IN THE COMPETITION APPEAL TRIBUNAL 1517/11/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 7 – Wednesday 8 July 2026

Before:

Ben Tidswell

Merchant Interchange Fee Umbrella Proceedings

A P P E A R A N C E S

Kieron Beal KC, Philip Woolfe KC, Flora Robertson, Oscar Schonfeld and Oliver Jackson (Instructed by Scott and Scott UK LLP and Harcus Parker Limited) on behalf of the Merchant Claimants and Kieron Beal KC (also instructed by Hausfeld & Co. LLP) in relation to the Host Case Application

Matthew Cook KC and Jagoda Klimowicz (Instructed by Freshfields LLP and Jones Day) on behalf of Mastercard

Brian Kennelly KC and Daniel Cashman (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: ukclient@epiqglobal.co.uk

Tuesday, 7 July 2026

(10.34 am)

Housekeeping

THE CHAIR: Good morning, everybody.

Morning, Mr Beal.

I'll just read the live stream warning. Some of you are joining us live stream on our website, so I'm going to start with the customary warning: an official recording is being made, and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Mr Beal, good morning.

MR BEAL: Thank you very much. Good morning, Sir.

May I start, please, with representation? On behalf of the Claimants, I'm appearing with my learned friend, Mr Woolfe KC, leading Mr Schonfeld and Mr Jackson.

Mr Kennelly KC is leading Mr Cashman for Visa to my immediate right, and then beyond them we have Mr Cook KC leading Ms Klimowicz for Mastercard.

THE CHAIR: Thank you.

MR BEAL: May I extend a warm welcome to Mr Cashman and Ms Klimowicz for their introductory first outing in the wonderful world of Interchange, or at least Interchange CMC. I hope it won't be their last.

I hope the Tribunal has four main hearing bundles: a core bundle, supplemental bundle, correspondence bundle, and what I'm going to call an EMPO bundle.

THE CHAIR: Yes, I've got a lot of bundles. Is that the preliminary issue application bundle, the EMPO bundle?

MR BEAL: Yes. Yes, and that's for tomorrow.

THE CHAIR: Yes.

MR BEAL: There are now two supplemental bundles. The second supplemental bundle has materials relating to a number of matters that also will be considered for tomorrow, not today.

A third supplemental bundle now contains the skeleton arguments for this CMC, together with a Defence and a Reply from the Louis Vuitton case. That Louis Vuitton case will be the subject of submissions today when my learned friend Mr Woolfe comes on to deal with the amendment application for the Consolidated Amended Particulars of Claim.

THE CHAIR: Yes.

MR BEAL: Which is the third item on the agenda.

THE CHAIR: Yes.

MR BEAL: I will be dealing with the first two items; namely, the shape of Trial 4, encompassing both the preliminary issue on limitation and the overall shape of Trial 4.

Then I'll also be dealing with the Host Case issue in relation to the *Boels* Proceedings where, happily, there's a large amount of common ground but there are some thorny issues to be resolved.

Unless you'd like me to take it otherwise, what I'm proposing to deal with is Trial 4 first, and then come on to the Host Case, and then pass over to Mr Woolfe to deal with the CAPOC application. Thank you.

THE CHAIR: Yes.

Submissions by MR BEAL

MR BEAL: In terms of what I propose to start with, with your permission, what I may do is just have a very quick look at the remaining issues so that we know what we're doing.

THE CHAIR: I think that would be very helpful. I've been trying to get my head around them and I have to say it is not the easiest of tasks. Indeed, the List of Issues is helpful up to a point, but there's also just a question as to what they actually mean in practice, which I think is a very important question for the purposes of what goes into which bit of Trial 4.

MR BEAL: It is, and there's been a somewhat telling difference of approach between the parties on the List of Issues. What we sought to do was to take the original List of Issues -- which you'll find in core bundle, tab 18, page 189 -- and, in a sense, try and knock off the bits we thought we had done, up to a point.

So, what we then proposed at tab 19, page 267, was our list of remaining issues for determination. Running through that document, from page 267 onwards, we sought to identify in blue text where we did not agree with something proposed by the Defendants, and then in green text where there was something we'd proposed that they didn't agree with. So that's the convention.

THE CHAIR: Yes.

MR BEAL: At page 268, we see that a large number of liability issues, we say, from Trial 1 have been determined in Trial 1. So, the typical gamut of Article 101(1) issues. Coming on to issue 6.1, however, we still have whether the imposition of non-UK/Irish domestic MIFs, i.e. everything other than UK and Irish domestic MIFs, do infringe Article 101. But that remains, in principle, live. You will hear submissions from me later but at this stage it's difficult to think, in the light of the findings in Trial 1, how it might be said that the scheme rule that imposes a positive default MIF in France is any less of a restriction of competition in the French market than it is in the UK and Irish markets.

THE CHAIR: Well, it's certainly something I think we need to get to the bottom of and, no doubt, the Defendants will have something to say about that.

MR BEAL: Yes.

THE CHAIR: I hope they will because, as I understand it, the issue is still framed in the way that it was for Trial 1, which is: can the domestic MIFs in those countries be materially distinguished from the essential factual basis in Mastercard 1 which, of course, was then reflected in the Supreme Court in *Sainsbury's* and then reflected in the liability judgment. All this, assuming the liability judgment is not successfully appealed.

So, I think there is a question, the question you raise, which is: what is it that is going to be materially distinguishing them?

MR BEAL: Yes, and -- spoiler alert -- my submission when I come on to deal with the shape of Trial 4 is that essentially anything that's already been the subject of Trials 1, 2, or 3 by then ought to be capable of resolving the framework. Really, it's for the Schemes to say if, for example, there's a reason why the position on exemption in Estonia is materially different from the position on exemption in Ireland, then the Schemes have to come forward at this stage or pretty soon and say, "There is a material difference which we are alleging", so that we can factor that objection into the shape of Trial 4.

THE CHAIR: Yes.

MR BEAL: If you've got four front-runner jurisdictions -- which seems, on the face of it, a perfectly sensible way to go for our Trial 4 as well -- then we need either the biggest jurisdictions or the ones that pose the most problems. If, for example, no real objection is taken to the suggestion that Germany is pretty much the same as the UK, in terms of how it treats the MIF and exemptible issues, we don't need Germany in there, even though it's a large-volume country.

The alternative is simply to pick off the four largest jurisdictions and say, "We will apply those findings to everything else unless you, the Schemes, say that there's an objectively verifiable reason why, for example, Greece is to be treated differently from Italy".

THE CHAIR: I mean, the Schemes say that the burden of proof is still yours. But there is the point, isn't there, that the issue and the way this has been approached is about whether they can be materially distinguished from Mastercard 1. Obviously, you're not in a position to venture the view as to what they think materially distinguishes them.

MR BEAL: No, because we say there are no material distinctions in any of the EU jurisdictions --

THE CHAIR: Yes.

MR BEAL: -- as vouchsafed by the Commission approach in Mastercard, where the Commission didn't say, "Oh, well, this is the intra- EEA MIF. It's different in the way it's applied in Greece to the way it's applied in Italy". They simply said, "No, it's unlawful across the EU".

But -- again, spoiler alert -- it's a case management issue. It can't be open to the Schemes to sit back and say, "Well, let's deal with the top four by volume, have a very extensive Trial 3 and then Trial 4 for sample jurisdictions", and then say, after all of that has been done, "Well, actually it's different in Estonia and for 0.1 per cent of the claim value we're going to rerun the whole thing again".

THE CHAIR: I'd understood that, for the purposes of the preliminary issue, you were accepting and agreeing that there should be some sample cases. But I hadn't appreciated that for the purposes of Trial 4 you were saying that. Is that your position there as well?

MR BEAL: In our position paper -- and I'll come on to deal with it in due course -- what

we say is there's a variety of different ways in which we can approach Trial 4.
THE CHAIR: Yes.
MR BEAL: We are seeking to be co-operative about a manageable way that doesn't place undue burdens, either on the parties in terms of costs or indeed on the Tribunal in terms of judicial resource. What we can't have, in my respectful submission -- and the point needs to be lanced now -- is everyone going into Trial 3 thinking that there's going to be a rerun of Trial 3 for each of the 23 jurisdictions in due course. That simply is not going to happen, because it's litigation by attrition and it needs to stop.
Similarly, we say, when we are reading across the framework from Trials 1, 2, and 3 to those other jurisdictions, yes, we can have a targeted, focused approach as to whether or not there is, in fact, any material difference that needs to be dealt with. But, absent that, one solution is simply to take four jurisdictions and say, that's the 95 per cent of the volume of commerce for the Claimant class. We'll deal with those because you haven't raised, through an exceptions process or something similar, a reason to spin off any other jurisdiction for individual treatment. Now is your time to tell us. If you're not saying that there is any reason to spin off any other jurisdiction, we'll go with the top four and we'll apply that for case management reasons to everything else. With the greatest respect, the suggestion that this Tribunal can't do that to manage resource is simply misplaced.
The consequence otherwise is that you have three, four, however many trials, but each time the Schemes ex hypothesi lose, they have another crack at a different jurisdiction. Say, "Oh, well, it's different in that jurisdiction". That's something that this Tribunal ought not to contemplate.
THE CHAIR: So, the argument that's put against you on that is that: if the facts are different, then the Schemes are entitled to explore the consequence of those facts. But isn't the answer to that whichever alternative it was you were presenting, which is

that it's put up or shut up when you get to Trial 4. So, if you think you've got an issue in Lithuania or wherever it is, that is the one per cent, albeit that it's one per cent, let's see what it is and it goes into the pot, and if you don't, then it will be subject to the inference that there is no issue.

MR BEAL: Also, the reason I'm going to go through both the issues in this List of Issues and also, then, if I may, the pleadings, albeit briefly, is to say, "Well, what are the differences that actually the Schemes are putting forward? Are they material differences?" It's no good saying, "Well, for example, in France there's a different card system". Of course, there'll be different card systems in different jurisdictions. That doesn't affect the way the Schemes operate in each of those jurisdictions.

So I would like to drill down into what the material differences are said to be. Because at the moment, there's a paucity of submission from the Schemes as to what the differences are that they think exist that would make a material difference.

THE CHAIR: Really, my observations so far have been thinking about it from a liability point of view. When you get into -- and I don't want to trespass into what we're going to do tomorrow -- for example, exemption, is it possible that there is more room for difference between jurisdictions?

MR BEAL: Well, I'll show you Mastercard's own pleading on this because what they say is, "For the purposes of exemption, we rely on our exemption position statement. We think that that's capable of being read across to the other jurisdictions. We reserve the right to provide further particulars of those other jurisdictions in due course". That, I'm afraid, sells the past because it shows that they are seeking to hold back an aspect of their case, that the *Johnson v Gore-Wood* principle of abuse of process suggests they should be making available at the first available opportunity.

What they can't do is retain this right constantly to relitigate the common issues applying across jurisdictions on the basis of unspecified, unparticularised purported differences.

MR BEAL: So, going back to page 268 -- I'll take this at a canter because I know that the Tribunal is familiar with it -- one sees that all of the existing questions are essentially being redone but slotted into non-UK, non-Irish MIFs. That's the way that the issues have been determined.

Page 270 then, there's some detail on other rules. Most of those have -- are no longer in issue in light of the approach that was adopted in the liability trial. Obviously, if that's impugned on appeal, then that may need to be revisited.

We then come on page 271 to exemption, and one sees that that's all a matter for Trial 3.

We then come on to quantum, page 273. But what's telling is, certainly for the UK and Irish position, and there's no reason why it wouldn't apply to other jurisdictions as well, our position is relatively straightforward, which is that you work out how much the Claimants spent on merchant service charges. You then work out what the proportions of the MIFs were within those merchant service charges, and that establishes the prima facie overcharge.

Now, that is a complex process of data analysis. It requires a great deal of time and effort by those who do data crunching and enjoy it, but it's not complex.

THE CHAIR: So, you're saying that effectively you're running, behind the scenes, a process to come up with an aggregate number rather than worrying about the individual.

MR BEAL: Well, for corporate groups, I think it would have to be on a corporate group basis.

THE CHAIR: Yes.

MR BEAL: Whether or not one needs to descend into individual entities, we'll leave for now.

CICC is being approached differently, and that would be an aggregate damages assessment in any event. But, certainly, I think that what we had in mind was a corporate group analysis whereby in due course, the data is provided as to what the volume of commerce was that was subject to the merchant service charge, and you then factor in applicable MIF rates on a per jurisdiction basis.

So, when I say, "It's not complex", I mean that legally it's not a complex process. Obviously, there is a computational element to it that will take a lot of computing power and that does require quite a lot of time and effort, both at the level of my clients, and at the level of those who assist them, be it Ankura or whoever else is assisting with the data management process. That's why we say that that shouldn't go ahead, because it's wasteful of resources, costs, client time and everything else until we know the outcome of Trial 1's appeal.

THE CHAIR: So, just putting that aside for a minute, and we'll come back to that.

The thing that I've been struggling with is: if you think about what actually happens on a day-to-day basis in Trial 4, how much of that is really going to be occupied by quantum? Because I think that the difference between you is that you're suggesting you do it the way you're doing it; I think that the Claimants are, or at least the Defendants are, reserving the position to, in the course of the Trial, test the evidence in relation to overcharge.

Now, I don't really understand what that means as a matter of practice, because as you say, it ought to be capable of verification by some form of expert or some sort of process.

MR BEAL: The legal issue between us is: is it relevant that there might hypothetically have been an acceptable level of MIF?

THE CHAIR: Yes.

MR BEAL: Even if that wasn't the level of MIF that was set. That's the legal issue.

You'll be aware from, for example, the *Kent* case and other abuse of dominance cases, that what the CAT looks for is the market price, the lawful market price, and not the highest non-abusive price that you might have had an abuse of dominance, for example.

So, we say by analogy, if you, yourself, have not set a level of the MIF that's acceptable, then you don't have exemption for what you've set it for. Therefore, the overcharge prima facie is the difference between a zero MIF and what we paid; that was for the MIF component. That's straightforward. If we're wrong on that, then the Schemes will be arguing for an exemptible level; the Tribunal will have to find what they say is the highest non-exemptible level. If that's the correct legal way to go -- we say, "No" -- then you still have a calculation, but just with a different figure.

THE CHAIR: So, as we've set up Trial 3, the Trial 3 case asks us to do that, doesn't it, to find an exemptible level, so by the time we get to Trial 4, we know what that is?

MR BEAL: We've got a figure one way or the other. Then it's a question of law (overspeaking) quantum rather than -- but I think that you're right that the Trial 3 issues envisaged the associated quantum issue being dealt with in Trial 3, i.e. --

THE CHAIR: As a matter of fact.

MR BEAL: Yes, as a matter of fact. That is --

THE CHAIR: The legal significance of it would be dealt with in Trial 4.

There are some points that are raised by the Defendants as to quantum, which are effectively, I mean, I think of them as counterfactual points about switching to other payment mechanisms and other harmful consequences that have been avoided by the MIFs and those sort of points. Again, are they points of legal principle and they're to be determined, and if they're determined against you, what are the implications of that?

MR BEAL: Yes. I mean, that will have to be dealt with in Trial 4. At the moment it's not leaping out at me, at least, as being something that's going to occupy a great deal of time, and it will be a matter for the broad axe if they're right on the overall approach. That may or may not be a satisfactory answer, but I confess that I haven't really understood how it works. It seems to me that if we've suffered loss, the idea that somehow we have an unspecified benefit for an indeterminate amount of money as a result of simply using a service is nothing to the point.

Say that you have a breach of contract case where you've suffered loss. The fact that you derive a benefit from the contractual service that has otherwise been provided, well, you've paid for that. We've paid for the acquiring service; we derive a benefit from the acquiring service. The issue is not the benefit we derive from being able to use a payment system. The issue is the loss we suffer from the imposition of a MIF as an anti-competitive imposition of a fixed price within that relationship.

THE CHAIR: I mean, I think that it came up at a case management conference some time ago, and it's been something which has been mentioned and obviously was pleaded as well and in the List of Issues, but I'm not sure I completely understand it either. I'm sure we'll get to it when we ...

MR BEAL: At the moment, I don't see that occupying a week of the 14 weeks that we have earmarked for this.

THE CHAIR: Well, the question that determines whether that's right or not is whether the Schemes anticipate that if they are entitled to, if you like, credit from those items, whatever they are, whether they anticipate that that needs to be done on an institution by institution, undertaking by undertaking basis, or whether it can be done, as you say, on a sort of broad axe way.

But I think their position at the moment is that it would be necessary to examine what every individual claimant received by way of credit. Take the example of switching to other payment mechanisms. If, without the MIFs, they would have had to pay more because they would have used "buy now, pay later" type mechanisms and paid more for it, I think they're going to say that is something which is very much dependent on the profile of the merchant and, therefore, we'd have to have individual examination.

MR BEAL: I'm struggling at the moment to understand how that isn't a question of alleged mitigation, which would fall into the three-fold category that we saw in *McGregor* on damages for the purpose of the Trial 2 judgment, whereby you would need to have a direct and immediate link between the purported benefit and the breach.

THE CHAIR: So, there are two points there: the exemptible level question, and the question of the counterfactual credits, if we can call it that. I hesitate to add to the list of things that might be dealt with by way of preliminary issue, but are they actually legal points that could be dealt with, actually, in advance of Trial 3, let alone Trial 4?

MR BEAL: The reason for my hesitation is: one could no doubt try and frame a legal question, but the difficulty would be, as always, separating it from the factual analysis that would necessarily underpin it. We've seen, and you'll be familiar with the reasoning, preliminary issues frequently are treacherous shortcuts if they involve, for example, I won't say "half-hearted", but an incomplete analysis of the factual framework which is necessary in order to provide a meaningful answer.

My concern here, a bit like pass-on, is that pass-on involved both the legal question and a factual question. And, actually, it wouldn't have made any sense to divorce the two, unless there was, what I would describe as a "legal causation issue", i.e. a remoteness or a public policy reason why a person shouldn't have been recognised. So, there was a legal test to the question of whether or not a particular loss had been mitigated through finding its way into downstream prices, or finding its way into a renegotiated supply contract, but that couldn't sensibly be divorced from an overall analysis of whether that had in fact happened.

THE CHAIR: Yes.

MR BEAL: I fear that the same may well be true for something which, at the moment, with the greatest of respect, is rather unstructured as a submission that somehow, "Yes, we've suffered loss" -- but it would have to be, "but for the breach, we wouldn't have had the benefit", as opposed to: “you've got this service, you're receiving this service anyway, and that provides a benefit”. That factual question, I think, will have to be analysed if, as a matter of law, it's even right that you can claim that as a benefit which offsets a purported loss.

THE CHAIR: Yes. I share your concerns about proceeding with this as a preliminary issue, but the reason for raising it is that one of the difficult things about working out what we do with Trial 4 is understanding whether we are going to have to do a claimant-by-claimant examination. I mean, that seems to me to be the big issue. That applies, not just to the quantum issues, but also, potentially, to the merchant pass-on issues which the Schemes, they haven't been solved yet in relation to the non-Trial 2 Host Cases.

So, the big swing factor in relation to how one deals with Trial 4 seems to me to be this question of how much, and to what extent, are we going to have to deal with individual claimants and their operating regime, whether it's for the purposes of dealing with some sort of further pass-on analysis, or whether it's for the purpose of dealing with these arguments. I'm not sure we can really work out what we do with Trial 4 until we understand that.

MR BEAL: On page 274, the List of Issues, we've set out, in essence: what's the extent of the overcharge? We were proposing to take a largely arithmetical approach, as I've indicated.

THE CHAIR: Yes.

MR BEAL: The card Schemes' proposed formulation of the relevant sub-issue is: what is the total amount of MIFs paid by the Claimants' acquirers for relevant Visa transactions and for relevant Mastercard transactions? That's a data exercise. To what extent, if any, would the MIFs and/or Scheme fees paid by the Claimants' acquirers have been lower? I think it should be in the counterfactual.

THE CHAIR: Yes. So, they're not approaching it there as a detail. But there's no question when you get into looking at the -- I can't remember where they are, but the counterfactual credit issues. They do plead --

MR BEAL: They pleaded this concept of giving credit for purported benefit.

THE CHAIR: Yes.

MR BEAL: But the benefit must necessarily be tied up in the breach --

THE CHAIR: Yes.

MR BEAL: -- in order to become a mitigation of loss for common law purposes.

THE CHAIR: Yes, I understand that. I understand your position on that. But they do plead that as being a claimant-by-claimant point, I think, don't they?

MR BEAL: Well, if I may I'll let them develop that --

THE CHAIR: Yes. No, of course.

MR BEAL: -- and explain (a) why it's a good point and (b) why it requires 1,500 or however many it is by then Claimants to be examined individually before this Tribunal in order to come up with an answer.

THE CHAIR: Well, to put down a marker, I'm obviously open to whatever the Schemes say, but there's just a practical reality. We're not going to run a trial, I don't think, which involves 1,500 claimants and opening their books in the witness box. That's just not going to happen as a matter of practicality. It's not a feasible outcome. So there has to be some shortcut.

I mean, I'm not saying that there isn't an entitlement for the Schemes to test the evidence, and they've got to have an opportunity to do that if the evidence is relevant to the outcome. But I do think the parties are going to have to come up with a different solution. If that's the answer, it's got to be a different solution from having the finance director of each and every claimant sitting in the witness box and answering questions about their operations.

MR BEAL: It's never been an entitlement of any litigant before this Tribunal, let alone before the English courts, to have an entitlement to unimpeded access to the court regardless of the proportionality of the time that's being spent on an issue.

THE CHAIR: Well, there's also the question of effectiveness as well.

MR BEAL: Yes.

THE CHAIR: Anyway, that's really a matter for the Schemes, but it'll be helpful to have a marker down.

MR BEAL: I'll come back to it in reply, if I may.

THE CHAIR: Yes.

MR BEAL: We then move on to bottom of page 274, confirmation of exemption-related quantum issues.

Then issue 28 is non-UK/Ireland pass-on/mitigation and volume effects. So, this is for Trial 4 it feeds into a submission I think I made in April where I recognised that, for example, because the pass-on defence was pleaded in Trial 2A, but only against the Claimants in Trial 2A at that stage, it is, of course, as a matter of principle, open to the Schemes to plead a pass-on defence in other litigation that wasn't part of Trial 2A. There's nothing I can do about that. It's their entitlement.

I repeat my submission, however, that that doesn't mean that they are entitled to an open-ended approach to determining those issues, regardless of the time and expense for the parties and the judicial resources at stake.

So, yes, this remains an issue. No, that does not mean that the precise means by which that issue is determined is for complete re-litigation from scratch. And certainly what we had envisaged on our side was the exceptions process for Trial 2A so that Claimants who were coming into and becoming a Host Case would have to explain in detail and convincingly why the pass-on -- say an insurer comes and joins as a Host Case next week. If that insurer doesn't want to have the benefit/burden of the finding on merchant pass-on for the insurance sector, there will be a heavy burden on that insurance client to explain why those findings shouldn't apply to it. And the same must hold true of the Defendants if they want to say we need to have a complete rerun of merchant pass-on, with everything being determined for each individual claimant, claimant-by-claimant. That is going to require some substantial justification in order to persuade, we would suggest, this Tribunal to adopt that course.

THE CHAIR: Can we just distinguish between the UK and the non-UK? I don't think, as I understand it, the Schemes are saying it makes any difference to their position, but it is perhaps worth thinking about them separately.

So, if your insurer comes along, it's a UK insurer, then presumably it says "Well, I'm going to take advantage of the finding in relation to the sector which was made in the trial 2A judgment". If it was somebody who was in a sector that wasn't dealt with in Trial 2 judgment, then that's different, isn't it?

MR BEAL: Yes, potentially.

THE CHAIR: At least factually. I'm asking you really what the implications are.

MR BEAL: So, there are some sectors that weren't subject of any evidence and that much is true. And there will need to be a proportionate approach to dealing with how one establishes appropriate rates for the claimant class that are going through to Trial 4.

THE CHAIR: And then, of course, because of the way in which the legal findings in Trial 2 were made -- this is probably rather in shorthand, so not, I hope, in any way that would be criticised -- you would effectively be looking at whether or not the merchant put its MIF, its MSC charges into a cost-of-goods sold-price setting exercise --

MR BEAL: Yes.

THE CHAIR: -- or didn't, or whether it sat on an overhead stack. That's sort of the broad division of play.

MR BEAL: The framework that's been established, one would hope, would be read across in a way that doesn't amount to simply predetermining the issues. But the framework, much like the liability framework and the exemption framework, the framework is the framework. And if that framework is to be disowned, then good cogent reasons need to be given for that. Otherwise, it's a question, in my respectful submission, of a relatively limited amount of evidence, with the prima facie position from Trial 2 on MPO being applied unless there's a good reason to depart from it. And the good reason to depart from it would be those sectors where no findings have been made.

But I do invite the Tribunal to recall that Mr Holt had felt able to come up with an economy-wide pass-on rate by, in a sense, stitching together the different sectors and using some underlying weighting in order to come up with a residual pass-on rate for the economy as a whole.

THE CHAIR: Although, if I'm remembering correctly, that was largely done on the basis of material that was effectively cost-of-goods-sold data, wasn't it?

MR BEAL: It was.

THE CHAIR: So actually, I think if you stick with the framework, then I'm not sure that really helps you very much?

MR BEAL: Well, we objected to it in any event. So there's a forensic point against it.

THE CHAIR: (Overspeaking) no.

MR BEAL: I'm simply saying it's not beyond the wit of humankind to come up with a solution which is proportionate and structured for the claimant class as it exists by Trial 4.

THE CHAIR: I can just summarise to see if I've got this right: you're accepting that Trial 4 might involve some inquiry into UK Host Cases that were not Trial 2 Host Cases. You would anticipate that to be quite limited in any event, but particularly where they were within a sector which fell within the Trial 2 judgment. You would say the answer was fairly much (overspeaking).

MR BEAL: I'm saying there'd be a very strong case for a simple read-across exercise, certainly in those sectors where a finding has already been made. In those sectors where a finding hasn't been made, the analysis of those other sectors can be considered with relatively limited further evidence. We don't need to redo Trial 2A all over again.

THE CHAIR: There's a slight oddity in that, isn't there, which is that there are a whole lot of Host Cases who were Trial 2 Host Cases who are not going to be forced to go through that exercise at all. I mean, they get the benefit of it without -- and, you know, this is obviously one of the complaints that the Schemes have about the Trial 2 outcome. They get the benefit of the Trial 2 case without having produced a witness statement or a document?

MR BEAL: But that's a feature of the Umbrella Proceedings Order --

THE CHAIR: Yes.

MR BEAL: -- and when somebody has joined it.

THE CHAIR: Yes. So, you accept that because they don't get the benefit of that, so therefore they've got to do some more hard work.

