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6 **IN THE COMPETITION**  
7 **APPEAL TRIBUNAL**  
8

Case No. : 1380/1/12/21

9  
10 Salisbury Square House  
11 8 Salisbury Square  
12 London EC4Y 8AP  
13 (Remote Hearing)  
14

Friday 5th March 2021

15  
16 Before:  
17 The Honourable Mr Justice Marcus Smith  
18 Bridget Lucas QC  
19 Professor David Ulph CBE  
20 (Sitting as a Tribunal in England and Wales)  
21

22  
23 **BETWEEN:**  
24

25  
26 BGL (Holdings) Limited & Others  
27

28 -v-  
29

30 Competition and Markets Authority  
31

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

34 Daniel Beard QC and Alison Berridge (On behalf of BGL)  
35 Ben Lask and Michael Armitage (On behalf of Competition and Markets Authority)  
36

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(2.00 pm)

**Case management conference**

**THE CHAIRMAN:** Good afternoon everyone. I appreciate that this is obviously a remote hearing. But apart from its remoteness, it is in all other respects a hearing as if in open court and the usual rules apply. I'm sure I don't need to tell anyone this -- yes, I see. Mr Beard, are you there? There's a very odd --

**MR BEARD:** Yes, I am, sorry.

**THE CHAIRMAN:** Right. Something's gone wrong with your image. I don't know ...

**MR BEARD:** I'll switch off and switch on again.

**THE CHAIRMAN:** There you are.

**MR BEARD:** I'm very sorry sir. I don't quite know why that happened.

**THE CHAIRMAN:** Not at all. These things regularly do.

I was saying that although I don't need to tell anyone this, the rules about recording, broadcasting or transmitting this hearing apply. They shouldn't be done, it would be wrong to do so. The hearing is of course being recorded for the purposes of a record at the Tribunal.

It would be helpful, I think, if in your submissions you can take it a little bit more slowly than one would in a physical courtroom and in particular my experience at least is that it is slower digging up electronic documents than it is finding paper documents. But there we are.

I have a few things that I want to go through before I invite the parties to speak. I have quite a long speaking note setting out some of the views that we have about the process and I think it's probably important to get those off our collective chests before you address us, rather than throw them at you in the

1 course of your submissions. So apologies in advance for not inviting you,  
2 Mr Beard, to open the case management conference in the way you normally  
3 would.

4 Before I come on to our thoughts about process, I know I probably shouldn't have to  
5 raise this, but we are all three of us subscribers to home insurance products.  
6 Some of us have used price comparison websites, we all know about the  
7 meerkats and ComparetheMarket, but I take it that that is not a problem.  
8 I raise it simply out of an abundance of caution so that that is on the record.

9 I appreciate that we have an agenda and probably the most important questions  
10 before us are the following three: first, the timetable for the service of the  
11 CMA's response to BGL's notice of appeal and evidence; secondly, the  
12 permission to file and, if permission is granted, the timing of any reply from  
13 BGL; and thirdly, the timing and length of the appeal itself.

14 I don't want to anticipate too much. But it may assist the parties if I indicate now that  
15 we are minded, subject to hearing from the parties and subject to what I'm  
16 about to say, to extend the time for the CMA's response, to make provision for  
17 reply evidence from BGL and to go for a hearing no later than  
18 November 2021.

19 Now I had hoped that this would be an uncontroversial matter, given the parties'  
20 helpful indication as to availability. Unfortunately, as you probably all know  
21 from communications from the Competition Appeal Tribunal during the course  
22 of this morning, we have a problem with the dates suggested by the parties  
23 and I'm afraid we are going to have to debate different dates. I'll say no more  
24 than that.

25 But we are going to have to press the parties about when the matter could go and  
26 we are looking, and I know this will not come as pleasant news to the CMA,

1 but we are looking at dates at the very beginning of November for the three  
2 weeks then which we, the Tribunal, can do, I know Mr Beard can do, but I also  
3 know that that places Ms Demetriou in difficulties. So it's obviously something  
4 which we haven't finally decided, we'll want to hear both parties on it. But  
5 I think I should signal a distinct reluctance to move the hearing into 2022 or  
6 beyond because I do feel that although this is an historic abuse, these  
7 appeals should be heard quickly and not slowly. So those are the broad  
8 picture points.

9 But in light of the volume of the material which we've already seen, and by that  
10 I mean the CMA's decision, and BGL's appeal material which we've read, we  
11 are concerned to achieve as part of the timetable to the hearing  
12 an identification of what is common ground and, to the extent that matters are  
13 not common ground, a frame of reference that everyone, the parties,  
14 the Tribunal and witnesses, can use so that there are no misunderstandings  
15 or ships passing in the night.

16 Now this is obviously a case where the infringement that has been found by the  
17 CMA's decision is an infringement by effect and not by object of Article 101  
18 TFEU, or the Chapter I prohibition. For shorthand, I'm going to refer to these  
19 provisions as the cartel prohibitions, although I appreciate that this case is  
20 very far from a typical infringement of the cartel prohibition and the range of  
21 this provision is far wider than the name I've given it would suggest.

22 In very broad summary -- you'll know this better than I -- the CMA has determined  
23 that BGL through its insurance price comparison website,  
24 comparethemarket.com, has infringed the cartel prohibition by entering into  
25 agreements with insurers -- and I will call them subscribing insurers -- offering  
26 insurance through comparethemarket.com which contained a wide most

1 favoured nation clause. As I understand it, it seems to be common ground  
2 between the parties that a number of the conditions necessary to be  
3 established under the cartel prohibition are uncontroversially met.

4 It seems to me to be common ground that the agreements with insurers are  
5 agreements or decisions or concerted practices within the cartel prohibition,  
6 that the agreements, if I can use that shorthand, are between undertakings.  
7 The logical consequence of the CMA's decision just on that point is that the  
8 insurers subscribing to comparethemarket.com are themselves in breach of  
9 the cartel prohibition.

10 However, the CMA's decision is not addressed to those subscribing insurers, as I call  
11 them. The inference of this may be that the subscribing insurers were  
12 involuntary participants in the infringement and the relevance of this may be  
13 something -- I can say no more than that -- may be something that needs to  
14 be further developed when we come to "theory of harm". However, simply  
15 looking at the need for there to be agreements/decisions/concerted practices  
16 between undertakings, it appears to be common ground that that requirement  
17 is met.

18 Thirdly, it appears to be uncontroversial that the effect on trade, whether between  
19 Member States or within the United Kingdom, is satisfied.

20 As we see it, the real area of dispute is whether the agreements between BGL and  
21 the subscribing insurers have the effect of preventing, restricting or distorting  
22 competition. In order to avoid the repetitive mantra of "preventing, restricting  
23 or distorting competition", I'm simply going to refer to the distortion of  
24 competition. The decision does not allege that the use of wide most favoured  
25 nation clauses had as their object the distortion of competition. This is a case  
26 where it is said that the effect was one of distorting competition.

