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**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1301/6/12/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 March 2019

Before:

THE HONOURABLE MR JUSTICE MORRIS
(Chairman)
MICHAEL CUTTING
PAUL DOLLMAN

(Sitting as a Tribunal in England and Wales)

BETWEEN:

B&M EUROPEAN VALUE RETAIL SA

Appellant/Claimant

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

TESCO PLC

Proposed Intervener

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.com*

CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr Richard Moules (instructed by Gordons LLP) appeared on behalf of the Appellant.

Mr Ben Lask (instructed by CMA Legal Services) appeared on behalf of the Respondent.

Mr Michael Armitage (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Proposed Intervener.

1 THE CHAIRMAN: Good morning, Mr Moules.

2 MR MOULES: Good morning, Sir.

3 THE CHAIRMAN: As you know, we have an agenda for this morning. Just by way of formal
4 statement, I am assuming that we have no issue that the forum for this case is England and
5 Wales. It is a matter of formality, but it will be recorded in the order. I am seeing nods
6 from the parties, so I think we can proceed and make that direction.

7 The first point on the agenda is to consider Tesco Plc's request for permission to intervene.
8 From our point of view, subject to anything you wish to say, Mr Moules, we think we
9 would like to hear from the putative intervener on that first.

10 MR MOULES: Certainly.

11 THE CHAIRMAN: Good morning, Mr Armitage.

12 MR ARMITAGE: Good morning, my Lord, members of the Tribunal. The parties, as you may
13 have inferred from the correspondence, have indicated that they do not object to Tesco's
14 application to intervene, though of course it is a matter for the Tribunal ultimately. So, with
15 that in mind, I will set out my submissions in four short topics. You have, of course, seen
16 the notice of intervention, which I will not repeat at any length.

17 THE CHAIRMAN: Yes, we have.

18 MR ARMITAGE: The four topics, are in brief: first, there is the legal framework governing the
19 power to permit interventions in this jurisdiction; secondly, why the Tribunal can be
20 satisfied that Tesco has a sufficient interest in the outcome, which is effectively the
21 threshold question for intervention, as the Tribunal is well aware; thirdly, why the
22 envisaged intervention would not disrupt the expeditious determination of the application
23 which is relevant to the residual discretion to grant or refuse an intervention where a
24 sufficient interest has been established; and fourth, some points of detail about directions
25 although there is, in fact, now a set of agreed directions, so there are just one or two points
26 of emphasis that arise in the event that the application is granted.

27 THE CHAIRMAN: I think, from our point of view, we would prefer to deal with that fourth
28 point after we have made our decision one way or the other, and that can be dealt with.

29 MR ARMITAGE: Yes, understood. In terms of the legal framework, I hope the Tribunal has
30 copies of our application for permission to intervene.

31 THE CHAIRMAN: We do.

32 MR ARMITAGE: Paragraph 4 sets out the test that is put there for permission to intervene. It is
33 under rule 16(6).

1 “[The Tribunal may permit a party to intervene where it] is satisfied, having taken
2 into account the observations of the parties, that the intervening party has a
3 sufficient interest ...”

4 Although not in the quotation there, the word “may” appears in the rule, which indicates
5 that, as put there and as is well established, it is a two stage test. There is the threshold
6 question of sufficient interest and then a discretion, and we cite there the authority of
7 *Barclays Bank v The Competition Commission*, which emphasises the discretion, and then
8 also the *British Sky Broadcasting v Ofcom* case, which, in unsurprising terms, talks about
9 whether allowing the intervention would be consistent with the just, expeditious and
10 economical conduct of the proceedings. One of the important considerations there is
11 whether intervention will affect the existing timetable and envisaged dates for the hearing.
12 There is no issue of that nature here in the light of what has been agreed, we infer.

13 In terms of sufficient interest, and the meaning of that phrase, there is regrettably - and
14 I have looked high and low - precious little authority as to the meaning of the phrase itself.
15 There are many examples of interventions being either granted or refused, but little that
16 actually engages with the meaning of the words used. It is obviously, Sir, a highly familiar
17 phrase in the judicial review context where it is the test for standing in s.31(3) of the Senior
18 Courts Act 1981, but to my knowledge, and in the course of my research, it has never been
19 suggested that the same approach applies in the CAT context.

20 THE CHAIRMAN: Yes.

21 MR ARMITAGE: So, Sir, in my submission, despite the identity of wording, there is no
22 suggestion that the same approach applies, or the judicial review authorities on standing are
23 of particular assistance, and that is the reason we have not advanced any, although it is
24 obviously of note that the threshold in the judicial review context, if I may put it this way, is
25 not hugely rigorous. One calls to mind the old authorities about ‘busybodies’. Of course,
26 the law has moved on to some extent in the judicial review context, but we do say that the
27 fact that it is not a rigorous test in that context suggests that the same approach applies here,
28 but of course there must be a sufficient interest. In the absence of, as I say, clear authority
29 on the meaning of the words used, we would suggest that the question for the Tribunal is,
30 having regard to the application under consideration: has the entity wishing to intervene put
31 forward sufficiently weighty considerations to justify permitting it to be given a
32 proportionate amount of court time to make its submissions? That obviously----

