 **PROFESSOR WATERSON:** Just to come in here. I understand, to use a bit of jargon,
15 that essentially on pricing you are taking the sort of Friedman type approach.
16 Remember the famous billiard player example. You don't ask the billiard player
17 whether he calculated the angles. What you see is whether he got the ball in the
18 pocket.

19 **MR HOLT:** I think that's a perfect analogy for the approach that I've been adopting,
20 which is, in the long-term profit maximisation should be a very good proxy for what
21 firms will be doing.

22 **THE PRESIDENT:** I have no further questions.

23 Thank you very much. I'm much obliged.

24 Does anyone want to speak next?

25 **DR NIELS:** Can I speak up on precisely this discussion we have just had.

26 Also just coming back to the importance, the relative importance between the data,

1 the quantitative data that does the heavy lifting, which I also agree with, but then also
2 the qualitative data or the factual information. And this comes back to what you just
3 said, Mr President, that it is certainly true that this factual information is needed to
4 understand the data, but I would also go one step further in that it is also needed to
5 interpret the data.

6 And I wanted to give an example because, as you asked earlier, Mr President, the
7 question: so okay, let's say the economists have done the analysis; what does this
8 data tell us? And as you said earlier this morning, a reminder to everyone, when we
9 look at data we are not actually quantifying pass-on of the MSC directly but rather of
10 proxies.

11 So let's say the economists look at the data and do the econometrics -- and usually
12 actually there isn't much disagreement on the findings. It's more about the
13 interpretation. And that was also the case in previous cases. But let's say there is
14 one regression that has the relationship between prices and costs and another
15 regression that has the relationship between prices and overheads, and one suggests
16 high pass-on and the other low. Then precisely, the Tribunal is actually faced with the
17 question, well, how do we interpret this?

18 And for that I think you need partly economic theory, as Mr President, you said, but
19 also factual understanding. What is actually the best proxy and therefore factual
20 understanding of how do merchants treat MSCs. And is it more similar to costs or
21 to overheads.

22 **MR TIDSWELL:** Can I just see if I understand the point, because I can see that if you
23 are dealing with the data of a particular enterprise and then asking them -- and you
24 are trying to run a regression in relation to proxy cost, I can see you would want to
25 satisfy yourself that the proxy cost was one that was treated certainly in the realm of
26 how we would expect the industry to be treated.

1 That's the point, I think. And clearly if we have material from Allianz, for example, and
2 data, and you have chosen a particular proxy cost, you may want to ask about how
3 they treat their proxy costs. I can see that. And I think we get very squarely into the
4 category of understanding the data (inaudible word) as you say, the way it can be
5 used. But that's quite different, I think, isn't it, from going out into the group of hotels
6 and finding a whole bunch of different types of hotel operators and asking them
7 whether they treat a particular cost as being an overhead or a cost of goods sold
8 because, as we have discussed, the fact that four people might say they treated it as
9 an overhead tells you nothing about the rest of the group.

10 So if they are not actually the people who are giving you the data, and if you are using
11 that only to interpret the material that, say, Mr Holt assembled from a public source, it
12 doesn't really help you, does it? Are you saying it would help you?

13 **DR NIELS:** No, no, actually my original approach was that whichever merchant
14 disclosed data, whether it's through my sampling approach or through this now
15 proposed approach of the larger willing merchants, whoever provides the data it is
16 indeed that data that you want to analyse and understand and interpret. So it is
17 precisely for those merchants what is the relevant interpretation. And that's precisely
18 why you need that factual understanding, because if you don't have it and you just
19 have the data and just have a pass-on rate after quantitative analysis, and then you
20 come in with some generic, I don't know, industry factual witness who says, "In general
21 in this sector it's more this than that", that would be the problem.

22 So indeed it is in relation to the merchant-specific analysis. But I would also add one
23 point. In my opinion this understanding of what is the best proxy is actually also
24 a question for Mr Coombs' more aggregate macro analysis for PPI and also there you
25 need to understand is PPI actually a good proxy or not.

26 **MR TIDSWELL:** And I don't know -- we haven't got on to this subject but are you

1 suggesting that the Tribunal needs to direct people about the process of choosing the
2 proxy cost? Or is it something that we should be leaving to the experts themselves to
3 determine for the work they're doing.

4 **DR NIELS:** That's a very good question and it also points to what you were saying
5 earlier, that there is a need overnight maybe for the experts to agree what data is
6 actually needed.

7 I think there is quite a lot of common ground. At the highest level it is prices and costs,
8 for a certain period. Pragmatically it doesn't have to be the whole claim period. But
9 costs in previous cases we looked at -- there may be different types of costs, the
10 variable costs, the overheads. In principle they are all relevant but probably we are to
11 some extent guided by the claimants themselves what they think is the most relevant
12 costs where the pass-on comes in.

13 But there shouldn't be too much disagreement or too much difficulty in disclosure of
14 one set of costs or two.

15 **MR TIDSWELL:** Yes. Well, I think the brief discussion we had rather suggested we
16 would prefer to leave that to you unless you felt we needed to be involved in that.

17 **THE PRESIDENT:** Indeed. I think one of the things that I have learned today is that
18 this is another example of the perfect being the enemy of the good. If we attempted
19 to embody the sort of things that we have been discussing very helpfully today into
20 an order then we would be in some difficulties. And I float this because I want people
21 to think about this. But I am coming to the conclusion that seeking to articulate in
22 a once-and-for-all order what it is that we are envisaging would be an error, because
23 immediately you get into an argument about what falls within and what falls without
24 that which is envisaged in the order.

25 As most of you and indeed I think almost all of the economists know, we have in the
26 context of Trial 1 been holding fortnightly case-management hearings at an ungodly

1 hour on Friday morning. And they have proved in the context of Trial 1 onerous but
2 extraordinarily useful. And I think I am putting both my and Mr Tidswell's heads in
3 a noose that we are minded to say that that regime which would naturally die a death
4 with the commencement of Trial 1 will continue, and it will continue seamlessly. It's
5 just the Trial 1 issues will fade and the Trial 2 issues will become a part of a fortnightly
6 debate at which exactly this sort of problem can be articulated if it arises.

7 And it seems to me that it would be folly to try to engineer an order that catered for the
8 dynamic operation of this process. Clearly the borderline between that which is data
9 and that which is explanatory of data is something which is a difficult one. It may be
10 that there is a need simply for an explanation. It may be that there is need for the
11 production of documents in order to understand the data. We don't know, we cannot
12 say, and it would be a mistake to legislate for that in advance.

13 So there's a fairly clear indication -- and if there is to be push-back we'll welcome it
14 tomorrow -- there's a fairly clear indication, we think, that the Trial 1 management
15 regime should persist into Trial 2, and we use that, rather than an ex ante articulation
16 of what it is we want in an order to be the manner in which things evolve.

17 If orders need to be made of course we will make them. But for the moment I frankly
18 don't see the need. Provided the parties are absolutely clear what they are doing and
19 provided there is a broad-brush timetable, which we are minded to order -- even there
20 provided it's clear -- I'm not sure we'd need an order -- provided there's a timetable we
21 are willing to make ourselves available to deal with the difficulties and disputes which
22 will undoubtedly arise in the course of that process and resolve them in the way that
23 we have done in the past four or five months.

24 It's worked extremely well and I think the parties are entitled to factor that into their
25 considerations. And I hope that goes a long way to answering the concerns that you,
26 Dr Niels, have just raised and indeed the concern that Mr Holt raised, which was just

1 | how much documentary disclosure is envisaged. Well, the answer is we don't
2 | envisage it but on the other hand we do, but only to understand the data, and if there
3 | is something which we are not expecting.

4 | We fully understand that this is a dynamic process where unpredictable things will
5 | happen. While we are very happy to deal with them, we just don't think we should
6 | deal with them until we know what they are.

7 | **MR PICCININ:** Sir, just, if I may, to foreshadow a point that I will be making tomorrow.

8 | **THE PRESIDENT:** Yes, of course.

9 | **MR PICCININ:** I wanted to foreshadow it now so that it's not too late when I make it
10 | tomorrow.

11 | While I absolutely understand the merits of what you have just said in terms of flexibility
12 | and not trying to encapsulate everything in a simple order with a bright line now, I am
13 | very concerned that the debate that we've just had between Mr Holt and Dr Niels about
14 | this particular point of how you choose a proxy cost is one that we can't really afford
15 | to kick down the road any longer. And it's specifically the question of whether, at trial,
16 | the Tribunal is going to be invited to draw conclusions about how merchants
17 | categorise MSCs and other costs and the myriad ways in which they do or don't take
18 | them into account in setting their prices.