1 It would be helpful to have on the record confirmation that this is indeed the  
2 battleground between the parties. To be clear, I have no desire, none of us  
3 do, to shut out any defence that is being run. But if there is a point in issue  
4 going beyond the question of the existence of a distortion of competition,  
5 including, to be clear, questions of market definition, which I regard as part of  
6 this question, then we consider those points need to be clearly articulated by  
7 BGL in short order. I hope it is a simple confirmation, but if there are other  
8 points alive, then I want to know about them sooner rather than later.

9 I want to stress that this aim for clarity and common reference isn't intended in any  
10 way as a criticism of either the CMA or BGL. Rather, it's a reflection of the  
11 complexity of the appeal and the volume of material on both sides already  
12 produced and to be produced in the future.

13 Now assuming we're right about the ambit of the common ground between the  
14 parties and the areas of dispute, the question is how best to focus everyone's  
15 efforts on these controversial questions which relate to the existence of  
16 a distortion of competition within the sense of the cartel prohibition.

17 As to this, at the risk of being obvious, the critical and crucial question in order to  
18 ascertain whether there's a distortion of competition is the comparison  
19 between the conditions of competition with and without the conduct in  
20 question. In other words, we consider the actual as against the counterfactual  
21 case that would pertain if the infringing conduct were removed. I'm going to  
22 refer to these as "the actual case" and "the counterfactual case", again for  
23 shorthand.

24 The difference between the actual case and the counterfactual case lies, as it seems  
25 to us, in the use of wide most favoured nation clauses in agreements between  
26 BGL and its subscribing insurers. As a preliminary, it would be very helpful if

1 the parties could agree: first, the relevant examples of wide most favoured  
2 nation clauses as used in the agreements between BGL and the subscribing  
3 insurers, and the widest permissible, that is to say non-infringing, narrow most  
4 favoured nation clause that would appear in the counterfactual.

5 We consider it's important to get these terms identified when considering the  
6 counterfactual case now, sooner rather than later. I appreciate of course that  
7 examples of clauses are quoted in the decision, for example at  
8 paragraph 2.59. But I think it is very important that we know exactly what  
9 we're talking about. It may be of course that examples will not cut it and that  
10 we'll have to look at each and every clause in play between BGL and the  
11 subscribing insurers. If that's the case, then so be it, but I do want to know  
12 what we are talking about.

13 There is one point which I think is uncontroversial but I'm going to note it in case it's  
14 not. Our understanding is that narrow most favoured nation clauses existed  
15 as between other price comparison websites that competed with  
16 comparethemarket.com and insurers subscribing to those websites; therefore,  
17 the existence and effect of such clauses will be present in both the actual  
18 case and in the counterfactual case. If that's wrong, again I would like to  
19 know. It may be helpful to ensure that there's common ground as to the terms  
20 of these provisions also or, if there is a dispute, that it is articulated sooner  
21 rather than later.

22 Moving on to what I think is a genuine point of controversy is this: there is, I think,  
23 a dispute between the CMA and BGL as to the extent to which wide most  
24 favoured nation clauses were either present in the agreements between BGL  
25 and the subscribing insurers or, if present, the extent to which they were  
26 effectively enforced.

1 Now on this point, it seems to us that the point is both relevant and important  
2 because if it is said by BGL -- and let me stress I'm not trying to state BGL's  
3 case -- yes, these wide clauses were present in the agreements but no one  
4 took any notice of them, then that might be said to affect the actual case when  
5 contrasted with the counterfactual case and assessed. Of course, the CMA  
6 may say in response that when deciding whether the cartel prohibition is  
7 infringed, regard must be had to the effect on potential as well as actual  
8 competition and that we should proceed on the basis that even if the wide  
9 most favoured nation clauses were not enforced, they could have been. We  
10 have absolutely no desire to prejudge this issue, it would be wrong to so, but  
11 again we do want the battlelines to be clear.

12 In the first instance, we would like BGL to clarify its position as to the actual case  
13 against which the counterfactual is to be judged. For the moment, I'm going  
14 to assume that it is BGL's case that what matters is the extent to which wide  
15 most favoured nation clauses were complied with by subscribing insurers as  
16 opposed to what their theoretical contractual obligations might have been.

17 It may be that BGL could provide a series of factual propositions on this point so that  
18 the CMA can understand exactly where BGL is coming from, and any factual  
19 controversies addressed in evidence well before the hearing.

20 If we are right and this is indeed BGL's position, then it seems to us that the CMA's  
21 defence may have to differentiate between and deal with two actual cases  
22 against which the counterfactual case is considered. First, the CMA may say,  
23 as I mentioned, that what matters is the potentiality and not the actuality. If  
24 so, then the CMA will have to be very clear as to how the potentiality of  
25 a rigorous enforcement of wide most favoured nation clauses affects the  
26 actual case.

1 Secondly, the CMA may wish to say, either in the alternative or as its primary case,  
2 that there is an infringement of the cartel prohibition even on the basis of the  
3 minimal actual use of wide most favoured nation clauses. Or, of course, the  
4 CMA may say on that basis, the actuality, there's actually no infringement.

5 However, if it's the former case, that there is an infringement even on the basis of the  
6 actuality, it seems to us important that the parties engage well before the  
7 CMA's defence in identifying and resolving the factual disputes that may exist.  
8 It would, we consider, be entirely inappropriate for those factual disputes, as  
9 opposed to arguments about their relevance, to persist up to the final hearing  
10 of this appeal.

11 Now to be clear, we are not minded to make an order in this regard, but we do want  
12 to send out a clear signal because we think that unless this question is  
13 addressed early, an efficient and effective hearing is prejudiced. It may be  
14 that narrow and clearly defined factual issues in this area can be left for  
15 determination at the final hearing, but they will have to be narrow, they will  
16 have to be clearly identified, and evidence will have to be led to the extent that  
17 there is disagreement.

18 In any event, it seems to us that the appeal may very well turn on the existence of  
19 two, rather than one, actual cases. Provided the issues are clearly  
20 articulated, we see no problem with this. The counterfactual question, moving  
21 on to that, whatever the actual case, becomes "what would have happened if  
22 during the relevant period, narrow most favoured nation clauses had been  
23 used by BGL in their agreements with the subscribing insurers in place of the  
24 wide most favoured nation clauses actually used?", whatever "actually"  
25 means.

26 The starting point in relation to this question lies in identifying the relevant market or

1 markets. We are conscious that there is considerable dispute between the  
2 parties on this point, and again we have no desire to prejudge. We just wish  
3 to ensure that the Tribunal and the parties have a clear understanding of  
4 where the fault lines are.

5 With that end in mind, we consider that in the first instance, the CMA should  
6 articulate all of the markets that are potentially relevant. We say potentially  
7 relevant because we consider that there is benefit in the CMA defining  
8 markets, even if it is not contended that there is a distortion of competition on  
9 that market.

10 The reason we consider there to be such a benefit is because of the controversy  
11 regarding market definition that exists between the parties. We consider that  
12 the CMA should go first on this because it is the CMA's decision that is under  
13 appeal, and we consider that the CMA should do this in short order within the  
14 next week or so. To be clear, this effort at market definition will be followed --  
15 I'll be coming to this -- by a statement of the CMA's "theory of harm" in relation  
16 to each market. In other words, what we are asking the CMA to do is to distil  
17 section 5 of its decision, pages 57 to 157, into something more manageable.  
18 I want to be clear that nothing in these clarifications we're seeking is intended  
19 either to allow a party to expand its case, particularly the CMA, or to preclude  
20 a party from taking a point that has clearly been made.