MR BEAL: Yes.

THE CHAIR: Yes. But you say it's limited hard work.

MR BEAL: The reason I'm making what may look like a concession, but it seems to me, I'm afraid, is simply a reality of the procedure is until -- there will be some Host Cases that have joined to whom Trial 2A under the Umbrella Proceedings Practice Direction and under the Umbrella Proceedings Order previous findings can be read across to them, because that's the whole point of the Umbrella Proceedings. But there will simply be those cases where there are no relevant findings that hit that particular sector, or to which that claimant can be tagged, as it were.

We have recognised that Claimants should have an entitlement in principle to an exceptions process whereby they can say, "Well, you can't give me an MPO of x because in fact, I'm not in the insurance sector, I'm different." Now, that would be a matter for debate in due course. But there is therefore this logical space where certain Claimants will not be covered by an existing finding in 2A, and therefore further work will need to be done, and that's all my submission is reflecting.

In terms of the way the issue 28 is put, it's non-UK/Ireland pass-on or mitigation rather than anything else.

THE CHAIR: So just turning to that then. So, an insurer turns up from France? So are you saying the position is more or less the same.

MR BEAL: Well, insurance companies are subject to a very common regulatory framework -- for years, subject to a common regulatory framework in the EU. The commercial markets may have modest differences between them, but the way in which an insurer in France assesses a premium, charges a premium, decides how to cover its costs is unlikely to be materially different, we submit, from the way that a UK insurer would deal with that.

If, for example, a very small MIF charge as a component of a very small MSC charge is treated by a large supermarket in the UK as being an overhead cost and doesn't feature in its decisions as to pricing of products that it sells on the shelves, is it likely that the very large supermarket in Germany does things any differently?

So our approach would be to say, well, you start off with the framework we have from Trial 2 as a composite. You then apply that framework to these other jurisdictions, but it's really for the Defendants who bear the burden of proof, in any event, on pass-on to set out cogent and justifiable reasons why the situation for a merchant in Germany is so wholly different from the situation of the merchant in the UK and Ireland, that an entirely new trial of pass-on for that individual jurisdiction is worth the candle.

THE CHAIR: They'll say, of course, that in order to do that, they'll need to have some understanding of how it's actually dealt with. Would you accept that, or does there have to be a process by which that sort of information is made available?

MR BEAL: With the greatest of respect, not, because it's no good simply to say, "Well, this supermarket is in Germany, Marks & Spencer is based in the UK". Circumstances, for example, where Marks & Spencer has a store in Paris. So there needs to be a credible explanation as to why the relevant market conditions in a different jurisdiction mean that the preponderance of merchants are suddenly moving on to a very intense cost-plus pricing basis for all of their products. There needs to be some evidence of that.

THE CHAIR: Yes.

MR BEAL: Now, if they want to do some independent research and think, well, there's a candidate country here where we think all the accountancy units within a large multinational are so on their toes with costs that they have a rigorous cost-plus approach to pricing. If there is a candidate jurisdiction like that and they can point to a candidate claimant, then we can deal with targeted and focused requests with justification for disclosure. But that's very different from having another four-week trial for each of the 23 jurisdictions on the question of pass-on, which is just untenable.

THE CHAIR: The legal test, we'll come on to it, but there's a question I want to ask you about post-withdrawal claims and the jurisdictional basis of that, which I think is raised by the Visa skeleton, which seems to be quite important and we need to get to the bottom of.

Just putting that aside for a moment. Let's assume this is a pre-withdrawal day claim. It's an Article 101 claim brought by the French insurer. Did the findings in the Trial 2 judgment as to mitigation apply to that as well. In other words, do English law principles of mitigation apply to that situation or do we have to look at what European law says about that?

MR BEAL: Well, the French law will be governed, certainly after December 2016, by the Damages Directive.

THE CHAIR: Yes.

MR BEAL: The Damages Directive establishes that there's a presumption of, effectively, us having suffered loss and the burden is on the Defendants to show pass-on. The Damages Directive is slightly odd in that there's also a further presumption in favour of consumers which, again, the Defendants have to surmount. But that's the legislative choice that was made at EU level, to have this slightly odd double presumption.

What that means in answer to your question, Sir, is that, yes, it will be a matter of French law. But the French law necessarily has to give effect to the EU law principles, which we will find out in the course of the limitation preliminary issue. If there's a presumption in favour of loss and a burden on the Defendants to show pass-on, then it will really be for the Defendants to show that the proper legal test for pass-on under French law is different. Unless they can show that, then there's no reason why we couldn't apply the findings from Trial 2A as a general framework for a new French insurer coming along.

THE CHAIR: But that does open the possibility that we might need to explore, for all of the Claimant jurisdictions, what the test is for mitigation, effectively.

MR BEAL: We're recognising that when we come to Trial 4 there will need to be some sort of proportionate approach to jurisdiction selection. Which is why we're suggesting a lengthy period of 14 weeks because we realise that there's no getting away from the fact that this will be a large exercise. But it makes sense to do it all in one go because that will lead to efficiencies and there are ways, we suggest, through active case management whereby we can manage the process.

THE CHAIR: So you're not suggesting a sample process for this at Trial 4. You want the whole lot in play.

MR BEAL: The sample process would be a case management decision to say, "Let's take the five most valuable jurisdictions, use them for the evidence base" and then it's for the Schemes to say, for example, that they have a different pass-on case for Lithuania than for Estonia.

THE CHAIR: Yes.

MR BEAL: Implausible though that may be. We're open to a suggestion of either picking the top biggest five or, if there are said to be geographical or regional differences, we can pick a Nordic country, we can pick an Eastern European country, we can pick a southern Mediterranean country and we can pick a central European country. If there are geographical or regional variations in their case -- this is their case, not ours -- then it's incumbent upon them to identify those as early as possible so we can manage it accordingly.

We accept that all 23 jurisdictions will have to be the subject of determination in due course. What we don't accept is that it's open to the Defendants to require each of those jurisdictions to be subject to its own sort of mini Umbrella Proceedings litigation process, because that's wholly unreasonable and wholly disproportionate.

We are trying to come up with solutions as to how we can deal with this in a sensible way, admittedly leading to a 14-week trial, but where everything is done. The reason why we want everything done is some of these claims were started, I think, at the beginning of 2017. We start rubbing up against a very real concern that we're non-compliant with Article 6 in terms of having proceedings dealt with in a reasonable period of time.

I accept that it's complex proceedings, but salami slicing everything all the way through so that you don't grasp the nettle and say, "Right, enough is enough. This is the end of the Article 101 claims", is simply storing up trouble.

THE CHAIR: Just coming back to this question. Probably relevant to all the things we've been talking about is the complication that -- and we'll come on to the preliminary issue in a minute, I'm sure -- for some of these non-UK Claimants, you may be claiming back to 1992. So where you get to any question of whatever has been decided so far, we've not got anywhere near that period of time. So that opens up in a way that I think allows the Schemes a much broader canvas to say, "Well, hang on a minute, surely you can't just read across from the liability judgment or indeed the trial to judgment".

MR BEAL: We're saying read across the framework and the overall tenor and you, the Schemes, tell us where the burden is on you, for example, for exemption and for pass-on. You need to tell us why there is something in the temporal period covered, the geographical range of the claims. There has to be an objectively verifiable reason why that framework doesn't suit.

THE CHAIR: Yes. Just turning to the post-withdrawal day claims, I mean, I think there is a bit of a jurisdictional problem there, isn't there? So, if you've got a 47A claim prior to withdrawal, obviously that's fine. We have jurisdiction to deal with it as an Article 101 case, talking about non-UK claims. I don't think we do have jurisdiction after the withdrawal date.

MR BEAL: No, the claim is arising on a day-by-day basis as is recognised in schedule 8(8) of the Competition Act. Those claims post 1 January 2021 will necessarily be claims that have to be determined effectively in the High Court. Many of these claims have been started in the High Court and then transferred.

THE CHAIR: Well, there's a bit of a question as to whether they could be transferred here, at least that aspect of them, if we had no jurisdiction. I mean, there's no --

MR BEAL: The solution, I think, that's been suggested is that the chair of Trial 3 and Trial 4 be a High Court judge sitting in a dual capacity. That's been done in other cases.

THE CHAIR: I think that's probably not going to be the position here. I mean, I don't know whether Mr Justice Green indicated his exit stage left, but he's no longer involved in these proceedings. I don't know whether he told you that when you did the last CMC.

MR BEAL: That's news to me, if I can put it that way.

THE CHAIR: No, I'm afraid you've got --

MR BEAL: I wish him very well.

THE CHAIR: -- you've got me for Trial 3.

MR BEAL: Yes.

THE CHAIR: I'm not sure that there's a huge attraction to having a constituted Tribunal sit through a whole lot of evidence in relation to matters, which at least the wing members have no interest. I mean, I --

MR BEAL: I'd read Visa's skeleton as suggesting that the High Court judge was a practical solution to the issue and therefore I hadn't, I'm afraid, taken instructions on, if that isn't available, what the consequence is. May I, when I come to look at the transcription --

THE CHAIR: Yes, of course (overspeaking). It's not a matter we can deal with today.

MR BEAL: No.

THE CHAIR: But I think it's important as a marker that people give some thought, because I don't think you can assume that that is the answer.

MR BEAL: If I can volunteer this and if I need to apologise because I've got the wrong end of the stick and/or I've got it wrong, then I'll do so. But my understanding as a matter of law would be that on a day-by-day basis, the jurisdiction for this Tribunal to entertain claims under 101 and 102 no longer exists once the amendments are made to the Competition Act, as to what's within the scope of the Tribunal's jurisdiction.

THE CHAIR: Yes. I mean -- and we'll come back to this when we talk about the Host Cases -- but there is a bit of a point there as to why, given there's a continuing infringement -- I mean, goodness knows how long they will continue for -- why these cases are coming here in any event. I mean, why should they be tried in the UK and use UK resource and Tribunal resource. Obviously, these proceedings take up a huge amount of Tribunal resource.

MR BEAL: Well, if I may reassure you on that, increasingly very large claims are being brought against these defendants in other jurisdictions.

THE CHAIR: Well, maybe we'll just park that point. By all means, take some instructions, come back on it. I'm not sure what the answer to it, from a practical point of view, is. But I don't think you can proceed on the assumption that Trial 4 is going to be chaired by a High Court judge.

MR BEAL: May I take instructions and come back whenever we break for the short transcription break?

Page 277, just finishing off our List of Issues. Limitation: that essentially, we say, sets out the key legal issues that we're then seeking to suggest is appropriate for preliminary issue.

THE CHAIR: Yes.

MR BEAL: May I now, please, have a quick canter through the pleadings just so you can see how the claim is put. Starting please --

THE CHAIR: Just before you do that, just in relation to limitation, there is the possibility of some factual issues finding their way into Trial 4 depending on obviously how the preliminary issue goes; isn't there? So, if we were to find that in order to work out what the application of *Heureka* was, we had to examine the relevant law, for example, of France as to limitation to work out whether it was compliant or not with the principles in *Heureka*, then that would require some evidence, wouldn't it, at Trial 4.

MR BEAL: I'm not sure that there's much left by way of factual inquiry once the preliminary issue has been determined for an EU member state what the answer is.

THE CHAIR: Well, that's assuming you are successful though; isn't it? If you're not successful -- well, I suppose there sort of seemed to me to be a variant of that outcome which might allow for the examination of individual state limitation regimes.

MR BEAL: The only wriggle room left is if somehow factually there was a cessation event which happened in a given jurisdiction, other than the sole factual candidate that's been put forward which was Mastercard saying, "Well, we didn't charge intra-EEA MIFs. We set intra-EEA MIF at zero from, I think, June 2008 through to June, July 2009".

THE CHAIR: Yes.

MR BEAL: Now, that's the sole factual candidate. As you know, the EEA MIF situation has been subject to a summary judgment determination. Certainly, from Mastercard's perspective, Mastercard doesn't plead exemption for intra-EEA MIFs over that point in time.

So that factual position -- which, as I understand it, is vouchsafed on the face of various judgments and decisions in any event -- can be addressed as part of the preliminary issue. Our concern is simply: Mastercard haven't pointed to anything else anywhere. Indeed, the EEA MIF at zero period isn't even put forward in their skeleton as being a candidate for a cessation event.

The Visa exemption decision can be dealt with as a matter of submission.

THE CHAIR: Yes.

MR BEAL: The difficulty we have is, in the absence of any other factual candidate, we think it would be a bad idea to leave the door open for candidate factual events being squeezed in to a preliminary issue, because it will simply mushroom, cause disruption. So when you ask me, Sir: is there a risk potentially of factual evidence coming out which makes a difference? Yes, there is. But it falls into the category of: if there are factual circumstances, the Schemes need to tell us now.

THE CHAIR: So you're saying that it needs to be flushed out and dealt with in Trial 3 one way or another, albeit that if it does properly, as a result of Trial 3, involve a factual inquiry, it should end up in Trial 4.

MR BEAL: But the preliminary issue we're proposing is ahead of Trial 3.

THE CHAIR: Yes.

MR BEAL: A number of --

THE CHAIR: Sorry, I'm in a preliminary issue, yes. I'm sorry, yes.

MR BEAL: Trial 2C I suppose it would be. But where we end up is: if that's been dealt with, it's incumbent upon the Schemes, really, to put forward their case as they know it to be now.

THE CHAIR: Yes. So if, for example, the Schemes came along and said, "Actually here's a factual event in France which is a cessation event", we would know that in advance of the preliminary issue, but we wouldn't be dealing with it as a factual matter at the preliminary issue.

MR BEAL: No, we wouldn't, because it involves all sorts of investigation into what was happening in France, which is probably a matter for Trial 4. But what we would have is a framework from Trial 2C -- I'm going to call it that now because it's easier -- that

we can then apply in Trial 4 because the basic principles have been determined. This Tribunal will have ruled, as a matter of EU law, what the position is, and also as a matter of the four sample jurisdictions that we have, how a compliant member state is meant to deal with EU law in its jurisdiction.
THE CHAIR: Yes. So it is, at least in principle, possible there could be a cessation event issue in Trial 4, but you're saying that at the moment it's not clear what that could be.
MR BEAL: Yes.
THE CHAIR: Yes.
MR BEAL: The important thing is that I have to acknowledge that all of these things might happen, but it's not within my knowledge or my gift to say what they are.
THE CHAIR: No. It's helpful. In a way, part of this, I think, is to provide a bit of a roadmap, which I hope will encourage the Schemes to engage in the same way and tell us as much as they can about what the answer is.
MR BEAL: My objective, just so I'm absolutely clear, is that I just want this thing to end at some point before my retirement. Ideally, I --
THE CHAIR: I think there may be quite a lot of people in the room who feel the same way, Mr Beal.
MR BEAL: I mean, I'm sure Mr Schonfeld KC will be eminently capable of dealing with Trial 26 in 2039, but I won't be here.
Can I then, please, just very quickly have a canter through the pleadings so you can see how it's dealt with. So the CAPOC, if I can put it that way, is I think in the supplemental bundle, tab 6, page 152. I have it down as --
THE CHAIR: Yes, I have it.
MR BEAL: That's where it starts.
THE CHAIR: Yes.

MR BEAL: We see at page 154, paragraph 3, the standard challenge under EU law and domestic competition law to the Scheme Rules, and the implementation of MIFs pursuant to the Scheme. It's the Scheme's operation of those rules and the setting of the fees that is impugned.

If we look at page 163, paragraph 28(c) says:

"Interchange Fees paid by the Acquirer to the Issuer [that's giving an example of some of the fees]. The Visa Rules and the Mastercard Rules each require default Interchange Fees set by the Scheme ... to be paid by the Acquirer to the Issuer, unless (exceptionally) the Acquirer and Issuer have made an agreement between themselves [i.e. a bilateral] ..."

So it's the Scheme that says a rate has to be set. Whether it's an association of local banks that in practice have set that is irrelevant, because, of course, the finding in liability Trial 1 was that it's the Scheme's requirement for a default MIF set at a positive level that has generated the infringement.

So when, for example, some of my learned friends' skeletons postulate, "Oh, well, we'll need to investigate who set the particular MIF in a jurisdiction", with the greatest respect, that isn't right, because the way that liability has been determined, that means that that is not a relevant or material factor. What matters -- and I'll show you Mastercard's pleading on this, for example -- is that it's the Scheme that has set the rules that requires the MIF to be paid.

In any event, if we look then, please, at paragraph 43, page 170, the CAPOC pleads out our understanding of how the MIFs have been set and it names, for various periods, the fact that it was the specific Defendants who set the relevant MIFs, and I'll show you that the Schemes answer that in a moment.

At page 198, in passing, if I can show you the Scheme pleading, it's something that Mr Woolfe will deal with later, potentially tomorrow. That's just to bring it to your attention now.

Then at page 205, we see the pleading of "Applicable Law", following the threefold partition that was adopted by Mr Justice Barling in the *Deutsche Bahn AG v Mastercard* case.

THE CHAIR: Yes.

MR BEAL: Paragraph 117 at page 206 then lists out all of the different jurisdictions. Then at paragraph 118, page 207, we say, "For the avoidance of doubt, none of the claims referred to in paragraph 117" --

THE CHAIR: I'm sorry, Mr Beal, would you just give me that again.

MR BEAL: Paragraph 118, page 207.

THE CHAIR: Thank you.

MR BEAL: We say that none of them is:

" ... time-barred where the relevant applicable domestic law is based on or must comply with European Union law, (including the law of EEA States) ..."

Now that excludes, I'll be frank, Switzerland. So, the *Heureka Group A.S. v Google LLC* preliminary issue wouldn't apply to Switzerland. So that's going to have to be dealt with on its own terms in due course.

But what we then see at paragraphs 123 --

THE CHAIR: Just in relation to Switzerland, what's the size of the claim portfolio (overspeaking)?

MR BEAL: I will take you to that. Off the top of my head, I think, it's 2 per cent for the SSU, but I'll show you.

THE CHAIR: Not (inaudible) large then.

MR BEAL: I think that it might actually be fifth in the SSU, but it's 3 or 4 per cent.

We then see, please, at page 209, paragraph 123 and 124 that we plead that countries which are members of the EU, at all times, have to give effect to the substantive provisions of EU competition law.

We then deal with, at paragraph 124, the position of EEA states; EEA states can become EU states, et cetera. So that complexity has been addressed.

At paragraph 127 we point out that the appendix on, "Foreign Law", then gives chapter and verse, and that Appendix begins at page 212. Where appropriate, for example, paragraph 131, we plead expressly that the provisions of domestic law have to be read, subject to the effect of EU law. 131 is an example; 132 is another one.

To take an example, which, I'll repeat, is France -- the reason for France is that it's one of the highest value, if not the highest value, jurisdiction -- if we look at page 226, we see at paragraph 178:

"a. French law at all material times gave effect to the substantive provisions of Article 101 TFEU [and conferred a right of full compensation] ..."

We then see, please, at page 259, "Principles of EU Law", set out. The Claimants invoke general principles of EU law, which include: the right to an effective remedy, the right to an equivalent remedy and the EU law principle of supremacy.

We feed at paragraph 295, as I hope is trite, that any relevant national law within a member state of the EU that's applied inconsistently with EU law has to give way to it. Then there's a pleading about whether or not culpability would make it, "difficult or practically impossible ... to obtain compensation". So parts of the defence from Mastercard and Visa say, "Well, we didn't meet the requirements for culpability". That will have to be determined in due course.

Mastercard's Defence is tab 7 and starts at page 261. Paragraph 8, page 265 pleads a limitation defence.

THE CHAIR: Yes.

MR BEAL: You can see that there. Paragraph 13, page 262 put back in issue some of the issues that were dealt with in Trial 1. But on the basis that these are jurisdictions other than UK and Ireland, as I understand it, Visa has a separate pleading that says, "Well, pending the outcome of the trial on appeal, we're saying this". I didn't detect that approach in the Mastercard pleading, but I'll be corrected if I'm wrong.

Then page 276, I said I'd show you the response to the MIF setting point. We see that at paragraph 35, where it's accepted, I think, that Mastercard set a number of MIF rates, but nonetheless it points to under subparagraph (ii):

"a. ... Mastercard did not set MIFs in all countries throughout the claim period, for example, it only began setting ..."

And then it points to four jurisdictions where it says that it didn't set it before a given date.

Now, for example, I don't know whether it's going to be suggested by Mastercard that that makes a material difference for either liability or exemption. My respectful submission is that it wouldn't make a difference to either, because it's the Scheme Rule that sets a positive MIF rate. The Scheme Rule is imposed by the Scheme on licensees, and that is the restriction of competition, and that is the restriction of competition that needs to be justified by cogent evidence for the purposes of exemption.

I should also point out that at paragraph 9, Mastercard had admitted that the "setting or implementation of the MIFs" arose out of an agreement between Mastercard and its licensees, which rather deals with the point.

Paragraph 51 at page 286 --

THE CHAIR: Yes.

MR BEAL: A series of admissions are made:

"a. Mastercard set the Inter-Regional MIF throughout the claim period;

"b. Mastercard set the Intra-EEA MIF throughout the claim period;

"c. Mastercard set the UK MIF throughout the UK claim period ...

"d. In relation to domestic MIFs for each of the relevant countries ... save that it is admitted that Mastercard has set all domestic MIFs in EEA countries since 2015 [but it's denied that it set them for all] ..."

It then gives the four examples.

Now, those four examples are said to be non-exclusive. That's a classic example where Mastercard needs to come off the fence and say if there are any others and if so, why it makes a difference. We say that it doesn't make a difference. It's beholden on them to say why it does, and to give chapter and verse.

We turn then, please, to page 308, paragraph 96. We see:

"Insofar as necessary to do so, Mastercard will contend and put forward evidence to demonstrate [exemption in other EEA member states] ..."

Mastercard then says at 97 that it:

"... has filed a specific exemption pleading in relation to the UK and Irish MIFs for the purposes of Trial 3. Mastercard refers to and relies on its Trial 3 pleading. In relation to the claims in relation to the other Relevant Countries, Mastercard refers to its Trial 3 pleading *mutatis mutandis*, but reserves the right to provide further particulars of its exemption case in relation to those countries in advance of any exemption trial ..."

We say that we can't stop you doing that; we can't stop you taking that approach. The time for you to put up or shut up is now, or within a reasonable period of time, so that we can manage this litigation effectively. It's no good holding back part of your case and unleashing it only after the end of the Trial 3 exemption trial.

THE CHAIR: Just by way of the mechanism for that that you're proposing, I mean, you're effectively proposing, you're making a request and getting further particulars; is that the way it needs to work?

MR BEAL: I'm suggesting that in order for this -- this Tribunal has recognised that case management is very complex in this case. One way of making that case management easier is to understand how Mastercard and Visa are proposing to respond to any exemption judgment that's given at the end of the trial that we do have listed in Trial 3.

So imagine that the Tribunal hands down its judgment in Trial 3 in June 2028. Is Mastercard and Visa going to say at that point, "Well, this is all very interesting. We've had a ten-week trial in 2027, but, in fact, none of that applies to Germany because the conditions in Germany are utterly different." "It would have been very useful to know that sooner", I think, probably would be my response in June 2028, and that's why I'm raising the point now, so it can be dealt with now within a reasonable period of time, that we don't end up having that entire process in October 2027 and then not knowing where it's going to go.

THE CHAIR: Well, I think I understood you to be putting it higher than that. You're saying they have to do it if they don't want to get caught by *Johnson v Gore Wood* abuse of process --

MR BEAL: Yes.

THE CHAIR: -- because it's a matter which is put in issue by your pleading --

MR BEAL: Yes.

THE CHAIR: -- and if they want to respond to it in relation to any jurisdiction they need to address it.

MR BEAL: Absolutely. But I'm saying now is the time to address it. They can't simply reserve the right to do so as their pleading purports to do.

THE CHAIR: Obviously, you've not made an application for -- at least as far as I'm aware -- for further particulars --

MR BEAL: No.

THE CHAIR: -- and you're not asking me to make an order to that effect today. The purpose of this discussion is really to help us to frame the shape of Trial 4, isn't it?

MR BEAL: Absolutely.

THE CHAIR: But it follows, doesn't it, from your submissions, that if I were to agree with you, then we are going to need to go down that path of requiring some further reading, is it?

MR BEAL: So, in terms of the rest of the Defence, I think I can move on to -- there's a Scheme-fee section that I think I'll leave my learned friend Mr Woolfe to deal with, but page 321 deals with the *Heureka* pleading. This is relevant to see because of our application for a preliminary issue.

If I could just invite you to cast an eye over that.

They simply say the application of *Heureka* will be a matter for expert evidence in due course. And then they raise in 139 the fact that the consumer EEA MIF was set to zero from June 2008 to July 2009. My recollection is that that was vouchsafed in a subsequent commitments decision by the Commission or -- it's been confirmed by the EU Commission is my recollection, so that is capable of being brought within the scope of the limitation issue, preliminary issue.

But that's the only thing that's mentioned as a possible factual cessation event. All the other arguments are essentially parked for expert evidence in due course. And paragraph 118 of our pleading, which dealt with *Heureka*, is not otherwise pleaded to at all.

Tellingly, however, at paragraph 141, at page 322, it's recognised that the law of each country which is a member state of the EU would have to give effect to the substantive provisions of articles 101 and 102. And we infer from that that the case law of the Court on those issues would also have to be applied in those jurisdictions.

Page 324, Mastercard sets out its detailed pleading by reference to the laws of different member states, and then Switzerland. So it's apparent that it has procured evidence of foreign law from, one would anticipate, an expert in order to be able to sign a statement of truth verifying these particulars. The job's already been done. If we then please turn to page 333. In relation to France, for example, they say:

"... detailed content of French law [is] a matter for evidence [in due course] ...

"It's admitted that Article 101 and the EU law right to recover full compensation for a breach thereof [was] directly applicable throughout the Claim Period under French law."

So it's recognised that general principles of EU law will be applied in France throughout the material period.

German law, similarly, page 334, paragraph 38(b): recognition that the general principle of EU law to recover full compensation directly applicable throughout the claim period.

Finally, at page 350, paragraph 117: it's accepted that the provisions I took you to on EU law -- the numbering went awry, was then corrected -- that those are summaries of relevant principles of EU law. It then says, however:

"For the avoidance of doubt, the content of any applicable foreign law is an issue of fact to be proved by evidence ..."

And they seem to imply that that includes EU law. If that is what they are implying, I'm afraid that's wrong.

Could I please pass up or have passed up paragraph 3 of Schedule 5 to the European Union Withdrawal Act 2018?