19 | And my concern is that there isn't actually any way to try that question at Trial 2 for the
20 | parties that we have in front of us. And I fear that Dr Niels's approach that he has just
21 | outlined is essentially to take the five or ten particular merchants who produce data in
22 | the process that has just been debated this morning and this afternoon, then to find
23 | out from those five or ten particular self-selecting claimants how they categorise MSCs
24 | and how they take into account that category of costs, call it overheads, in their pricing
25 | practices, and then on the basis of that information invite the Tribunal to prefer
26 | a regression analysis that uses that category of costs. In particular what I envisage

1 the claimant saying is, we treat MSCs as an overhead, therefore the regression
2 analysis that you need to do for Marks & Spencer or for Jet2 or whoever it is is
3 a regression analysis of price on overheads. And you will hear all of that evidence at
4 trial. You will then hear Mr Holt and Mr Coombs looking at variable costs and more
5 general costs indices, and you will be left with exactly the kind of question, sir, that you
6 characterised before as untriable or non-justiciable because you won't have any way
7 of being able to verify and then extrapolate from one merchant to another on the
8 fundamentally unknowable question about how they all deal with their costs and
9 prices.

10 **THE PRESIDENT:** Mr Piccinin, that's a helpful point but I think not quite the helpful
11 point you thought you were making. I think your intervention may be betraying
12 something of a misunderstanding, and that is why I'm pleased you've raised it, as to
13 how we see the data extraction from the claimants operating.

14 We do not see this as a claimant-led process, save to the extent that it will be
15 the claimants who will be providing the data. If we have a dispute, as I'm sure we will,
16 between the economists as to what matters for the purposes of regression and what
17 does not, then that which does not matter to one set of economists is nevertheless
18 produced so that the other set can use it.

19 **MR PICCININ:** Yes.

20 **THE PRESIDENT:** So whilst the claimants will be obviously obliged but willingly
21 obliging to produce the data we would not want the parties who are receiving that data
22 to have an unacceptable data set foisted upon them.

23 Now, there will of course come a point in time where the demands from let us say Visa
24 are regarded as unreasonable by the producing claimant. Well, at that point that is
25 precisely why we are planning these hearings at which to resolve these matters.

26 Now, I think that goes some way to resolving your concern. If there's a methodological

1 | dispute as to which regression approach is to be preferred, which I think fundamentally
2 | underlies your question, well, that surely is not a matter for now, provided you have
3 | the data to do the job.

4 | **MR PICCININ:** I'm sure it's my fault in not being clear about the nature of my concern,
5 | but I'm afraid that doesn't quite resolve it.

6 | **THE PRESIDENT:** Then do please repeat it.

7 | **MR PICCININ:** I absolutely anticipate, as you say, that the claimants will be producing
8 | data on all of their costs so that both sides can run the regression analysis that they
9 | wish to run. My concern is that when you get to trial you are going to be in the situation
10 | that you described before, where you are given incompatible regression analyses, one
11 | lot of which is based on overheads and another which is based on costs of goods sold,
12 | or some other category of industry-wide variable costs. And my concern is that you
13 | are not going to have the material before you with which you can choose between
14 | them, other than on the basis of economic theory.

15 | The only suggestion so far that's been canvassed is that you would have industry
16 | expert evidence telling you, ah, well, this is how it's done in the industry. And my
17 | concern with that is that it's inevitably going to be effectively *ipse dixit* evidence of an
18 | industry expert saying to you, well, MSCs are categorised as overheads, trust me,
19 | because that's the way I've always seen it done.

20 | And my submission is that that's not a proper basis on which we can have a trial.

21 | **THE PRESIDENT:** Yes. Why can't both be done?

22 | **MR PICCININ:** Sorry, sir, why can't both --

23 | **THE PRESIDENT:** Both exercises be done? I mean, why do we have to choose now?

24 | **MR PICCININ:** My concern, sir, is that if you don't make a decision now, or at least
25 | soon, then you are going to turn up at trial with a dispute of fact which you are not able
26 | to resolve on the evidence.

1 **MR TIDSWELL:** But what is it are you asking us to decide? Because we can't decide
2 now whether or not the MSC should properly be treated as a variable cost or overhead
3 cost. And actually the answer to your question is that's the dispute. It's not which of
4 the regression analyses is the right one. It's whether --

5 **MR PICCININ:** The cost is by proxy --

6 **MR TIDSWELL:** And I think there's no question we will have in the trial with
7 an argument about the right proxy. And I think the indication I gave to Dr Niels just
8 now was that we don't think we should be resolving it. We think that's a matter for the
9 experts to exercise their judgment, and to do that now would be to create an artificial
10 intervention into the expert process.

11 **MR PICCININ:** But I think it is crucial, sir. If that is going to be left to trial then there
12 is clear plan in place for how it is going to be -- what evidence is going to be --

13 **MR TIDSWELL:** I can see your concern. I think it seems to me you are suggesting
14 that there is a concern that we may take into account selective evidence from a small
15 number of people who happen to have provided data to support an argument that for
16 example overhead is the right treatment rather than variable.

17 Now, I mean, for all the reasons -- we are not going to resolve the issue now and I'm
18 not going to express a view on whether it's the right answer, but clearly, for reasons
19 we have talked about, that isn't actually particularly helpful evidence as to what
20 happens across the claimant population. And I think that is the point you are making.

21 **MR PICCININ:** It is.

22 **MR TIDSWELL:** But it seems to me the answer to your question is, well, you have to
23 have the confidence that your expert Mr Holt is going to be able to persuade us of his
24 view as a matter of economic theory and that is going to carry the day. If it doesn't, of
25 course, then you are not going to succeed anyway.

26 So you may be uncomfortable about having what you see as not particularly helpful

1 evidence which has been brought in through the back door, I think you are suggesting,
2 by way of setting up a regression analysis, but I don't think that is what this dispute is
3 about it. It is about economic theory not about which regression analysis is chosen.

4 **MR PICCININ:** Yes. I think what I'm really asking for clarity on is, other than the data
5 and questions about what the data are, what other forms of evidence on these
6 qualitative issues is envisaged will be permitted? Are they going to be pricing reports
7 of the kind that the Stephenson Harwood and Scott & Scott claimants have put forward
8 or is there going to be disclosure or witness statements or industry experts opining on
9 the way costs are categorised and prices are set?

10 **THE PRESIDENT:** Mr Piccinin, you have suddenly broadened the point to the
11 unhelpful, if I may say so.

12 Let's get back to the point of trials. The point of trials is to resolve issues. And we
13 know that parties would like to have trials or issues at trials resolved before the trials
14 themselves, but unfortunately no one has yet got a better way of resolving issues other
15 than through the trial. So that is how we are going to do it here.

16 Now, clearly there is going to be economic evidence in relation to how we are to treat
17 the various regressions that are produced. I have made it, I hope, as clear as I can
18 but I'll say it again: we do not favour a black box approach: here is my regression;
19 that's the answer; take it or leave it.

20 We are not doing that. So obviously where there are different approaches which are
21 underpinned by differently views of the economic theory, those are questions that we
22 must resolve at trial. Obviously.

23 So I confess I don't see the problem. And we are absolutely not going to resolve it
24 today. The chances of us resolving it before trial are, I would put it at slim to vanishing.

25 So the parties had better make sure that the material before us at trial is there. And
26 we'll resolve it. We are going to need someone to speak to the regressions they

1 produce to explain what their meaning is.

2 And we would expect that to involve an articulation of what economic theory would
3 suggest, and why it is that that suggested economic theory is supported by the
4 evidence, including in particular the statistical data.

5 That's how this is supposed to work.

6 **MR PICCININ:** So far I have no quarrel with any of that.

7 My only question is, is the set of evidence that you envisage at trial at that hearing the
8 evidence from the people in front of you right now or is there another category of
9 pricing experts and industry experts that you envisage having as well. That is what
10 wasn't clear to me.

11 **THE PRESIDENT:** At the moment we've heard no submissions on that. Today has
12 been exclusively concerned with the management of a disclosure process. And I hope
13 we have put a bullet through the head of the notional of disclosure and we are focusing
14 on data. So at the moment the parties can take it as read that we will expect all of
15 those who are producing statistical analyses or economic theories as to pass-on -- and
16 I'm referring to the front row here -- to be giving evidence.

17 But no one should take as read that there is any consent for anything else at the
18 moment.

19 Now, it may well be -- but we will be led by the data on this -- that there is a need for
20 some additional evidence to enable us to understand the data. We've discussed the
21 existence of idiosyncrasies between regressions, which need explanation. So at that
22 point we may have a dispute to resolve. But I anticipate not, because everyone on the
23 front row will be wanting us to have the best understanding of the data so that they
24 can win the case on the merits.

25 **MR PICCININ:** Of course.

26 **THE PRESIDENT:** But the idea that we are writing a blank cheque for experts of any

1 hue or colour, or indeed industry experts of any hue or colour, to come in, that is not
2 going to happen.

3 **MR PICCININ:** In that case I have no difficulties with that. I'm very grateful.