33 THE CHAIRMAN: Sufficiently weighty, what was your term?

1 MR ARMITAGE: Sufficiently weighty considerations or reasons to justify permitting the
2 intervention.

3 THE CHAIRMAN: Yes.

4 MR ARMITAGE: That obviously has to have regard to the specific nature of the application
5 under consideration.

6 Just by way of a short further submission on the nature of the test, rule 16(5)(a) provides
7 that the application to intervene must set out the matters in issue which affect the person
8 making the request. I simply draw attention to that to make the point that there is no
9 requirement there for any particular type or degree of effect. There is certainly no
10 suggestion in the rules themselves that there is a requirement to show either a direct or a
11 serious effect, or anything of that kind. It is the interest in the outcome of the case that
12 matters. I draw attention to that because there is, of course, a test for intervention or being
13 an interested party, again in the judicial review context where the CPR speaks of being
14 directly affected by the outcome. There is no equivalent in this context.

15 THE CHAIRMAN: One moment, please. It is implicit in the rule there has to be an effect?

16 MR ARMITAGE: Yes, I think we cannot get away from that. To have a sufficient interest, the
17 decision must affect the would be intervener in some way.

18 THE CHAIRMAN: Okay.

19 MR ARMITAGE: As I will come on to, I do say that Tesco is directly affected, if I need to go
20 that far, but, in my submission, that is not what is required.

21 As I said, the cases on intervention provide only limited assistance, other than being
22 examples of circumstances in which particular Tribunals have granted or refused
23 applications to intervene.

24 To give one example, if I may - and I am sorry this was not provided in advance, but my
25 friends have seen it - incidentally involving Tesco, but in that case as the applicant. It is a
26 ruling from 2008, Mr Justice Barling presiding as the President. One can see from para.1 of
27 the ruling the context in which the applications to intervene arose. Tesco was challenging a
28 report by the Competition Commission which found an adverse effect on competition in
29 certain local markets for the supply of groceries. You will note the familiarity there. This
30 is about another aspect of that investigation which was about amending the planning
31 legislation which was said to contribute to that finding of an adverse effect on competition,
32 and introduced a competition test where certain larger grocery retailers were applying for
33 planning permission to develop stores.

1 There were four applications for permission to intervene. Paragraph 2 records that three of
2 them----

3 THE CHAIRMAN: Were not disputed.

4 MR ARMITAGE: -- were not disputed. They were lodged by effectively rival retailers to Tesco
5 - Waitrose, Marks & Spencer and Asda - and those applications were allowed in by
6 reference to the fact that they were not opposed without any further consideration. As it
7 happens, it is not apparent from this judgment, those retailers were intervening in support of
8 the Competition Commission in that case. That can be seen - I am afraid I do not have the
9 reference - from the transcript of the hearing.

10 THE CHAIRMAN: No, it is all right, I will take your word for it.

11 MR ARMITAGE: In a parallel position, in a sense, to Tesco in this case, in support of the
12 relevant regulatory decision.

13 Then there was a contested application brought by an entity called the Association of
14 Convenience Stores. The reason this appears in the written ruling is that that application
15 was made out of time. There is no such issue in this case. If I could take the Tribunal to
16 what Mr Hoskins for Tesco was saying - he was opposing the application on the grounds
17 that there was, in fact, no sufficient interest on the part of the Association of Convenience
18 Stores ('ACS'), and he was saying that that was because the competition test, which was the
19 remedial provision that had been imposed and which was the subject matter of the appeal,
20 only related to larger grocery stores and therefore would have no direct application to
21 convenience stores of the kind whose interests ACS was representing. So one might think,
22 looking at that - and there is no suggestion that Mr Hoskins was wrong to submit - that ACS
23 was not directly affected by the competition test.

24 THE CHAIRMAN: Can I just read 7 above. (After a pause) They were arguing a different
25 perspective?

26 MR ARMITAGE: Yes, that was their argument in terms of what they could offer and, in my
27 submission, that goes to the discretion, not to the question of sufficient interest. So in part,
28 in fact, sufficient interest was what Mr Hoskins for Tesco was talking about there.

29 THE CHAIRMAN: And then in 9, "Capable of affecting".

30 MR ARMITAGE: "Capable of affecting", yes, although not directly subject to the regulatory
31 measure under consideration, capable of being affected by the way in which this operated in
32 the market, and therefore allowed in, notwithstanding - I will take a step back, not therefore
33 allowed in because there was also a discretionary consideration.

1 MR CUTTING: Can I just ask, on one view we are talking about the designated order which
2 relates to the relationship between grocers and suppliers, which is, in effect, in this issue,
3 the impact is between B&M and suppliers, which is a class that does not include Tesco. So
4 your parallel is that Tesco is a downstream competitor in the same way that the ACS is a
5 federation of people who would have been affected. Is that the----

6 MR ARMITAGE: Yes, that is the short point on sufficient interest, which I will come on to, or
7 one of the two points I will make on sufficient interest. The first point I am drawing is
8 simply the language used by the Tribunal in considering sufficient interest, “capable of
9 affecting”.