Thank you very much. (Handed)

THE CHAIR: Thank you. (Pause)

MR BEAL: Paragraph 3 now reads at the bottom of page 2 of the clip:

"Where it is necessary in legal proceedings to decide a question as to the meaning or effect in EU law of any of the EU law treaties or any other treaty relating to EU or the validity, meaning or effect in EU law of any EU instrument, the question is to be treated as a question of law." [as read]

So, in our submission, that confirms that where this Court is dealing with EU law, Parliament has recognised that because you will have to, for example, apply EU law for the pre-Brexit period, that is a question of law that this Tribunal can adjudicate upon, and this Tribunal is therefore competent to rule as a matter of law on what EU law is. That means that you and not a foreign law expert will be capable of determining what a general principle of EU law is and what it means.

Indeed, if now is a convenient moment, we will look after the short break at the decision of the Court of Appeal in the *Volvo* limitation case where the Chancellor determined, I think -- sorry, it's the Master of the Rolls, I think -- determined that the nature of *Heureka* was to set the general principle of EU law based on effectiveness, and he gave content to that and said, "That is now a matter of EU law. I find, as a matter of EU law, that is the principle", overturning the first instance decision to the contrary effect.

Is that a convenient moment?

THE CHAIR: Yes. Let's take ten minutes. Thank you.

(11.47 am)

(A short break)

(12.01 pm)

MR BEAL: So that was the Mastercard pleading. The Visa pleading is pretty similar. If I could just turn to one point of detail in the Visa pleading. It's at page 390 behind tab 8 of the supplemental bundle. And we see there, paragraph 38.4. In fact, over the page, page 391.

THE CHAIR: Yes.

MR BEAL: Visa pleads in relation to various entities in various jurisdictions being responsible for setting the MIF up until a point in or around 21 June 2016.

If you recall from the *Dune* CAT decision and the Court of Appeal decision, Visa was running an argument that at a certain point, Visa Inc. took over responsibility for setting the MIF and they said, therefore it's unilateral, therefore, with one leap, we're free from Article 101, and that was rejected by the CAT, upheld by the Court of Appeal on the basis that it was the interaction of the MIF setting with the Scheme Rules as a whole, and the Scheme Rules as a whole were an agreement between the card Scheme and its licensees, and so that brought in Article 101. So the relevance of all of this is unclear.

It was relevant, oddly, in *Deutsche Bahn*, when one of the issues was where does the actual harm take place, or where does the infringing event take place? But in the light of Mr Justice Barling's approach to harm being on a geographical market basis, that issue has fallen away --

THE CHAIR: Yes.

MR BEAL: -- and everyone accepts that now. So it's difficult to see why this pleading is said to be relevant. There we are.

Visa also contends that EU law is a matter of fact for an expert. With respect, that's simply inconsistent with the statutory provision I took you to.

THE CHAIR: Yes.

MR BEAL: Coming on then to the preliminary issue application -- I'm conscious of time, so I will take this at a lick, or a faster pace than you've had so far, for the simple reason that you've already, in the course of our interchange, as it were, discussed quite a lot of the issues --

THE CHAIR: Yes.

MR BEAL: -- so I can take it more briefly.

I would, however, like to pick up in *Heureka* the points of principle that arise. This is in the bundle of authorities tab 28, page 709.

This was a case in which Czech law didn't implement Article 10(2) of the Damages Directive until roughly December 2016.

THE CHAIR: Yes.

MR BEAL: The *Volvo* decision had determined that limitation was a substantive provision and therefore the retrospective application of the Damages Directive didn't apply to that substantive provision; it only applied prospectively. The question, therefore, was whether or not limitation had already expired by the time that the Damages Directive came into force. If it hadn't, then the Damages Directive was capable of applying to the claim because it wasn't time-barred.

If, however, limitation had expired by December 2016, then it would only be claims arising as and from December 2016 that would be within the scope of the Damages Directive.

Now, on that particular issue, the Court then had to look at what was the applicable limitation provision as a matter of domestic law read in the light of EU law, because that was one of the questions that was asked by the referring court. That really starts at page 719, paragraph 54.

There's quite a long section, but I suspect it's easier for you, Sir, listening and me speaking, if I were to invite the Tribunal to read paragraph 54 through to 63 of that judgment.

THE CHAIR: Yes. (Pause)

Yes.

MR BEAL: In a nutshell, the cessation requirement is part of the general EU law principle of effectiveness. That's then confirmed at paragraph 79, page 723, where the court builds in the reference both to Article 102 and to the principle of effectiveness, both the principle treaty provision and the overarching principle of effectiveness require the suspension or the interruption of the limitation period for the duration of an investigation by the commission.

And we then also see in the bottom half of that paragraph:

"The suspension or the interruption of the limitation period for the duration of the Commission investigation are, in principle, necessary to enable the injured party, in particular ... to assess whether an infringement of competition law is being committed ..."

So the cessation is also part of that overall analysis.

Then at 81, there's a finding that in the light of the consideration set out above, the rules on limitations such as those at issue in the main proceedings, which of course are the domestic limitation rules, which are then set out, had to be read conformably with the principles that have just been outlined, so that in fact, limitation could not be treated as anything other than that suspended or interrupted until the end of the infringement and during the course of the Commission investigation. And the answer to the issue between the conflict between EU law and the domestic law was that the domestic law had to be disregarded to the extent it was incompatible with Article 102 and the principle of effectiveness.

The consequence of that, see paragraph 86, was that the claim should not be treated as time-barred if it had not ceased which, it appeared from the relevant procedural history, it had not. Then 87:

"It follows that, on the date on which the time limit for transposing [the Damages Directive] expired ... not only had the limitation period not expired but it had not even started to run."

It was as a result of that then the Court would have been able to apply the principles in the Damages Directive to the claim as it stood. See paragraph 88, Article 10 of the Damages Directive, therefore, applied ratione temporis.

Now, EU law -- a bit like the common law -- states the law not only as it is but as it's always been. That's the declaratory theory of law. You'll find support for that in the *Meilicke* case, tab 27 of the bundle of authorities, page 705. If you'd be kind enough to read paragraphs 33 to 36 on that page, that confirms that absent a temporal order or ruling from the court saying, "This will only apply prospectively for the purposes of the ruling given in this particular judgment", the court states the law as it's always been.

(Pause)

If you would then, please, be kind enough to turn to page 363 in the bundle of authorities, which is part of the *Volvo* interchange Court of Appeal judgment of the Master of the Rolls.

THE CHAIR: Yes.

MR BEAL: You should have there paragraphs 30 and 31 where the Master of the Rolls, as I've already indicated, concludes, as a matter of EU law, that the cessation requirement is now part of the principle of effectiveness and has to be read into international limitation laws.

Over the page at page 31:

"It was suggested that even *Heureka* did not go so far as to express a general principle that the EU law principle of effectiveness requires the Cessation Requirement to be imported ... In my judgment, it is clear from *Heureka* that that is precisely the principle that the CJEU was stating."

Now it's true that the Master of the Rolls then says:

"It is not necessary for us to reach a conclusion on the retrospective effect of the decision in *Heureka* as it affects current EU member states."

But that's because, of course, he wasn't dealing with applicable law issues in relation to those member states. So the issue was simply not before him. Instead, this was geared towards the position under English limitation provisions as to whether or not *Heureka* should be applied for the purposes of section 6(2) of the 2018 Act. It was there that he held -- because, effectively, it was perceived to be a change in direction by the European court -- that it shouldn't be. They followed *Arcadia* instead. The Supreme Court refused permission to appeal, so that's the position under English law. That, of course, doesn't answer the question of what is the law in an EU member state, like Ireland, for example. Given the declaratory theory that we've just seen, it's a relatively straightforward inference to say that Ireland, for example, must be a member state where EU law still applies and where *Heureka* will determine the extent of the principle of effectiveness, and with it the cessation requirement.

In those circumstances, we respectfully submit that the issue for determination that we've set out in our position paper, page 22 of the core bundle, is apt for a preliminary issue. We've indicated the wording for the preliminary issue that we seek but it's essentially geared towards determining why *Heureka* should not apply to a particular jurisdiction.

Can I then come on to deal with some ancillary matters. The first of which is cessation events. As I've indicated, I've traversed quite a lot of this thinking already. To the extent that the Visa exemption decision can be dealt with, as we say it can as a matter of legal submission, then there's no problem with that.

To the extent that the suspension of the EEA MIF for the just over a year period can be vouchsafed by a Commission finding to that effect, which my recollection is that it can, then again that can be brought within scope. There have been no other candidates put forward.

We do object to an open-ended suggestion that whatever facts the Schemes may choose to suggest are cessation events can be somehow imported. We would resist having any form of factual evidence or factual evidence that required cross-examination, because the preliminary issue would quickly become unwieldy. It would no longer be an effective means of resolving the key issue. It would become a treacherous shortcut.

The solution, we respectfully suggest, is for the Schemes to be required to commit to identification of what they say are cessation events, and then the Tribunal can rule as to whether or not they're capable of being within scope. Seeing as they haven't identified any, we're not in a position to make submissions on that. The marker that we put down is it cannot require factual evidence that would require cross-examination.

The next ancillary matter is which jurisdictions should be picked. In the High Court in *Deutsche Bahn*, admittedly, Mr Justice Barling didn't go on to deal actually with the limitation provisions. He simply dealt with applicable law issues. But the four jurisdictions selected were the UK, Germany, Poland and Italy.

In the correspondence bundle at page 36, tab 10, there's a letter from my solicitors to the Defendants' solicitors. At page 37, there is a table with the top countries. Switzerland, we'll see there, is listed as 4.3 per cent, but my understanding is that the other active Claimants, at least those represented by Hausfeld and Stephenson Harwood, don't have Swiss claims. So that figure will come down. But Switzerland is their fifth. Is that right? I can't confirm Stephenson Harwood, I'm sorry. It's definitely right for Hausfeld.

So that's the table. That table was then updated, and we can see that at page 122. These are not necessarily in order. Switzerland is still indicated as being 4.3, but we see that it's geared around breakdown by country; a revised table. France, Italy, Germany all remain high. Anyway, that's the broad geographical spread.

The percentage for Estonia, which I've mentioned a couple of times, is 0.1. The percentage for Bulgaria is 0.0, so I imagine that's due to a rounding issue. The idea that you would spend weeks and weeks dealing with Bulgaria is ridiculous.

Now, in terms of the stated basis for not applying *Heureka* as a matter of EU law in an

EU law member state.

THE CHAIR: Sorry, Mr Beal, just before you move on. Just in terms of the candidates, I mean, I think there is a difference between you and the Schemes; isn't there? Am I right in saying you’ve suggested France, Ireland, Germany, and they've suggested France, Italy and Germany. Is that right?

MR BEAL: So we've suggested France, Germany, the Netherlands and Ireland.

THE CHAIR: Yes.

MR BEAL: I'll come on to explain why Ireland.

THE CHAIR: Okay, I'm sorry. I thought you were --

MR BEAL: In terms of the Netherlands, the reason we switched from Italy to the Netherlands as the highest was because we've taken into account the active Claimants who are either applying to be Host Cases or are intending to apply to be Host Cases. So we've broadened the analysis by reference to Stephenson Harwood's data and Hausfeld's data. Combining that data with the Scott+Scott data, we end up with the Netherlands being one of the largest value jurisdictions.

THE CHAIR: Okay, so they change from 0.3 per cent to something else; do they?

MR BEAL: Yes.

THE CHAIR: Bigger than Italy.

MR BEAL: That's my understanding. I think Hausfeld, in particular, have a very high concentration of Dutch claims.

I'm asked if we have a table. I'm not sure we do.

THE CHAIR: Broadly, the point that you're advancing is -- I mean, you're accepting that the best thing to do is to --

MR BEAL: Pick the top three.

THE CHAIR: -- pick the top three, yes.

MR BEAL: Yes, and then --

THE CHAIR: And you put Ireland in because it's interesting.

MR BEAL: Well, no, I put Ireland in for a slightly more sophisticated reason, if I may say so. Which is this: that when -- as you've seen from the correspondence, for example, page 61 -- Visa responded finally to our suggestion, "Why are you saying *Heureka* wouldn't be applied," there were two jurisdictions they'd pointed to; France and Germany. They said that there were interesting academic discussions as to whether or not *Heureka* was capable of going toe to toe with the constitutional provisions there.

Now, the first point to make about that is, well, France and Germany are part of the sample that we've suggested. So, as candidate jurisdictions, they reinforce that desire. Neither Visa nor Mastercard have said there was a reason why, for example, the Netherlands, Italy or Ireland wouldn't apply *Heureka*. Top three, we say -- and it can either be Italy or the Netherlands, depending on whose data we use, but we're not terribly wedded to that save that it makes sense to deal with the Netherlands if it indeed has moved into third spot.

Ireland is for the simple reason that it is an EU member state. It has a common law approach to case law. It has a very similar limitation act: the Statute of Limitations 1915, which, following amendments in 1991 and 2000, is similar to the UK position. We know from case law -- it's trite, I haven't taken you to it, but I can do, if I need to -- that as a matter of EU law, an inconsistent provision of a domestic limitation provision needs to be set aside. That's what, in a sense, we saw from *Heureka*. I could take you to a Court of Appeal decision in *Repertoire Culinaire* that says exactly the same thing. It's, you would read down or disapply domestic legislation that doesn't give effect to the cessation requirement. That's the submission.

Now, the point about including Ireland rather than either Italy or Spain or whoever comes fourth. They've already been in the scope of Trials 1, 2 and 3. So the Tribunal

has already made findings about Irish entities who have claims.
Moreover, we're in a fortunate position whereby Mr Kennelly KC is a senior counsel in Ireland and, no doubt, he can confirm to you that the Damages Directive was implemented in Ireland by the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017. I'm qualified in Ireland too, but I'm only a mere junior counsel in Ireland, so I defer to Mr Kennelly on this, and he can no doubt upbraid me and tell me I'm wrong if I'm wrong. But I respectfully suggest I'm not.
Now, the interesting thing about the Irish implementation of the Damages Directive is it only applies to competition infringements on or after 27 December 2016; the due date for transposition of the Directive. Therefore, we're in a position where the Irish implementation of the Damages Directive has to be read subject to *Heureka* as a matter of EU law.
The Irish position is: in the English language, they have a common law jurisdiction and therefore, in a sense, it's an easy one for the Tribunal to consider. That's why we're putting it forward.
THE CHAIR: Yes. Although, on your theory, wouldn't we want to have the difficult ones? I mean, I think your suggestion is that the Scheme should be telling us what's difficult rather than what's easy. It sounds so easy that -- well, subject to the implications of going back to 1992 for the question of liability, it sounds so straightforward that it's unlikely to be one I would have thought would be top of their list -- particularly given the amounts involved -- of contention. Maybe, I don't know. Shouldn't we be trying to combine this, if we were going to do something that wasn't in the top whatever it is of volume, shouldn't we at least -- we will have to deal with the ones that the Schemes put forward as being countries where there might seriously be a difference.
MR BEAL: Well, can I show you another CJEU decision, which is the famous IHG

case in *Internationale Handelsgesellschaft* from 1970. It's at bundle of authorities 1, tab 19, page 560. (Pause)

In particular, paragraph 3. What you'll see there is the Court of Justice saying, in no uncertain terms, that it's not open to a, in that case, German court to fail to apply EU law because of a concern about whether or not it was compatible with the constitutional protections under the German constitution. This was quite a seminal case at the time because it's the court at paragraph 3, they say:

"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law."

So what it's saying is you can't rely upon domestic constitutional provisions in order to fail to give effect to EU law. It says:

" ... the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution ... or the principles of a national constitutional structure."

Which is essentially the argument that's being put forward in Germany and France as examples.

Now, the reason for going for Germany and France is that Germany has a relatively long history of its Constitutional Court rubbing up against the European Court in two cases called *Solange I* and *Solange II*, where it came to a head. *IHG* was the first example of that, but also *IHG* is important because as a reassurance to the German Constitutional Court , the Court of Justice in 4 was saying, "We recognise common constitutional principles across the member states", and it was really the first recognition of general principles of EU law that gave fundamental rights protection in the EU. So the *IHG* is saying, "Well, you don't have to worry about us doing something

that's contrary to a fundamental constitutional principle, because we have our own and we're going to apply our own".
So Germany and France, they're the two that Visa have picked as being difficult. The reason I'm saying, "Do an easy one", is because you've got the plain, vanilla answer in an English language with a witness of foreign law who will speak English without a need for a translator who can tell us what the plain, vanilla answer is. Then the question is: why would the EU compatible law of any other member state be different?
THE CHAIR: Yes, I understand the point that you're making. I suppose the point I'm making is that maybe this is just a question of sequence. If the Schemes come up with similar arguments for another jurisdiction, as they have for France and Germany, that's obviously a matter for the premiere issue, and we'll have to apply that with the case law and work out what the answer is of doing that today. But I'm simply saying that I think that Ireland is unlikely to keep its position if they were to find some other jurisdictions which they argued --
MR BEAL: If it helps, I accept that. If they find five examples of member states that are flagrantly not complying with EU law by not giving effect to *Heureka*, and they want to have those as the target jurisdictions, fine; I've got no objection to that. Our response will be to inform the EU Commission of that and see if they want to participate in an amicus capacity, or by way of an intervention, because it would be very interesting to see what their response is. But I've got no objection to the Schemes putting forward credible, objectively verifiable reasons why *Heureka* doesn't apply in a given member state.
THE CHAIR: At the moment, we're talking about a hearing that might be a week or two weeks long.
MR BEAL: Well, we would hope to have it done in a week.
THE CHAIR: So it is going to require some control as to subject matter, isn't it?

I mean, what we don't want to do is define that we've got lots of jurisdictions we have to deal with in a week, and it's all (overspeaking) --

MR BEAL: No. If it helps, if I can give you the shape of my anticipated submission without committing myself to it.

My cross-examination of the foreign law experts is likely to go along the following lines: do you come from a jurisdiction that recognises EU law, yes or no? Do you come from a jurisdiction that has to implement EU law, yes or no? Then matters of EU law, such as the doctrine of supremacy, application of effectiveness, what effectiveness means, are then all for the Tribunal as a matter of legal submission.

THE CHAIR: Yes.

MR BEAL: So the Schemes are seeking to suggest that this is a massive undertaking. It's going to take a lot of time; it's not. With the greatest of respect, until they can put up or shut up as to why a judgment of the European Court applying ex nunc and ex tunc shouldn't apply under the domestic laws of a member state, which gives effect to EU law, and requires EU law to take precedence over any inconsistent national provision, it's very difficult to see where this point goes.

Now, I'm not inviting this Tribunal to prejudge it, but I am inviting this Tribunal to recognise that the point is incapable of being determined in a relatively short compass. I'm letting them have their head so that they can call the experts to say what they like about the academic, very interesting academic commentary, and then I will be making submissions about EU law for this Tribunal to rule on as a matter of law.

THE CHAIR: Yes.

MR BEAL: Timing and consequences is the next thing. We say that it shouldn't take more than a week. A week was enough in *Deutsche Bahn AG v Mastercard* and that required quite a lot of cross-examination as to where Mastercard's various rates were being set. For the reasons I've indicated, we don't have that issue here. If we simply have one expert for four jurisdictions from each of the parties, i.e. Defendants and Claimants, then you're talking about the cross-examination of eight experts, and I've already indicated to you what our line of cross-examination will be. I anticipate legal submissions would be two and a half days, and expert evidence would be two and a half days. Those legal submissions could be split: opening and closing.

In terms of when it should happen, we say sooner rather than later. There's a number of reasons for that. Firstly, it makes sense to get it done and dusted before Trial 3, because the timetable after Trial 3 becomes heavier.

Secondly, the historical experience -- and I'm not seeking to raise more heat than light -- is when there has been a trial listed, a good proportion of claims have suddenly settled. The Humphries Kerstetter claims, you'll recall, settled in October 2023 just after Trial 1 was listed for February 2024. The insurance and supermarket claims settled just, I think, on day 1 of Trial 2. Historically, when I was involved in the *Deutsche Bahn* claim, I recall the *Deutsche Bahn* claim settled on the evening before I was due to appear in the Supreme Court to argue relation back. So the presence of a hearing does seem to produce a helpful urge towards compromise.

Obviously, the sooner we have -- more practically -- the sooner we have an indication of whether these claims go back to 1992 or not, the more we know what the likely ambit of any potential claim is, and therefore the exposure of the Defendants to liability. So, having that resolved sooner rather than later is an aid to settlement, and having a trial of that issue has historically proved to be an incentive towards settlement.

What do we do with the findings? This is the next question. Well, in my respectful submission, we're in a similar position to the one I've been trying to articulate consistently across all of the Trial 4 issues, which is: once you've got four of the most difficult jurisdictions, or three difficult jurisdictions on a plain vanilla jurisdiction, the idea that a member state nonetheless is an aberrant country that doesn't apply EU law is fanciful.

So it's really on the Defendants. You've picked the best four that you say are not giving effect to EU law under their domestic regime. We'll have a preliminary issue on those four. If you can't find anything better, then why on Earth doesn't the same reasoning apply? We say that this is a classic example where it's incumbent upon the Defendants to bring forward their best case now as to which member states are not following EU law contrary to their obligations. Then we can have that determined.

We don't say that the issue of read across needs to be determined now, but if I can put down this marker: if we are in a position where consistently with my case the limitation ruling is that the effect of *Heureka* is that claims go back to a given date -- be that 2009, be that 1992 -- if that's the conclusion of the hearing, then we will apply for summary judgment in relation to other jurisdictions following that ruling if the Schemes then say that they can't be read across. That would be the solution.

We would say, "You were given the chance to bring forward the difficult jurisdictions. You haven't come up with a reason why any of the other jurisdictions wouldn't follow it, following *Johnson v Gore Wood & Co*. You should have done. We're going to apply for summary judgment on the basis of the other jurisdictions that, effectively, the limitation goes back to whatever the found date is".

THE CHAIR: Why are we not doing it on the basis that Schemes have to put forward, now, any jurisdiction in which they say doesn't apply. Obviously, if they say for the same reason that it doesn't apply across 23 different member states, well, that's easy. But if they say that there's a difference in any particular member state, why are we not dealing with that now rather than leaving it for later?

MR BEAL: That's, with respect, my submission.

THE CHAIR: Well, I mean --

MR BEAL: But it then feeds into an abuse of process argument if they haven't brought

it forward now.
THE CHAIR: Because in a way, you're not really doing a sampling case at all. You are in the sense that we all know we're going to have to do Germany and France --
MR BEAL: Yes.
THE CHAIR: -- and actually it makes sense to do, whatever the next biggest one is. The precise constitution doesn't matter, provided that the Schemes have had the opportunity to raise any country they wish to.
MR BEAL: Yes.
THE CHAIR: If they were to come up with a list of 20, and it seemed problematic to do it in a preliminary issue, we might have to think about that again. But I don't really understand why we -- I'm hesitant to put ourselves in a position where we are unsure about what the implications of the finding is. Why not deal with it all at once? Is there any reason -- I mean, it's a question to ask the Schemes, but if we're going to do this, why not deal with it --
MR BEAL: What I'm trying to avoid is a situation in which we have 23 different national law experts all coming along and saying, "Well, yes, EU law applies here", and my cross-examination finishes, and I then make the same submission of EU law.
THE CHAIR: Yeah. Well, there's a difference between the same argument as it might apply in different countries, and different arguments in different countries. In other words, if you're right about the supremacy of EU law and that's a matter of law on which we can make a decision, then it doesn't really matter how many people they turn up with if they all say the same thing. But if they turn up and say something different, they say for whatever reason, "The particular conditions in Estonia were different", then we should be flushing that out, shouldn't we?
MR BEAL: Yes, but it needs to be a sustained reason. It can't simply be, "We say that Estonia is different"; they have to explain why.

THE CHAIR: Well, they'll have to set out the reason and produce the evidence and then --

MR BEAL: That was -- I mean, I haven't wearied you with the correspondence because it's water under the bridge, but we did ask, on about four occasions, what the basis for saying, "*Heureka* wouldn't apply to an EU member state", was. What they came back with was, "Well, there's some academic grumblings in Germany and France". Fine. Let's have that resolved as to whether that makes a blind bit of difference to what the appropriate legal principles applied in Germany and France are.

THE CHAIR: Yes. Okay. Well, let's see what they say about that when we get to them.

MR BEAL: Right. That, I think, is all I need to say on the question of the preliminary issue.

I then move on to the handling of Trial 4 more generally. The *Dune* CAT decision -- I, if I may, briefly turn this up, it's in the bundle of authorities, tab 37, page 927, paragraphs 14 to 16.

THE CHAIR: What is this page? Sorry.

MR BEAL: This is the bundle of authorities.

THE CHAIR: Which decision is this?

MR BEAL: Have I got the wrong reference? (Pause)

THE CHAIR: (Inaudible) It's the 2022 Ruling; is that right?

MR BEAL: Yes, it's 2022, CAT 14. It's a decision of Sir Marcus Smith and you, sitting with Andrew Young QC.

THE CHAIR: Yes. Right. Okay. So it's getting right back to the beginning for me, I think. Yes, my first outing.

MR BEAL: I think it slightly predates the Umbrella Proceedings Order, because -

THE CHAIR: Yes, I think it does.

MR BEAL: The Umbrella Proceedings came out of this reasoning.
Could I invite you please, just to refresh your memory, seeing as you were in the panel, with paragraphs 14 through to 16?
THE CHAIR: Yes.
MR BEAL: If we then turn to page 930, paragraph 19, just dealing with the quantum point. The Tribunal recognised that quantum would be traditionally viewed as specific to each claim advanced, which is true.
"Ultimately, if any of these claims are successful, the quantum of the particular claim may well depend upon the level of MIFs paid by the MSC by the particular claimant ..."
So that seems to be the paramount issue for quantum purposes.
But then, importantly, at 21 to 22, the Tribunal expressed concern -- it turns out justifiably -- that there shouldn't be opportunity for either different Claimants or indeed these same Defendants to require the entire species of litigation to be relitigated all over again. That concern was expressed by reference to the *Ashmore* case, where there was essentially a trial of lead cases, but then somebody wasn't happy with the result because the employee lost in that case, then wanted to have to relitigate everything all over again, and the Tribunal considered that.
We then see at paragraph 24 that an attempt to deal with that would be through the abuse of process principle, and that's the one I've been highlighting this morning. Then instead, the CAT preferred a degree of certainty as to the management of the claims, introducing a process of joint management, and it's from that genesis that the Umbrella Proceedings Order sprang.
If we see in paragraph 26:
"We therefore intend, in the first instance, to put in place a process for the detailed identification of the issues ... before us by reference to their suitability for management in a generic way across the wide pool of claimants ... [et cetera]"

People would have a chance to join in and participate, and they would then be bound by the decisions on those common issues, see paragraph 28. Stays would, however, be looked on favourably.

So that -- and I'm sure you're familiar with the Umbrella Proceedings Practice Direction. The overall process has been that once you're a Host Case within these proceedings, as a claimant, you take the rough with the smooth, and so when you come in, you are bound by what's gone before, and the Defendants have the advantage of having a consistent line of reasoning applied to them across a very broad claimant cohort class.