21 In response to this list of potential markets, and again in short order, BGL needs to  
22 articulate the extent to which it disagrees with the CMA's formulation of the  
23 potentially relevant markets and state its own position as to the potentially  
24 relevant markets that it says exist. In short, we want the respective positions  
25 of the parties locked down well before the CMA's response to the notice of  
26 appeal.

1 We anticipate, but this is subject to argument, that all of the steps we are minded to  
2 order, with the exception of the factual disputes regarding the actual use of  
3 wide most favoured nation clauses, can be dealt with within three weeks of  
4 today; that is to say, by around 26 March 2021.

5 We would then be minded to give the CMA a further four weeks to 23 April 2021 to  
6 file its defence and evidence in support. I know that's a date which BGL want  
7 to push back on, but that is our present thinking.

8 At some time well before 23 April 2021, the aspirational date for the defence, we  
9 would want the CMA to file an indicative "theory of harm" pleading, setting out,  
10 without adducing evidence, the distortion of competition it alleges in relation to  
11 each market identified by each party, nil returns being required.

12 I say "indicative" because the CMA would be at liberty to adjust this pleading at any  
13 time up to the service of its defence, that is to say on 23 April 2021 if that is  
14 the date we order, so as to enable the CMA to take full account of the views of  
15 its experts or expert. But this approach would enable both the parties and  
16 the Tribunal to consider the extent to which market definition is significant to  
17 the outcome of this appeal.

18 There would be no need for BGL to respond to the articulation of the CMA's "theory  
19 of harm" until the service of its reply evidence and, as I've indicated, we are  
20 minded to permit such evidence.

21 I hope that these points will assist in crystallising the points of dispute and the issues  
22 between the parties without in any way precluding the parties from taking  
23 points that they want to take. We also hope that this approach will enable  
24 BGL's reply evidence to be served well before the long vacation in the course  
25 of late May or early June. That would leave open the potential for the appeal  
26 to be heard right at the beginning of the new term in October, or in November.

1 As I say, we'll have to come back to timing in a moment.

2 I've gone on far too long. I've a few final points to make to conclude those opening  
3 remarks. First, we consider that a further CMC should be in the diary for  
4 a date not earlier than three weeks from today and not later than five weeks  
5 from today. That is in order to deal with any issues arising out of the matters  
6 that I've already mentioned. We consider that there would be a yet further  
7 CMC in July in the run-up to the long vacation and that would be, in effect, the  
8 pre-trial review because we would expect by that date everything to have  
9 been served that is going to be served with the exception of written  
10 submissions.

11 We do not propose, and I don't think the parties are going to try to persuade us  
12 otherwise, to consider how evidence is to be received at the appeal hearing.  
13 That, it seems to us, is appropriately considered at a later CMC. It may be  
14 that the evidence could be given issue by issue or that "hot tubbing" would be  
15 appropriate. I confess that I have views on both those points, essentially  
16 sceptical ones, but they are obviously best discussed when the parties'  
17 positions are clearer, and it may be that the best time to debate this is actually  
18 at the CMC just before the long vacation.

19 It may be that that the July CMC could be combined with a "teach-in". Again it's  
20 something which has been raised and it is perhaps too early to say whether  
21 a "teach-in" would be necessary. But the operation of price comparison  
22 websites, particularly for insurance products, seems to us to be potentially  
23 quite complex and we would rather that provision was made for a "teach-in"  
24 that could, if necessary, be scrapped later on in the year. So what I would  
25 want the parties to think about is a two-day slot, ideally together but wouldn't  
26 necessarily have to be, in July at which we would discuss procedural

1 questions as at a PTR and have the “teach-in” over one or maybe two days.

2 Just on the question of “teach-in”, in some cases it's blindingly obvious what the  
3 subject matter of the “teach-in” will be. This is not such a case and what we  
4 would have in mind would be, well before the aspirational date of the  
5 “teach-in”, for us to articulate to the parties the questions or subject matter  
6 areas that we would want to be helped on and for the parties to either add to  
7 that list or even say, "Frankly you will understand this by the time we get to  
8 the hearing, you don't need to be taught about this".

9 So that, I suspect, is the way in which one could work out whether a “teach-in” is  
10 indeed necessary or not. If when trying to work out the questions we draw  
11 a blank, then that would strongly suggest that a “teach-in” is not necessary. If,  
12 on the other hand, we come up with ten pages of detailed questions on which  
13 we don't know the answer, then a “teach-in” is almost certainly indicated.

14 Finally, we want to say something about expert evidence. We can see, and it is  
15 understandable, that both sides will be relying extensively on expert  
16 economists. That's only to be expected and of course we welcome the  
17 assistance of expert economists in this case. But we do not want the  
18 expertise of the economists to be abused. So far as we know, none of the  
19 economists that the parties intend to call are experts in the field of insurance,  
20 or home insurance, or the rating of insurance business, or indeed the placing  
21 of insurance.

22 Now these insurance-specific fields may or may not be relevant, we can't say. But if  
23 they are relevant, we as a tribunal will take a singularly dim view of these  
24 matters being addressed by or through economists. This is a warning that  
25 has been sounded many times by this Tribunal under various different  
26 constitutions and I have particularly in mind the statement made by Mr Justice

1 Barling in the Tribunal in *Sainsbury's v Mastercard* [2016], CAT 11,  
2 paragraphs 36 and following. If and to the extent that there are questions of  
3 insurance or insurance marketing or insurance pricing arising in this case,  
4 then either these issues must be presented in the form of an agreed  
5 statement of facts or agreed data on which the economists can comment, or  
6 proper evidence on the point must be adduced from a witness of fact or  
7 an expert in the field.

8 I'm conscious that I've thrown a great deal at the parties in those opening remarks.

9 I have reduced my speaking note to writing which identifies in red highlight the  
10 orders we are provisionally minded to make, subject of course to the parties'  
11 submissions.

12 What I'm minded to do is to email the speaking note to the parties and their  
13 representatives and rise for, say, 20 minutes so that counsel can take  
14 instructions and the parties can respond after at least some consideration --  
15 the email can go now by the way.

16 I should also say that the Tribunal appreciates that it is far behind the parties in  
17 understanding the matters here in issue, so that is an invitation to the parties  
18 not to hesitate to push back as strongly as they consider advisable if we have  
19 the wrong end of the stick in these procedural directions. If they are not  
20 workable, then tell us. But that is the end of an overlong introduction.

21 Mr Beard, does 20 minutes fit the bill or would you want longer or less?

22 **MR BEARD:** I think it might, given we are all remote and therefore will have to be  
23 linking up with people around the place, if we could be given half an hour 'til  
24 3.00. I think that might be best.

25 **THE CHAIRMAN:** I'm more than happy. Mr Lask, is that enough for you, or would  
26 you want more?

1 **MR LASK:** I was going to suggest the same. Unless those assisting me tell me  
2 they need longer, I think half an hour should suffice.