10 THE CHAIRMAN: That, you say, is the test we should apply in conjunction with (5)(a), capable
11 of affecting?

12 MR ARMITAGE: Yes, precisely. I should say, to conclude, the Tribunal then goes on to
13 consider discretionary elements, including ACS’s ability to give a different perspective. It
14 is quite clear, in my submission, those are matters that go to the discretion rather than
15 sufficient interest.

16 THE CHAIRMAN: Yes, all right.

17 MR ARMITAGE: So effectively the Tribunal says, “capable of being affected and can provide a
18 different perspective, therefore notwithstanding the fact that they were out of time we will
19 grant the application to intervene.”

20 Against that background, Sir, members of Tribunal, I will turn to the second topic which is
21 why we say that Tesco have a sufficient interest in the outcome of this judicial review
22 application. I should preface that by saying that Tesco, of course, has only seen the
23 summary of the application and read the transcript of the interim relief and jurisdiction
24 hearing, so it has been able, of course, to garner some sense of the nature of the application
25 and the relief is sought. The point we ascertained, *inter alia*, is that the relief sought
26 includes a request to de-designate, or to quash the designation decision, which will have that
27 effect at least immediately.

28 So, for our submission, in a nutshell, I would take the Tribunal to para.14 of the application
29 for permission to intervene.

30 THE CHAIRMAN: Level playing field.

31 MR ARMITAGE: It is the level playing field point. As we say there:

32 “Complying with the provisions under the Code places a burden on designated
33 retailers [such as Tesco].”

34 Tesco has been designated since 2009.

1 “Where a retailer meets the tests under the Order for governance by the Code, not
2 designating such a retailer would lead to distortion of competition in the market
3 and so naturally, Tesco is interested to ensure that a consistent approach applies to
4 all retailers, including B&M, to ensure that there is a level playing field amongst
5 grocery retailers.”

6 In terms of the nature of those burdens, there is a helpful summary - I can take the Tribunal,
7 if they wish, to the order itself, but there is actually a very helpful summary in the
8 application summary that was published on the CAT’s website, which may be a convenient
9 way of dealing with it.

10 THE CHAIRMAN: You can read it to us.

11 MR ARMITAGE: Essentially, there is a range of obligations on designated retailers:

12 “... (i) must not enter into or perform any Supply Agreement unless that Supply
13 Agreement incorporates the Groceries Supply Code of Practice ...”

14 There is a requirement to provide suppliers with certain information pursuant to the Code.

15 THE CHAIRMAN: I think we are pretty familiar with this.

16 MR ARMITAGE: Record keeping requirements, and so on and so forth. So there is a range of
17 burdens, and, in fact, when seeking interim relief, unsurprisingly Mr Moules for B&M, and
18 the evidence that we have been able to ascertain was provided in support of that
19 application, emphasised the nature of those burdens and the business disruption caused.
20 That is at p.38 of the transcript of that hearing, if that is of assistance.

21 THE CHAIRMAN: We have the point.

22 MR ARMITAGE: I think the Tribunal has the point. Further and alternatively, there is a level
23 playing field point as regards B&M specifically. It is a retailer that has emphasised that it is
24 a rapidly growing business, 600 stores, I think, in the UK. So Tesco have an interest in
25 ensuring that this particular retailer competes on a level playing field.

26 I say that is enough to satisfy the “capable of being affected” threshold and sufficient
27 interest threshold.

28 THE CHAIRMAN: Yes.

29 MR ARMITAGE: There is also a related point. The Tribunal in this case, as we understand it, is
30 being called upon to decide effectively what the proper approach to designation is. As
31 I say, Tesco is somewhat hampered by not having seen the application yet. As we have
32 ascertained it, what B&M is effectively saying is, “We are not what the Competition
33 Commission had in mind when imposing these remedies because of the nature of our
34 business.”

1 THE CHAIRMAN: You are going to go on to show us a level playing field with others who
2 might be in B&M's----

3 MR ARMITAGE: This is the first case under this particular regime in which the Tribunal is
4 called upon to consider the CMA's approach to designation. Obviously the Tribunal's
5 approach is capable of having a bearing on the way in which the CMA approaches this in
6 the future in relation to other potential designated entities, or designated retailers. So there
7 is a potential effect on Tesco's interests from that angle too. Taken together, or
8 individually, in my submission, we say there is a clear sufficient interest here.

9 THE CHAIRMAN: So a level playing field with B&M and anybody else who might potentially
10 be designated in the future?

11 MR ARMITAGE: Yes, Sir, quite right.

12 So turning then, if I may, to the third of my four short topics, as I say we set out the
13 reference in the *BSkyB* case as to whether the intervention would be consistent with the just
14 and expeditious----

15 THE CHAIRMAN: Whether that remains strictly the test may be technically open to question,
16 because, as far as I understand it, that was a case at the time under the old rules, and I will
17 be corrected by those who were there----

18 MR ARMITAGE: You are right, yes.

19 THE CHAIRMAN: -- I just want to point out to you that it may be that the same concepts are
20 contained within rule 4 of the current rules Governing principles, which deal with "justly
21 and at proportionate cost", and goes on to deal with equal footing, saving expense,
22 expeditious and fairness. I imagine it comes to the same thing.