So it's helpful for both sides in that sense, and claimants have the choice to apply to be a Host Case or not. But if they don't, they're very likely to find that their case is stayed. Then, the question really becomes, what is the purpose behind that Umbrella Proceedings? And the purpose behind it was to deal with claims efficiently; at the lowest cost possible; consistently with very large litigation involving hundreds, if not thousands of claimants; and to ensure that there was not this risk of inconsistent decision-making or inconsistent results between different tranches of litigation.

But as I've said, we are now in the ninth year of litigation for some of these claims, and looking at the Defendants' proposed approach, it's instructive, we say, to consider how far have we got in those nine years? The best way to do this is to look at their List of Issues, which is in the core bundle, tab 20, page 280.

To use their colour scheme, lilac means that either an issue has already been determined or that it is for determination in the course of what both parties accept has to be a Trial 5 to deal with abuse of dominance claims.

THE CHAIR: Yes.

MR BEAL: And so just picking up, and really doing no more than forensically flicking through and looking at the colours of the pages, what one sees is that lilac doesn't really come into play until page 317.

If we pick it up at page 317, we see that lilac is now suddenly in play. Therefore, the issue is already determined or not to be determined. We see that, actually, what is in lilac here is the abuse of dominance claims and issues. And, of course, they're all for Trial 5.

So when we look through this colour-coded document, the only thing that's been determined is not actually anything that's been determined at all for these purposes, the purposes of Trial 4. Nothing has been determined according to this, because the only thing that is either determined or to be determined is abuse of dominance.

And so in a sense, everything is still to play for on the Defendants’ case.

THE CHAIR: Well, that's not quite right, is it? Part of the reason why it looks like that is because of the approach we've taken, rightly or wrongly, to UK and non-UK, and because of the continuing arrival of claims.

MR BEAL: Yes.

THE CHAIR: And so if the claim cohort hadn't changed, then actually all of this would be a lot simpler. I mean, the fact that claims keep arriving all the time does make this enormously more complicated, and we'll come back to that when we talk about the Host Cases.

MR BEAL: Yes. Look, my submission is this really, that we have obviously made very good progress on UK and Ireland claims and the hope on our side, if not the expectation, was that that would introduce a degree of realism as to the rollout of those findings to other jurisdictions, because otherwise you're in a position where you have simply made determinations on UK and Irish issues, where, as we've seen from the chart of the value of commerce, that was appended to the Scott+Scott letter, the UK was I think 7 or 8 per cent. I can't remember how much now. But, in any event, it is a substantial minority of the claims value.

On the Defendants' proposal with 4A dealing with the rest of the UK and Ireland, and 4B -- they haven't given a date for 4B, we don't know when that will be. 4B would then be a time to be determined, and it's 4B where the lion's share of the value of the claim is. And even then, on their case, on 4B, we only have three or four what are called front-runner jurisdictions. So you get to the end of Trial 4B in 2031 or 2032, or whenever it is being proposed for, and you've dealt simply with the liability position in three or four other jurisdictions.

If the Schemes thereafter say -- I'm sorry, I've misspoken, UK apparently is 24 per cent, so it is higher, but it's still a minority -- and we're in a position, therefore, 2032 where the Schemes can say, "Oh, well, actually the position in the other 2019 jurisdictions is totally different".

THE CHAIR: If I just cut through this a bit, because I certainly -- and obviously want to hear from the Schemes and hear what they have to say, but at the moment, having read the papers, my preliminary view is that we should list a trial in March 2029. It would have to be the middle of March, I think, because of availability. That trial should be -- I'm reluctant to list a trial for 14 weeks, actually, but certainly ten weeks and possibly more depending on all the things we've talked about and how that ends up being resolved by way of particulars and so on. But with the express intent of doing as much as possible in that space.

Now, obviously, we have to hear what the Schemes say about that, but I think there is a powerful argument for getting on with as much as we possibly can as soon as we can, and that probably is the right time to do the next trial. Now, what I don't think we can do at the moment is determine whether that is everything other than the Article 102 issues, because I haven't heard what they have to say about things that might be difficult, and there may be some things that can't fit into there for all sorts of different reasons.

MR BEAL: Yes.

THE CHAIR: But I mean, I think that's certainly my thinking at the moment, if that's helpful.

MR BEAL: I think in the light of that indication, the best thing I can do is to sit down.

THE CHAIR: Yes. Okay. Thank you.

Are we going to deal with Host Cases?

MR BEAL: I didn't know whether you wanted to go agenda item by agenda item?

THE CHAIR: I think you're right. Why don't we, go straight into the Schemes' response.

Reply submissions by MR COOK

MR COOK: So in light of the way Mr Beal has presented his submissions, I probably need to start with exactly what's going to be in issue. The scope of the issues are going to be in different trials --

THE CHAIR: Yes.

MR COOK: -- or no under different headings, at least for the moment --

THE CHAIR: Yes, that would be helpful. Thank you.

MR COOK: -- and start in relation to what we're going to do in relation to the quantum issues for the UK and Ireland.

THE CHAIR: Yes.

MR COOK: Obviously, our approach, very much, is the Tribunal put in place a structure however many years ago now, which was let's do the UK and Ireland first. At that time that wasn't parochialism. That was because the UK and Ireland -- well, the UK, Ireland has always been a convenient bolt-on with our apologies to my colleagues who have history and professional qualifications in that jurisdiction. But it was similar enough and small enough to be added to the UK determination. But that's where, because the bulk of the claims at that time were the UK claims. That's why we started there.

And my learned friend Mr Beal has made play of the fact that today, at least now, although it's a rolling picture and he has more of that picture than we do, but he says the bulk of the claims are non-UK. That is a reflection firstly of the fact that there are a lot of new claims coming in and continuing to come in, and secondly, the fact that the vast majority of the claims that were before the Tribunal three or four years ago that were the UK claims have settled, because the process of the Tribunal reaching the resolution in Trial 1, in Trial 2, or the process leading up to it, has allowed the parties to see which way the wind was blowing and reach resolutions in relation to that.

So it's not a case of the Tribunal structure not having worked. It has worked. It's settled, resulted in resolution of the majority of the value. But there is this structure that's been in place, which is, deal with the UK and Ireland first, and we are getting quite close to the end of that process, at least in terms of the main issues.

What is going to be left at the end of a Trial 3 judgment? We think it's very important to focus on it at the end of the judgment. It's one of the things my learned friend, sort of, persistently ignores, is that once Trial 3 is done, we're very conscious of the fact that the burden then falls to the Tribunal to produce that judgment. And that is, we're aware, often a monumental task that is not going to be knocked out over the course of Christmas 2027, one hopes, suspects.

But when we get the Trial 3 judgment, what is going to be left to be dealt with in relation to the UK and Irish claims? Well, what we thought was going to be the intention of Trial 4, because that is what the Claimants have said persistently, and indeed said so at the Trial 3 CMC, was a process of finalising those claims, saying at the end of that, taking everything that's happened before, producing some specific numbers of claimants, working out the rulings of Tribunal's given, which are likely to be at a more of an aggregate level and applying them to the individual claimants, that the end result of that is going to be saying in relation to x co, they have suffered loss of £10 in relation to Mastercard, £15 in relation to Visa. That's the damages they're entitled to, and they're entitled to interest at x per cent for the time period.

That is a conventional resolution of a claim. That you end up with a final number, a final award of damages and eventually an order. That certainly was what we thought would be -- the only way one can describe claims as having been resolved is when we get to that point where there is a number.

Now, that is --

THE CHAIR: Sorry, just to test that a bit. I understand the point you're making, but in these proceedings, in this context, there are two things aren't there? One is that there's just no way we can do that for hundreds and hundreds of claimants. We're not going to do it. Secondly, one would hope, by the time one gets to that exercise, it's reasonably mechanical and probably doesn't involve the Court's intervention at all, except where there are disputed things which one would hope were more matters of principle than individual claimant-specific. Is that not right?

MR COOK: I mean, we're coming to this from a process of the history of having gone through a quantum trial with *Sainsbury's* and having got to the final weeks of being about to start a quantum trial with *AAM*. It turns out that the basic quantum issues are not often as simple as one might think but actually just simply identifying, when you're going back an extended period, even what transactions people had with particular card Schemes, what particular MIFs applied to them, sadly turns out to be not simply a question of pressing return on the keyboard and saying, "Print out the last 11 years of bank statements showing the MIFs". I'm afraid, as a practical reality, it hasn't been that simple.

THE CHAIR: No, I understand that. I can see that it might lead to quite a complicated forensic exercise. You no doubt would have to get some expertise, some forensic accountants, to help with that and no doubt there might be some where it was really quite difficult to work out what the answer was, and there might have to be some sort of escalation process. But to elevate that, for the purposes of these proceedings, into a trial where we had people coming in and sitting in a witness box to resolve that would be entirely disproportionate; wouldn't it?

It depends on the amount involved, but I rather suspect that there are not going to be many individual claimant cases where that's warranted. So it's hard to see at the moment why that should be playing a significant part in the shape of Trial 4. That's really the point, I think, that I'm concerned about and which I think Mr Beal is making.

I think it is beholden on the parties to find some process and put forward some process which is going to manage that, recognising that there may be some things that simply cannot be agreed or determined by forensic accountants. There may have to be a process of, effectively, adjudication. It is possible in some cases, it may have to be a witness in a witness box with some documents. I mean, I'm not excluding that. But to start with the presumption that that's going to be the case, I think, is the wrong way round. It needs to be the other way round, that that's the exception, doesn't it?

MR COOK: Well, Sir, we understood that when people talk about resolving the claims to resolution, that we need to be working towards a process where we actually get some final numbers in relation to it. Obviously, there is a scale issue, not least because the scale of the claims has grown and continues to grow on an ongoing basis. We certainly flagged in our reply position statement that there was going to, at some point, be a need to -- you know, we can't do all of them by any means.

One obviously hopes for smaller claimants or people with particularly good accounting records, the issues fall by the wayside. But, essentially, unless there is a procedure in place to identify initially at least and then try some of those quantum calculations, then we won't have reached final numbers in any case at all.

More importantly, until we have the basic pleading of what those claims are and basic disclosure on it, we can't get to the stage of even knowing what the disagreements are in relation to those kinds of issues. So we certainly see that as being, in terms of where we're going to be on the UK and Irish claims, a necessary process to be embarked upon at some point.

THE CHAIR: Well, yes, of course.

MR COOK: And hoping that if we identify a certain number of claimants, some of them will fall by the wayside, the issues in others will be narrow, but there may be some where it truly is valuable and there needs to be some kind of evidential process to deal with that.

THE CHAIR: Well, possibly, yes. I'm not excluding that. But I think if we're trying to work out how we case manage Trial 4, I don't think we start with the presumption we're going to have a whole lot of finance directors turning out to be cross-examined. I mean, I think it's the opposite of that; isn't it? That it may be necessary, for some particularly difficult and high value cases, for there to be some sort of evidential process in a trial setting. But one would hope that that would be very rare, possibly non-existent.

So in a way the question is: how do the parties -- with their duty to co-operate with the Tribunal and their duty to try and resolve these issues as part of the proceedings -- see that process unfolding and what are the mechanisms that they need assistance with? We can be very flexible about what those mechanisms are. We don't have to have a full-blown trial to be able to review documentary material particularly, and reach a robust decision where that's the most proportionate way to deal with it. It can be done on papers in some circumstances.

I'm anxious to emphasise: I'm not saying that the Schemes are losing their entitlement to test and challenge. But what I am saying is that I don't think that that is something you can assume is going to take place in a trial context, unless the complexity of it and the size of the amount of stake for an individual claimant warrants that. Otherwise, I think it's going to have to be a little bit more broad axe from your point of view rather than our point of view. We have to find a mechanism that resolves that so that you feel you've got something that you can say to your clients that this is probably more or less right, but it's not occupying Tribunal trial time.

I think it's a challenge for you. I'm not in any way criticising you or Mr Kennelly or your clients. I understand why we are where we are. But I think, just in terms of the case management and thinking about what this is going to look like, I don't think it looks like that.

MR COOK: Sir, essentially if the Claimants are saying they don't want final numbers at that stage, that does put a different complexion.

THE CHAIR: Well, I think they do want final numbers. I think they just don't want it to be dealt with in the way that I think you're assuming it is. I mean, I think Mr Beal does want to know what the answer is. But there needs to be a process which needs to happen before Trial 4, which one would hope -- if it was well designed and parties were being sensible about it -- would resolve a very, very large proportion of the amount, value and number of claimants who had to be dealt with.

I understand entirely the point you're making about record keeping and so on but at the end of the day, if it's a record-keeping point, someone has to make a robust assessment about that. It's unlikely to be really very much illuminated by cross-examining a finance director about it. If we're going to have to --

MR COOK: I think, the idea that we're going to cross-examine finance directors and detailed record keeping, of course not.

THE CHAIR: Or cross-examining anybody. It's cross-examining anybody about it. So if it's really just a documentary point, I mean frankly it would be a surprising thing if it was necessary for the Tribunal to have to make that robust assessment for what will be no doubt a lot of relatively low value cases, which you couldn't make yourselves between you and resolve.

I'd just be very surprised if we get to that point. That's obviously a matter for you to think about and take away. But I think what we are going to have, in quite short order I think, is some proposals for how quantum is going to be resolved in a process that doesn't require Tribunal trial time.

MR COOK: That's understood. So I'm working through the issues. What we need, in order to get a final resolution, is, in the language we've been using, the VoC and then the applicable MIFs applied to that, recognising that there are whole gradations of different MIFs that apply to different commercial card, intra-regional, et cetera. So it's not simply a question of: this is the VoC and multiply it by one number. You have a whole variety of those. That's the first step.

THE CHAIR: It's complicated, but it is largely mechanical, except where there are differences about the historical record. That's probably the --

MR COOK: It's only having been through it that Mr Beal's optimism that it's going to come out at the press of a button strikes me as being misplaced.

THE CHAIR: Yes.

MR COOK: Because even when we were dealing with very large entities, where you would think a company like Sainsbury's or Asda and Morrisons would be absolutely clear, they'd be able to find the records. It actually turned out to be rather more complicated, partly because they've got different business units, they've changed acquirers and, in any event, people don't necessarily maintain records going back a decade in the reliable way one might --

THE CHAIR: One of the things you might want to do -- and I'm not sure that this is something that I could do anything more than encourage the parties -- is to actually set up an independent adjudication process so that you've got somebody who's a lot quicker and a lot cheaper than the Tribunal -- cheaper in the sense that you don't all have to turn up here and argue about it -- who can make the decisions on these things where somebody has to make a decision.

There's all sorts of different ways of doing this, but I just think that the one thing that is not going to be the right way of dealing with it is dealing with this in a full-blown trial context, unless it really warrants that because of the complexity and the size of it.

If it's helpful to come back to the Tribunal at any stage for guidance about the principles that should be applied, so if there are proper legal issues that need to be dealt with, of course we'll deal with that. But I don't think that we're in the business of being, if you like, a sort of an adjudicator of vast numbers of relatively small claims. That's not really what we're here for.

MR COOK: With respect, I'm not sure in terms of the numbers we're talking about. We are talking about vast numbers of small claims. We're (overspeaking) --

THE CHAIR: Well, relatively --

MR COOK: (Overspeaking) measured in the millions rather than £30,000.

THE CHAIR: I don't want this to be quoted out of context but, in the grand scheme of things, that is a relatively small context. When you think about the resources of the Tribunal being employed, the Tribunal's resources are being employed to deal with collective proceedings worth billions.

So I'm afraid to say that that is relatively small in terms of our ability to dedicate time to it, and we just don't have the resources here to sit down and adjudicate claims for a million pounds. We're just not going to do that on an evidential basis. By all means, to facilitate and to find a way so that there's a process that those get dealt with efficiently and properly.

I really want to emphasise, I'm not suggesting you lose your right to challenge, but I think it is incumbent on the parties to start thinking very hard about what sort of process might lead to that outcome in a way that you consider fair and reasonable, rather than expecting us to deal with it in a trial.

MR COOK: Ultimately, Sir, all of the issues I'm going to be saying will come up there, are going to be variants of a need to start thinking about how general findings that are likely to come out of Trial 3 actually result in individual numbers in the context of individual claimants.

In terms of the points that were going to arise. For example, we're going to be dealing with things like switching. Now, that may or may not work as an argument. The Tribunal will consider that in the context of exemption. But if you say in generic terms that there'll be some switching, but not good enough for exemption, but you conclude there's some switching, we will then need to look at, "Well, do individual merchants -- you've said, are switching to Amex". Somebody will say, "I don't accept Amex", or that someone's an internet-only business and therefore switching to cash doesn't arise. They don't accept cash at all. So it's that kind of implementation of general findings to the specifics of individual merchants.

To some extent, those issues can be dealt with at a more granular level in terms of individual categories of business, similar kinds of business. But it's those kinds of implementation points one's going to need to deal with.

THE CHAIR: Yes. Look, I understand that --

MR COOK: Then ultimately, the other issue, of course, is MPO where, certainly, as I understand my learned friend's submissions in terms of where we've got to, is taking some kind of point about exactly what we're free to argue, which respectfully, I say, he hasn't developed in the way that we -- it would be a very important point that you should -- you are in a position, particularly sitting alone, to decide that kind of point, which would restrict our ability to argue points.

THE CHAIR: Well, I'm not deciding anything like that. I mean, just to be clear, I'm not intending to do anything like that in this hearing.

MR COOK: That's reassuring and, with respect, exactly the right decision.

THE CHAIR: There are undoubtedly some points, which one can see that there is room for. We had the discussion about *Johnson v Gore Wood* and the question of, for example, the different jurisdictions and the application of *Heureka*. I think there is room for those principles to apply, so there is obviously a sensible basis to discuss them, but I'm certainly not going to make any decision about any of them in this hearing.

MR COOK: But the point I was simply going to make at the conclusion of that is that my learned friend says there is some application of these principles, but was certainly recognising at various points during the submissions that there is going to be a rump of MPO issues that we are free to run, with the obvious example being where a sector was not dealt with in Trial 2A, and there simply was no evidence in relation to pricing practice in that sector.

The reason there wasn't is because there was no claimant in Trial 2A at all, in many cases, that we could possibly have got disclosure from. Obviously the Tribunal's test, which you fairly summarise, is very much based on the specific evidence of merchant practices. Clearly, if there's no evidence that was possible, or capable of being put forward on those issues, and it didn't arise, with respect, it must be open to us now to say that there's never been any evidence of that kind that we're told is the only relevant kind. Now there should be --

THE CHAIR: I suppose, the point --

MR COOK: That would be (inaudible) disclosure, and then we can deal with the point in relation to those sectors. But certainly from our perspective, Sir, you know, we obviously did succeed in showing pass-on for a number of sectors when there was evidence in front of the Tribunal.

THE CHAIR: I suppose the point there is similar, isn't it? Because it would be surprising if -- let me start again. It's possible that there might be some ambiguity in relation to a particular claimant or sector, but given the way that the evidence unfolded in Trial 2, it was pretty obvious when it was one or the other, if one can put it that way, of the two alternatives.

I would assume that if you're faced with a claimant who says, and we can argue about what level of certainty you might want and the evidence that's before you, but let's say you have a claimant that says, "No, this is the way I do it", and they produce the documents if you ask for them. Again, you've got something where I can't see what the point of involving the Tribunal in that discussion is. Why are we spending resource of the Tribunal in a trial resolving something, which you've been told what the answer is, unless you've got something to challenge? I mean, it's going to have to be something that you would say is either misleading or wrong in the way that it's put, or some ambiguity that arises from it. Fine; if those are the positions, then you must be entitled to take them, but it's just difficult. I mean, I don't anticipate that that's really going to be a very likely outcome for most of these claimants, is it? I mean, putting aside the non-UK ones; we're just talking about the UK at the moment.

MR COOK: In terms of the UK, well, essentially, as long as we have a disclosure process which gives us the material to test those kind of assertions -- obviously, we're not in the territory of accepting when a claimant says, "I didn't pass-on", any more than they would accept when we say, "Don't worry, we don't restrict competition". They test that and challenge it. So in the same way, you know, this can't be a process simply of people asserting. We would need disclosure --

THE CHAIR: Of course, I'm not --

MR COOK: -- so regardless of what the process leads to in terms of a trial, there needs to be a process of disclosure and an analysis of that material to take that forward.

THE CHAIR: Well, yes, but -- well, you say regardless of whether it leads to a trial, but that's the subject we're discussing: how we should configure the trial. I suppose that I'm just saying to you, it seems to me somewhat unlikely that we're going to be configuring a trial that has an awful lot of that in it. I'm not saying that it's excluded; I'm just saying that it's hard to see why we would, if we had a proper process, end up with long lists of claimants who needed to come and prove their position just like we saw the witnesses who turned up in Trial 2. We've done all that. Unless there's something that's very different, which I don't think there's any reason to anticipate, it is actually just a process. It's a largely mechanical exercise, isn't it?

MR COOK: Well, (inaudible) all three of the witnesses, all three of the Claimants you end up finding that there was pass-on in relation to in Trial 2 had pleaded that they had not passed on at all.

THE CHAIR: No, no, of course. I understand the point you're making about verification, but we know the answer now, don't we? We have -- at least we know an answer. I appreciate you might not agree with it, and it's obviously subject to appeal and so on.

Putting all that aside, we do have, as Mr Beal puts it, a framework. If things fall outside the framework, you have to be entitled to test them, obviously. I don't think that anybody's suggesting that that's not the case. All I'm saying is: the likelihood of there being a lot of things that fall outside the framework, in relation to UK entities and pass-on, doesn't seem to me to be very high. So if I'm thinking about what we can sensibly manage in a Trial 4, it doesn't seem to me that at the moment I should be putting a lot of weight on spending a lot of time on those issues. That's really all I'm putting to you.

MR COOK: That's probably a convenient moment to break.

THE CHAIR: Yes. Let's do that. We'll resume at 2.00. Thank you.

(1.07 pm)

(The short adjournment)

(2.10 pm)

THE CHAIR: Yes, Mr Cook.

MR COOK: Yes, Sir. Before the lunch adjournment, I'd been making submissions about the quantum issues that we've been suggesting would need to be addressed in our proposed Trial 4A, or Trial 4 generally. I had planned to move on to the foreign MIF claim issues. There is, I would suspect, in the light of your exchange with Mr Beal this morning, a really big issue that we do need to address which is the jurisdictional point. On the basis that, if the jurisdictional point is -- as to some extent we all think it is -- then that sort of puts a completely different complexion on what type of trial we should be having and what consensus would be done in relation to it.

The impact, as we understand of the jurisdictional provisions, is that this Tribunal has no jurisdiction to deal with claims based on the application of EU competition law after 1 January 2021. So that's going back five and a half years now. By the time we get to any form of trial, that's going to be six, seven, eight years, depending exactly when it was. Seven and a half years or so, eight years.

Then what the Tribunal doesn't have jurisdiction to deal with is claims under foreign law at all. Now, there are a number of claims brought in relation to non-EU jurisdictions like Switzerland. There are also ones in relation to EEA jurisdictions like Norway, for example, which, again, I think that that's not an application of EU law; that's an application of the EEA agreement. I haven't had time to work out the footnote position in relation to that, but I suspect that the position is likely to be the same. (Overspeaking) doesn't have jurisdiction to deal with -- essentially, that would be part of domestic law in those countries rather than being EU law carve out.

THE CHAIR: So are you saying that there wouldn't be jurisdiction post-withdrawal day, or are you saying just not at all?

MR COOK: I think in relation to the foreign law claims, basically, the Tribunal has lost jurisdiction to deal with issues of foreign law. That's my understanding of the position. But I mean, to some extent, this point has arisen as a result of your indication that there won't be a High Court judge because that would have been a route through it, so we're sort of dealing with it a little bit on the hoof, and certainly would dot the i's and cross the t's.

Our understanding is that the position is that: there's no jurisdiction to deal with foreign law claims at all. So that would mean claims for, as I said, Switzerland, and we think that at the moment that would also be the EEA jurisdictions like Norway. They, just simply, would have to be out entirely.

There are also a number of claims. The claims are advanced back to 1992 and while, obviously, some of the primary or the largest European countries -- the ones we're talking about, Italy, France, for example -- were in the EU throughout that entire period, in relation to quite a number of jurisdictions we're talking about, they didn't join the EU until many years later.

THE CHAIR: I think that Mr Beal dealt with that. There's something in the Claimants' pleadings about it, wasn't there, about how there was still jurisdiction? I can't remember quite what it was, but we did look at some of the --

MR COOK: Okay, well, we'd have to look at that, but my understanding position is there isn't, essentially, jurisdiction to deal with those domestic law claims --

THE CHAIR: No. Well, I think --

MR COOK: -- because they are points of foreign law. So at the moment they plead that in relation to the period pre-EU. They go through, and I think what we took you through, is that they have pleaded aspects of whatever the domestic law was of that country, and we've pleaded back to it in relation to those periods.

It's not that we're saying that there isn't the potential for a competition law claim. Many of those, almost all, of those countries have some version of competition law prior to joining the EU, and they can try and put a claim and have done in relation to those periods. It's a matter of the jurisdiction of this Tribunal to hear those claims.

At the moment our understanding of the position is that if you have a claim which is just advanced under foreign law, non-EU foreign law -- by definition, it is, when you're dealing with claims in respect of a period when a country was not part of the EU -- then those are also outside the Tribunal's jurisdiction to deal with.

THE CHAIR: Well, I mean, in a way the issue is on the table, fairly and squarely. I think I said you can't assume that you're going to have a High Court judge to deal with it, so I'm not completely closing the door on that. But certainly, having discussed the matter with the Registrar briefly this morning, that was the immediate position, i.e. you can't assume. So I think it would be worth somebody or everybody, I suppose, applying their minds to what is and what isn't within the Tribunal's jurisdiction and, and reporting back on that, and if there's a disagreement about it, then obviously that'll have to be resolved somehow. But for present purposes, it would be useful to understand what the size of the issue is.

MR BEAL: Can I also make a request that goes for the exemption trial already listed for October 2027, because the Schemes need to -- if they're going to run this point, and if there is no High Court judge available, that has an impact, potentially, on the October listing 2027 for the Trial 3.

THE CHAIR: Sorry, just explain that point to me? Because?

MR BEAL: Because the exemption issues run post-Brexit --

THE CHAIR: Yes, I see. So we wouldn't be dealing with exemption post-Brexit for those Claimants who are claiming for their period.

MR BEAL: Exactly. And I anticipate that, having taken instructions on it over lunch, if this objection is being taken across the board and therefore brings into scope the October 2027 trial, then my clients' position will be that we will formally apply to the Tribunal to have a High Court judge listed so that it can adopt the *Sportradar* approach of having a High Court judge deal with the High Court issues, and then the panel of the CAT deal with everything else.