4 **PROFESSOR WATERSON:** Can I just express by way of an analogy the way that I
5 think of this. It's a bit like as if I were advising a PhD student. So the PhD student
6 goes and gets some data. They produce some results. The supervisor then
7 challenges them and says, you know, what is your understanding of this? Why is that?
8 Can you show me maybe a simple chart that also expresses your point simply? And
9 how have you engaged with the data to understand more about it?

10 And what I would envisage, given that sort of thing, is that the regression analysis
11 would have to be done to give enough time for this second process of, you know,
12 understanding what it is that I produced -- not me myself, I'm not going to produce
13 it -- but understanding of what I the researcher have produced, and am I sure that
14 I have understood what the industry does in the right way in order to say that.

15 **MR PICCININ:** That's very helpful. I'm grateful.

16 **THE PRESIDENT:** Thank you, Mr Piccinin. That's very helpful.

17 We didn't actually have a running order for the next economist. If anyone wants to
18 volunteer.

19 Excellent, yes.

20 **MR RAMIREZ:** I am John Ramirez, instructed by Primark.

21 I thought, as Mr Jones informed you Primark is willing to provide data, that I
22 would spend just a few minutes discussing what that data looks like -- I have seen
23 it -- what it contains and what information might be disclosed to the other experts.

24 So Primark primarily maintains three different types of data. One is their sales data.

25 Now, that can be disaggregated by product, it can be disaggregated by store, and it
26 can be disaggregated by time frame.

1 Of course, daily data might be a bit too much because every day they are selling a lot
2 of products, but weekly or monthly would be feasible.

3 So within that sales data, information on the quantity that was sold, the price that the
4 product was sold at, which product was sold, are all available in that data set. So that
5 gives a broad overview essentially of the prices that Primark has charged to the
6 customers who come into their stores.

7 Primark also maintains two types of cost data. Primark does not manufacture its own
8 products. They contract with suppliers. Primarily those suppliers are abroad. They
9 only have a few suppliers in the UK. About 40 per cent of their volume comes from
10 China.

11 So what Primark has, then, is what they would refer to as their product cost,
12 essentially. What does it cost to acquire this product and to a certain extent get it into
13 a store? So that data is available at the product level. That could, in a sense, be
14 framed by the discussion that we've had in terms of, well, what is the variable cost
15 associated with the product?

16 That data will be available also at a refined level, I doubt daily, but monthly would be
17 feasible.

18 The last set of data is all the other costs that Primark incurs as they operate their
19 business. You can think about those along a couple of categories. One would be
20 what does it cost Primark to operate their stores? They pay rents, they pay personnel,
21 they have other costs. Secondly, the administrative costs, accounting costs, fees that
22 they pay their banks, including merchant service charges and several
23 other categories.

24 There are some costs for marketing and publicity but I think it's very well known that
25 Primark doesn't really engage in that as a business practice. But the data that Primark
26 can provide for these other types of cost is quite disaggregated and also available on

1 a monthly basis.

2 So I think it is useful data that can be provided because it includes everything that
3 everyone has been talking about today. We have the sales data with the prices that
4 were charged. We have the costs associated with acquiring the product, and we have
5 the other costs.

6 To the extent that there is a dispute about what proxy is relevant -- and to just to agree
7 with Dr Niels, I agree that Primark when providing this data should give some
8 indication about, number one, what is the cost category or categories that relates to
9 merchant service charges, and then, two, which costs does it consider and when -- or
10 costs as a group, when it sets prices, to identify what would be an adequate proxy.

11 To the extent that Mr Holt or other experts disagree and say, well, all costs are variable
12 in the long run, well, they are welcome to test that proposition with Primark's data
13 because they will have both the overhead costs and they will have the variable costs.
14 That's a testable proposition. And for those experts who may conclude that, no, the
15 proxy should be narrower than that, they will be able to test that as well with Primark's
16 data.

17 So I just wanted to shed a little light on what Primark can produce and is willing to
18 produce. But Mr Jones is in a much better position than me to explain.

19 In terms of making that data available and usable to other experts we will, of course,
20 being instructed by Primark and having familiarity with the data, be more than willing
21 to put together a guidance note for other experts in terms of: this is what the data looks
22 like, this is what the particular variables are, and how they can go about analysing it
23 and beginning that work.

24 **PROFESSOR WATERSON:** It just occurs to me incidentally -- and this is just
25 an illustration; it's not meant to provide a framework -- but Primark sells some goods
26 which are VATable and also some goods which are not VATable, namely children's

1 clothing.

2 So someone wanting to do analysis might for example make use of the difference, if
3 any, between the way that VATable goods are treated and non-VATable goods are
4 treated in terms of if you are looking at changes over time, for example.

5 **MR RAMIREZ:** That's correct, sir, because Primark's data will come with the price
6 that the customer paid and whether it included VAT or not. One thing I didn't discuss
7 is that I think in addition to what product Primark sold they should be able to
8 provide -- I have seen some categorisations of their products in terms of at what level
9 it is for children's clothes but within that there are many other categories. And those
10 can be used for the analysis you describe, sir, but then also to control for similar types
11 of products.

12 That brings me to something that I've said in my reports, and that is that I have
13 concerns with publicly available data on clothing items, in particular the CPI and the
14 RPI, which are both maintained by the ONS. There are some known issues with those
15 series with respect to clothing. In particular, you know, the ONS has identified issues
16 with those related to product comparability. In other words how you find like-for-like
17 products. And then also when the ONS price collectors go out they look at January
18 prices as their base. And that becomes very difficult, because I was in a store
19 yesterday and there were some full price things and there were some things that are
20 on sale.

21 **PROFESSOR WATERSON:** Which did you buy?

22 **MR RAMIREZ:** On sale, sir. Especially because I needed a jacket and I live in India,
23 so on sale was best.

24 Those problems have vexed the ONS from 2008 and they are still working on those
25 issues now. And one way that they are trying to get around that is essentially to say,
26 "Well what we really need to do is measure products on a more refined basis". And

1 I think, in that sense data from merchants such as Primark is helpful because
2 a clothing company like Primark or M&S is going to want some of their own internal
3 categorisation to say, “Okay, if I am looking at a cardigan, what should I be comparing
4 prices to?” So I think that merchant data in the sense of clothing items is very
5 important, given the known problems in the publicly available series.

6 I would just quickly mention that the same problem would be there for
7 publicly-available cost data and that’s primarily for the reason I discussed earlier. PPI
8 series for what UK manufacturers sell their products at is, you know, can only be
9 coincidentally correct as to what Primark pays to import from China. In both of those
10 respects I think merchant-specific data would be important for at least the fashion
11 sector. I don’t take a view on other sectors.

12 **THE PRESIDENT:** Thank you, that’s very helpful.

13 If I may say two more practical questions, just so we can get a feel for timing and
14 workability. Clearly Primark has ready access to a wealth of what looks like very useful
15 information, which is great. To what extent do you envisage any issues in terms of,
16 I will use the word “harmonising”, harmonising Primark data with, let us say, with M&S
17 data or hotel data so that one could conduct a multi-sector, as it were, pass-on
18 assessment, if that is what one was inclined to do, would it be possible to achieve
19 that? Or do you think that the Primark data would only be manipulable on its own
20 terms?

21 **MR RAMIREZ:** Sir, I think it could be harmonised across multiple claimants, whether
22 in the same sector or different. I mean I’m sure my colleagues on this panel have
23 experiences, as I do, that often in cases either you will get data from different
24 defendants or different claimants and those need to be harmonised together if let’s
25 say you are doing a pooled regression analysis where you have all the claimants or
26 all the defendants together. Sir, my firm has a lot of experience with that both, in

1 the US and in Europe and I would of course expect the same for some of my
2 colleagues here. So I don't see it as insurmountable.

3 In my work you often encounter situations where a variable in, say, Primark is not
4 measured exactly the same way as M&S; the database can be structured to be more
5 flexible so that experts can discern those distinctions and come up with their own
6 solutions on how they stand. -- So I think it would be workable.

7 **THE PRESIDENT:** That's very helpful, thank you.

8 And secondly, the sense I'm getting is that Primark could move extremely quickly on
9 this if they wanted to. Is that impression --

10 **MR RAMIREZ:** Sir, yes. I think Mr Jones can speak to this a bit more tomorrow but
11 my impression is yes, and I think -- obviously we are dealing with a very big company
12 that has very big database systems, so there will inevitably be some time that will be
13 needed to pull all the data and consolidate it, and I think Mr Jones can perhaps give
14 a better sense but I don't expect it to take very long because I've seen all of these data
15 sources already.

16 **THE PRESIDENT:** I'm very grateful to you. Thank you very much. No further
17 questions for you.