3 **THE CHAIRMAN:** Look, we'll resume at half an hour. If you need more time then,  
4 then of course you'll have it because there's no point in dealing with these  
5 points without proper consideration. So what we will do, that is to say  
6 the Tribunal, we will leave this hearing and I think the other parties, or the  
7 parties and their representatives and advisers, can stay in the courtroom  
8 virtually as they wish. But we will now retire to our virtual retiring room. So  
9 we will resume at 3.00. Thank you all very much.

10 **MR BEARD:** Thank you.

11 **MR LASK:** Thank you sir.

12 **(2.35 pm)**

13 **(A short break)**

14 **(3.00 pm)**

15 **THE CHAIRMAN:** Good afternoon. Can you hear me now?

16 **MR BEARD:** I can, sir. Thank you very much.

17 **THE CHAIRMAN:** Excellent, thank you very much. In that case, I think we are good  
18 to go. **(Pause)**

19 Yes, Mr Beard, thank you very much.

20 **Submissions by MR BEARD**

21 **MR BEARD:** Sir, members of the Tribunal, I appear with Ms Berridge today and  
22 Mr Lask appears for Mr Armitage I believe.

23 In relation to the agenda that you kindly provided to us, I'm going to leave the  
24 majority of it and just focus on the issues which your very helpful speaking  
25 note has drawn attention to, but obviously I think we were quite acutely aware  
26 would probably be the centre of discussion today. I thought the way I would

1 deal with it, if I may, is zip through the various red points in your notes and in  
2 doing so then pick up issues in relation to timing and evidence and the  
3 remainder of the procedures because I think they are all probably somewhat  
4 interlinked, rather than trying to separate stuff out. Then Mr Lask obviously  
5 can comment as he sees fit, and then perhaps come back to do a tidy up on  
6 remaining issues, if that pleases the Tribunal.

7 **THE CHAIRMAN:** That seems very sensible, Mr Beard, because you are right,  
8 these things are interconnected and it wouldn't make sense to do them point  
9 by point. Sometimes it's sensible to hear from both parties on one point  
10 before moving on. Your course commends itself.

11 **MR BEARD:** Thank you very much, sir.

12 If I may, I am just going to -- we're enormously grateful for the outline and indeed the  
13 preparation of work that's gone in that you were able to provide it to us so we  
14 could take instructions. But with that in mind, I'll then just work through the  
15 points, sir, that you highlighted.

16 Paragraph 8 and paragraph 10 of the speaking note, you highlighted the question of  
17 whether or not there are actually contentions about whether or not what we're  
18 talking about are agreements or concerted practices within the scope of the  
19 prohibition. The answer is no, there isn't an issue in relation to that.

20 Are there agreements between undertakings? Well, whether or not they are, strictly  
21 speaking, agreements or concerted practices, they're certainly between  
22 undertakings. As to effect on trade, I don't think there's going to be any issue  
23 there. I think theoretically some issues arise about trade between Member  
24 States, but let's park those because they are entirely minor in all of this. That  
25 then takes us to a simple proposition which is: is this case about distortion of  
26 competition, as you put it in your shorthand, and the answer is yes.

1 We will come back and formally confirm all of that, but I think I can deal with that one  
2 relatively swiftly.

3 Obviously that is only the start of the enquiry in relation to these matters and in  
4 relation to a case which, as you emphasise, is about effects, not object. So if  
5 we then move on to 13(2):

6 "As a preliminary it would be very helpful if the parties could agree examples of wide  
7 most favoured nation status clauses and the widest permissible narrow most  
8 favoured nation status clause."

9 We are very happy to engage in that exercise; do it by way of example or discuss  
10 with the CMA in relation to that.

11 Obviously in relation to 2(b), there may be issues that arise as to how it is the CMA  
12 makes assertions about what is or isn't permissible. This is going to -- I'm  
13 going to highlight now a point that will become boring I fear in my  
14 submissions. But in dealing with any of these matters and their submissions  
15 subsequently, and indeed any other evidence, the key issue here is ensuring  
16 that the CMA indicates where in its decision it has dealt with these matters.  
17 So we think that whenever the CMA is providing any of this material, it should  
18 be identified by reference to parts of its decision on why it is making these  
19 assertions.

20 The reason that matters is because it may well be that certain of these points aren't  
21 covered in the decision and that might itself be germane. But I don't want to  
22 cut across the project that's set us in 13(2) and we are entirely content to  
23 engage with the CMA on that project.

24 **THE CHAIRMAN:** Mr Beard, you've made a very important point and it does bear  
25 repetition. I see it in, for instance, what you say in your skeleton regarding the  
26 evidence of Professor Baker, which I'm sure we'll be coming to. But to be

1 clear, I think we all know, and I'm including in the "all" the CMA, that this is  
2 very much a question of the CMA defending a decision it has made and that  
3 we are not in the business of working out whether there is another different  
4 case that could have been made but hasn't.

5 So you can certainly take it that we are very conscious of that and indeed I'm  
6 absolutely sure that the CMA team is itself very conscious of that because it  
7 is, frankly, the starting point for this kind of appeal. But it does bear repetition  
8 and I think your marker that it would be helpful to tie matters back to the  
9 decision is a good form of best practice because frankly it's a long decision  
10 and it will simply help us to work out what the CMA is thinking about when  
11 they make a certain point. But I don't think I'll be minded to make an order  
12 that these materials be part(?) of it, but I think as a marker, the point is well  
13 made and I endorse it.

14 **MR BEARD:** I'm grateful, sir. I wasn't pressing for an order. I'm trying to avoid  
15 getting into too much formality about these things, but I wanted to send  
16 a signal. So you hear it and the CMA do too. So thank you, sir.

17 If we move on to 3, it's the point about other price comparison websites and the use  
18 of narrow MFNs by them. We will confirm the position, but yes, they are  
19 subject to these provisions. But we'll obviously liaise with the CMA in relation  
20 to their position on that so you have the position of both sides.

21 Then when we move on to 13(4). There is obviously a discussion in 13(4)(a) about  
22 the possibility of two -- it's actual versus counterfactual, but within the actual  
23 it's actual or potential competition.

24 **THE CHAIRMAN:** Yes.

25 **MR BEARD:** Now this is going to be an issue of some controversy both as to the  
26 extent to which there is a proper case made on either or both of those bases

1 in the decision, and I think as is probably plain from our notice of appeal, the  
2 extent to which that is permissible under law, having regard to *Krka* and so  
3 on, or indeed adequate in circumstances where of course we are talking  
4 about a situation where these clauses came to an end in 2017 and there's a  
5 natural experiment. Now obviously that is a debate for another day, but I think  
6 it is worth putting down a marker because it links back to those points about  
7 how the decision deals with these things.

8 But in relation to the red, in relation to 4(b), you would like BGL to clarify its position  
9 as the actual case against which the counterfactual is to be judged. We are  
10 certainly happy to do that and the way we put it in the notice of appeal is we  
11 look at the actual cases, asking ourselves how the wide MFNs affected the  
12 behaviour of the insurers and it's not simply a matter of the formal terms of the  
13 provisions because we are dealing with an effects case. So we'll certainly set  
14 that out and that's fine.