THE CHAIR: Yes. Well, I mean, by all means. I'm not --

MR BEAL: I'm just making it clear --

THE CHAIR: And just to be clear, I'm not upset if somebody else ends up doing it. I'll still be here. So whatever happens, I'm not going anywhere. It would be a mistake to think that I was jealously eyeing Mr Justice Green's position, and delighted at his departure. That would be a mistake.

I think the marker I'm putting down to you is that I'm not sure that that's going to be met with a yes by the Registry. I don't know, it'll obviously have to be discussed --

MR BEAL: My point is, it's a more immediate problem than Trial 4.

THE CHAIR: Yes, exactly. Understood. Yes.

MR COOK: My learned friend said, if we're taking the point, I'm afraid it's not within our gift to --

THE CHAIR: No, no, of course.

MR COOK: -- take it or not take it. It is a jurisdiction.

THE CHAIR: Of course. That's why I was very keen that we got it on the table. It was the first I'd seen of it, in Mr Kennelly's skeleton. I hadn't picked it up before, so --

MR COOK: The Tribunal as a creature of statute.

THE CHAIR: Yes.

MR COOK: And, you know, you simply have the powers that you do.

THE CHAIR: We do indeed.

MR COOK: In the High Court, you have some inherent jurisdiction. If you don't have jurisdiction, then one, it's incumbent on us to point that out. But also it is absolutely critical that you're only deciding points you have jurisdiction for.

THE CHAIR: Yes.

MR COOK: In relation to Trial 3. I mean, essentially, I think that only becomes a live point on the basis that exemption is also going to be dealt with as a matter of English law, Competition Act 1998, where ultimately the provisions of section 9 are essentially materially identical to 101(3). So in relation to the UK claims, it has no relevant impact because the full exemption issue can be resolved, essentially.

Where it is relevant is in relation to Ireland, where Ireland obviously is an EU state, and therefore there would be this issue in relation to the period after 1 January 2021, where that is a pure point of Article 101(3) or Irish competition law, which again is outside the scope. But in reality, the quantum of value associated with Ireland is fairly small, so it doesn't matter too much, particularly in circumstances where a lot of the Irish claims only go back to 2011, not all the way back to 1992 anyway.

But certainly that does seem to us to be an immediate issue that needs to be resolved on the basis that quite apart from anything else, it would certainly not be sensible, even if the Tribunal has jurisdiction to deal with a sort of middle period for some jurisdictions, that would simply not be a sensible case management approach to adopt. If there was going to be a resolution to these issues, it would be in a single jurisdiction, which would then be the High Court.

THE CHAIR: Well, I mean, maybe. So were you always anticipating prior to this point arising, you were anticipating the exemption Trial 3 would encompass the foreign

claims, the non-UK claims? That's right, is it?
MR COOK: Only Ireland.
THE CHAIR: Only Ireland. Okay.
MR COOK: And at that point Mr Justice Green was sitting as chairman.
THE CHAIR: Yes, exactly. No, I understand.
MR COOK: At some point we have to formally say, and indeed that's what Visa's skeleton did, that it should be dealt with like that. But that's really only a question of which hats are being worn --
THE CHAIR: Yes. I mean, I suppose there is a point. Well, anyway, that's fine, I understand. So Mr Beal's intervention only applies to Ireland, yes --
MR COOK: Yes. But Sir, I mean it does seem to --
THE CHAIR: Sorry Mr Cook, you're not suggesting that somehow that it wouldn't be the sensible thing to do to proceed with Trial 3? If we end up that a bit of Ireland has to go off and be dealt with somewhere else, if Mr Beal wants to pursue it, then you're not suggesting that that should wag the Trial 3 tail, are you?
MR COOK: Not in the least, for a number of reasons, not least at that point, the Tribunal absolutely does have jurisdiction to finish the third trial once it's done in relation to the UK claims.
THE CHAIR: Yes.
MR COOK: It is a legally standalone issue exemption in relation to the UK. Obviously, recognising principles, you may establish framework principles, but it is, in terms of the final exemption numbers, it is a standalone set of issues. And the question of exactly where the line is drawn in terms of what needs to be transferred if it does, that's not going to alter the desirability of having a UK trial in relation to exemption, because that has always been sensible.
THE CHAIR: Whatever it does on the basis that we're proceeding, it's not going to

deal with anything before the defined claim period for the UK Claimants, and it won't deal with anything after January 2021. I mean, that's the current position unless we get a High Court judge involved.

MR COOK: Yes.

THE CHAIR: And you would say that exemption -- you couldn't read exemption back, obviously, from -- you might have different cessation events, if nothing else.

MR COOK: In terms of bringing it back to --

THE CHAIR: Sorry, I'm mixing myself up. You couldn't read it back prior to the claim period on this if it goes back to -- if the foreign Claimants are entitled to claim back to 1992, you've got a very long period prior to the beginning of the claim period for UK Claimants, which no doubt you would say would make it very difficult to read. Well, I suppose it depends on what the answer to exemption is. You might like it and you might say it does read back to 1992. But I think your point is, it is specific to the period and the geography; that's the point you're making?

MR COOK: Absolutely, it is. The factual findings that whatever the legal framework you establish will then make factual findings in relation to that. Those factual findings -- and this is what *Westover* decided -- factually, the analysis of an individual market that makes factual findings in relation to that is obviously not going to be binding in relation to another market which is different --

THE CHAIR: Yes.

MR COOK: -- particularly when we're dealing with different time periods. We have to think of our own market. In the 1990s, the use of payment cards was completely different. The alternatives were completely different. Cheques, which most of us hadn't written for a decade, you know, there was a completely different framework, utilisation of cash. So, time period and geography matters in this regard.

THE CHAIR: Yes.

MR COOK: So we do say that there is this problem that we are going to need to deal with on the basis that listing a ten-week trial to deal with issues which ultimately may actually not be before this Tribunal is something we need to rapidly reach a landing on, on what would happen in relation to that, Sir, so because it does alter really whether that trial is needed and in what form.

THE CHAIR: Well, the position in relation to trial form might be different because it's a much bigger tail, isn't it, that you've got. We'd be dealing with a much wider range of non-UK Claimants and a much greater value so there might be a different consideration for everybody as to the right way to deal with it. I mean, I think just looking at Trial 3 at the moment, it doesn't seem to me (audio distortion) immediately that it's as significant as it might be in Trial 4.

MR COOK: Absolutely. I mean, it's in commercial terms minimal significance in relation to Trial 3.

THE CHAIR: Yes.

MR COOK: It is of core significance in relation to 4B (inaudible) suggesting it's absolutely central to that, and if you're looking at a combined trial, therefore the shape of that combined trial. So we do say that is something that is going to need to be a fairly rapid landing on going forward in relation to that, not least because the Tribunal, if it's not going to have jurisdiction to resolve the issue, shouldn't really be case managing.

Formally, I would say having thought about it, I don't think there is a PI -- there is technically an issue with a preliminary issue trial being dealt with, because that is actually dealing with a situation which will necessarily go back to the period prior to 1 January 2021.

THE CHAIR: Yes. The difficulty is, of course, whatever conclusion you reach about the best way to deal with the post-January 2021 cases, we have got before us pre-January 2021 cases. We do have jurisdiction and we have to try them. I mean, sure, it may be that the parties might agree, or indeed we might be persuaded that there's a different way of doing that, whatever it is, but I don't think you're saying we can't get on with any part of Trial 4, are you?

MR COOK: Well, with respect Sir, I think at that point the Tribunal would need to consider -- I mean, particularly when claims are being transferred to it. Firstly, whether claims should be transferred if essentially you only have jurisdiction for a partial transfer, and whether you should transfer claims back in circumstances in which the High Court would have the ability to hear all of it, whereas the CAT could only hear part of it, and, with respect also, commercially, probably not the most important part of it.

Card usage has only gone up over time, and so the most recent five and a half years of claims, that continues accruing over time, is likely to be where at least a substantial part of the value is associated, perhaps the majority of the value associated with the more recent period. So I think there certainly would be at that point, a case-management question about, is it sensible to proceed with part of the cases rather than them all going to the High Court, which is the reason we wanted to flag it now, because it does have a very significant importance in relation to this.

So then in terms then of the issues that will need to be addressed in the foreign MIF trials. I mean, we're obviously intending to be sensible in relation to this, that if there are no material differences from points that have been decided, then we'd be banging our head against a brick wall to try and ask the Tribunal to make a different decision on, essentially, materially identical facts. Where the differences are going to arise is where there are material differences in relation to those foreign jurisdictions.

THE CHAIR: Well, just to go back to the wording of the issue and the List of Issues. It does use that exactly that language, doesn't it? "Material differences." Where are we ...

MR COOK: It was issue 6 or 7.

THE CHAIR: Yes, that's right. I'm looking at your List of Issues. So it's page 294, isn't it. So can the:

" ...non-UK/Irish domestic MIFs be materially distinguished from the essential factual basis upon which the Court of Justice [decision in] ... *Mastercard* held ..."

There is just built into the issue, effectively, an invitation to you to tell us what the difference is, isn't there. I mean, that's the way it has worked. It's the way it worked in Trial 1. I'm dealing with the sort of burden of proof point. Maybe a more general point than that. But the point that's being put against you is, "Come on, let's find out what they are. Could you please tell us what they are", and I'm sort of rather sympathetic to that. Don't you have to tell us sooner rather than later why they can be materially distinguished.

MR COOK: Sir, just a quick point to note in relation: that's dealing with Article 101(1). So that's restriction where -- that sort of language doesn't sort of find its home in relation to 101(3) necessarily in the same way.

THE CHAIR: No, no, I'm dealing with liability at the moment. I'm just simply dealing with liability.

MR COOK: So, I mean, it's slightly surprising to get a complaint today, already on my learned friend's feet, to complain that we haven't pleaded detailed cases going back 30 years. It's an approach we've taken for a number of years without complaint, including in his three rounds of written submissions in relation to this hearing.

We've taken, with respect, what we say is an entirely reasonable approach of -- in circumstances where the UK and Irish claims were proceeding ahead -- not doing that incredibly expensive investigation in relation to foreign jurisdictions.

THE CHAIR: Yes, and I'm not criticising anybody for it. I think that we are at the point now, aren't we, where it's quite difficult to work out what we do with Trial 4 unless reasonably soon we know what points you are taking. I mean, are you taking a point in relation to lots and lots of different countries in Europe, or is it a general point relating to all of them, or what is it? I think we are getting to the point where you are going to have to articulate that.

MR COOK: Well, Sir, we certainly recognise that that will need to be dealt with certainly at some point, significantly in advance of Trial 4 for obvious reasons, whatever format that takes. The question, initially at least, is: is it sensible to deal with those kind of points before we've dealt with the preliminary issue trial. On the basis that the preliminary issue trial has the potential, in its various forms, to substantially impact upon the time period that we're considering and particularly the difficult part of the time period.

It's relatively easy to identify what's going on in the market today. It is very difficult to try and go back and identify exactly how things were operating 30 years ago in relation to 20 plus jurisdictions. Obviously, one of the things one is concerned about is embarking on a very substantial exercise in relation to that many jurisdictions at a point when it may turn out to be unnecessary.

But we certainly know in general terms some of the issues that exist in relation to those countries. But without having done the detailed analysis to know every single time they arise.

To give you some examples, there are countries in which interchange fees were set bilaterally at various times. For your reference, the Trial 1 judgment rejected Marks & Spencer's claim in relation to Maestro in the UK on the basis that interchange fees were set bilaterally. So that is, you know, an immediate example of a situation in which there is a completely different analysis.

There are markets in which MIFs were not set by Mastercard and in some cases where

the rules themselves domestically were not set by Mastercard.
THE CHAIR: But on the first of those points, Mr Beal says, "So what". Do you accept that it doesn't matter who set them if the rules provided for them?
MR COOK: Certainly in terms of the way in which it's analysed in Trial 1 judgment. That's certainly --
THE CHAIR: Obviously subject to --
MR COOK: That point is one we are challenging. But, yes, indeed, if there is a Mastercard rule, that would be the origin of it. But there will be countries -- indeed, that was the position in relation to the UK: that the Maestro rules were set by the banks and not by Mastercard. So that's another point we took in relation to the difference of those. So it's those kind of points.
There are countries where there was a sole acquirer, for example, at various times. Again, the entire analysis that the MIF restricts competition seems to me to be very difficult to apply if you have a sole acquirer. What competition is being restricted? There is no competition. There is just that sole acquirer providing acquiring services. Again, the very nature of the analysis simply doesn't arise in those circumstances.
There are countries in which there are very, very strong domestic alternative payment cards. Again, we get into objective necessity arguments that, it's right to say, failed in relation to the UK in *Sainsbury's* and that was rejected by the Court of Appeal having initially succeeded before Mr Justice Popplewell.
There are countries where the different facts would allow us to run that argument with, one hopes, better prospects of success. That was a point that was flagged and, indeed, is the origin of the bit of the judgment we've referred to in *Westover Group Limited v Mastercard Incorporated*, which says the need to look at different facts was in relation to exactly that point, noting that it wasn't one of the points we were taking in relation to Italy. The judgment about dealing with Italy was about

potentially objective necessity being an argument that arose. The Tribunal saying, "Well, it may have been rejected by the *Sainsbury's* Court of Appeal in the context of the UK facts but, when we come to a different market, we need to look at it again".

So those are to give you some examples of the kind of points that exist. There is a patchwork, particularly when one is going back 30 plus years in relation to as many jurisdictions as we are. It will be a point where you say, "It was bilaterals during this period. It was this duration to that country during that period". So we know there are points out there that exist, but the scope and duration of those points would be a very substantial exercise. Particularly as, the further you go back, the more likely it is that a number of these alternatives exist. Because, since 2015, Mastercard has set -- and that's what we say in our pleadings, and you'll be shown that -- the MIFs domestically for the whole of Europe since 2015. The historical period, which is really where it matters, is where something different often happens.

THE CHAIR: I mean, I understand all that, but you are going to have to get on with bits of that, aren't you? I take your point about the preliminary issue, but we're getting to the stage where we do need you to do that analysis, don't we? We need to know from you what points you're going to take, at least since 2015. So therefore, regardless of the outcome of the preliminary issue. Because we've got a trial in which we want to deal with some of this stuff in February 2029. So we can't really wait any longer.

It may be that the consequence of the points you've made, in other words, if you turn up with an objectively credible list, it may well be that does alter the view as to what goes into Trial 4 or not. But at the moment, we don't have the list. Clearly, the way that the preliminary issue turns out may affect that as well. But I just think the basic point is that you need to get on with this now. I mean, is that accepted? Are you --

MR COOK: Well, with respect, Sir, my primary position is: no, it's not. On the basis that if we're going to have a preliminary issue trial, a sensible time to do that would be once we've got a ruling in relation to that, so we know if these time periods are relevant at all.

Then there's the question of when we actually start making progress in parallel towards this trial. But as soon as the Tribunal says, "Active progress needs to be made towards this trial", clearly that needs to be one of the first steps that's taken.

THE CHAIR: Yes. But you're going to have to do it for the claim period, aren't you? The preliminary issue is not going to change that.

MR COOK: Yes, but I suspect the points to be taken in relation to the claim period are likely to be much more limited.

THE CHAIR: Well, in that case, I think --

MR COOK: Mastercard has set MIFs since 2015. So the points will be narrower in relation to that period.

THE CHAIR: Okay. Well, I mean, as a starting point, I think we need that list, don't we? We need a definitive list. So if I put it that way, I'm inviting you to agree that that's a reasonable thing to start you working on.

The reason, Mr Cook, I'm not trying to be difficult about it, it's just that I don't see how we can have a sensible conversation about what Trial 4 looks like. We're clearly not going to resolve that completely today. But if we're going to have a trial in 2029, of any sort, we need to start working out what's in it now and have some idea of that, I would have thought, by the end of this year. We can't do that unless we have your list, at least what you can sensibly do at the moment.

So I think I'd probably push you again and say, if we were to say to you, "Look, go away and give us the list for 2015 onwards", is that something you think would be ...?

MR COOK: Well, from 2015 onwards, then certainly that's something that can be done in (inaudible) period. The concern is always here that there's a lot of Trial 3 work being done and the extent to which that limits team availability to focus on, but we --

THE CHAIR: Awful lot of people in Court, Mr Cook, and you've got some very big legal teams. I'm not going to be very sympathetic to arguments that you don't have the resources.

MR COOK: (Inaudible). That needs to be done at some point. We would suggest the best time is after the PR judgment, but, ultimately, we're in the Tribunal's hands as to when you think that's the right time for us to get on with that exercise.

Then, when we come, obviously, to exemption, that becomes a very different kind of exercise once again. Obviously, until we get the T3 judgment, then we won't know essentially what categories of sort of relevance are being accepted by the Tribunal at all. The difference is in relation to those --

THE CHAIR: Sorry, I'd like to interrupt you. You're talking about quantum points coming out of exemption. Is that what you mean?

MR COOK: No. The way we've described it in our submissions as the T3 judgment is: it's not directly going to address France or Germany or any of these other countries. What it's going to provide is a legal framework.

THE CHAIR: I see. You're talking about the non-UK Claimants.

MR COOK: Yes, the non-UK Claimants.

THE CHAIR: I see. Yes, I'm sorry, I was just not quite sure which way you'd gone on this.

MR COOK: Yes, so the non-UK claims. So in relation to that it is going to be looking at what that judgment provides in terms of seeing: are there entire categories of benefits that, for example, you may have ruled in or out. Obviously, there is going to be a great deal of difference between, particularly the UK market in 2011 to date, versus how a number of these markets operated in the 1990s.

You know, where they are talking about post-communist countries in the 1990s, you're going to have a radically different payment environment for all sorts of reasons compared to what you have today in the UK, where payment cards are ubiquitous, there's very high levels of usage compared to very small levels of cash usage and (inaudible) to some extent dying out almost.

In relation to that, we will be looking at the fact there are different payment alternatives in a number of these markets where they have non-bank-card alternatives, such as direct balance transfer, which are much more convenient or they've been set up to be convenient alternatives to paying with card.

So we will be looking at those kind of factual differentiations once we have the framework that's been provided by the Tribunal's T3 judgment. So that, to some extent, falls into a slightly different category than it does in relation to restriction because, obviously, with the benefit of the Trial 1 judgment, we know what points we need to try and distinguish, subject to the impact of the appeal potentially. But in relation to the Trial 3 judgment, all we'd be doing is saying: on the assumption we potentially succeed on everything, we'd make similar points by reference to different facts in relation to the other countries in Europe.

There, of course, then are the other issues that need to be dealt with. One point that was skirted over is acquirer pass-on. Acquirer pass-on, of course, is where the Claimants bear the burden of proving acquirer pass-on clearly in relation to interchange++, that is mechanical pass-on. We'd accept that regardless of which jurisdiction it is. But interchange++ is a relatively new beast. Certainly, without wishing to give evidence, when we looked at this in relation to *Merricks* -- even in relation to the UK -- it was a beast of the 2000s, not of the 1990s. We may well find that something very similar, if perhaps even more pronounced, in relation to a number of other foreign jurisdictions. In any event, blended MSCs are still a heavy component of the UK market, hence the 85 per cent finding that we've made. That is something, again, where the Claimants need to think about how they will acquire a pass-on in relation to other jurisdictions where they may well have simply significantly different acquiring markets and structures of transaction, or structures of merchant service agreements from the UK, and it does need to be proved.

Then when we come to merchant pass-on, one of the most significant factors is likely to be whether or not the standard that's adopted by the Tribunal, the legal standard, actually reads across in relation to other jurisdictions. It obviously can't automatically. My learned friend made various references to the Damages Directive, but of course the legal standard this Tribunal decided was justified, or appropriate, as a matter of English law. The Trial 2 judgment was exclusively a matter of English law. It wasn't impacted by the Damages Directive or any principles of EU law. It was simply as a matter of UK tort law, English tort law, "What did you decide was the correct test?". The likelihood is that there will be, at the very least, significant arguments about a different legal test existing under foreign laws.

So, you know, intrinsically, since that has been very much the guillotine that the trial judge took, which was to say, "If it's dealt with by way of an overheads cost stack, that's not good enough. If it's part of some kind of costs plus cogs mechanism, it is", if there's a different legal test, that entire distinction goes completely out of the window. So again, one would need to look at those legal issues in relation to all the different countries.

Then, even for those countries where there's the same legal test, or arguably the same legal test, one would again say that the way in which a particular sector priced in a different country in the 1990s or 2000s might be very different from the way in which the evidence showed up in the UK, in relation to how Wagamama was setting prices in 2022. Because, again, a lot of the evidence was very recent in relation to the trial. So in relation to all of those, with respect, you know, the read-across ability is likely to be very limited.

We do say that the merchant pass-on is something that is going to be a very substantial exercise in relation to foreign jurisdictions, because we aren't starting off with even the certainty of the legal framework being applicable, and then the quantum issues of whatever size the Tribunal thinks is relevant for the UK and Ireland. Obviously, that also arises in relation to those foreign jurisdictions.

So all, essentially, the issues of Trial 1, where we're looking at material differences from the Trial 1 judgment, and Trial 2, essentially looking at a number of those issues, potentially by reference to a very different legal standard, and then exemption with a lot of factual differences, is going to be going back through a lot of the issues again in relation to a very long time period and a lot of jurisdictions.

So that's certainly why we see that as being a tremendous amount of work to be done in relation to any form of trial in relation to the foreign MIFs, where certainly we see it as being a credibility issue of, "How can we sensibly do this?", which is to deal with a couple of front runner jurisdictions first.

THE CHAIR: See, the trouble with that, Mr Cook, is that when we've done that -- encouraged -- not necessarily encouraged, but certainly I would say with what appeared to be your agreement and buy in -- well, I don't mean you personally -- well, maybe I do mean you personally, but I mean your clients, your agreement and buy in to the idea that we were making all this simpler and it would be better, we actually seem to have made much less progress than we thought.

I'm really not very attracted by doing sampling in circumstances where you're going to turn around and say, "Oh, it's all very well that these four countries, or whatever it is, work this way, but they're all completely different". I just can't see the point in that. I'm afraid that your current approach to all of this is really pretty inconsistent with that sort of submission. I'd much rather be trying to set things up so that we, at least, finish things as far as possible and don't leave them to be relitigated later. That's the pattern we're at the moment, relitigating it.

Now, it's not a criticism. You obviously have to deal with this case as you wish, but certainly from up here, it looks like you're taking advantage of every possible difference to relitigate things, which we thought we were at least making more progress with. That's just how it is. But it does mean that sampling doesn't feel very attractive. We go and we spend a whole lot of time and money looking at a few countries, and then you turn around and say, "Well, they actually have no relevance to the other 20 countries because they're all different".

MR COOK: What we say in relation to that, Sir, is that we have the potential, by doing a very small number of countries, to really deal with the vast majority of quantum issue. The idea that anyone in the end is going to worry about what's happening in Bulgaria -- I mean the claim is £100,000 for Bulgaria -- is just simply fanciful. There's a difference between taking points when they have real value associated with them versus the detail of a lot of very small jurisdictions.

THE CHAIR: Well, you say that, but I mean, you're not offering any commitment to be bound by it across those jurisdictions. So what assurance do we have that we're not back, in a way, in a worse position so that we've got jurisdictions which are largely uneconomic to litigate, and you're just refusing to engage with them and with the findings that have been made?

There may well be perfectly good reasons for you to say that Bulgaria is different. I don't know, I'm not criticising you. Just to be clear, I'm not criticising Mastercard or Visa's relationships. I understand that the points you're making are perfectly valid points to make, but in terms of the efficiency of the process, sure, you get rid of some big claims, but you actually make things quite difficult for the ones that are left, unless there's some sense that there is going to be a reasonable degree of read across. At the moment the degree of read across is probably less, certainly less, I think, than Mr Beal anticipated, and it's probably less than I anticipated. It's not a criticism, but that's just the way it's panned out.

MR COOK: The point I'm noting there is that is most of the claims that are outstanding now are group claims. So while we're being sued in relation to 20 jurisdictions, in many cases, it's an undertaking which has subsidiaries in multiple different jurisdictions. So, for the most part, these are not a standalone claimant in Iceland that is added to a claim here. It is a hotel chain that has subsidiaries in 25 different jurisdictions.

THE CHAIR: Isn't that a bit inconsistent with your submissions on, for example, merchant pass-on? Because presumably if they're doing it, they're going to do it everywhere, aren't they? Why do we need to have a merchant pass-on trial for all the jurisdictions that are hotel chains? And if they're going to price it the same way, they will, won't they?

MR COOK: Well, there may be some overlaps in relation to this, depending on what -- the other thing is going to be what the local markets operate at and how it's dealt with. The fact that you're part of a group doesn't necessarily mean you have universal pricing mechanisms.

THE CHAIR: The trouble is that it just feels a bit like you're having it both ways on us. I'm not criticising you, but in terms of trying to reach a resolution that has the maximum effect, I think that I'm saying to you that I'm not very attracted by a sampling process which does nothing more than resolve, as far as I can see, the samples. It's not having the effect of crystallising, either through settlements or -- not obviously, I can see, through settlements -- the lack of need to litigate it again.

I think I'm much more attracted by saying to you, for example, whatever we do in Trial 4, we'd like you to turn up and tell us everything in relation to the essential factual basis under 6.1 in relation to all jurisdictions, and we'll deal with them. If that means there's more work up front, at least we know we've dealt with that completely and liability's gone.

MR COOK: The submission I make, Sir, is to simply say that it's a cost benefit analysis and that, actually, the work in relation to all of these small jurisdictions -- it would be more cost effective to resolve some of the big ones which really knock out the quantum, than doing a lot of work in relation to small jurisdictions where there aren't huge amounts of money associated.

THE CHAIR: I mean, that's a matter for you to take a view on, isn't it? But we're here to resolve things, not -- I mean, if that's the position, you can always settle then.

MR COOK: So, ultimately, if the Tribunal thinks a trial in March 2029 is the right way to proceed with this, then the important issue is going to be progressing disclosure, and a large part of that is going to be coming from the Claimants.

THE CHAIR: Yes.

MR COOK: One of the key points of difference between the parties in relation to disclosure has been whether that should take place in 2027 or not. As you know, our proposal has been that that is something that a lot of the material -- quantum points I know you're not keen that those should be resolved at a trial, but those are important points to be resolved, however they are.

Obviously, when you come to look at the different jurisdictions, there is going to be, in any circumstance, a claim going back, whatever it is, six, eight, ten years, depending on the individual claimant, regardless of some of the limitation points. And there is no reason why those categories of disclosure can't be progressed in 2027. With respect, we do say that the only way that you make a trial in early 2029 viable is to have made significant progress with these categories of disclosure in parallel with Trial 3.

THE CHAIR: I understand that.