18 Yes.

19 **MR COOMBS:** Sorry if I may, can I just take a minute to respond to the point that
20 Mr Ramirez made about the public data on the clothing and a apparel sector, which is
21 just say that in terms of the pricing data, so the problem with the CPI and the RPI, so
22 the first thing is just to say that this is an issue that is, as I understand it, unique to the
23 clothing sector due to what Mr Ramirez was describing, the very high turnover of
24 products in the clothing sector, so a product that was available in January 2023, when
25 a researcher goes in to see the price of that in January 2024 they find that that product
26 is no longer available and that's creates an issue which is unique to the clothing sector.

1 And this is something which is well-known to the ONS and the UK statistics authority
2 that oversees the ONS and which has researched this problem and tried to identify
3 solutions to it, and in particular has suggested that the CPI measure may therefore be
4 more reliable than the RPI measure.

5 I know we are not here to choose data sources today but I just wanted to make sure it
6 was understood that in the context of that problem it is unique to that and it's not
7 something which is unknown or insuperable but it is something which has been
8 investigated and there are ways to deal with it.

9 And secondly, on the point about the costs and the fact that products are imported,
10 the ONS does produce indices of imported goods prices as well, so again that is not
11 a problem that's insuperable again.

12 **DR HOLT:** I would like to make one brief comment in relation to Mr Ramirez's testable
13 proposition point where -- I think the point was that if the data is available from Primark
14 looking at, for example costs that it could sort on one hand and other costs such as
15 overheads on the other, that if you disclose that data you can carry out whichever
16 regression or you can regress on all these costs items and form a view as to whether
17 either only one or all of these might be subject to pass-on.

18 But I think that is not quite the point -- at least doing that analysis, which I agree could
19 be done, in other words you could regress to carry out that sort of analysis and try and
20 understand whether overheads in the long-term do have an impact on costs. But that
21 wouldn't address the issue relating to these proceedings which is whether the MSCs
22 are best, in effect treated as if they are variable costs or a fixed costs. And the reason
23 for that is that, say for example you found that there was no relationship with overhead
24 costs but there was a relationship with costs of goods sold, the extension of that to say
25 well, because MSCs are in the overhead cost therefore that would suggest no pass-on
26 would be a false one in my view, because what that would be essentially doing is

1 looking at the extent to which movements in overhead costs trigger changes in prices
2 which might be an interesting line of analysis in its own right, but it would not tell you
3 whether changes in MSCs affect prices in the longer term, and the reason for that is
4 the signal to noise problem.

5 And the other inference is really just a categorisation issue, should you best treat
6 MSCs and overhead because that's where it is in the Primark accounts, or should you
7 best treat it as if it's a variable cost because of its inherent nature as being linked to
8 sales of clothing.

9 So that testable proposition doesn't, in my view, actually resolve that question.

10 **MR RAMIREZ:** Thank you, Mr Holt and Mr Coombs. I guess my response to
11 Mr Coombs would be that we're ultimately after a costs proxy here. I believe most
12 experts agree with Mr Holt that the MSC is too small a cost to measure pass-on on its
13 own. However, I do want to say Dr Trento is leaving the possibility open.

14 So I think then the question becomes well, what is the appropriate cost proxy? And
15 I think as other experts have articulated today that one thing that matters is well which
16 costs do merchants consider when setting prices and where do MSCs fall into that?

17 So I wouldn't make such a distinct characterisation between whether it's variable or its
18 overhead. So for example, M&S or some other claimant may say MSC costs we roll
19 that into store costs, so what that means is they are treated similarly in our pricing as
20 rents, staff wages for the floor. But we don't treat it the same as some other variable
21 costs and overheads costs. And given Primark's data is disaggregated there will be
22 the flexibility for experts to work out what they think the most appropriate cost variable.

23 I just wanted to clarify that.

24 **THE PRESIDENT:** That's helpful.

25 I see the time. It's probably time for a transcriber break so we'll rise for ten minutes.

26 Before we do, however, can I just see who has something substantive to say, the law

1 of diminishing returns set in, we don't want to shut anyone out but equally if those who
2 have not spoken have had their concerns or points made, then we are more than
3 happy not to hear from them.

4 **Mr Harman, you are perhaps next. I don't know else would want time, but we do**
5 **need to finish -- very good.**

6 We are deal with -- (Pause).

7 That's fair enough. You are, and Mr Tidswell rightly reminds me, Mr Harman, on the
8 supply side, we will deal with you at the end but we will deal with the other two after
9 we resume in ten minutes. No difficulties I think in finishing by 4.15 to 4.30, we will
10 see how we go. But thank you very much, we will rise for ten minutes.

11 **(3.26)**

12 **(A short break)**

13 **(3.40 pm)**

14 **THE PRESIDENT:** Mr Von Hinten Reed, would you like to go next?

15 **MR VON HINTEN-REED:** Thank you very much, Sir.

16 Good afternoon. I'm Mr Von Hinten-Reed. I was the expert in Sainsbury's, for
17 Sainsbury's, and I met you then. Today I'm representing Ocado in these
18 specific proceedings.

19 Thank you very much for changing the terms of how we approach this this morning. It
20 gives us a good chance to re-think everything. What I'm going to do is, I'm going to
21 actually explain to what you we were going to do because of a reason, but not to go
22 through it in any detail, but where I want to go to at the end is to try to follow your
23 proposal and see how we can actually get there together.

24 What I was intending to do or what I was intending to propose was we do have some
25 sort of questionnaire that samples the population. But my thing was not about simply
26 looking at the SIC code. I was going to go to the thing that we actually worry about

1 here, and that's the treatment of the MSC in the context of this particular case.

2 And it's the context of how it feeds through -- the issue is one of pass-on, so how it

3 feeds through into pricing. So it may do via surcharging. So I'm thinking of these three

4 boxes I'm going to describe. Surcharging, directly input into pricing. The other one

5 is -- we call it overhead or operating costs, but remember that in Sainsbury's the MSC

6 was a small operating cost. We are not trying to generalise to all operating costs.

7 That's an important point for later. So there's the issue of treatment.

8 And from that we would get a sample of -- it was going to be something like 50 to

9 a hundred. You have your hundred -- where we group those claimants who were in

10 the SIC code within the bucket of what was the treatment. So if they surcharge -- and

11 typically you see that in airlines and hotels, and you have the SIC code and the

12 treatment. So that was a sort of sector approach.

13 Then from that we will have actually thought about how to whittle this down. So it's

14 not about 3,000, it's not about 1,500, so ultimately we would have got to a point which

15 was about ten to 20 claimants. So whether it is five to ten by Mr Moser or -- we would

16 never have been dealing with hundreds at trial.

17 And that process would have been going from January and the important things would

18 have been March, May, August. August would have been the end of the evidence.

19 And that evidence in August would have been the witness statements.

20 The reason I'm just describing that is actually I am thinking in terms of -- where I was

21 thinking was it's actually quite important to think how the MSC is actually treated,

22 because then you can actually group the analysis. That was an example, remember,

23 of me trying to go from qualitative to quantitative at the end. I would have had to try

24 and get estimates, either on sector-specific basis, and that is sector, inverted commas,

25 because when I think of sector I think of treatment/SIC, or a weighted average.

26 I want to basically go through why I think, unlike my esteemed colleague Dr Holt, you

1 do need to think about those things in terms of -- because economic theory -- I just
2 want to talk about economic theory, and I will take a Friedman approach. Friedman
3 basically said that economic theory is about prediction, based on false assumptions,
4 and you come up with something; and in this case the simple price-related theory was
5 you came up with 50 to 100 per cent depending on whatever is perfect competition of
6 monopoly.

7 So economic theory can offer insights, none of us are saying economic theory can't
8 offer insights. But it's dependent on whether the assumption is correct. It's a testable
9 assumption. It's not to be assumed -- my kind of critique in the way in which the
10 approach is: okay, all the variable costs are -- all the costs are variable, whether it's
11 the short run or the long run, and on the basis of that I know that COGS are variable,
12 okay, I will then say that the MSC is variable as well, right, easy, my proxy is
13 MSC/COGS, they are treated same.

14 The problem is that's not actually how variable costs are treated in practice. There are
15 some variable costs such as costs of goods sold, COGS; it may feed directly into price.
16 As an expert I wouldn't defer from that. So if actually the MSC was very much treated
17 as GOGS, there wouldn't be an awful lot of need for two days of hearing, frankly.

18 Other variable costs may be treated as overheads and have no direct link to prices.
19 So for me it's about whether the costs actually feeds through into price, not whether
20 it's variable, or fixed.

21 Now remember in Sainsbury's the MSC was not included in COGS but was treated
22 differently, as a cost of operations in Sainsbury's terms but in my terms today I will just
23 call them overheads.

24 I want to come on to emphasise that whilst the MSC for me is a variable cost that's not
25 the critical question. (Inaudible) B1, B2, B2 is what is actually crucial. Because how
26 you treat it, will also have implications for the sorts of evidence you ultimately will want

1 to see. So if the MSC is treated as direct input costs, input into pricing, the evidence
2 on pricing rules, then evidence on gross margins may be relevant. And here, the
3 econometric studies may be complementary. So some of the things that Dr Holt wants
4 to do with the studies if they cover -- and there are some issues with them, and there
5 are some issues about explicability, but if you get over those, then I would say if MSC
6 is treated as COGS we have a way of using those studies.