23 MR ARMITAGE: Yes, I think that is right.

24 THE CHAIRMAN: That wording may come from the old rules.

25 MR ARMITAGE: I will have to check, I think it was referred to in the *Pfizer* case on intervention
26 in 2017. I think it was cited as the----

27 THE CHAIRMAN: The old test?

28 MR ARMITAGE: The test from *BSkyB*. I was not there, but I think it is common ground
29 probably that those----

30 THE CHAIRMAN: It seems to me to be a useful nutshell summary.

31 MR ARMITAGE: A useful approach to the discretion.

32 THE CHAIRMAN: Yes.

33 MR ARMITAGE: So I have got three points to make on why, in its discretion, the Tribunal
34 should grant the intervention. The first is that the intervention would not be disruptive,

1 particularly in relation to the existing proposed hearing dates, which we understand to be 14
2 and 15 May 2019, and in fact the parties have now, on the presumption that Tesco - not the
3 presumption, but on the assumption that Tesco - is granted permission to intervene, have
4 agreed directions which will enable the existing hearing date to be maintained to the
5 satisfaction of all parties, subject of course to the Tribunal.

6 THE CHAIRMAN: Right, go on, would not be disruptive.

7 MR ARMITAGE: There is no concern about disrupting the timetable. There may be an issue
8 about a suggestion that Tesco's time for oral submissions should be limited, but that, as the
9 Tribunal has already indicated, is a consideration we can come to in the event that the
10 application is granted. We say the position taken by the parties and the agreement on
11 directions indicates that there can be no disruption here.

12 THE CHAIRMAN: Yes.

13 MR ARMITAGE: Secondly, the intervention will not lead to unnecessary duplication. Tesco
14 brings its own perspective to this matter as a retailer that has been subject to these
15 provisions and this regime since 2009. It intends to support the overall position of the
16 CMA, as is apparent from what I have already said, but it is committed to liaising with the
17 CMA in the ordinary way to ensure that its submissions do not duplicate anything the CMA
18 says. I can assure the Tribunal we have no desire to duplicate in any way.

19 THE CHAIRMAN: Good, yes.

20 MR ARMITAGE: I think, in the standard way, interveners in these proceedings are obliged, of
21 course, to liaise with the party in respect of whom they are supporting.
22 Then, thirdly, in my respectful submission, Tesco can be expected to add real value to the
23 proceedings with its intervention. As I have already said, it can bring to bear experience of
24 the effect of designation on the designated business and its ability to engage with particular
25 practices based on having been regulated for nearly a decade by these provisions. The
26 Tribunal will recall, and again so far as we have been able to ascertain from the transcript
27 and the summary, the appeal, among other things, involves a comparative factual assertion
28 about B&M's ability to engage in the practices that the system is designed to minimise. To
29 put it in a nutshell, its ability to exercise buyer power in respect of its supply chain.
30 We have set this out in our application to intervene: there was a particular assertion in the
31 transcript----

32 THE CHAIRMAN: It is paragraph 11.

33 MR ARMITAGE: Yes, exactly.

34 THE CHAIRMAN: It is about business models, is it not?

1 MR ARMITAGE: Yes, there is an assertion about the differences between B&M and large
2 retailers like Tesco. Obviously that is a comparative statement, but, in our submission,
3 Tesco can provide real value in assisting the Tribunal with the large retailer side of that
4 factual comparative in support, of course, of the position that the CMA is taking.

5 Thirdly, on the discretion----

6 THE CHAIRMAN: This was thirdly.

7 MR ARMITAGE: I am so sorry, firstly, was the----

8 THE CHAIRMAN: You will not be disruptive.

9 MR ARMITAGE: Will not be disruptive.

10 THE CHAIRMAN: I thought two was no unnecessary duplication.

11 MR ARMITAGE: You are quite right.

12 THE CHAIRMAN: Three was can add real value.

13 MR ARMITAGE: You are quite right, I had two “thirds”. Fourth is the consideration that this is
14 the first appeal of its kind. The question of the circumstances in which the CMA can
15 lawfully designate the grocery business is one of substantial wider public importance. That
16 public importance was emphasised also by B&M, again when seeking interim relief in these
17 proceedings, and we agree. It is important, in our submission, that the Tribunal makes a
18 fully informed decision on the legal framework, and we say that an intervention from Tesco
19 with the factual experience it brings to bear as well as the legal experience in regulatory
20 matters of its legal team can assist the Tribunal in a non-duplicative way in reaching a
21 decision on the matters that arise.

22 So those are the four points on the discretion issue.

23 THE CHAIRMAN: Can you just give me a moment. (After a pause) We would like to hear if
24 anybody has got anything to add, in particular, and I will ask Mr Moules to go first if he has
25 anything to say; from the CMA on the question of what, if anything, the intervener might
26 add to the CMA’s case and add to what the CMA has already said and is already saying,
27 particularly on the issues in relation to business model. I do not know if Mr Moules has got
28 anything to add.