MR COOK: (Overspeaking) The Claimants seek to be enthusiastic about getting on and having a trial listed, but not enthusiastic with getting on with the work.
THE CHAIR: No, I understand.
MR COOK: They can't have it both ways.
THE CHAIR: Yes. I think that if we were to take the view that we wanted to try and deal with quantum, at least for UK and Irish Claimants, entirely in our Trial 4, and given the observations I made earlier about the need for a process in advance of that, I can see the force of what you're saying.
MR COOK: In relation to some of the points about the preliminary issue, my learned friend, Mr Kennelly, was going to deal with those. Those are my points on the shape of the trial.
THE CHAIR: Yes. So just to try and wrap up on that. So as I indicated, I am minded to put something in the diary for late March 2029, partly because otherwise we're not going to find available trial time at the Tribunal. That's just the reality of the workload here at the moment. So I think we need to do that.
Then the question is, what goes into that bucket? And the objective has to be as much as possible. Just so you're clear I'm not at all sympathetic to the idea we're just pushing stuff off, but I take the points you've made on board. I understand the points you've made about the difficulty of some of these points. It is complicated. But in order to work that out, I'm afraid the parties are going to need to do some significant work now, not just disclosure, but also particularisation of claims identification, all these things, because otherwise we just don't know what goes into that trial. That's, I think the chicken-and-egg problem we've got. Yes.
MR COOK: My understanding was today that you weren't planning to make any decisions really about what goes into that trial, but to start a process which will allow us to have that crystallisation over the course of -- in parallel to the Trial 3 process?

THE CHAIR: Yes, certainly over the next few months. That's certainly where I am at the moment, yes. Thank you, that's helpful.

Yes. Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Thank you, Sir.

First, the Tribunal, I propose to follow Mr Cook very briefly on the points you've been discussing with him --

THE CHAIR: Yes.

MR KENNELLY: -- and then deal with the foreign-law preliminary issue quite quickly, because I think there's a lot of common ground between us now.

THE CHAIR: Yes, good.

MR KENNELLY: But on the points that you were discussing with my learned friend, and we entirely understand the concerns raised by the Tribunal, we would like to respond to some of the points that Mr Beal made about what justice requires for Trial 4, and the question of quantum.

Plainly, if the Tribunal were minded to focus on the UK and Ireland, Trial 4, the trial which the Tribunal envisages in March 2029, subject to the feasibility of that, that's consistent with the proposal which the Defendants have been advancing about resolving UK and Ireland claims entirely first, and as early as possible.

THE CHAIR: Well, if you're picking up what I said to Mr Cook now, for example, we want to deal with that, I'm not advancing that to the exclusion of dealing with other things and particularly non-UK quantum. I think there's a bit of an issue about even starting to talk about non-UK quantum, because we don't actually know what the issues are for liability, and there are obviously quite a lot of other bits and pieces floating around. But I think if you take it as a sort of guiding principle that we would want to do as much as we possibly could do in Trial 4, and that it would only be if we really couldn't do it, it would have to go off to something else, that's really where I'm coming from.

MR KENNELLY: That we entirely understand. To respond, then, to the points that Mr Beal made in relation to that objective, and the question of read across, because Mr Beal placed very heavy reliance on the availability of read across to allow the foreign law claims to be resolved in Trial 4.

THE CHAIR: Yes.

MR KENNELLY: We are, of course, not concerned with collective proceedings here. We're not concerned with aggregate damages. The ordinary approach in claims like these is that before the Schemes are ordered to pay substantial damages to Claimants, Claimants have to prove their actual loss. And, of course, in order to establish the actual loss suffered by the individual Claimants, it will be necessary to take into account and to give credit for the countervailing benefits which arise from the MIFs themselves.

THE CHAIR: Well, that's your argument. I mean, I don't think Mr Beal accepts that, and obviously that is a matter that's an issue.

MR KENNELLY: Yes, and it's a legal question. And we say it arises even if we lose on exemption, because even if we can't prove that the benefits outweigh the alleged harm, we're still entitled to insist that credit be given for the countervailing benefits at the quantum stage.

Now, that's a question of law, but if we're right about that, that will require an investigation of the extent to which the Claimants themselves benefited from the MIFs, because that will affect the actual loss they've suffered. And one can see -- I'm not going to go through our pleading on these issues, but the Tribunal is very familiar with the argument that we've raised which arises at the quantum stage, even if we lose an exemption, that there are detailed benefits which individual Claimants will have received from the MIFs, and that will vary, and vary significantly, between Claimants. It's not just those kinds of benefits. There are claimant-specific differences in the quantum exercise in relation to compound interest. Certain Claimants are claiming compound interest. For example, the Louis Vuitton Particulars of Claim. I'll just give you the reference. Supplemental bundle tab 1, page 204, paragraph 111 of the CAPOC. Of course, an entitlement of compound interest requires proof of that loss, and this Tribunal knows very well that means that Claimant has to show that they would have borrowed less in the counterfactual in order to start to claim compound interest. That's a very Claimant-specific question that requires disclosure and evidence from particular Claimants.

We fully acknowledge the use of the broad axe, and the broad axe will be deployed to ensure effective justice for all sides and have regard to the Tribunal's resources.

The key concern for the Defendants for Trial 4 is that the Claimants give disclosure as far in advance so that we can work out how the Tribunal's resources are used effectively, because with disclosure from the Claimants -- and this applies equally and in particular to the foreign Claimants -- with disclosure, we can see how to group the Claimants where patterns and similarities arise, and that will allow us to make proposals which will be proportionate for the Tribunal, because, for example, the need to cross-examine individual Claimants about the benefits. If we're right, the benefits ought to be taken into account. That could give rise to cross-examination, but it would be limited to what is proportionate once we see, through disclosure, the patterns and similarities that arise among different groups of Claimants and categories of Claimants.

Without disclosure from the Claimants and in particular, the foreign Claimants, we are blind. We are unable to assess the extent to which individual Claimants obtain benefits from the MIFs. Mr Beal referred to the ability for the defence Schemes to conduct studies or ask the question in general terms. This goes to the internal benefits which the Claimants receive from this, and that's before we get on to the treatment of costs internally within the merchants, again, something about which we will know nothing. We cannot fairly engage with that without disclosure from them. But if we get disclosure far in advance, that allows us to approach this in a much more streamlined and rational way, and to make proposals to that end to the Tribunal.

THE CHAIR: So can we just work through sort of an example of this? I mean, what are we talking about here? Is fraud protection a good example?

MR KENNELLY: Yes.

THE CHAIR: So the Claimants, you say, without the MIF would have to find an alternative for protection arrangement, and that would cost them money; that's one way you might put this, is that correct?

MR KENNELLY: Yes.

THE CHAIR: Disclosure is not going to tell you anything about that though, is it? Because they haven't got the fraud protection externally, they've got it through the MIF. That's your point. So what is disclosure going to tell you about that that helps you?

MR KENNELLY: Well, we can see the extent to which they've avoided costs. So, I mean, fraud is one example where through disclosure we could identify the extent to which the merchant has suffered fraud. This may be a rather crude example, and I'll be giving others if it isn't correct.

THE CHAIR: No, no, it's helpful.

MR KENNELLY: They could have suffered significant fraud, but in those circumstances, they were covered by the issuers and had they had to deal with it themselves, they would have had to have purchased fraud protection from a third-party provider that was more expensive.

THE CHAIR: But you know the answer to that already, because you know what fraud prevention rates are. I mean, you've got all the data on what fraud rates are in all these countries, haven't you?
MR KENNELLY: We have no idea what Hennes & Mauritz in Germany would have to pay for fraud protection in view of the particular fraud problems it experienced in 2013.
THE CHAIR: Well, first of all, you do know what the level of fraud is for retailers like them in Germany? You've got that data? You must do, mustn't you?
MR KENNELLY: We will have a certain amount of data in relation to the level of fraud in particular sectors, in particular jurisdictions.
THE CHAIR: Yes.
MR KENNELLY: But the way it operated in the companies concerned and what those companies would have had to do in order to deal with it in their own circumstances -- I mean, neither I nor, with respect, the Tribunal really knows at this stage what the true answer is.
THE CHAIR: I appreciate that. I mean, none of that should hold you to anything, Mr Kennelly. I'm not trying to pin you down on it. I'm just trying to get a sense of how this works. Because if you think about it, the cost to the claimant is either going to be the actual cost of the fraud, or it's going to be the cost of buying some protection somewhere else, and neither of those things are going to be apparent from disclosure, at least not to the extent you don't already know them.
I'm just struggling a bit with why -- I mean, it may well be that Mr Beal is somewhat cavalier in saying you can go off and do some studies, but actually working out what the rate for fraud protection in Germany in the 2010s -- I mean, the disclosure is going to tell you no more than you would find by asking anybody else. I don't understand how that helps?
MR KENNELLY: I'm with you, Sir, so far as you said, that Mr Beal may have been

cavalier with the process.

THE CHAIR: I knew you would be pleased with that. I'm trying to bring you along.

MR KENNELLY: But just on that fraud example -- that's just one of many examples of benefits. But on the fraud example, the availability of fraud protection will, in certain sectors of the economy in Germany, for example, have allowed businesses to develop, for example, their online presence in a particular way. It may be that disclosure will show that because of the -- notwithstanding the obvious fraud risks by having an online retail presence in some context or offering certain kinds of products or certain kinds of consumers which are perhaps more liable to commit fraud, the existence of the protection through the Schemes has encouraged the development of that business stream, and disclosure might reveal that to us. It might even be a value given to it in the particular business in that context.

In circumstances where that business is suing the Schemes for cash, that's the disclosure we would need and we'd be entitled to in order to test the level of benefit that they got from that.

THE CHAIR: Quite a long way away from a benefit that's been caused by the breach, isn't it? I mean, it's becoming quite distant from --

MR KENNELLY: Its subject to us showing that the MIFs -- it's the chain, obviously. We have to show that the MIFs triggered the issuers to behave as they did and that the benefit then accrued to the merchants. But we have a right to have the argument. We can't have the argument without the disclosure. I mean, the Tribunal might think, well, that all sounds a bit speculative, but ultimately the Tribunal has no idea until we see the disclosure from the Claimants.

THE CHAIR: I --

MR KENNELLY: I'm sorry, may I just -- on fraud.

THE CHAIR: Of course, yes.

MR KENNELLY: I mean, obviously questions like the other types of benefits that disclosure would reveal. I mean, the technology, the innovations in payment technology is a clear example of the benefits that merchants receive. Because, if we can show that the MIF revenue streams caused these innovations -- tokenization, contactless and so forth -- it is likely that disclosure from these claimants will show significant benefits that accrued to them arising from these technologies, if we can show that they were caused by the MIFs.

The different benefits that these Claimants receive will vary, and they will particularly vary between jurisdictions. The real siren song, which must be avoided, is the idea that the Tribunal can assume that merchants in Germany or France or Italy benefited in the same way, to the same degree, as merchants in the UK. The markets are all different markets and you can't assume that.

THE CHAIR: Okay. I understand your point on that, but just take that for a bit, the same sort of analysis. What is it that you're going to be asking the Claimants to disclose that tells you the answer to that. I mean, you're going to ask them what? How are they going to answer the question that they've benefited from technology? What documents are going to show that?

MR KENNELLY: If they're able to close bricks and mortar shops because of the increase in online shopping, reduced labour operational costs, if we can demonstrate increased consumer spending because of the frictionless availability of online shopping which again is, we would say, caused by innovations funded by MIF revenue. This is something which -- we had a taste of it in Trial 1. We would expect significant disclosure in evidence as to these points from these claimants in Trial 4, and to a much more limited extent in Trial 3. But all the Tribunal --

THE CHAIR: Just before we move on, Mr Kennelly. I mean, I did raise with Mr Beal the idea that we might try and deal with this as a preliminary issue, as to whether or

not you're entitled to raise these points as, if you like, credits against the loss. What's your position on that?
MR KENNELLY: There's a legal question as to -- I suppose it could be said that, as a matter of law, we're not entitled to get credit for these benefits at all if we fail on exemption.
THE CHAIR: Yes.
MR KENNELLY: But that, in my respectful submission, would be a hopeless legal point. As a matter of principle, we would say it's obvious that we're entitled if we can show the causal connection.
THE CHAIR: Well, that's --
MR KENNELLY: That's the problem. That's why it's not right for a preliminary issue. Because it's a fact-specific question. The only way that fact-specific question can be resolved is with disclosure from the Claimants. It would be extremely unfair to deny us the opportunity to -- on a question of the internal benefits accruing to the Claimants, to be denied disclosure from them and forced to scrabble around in the market for publicly-available material in relation to matters that are, by definition, highly sensitive and commercially internal matters within the Claimants themselves.
THE CHAIR: I think the question is probably a more limited one, which is caused by what. Is it caused by the existence of the MIF or is it caused by the breach, the infringement? That's the legal question, isn't it?
MR KENNELLY: Well, the positive MIF is the infringement. So if we can show that the MIF revenues are causally connected to these innovations which bring benefits to them, then we have done our job.
THE CHAIR: Well --
MR KENNELLY: Because they --
THE CHAIR: The question is: is it a byproduct of the Schemes or a byproduct of the

MIF. Isn't it? Isn't that the --
MR KENNELLY: Well, no.
THE CHAIR: (Inaudible) we're talking about.
MR BEAL: Well, no. We say the MIF is what funds the innovation. We have to prove that. But that's the question.
THE CHAIR: Okay.
MR KENNELLY: We fully accept that we have to show the requisite causal connection between them. The positive MIF, exemptible level of MIF, for example, and the benefit which we say accrues to the claimant.
Anyway, I've made my point. In order to show the benefit accruing to the claimant, the only fair way that could be done is with disclosure from the claimant, and it would be --
THE CHAIR: I must say, I'm struggling a bit with the expectation that you're going to get a lot of very relevant material on disclosure, because I just don't think that a lot of this is going to be stuff that's written down in companies that tells you the answer. But, I mean, on the basis you put it, if you want to ask for it you can see what you get.
MR KENNELLY: We will ask for it. Just to reassure you, in case you are worried, you recall in Trial 1 -- and we just scratched the surface in Trial 1, and my learned friend kept saying, "Well, this is all 101(3) stuff. It's got nothing to do with 101(1)" -- we did see, even within the small pool of claimants that gave some disclosure, tables where they compared the costs of payments from Klarna, for example, and buy now, pay later --
THE CHAIR: Yes.
MR KENNELLY: -- and Visa. They were positively tracking the benefits they were getting when sales came through payment cards rather than through Klarna. It was in black and white. That was just a drop of the ocean in a context which the Tribunal ultimately found was inapposite for the issues that were before you in that case.

So we are confident that we will find similar and more disclosure along those lines from the Claimants in Trial 4.

Now, what can't happen, we say, is the suggestion from the Claimants that you can somehow just read across from the findings regarding benefits in Trial 3. There was a suggestion that somehow that Trial 3 will give you all the information you need for the purpose of Trial 4. That's wrong in principle because, of course, Trial 3 and the question of 101(3) is concerned with economy-wide issues. It's not claimant-specific in the same way, which is why the experts were content to extrapolate from only 38 sample claimants. But there are, of course, more than 1000 active claimants in the case. Extrapolating from the 38 sample claimants, even to the body of UK claimants, we would say, cannot be done for the purpose of a safe assessment of countervailing benefits. It still requires a more granular analysis when you're assessing the particular loss that the UK claimants have suffered.

But for the foreign claimants, it is a fortiori impossible simply to extrapolate because, as Mr Cook explained, the foreign law claims are very, very different indeed. The markets are different, but the period is potentially very different. My learned friend Mr Beal's suggestion that, because Marks & Spencer has a shop in Paris, that will allow you to infer how benefits and costs are treated internally in French companies, is very difficult to understand.

THE CHAIR: Really the same point I put to Mr Cook: you're not seriously suggesting that we should deal in a trial with each and every one of these claimants, are you?

MR KENNELLY: No. Because if we get enough disclosure and we get proper disclosure from all of the Claimants, and sufficiently advance a trial, that will allow us to streamline the number of claimants that will actually have to come to court to give evidence. Because, where we see patterns and similarities, where we can categorise them with the assistance of the experts, that will allow us to make efficient use of the

Tribunal's time. But ultimately, the Tribunal will have to adjudicate on our disagreements between what particular benefits we say the MIFs have brought to the Claimants.

THE CHAIR: I absolutely see that we're going to need to deal with the question of: if fraud protection is considered to be a benefit, what does it look like, and how would one fit that into a causation credit analysis? But I suppose I'm really more testing you. I mean, I think the observation you made earlier was that it could be different for every claimant. In other words, are you suggesting that somehow we need to resolve the difference between claimants for the same thing?

That's the point I'm concerned about. Because I just can't see how we can do that, Mr Kennelly. We just simply cannot manage individual claims in these proceedings. It can't be done.

MR KENNELLY: Well, ultimately, at the end of the day, each claimant is going to have its particular loss determined.

THE CHAIR: Yes.

MR KENNELLY: How that's done will have to be done in a proportionate fashion. If disclosure is given sufficiently in advance, it will allow the Defendants to make proposals as to how that can be streamlined, in order to avoid the situation where we have hundreds of directors of finance attending the Tribunal. It will allow us to categorise them and see where samples can be extracted, which would be representative of different categories. Again, it'll be for the experts to assist us. But in order to do that job, disclosure is critical.

THE CHAIR: Well, look. Obviously, you and Mr Cook are very firmly putting your spades in the ground on disclosure. I understand that. Obviously, we're going to have a conversation about that. I think it'll come up tomorrow, and if not fully ventilated, it'll be ventilated pretty quickly. But the thing we're discussing here is what Trial 4 looks like and the way in which we work out how much time we have available to spend on what. That's really what I'm more interested in.

I understand all the points you've made. I don't have a problem with them. Mr Beal will argue with them, no doubt. But the real question is: how much of the Trial 4 time can sensibly and reasonably be taken up with these sort, of issues? That's the real question.

MR KENNELLY: In my submission, it's going to be very hard to fit in many of these foreign law, foreign claimant points into Trial 4.

THE CHAIR: Obviously, that's your position. But what I'm not getting very clearly is why. I mean, I understand why in a general sense, but I'm not getting from you. Again, I'm not criticising you because I think this is very difficult. But in order to reach some conclusion about this, we need to have some sense of what you think is actually going to happen in the trial. I mean, how many of these people are you going to need to put in a witness box and cross-examine?

MR KENNELLY: Well, Sir --

THE CHAIR: It's no good saying you won't know the answer to that until you have the disclosure because by that stage we've listed Trial 4 and we're on the way. We need to grapple with this earlier than that. We need some way of cutting through all this so that we have some sense of what we can sensibly allocate to the 10 or 12 weeks that we might be able to find in March 2029.

MR KENNELLY: Indeed. So UK and Ireland, as Mr Cook said, is likely to be a bit more complex than maybe the Tribunal had in mind. That's our submission also.

On the Trial 4 issues, to the extent they concern the foreign claimants. As Mr Cook explained, we begin with the question of liability, which, again, is different for the foreign claimants. You cannot simply read across the Trial 1 findings. I have nothing to add to what Mr Cook said about that. That's going to require separate adjudication.

The 101(3) issues -- sorry, and to an extent the liability questions are questions which can be partly informed by publicly-available material. But when we come to 101(3) and quantum, those are entirely dependent on internal claimant documents and claimant evidence, because they go to --

THE CHAIR: I think you've made all these points.

MR KENNELLY: Yes, so --

THE CHAIR: That's not really what I'm asking. What I'm asking is what that means in practice. I appreciate it's a very difficult question. I'm not expecting you to give me a sort of crystal-clear answer. I think I'm inviting you to at least speculate a little bit about what the burden on the trial timetable is going to be from dealing with these sort of things. I don't know whether you're able to help. You may not be able to help with that.

MR KENNELLY: It's difficult to see how the Tribunal can fairly address 101(3) and quantum issues for the foreign claimants in a trial beginning in March 2029.

THE CHAIR: Because of the sequencing issues or because of the time it will take?

MR KENNELLY: Because of the time it will take. (Pause)

In order for us to decide which foreign claimants we need to cross-examine -- in order for us to decide even just that basic question -- we need disclosure in advance and we need a process where we decide how we can streamline our testing.

THE CHAIR: Well, that's what I meant. We're talking about sequencing. That's what I mean by sequencing.

MR KENNELLY: Sorry. I'm so sorry.

THE CHAIR: By time I mean the amount of time it's going to take in the trial. I understand all the sequencing points. I understand that.

MR KENNELLY: But even in trial, once we get into trial, we're dealing with -- depending on the number of jurisdictions the Tribunal has in mind -- several entirely separate EU countries with different markets and different domestic conditions. We will have claimants, which will obtain very different benefits from the MIFs and will treat their internal costs in a very different way if proximity is part of the test.

THE CHAIR: I understand all that. I'm afraid to say, you're repeating yourself and Mr Cook, and that's not helping me to get to the sharp point.

MR KENNELLY: The simple point is: because they're very different. There will be many of them in the Tribunal being tested, because we will not be able to extrapolate from one category to a different category.

THE CHAIR: So the short point is that you are saying, "We're going to have quite a lot of live evidence to manage this". That's the short point.

MR KENNELLY: That is, I'd say, likely, but I say that in complete ignorance of what the disclosure would ultimately show. But I would be surprised if one can read across vastly different categories in different jurisdictions.

THE CHAIR: Okay. Understood. That's helpful.

MR KENNELLY: The extent that my learned friend suggests, Mr Beal, that the burden is on us to show why a French retailer is different from a UK retailer --

THE CHAIR: Well, I think, it depends on what you're talking about, doesn't it? If we're talking about liability, I think that the way the List of Issues is framed does require you to.

MR KENNELLY: I'm so sorry. I'm only talking about quantum at this point. The burden is on them when it comes to quantum. And not only is the burden on them, but there's no way for us to show -- and I'm repeating myself -- how the French retailer treats things differently without disclosure and evidence from the French retailer. That's benefits and the way they handle their own internal costs, the question of proximity.

To the point that you made to Mr Cook, Sir, about, "You, Schemes, come here and

you're constantly obstructing us", sorry, I'm not saying --
THE CHAIR: I didn't say that.
MR KENNELLY: I'm so sorry. I'm being glib.
THE CHAIR: No, I'm not suggesting that you're not doing anything other than exercising the rights that you're entitled to exercise. What I am saying, I think, is if you look back at where we hoped we might be with some of this, we haven't got as far as we thought we would.
MR KENNELLY: May I just address you on that briefly, and I apologise, I didn't mean to be flippant about it, but these Umbrella Proceedings were designed for the UK and Irish claimants. Actually, contrary perhaps to what the Tribunal suggested to Mr Cook, they've been very effective in relation to the UK and Irish claimants. Thanks to the judgments of the Tribunal, hundreds of those claims have been settled because one can draw important lessons from the findings that the Tribunal made in relation to UK and Irish claimants.
We would say it's different when it comes to questions of pass-on and quantum. We've taken the guidance and we've behaved as responsible litigants. All this complexity is coming from the foreign claimants. The vast majority of the commerce now is coming from foreign claimants who are pouring into this litigation. This is not a problem of our making; this is a problem of the Claimants' making. This complexity, which is delaying these proceedings, is coming from that factor.
The Schemes have engaged cooperatively with the Umbrella Proceedings and we have been settling hundreds of claims in this jurisdiction. It is much, much harder to learn lessons from the judgments already handed down in relation to claimants coming from jurisdictions which have nothing in common with this jurisdiction. That's the problem.
THE CHAIR: So I'm just conscious of time, Mr Kennelly. Unless you've got anything

you really need to say, I think we should get on with the --

MR KENNELLY: I'm so sorry.

The last point on that was just to say that, obviously, if we're right on the *Heureka* preliminary issue, which I'm going to come to now, and if we're right about undue hardship, for example, and stretching the limitation period back as the Claimants suggest, well, that will significantly reduce the time that we're talking about in terms of the disclosure that needs to be provided. That's why, really, it's hard to decide what should go into Trial 4, and how it should be organised, and should we get a judgment in the ...

THE CHAIR: Well, it's certainly hard to be sure about the extent of it. That, I think, is clear from the exchange with Mr Cook.

MR KENNELLY: Foreign law, preliminary issue: so we agree that there should be a preliminary issue dealing with foreign law limitation. We agree what it should consider. There's no need to go over what's agreed in that respect.

There is one point where we anticipate the Claimants will agree -- perhaps there's been some misunderstanding in the submissions -- and that's in relation to the doctrine of laches. On the basis of the parties' agreed approach -- which is that we deal with questions of law and not material disputed issues of fact involving cross-examination, to use Mr Beal's expression -- the question of law that could be included is whether the doctrine of laches is applicable in English law, notwithstanding a limitation period otherwise applicable under foreign law.

THE CHAIR: So that's the --

MR KENNELLY: That's a legal point.

THE CHAIR: That's the only element of that that you would anticipate.

MR KENNELLY: That's right. Any application of the doctrine of laches isn't suitable for the preliminary issue, because that would involve assessing whether particular claimants acted unconscionably in delaying. So I think that wouldn't be suitable. I don't anticipate any disagreement from the Claimants on that.

So we appear to disagree, or potentially disagree, on three points. The first is which jurisdictions will be examined, the second is whether a finding on the application of *Heureka* is binding in relation to the other jurisdictions and third, the timing of this preliminary issues hearing.

THE CHAIR: The second of those is a matter for the preliminary issue, isn't it?

MR KENNELLY: And I'll come back to that, because I think the Tribunal made some suggestions to Mr Beal.

But on the question of which jurisdictions would be examined, it appeared that we agreed that it should be France, Germany and Italy for the reasons that Mr Beal showed you, the significance of those jurisdictions.

THE CHAIR: I think he swapped out Italy because the Netherlands is now bigger, he said.

MR KENNELLY: Well, he said that the Netherlands is now bigger.

THE CHAIR: You don't know that.

MR KENNELLY: We have no idea, because these are claimants that haven't issued their claims yet. According to my learned friend, they have, but we certainly haven't seen them. So, I'm afraid, it's really unfortunate that we are in the dark. It seems the Tribunal is not in a position now to decide which jurisdictions --

THE CHAIR: But there is an agreement. Effectively, it should be the three largest claimant groups. Is that --

MR KENNELLY: That's correct, yes.

THE CHAIR: Correct, yes.

MR KENNELLY: Notwithstanding my learned friend's newfound interest in Irish law, there seems to be no point in including Ireland in these sample jurisdictions. As you pointed out, Sir, from the list of factors that my learned friend gave, they all appear to be entirely uncontroversial. So resolving this question from the perspective of Irish law seems, to us, to be completely unnecessary.

MR BEAL: Can I just check, does that mean my learned friend's conceding that *Heureka* applies as a general principle of law under Irish law?