15 As to a series of factual propositions on this point so the CMA can understand  
16 exactly where BGL's coming from, obviously we'll have that in mind and do  
17 our best in setting out a summary of our position in relation to it. I think at this  
18 stage, that's probably as far as I can go, but we're certainly not cavilling at the  
19 idea of fulfilling that role you have for us under 4(b)(i).

20 **THE CHAIRMAN:** No, indeed, thank you. This was the one bit of red I didn't put  
21 a date by because I'm very conscious that it's something which is actually  
22 very difficult to pin down. What I have in mind as the sort of disaster scenario  
23 I want to avoid is for there to be at the appeal hearing itself an absence of  
24 a clear articulation of what both sides are saying was the actual case.

25 **MR BEARD:** Yes.

26 **THE CHAIRMAN:** That's the concern I have. But I completely accept that what I'm

1 asking the parties to do in this regard is not something that could be done in  
2 a week or two, it's something which just has to inform the way in which the  
3 pleadings and the evidence supporting the pleadings develops. So it's rather  
4 like your first point, it's a marker that I'm putting down as to how I want this  
5 dealt with.

6 **MR BEARD:** Yes. We of course completely see, sir, your point in relation to this.

7 And we will do our best so that it can be fed into what the CMA are dealing  
8 with in their defence. I should say it's actually in relation to (iv) that we had  
9 more difficulty, and I think this perhaps overlaps with the point you were just  
10 raising because you are suggesting that well before the CMA's defence, you  
11 want us to identify what disputes exist between us.

12 Now we understand the thinking behind that but in many ways, the defence is the  
13 crystallisation of what issues do exist between us because obviously we've  
14 put forward our notice of appeal and said, "Look this is what we're not happy  
15 about, this is what we think you've got wrong, this is where we take issue with  
16 things specifically which we say really affects the way your decision was  
17 taken".

18 We anticipate that the CMA's defence will come back and say, "We don't agree with  
19 you on that" -- I mean, it would be delightful if they came back and said "No,  
20 no, no, you're absolutely right", that would foreshorten all of these matters, but  
21 I'm not so naive as to think that's where we stand at the moment.

22 But the point I make is that it's actually going to be extremely difficult to engage in  
23 this particular exercise prior to the defence because if you think about it --  
24 obviously in this Tribunal, pleadings are done on a rather fuller basis. But if  
25 you were to think of this as being the claim and defence, in particular the  
26 claim and defence in ordinary commercial proceedings, until you get that

1 defence, you don't know the issues that are crystallised between the parties.

2 So I do wonder whether -- you were asking about practicability. I have a real  
3 concern that we could spend an awful lot of time, whilst the CMA are actually  
4 trying to formulate their defence, arguing about what the issues are between  
5 us, and I do wonder whether or not we are going to achieve much by that  
6 means.

7 On the other hand, getting the defence, and part of the reason why we wanted the  
8 defence sooner rather than later, but I'll come back to that, was that we do  
9 want to work out what their case is and how we engage with it. On the other  
10 hand, I think that is the document, the forum in which it should be done and in  
11 those circumstances, it would seem to us rather than having this sort of  
12 engagement, we should actually see the defence doing it.

13 But if in the light of that defence there really are outstanding ambiguities about the  
14 respective positions of the parties in relation to the actual case against which  
15 the counterfactual's to be measured, then I think one is in a much clearer  
16 position to require the parties to do things and engage and perhaps provide  
17 relevant lists of differences, and so on. But I just wonder whether it's slightly  
18 premature, given that we don't have the defence of the CMA in that regard.  
19 That will be my observation on 4 (iv).

20 **THE CHAIRMAN:** Yes, I understand what your issue is with this. The analogy with  
21 civil process isn't complete, of course, because in an odd way your document,  
22 although the appeal, is really a response to the decision which sets the ball  
23 rolling. But of course I take your point.

24 What I had in mind, it may be that one could phrase what I'm looking at differently, is  
25 if there is a point which the CMA is working away in its defence and thinks  
26 actually, we're not quite sure what the appeal is saying on this point -- and it

1 will save us a great deal of work if we had a degree of clarity -- then what  
2 I would want is I would want that to be raised between the parties before the  
3 defence comes so that the defence can be better focused.

4 So again, this is one of the provisions that one can't make an order in relation to. But  
5 it does seem to me that if I put down the marker that it would assist us if there  
6 was, if necessary -- I mean the CMA may say it's not, but -- a constructive  
7 engagement to work out what each party is saying even though the defence  
8 hasn't been served so that the defence can be better focused, that would,  
9 I think, be time well spent. But I think that is as far as I would want to go.

10 **MR BEARD:** Well, look, if -- obviously the team and those involved in the case on  
11 the BGL side are on this hearing and we all hear your statement, sir, in  
12 relation to that. The CMA can be assured that if there are concerns or  
13 ambiguities they want to raise with us, we will stand ready to try to answer  
14 those as quickly as we can in order to assist them in the process of ensuring  
15 that their defence can be efficiently prepared. As I say, that doesn't mean we  
16 won't engage with (b)(i), we will do that in addition, but I think that might be  
17 the practical position which means neither side is wasting inordinate amounts  
18 of time, but we are hopefully capturing a solution to the concern, sir, that you  
19 are raising in relation to these matters.

20 **THE CHAIRMAN:** That's helpful. The last thing I want is a cottage industry growing  
21 up of informal requests for further information which simply result in the  
22 cutting down of more trees than one wants. So I think the point is on the  
23 record and we'll see what Mr Lask has to say. But for my part, indeed our  
24 part, I think that is an approach we are content with.

25 **MR BEARD:** I'm grateful.

26 That then takes me down to 7. This is really a matter for the CMA articulating the

1 markets that are potentially relevant. Again, I put down the marker that has to  
2 be by reference to what's in the decision, but I leave that to the CMA. Then 8  
3 is our responding to that, and of course we will respond and be happy to  
4 respond promptly in relation to those issues.

5 Then 13(11), again a matter for the CMA. Indicative "theory of harm", pleading, well,  
6 I leave that up to Mr Lask to make submissions in relation to. If it's feasible,  
7 then that would be excellent. If it's not going to be feasible, if Mr Lask says  
8 this creates difficulty for him, then obviously this ends up being a very clear  
9 marker as to what needs to be set out in his defence when it comes. But  
10 I leave that to Mr Lask and how he wishes to deal with those matters. So in  
11 relation to BGL, we are happy to deal with matters in relation to 8.

12 That I think then takes us to -- I think that has dealt with all of the specific points, sir,  
13 that you very helpfully raise in your speaking note, so we are very happy with  
14 that process. There aren't specific times attached to anything except perhaps  
15 the suggestion in 7 that the CMA should articulate the relevant markets within  
16 the next week which are potentially affected. We are very happy to respond  
17 to that promptly thereafter. So if you want indicative timings, I'm sure we can  
18 provide that.

19 But that rather takes me to the other issues here about timing more generally --

20 **THE CHAIRMAN:** Yes.