29 MR MOULES: Just in fairness to Tesco, I should point out that a direct impact that you heard at
30 the interim relief application stage, the Groceries Code Adjudicator is funded by the
31 Adjudicator’s costs annually amongst the number of designated businesses. So the effect of
32 the relief we seek would, albeit in a relatively small amount given Tesco’s turnover, be to
33 impose a financial cost on Tesco.

34 THE CHAIRMAN: All right.

1 MR MOULES: It is my duty to point that out, but otherwise I have nothing further to add.

2 MR ARMITAGE: I am very grateful.

3 THE CHAIRMAN: Yes, Mr Lask?

4 MR LASK: Sir, thank you. As you will have seen from the correspondence, the CMA is neutral

5 on Tesco's proposed intervention, subject to two points. The first is that the intervention

6 does not hinder the speedy resolution of the case, and as you will have heard there are

7 agreed directions----

8 THE CHAIRMAN: We will come back to that in a moment.

9 MR LASK: -- at least as between the parties that would allow it to proceed on the current

10 timetable.

11 The second is that there is no duplication of the CMA's submissions, and that Tesco does

12 not, in effect, seek to re-run the defence. Tesco has been very clear, both in writing and

13 indeed this morning, that they will not be seeking to do either of those things.

14 THE CHAIRMAN: Yes.

15 MR LASK: Coming to the point, to the question that you asked, there is a degree of speculation

16 involved, but from the CMA's perspective we can see force in the submission that Tesco

17 will be able to add some value in terms of evidence: firstly, on Tesco's experience of being

18 designated, and what in practice designation involves from the retailer's perspective; and

19 secondly, on the issue raised by B&M in relation to their business model, and whether it is

20 right, as B&M say, to argue that B&M's model is sufficiently different from the business

21 models of the existing designated retailers to undermine the substantive basis for

22 designation.

23 THE CHAIRMAN: Thank you. I think it is fair to say that we have reservations about this. I am

24 not indicating a decision. Our current thinking is that - let us take it in stages - the sufficient

25 interest test is the first hurdle. The second hurdle is the discretion. My understanding and

26 reading of the provision is that that is a discretion as to whether to allow the intervention at

27 all, not just a discretion as to the manner in which that intervention is allowed.

28 Our concerns are informed by the tight timetable and two matters arise really. One is, and

29 this is highlighted by what Mr Lask has just said, that the value which is being added is, or

30 may be, confined to evidence, and we are concerned about whether or not, in fact, the actual

31 intervention as an intervening party will merely replicate the position of the CMA. In that

32 regard we have well in mind the *Replica Kit* case, the *Umbro* case, where this Tribunal

33 declined to allow what was then known as Sports World to intervene on grounds that they

were merely supporting the regulator and they could liaise with the regulator by way of putting evidence in. We think that that case sheds some light on the situation here.

That is our first concern, what will Tesco bring to the party here that they could not bring to the party by way of providing a witness statement, for example?

The second issue connected with timetabling is the issue about confidentiality, redactions and the like. We have a concern that Tesco, if they become a party, are entitled to see the pleadings. As yet they have not done so. People have said there are no confidentiality concerns, but we do wonder whether B&M have carefully considered all the material they have placed before the Tribunal and the extent to which they would wish Tesco to see that. If they would not, that process in itself may take some time.

With those observations in mind, Mr Armitage, you might wish to address them, and particularly this observation about replication and what you will actually add by way of being a party.

MR ARMITAGE: I quite understand the concerns. I am afraid I have not had a chance to consider the *Replica Kit* case. I recall reading it in the past. I might want to address you about *Replica Kit*. I understand the----

THE CHAIRMAN: I can tell you in summary that in that case it was declined because the OFT was primarily responsible for proving its case, and there was no need for the proposed intervener to be a second prosecutor. Now, of course that was an infringement case. I understand it is different.

Secondly, in any event, the proposed intervener could assist the OFT in marshalling the evidence and argument, and they did not rule out being granted permission to intervene later, but that did not really apply. In fact, it was allowed to intervene on the question of costs. It is this question of can a proposed intervener actually assist by just providing a witness statement.

MR ARMITAGE: We understand. The answer is, we do not know, we have not seen the way in which the legal arguments are put. My short point is that it may be that Tesco's submission is largely, if not solely, confined to providing supporting evidence, evidence based on the unique perspective that Tesco could bring to bear in these proceedings. That may be the case, but, in my submission, it would be premature or wrong to make a decision at this stage on that basis. It may well be, albeit as indicated with no desire whatsoever to duplicate any legal points that have been taken, that Tesco does have independent legal points of its own in relation to the operation of its regime, that it would assist the Tribunal to have sight of. The point is, Sir, being an intervener carries with it a formal status, an entitlement to see

1 documents in the proceedings and to participate in that way subject always to the principle
2 that the intervener must not duplicate. We say there is a real benefit to Tesco having that
3 formal status. It will of course consider at all stages whether legal submissions add any
4 value at all to the position that the CMA is taking, including by liaison directly with the
5 CMA. At this stage, we cannot say that with any certainty----

6 THE CHAIRMAN: Your answer is that you have not seen the case so you do not know. Of
7 course, we have seen the case, so we are slightly better informed----