MR KENNELLY: Absolutely not, as he knows. But the point is: what is the Tribunal going to get usefully from this exercise? Because we accept that one outcome of the preliminary issue, although we say it doesn't obviously bind the position in relation to other foreign laws, is that lessons can be learned, and we will then reflect on the extent to which the ruling of the Tribunal gives us guidance as to what you're likely to decide in relation to the other jurisdictions. That's why sample jurisdictions are a useful exercise here.

THE CHAIR: Yes. If Mr Beal's argument is going to be that *Heureka* applies because it's European law, because of this supremacy of European law, and it doesn't matter which member state you are, then if he wins that, that's it, isn't it? I mean, is there any room for any further argument about it?

MR KENNELLY: Well, that's his point.

THE CHAIR: Yes.

MR KENNELLY: I mean, if that's his point, I'm not sure why he's agreeing to having sample jurisdictions in the first place. Because ultimately we're concerned here, not with the position under EU law alone, but how *Heureka* is being implemented in the different national systems and whether, in Germany and France and Italy, for example, it is being applied or would be applied retroactively to imagine how the Supreme Court in those countries would deal with that question if it came to them.

THE CHAIR: But he says that that's a principle of European law, so it doesn't matter. I'm not saying he's right, but just in a sense, the whole point of his argument is to remove any question. His preliminary issue is essentially, as I understand it, to say, "You can forget about domestic law because it doesn't matter, because European law trumps on every occasion, and it's retrospective". Either he wins or loses on that. If he wins on it, I can't see where you go on that. I mean, what are you going to say, because the whole point of the argument was that it doesn't matter whether it's Germany or Poland or Estonia; it doesn't matter if that's what the European law says. (Pause)

MR KENNELLY: The question is, in the German Supreme Court, for example, faced with *Heureka*, would they read it down in order to avoid it having retroactive effect? It's silent as to whether it operates retroactively, we have, Mr Beal will make his point about ex nunc and ex tunc, but the question is: would the German supreme court, with its very close concern with fundamental rights and the principle of non-retroactivity, would they read it down in order to avoid it having retroactive effect?

THE CHAIR: He says that they've got no choice. I'm not saying it's right, but he says that they've got no choice. If they've got no choice, they've got no choice. Let's be clear, if he was right, you're not saying you're still entitled to run a case saying that they wouldn't do it. I just want to be clear about this, you're not going to argue that the German courts are entitled to do something which is contrary to EU law, are you?

MR KENNELLY: Well, it depends on what EU law requires in this context.

THE CHAIR: No, I think that, with respect, I'm afraid that that doesn't answer my question. If EU law is as he says, and to act in another way would be contrary, you're not going to run an argument saying that that is the right way to look at this. That's the question I'm asking you. Once he's established what EU law is and what it requires, and if your argument naturally and necessarily requires the German court to do something that's contrary to it, you're not relying on that to say that's what the answer is. That's the question.

MR KENNELLY: The problem is that the perspective we're looking at here is what the German Constitutional Court have decided. The answer is not simply what EU law says. The question is: how will the German Supreme Court resolve the question?
THE CHAIR: Well, that's the question I'm asking you, though. I'm asking you whether you're intending to turn up and say the German Supreme Court would do this, notwithstanding that it is accepted, if we were to find it so, that it's contrary to EU law? That's the question I'm asking you.
Are you seriously going to run an argument that says the German court can do what it likes -- I'm not saying it can't, but if it does something which is manifestly contrary to EU law as we find it, then surely you can't turn up and say you're entitled to take German position as being the relevant law for the purposes of this case, can you?
MR KENNELLY: I mean, I entirely see why that seems very, very odd in a situation where EU law is supreme. But I hesitate just to accept that because what's clear is that it's a question of German law implementing EU law, and I don't have German expert advice saying to me -- the history of the German Supreme court in the EU is a mixed one, so that's why I'm hesitating just to say --
THE CHAIR: I understand all of that.
MR KENNELLY: Of course.
THE CHAIR: But it seems to me it's just an impossible point, isn't it, Mr Kennelly? I'm not saying you've lost on all this. I'm just saying, if we were to find that conclusion, I don't see how you can possibly turn up -- if we were to find that European law is supreme, it is retroactive, and the German court cannot disregard it, if you were to then turn up and say, "Actually, I think the German court would disregard it" and persuade us even that they might do that, does that matter anymore?
MR KENNELLY: It would -- it seems very, very, very difficult, and I can have that cited back to me.

THE CHAIR: I think that's putting it mildly.
MR KENNELLY: I have that well in mind. I just --
THE CHAIR: I'll stop bothering you on that.
MR KENNELLY: But in the absence of a German professor telling me otherwise, I'm not going to say any more.
THE CHAIR: Because in a way, you know, it is to your point about the claimant groups, because once we get to that -- if we were to get to that position, which is what Mr Beal's urging on us, that's what he wants to achieve. And if he's right on that -- I'm not saying he is, but if he is -- then it isn't really a point about sample countries because it's anywhere that European law applies just by definition of him being right. I'm not saying he's right, but if he were, that sort of seems to answer the question.
MR KENNELLY: Yes. And that's why, depending on the answer that he gets, we will then have to think very carefully about what we say is the implication of your finding for the other jurisdictions.
THE CHAIR: Yes. Of course. Yes.
So on timing, I mean, in a way, you've been telling us that you don't want to -- there are some things that we won't know the answer to until we know the answer to that, but on the other hand, you're not that keen to do it in a hurry. Is that a fair summation?
MR KENNELLY: I mean, it is. Our concern here -- this is unlike -- the Trial 4 timing issues are much more complex. This one -- the only point I make about timing for this is avoiding the periods of congestion in relation to Trial 3. We think this could wait till after Trial 3.
THE CHAIR: But if it does, then you don't know the answer to the questions that you say are necessary in order to be able to develop Trial 4. We're practically at Trial 4, at least the bit that I'd like to get on with, and any other bit is then going to be pushed off for years. I mean, I just think the whole thing has got to come faster.

MR KENNELLY: Yes. I mean, I see that.

THE CHAIR: I appreciate the pressure it puts on the team, and, you know, I rather glibly say there's a big legal team, you've got lots of lawyers, which you do. But on the other hand, we do need to get on with this stuff.

MR KENNELLY: I fully see that. We're at a slight difficulty because, of course, we don't know now what's actually going to be in the March 2029 trial, and that is a much more expedited timetable than we envisaged for a UK-and-Ireland-only quantum trial. So the burdens on us now are greater than we anticipated coming to Tribunal.

THE CHAIR: Yes.

MR KENNELLY: So I'm afraid that the congestion issue we have is a greater one. I'm afraid I'll have to take some instructions because the burden will not be falling directly on me.

THE CHAIR: No, well --

MR KENNELLY: We agree that it's about a week-long trial, six to eight experts, should be six because we think Ireland shouldn't be included. But where it goes in -- if it goes in in March or April 2027, that overlaps with a very heavy period for the Trial 3 timetable. That overlaps with the period where we have expert evidence -- reply factual evidence and expert evidence, and at the same time, we'll be dealing with expert evidence for this limitation preliminary issue.

May I?

THE CHAIR: Of course, yes. (Pause)

MR KENNELLY: So perhaps it's a matter really for the Tribunal to tell us -- I'm not saying now, but when would be convenient for the Tribunal availability in, say, April or May 2027?

THE CHAIR: Well, I think --

MR KENNELLY: Or if you envisage something earlier to let us know what slots the

Tribunal has in mind?

THE CHAIR: I think what I had in mind, probably, was to say, let's identify a window between the middle of March and the end of April, and then let's see what counsel's availability is, and I'll need to check with the other panel members.

MR KENNELLY: And what about the point, Sir, about this question of a High Court judge? I take the point that, for this, it doesn't seem necessary because we're dealing with pre-EU withdrawal. But again, we haven't really reflected on the jurisdiction issue for the *Heureka* claims. We probably have to think about that, and if between us we see a problem -- it's hard to imagine right now, but because it goes to jurisdiction, it's very important.

THE CHAIR: Given the way the preliminary issue's framed, I can't see a problem with it. I mean, you know, I'm not taking it personally, Mr Kennelly. I think it's the second time you've tried to kick me off a case, but I'm not taking it personally. But, I mean, the simple fact is that finding somebody to do a week-long trial is perhaps not so difficult. Finding High Court judges to do ten-week trials, particularly, dare I say it, in relation to the subject matter, is not the easiest thing in the world. So I mean, that's, you know, part of the problem. But I think the answer is going to be that it'll be me chairing it in March or April.

MR KENNELLY: Right now, I can't see a reason why this point needs a High Court judge.

THE CHAIR: Well, if you identify one, then we should know about it.

MR KENNELLY: Those are my submissions on the limitation preliminary issue.

THE CHAIR: Yes.

MR KENNELLY: And I think the idea was that Mr Woolfe would then address you on the cut-off for new claimants, and I could respond to him.

THE CHAIR: We should take a break at some stage, but if you want to --

Reply submissions by MR BEAL

MR BEAL: May I just make a few short points in reply to deal with agenda item 1 first?

THE CHAIR: Yes.

MR BEAL: Dealing in reverse order, my learned friend Mr Kennelly's submissions on limitation. We're happy for whoever the three largest claimant groups are to go forward. We do suggest Ireland is a good one because, ironically, it's an easy one, but ultimately, the point is good regardless.

Whether it's Italy or the Netherlands, we can -- what we don't have is all of the claims presently before this Tribunal, because not all of them have been transferred. Nor do we have what I would describe as court-worthy estimates of volume of commerce. What we have is internal estimates of volume of commerce that are protected by litigation privilege and over which I do not waive any privilege. But that analysis is being conducted with a view to a general ballpark figure, and it's on the basis of that ballpark figure that we've said, Netherlands, but I'm not going to die in a ditch.

THE CHAIR: I don't think much turns on it, does it?

MR BEAL: No, which is why I'm not dying in a ditch on it.

The second point, week-long trial. Good to have that as an anticipated length of hearing, and we're happy with mid-March to the end of April. It certainly doesn't need a High Court judge for the simple reason that, by virtue of *Lipton*, it all relates to pre-Brexit limitation. EU law is within the gift of this Tribunal for that period. You have my submission on that.

Turning then to the jurisdiction issue. In terms of Trial 3, the workaround that Mastercard alighted upon was to say, "Oh, well, it doesn't matter very much because the Irish claims are not very valuable". That isn't a massively satisfactory answer in circumstances where this Tribunal, admittedly, when there was a High Court judge as part of the composition of the panel, has listed Trial 3 for October to December 2027. So what's actually changed here is that a High Court judge who was a member of the panel is no longer available, and as I've said, this side wish him well.

But that doesn't deal with the practical problem that arises that the Irish claims, including for exemption, cover the post-Brexit period and are within the scope of Trial 3. And if my learned friends are right, then they have no place being there and all of the evidence that we're currently adducing involving exemption conditions in Ireland post January 2021 becomes on their case irrelevant.

So our practical workaround is this: if Mastercard and Visa intend to suggest that the conditions for exemption in Ireland change materially in the period post January 2021, then they must let us know. The reason for that is that if that is the case, then certainly we would anticipate inviting the registrar, and therefore the Tribunal, to appoint not as chair, but as a wing member, a High Court judge. I fully take on board and am acutely aware of the difficulties of securing that resource at this stage, for a ten-week hearing in October 2027. But if there is a material reason why it makes a difference before and after January 2021, it would be very good to know that now.

The reason I say that is if there is in fact no material difference, then we can apply post the Trial 3 judgment, if necessary, for summary judgment in relation to the post-January 2021 Irish position, but make that application in the High Court and take the benefit of the findings that have been made, either on a res judicata basis or on a issue estoppel or abuse of process basis.

If, in truth, there is no material change after January 2021, then equally there should be no difficulty in simply applying the reasoning from the Trial 3 judgment across to the post-Brexit period for Ireland. What we don't want is to have the issue left in limbo, where the Schemes, as they have done in the past, say, "Well, this is all capable of being dealt with. It's not a very substantial commercial amount." And then they, after the Trial 3 judgment, if it goes against them, they say, "Actually, we want to have a complete re-run of the exemption issues for Ireland for the post-Brexit period", because that would, frankly, be very annoying, and we've fallen for that in the past.

THE CHAIR: Yes. Well, I'm not sure we're going to resolve this today.

MR BEAL: No.

THE CHAIR: You put your marker down.

MR BEAL: I put my marker down.

THE CHAIR: They've heard what you've said. They can think about it. I think somebody needs to come back to the Tribunal pretty smartly if there's any further development of that sort, otherwise I'll discuss it with the registrar and the president, and we'll see whether there's anything we can do. But I think it's something to put on the watch list that needs attention.

MR BEAL: We have a number of similar action points where we're going to chase, I think, probably, the Defendants for a committed position rather than a non-committal position.

THE CHAIR: Yes.

MR BEAL: So that's all I have to say on the jurisdiction point at the moment.

There were then a series of rather speculative, if not factual evidence being given by my learned friend. I did wonder about asking them to be sworn at one point, but there were certainly some assertions of fact and/or submissions being made as to how things are different elsewhere.

My learned friend, Mr Cook, referred to the Maestro position. There are no Maestro claims here, they were extracted from the claims.

Objective necessity: It was said it might be different in different jurisdictions. Well, the Supreme Court recorded in, I think, paragraph 13 of its decision for your note, page 208 of the bundle, that it was common ground and the Schemes accepted that there was no objective necessity for the MIF in a four-party Scheme. There's no reason why that wouldn't apply equally here.

In relation to bilaterals, it was said, well, there may be bilaterals in other jurisdictions. Well, again, interestingly, at paragraphs 43 and 44 of the Sainsbury's Supreme Court, page 206 of the bundle of authorities, it was accepted that there was no real risk of bilaterals in practice, and you'll recall that that's precisely the reason why Mastercard was challenging the finding in *Sainsbury's v Mastercard*, which had found that bilaterals were a realistic possibility as a counterfactual. So it's slightly odd now to hear that there were somehow in certain unnamed jurisdictions over certain unnamed periods this detailed bilateral structure, which Mastercard said was not a practical reality for the purposes of a counterfactual before the Court of Appeal and then the Supreme Court in the Sainsbury's litigation.

My learned friend, Mr Cook, then said -- or claimed -- that somehow there would be different issues for merchant pass-on and exemption. In other jurisdictions he said the conditions may be different. My learned friend, Mr Kennelly, said, "Well, the markets are different, therefore, issues of exemption, merchant pass-on may be different".

Well, both merchant pass-on and exemption are matters for them to prove and plead. So if they are different, they need to say that they are different. You have my submission: that Mastercard, in its current pleading, has adopted the exemption statement of case and reserves the right to make particulars. Now is the time for them to put up or shut up as to what the differences are.

If we look at the Visa pleading. For reasons of timing, I didn't take you to this, but there is a very short point here. Page 420, please, of the supplemental bundle, tab 8. Paragraph 97 starts over the page, sorry, at page 419.

THE CHAIR: Sorry, I'm just trying to work out which of these bundles is the supplemental bundle.

MR BEAL: If we start at page 419 of that. Once, Sir, you have it.

THE CHAIR: Yes, I have 419.

MR BEAL: 419, bottom paragraph:

"Further, even if the Claimants can establish that in a counterfactual ... their MSCs would have been lower, the Claimants must also take into account ... the other (harmful) consequences they would have suffered in such a counterfactual ... For the avoidance of doubt, any such counterfactual must take into account ... the strategic reactions [et cetera] ..."

It's this pleading that essentially leads to a suggestion that somehow, we have benefited in some way from a breach of competition law by the Defendants, by virtue of what would have happened otherwise. They then say, tellingly, in paragraph 98:

"Further and in any event, even if the Claimants paid an Overcharge that was not fully mitigated by the benefits referred to in paragraph 97 above ..."

So Visa is characterising this argument as a form of mitigation. Again, the burden is on them to show that there has been a distinct act of mitigation directly connected with the breach in question in order to get home on this point.

They have to then make, in our respectful submission, the case as to why these are benefits and how they would be mitigation. They would have to make targeted and proportionate applications for disclosure, as was done in relation to Trial 2A. But in the meantime, of course, there's simply a high degree of speculation that because it's a different national market, the situation must be different.

Now, in a common European framework of countries which are connected by a single European payment mechanism, subject to common regulation by the EU and the European Central Bank, where multinational companies provide services and goods across boundaries and where banks operate multi-jurisdictionally, the suggestion that simply because it's a different national market, it must be different holds no water.

THE CHAIR: It might be a bit different if you go back to 1992, though, mightn't it? There's a significant complication that comes with the extension of the limitation period back.

MR BEAL: That's true. But, in the same way that the banking system has developed over the years, it's not being suggested, as I understand it, that there have been outlying pockets of the EU, say arguably for accession states to the EU, but certainly for the core countries where the bulk of the volume of the commerce is.

The suggestion that Germany suddenly had a much more modernised banking system than France for a period of a decade -- from 2010 onwards -- is nonsense. If I'm wrong and it's not nonsense, they should be saying why it's nonsense. Why what I'm saying is wrong. So the burden is on them. It's time for them to, as I've repeatedly said, say what their case is as to why there's a difference. On that basis, we could then go forward with proportionate requests for disclosure. To suggest that we have to give disclosure to see whether or not they can advance the case gets things entirely the wrong way round.

Just as a pure point of fact, in terms of the MIF and what, if any, benefit it produces for merchants, this was in fact the subject of findings in Trial 1. If you would be kind enough to turn to page 1127 of the bundle of authorities. You'll see in paragraph 208 that there is a finding that there was no causal connection between the MIF and any particularised benefits from it for the purposes of the analysis that was conducted at that stage.

You'll recall that, in Trial 1, one of the complaints I made was that, essentially, matters that went to exemption were being dealt with at 101(1) stage rather than where they properly belonged, which was 101(3). But, in any event, the finding was made at paragraph 208, bottom of 1127:

"There is no correlation between the interchange fee and the costs that it is supposed to discharge or compensate for."

That was then the subject of an exchange of questions and answers from the learned president, as he then was, with Ms Dooney who, I think, was Barclays.

THE CHAIR: I did wonder about whether there might be a question as to the consequence of this part of the judgment. Obviously, binding findings of fact. I mean, I'm not sure because it's not entirely clear what points are going to be taken. But, presumably, there is an issue about some of these points having been decided already.

MR BEAL: Yes, there will be. That's for Trial 3.

THE CHAIR: Yes.

MR BEAL: Next point is in terms of exemption. So I've dealt with merchant pass-on, I've dealt with the alleged benefit of the MIF, if any. More generally on exemption: again it's incumbent, we say, on the Defendants to stipulate which jurisdictions have material different factors. Given that the Scheme Rules are set by the Defendants in each jurisdiction, burden therefore lies on them to justify the MIFs set in each jurisdiction. There's no suggestion that somehow a different mechanism for setting the MIF applies.

You've got my point that these are all Western liberal democracies under a common regulatory regime. You can't simply have an assertion that, "Well, it's a different country, things are different". That may be the case, but it needs to be the subject of evidence that's led on that by the Defendants, because the burden lies on them for exemption.

Quantum. We recognise, as we must, that each of my claimant groups will have to establish what their level of overcharge was. That involves, firstly, how much have they paid by way of a merchant service charge. Secondly, what was the MIF component of that.

Now, it's said that the Schemes can't make headway with any analysis of what the claims are without thorough disclosure from us, and it has to be done in parallel with Trial 3. The short answer to that is that they have been capable of evaluating what the volume of commerce is by reference to their own internal records of merchant identifiers, which can give a broad corporate group name as we've seen from, for example, the CICC case, where they've been able to identify broadly the corporate group but they haven't been able to track down necessarily each legal entity that is associated with it.

We know that the Schemes have been more than capable of settling a very large number of their claims. It was a point that Mr Kennelly made in favour of his submissions earlier. So they are capable of identifying the volume of commerce that has been incurred by these corporate groups. They are capable of having their own internal appraisal of how much is at stake. What they're asking us to do is what they acknowledge is a very complex process of trawling back through data records, getting a data-processing company to act in tandem with us, and getting us to do that ahead of the end of Trial 3. That's essentially what they're pushing for.

If it's dealt with after the end of Trial 3 -- i.e. after December 2027 -- then, yes, there's no problem with us proceeding with this process. It's all part of the preparation for Trial 4.

THE CHAIR: Why is Trial 3 significant? Just because of the ...

MR BEAL: Well, two things: (a), by the end of Trial 3 we're likely to have the outcome of the liability appeal judgment. One hopes. Assuming we have a listing in March 2027 then one would hope that the Court of Appeal would let us know the answer by December 2027. Secondly, Trial 3 is then out of the way.

THE CHAIR: Yes. I think, Mr Beal, I don't really want to have the disclosure argument here today but I have to say that I do think you're going to need to get on with it. Quite what the "it" is, is yet to be determined. But I don't think you can really just say you want to get on with Trial 4, when quantum is an essential input for all the reasons that we've discussed and then say, "I'm not going to do any work on it". I mean, I think that probably isn't going to withstand.

MR BEAL: Can I take that observation away and see what we can work on in order to at least try and get the ball rolling with something. It may have to be a rolling process.

THE CHAIR: Well, I know there's a dialogue going on and I don't think it's formally before the Tribunal but I'm anticipating it might be here quite soon. So I think it would be helpful.

MR BEAL: In terms of my final point on this. It was said somehow that the umbrella claims were all intended to be solely UK and Ireland. I'm instructed that, for example, Stephenson Harwood's cohort of claimants at the pre-Trial 1 stage or thereabouts, 35 per cent were non-UK/Ireland. So there were very significant foreign claims in throughout.

THE CHAIR: (Inaudible) the Italian claimants (inaudible).

MR BEAL: Well, we asked for the Italian claimants to be a sample and came second on that.

THE CHAIR: Thank you.

MR BEAL: Unless I can be of any further assistance.

THE CHAIR: No, that's helpful. I think what I might do is… we should take a break for the transcribers a bit later, and then I will give you a ruling on how we're going to proceed for those two items.

Then Mr Woolfe, coming to you.

Just in relation to this point, I am wondering that the scheme fees --

MR WOOLFE: I am going to be dealing with the amendment point. We can deal with that tomorrow.

THE CHAIR: Well, I have to say, I'm not entirely sure that it's a help. I wondered whether there might be a shortcut to it.

MR WOOLFE: Well, the shortcut I was going to suggest is, actually, you could permit the amendment subject to their right to say the amendment should not relate back.

THE CHAIR: Yes, which could be dealt with at trial. That was what I was going to suggest to you as well. But that's really a matter of fact for them to have to think about at the break.

MR WOOLFE: Perhaps they can consider that suggestion.

MR BEAL: The only other issue is the Host Case application. I can be short on that.

THE CHAIR: Yes. We should have some time to deal with that. Yes, good. Okay. Well, I'll rise for ten minutes.

(3.51 pm)

(A short break)

(4.03 pm)

Ruling

(4.05 pm)

THE CHAIR: Two linked issues arise for consideration. The first is whether there should be a preliminary issue to deal with limitation and other related issues in respect of non-UK claims in these proceedings, and if so, what that should cover and when it should take place. The second is what form Trial 4 in these Umbrella Proceedings should take and when that should be listed for.

In relation to the preliminary issue, the parties agree that it is a good idea in principle, and the main points in dispute are scope and timing. The claimants argue for a narrow set of essentially legal questions and suggest a week's trial in March or April 2027.

The defendants say that there's some scope for factual matters which are not likely to be significantly disputed, and the preliminary issue should be listed after trial 3. So that is in early 2028.

I agree that a preliminary issue is a good idea, provided that it is limited to essentially legal, and not factual, matters. That is the case in relation to all of the subjects which the parties propose, save for any events of cessation of infringement which the defendants wish to rely on where there might be material factual questions.

At the moment, the only potential cessation event put forward is a commission exemption decision in 2002, which everyone agrees does not require factual inquiry. If there are other potential events which the defendants wish to put forward, they may do so on the understanding that these will only be included if the factual context is essentially undisputed. That is, there is no real need for cross-examination of witnesses.

I will therefore order the preliminary issue in the terms proposed by the claimants, including the 2002 potential cessation event, on the basis that the defendants may propose further cessation events if they are so advised, and I will deal with any dispute about the inclusion of those on the papers.

There is one further matter which was raised by Mr Kennelly, which is a preliminary issue in relation to laches, and it appears to me that that also ought to be included, subject to any point that may be made to the contrary by the claimants, which I will also deal with if disputed.

MR COOK: There was a second one, that Mastercard had a zero EEA MIF between 2008 to 2009.

THE CHAIR: I was not entirely sure that it was accepted that that was a matter without any factual material, but I think Mr Beal did accept that.

MR BEAL: I said it was subject to double checking with the commission decision. But on that parameter then, yes.

THE CHAIR: I will put that in the category of things that you can propose, and Mr Beal hopefully will identify that it doesn't and therefore there will be no dispute. If we can leave it on that basis. As far as timing is concerned, I agree that it is suitable to list this for a week in late March or April 2027. I do not accept that preparation for Trial 3 should delay the preliminary issue. The defendants have large legal teams and should be able to manage a one week hearing which will take place six months before Trial 3. The parties are to liaise with the registry to identify a suitable week for the preliminary issue hearing. The parties should also seek to agree the form of the preliminary issue wording within 14 days, failing which, I will resolve any dispute on the papers.
The defendants are also required to identify each and every jurisdiction in which there is a claim, and in which they say there is a reason why the principle in Heureka, on which the claimants rely, does not apply. Where this is a general point in relation to the application of EU law, this may be done generally. Where there is a specific point based on domestic law in a particular jurisdiction, it needs to be identified and particularised properly. This needs to be done as a matter of some urgency given the preliminary issue fixture, and we can deal with the particular timings shortly.
In relation to the timing and form of trial 4 itself, there remains some lack of clarity about exactly what can, and should, be included in one or more trials. That is partly as a result of a difference of approach between the parties, with the claimants seeking to resolve all outstanding Article 101 issues in one large trial, and the defendants seeking to deal with smaller chunks in part A and part B trials with some material Article 101 matters left over for Trial 5. It is also partly because it is not entirely clear at the moment how certain issues are going to be tried. For example, neither side has

been able to give me a clear sense of how quantum issues are going to be managed at trial.

I do think that it is important to keep up the pace of progress in the Umbrella Proceedings, which are already, for some host cases, very long in the tooth. While I accept that places a burden on the legal teams, they are large teams, with the defendants each instructing two large firms of solicitors. My proposed way forward is to set the Trial 4 window for ten to 12 weeks, commencing in late March 2029. That is just over a year after Trial 3 concludes.

It is true that there may be developments in 2028, such as the Trial 3 judgment and Trial 1 appeal, but I do not think that we can adjust the timetabling too much to accommodate those sort of events or otherwise we would never have a hearing given the amount going on in these proceedings.