21 **MR BEARD:** -- both in relation to the defence and also of the trial itself. I'm not  
22 going to repeat the points that we've made in our submissions, and you'll have  
23 seen the concerns we've expressed, and I'm grateful, sir, for your  
24 acknowledgement of those issues, I'm not going to press them further.  
25 I mean, our position was, you know, we received an 800-page document  
26 which was a huge task for us to deal with over Christmas and we dealt with it

1 with a two-week extension, and frankly having the CMA turn up and say, "We  
2 want to double the statutory period for the service of a defence", seems to us  
3 unreasonable, and these points they made about the shock of the new -- in  
4 relation to the material that had been put forward were very significantly  
5 overstated when we were basing our analysis on the CMA's own data, save  
6 for some very limited material in relation to commission data in 2019. And all  
7 of the exercises undertaken were either built on those that had been put  
8 forward or were relatively simple.

9 But I do wonder whether in the spirit of trying to make these things work rather  
10 better, we need to take a slight step back in relation to that. Although  
11 submissions are very well and good, but if we are going to have this process  
12 of engagement which, sir, you've adverted to in the various points we have  
13 just been traversing in your speaking note, I can see that that is going to add  
14 to the time that the CMA needs. But I'm also conscious of the point that  
15 the Tribunal's emphasised of wanting to get this done this year in October or  
16 November, which, as I say and we've indicated, we will ensure we're able to  
17 do.

18 But as far as I understand it, the objection on the CMA side is that their counsel,  
19 Ms Demetriou QC, wouldn't be available during the period. Obviously that is  
20 not ideal for them and I'm not suggesting anyone can replace Ms Demetriou in  
21 the way that she would deal with matters in the sense of replicating how she  
22 would deal with things. But I think there is an interest in making sure that this  
23 hearing is dealt with relatively promptly and we would be moving to a period of  
24 over a year from the decision before a hearing if we move it into 2022.

25 Obviously the CMA do have other standing counsel, such as Mr Lask and others  
26 who may be able to assist with this, as well as obviously the pool of fine

1           barristers that are out there.

2 If --

3 **THE CHAIRMAN:** Mr Lask -- sorry Mr Beard, just one moment.

4 Mr Lask, you have your hand up, which ... and you are now breaking up.

5 **MR LASK:** I haven't been able to hear Daniel Beard very well for the last two

6           minutes.

7 **THE CHAIRMAN:** I'm so sorry.

8 **MR LASK:** I'm not sure if I'm also breaking up. It was just about the time he was

9           starting to take a step back and perhaps (distorted audio) but I missed that.

10 **MR BEARD:** I am so sorry.

11 **THE CHAIRMAN:** No, not at all. Mr Beard, you were coming through loud and clear

12           at this end. Mr Lask, your connection is quite poor. So what I'm going to ask

13           Mr Beard is to use his time machine and go back two minutes and I think it's

14           really the point that you have a great deal of interest in, which is the

15           scheduling of the time for the hearing.

16 **MR BEARD:** Yes.

17 **THE CHAIRMAN:** And I think it's probably important although I heard your

18           submissions, that you repeat them.

19 **MR BEARD:** Yes.

20 **MR LASK:** Sir, before Mr Beard does that, I'm so sorry, may I suggest that given it

21           seems like it's a connection problem at my end ... and rejoin.

22 **THE CHAIRMAN:** Yes, I think that is a very good idea, Mr Lask.

23 **MR BEARD:** I'll pause.

24 **THE CHAIRMAN:** We'll wait here, Mr Lask. Feel free to leave and rejoin and

25           hopefully you'll have a better connection. **(Pause)**

26 Mr Lask, welcome back. Do you want to say a few words so we see the strength of

1 connection?

2 **MR LASK:** Is that connection any better?

3 **THE CHAIRMAN:** No. I'm afraid, Mr Lask, it is exceedingly poor. I'm not sure that

4 I would be able to follow your submissions if the quality remains at this level.

5 And equally, it seems clear you are not hearing others.

6 **MR LASK:** What I might suggest ... (distorted audio) the Tribunal.

7 **THE CHAIRMAN:** I'm sorry, Mr Lask, you will have to repeat that. I didn't ...

8 **(Pause)**

9 What we're going to do is we're going to move remotely to our retiring room whilst

10 this matter is being dealt with. But before we do that, I'm assuming that

11 Mr Lask doesn't have multiple internet connections from where he is

12 speaking. I'm not sure what the solution to that is, but I certainly don't want to

13 lose this hearing, that would be remarkably unhelpful. But equally, I obviously

14 have to hear from Mr Lask.

15 **MR BEARD:** In the meantime, sir, I am actually in chambers, as is Ms Berridge. If

16 there is a particular problem with Mr Lask's laptop or desktop, Ms Berridge

17 has offered to see whether or not his using her laptop might work. He would

18 in due course become Ms Berridge as the submitted screen, but that might

19 work because I think her connection seemed to be working earlier. So we'll

20 get in contact with him if that's of assistance.

21 **THE CHAIRMAN:** That's extremely helpful, Mr Beard -- ah, Mr Lask, it may be that

22 matters are better. Do you want to say something so that we can see how --

23 **MR LASK:** Yes. Apologies for the disruption, sir. I'm now in Mr Armitage's room

24 and I'm hoping this is better.

25 **THE CHAIRMAN:** It certainly does seem to be, in which case we will resume. But

26 I would be very grateful if all those participating would keep an eye on

1 audibility and raise their hand if there is a problem so that I can deal with it  
2 further. But pro tem, it looks like the problem has resolved itself so Mr Beard  
3 you can go back to Ms Demetriou's availability.

4 **MR BEARD:** All I was saying, just for Mr Lask's benefit because I'm not quite sure  
5 where it ended, was that we did have real concerns about the idea of the  
6 period for the defence being doubled beyond the statutory scheme, six weeks.  
7 We don't see the justification, particularly given what was served on us and  
8 the time we had to deal with it over Christmas.

9 However, we are conscious of two matters. First of all, the matters that have been  
10 put forward by the Tribunal through the Chairman, that obviously will require  
11 some further consideration to feed into the defence process.

12 Second of all, we recognise the concern expressed by the Tribunal about moving  
13 this hearing out into 2022 which would mean that the matter was only being  
14 heard over a year after the decision was produced which is, I think we all  
15 agree, unsatisfactory.

16 We recognise that the real concern on the part of the CMA is that their chosen  
17 leading counsel wouldn't be available for the October/November hearing and I  
18 was making it clear that we recognise that always does create difficulties for  
19 a party in these circumstances. However, I was also noting that the CMA  
20 does have other standing counsel and can call on other members of the bar.

21 But if it was to be of assistance in ensuring that the CMA was able to instruct  
22 alternative leading counsel and be able to then attend a trial in October or  
23 November of this year, and that having a longer period for the defence would  
24 enable that or facilitate that on the part of the CMA, then that in conjunction  
25 with the proposals put forward by the Tribunal would seem to us to be  
26 a sensible course.

1 Obviously I'm sure the CMA would not be delighted, but that may be the  
2 proportionate and sensible course in all the circumstances: that the CMA have  
3 slightly longer to prepare their defence, they will be able to deal with the  
4 matters set out by the Tribunal and will be able to involve leading counsel at  
5 least in the latter stages of preparation of that defence.