8 MR ARMITAGE: Yes, I understand.

9 THE CHAIRMAN: -- as have the two parties.

10 MR ARMITAGE: I understand. That is our position. In my submission, if that is the Tribunal's
11 concern, there are measures that can be taken. There could be an express requirement not to
12 duplicate, and so on and so forth. I take your point, Sir, that once you get to the discretion
13 stage, that is not just the discretion as to the terms of the intervention, it is a broader
14 discretion. We understand that. In our submission though, we can add real value, including
15 potentially on the legal points in relation to this immature regime, if I can put it like that.
16 We do not know at this stage, but we say that having a single intervener in these
17 proceedings, the time limit for interventions now having expired, will assist.
18 On confidentiality: I understand from discussions with Mr Moules this morning and from
19 the correspondence that the pleadings and evidence from my friend's clients does not
20 include any confidential material. I understand the same is true, or very likely to be true, of
21 the CMA's defence. So, as we understand it, that particular concern does not arise in this
22 particular case. I can see in other cases that would be a real consideration.

23 THE CHAIRMAN: Can I hear Mr Moules on that issue first? It is quite often in proceedings in
24 this Tribunal that those issues do arise. I have not got in my mind everything that you have
25 put in, both in your application and in your witness statement and attached material,
26 whether there is specific material that you would not want obviously Tesco, your
27 competitor, to see.

28 MR MOULES: Indeed.

29 THE CHAIRMAN: Where are you on that?

30 MR MOULES: The closest we get to that is paras.36 to 44 of Mr McDonald's first statement,
31 where he does discuss the number of suppliers that B&M trade with, and their average
32 spend with those suppliers. He does not identify the individual suppliers, or the particular
33 amount of trade with them. So, taking a pragmatic view, my instructions are that if Tesco is

permitted to intervene, so as not to jeopardise the timetable, we do not take a confidentiality point.

THE CHAIRMAN: Right, so you would not be seeking any redactions?

MR MOULES: No.

THE CHAIRMAN: Fine, that is helpful. Mr Lask, is there anything on that aspect?

MR LASK: Well, we do not have anything to add on confidentiality, save that if there are no confidential matters in the defence or evidence then it would be pretty quick for us to prepare versions that can be served on Tesco.

Just coming back to the Tribunal's suggestion that Tesco's participation could be pursued by way of evidence given in support of the CMA's case, the CMA certainly has no objections to that proposed course. It would then, of course, be a matter for the CMA to decide whether it wished to rely on Tesco's evidence.

THE CHAIRMAN: Yes, of course.

MR LASK: As I say, we have no objection to that course of action.

THE CHAIRMAN: All right, thank you. We are going to rise to make our decision on that aspect. Thank you very much indeed.

(Short break)

THE CHAIRMAN: In this case we have an application to intervene by Tesco Plc. We find that there is jurisdiction to allow the intervention on the basis that Tesco has a sufficient interest in the outcome of the proceedings. However, we have concluded in our discretion not to allow intervention. We consider that such intervention would not be consistent with the just, expeditious and economical conduct of the proceedings. We will give a written ruling in due course expressing the reasons for that conclusion. As we indicated in the course of argument we consider that Tesco would be able to assist the Tribunal by way of the provision of evidence to the Tribunal, and in that regard it is a matter for the CMA to liaise with Tesco to that end, should the CMA wish to do so. As I say, in our reasons we will explain the basis for that conclusion.

That concludes that issue. We then need to proceed to deal with directions for timetable which might be somewhat affected by that decision. Can we say, and it may be that this is a matter just for a round table discussion, it looks to me as though the parties are pretty well agreed, that we have come to the conclusion, subject to anything that the CMA wishes to say, that we think it is appropriate for B&M to be given the opportunity to put in a reply, which might or might not include any further evidence it wishes to put in as a distinct step from it putting in its skeleton argument. We think that there is sufficient time to enable that

1 to happen. We also think that skeleton arguments for the hearing should be sequential.
2 That is our provisional view. I do not know whether, between us we can work out where
3 we go from here. Mr Moules, yes?

4 MR MOULES: I think those matters are reflected in the agreed directions, provision for a reply.

5 THE CHAIRMAN: When you say agreed directions, you have got something to hand up?

6 MR LASK: Over the weekend, the parties agreed directions that worked either with or without
7 the intervention. There are some square brackets that cover the intervention. I think there
8 may be some tweaking to a couple of the deadlines to reflect the opportunity that the
9 Tribunal is suggesting be afforded to Tesco to liaise with the CMA.

10 THE CHAIRMAN: That is a point that, as you stood up, was occurring to me, that if and in so far
11 as the CMA wishes to put in further evidence then that would have to be the next step,
12 I think, and that would need----

13 MR LASK: As Mr Moules indicates, the agreed directions do reflect, or do make provision for, a
14 reply from B&M and for sequential skeletons.

15 THE CHAIRMAN: Have you got copies for us?

16 MR LASK: Yes.

17 THE CHAIRMAN: And can we work through what we might do and then----

18 MR LASK: It may be that we can, on our feet, work through it.

19 THE CHAIRMAN: That is what I am hoping we will do. (Same handed) Thank you very much.
20 Just working through the order, obviously it will be refused, para.1. Then para.2 comes out.