What the parties will need to do is to take the various issues in the list of issues and start to provide more detail about exactly what needs to be tried. That needs to surface, at least at a general level, things such as the likely nature of the trial process, the sort of disclosure that might require and the sort of evidence it will entail. That needs to be done fairly smartly and any disagreements, which I anticipate there will be, need to come back to me for resolution on the papers, if possible, or by way of a short hearing. It should then be possible to determine precisely what is and what is not capable of fitting into the trial 4 window.

The areas which the parties need to focus on in particular are first, where the Tribunal has already made findings, what realistically is different about claims in other jurisdictions which require addressing? The areas in which this especially arises are liability and merchant pass-on. This needs to be done properly, not as a burden of proof point, but as responsible litigants cooperating to assist the tribunal to manage the proceedings. The claimants should formally request particulars of these matters from the defendants and these should be provided promptly, I would expect, sometime in the autumn.

Secondly, what process is envisaged for determining quantum for claimants, given the large number of claimants? This will need to take a realistic approach as it will be neither proportionate nor consistent with the principle of effectiveness to conduct a detailed examination of factual questions about the level of overcharge for each claimant in Trial 4, save for the largest and most complex cases. I would encourage the parties to seek to agree on some form of independent adjudication process, but in any event, there needs to be designed, and put in place, a robust process for what is largely a mechanical exercise of determining the level of overcharge for each claimant. That exercise needs to be undertaken comfortably in advance of Trial 4, so that any complex and high value issues that arise can be dealt with in that trial. The expectation is that all quantum issues for at least UK and Irish claimants will be resolved, at the latest, by Trial 4.

Thirdly, and to the extent not already covered by the above, in relation to non-UK claimants and what might be called the pure exemption points -- that is, not the quantum implications of those points -- and merchant pass-on those are matters on which the defendants bear the burden of proof, and the defendants need to articulate their cases in proper detail by reference to the jurisdictions concerned.

Fourthly, all the parties will need to discuss a suitable process to deal with the counterfactual switching and benefits points to seek to agree an efficient way of bringing those before the tribunal. A further CMC should be scheduled for October to address further the precise content of Trial 4.

(4.11 pm)

MR BEAL: Thank you very much. We'll obviously take away the action points.

THE CHAIR: I think that the only thing that comes out of there is probably a timing point, and I think it's probably for Mr Cook. This is his point about the preliminary issue and other jurisdictions. I appreciate that we're proceeding on the basis that we're going to look, in detail, at France and Germany and something else, whatever it is. I just don't think we can go into this preliminary issue without knowing whether you're going to have some other rabbit out of the hat in relation to *Heureka*, so I think that you need to get on and tell us if there is a *Heureka* point somewhere else.

In other words, if you're going to say at any stage now -- whether that means we can deal with it in the preliminary issue or not, that's another question, but I do think that you need to sort that point out if you're saying that there's something else out there other than this question as to whether EU law is supreme. That's essentially the point.

MR KENNELLY: Indeed. So what the Tribunal envisages is -- just to be clear, in respect of the other jurisdictions, all the other EU jurisdictions covered by the claims which concerned jurisdictions other than the lead, the front runners that we have selected, whether we maintain a particular *Heureka* point as in respect of the national laws, because it's focusing here on the national law, reception of EU law, how they deal with *Heureka*, whether it is not treated as having retroactive effect in those jurisdictions.

THE CHAIR: Yes. Just to be clear, it comes back to the dialogue we had, which was that I don't see how you can maintain, if Mr Beal is right, that it makes any difference which country it is. So it really is on the assumption that Mr Beal's right. Obviously, he might not be, but if he is right and EU law is supreme, what is it that you're going to say about that? Is there anything else that you've got in the bag? That's really the question.

I quite understand that if Mr Beal is wrong, obviously, the question then becomes, "What is the position on all these different countries?" So I'm not asking you to articulate what the position is if Mr Beal is wrong; I'm asking you to articulate what other argument you could advance if Mr Beal was right. That's the point.

MR KENNELLY: Yes. I mean, again, we're concerned with national law and national implementation. We all agree that EU law is supreme; that's the rule of EU law, and it's part of the national law. It's notwithstanding that supremacy doctrine, how a national law might be implemented.

THE CHAIR: I don't quite understand that. I think, in a way, that maybe that's the point. Maybe you just need to articulate that point a bit more clearly, but I'm afraid I just simply don't understand how: if you've got a Court of Justice decision that says what *Heureka* says, and on the assumption that Mr Beal's right about all this, that supremacy and retrospectivity and all that sort of stuff applies, I don't understand why it makes any difference whether it's Germany or France or Austria. That's the invitation: tell us why it would make any difference.

MR KENNELLY: That may be a shortcut, because that's the key concern that the Tribunal has, that *Heureka* doesn't say in terms that it's retroactive. The question for these cases is -- they're governed by foreign law -- the question is not what the EU would say, but what the Supreme Court in these countries would say. I entirely take the point.

THE CHAIR: Sorry to interrupt you, but maybe this is helpful. Turn it around a bit. If one assumes that if you're right about *Heureka*, in other words, that it is open to the German Constitutional Court to say we can do this our own way --

MR KENNELLY: Yes.

THE CHAIR: -- and therefore it won't be retrospective whether we're going to implement it. If you're right about that, then in a sense that opens up the whole question of the other 23, and we're going to have to do that job. I'm not asking you to tell us the answer to that. I'm just saying to you, on the assumption that you're wrong.

Is there anything else?

MR KENNELLY: Yes. Okay.

THE CHAIR: That's the point.

MR KENNELLY: That's really helpful because my point is -- well, we'll see what the experts say. But the point is that the German Constitutional Court may well say we're going to treat *Heureka* as not applying retroactively, and we believe that's consistent with our --

THE CHAIR: If you succeeded on that, then obviously, I think we would all accept -- I don't know about Mr Beal -- that you must be right in saying, "Well, we are entitled, therefore, to examine the position and see whether (inaudible) would say the same thing.

MR KENNELLY: Indeed.

THE CHAIR: But that obviously is on the assumption that you're right. On the assumption that you're wrong, is there anything else that you want to advance? That's the point.

MR KENNELLY: That's a point that may not require further evidence from other jurisdictions, because what we want to avoid is having to produce Is having to canvass expert evidence from the all the other EU jurisdictions.

THE CHAIR: Yes, exactly. No, I'm not inviting you to do that. I just really want to know if there's anything else. Maybe there's nothing else to say, and maybe -- but I don't want to go into the preliminary issue thinking that there's only two answers to this, when, in fact, there are possibly three. That's the point.

MR KENNELLY: And you want that --

THE CHAIR: Well, whenever you can sensibly do it. I mean, I don't think there's any mad rush on it, but by the end of October, we ought to absolutely be sure that there's nothing else at play.

MR KENNELLY: If we're not asked -- if it's not a question of producing initial views of experts from several EU countries, then end of October --

THE CHAIR: Unless you are saying that there is this other thing out there lurking, in which case you have to tell us what it is.

MR KENNELLY: Indeed. But October sounds, subject (inaudible) that seems like a reasonable (inaudible).

THE CHAIR: That's helpful. Thank you very much.

MR BEAL: If it could be ahead of the October CMC that's envisaged, that would be even more helpful.

THE CHAIR: That would make sense, if that's possible.

MR KENNELLY: I think that's fine.

THE CHAIR: Yes. Good. Thank you.

MR BEAL: May I briefly deal with the host-case application?

THE CHAIR: Yes.

Further submissions by MR BEAL

MR BEAL: The short point here is that the Tribunal has before it an application from the Boels et al claims from Hausfeld. That's second supplementary bundle, tab 24, page 148. The nature of the application had already been set out in correspondence. If I can briefly summarise where it's got to: this is an application by Hausfeld on behalf of 30 corporate groups to be added as Host Cases. As of yesterday, all of the questionnaires from those corporate groups have been provided, save for one, which is the Davidoff corporate group, and they don't have any UK or Irish operations in scope of the claim.

In terms of compliance with the 22 May deadline, my understanding is that all but one of the corporate groups achieved that. And the further corporate group, which is, I think, the BCD travel group, complied yesterday. So one was late.

Both Mastercard and Visa are, as I understand it now, there was a nuance in their position, but they both now say two things. Firstly, you can only join the 28 that provided the questionnaire by the due date of said to be 22 May 2026, and the one who didn't make that deadline in time can't join, even though it's all part of one set of proceedings. And secondly, they say you join as a Host Case only for the purposes of Trial 3, rather than for all of the ubiquitous matters that are listed out in the Umbrella Proceedings Order.

We say that the first point, is, with respect, somewhat strained. The claim is brought on behalf of all of the corporate groups. One of them wasn't required to provide a questionnaire because it doesn't have claims in scope, and the other one admittedly didn't provide it in time, but has now rectified that position. But it was no part of the requirement for joining the Umbrella Proceedings that one had completed this questionnaire. The terms on which one applies to join the Umbrella Proceedings was set out in the Umbrella Proceedings Order and in the Umbrella Proceedings Practice Direction, neither of which have a reference to the questionnaire.

The point of the questionnaire was to deal with eligibility for participation actively in Trial 3, and there is a huge irony here, which is that four, I think, of the Boels Claimants are lead claimants on the basis of the experts' agreement, and five are base sample claimants for disclosure purposes. So there are nine out of this cohort who are actively participating in Trial 3.

In addition, the Adidas claims being brought by Hausfeld that have only just been issued and haven't therefore surfaced yet. One of the Adidas claimants has also been selected as, I think, either a base or a lead sample claimant. So the experts are approaching the availability of data in a way that's agnostic to the Schemes' objection to the filing of the questionnaire. But in any event, the Schemes' objection amounts to a rewriting of the rules of the Umbrella Proceedings Order and the Practice Direction. They are seeking to impose a limitation that was never in that framework.

Now, it may be that, as Visa suggests, it's appropriate to visit the Umbrella Proceedings Order and to work out whether or not it should continue to apply through to Trial 4. Our submission on that is twofold.

Firstly, we do say it is appropriate to continue with it because the consequence otherwise is that a whole series of claims will be commenced in the High Court, because, let's face it, claimants are still bringing claims. Whole series of claims will be commenced in the High Court and then left in limbo, either in the High Court to be tried in the High Court separately, which gives rise to all the risk of conflicting decisions that one wishes to avoid, or they will be transferred to the CAT, and the CAT will then have to manage them anyway, just outside the helpful framework of the efficiency inducing Umbrella Proceedings framework that the CAT deliberately put in place. That's the first point.

The second point is that even if the Tribunal were at the stage where it was minded to amend the terms of the Umbrella Proceedings Order or put a cap on it, then a period of notice would be needed to enable people to seek to bring themselves within the scope of the Umbrella Proceedings Order as a sort of interregnum period, so that their procedural legitimate expectation of a certain form of treatment for the case could be respected.

But we do say that the Umbrella Proceedings still serve a purpose. Why are the Defendants still receiving claims? Well, because they keep on charging the MIF, and it's been found to be an infringement of competition law that may or may not be capable of being justified. So where these companies have paid the MIF through the MSC, their directors have a duty to bring in cash for the business where there's a viable claim, and they're duty bound to bring these claims as a matter of the director's duty owed to the company. The way to stop these claims being brought is to stop the infringing behaviour.

THE CHAIR: Just putting aside these particular claimants, because I take the points you say about them. There is a bit of an issue, isn't there? It may not be so much a Trial 3 issue, because it seems to me Trial 3 is more about the general position. But when we do get to Trial 4 and all the tricky things we've been talking about, it is going to be very unsatisfactory if we have new Host Cases adding all the time and adding up reasonably close to the trial. I mean, that doesn't really seem to work, does it? I think we're going to get to the point where we're going to have to stop that at some stage?

MR BEAL: In terms of the individual adjudication of quantum, I think that's absolutely right. There must come a point at which the guillotine comes down, and for the purposes of determination of quantum, people will have to bring their own claims in due course and whether or not the Schemes can test them and fight them will be a matter in due course.

As you've rightly pointed out, Sir, the exemption issue is not dealt with on a merchant-by-merchant basis because the MIF applies to all merchants regardless.

THE CHAIR: I think the Defendants say that, well, they want to have the benefit of the evidence that's available, and if they haven't come in and aren't making the evidence available, it's not fair. How far that goes, I don't know, but I think it is different once you get into individual treatment of claimants.

I suppose the thing that perplexes me a bit -- maybe I shouldn't be perplexed by it -- we do have a very good regime in these in the Tribunal to deal with collective proceedings. I mean, why is it that we are getting individual claimants filing and then being dealt with in this way under the Umbrella Proceedings? Why is there not a collective proceeding for all of the merchants who are doing that? It just doesn't seem to me to be very helpful when we've got a very effective mechanism that does allow us to do all sorts of things that would overcome a lot of the difficulties we've been talking about all day, and nobody's -- well, I say nobody, CICC are using it on a very limited basis only.

MR BEAL: Yes. I think there is an anticipated -- there's been a letter before action sent by the CICC representatives with a new opt-out claim.

THE CHAIR: Yes, I picked that up somewhere. But of course, in the meantime, you know, we've got these cases piling in. I mean, if CICC were -- I mean, of course, if they were to issue proceedings, they would have to then to be certified and that will take several months and so on, so the whole thing drags on. In the meantime, we just accumulate more and more of these cases here where, you know -- frankly, we don't really want them, not being unkind because obviously we have to deal with them, but it's not an ideal way to -- and it creates the complications we're talking about now.

MR BEAL: The advantage of dealing with it all through the UPO is you don't have to deal with it individually, because you can have a sort of collective approach. I mean.

THE CHAIR: Yes, I'm not suggesting that we should dismantle the Umbrella Proceedings. I'll hear what the Defendants have to say about it all, but it's certainly not really where I was going. I was saying, if we've got a choice between maintaining the Umbrella Proceedings Order and bundling all these claims into collective action, I know where I'd rather have them.

MR BEAL: Well, if I could use a crystal ball, briefly. Imagine, for the sake of argument, that *Heureka* is found to apply to non-UK claims and that becomes public knowledge. I anticipate there will be further claims against the Schemes because people will realise that they have both UK claims going back six years and additional claims. Now, because of the Tribunal's jurisdictional limitation, it may well be that future litigation is in fact commenced in the High Court and stays in the High Court, whether as a group litigation order or otherwise, whether it's a CPO in this jurisdiction. But the CPO in this jurisdiction, of course, would only be UK law claims. So, I mean --

THE CHAIR: Yes. I see the point.

MR BEAL: The realpolitik and the commercial advantage of bringing a claim now in the High Court is ...

THE CHAIR: There's something of an oddity, isn't there? It's obviously a wonderful thing for all concerned, but it's something of an oddity that you have merchants from all over Europe coming to the UK to bring these claims under whatever law it is that applies to it, in circumstances where there really is very little connection with the UK at all.

MR BEAL: Well, I think if they had no connection with the UK, either in terms of the Defendants they're suing or with the transactions in question, then one would have anticipated that a jurisdictional challenge would be brought.

THE CHAIR: Yes. Of course. Okay, thank you. That's helpful.

MR BEAL: I should say, I'm instructed by Hausfeld that they're happy for this to be dealt with on the papers because you have a very full set of submissions in the correspondence. But if you wanted to have directions for further submissions to crystallise things, then that can be done as well. I'm in your hands.

THE CHAIR: Yes, thank you.

Mr Kennelly, are we really going to argue about the -- I mean, there may be some broader points to take but these particular corporate claimants. Your experts are already engaged with them. I can see there's a point here but is the point really about these particular claimants?

Further submissions by MR KENNELLY

MR KENNELLY: Yes. I mean, for the Claimants who filled out a questionnaire by

22 May, which obviously includes the ones that have been selected as lead and base sample claimants they're in. The problem is that the Claimants are seeking to bring in hundreds of extra claimants on the back of that fact, because they're on the same claim form as the ones who have been accepted. They say that because they're on the same claim form -- they're simply on the same lists -- that means they should be allowed in even though they've missed the deadline. So they haven't exposed themselves to the possibility of being considered for a sample claimant role.

THE CHAIR: I'm sorry, I'm probably being a bit slow, but how's that happened if they were on the same claim form as the people who have -- is it because they volunteered themselves before they issued?

MR KENNELLY: Yes.

THE CHAIR: Yes, I see.

MR KENNELLY: So the ones who were taken by the experts to be sample and lead claimants voluntarily filled in questionnaires in advance.

THE CHAIR: Yes, and if you were given the opportunity would you want to get some questionnaires from the hundreds who didn't volunteer themselves? Because it's not so late that you couldn't cope with this if you wanted --

MR KENNELLY: If, despite my submissions, Sir, you allow them in, well then we'd want questionnaires from all of them. Because we could use them to fill in gaps that emerge down the line.

But the primary submission is that this Tribunal ordered that active claimants fill in questionnaires by 8 May. The experts then took into account questionnaires that arrived until 22 May. That process is now over. The experts have decided who the lead and sample claimants will be. As a matter of fairness -- there's no rule in the Umbrella Proceedings Order -- to participate in Trial 3, the claimant needs to be prepared to be considered for a sample claimant role within the deadline that is set in order for that sample claimant role to be determined. That deadline has passed.

THE CHAIR: But in terms of real prejudice to you, are you really suffering any real prejudice?

MR KENNELLY: Yes. We are, and in fact, it's cumulative prejudice. As a result of allowing them in after the deadline, first of all, as a matter of fairness, they've dodged the exposure to being selected for a sample or lead claimant. Secondly, we are now facing hundreds of foreign claimants who, by their very presence, increase the difficulty and complexity of this trial. Which really has been part of the discussion I've been having, Sir, with you.

THE CHAIR: In Trial 3? Maybe I'm getting confused now but they're not in Trial 3, are they? Isn't trial --

MR KENNELLY: They want to come into Trial 3. That's the point. By holding out they've dodged the possibility of being selected as a sample claimant for Trial 3.

THE CHAIR: Are we doing non-UK claimants in Trial 3?

MR KENNELLY: I'm so sorry. For the non-UK claimants, they are not going forward for Trial 3. That's the Trial 4. Even for the UK claimants --

THE CHAIR: Well, I suppose --

MR KENNELLY: -- they are avoiding the possibility of being selected as a sample or lead claimant.

THE CHAIR: I'm not really quite sure why you are in a worse position by leaving them in. In fact, I would have thought you were in a better position because you actually could ask them for the questionnaires, and you might get something out of that.
At the end of the day, it's not like a limitation point where they're not going to be able to claim. It's just that you're excluding from them the benefit of something that's going to happen in a year and a bit's time. It all just seems a bit odd.
I can understand that you do feel that there needs to be some way in which we cut off,

particularly, where the interest of individual claimants are important. I can absolutely see the Trial 4 point. In relation to Trial 3 I just don't really see why it matters. I'm just struggling with it a bit.

MR KENNELLY: I mean, I've already repeated myself --

THE CHAIR: No, well I --

MR KENNELLY: -- in my submissions earlier on. I don't want to bore the Tribunal. But the basic point, first of all, is the point of fairness, which is --

THE CHAIR: What is the unfairness though? From your point of view, why are you in a worse position if they're in?

MR KENNELLY: The unfairness is that, had they complied with the Tribunal's order, had they completed questionnaires before 22 May, our experts would have had the opportunity to examine the questionnaires and potentially selected them as better candidates to be --

THE CHAIR: I mean, the only thing that can happen now is -- the only change to the position is that you can ask them for questionnaires if you want to. I understand the point. I can absolutely see what you're saying, that there's a sort of, if you like, a punitive aspect to it. But that's not a fairness point. That is, if you want to participate, you should abide by the rules. But, as I understand it, there may be perfectly good reasons why they haven't. This is not a situation where it appears on the face of it they've gamed the system to avoid being in a position. Is it? And if it is, well, let's make them put in the questionnaires, and then we can adjust the list if need be.

MR KENNELLY: But the problem is that the timetable for Trial 3 is already really quite tight. It's not appropriate. The whole timetable that you and the Tribunal have ordered, it required the experts to decide who would be sample and lead claimants by 22 May. The process, then, for disclosure from then has begun.

THE CHAIR: When is disclosure due?

MR KENNELLY: Disclosure is due October 2026. The timetable on Trial 3 is in tab 1 of the core bundle. Yes, disclosure by 23 October 2026.

THE CHAIR: Yes. Okay.

MR KENNELLY: My point, Sir, is that I understand the Tribunal's distinction between the foreign claimants in Trial 4, and the UK and Irish claimants in Trial 3, but even for the UK and Irish claimants -- again, I'm not suggesting any bad faith on their part -- they are now far less likely to be selected as sample and lead claimants because that job has been done. The disclosure process begins. It's very unlikely disclosure will be taken from them because they're not selected a sample of claimants. And then we're at risk that at some later stage in Trial 3, they may produce evidence as active claimants in Trial 3 and we won't have disclosure from them. And there's real injustice in that.

THE CHAIR: Well, we could deal with that by saying that they can't be, couldn't we? I know that's an issue for discussion tomorrow, but at least in relation to this group, we could deal with that, couldn't we?

MR KENNELLY: Well, I'm grateful. I mean, I appreciate the Tribunal's making a decision about that, but that indication is itself helpful. Because that's our concern, that we're in a situation where evidence is produced and they say, "Well, we didn't produce disclosure, but here's our evidence", and we have no way of testing it in Trial 3.

THE CHAIR: Well, we'll hear the argument tomorrow. Maybe it's different for the rest of it, but for this lot -- I'm just struggling to find the particular point of unfairness here. Because, against that, you've got 100 claimants who otherwise are not going to be bound into this process and, you know, that may be to your advantage to have them bound and you may succeed spectacularly in exemption and you know you've got this lot locked in and they can't raise any further points. I just can't see why that's not a good thing. I appreciate that, with some of these issues, there does need to be a cut-off. But it just doesn't strike me as being one of those issues.

MR KENNELLY: But Sir, I --

THE CHAIR: I've invited you to repeat yourself. By all means do.

MR KENNELLY: I'll try something different. The situation where the Tribunal sets a deadline, and people who want to participate in some form of group action and don't make the deadline are then excluded and have to work out how to vindicate their rights in some other process is (overspeaking) completely normal. In any group litigation case, there's a deadline for entering the register, and that deadline is closed before the disclosure process begins in order for an orderly process to trial. In collective proceedings, there's a deadline by which class members can opt in. That deadline --

THE CHAIR: That's not how we've operated here, is it? I can't remember what happened. My recollection is we had all sorts of people piling into the proceedings prior to Trial 2, after the sample process. I appreciate you don't like it, and it's fine to put your hand up and say, "I don't like it, I don't like to deal with it". But is this really the way to deal with the problem? I sort of feel like you're picking a bad example to make what is actually really quite a good point.

MR KENNELLY: Sir, if it's a good point, it's a good point. The basic point, and I'm afraid Trial 2 is an example of that. The reason why we have these deadlines is to create fairness between the parties, to allow the Defendants' experts an opportunity, and the Claimants' experts to pick the best sample claimants. If you're not in by the deadline, if you're not exposing yourself to that process, you shouldn't take the benefit of the trial. The real risk is, if people are piling in very late and it's too late to get disclosure from them, that creates the risk of real unfairness because whatever they say later cannot be tested according to the disclosure we would otherwise have got from them.

THE CHAIR: Yes. Okay. Thank you. I don't think I need to hear from Mr Beal.

(4.37 pm)

Ruling

THE CHAIR: There is a dispute about whether the Boels claimants should be entitled to participate in Trial 3, and therefore to be appointed as host cases in the Umbrella Proceedings, Trial 3 being one of the ubiquitous matters. The argument against that advanced by Mr Kennelly is one of unfairness: that where the tribunal sets a process and a deadline, that process and deadline should be complied with. That is a fair point, although I think not as important in the context of Trial 3 as it might be in the context of Trial 4.

It seems to me that if we are going to adopt a process which we haven't done to date of closing the host cases substantially in advance of particular trials, bearing in mind that Trial 3 doesn't start until October 2027, there would need to be proper notice any such deadline, with this being clear to any claimants who might be considering issuing proceedings and participating in the Umbrella Proceedings.

So on this occasion, I think it is appropriate to allow the participation of the Boels claimants, notwithstanding that they haven't complied with the deadline. Having said that, and no doubt, as will be discussed in the hearing tomorrow, there should be consideration as to how they are involved and whether they would be entitled, not having met the deadline, to participate actively by providing evidence, and that door was left open for discussion tomorrow.

I should say that this doesn't amount to an order to join them because that is customarily done by the president. So resolving the issue, if one can put it that way, and I would make a recommendation to the president about it.

(4.39 pm)

THE CHAIR: Thank you very much. Thank you.

MR BEAL: I think that's all for today. I think the CAPOC amendment will have to go into tomorrow.

THE CHAIR: Yes.

MR BEAL: I'm afraid I'm committed elsewhere, seemingly listed in this court, but I'm --

THE CHAIR: Well, I think we're remote tomorrow.

MR BEAL: Oh, you're remote tomorrow.

THE CHAIR: Yes, because you're listed on the --

MR BEAL: So I will be here, but the rest of you won't.

THE CHAIR: I don't know whether you made any progress, Mr Woolfe, about (inaudible) -- do we need to deal with it?

MR WOOLFE: I think my learned friend was considering. Maybe, perhaps, we could consider overnight and we can --

THE CHAIR: All right, we can deal with it. Why don't we put it on the agenda for first thing tomorrow morning, and then we can, and then if you want if to have an item about it, we can, otherwise, hopefully it can be resolved.

MR BEAL: I don't want to have an argument about it unnecessarily, it's just trying to ensure that there is -- a route through has been suggested, and if that works practically, by which I mean legally, then --

THE CHAIR: Exactly.

MR BEAL: -- we're happy with that route.

THE CHAIR: I think my --

MR BEAL: I'd go back to exactly what was said in the course, for example, in relation to Dixons, in relation to the mechanism we use here and whether or not it works to exclude the formulation my learned friend suggests.

THE CHAIR: Yes. The point is to make sure that your rights to raise the point are preserved, and that's the point, and really to freeze the position and park it till later. And I think it would be better to do that because, on the face of it, it'll be easier to understand the implications of it when we actually get to resolve it, if we ever do, which we may never do.

So it's not just about because it's right at the end and we don't want to deal with it. It's actually, it might be better to deal with it in context. But I mean --

MR BEAL: We're really happy with that as a matter of logic, it's just making sure --

THE CHAIR: You're protective of it --

MR BEAL: -- this is actually an appropriate mechanism to use in relation to --

THE CHAIR: Well, look, if you give some thought to that and we can pick it up tomorrow morning first thing. Good. Thank you.

That's it for this CMC, and I'll see some of you then tomorrow morning. Thank you.

(The hearing adjourned until 10.30 am
Wednesday, 8 July 2026)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person’s speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?