7 If the MSC is an overhead then the evidence on budgetary processes are likely to be
8 more useful. I take that from my experience in Sainsbury's. Dr Niels mentioned that
9 in Sainsbury's there was witness evidence, there was evidence on the budgetary
10 process, there was huge amounts of disclosure, the gold standard. Econometric
11 evidence, not so much although it was produced in evidence but it wasn't really treated
12 as such.

13 The thing about theory, though, it doesn't actually doesn't -- it's quite simple. I like to
14 think it's not a simple model, price quantity. So you have a changing cost and the
15 profit maximising output changes, and price. But that doesn't take into account how
16 businesses actually run -- are run. They are non-price factors. Non-price competition
17 is important. I don't think there is an expert, I hope not, on this panel who doesn't think
18 that actually non-price competition isn't important.

19 That involves issues of marketing. So discretionary spend. So the likes of a CEO and
20 CFO are worried about the portfolio of spend and how it should be allocated and also
21 what the impact then of the overcharge is on that spend.

22 Then you get the issue of imperfect information. So information is not costless. The
23 reason why we have CFOs doing budgetary processes and coming up with rules is
24 how to deal with something that sometimes is unknown. That is actually quite
25 important.

26 That is why we had the factual evidence in Sainsbury's of the actual pricing and

1 budgetary processes. As I identified in my expert reports and was written up in the
2 CAT judgment, but really most importantly the Supreme Court judgment, identified four
3 ways a merchant might respond to a cost pressure: do nothing, lower discretionary
4 spend, negotiate, lower supply prices, which my esteemed colleague Mr Harman will
5 discuss later, and increase customer prices.

6 However, three of the four options are not considered as consequence of the
7 assumption of a standard model. So whether predictions of standard models are
8 accurate, despite these limiting assumptions, can only be ascertained when they are
9 tested with relevant empirical evidence. Why is this important? It may be important,
10 it may not be, depending on where we are in the fork on the road, I will come on to
11 that.

12 I don't want us to go into great debate at this point with Visa and Merricks, who have
13 made various points in their submissions and which you see tomorrow, but just recall
14 that I just said that standard models don't actually encapsulate a lot of what the likes
15 of Mr Coupe who was the CEO and Mr Rogers the CFO of Sainsbury's had to deal
16 with every day, or indeed any of the claimant evidence that is going to be adduced.

17 What I feel important is that we need ultimately to ensure that we do not ignore these
18 important aspects. One can actually take almost a Nelsonian eye and simply assume,
19 in effect, that if you don't ask the question of what is the treatment of costs of the MSC
20 you can then go immediately to kind of assume, because they are variable, that you
21 would go and assume that they are COGS and therefore you could use a certain type
22 of evidence. I think that will be a mistake and something that we need to be careful
23 of.

24 Just going to the studies, and I think bearing in mind we have -- what we have tried to
25 paint is a sort of a fork in the road. On the right-hand side we have if the MSC is
26 treated as COGS then go and look at the studies. They may be really informative. If

1 they are not on the left-hand side then you need to think again, or you need to think
2 about interpretation.

3 The problem with the studies, and I think this something that Dr Niels -- I would agree
4 with Dr Niels, there are gaps in the coverage. So treatment of costs and also the
5 studies. So if you think of the studies, say as I have done I have looked at 80 studies
6 with my team, I found that 34 are COGS, 29 are taxes and five are operating costs.
7 Of the operating costs four were wages, one was electricity, none were small operating
8 costs. So we do have an issue. And certainly if the issue is the MSC is not treated as
9 COGS then the 34 are less relevant. Taxes are actually treated totally separately to
10 operating costs in many businesses and therefore either they are too big, compared
11 with the MSC, which was small, or they are in a totally different area. I mean there are
12 examples, and I will give an example for Sainsbury's. There was a study of
13 Sainsbury's, I think it's used, where VAT is actually passed on in Sainsbury's. I think
14 it's in the sample, and yet when we looked at it from the context of the MSC we could
15 not find the fact of pass-on. It's actually quite important.

16 **MR TIDSWELL:** Sorry to interrupt you. These are really -- I think we've canvassed
17 to some extent the need for some matters to be left for trial, and it does seem to me
18 that most of the things you are raising are the very things that we are going to be asked
19 to determine at trial --

20 **MR VON HINTEN-REED:** Good.

21 **MR TIDSWELL:** Which is fine, and obviously fine for you to rehearse them but I think
22 what we don't want to do is deal with them now, as the President has made clear.
23 I just wonder whether there was anything you wanted to say particularly about the
24 approach that we've settled on, I think pretty much, with the other experts who have
25 spoken, and any reason why it does not allow you to do what you need to do properly,
26 and I --

1 **MR VON HINTEN-REED:** It's my last page.

2 **MR TIDSWELL:** If I could accelerate you to that. The difficulty I think with the way
3 you have introduced us to some of the points you have been making is it may be all
4 very well to say that -- and indeed as a matter this can be put for trial, we don't need
5 to deal with that, but you may be right, you may be wrong, that exactly what an
6 individual merchant does in any one case will determine whether the costs are passed
7 on or not but that's not where we are for the reasons we are here. And clearly -- I
8 gather it come in a slightly different guise because it's not part of the wider claimant
9 group, but at the end of the day we do have to have a degree of pragmatism about
10 how we deal with all of this.

11 So question is, are we going to be able to allow you to run the case you want to run,
12 the arguments you want to run, on the premises that we put forward earlier in the day?

13 **MR VON HINTEN-REED:** I was rapidly scribbling down as the President was making
14 his points this morning just how I will respond, so I am going to come to this page very,
15 very shortly.

16 **MR TIDSWELL:** Yes.

17 **MR VON HINTEN-REED:** Because we talked about the econometric studies, I agree
18 with Dr Niels, we talked about Mr Coombs' studies I agree with Dr Niels and
19 Mr Ramirez, there are no problems there. If you simply regress revenue cost without
20 some interpretation then we are going to have problems. Now in terms of process --

21 **MR TIDSWELL:** Sorry to interrupt you again. (Inaudible) so much in terms of process,
22 it's a substantive point which is exactly that --

23 **MR VON HINTEN-REED:** Are we going to get there?

24 **MR TIDSWELL:** Which is that if we are adopting an approach which starts with the
25 data and then requires some justification if we are going beyond that, recognising that
26 this sounds like there's going to be quite a considerable disagreement about the

1 correct proxy costs or what the implications of the choice about that are, but that is
2 a matter for trial, at least on the current construct.

3 **MR VON HINTEN-REED:** Yes.

4 **MR TIDSWELL:** I mean that is not where you started and obviously you should say
5 now that creates a difficulty for where you think you need to end up, so it's not just
6 a procedural point, I think that's actually a substantive point about how this is going to
7 be dealt with.

8 **MR VON HINTEN-REED:** I take your points and I will answer it. I described the
9 qualitative to the quantitative and in a way in which I describe the (inaudible)
10 quantitative, get the data then analyse it. I hate the idea of simply saying "regression",
11 it could be statistical relationships, it could be anything but at least you will be able to
12 interrogate that data.

13 Then the issue is, are we able to have time, I think, as experts, to think about the
14 implications? I think yes. I don't have a difficulty with the approach you've set out.
15 And I say that in the terms of the timetable in terms of November, because ultimately
16 that's the: are we able to do this or it's the right or proper standard by November and
17 I think we can, I don't have a problem.

18 We are going to actually collect the data, we are going to do some statistical analysis.
19 The only two important tests are whether I can actually look at the statistical
20 significance; in other words we are going to exchange data as well; and the other thing
21 is relevance. And there may be qualitative requests being made but I heard the
22 process this afternoon and I'm quite confident that if something needs to be ordered
23 or something needs to be asked then provided targeted disclosure and not a fishing
24 expedition that should suffice.

25 **MR TIDSWELL:** Yes. So if one, to take Professor Waterson's analogy of the PhD
26 student, so if we get to the point where we have some sets of data, the experts have

1 had a chance to look at it, there may well be some observations about the limitations
2 on it -- well there will be, no doubt, I'm sure; but also how far it takes us and then
3 identification (inaudible). The risk in all of this is we get to September, and I'm not sure
4 you have had the pleasure of involvement in Trial 1 and the discussions about that,
5 but the last thing we want to find is that we are having frank discussions in September
6 about how one is going to go about giving disclosure from particular groups of
7 claimants or indeed anybody else, and then putting ourselves under enormous
8 pressure for a trial that starts in November.