21 MR LASK: I wonder if Tesco is to have a meaningful opportunity to put in or to provide the
22 CMA with evidence that the CMA can rely on, whether Tesco will still need to see----

23 THE CHAIRMAN: That is not a matter of service on Tesco, is it? We will have to consider that,
24 but you, in order to seek to discuss with your witness, you presumably are at liberty to share
25 what is in your defence.

26 MR LASK: Yes.

27 THE CHAIRMAN: The question is whether there is an issue as to whether you are also at liberty
28 to disclose what is in the notice of appeal.

29 MR LASK: Indeed.

30 THE CHAIRMAN: I do not know technically what the position is in relation to that. It may be
31 that Mr Moules, in the light of the indications he has given, does not object in any event, in
32 which case we can indicate our agreement to you being at liberty to show them it. I am not
33 sure it should be formally served on Tesco because they are not going to be a party.
34 Mr Moules?

1 MR MOULES: I obviously have no instructions on this, but I do not anticipate there being a
2 difficulty with the CMA showing Tesco both its own defence and the notice of appeal. It
3 seems helpful to have evidence that is focused to the issues that the Tribunal has to decide.
4 I can seek instructions if that would be helpful.

5 THE CHAIRMAN: I would have thought, given that you were not going to object previously to
6 them being served----

7 MR MOULES: Indeed.

8 THE CHAIRMAN: -- I would have thought that we would indicate a liberty on the part of the
9 CMA to show them the pleadings. What is your position? Would you like some time to
10 take instructions on it?

11 MR MOULES: I think, if I had five minutes, I could come back with a definitive answer.

12 THE CHAIRMAN: All right. Let us move on and let us not make the order until you come back.
13 Maybe the order should record that liberty, partly because I am not sure - I am looking to
14 my Référendaire - strictly under the Rules what the position is in relation to pleadings in the
15 CAT and whether they are confidential to the Tribunal and the parties. Presumably they
16 are.

17 MR LASK: I think they are. I think that is the default position.

18 THE CHAIRMAN: We do need to give liberty I think in relation to the notice of appeal.

19 MR LASK: Yes, and accompanying evidence.

20 THE CHAIRMAN: Does para.3 stand save that it is going to be - timing wise, do we have an
21 equivalent of para.3, liberty for you to put separate evidence in if you are going to?

22 MR LASK: Yes, I think that is what would be required, provision for the CMA to file and serve
23 further evidence if so advised. It may be, however, that since there will need to be some
24 collaboration between the CMA and Tesco, two or three further days are required, so, if
25 necessary, move forward to 8 April.

26 THE CHAIRMAN: That is not going to affect the rest of it, is it? Okay, let us assume 8 April.
27 Then the reply to the defence, that is very tight.

28 MR LASK: Then you would need, I would suggest, another week for B&M to put in their reply.

29 THE CHAIRMAN: So that is 12 April.

30 MR LASK: If it was the 8th, it would then----

31 THE CHAIRMAN: Another week on top, sorry, so 15 April.

32 MR LASK: Yes.

33 MR MOULES: I hesitate to rise at the moment. These directions here were carefully crafted to
34 avoid a period where both Mr Maurici and I are unavailable running from the 8th.

1 THE CHAIRMAN: Before we deal with that, can we just go through the steps about what is still
2 needed and is not needed. We do need step 5, we do need step 6, we do not need step 8, we
3 do need steps 9, 10 and 11. Do we need step 7 or not - no?

4 MR LASK: No.

5 THE CHAIRMAN: So that should be it, if we take those out. Mr Moules, if we went for 8 April
6 for the witness statement, or any further evidence from the CMA. Paragraph 4, what date
7 would you wish to put in? It may be that, given that we take no steps out, it is going to be
8 okay anyway.

9 MR MOULES: To avoid the period where both Mr Maurici and I are unavailable, that would
10 have to be 30 April----

11 THE CHAIRMAN: 30 April?

12 MR MOULES: -- which is why we crafted directions with effectively two replies, one to the
13 defence which we received on Friday, and then the window until the 30th to reply to the
14 Tesco document. One option would be to delete step 4 and have the single reply
15 coming----

16 MR LASK: Or perhaps one retains step 4 as a reply to the defence, and one then retains 30 April
17 for---

18 MR MOULES: And then the 30th for the reply to the evidence.

19 MR LASK: -- the skeleton and any reply to the CMA's further evidence, the Tesco evidence,
20 essentially.

21 THE CHAIRMAN: What date do you have for step 4: 8th or 15th does it matter? If, Mr Lask, you
22 are keeping step 4, what date are you proposing?

23 MR LASK: Keep step 4 as the 8th.

24 THE CHAIRMAN: Right, as the 8th. Is that really a good idea for the reply? It is going to be
25 responsive in terms of evidence, is it not? I would have thought----

26 MR MOULES: This all comes about because of the extra three days for the CMA and Tesco to
27 agree their evidence. If you held that to the 5th you would still have the weekend to reply to
28 that, plus the Tesco addition.