6 I can come back to issues to do with the timing in relation to our reply and in relation  
7 to the two CMCs that are envisaged. We certainly have no issue with the  
8 need and appropriateness for a CMC in July which can stand as a pre-trial  
9 review, effectively, if we are going to be heading to a trial in October or  
10 November. That makes sense to us. In relation to the precise timings of  
11 an earlier CMC, we wonder whether or not that might more sensibly be set  
12 shortly after the defence was served at least in order that those matters that  
13 might arise in consequence of the defence and interactions to that date could  
14 be digested at the CMC rather than necessarily having it before the defence is  
15 lodged in circumstances where the CMA will no doubt be immersed in  
16 preparation and will be trying to finalise its position and in those  
17 circumstances it might be rather more difficult to get specific and constructive  
18 outcomes from that earlier CMC. But that I think is a small matter in relation  
19 to those issues.

20 There are one or two other points that I'll pick up subsequently, including matters to  
21 do with potentially Professor Baker, although we've made our points in  
22 relation to that. But those I think are our submissions relating to the very  
23 helpful observations made by the Tribunal to date, the position in relation to  
24 timing of the defence and the situation in relation to the trial, where we would  
25 emphasise that we do want to have this trial dealt with before the end of this  
26 year. We recognise that it's unfortunate it can't be dealt with in late

1 November/early December, but that may be unfortunate but unavoidable and  
2 we are looking to deal with that as best we can.

3 So unless I can assist the Tribunal further, those are my submissions on the very  
4 helpful opening and on those broad timing issues.

5 **THE CHAIRMAN:** Thank you very much, Mr Beard. I don't have any further points  
6 for you, but I will just check that my fellow Tribunal members themselves don't  
7 have anything they want to raise.

8 **PROFESSOR ULPH:** Not from me.

9 **MS LUCAS:** Not from me.

10 **THE CHAIRMAN:** Thank you very much, Mr Beard. Mr Lask, masquerading as  
11 Mr Armitage, you are welcome to start.

12 **Submissions by MR LASK**

13 **MR LASK:** What I propose to do is take matters in the same order Mr Beard,  
14 starting with the very helpful speaking note you provided earlier on in the  
15 hearing. I'll focus as Mr Beard has done on the passages highlighted in red,  
16 which are the action points, and the first comes at paragraph 10. We agree  
17 with the Tribunal and with BGL that this is what the case is about, namely  
18 a distortion of competition and associated issues concerning market definition.  
19 I would add for completeness that there is of course also an appeal against  
20 penalty involving not just the level of the penalty, but whether the statutory  
21 test of intention or negligence has been met.

22 **THE CHAIRMAN:** Indeed, you are absolutely right.

23 **MR LASK:** That takes me on next to paragraph 13(2) which concerns examples of  
24 wide MFNs and narrow MFNs. Like BGL, we are happy to engage on that  
25 and provide relevant examples to the Tribunal. One point of clarification  
26 I would make in relation to paragraph 13(2)(b), where the Tribunal refers to

1 the widest permissible, i.e. non-infringing narrow MFN, is that the CMA didn't  
2 find that narrow MFNs were necessarily permissible or lawful. It didn't  
3 address that issue and so it wouldn't want it to be misunderstood in any  
4 further pleading or document of another kind that it put in that it was somehow  
5 accepting that narrow MFNs were necessarily lawful. It's just not something  
6 it's made a decision on.

7 **THE CHAIRMAN:** That's entirely fair enough and I don't think there is any magic in  
8 the language "non-infringing", and certainly all we're doing is debating what  
9 would be slotted into the counterfactual. And by definition of course, it's got to  
10 be a proper clause that is slotted in and therefore not an infringing one. But  
11 obviously we entirely accept that in framing the counterfactual, the CMA is in  
12 no way committing itself to what might be an infringement in other  
13 circumstances regarding such a clause. And that, I think -- I won't say goes  
14 without saying because I think it's important that it be said, but that I think is  
15 now on the record and we obviously will ensure that the CMA is not even  
16 impliedly forced down a route where it is endorsing as legitimate something  
17 on which it is not making a decision. So I hope that's clear and helpful.

18 **MR LASK:** It is, sir, I'm very grateful.

19 A related point Mr Beard raised in relation to -- well, firstly in relation to this  
20 paragraph, was the suggestion that the CMA tie any statements made in  
21 documents submitted in accordance with these proposals to the relevant parts  
22 of the decision. The CMA's very happy to do that. The CMA of course  
23 understands the importance of defending the decision made and it has no  
24 intention of constructing a new case. It seems that BGL's concern about this  
25 arises from the CMA's decision to instruct Professor Baker to give evidence in  
26 support of its defence, Professor Baker being an independent expert. But the

1 purpose of having Professor Baker give evidence is to respond to the expert  
2 evidence adduced by BGL and there's no intention to construct a new case  
3 using the language that BGL has used in its skeleton.

4 **THE CHAIRMAN:** That's very helpful, Mr Lask. I'll obviously hear Mr Beard further  
5 on this if necessary. But it may be that I can give a provisional indication  
6 about our thinking regarding Professor Baker. As you've just said, and  
7 obviously you know, you can't expand your case, you have to justify it. I'm  
8 not, I think, minded to require you to explain beyond what you've already said  
9 why Professor Baker is needed. It seems to me that if -- I'm sure it won't  
10 happen -- but if Professor Baker expands the CMA's case, we all know what's  
11 going to happen at the CMC which if it's held after your defence is served,  
12 Mr Beard will be articulating any concerns he has with his usual clarity.

13 And we all know that if you do seek to expand your case, there's going to be a gap in  
14 the evidence that you serve because it's going to be removed from the  
15 hearing material. But that, as it seems to me, is a matter that we shouldn't  
16 address in the abstract, we should address it if -- as I said, I very much hope it  
17 doesn't arise -- but it seems to me that we shouldn't be debating now what  
18 Professor Baker might or might not say, we should if we have to, debate it  
19 when he has said it and if objection is taken. So I raise that just as a guide to  
20 you, but obviously if Mr Beard wants to push back, I'll hear from him and then  
21 hear from you in reply.

22 **MR LASK:** Sir, before -- I'm not sure if the intention was that Mr Beard have  
23 an opportunity to push back now or --

24 **THE CHAIRMAN:** No, in a bit later. I don't want to interrupt your submissions,  
25 Mr Lask.

26 **MR LASK:** I'm very grateful for that indication. And respectfully we would agree that

1 the time to raise any objection in relation to Professor Baker's evidence is  
2 once he's given it.

3 May I, however, lay down a marker of my own, which is to say that if Professor Baker  
4 is responding to new analyses relied on by BGL's experts and those analyses,  
5 being analyses the CMA didn't carry out in the decision, we would not accept  
6 that in responding to those new analyses he is elaborating on the decision or  
7 constructing a new case. That sort of approach to Professor Baker's evidence  
8 would, we submit, be purely responsive and would be entirely permissible.  
9 But I respectfully agree it's not helpful to debate the issue in abstract.

10 **THE CHAIRMAN:** Thank you. And again, I don't think there's any controversy  
11 about the principle you've just articulated, namely that the CMA is obviously  
12 entitled to address points taken in the appeal in order to deflect or respond to  
13 an attack made, that I think is trite. But whether something is genuinely  
14 responsive or an expansion of the case is something which one really can  
15 only test in the concrete case, and that I think is what we are minded to do.  
16 But we will see what Mr Beard has to say about that in due course.