9 So the one thing I think we do have to be clear about is that if -- and I appreciate there
10 may be some practical difficulties in this, but if there are genuinely some things that
11 people need beyond the data (inaudible) save them for later, I think that is part of the
12 point of having reasonably regular case management conferences, I just want to be
13 absolutely clear with you that there is no window of luxury of time that starts at the end
14 of process of the analysis that's being done on the data but then there's -- people
15 (inaudible) go off and do a lot of other things so there won't be time for this.

16 **MR VON HINTEN-REED:** Okay, let me do it the other way around. I started off doing
17 what I would have done previously and I mentioned that I had had a timetable in mind
18 that got you to November. I think this also gets you to November. We need to be
19 clear -- sorry sir --

20 **THE PRESIDENT:** I think we are getting to a stage where we are transiting into the
21 discussion we will have tomorrow.

22 **MR VON HINTEN-REED:** Yes.

23 **THE PRESIDENT:** And I think that is something where, because it is they who will
24 ultimately bear the burden of trying the matter, that the counsel teams will be thinking
25 very carefully about what is achievable and what is not achievable in light of the very
26 helpful discussions we've had today. And I think the concerns and capabilities of the

1 various economic experts will be key to that consideration but I think those concerns
2 and capabilities need in the first instance to be reflected in the consideration of the
3 lawyers who will address us on these points.

4 I think it's fair to say that we will be tilting towards an aggressive rather than a relaxed
5 timetable for what needs to be done, and we'd like the parties to think, not what is
6 a relaxed stroll to November but a reasonably brisk march to the trial date because
7 I anticipate there will be a number of possibly quite large issues that will need
8 resolution on route. I'm not talking about substantive trial matters, I'm talking about
9 process matters which are necessary for a fair trial, and I think we need to reflect that
10 in a, as I say, brisk march(inaudible).

11 I'm grateful to hear that there's no deal-breaking problem that you see in what's been
12 articulated, that is helpful to know. But I think how we are going to do it is something
13 which I would be grateful if you could reflect back with your legal team and they can
14 then synthesise where the stresses are, because we have a very experienced set of
15 lawyers who know, not merely how to do these things but where the pitfalls lie and
16 what we need to watch out for and we will be listening very carefully tomorrow as to
17 what a feasible timetable to trial looks like and what the various steps on that route
18 are. So thank you very much.

19 **PROFESSOR WATERSON:** Sorry, one other quick question. Can I ask you about
20 Ocado data, whether you have any familiarity with it and what the position of Ocado is
21 and it may be you can't say, but as Mr Ramirez told us was very helpful to have an
22 understanding of what was there.

23 **MR VON HINTEN-REED:** I have less understanding of Mr Ramirez and I was actually
24 going to make sure that I did understand before tomorrow.

25 **PROFESSOR WATERSON:** And Mr Brealey no doubt can pick that up. Yes, that's
26 helpful, thank you.

1 **THE PRESIDENT:** Thank you very much.

2 **MR MURGATROYD:** Richard Murgatroyd. I am instructed by Pinsent Masons on
3 behalf of the Allianz claimants.

4 **THE PRESIDENT:** Yes.

5 **MR MURGATROYD:** I don't have very much to say so you will be able to quickly
6 move on to Mr Harman I hope. I just want to touch base on a couple of points, focus
7 specifically on insurance because of course that's the category that the Allianz
8 claimants lie in and from what I've heard it seems that under both the UK-wide sort of
9 pass-on approach and also the assessment of whether a particular sector might
10 deviate from that approach, the Allianz information seems pretty key to that. There
11 seems to be much less information publicly available on insurance. I just want to say
12 a couple of things about that.

13 The first is I think that at least for the insurance sector it will be important to supplement
14 the quantitative information with some qualitative factual information around the
15 operation of the industry and the factors that are taken into account in pricing. So for
16 the avoidance of doubt I'm not talking about, how are costs categorised in an
17 accounting sense, I'm talking substantively, how does the industry work, how do
18 people think about pricing. There are more than a couple of reasons why that's
19 important but I think the one I would probably most like to highlight is unlike a lot of the
20 markets that we are talking about, where we are talking about businesses that take
21 inputs and assemble them into some sort of product and then sell it on, insurance
22 operates different in that context in that essentially you are managing a risk, you know,
23 you are selling something that may never pay out, it depends if a claim is made and it
24 depends on the value of that claim. And obviously there's modelling -- things that I'm
25 certainly not fully knowledgeable about but -- quantitative modelling that goes into
26 managing those insurance risks and pooling those risks across different people.

1 I think it's going to be important to understand that in order to, I suppose -- three things,
2 I think one is to make sure that when I'm giving expert opinion on economic theory I'm
3 making those observations from an informed position rather than an abstract one, so
4 I'm not applying abstract theoretical concepts that aren't grounded in the industry.
5 I think as the Chair identified, to understand the data, I think is going to be important.
6 But also to make appropriate empirical modelling choices that are informed by how
7 the industry operates. I think that is going to be important as well. Then obviously to
8 interpret the results of the empirical analysis. Let's just say I think there's
9 an importance for some limited qualitative factual information to help with the
10 assessment of insurance.
11 I then just wanted to talk very briefly, because I know the panel has asked about this,
12 about the Allianz data and about pooling. I'm familiar with some but not all of the
13 Allianz data. There is detailed granular information on pricing, so on sales. I'm not as
14 familiar on the level of granularity that there exists for costs. I think some costs will be
15 available at quite a granular level, but there will be I think a question which I think I will
16 try and answer overnight about how granular the information one can get about what
17 the business terms "claims costs", which are essentially the hypothetical costs that are
18 incurred if you have to pay out on these insurance policies. And because there are
19 elements of pooling risks across different policy members, I think there's a question
20 about whether you can get that at the individual transaction level or whether it's just
21 a mere sort of arbitrary allocation of those costs. But we will try and understand that.
22 I think on the pooling question, I think if the Tribunal is keen to pool these data
23 together, I think that's something -- pooling things is always feasible at some level, but
24 I think there's going to be a question about what level of aggregation is required to
25 facilitate that pooling. That's not just I think a function of the Allianz data but also the
26 data of the other claimants because in some sense you are probably going to end up

1 pooling closer to the highest level of aggregation because that's what's necessary.
2 But I think that's something that is evidently achievable. The only thing I would say
3 about that is to the extent that that pooling itself has an effect on the data that might
4 affect its applicability or its ability to be extrapolated purely to insurance, one might
5 also want to take that into account when thinking about, you know, you get a pass-on
6 rate in the UK-wide level, how do you adjust that upwards or downwards to reflect the
7 insurance sector?

8 That was all I have to say on the topic.

9 **THE PRESIDENT:** I am very grateful to you, thank you very much.

10 **PROFESSOR WATERSON:** Could I just check, I am afraid I don't know which areas
11 Allianz works in, does it work across motor and household, et cetera, et cetera?

12 **MR MURGATROYD:** Yes. I can give you some clarity on that. Before you are even
13 talking about types of insurance there are two types of activity. So there's
14 underwriting, which is selling the policy. That is the bulk of the commerce in the Allianz
15 claimants' claim. There is also a small part of claims due to broking, which is
16 essentially selling others' policies on a commission basis. There will be focus on
17 underwriting, you are talking predominantly about motor, home and then to a lesser
18 degree pet insurance, which is a level of insurance I knew nothing about until I started
19 this instruction, apparently it's a thing. It's kind of more household-y type insurance,
20 I think there's some business insurance in there but it's small in the context of the
21 overall claim. It's mostly about home and motor.

22 **PROFESSOR WATERSON:** And the broking bit is potentially interesting I think as
23 well because there you are -- as you say, you are not doing the insuring bit, you are
24 simply selling the product where someone else is taking the risk.

25 **MR MURGATROYD:** Yes, exactly. So you might want to -- depending on what the
26 evidence shows that might warrant a different approach to thinking about some of

1 these adjustments.

2 **PROFESSOR WATERSON:** That's more like the sort of standard cost of goods --

3 **MR MURGATROYD:** Indeed.

4 **PROFESSOR WATERSON:** -- for a business.

5 **MR MURGATROYD:** Or an online sales platform like Amazon that takes
6 a commission when it re-sells.

7 **PROFESSOR WATERSON:** Yes, exactly.

8 **THE PRESIDENT:** Thank you very much.

9 **DR TRENTO:** One brief point maybe that's connected to what we discussed before
10 the break, which is about the proxy costs approach. I think it became very clear during
11 the discussion that if we are going to take a proxy costs approach then the
12 identification of the correct proxy is crucial. Because if we identify the incorrect proxy
13 and then we assess the passing on on an incorrect proxy then we are going to give
14 you a wrong answer.

15 My point there is that unfortunately there is no way for us as economists to test whether
16 a proxy is good or is bad, because paradoxically, the only way to test whether a proxy
17 is good or bad is that we see that the passing on of that proxy is similar to the passing
18 on of the MSC. But if we can't estimate the passing on of the MSC then we cannot
19 obviously compare the two passing ons. So as economists obviously this is something
20 we cannot do.