29 MR LASK: Yes, that is true.

30 THE CHAIRMAN: So if you have it to the 5th you would have time to reply by the 8th - is that
31 right? So the witness statement comes on the 5th. When you suggest the 8th, I think it is a
32 bit tight, is it not? I am not sure that works. If we go back to Mr Moules' suggestion and
33 we take out step 4, why does that not work so that you put your reply, which would be a
34 pleading reply in terms of argument, plus any responsive evidence both to Mr Land's

1 second statement presumably and to any further statement by 30 April. Why is that a
2 problem?

3 MR LASK: From our perspective it is pretty late in the day for us to see a reply to the defence,
4 which has already gone in. It would be effectively five or six weeks, and only a week
5 before we have to put in our skeleton for trial.

6 THE CHAIRMAN: If you wanted step 4, you would keep step 4 at the 8th, would you? Yes,
7 because that would be replying to what you have got now.

8 MR MOULES: Perhaps one solution would be - this draft envisaged two documents coming
9 towards us: one, the defence, which we have received, and two, Tesco's statement of
10 intervention, and us replying to them sequentially, so to the defence at step 4 by the 8th, and
11 then to Tesco by the 30th. I think we could stick to that so that we reply to the defence we
12 have already received, step 4, by the 8th, and then on the 30th, step 7, we reply to what we
13 get by way of evidence at step 3, and on that basis we are content to move 5 April in step 4
14 to 8 April or even 15 April, providing we are replying to it, on the 30th.

15 THE CHAIRMAN: Replying to?

16 MR MOULES: To the further evidence.

17 THE CHAIRMAN: I think that is Mr Lask's proposal - I think?

18 MR LASK: It is.

19 THE CHAIRMAN: I think maybe that does work. My concern was that you were going to have
20 two separate documents. The reply that is going to be on 30 April can only be to----

21 MR MOULES: Only to Tesco or the new evidence.

22 THE CHAIRMAN: I would have thought it was a matter for evidence, and then, if and in so far
23 as it raises arguments, is that not something - I am not sure it would warrant a further reply,
24 because it is not a pleading. Would it not go in the skeleton? Do you see what I mean?
25 I would have thought it is the reply to the defence by 8 April, do we agree, on para.4?

26 MR MOULES: Yes.

27 THE CHAIRMAN: We will come back to the bundle issue. What do you say about----

28 MR MOULES: So 6 would be B&M's skeleton argument, and if so advised evidence in reply.

29 THE CHAIRMAN: Okay, evidence in reply, yes. Evidence in reply to any further evidence of
30 the CMA by the 30th - yes?

31 MR MOULES: Yes.

32 THE CHAIRMAN: Then I think that works, does it not? How about bundles? We can do with a
33 supplementary bundle, can we not, by then, 5. The only thing that would be missing would

1 be the evidence in 6. Can we have a supplementary hearing bundle at 5 on that date, or do
2 we wait until after any evidence in reply?

3 MR LASK: I do not see why we could not keep it at the date it is at and have a place holder for
4 any evidence.

5 THE CHAIRMAN: Yes, because that would be the only thing that would be added. Yes, all
6 right. I think that covers it. If everybody has got that they can produce a further draft. So
7 para.1 is refused, para.2 is CMA to serve any further evidence by 5 pm on 8 April, and then
8 4 is the 15th, is it? No, it is the 8th as well.

9 MR LASK: It is the 8th as well.

10 THE CHAIRMAN: Okay, has everybody got that? Yes, everybody has got it. I am looking at
11 Mr Collyer, he has got it as well. Can one of you produce a revised version of that?
12 The only other issue that I wanted to raise is we have got a time estimate of two days. That
13 is going to have to be kept to because that is the availability of the Tribunal, and I do not
14 think we can afford to go over to a third day. Can you give some thought to the timing of
15 submissions to fit in with that timetable, and who is going to be allowed what time?
16 The Tribunal, I am looking to my left and my right, will be able to sit a little bit later, if
17 need be, on each day, but after a while that becomes counter-productive. Do not bank on
18 being able to sit until six o'clock is what I am saying. Can you give some thought as to how
19 long you think you will need?

20 MR LASK: We will.

21 THE CHAIRMAN: I think it might be useful in advance of the hearing, maybe at the time the
22 bundles of authorities are lodged, to have an indicative timetable from the parties.

23 MR MOULES: Would it also assist with the Tribunal at step 10 to file with the agreed authorities
24 both a list of issues and a list of agreed legal propositions?

25 THE CHAIRMAN: I would have thought the issues can be agreed - that may be helpful. I am
26 not sure - go on, Mr Lask?

27 MR LASK: For our part, I would not have thought that is necessary. The Tribunal will have had
28 the skeleton arguments.

29 THE CHAIRMAN: Yes, it is a helpful thought, but it is another thing to seek to agree. I get the
30 impression that everybody is being eminently reasonable and sensible, but I know, from
31 your end, it is just another thing on the agenda to agree, and probably not necessary. I think
32 we will, hopefully, get out from the skeletons what the issues are. Thank you.
33 Any other matters? No. Thank you very much.