21 So I think because this question is a question that is mostly factual, practical, and we
22 are technical people, we are economists, we get the data, we do the estimation, we
23 do some regression model, we get the estimation, but we do not have the expertise
24 that maybe a pricing expert can have, which is they advise companies to price their
25 products or services and they have a much better knowledge of the pricing process
26 and the budgeting process, so a better understanding of what a relevant proxy could

1 be. I think we discussed before -- relevant proxy, we discussed that in terms of
2 overhead versus COGS, but I think it's much more granular than that, it is an ad
3 valorem or a unit cost, it is also if it is paid on all transactions or only on a subset of
4 transactions and so on and so forth. But these -- for me as an economist, it's
5 a question that I wouldn't know how to answer, unless I get someone with more
6 expertise or some guidance, maybe from the claimants or something else that would
7 help us. I don't think this is something that can be resolved as a matter of economic
8 experts only.

9 **THE PRESIDENT:** It's helpful that you raise that and it's in substance the same point
10 that Mr Piccinin made earlier. There will obviously be an order regarding adoption of
11 expert evidence. You can take it as read that there will be permission to call expert
12 economists and we would like them to be named expert economists, we are not going
13 to give permission to any particular expert, we will obviously allow changes to identity
14 if that is necessary but we will expect each party to identify the economists they intend
15 to rely on.

16 There will tomorrow be no further permission for anyone. That's not to say that there
17 won't be room for further witnesses, either expert or factual, but we propose to
18 maintain a strict control over the evidence that we hear at the end of the year because
19 we don't have an infinite amount of time, we have very limited amount of time. And it
20 is quite clear that we will be spending quite a lot of time hearing economic evidence
21 from you, and we will want to understand precisely why other evidence, including other
22 expert evidence, is heard. Obviously where it is said that an expert cannot deal with
23 a point, as you just said, Dr Trento, that is something which we will consider most
24 carefully but we don't want to deal with that sort of thing today. We are keen that the
25 parties have the opportunity to take stock to understand how the engine room of the
26 claim, which is the gathering and the analysis of data is to be done, we want a very

1 clear idea of time frame within which that is to be done, and we have already indicated
2 a route by which gaps in the evidence, including gaps in the expert evidence, can be
3 dealt with. We anticipate that if the point you have raised, or other points, become
4 a problem, they will in the first instance be flagged in the fortnightly meetings and if
5 they become contentious then we will have to have a full-fledged application to deal
6 with it. That is how these things are done. But we are not in the business, particularly
7 with this case, of writing blank cheques, we are going to take a very rigorous control
8 of what's going on. And that I think is very important, not merely to control costs and
9 to ensure that we stick to timetable, but also to ensure that the issues that are under
10 debate are clearly understood. I will want to understand why evidence of a certain
11 sort is being sought before it is let in because otherwise we get do a situation where
12 we simply have admitted evidence, the purpose of which we don't understand and
13 therefore which would not properly controlled.

14 We hear what you say, Dr Trento, I'm very grateful that you raised it but it's not a matter
15 for today and I don't think it is actually a matter for tomorrow. The furthest I will go on
16 this is it would be helpful I think if counsel were to indicate what in evidential terms
17 might be coming down the road so that we can think about it in advance of
18 an application being made but we will not invite applications tomorrow.

19 **PROFESSOR WATERSON:** Can I just add on that, let's as an example I know this is
20 not right, but if the MIF is simply 1 per cent on transactions then the answer to your
21 question is clear, that it's a percentage for an ad valorem.

22 **DR TRENTO:** I completely I agree.

23 **PROFESSOR WATERSON:** So then going on from that it's then a question of what
24 percentage of the company's Mastercard's and Visa's activities are of that nature and
25 what percentage are they of another nature, and to what extent do those mirror this
26 percentage factor and to what extent they don't. But this is something that Mastercard

1 and Visa should be well able to let us know about.

2 **DR TRENTO:** I fully agree. My only point is that even if the cost is an ad valorem
3 cost, if then the companies take the ad valorem cost and does not treat it ad valorem
4 but just takes the dollar value and adds it to the cost of goods sold as a pound value,
5 so not a dollar, a pound value, then the treatment of the company is different from
6 what we think from an economic theory point of view, and I think --

7 **PROFESSOR WATERSON:** But then I think you have to ask, well why is the company
8 choosing to do something which is not ultimately optimal?

9 **MR HARMAN:** Sir, a few thoughts on supplier pass-on. My name is Greg Harman
10 for the record, I was an expert on Sainsbury's and I was also working on AAM.

11 One of the clear things from those two sets of cases was evidence in the data that not
12 only did merchants seek to pass on through price, and we can debate as to how much,
13 but they also sought to I would say economically pass on through other means, and
14 one of those is through supplier costs. There can be a definitional issue as to what
15 we mean by "supplier costs", do we mean just the supplier of the product that is going
16 to be on-sold, but it could also mean the supplier of services in terms of SG&A, for
17 example. There could be discretionary spend: marketing, capital expenditure, or they
18 could choose to do nothing in terms of incur a loss -- if there was an increase in costs
19 they wouldn't do anything about it.

20 So to varying extents across those claimants one observed that the response to
21 changes in costs was not only through increasing prices but also through these other
22 means, and the supplier cost element of that was relatively material.

23 Now from an assessment perspective, it's not much different to the consideration of
24 pass-on through prices, there are some econometric difficulties potentially on top of
25 those that we observe with prices because we are trying to model changes in prices
26 based on changes in prices; it's both potentially the explanatory variable and also the

1 dependent variable. It doesn't mean that it can't be done, but there could be some
2 challenge from a very statistical perspective but there are other means of calculating
3 the level of supplier pass-on.

4 What I would say is that there is probably a small number of documents that would not
5 only assist in the determination of supplier pass-on and therefore whether one should
6 go on to calculate pass-on statistically through econometrics, but also that set of
7 documents is likely to be helpful for the other analyses that the experts are doing. And
8 that set of documents, and we can debate as to whether they are data, I would say
9 they are data but they may include some qualitative commentary in addition; and that
10 relates to documents on the budgeting process. The general way in which businesses
11 operate, and not all businesses but certainly across the supermarkets that I have
12 looked at so far, and other businesses just in my general consulting activities, is that
13 first of all a top-down budget is set, somebody in upper in management says: this is
14 what our forecasts or our preferred outcome is over the following period. Maybe it's
15 a level of profits, maybe it's a profit margin, maybe it's a growth rate. Once that
16 top-down budget is set, the business as a whole is asked to do a bottom-up budget to
17 try and meet the top-down budget and that will be much more detailed in terms of the
18 products that are going to be sold, the prices they are going to be sold at, the costs
19 that are going to be incurred and so on and so forth. If there is a gap between the
20 bottom-up and top-down, and I imagine there normally will be, unless by chance, then
21 the company thinks about how it's going to plug that gap between the top-down and
22 the bottom-up and all of the mechanisms that the Supreme Court put forwards are
23 possible ways of closing that gap in terms of increasing prices or changing prices,
24 changing costs, et cetera.

25 When you look at the budgeting process documents you get a very firm factual feel as
26 to how the business is being managed and therefore whether price pass-on or costs

1 pass-on is more likely. But the data also includes important information such as, what
2 are the costs shocks that have happened in a given period, what are the tail winds and
3 head winds that are flowing through the business that are going to impact the business
4 going forward. It may tell you something about how certain costs are managed. Are
5 they managed at a costs level or are they managed in aggregate?

6 Now, I know there's been some debate as to if you are a PhD student you go out and
7 you look at the data and you come up with some answer and you let the data talk for
8 itself. But that's a data-mining approach that isn't necessarily affected by the facts.
9 And I would say that the best econometric models are ones that start with some
10 understanding of what's happening in the business because you need to know what
11 was the cost shock, what is the likely response in terms of price, and costs.

12 That may come across as being qualitative data but I would say that in my experience
13 that there is, as I said, a small number of documents, they are budget documents, they
14 are documents that look at cost and price monitoring on a monthly basis. It includes
15 what happens at the end of the year; it includes the data that gets given to the board
16 in terms of how the organisation has performed over that year and it would probably
17 include essential financial information like management accounts. Those
18 management accounts which are produced on a monthly basis will also have
19 a commentary explaining what is happening in those businesses. I would say all of
20 that data is essential for a sensible econometric analysis because it informs how the
21 model should be constructed. It does not require expert evidence to be provided by
22 another expert, it does not necessarily require any factual witness statements. But
23 that core set of, which I will call, more financial documents, is going to help the
24 economic assessment not just of supplier pass-on but also price pass-on.

25 And I think those documents are generally readily available because they are the types
26 of documents that businesses use to manage their businesses. And I would also say

1 that you wouldn't need those documents for every single year and every single month,
2 actually what you would need is data for a number of years and for a number
3 of months, that you could actually reduce the burden of what I would call the data
4 contained in those documents.

5 And that's it.

6 **MR TIDSWELL:** Would you need it for every single claimant?

7 **MR HARMAN:** I think you would need it for every single claimant. We went through
8 this process for AAM, there were obviously three claimants, we actually looked at
9 every single year, it's not a difficult process to go through. We've been through it a
10 number of times.

11 **MR TIDSWELL:** Are we talking potentially about a couple of thousand claimants?

12 **MR HARMAN:** When you say "all claimants", I would say we follow the same -- I will
13 not confuse the word "sampling" -- the representative group of claimants who are
14 providing or readily willing to provide data, I would say that is the subset of claimants
15 that we would look at. And I agree, looking at some of the biggest ones are going to
16 be more efficient because they are most likely to have that set of data as a part of their
17 overall business.

18 **MR TIDSWELL:** Is the purpose of the exercise so you can conduct an econometric
19 analysis, or are you seeking to draw --

20 **MR HARMAN:** I think that is two things: one, we would like to do an econometric
21 analysis but we have to see what the data tells us. If the data tells us, for example,
22 for a certain subset of claimants, that they never pass on through supply costs then
23 I would say, why would you do the econometric analysis to verify what you actually
24 see in the factual record?

25 The second thing that I would say is important is that if you are going to specify the
26 model you need that understanding of how certain costs flow through. So let me give

1 you an example of that: there's some discussion here about whether merchant service
2 charges are variable, whether they should be treated as overheads or whether they
3 should be included as costs of goods sold. To me that kind of misses the point, at
4 least for certain businesses. So let me give you a reason why I say that. The
5 argument that I saw on Sainsbury's, for example, was the people responsible for
6 selling - small teams responsible for agreeing the price to sell at and also had the
7 responsibility for negotiating with suppliers, they said "Well we never see a merchant
8 service charge, we don't know if that ever changes, but therefore if it did change in the
9 future we wouldn't adopt our pricing or our costing responses to that".

10 But that wasn't quite the picture because in this top-down bottom-up process, actually
11 what leadership management said was, "You as a trading team need to hit a certain
12 margin overall because that margin is going to allow us to hit the overall profitability
13 for the firm". So actually the metric that was given to the people responsible for pricing
14 and for costing incorporated the actual level of the merchant service charge and all
15 overheads. And each year, if those costs changed, then margins would change. So
16 we would say that indirectly the people responsible for pricing were reflecting changes
17 in overhead costs potentially with a one-year lag. That's why understanding some of
18 that information will be important because it will go to questions such as, which costs
19 should we change in the overall regression analysis?

20 **THE PRESIDENT:** That's very helpful. It does seem to me that the case could be
21 made for this being intrinsically linked to the data-gathering exercise, and so I don't
22 think it would be right to be drawn on whether it will or will not be produced because
23 we are not at that stage of granularity yet. But clearly you have articulated, and you
24 will be articulating to those providing the material, the need and if the need persists
25 unresolved then it will have to be resolved in the way that I have been suggesting.
26 So on that granular point thank you, but we will say no more.

1 I think before we rise it's worth spending no more than two minutes my articulating
2 something that I would like the parties to bear in mind when they are considering where
3 we go from here. It seems pretty clear that this is going to be an expert economist-led
4 process. I have already indicated that permission to produce the expertise of the front
5 row here will be granted on a named basis. It does seem to me that your reports ought
6 to be, as it were, the lead reports, setting out the entirety of the case of your party for
7 purposes of Trial 2. Let me explain what I mean by that. We've already identified
8 certain areas in which you are not experts, Dr Trento made that very clear. I would
9 expect evidence that is independent of but related to front-line expert reports to be
10 referenced and embedded by reference in those reports so that we can read your
11 reports first and understand where you are passing, as it were, the opinion or evidential
12 buck to someone else. It seems to me that the consequence of that is that we ought
13 to have an in-parallel production of expert reports which are exchanged on the same
14 date and one of the questions will be what that date should be.

15 There would then be a round of reply expert reports dealing with what has been said
16 positively in the first round. That is a process which I suspect the barristers behind
17 you have seen done, it was done in the Chancery Division in a trial family trial that I did
18 which Dr Niels will certainly be familiar with, the *Optis v Apple* trial. It has been ordered
19 in a number of other cases here, it does work quite well, it's something that I have well
20 in mind. The key question is when, if we take this route, those two rounds of reports
21 are served.

22 And it seems to me the question is whether it is the end of June or the end of July for
23 the first round and the end of September for the second round. I throw those dates
24 out there not because I want any argument now, but I do want you to take those away
25 to think about them because if we ordered end of June that seems extraordinarily tight,
26 given we have to assemble a whole data set. But end of July gives you only

1 two months before the reply reports at the end of September, and I don't think I would
2 be very comfortable in pushing those beyond the end of September but that's
3 something you no doubt will want to think about.

4 Bear in mind that the process up to July will involve not merely the writing of your
5 reports, but the thinking about the issues, the thinking about the issues is dependent
6 upon the information you have, which you don't have at the moment, there's a great
7 deal to be done in the next six months. And I just want that to be the take-home point
8 for this evening because it is the practicality of getting that done and getting that done
9 comfortably, rather than putting everyone under a massive pressure that we want to
10 think about and want the parties to think about tomorrow.

11 **PROFESSOR WATERSON:** I just raise a practical point. We have eight experts
12 here. If they each respond to each of the other reports then we'll have 56 response
13 reports. That doesn't seem to me to be workable. So my suggestion would be, it's
14 really for the president to say, but my suggestion would be that those responses,
15 people should not feel necessary to respond to everyone else's report; and secondly,
16 that any response should be quite brief. There may be other considerations but it
17 does -- it just strikes me that 56 response reports are not a very good way to proceed.

18 **THE PRESIDENT:** It's probably my maths. I think that that is a point that is well made,
19 to think about proportionality. Obviously the response reports are not intended to
20 achieve a state of absolute truth, but to ensure that you protect your own case and
21 that we are able to try the case on its issues. Clearly we are going to have to
22 understand what is being said in attack on your case; that is what we are interested
23 in, not in a global quest for truth in respect of points that do not impact the claim or the
24 defence of claims for us. But Professor Waterson's point obviously is something you
25 will also take home and in a way it does underline the significant amount of work that
26 is involved in the next 12 months going forward.

1 Is there anything that can't wait until tomorrow morning? Otherwise I will adjourn until
2 10.30 tomorrow.

3 **MR SIMPSON:** One point --

4 **THE PRESIDENT:** Mr Simpson of course.

5 **MR SIMPSON:** Mr Moser only had a very short time I think over what must have been
6 an enjoyable lunch to deal with your indications earlier. I wonder if you might ask or
7 direct him, depending on how didactic you are feeling, to produce by tomorrow
8 morning some indication of the willingness of the parties he's indicated to provide the
9 data, the nature and extent of the data that they can provide and the timing within
10 which it can be provided, because that will then inform both the Tribunal's directions
11 and submissions tomorrow.

12 **THE PRESIDENT:** Well Mr Moser, you heard what Mr Simpson says. We are now at
13 4.35. What can be done between now and 10.30 is something which I think is rather
14 a tall order. The point I think that really underlies Mr Simpson's point is this, that we
15 are not necessarily going to make an absolutely final order tomorrow if there are
16 unknown variables but we will expect there to be a timetable order made within the
17 next four or five days which will be a feasible -- an aggressively feasible timetable to
18 a trial taking place towards the end of this year. That means, I'm afraid, a certain
19 degree of fairly urgent communications with your clients so that you can inform all of
20 the other parties because they all have an interest in what is or what is not feasible.
21 Equally though, you will be entitled, because you'll be asked by those expected to find
22 the data, what exactly it is that is to be provided. And I anticipate that that is going to
23 be a rolling process. So in making your enquiries you will, I'm afraid, have to apply
24 a degree of broad brush and that is precisely why we are anticipating the need for
25 regular reviews to deal with disputes, because we are unkeen to put the parties under
26 undue pressure but we will, and I think you all know this, put you under extreme

1 | pressure if we think that the trial process is getting out of control. Because we -- I will
2 | say it now -- we are not going to be adjourning trial two. (Overspeaking).

3 | **MR MOSER:** Sir, you may take it as read that aggressive feasibility was already
4 | factored in to how we intend to approach this. And I don't want to introduce a sour
5 | note but the Merricks party has introduced a certain amount of aggressive unfeasibility
6 | into deadlines in recent weeks and this was an instance of it live. We are not in the
7 | business of obstructing at all. We are going to be as helpful as we can and will do it
8 | as quickly as we can. Tomorrow morning is simply impossible. But it will be done as
9 | soon as it possibly can.

10 | **THE PRESIDENT:** We will resume at 10.30 tomorrow.

11 | **(4.45 pm)**

12 | **(The hearing adjourned until the following day at 10.30 am)**

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