17 **MR LASK:** Indeed, sir, thank you.

18 Prior to that diversion, I was indicating the CMA would be happy to tie any  
19 statements made in accordance with the Tribunal's proposals to relevant parts  
20 of the decision. We would also ask that BGL does the same and ties any  
21 statements it makes to relevant parts of the notice of appeal because we  
22 would be concerned, in the same way that BGL has expressed concern, if this  
23 exercise happened to lead even if only inadvertently to the expansion of the  
24 grounds of appeal. So we would ask that BGL adopt the same approach as  
25 the CMA in that regard.

26 In relation to paragraph 13(3), again we are happy to liaise with BGL on that and we

1 agree that in fact other PCWs do use narrow MFNs. And then  
2 paragraph 13(4), and again this was another issue in relation to which  
3 Mr Beard raised a concern about the scope of the decision. There is of  
4 course a difference, as I'm sure everyone understands, between an effect on  
5 potential competition and a likely effect on actual competition. The decision  
6 does include the latter, and Mr Beard mentioned the case of *Krka* as one of  
7 the reasons why BGL disagrees with that. So certainly insofar as the CMA  
8 advances a case based on the likely effects on existing competition as  
9 opposed to potential competition, that would not, in my submission, be going  
10 beyond the four corners of the decision.

11 We note that BGL will produce a note on the factual propositions in accordance with  
12 paragraph 4(b)(i) and we certainly hear what the Tribunal says in relation to  
13 4(b)(iv) in that it wants a constructive engagement between the parties if  
14 possible in advance of the defence. We hear that and we will of course  
15 engage if in the course of preparing the defence we identify ambiguities  
16 arising from the appeal that we think need to be clarified, and we hear what  
17 BGL have said about being willing to engage and we are grateful for that  
18 indication.

19 I think the next action points comes in paragraph 13(7), and this is the relevant  
20 markets exercise. In principle, the CMA is happy to comply with the Tribunal's  
21 proposal. I would however say that in section 5 of the decision, the CMA has  
22 only identified one relevant market, which is the market for the provision of  
23 PCW services in relation to home insurance, albeit it's a two-sided market. So  
24 we did wonder whether what triggered the Tribunal's request in this regard  
25 was the fact that the effects on competition found by the CMA include not only  
26 an effect on competition between PCWs, but an effect on competition

1 between the insurers as well.

2 **THE CHAIRMAN:** Well, clearly you are right that the range of effects in this situation  
3 might well be wider than simply the defined market. I think one of the reasons  
4 I was keen to have a list of, as it were, potentially relevant markets is because  
5 it actually assists everyone, including particularly the experts, when they're  
6 trying to distil the effects, as you just said. So for example, if you actually do  
7 define the various different markets that are in play, you can then use that as  
8 a shorthand to describe the effects. So it seems to us helpful to have it  
9 articulated in the first instance by the CMA, also of course to have calibrated  
10 the precise extent of the disagreement with regard to the scope of market.  
11 And it seemed to us that the best way of doing that was to have, as it were,  
12 sort of side by side a list of markets, which seemed logical for you to go first  
13 on, but then for Mr Beard to, as it were, set out precisely where his clients  
14 disagreed with that.

15 So we entirely take the point that you are making, but I don't think it diminishes the  
16 value of the exercise that we're proposing.

17 **MR LASK:** Thank you, sir. Would I be right in thinking then that the CMA's list of  
18 relevant markets in terms of what the Tribunal is envisaging would be a very  
19 short one because it would simply be the relevant market as defined in  
20 section 5?

21 **THE CHAIRMAN:** No, that's not really what I was saying. I quite understand that  
22 you are in section 5 articulating and identifying only one market. But you are  
23 not saying that there aren't other markets in play, what you are saying is  
24 they're not relevant for the purposes of your decision. What I'm suggesting is  
25 that when one comes to discuss effects, it is probably sensible to have a list of  
26 all of the markets that might be affected so that one can simply say, "When

1 I'm talking about this market, this is exactly what I mean". When I did  
2 *Mastercard*, I found it hugely helpful to list the three markets that we found to  
3 exist there.

4 Now that was a case where all three markets were actually relevant in your sense,  
5 but we would have still done that even if there was only one relevant market,  
6 just to ensure that we had explained exactly how what is not a straightforward  
7 or easy to understand market in the generic sense operates. That's where I'm  
8 getting at. So I'm looking for a longer list than you would produce if you were  
9 simply articulating the market that is, as it were, relevant to the decision. And  
10 that's why I think I've underlined the word "potentially" in subparagraph (7).

11 **MR LASK:** Yes.

12 **THE CHAIRMAN:** I hope that's clear.

13 **MR LASK:** I think it is. We've certainly heard those comments and they're very  
14 helpful and we will take that away and produce that list in accordance with  
15 the Tribunal's timing.

16 That leads me on to the subsequent steps in this exercise, and in particular the one  
17 at subparagraph (11), which requires the CMA to file an indicative "theory of  
18 harm" pleading setting out the distortion of competition in relation to each  
19 market identified by each party.

20 I think we would find it helpful to have a little clarification on that because of course if,  
21 as one might expect, BGL were to respond to the CMA's list with its list of  
22 alternative relevant markets which are affected in the notice of appeal, it might  
23 be rather difficult for the CMA to articulate a "theory of harm" in relation to  
24 those alternative markets because it has rejected the proposition that they are  
25 the relevant markets in the decision and therefore not found theories of harm  
26 in relation to those markets.

1 **THE CHAIRMAN:** Yes. So what you are saying is unless we're very careful, you  
2 are going to be sucked into precisely what Mr Beard doesn't want to have  
3 happen, which is expand your decision.

4 **MR LASK:** Exactly, sir.

5 **THE CHAIRMAN:** Does that mean that this proposition is correct: that if you are  
6 wrong on market definition, the decision must fall?

7 **MR LASK:** I hesitate before accepting that proposition certainly without consulting  
8 those instructing me, who have a much greater and deeper familiarity with the  
9 decision. But it's certainly right to say that, as I've emphasised, the CMA only  
10 found one relevant market and didn't, as far as I'm aware, engage in the  
11 decision with a consideration of what their decision or what their findings  
12 might be if an alternative market definition were adopted.

13 **THE CHAIRMAN:** Yes. I have no desire to tie you down because the question  
14 I asked you was a hard one. I mean, it seems to me logically to follow from  
15 what you have said about market definition and what you don't want to say  
16 about otherly defined markets. Perhaps we can leave it like this: you must,  
17 I think, only be required to articulate a "theory of harm" where you have, as it  
18 were, properly alleged it and if you don't consider that it has been alleged in  
19 the decision in relation to, let us say, a market as defined by Mr Beard's  
20 clients, then I think what you should say there is not "no harm", but "no harm  
21 alleged".

22 **MR LASK:** Yes, sir, I understand. That's very clear, thank you.

23 Sir, I think that deals with all of the action points highlighted in red in your speaking  
24 note.

25 **THE CHAIRMAN:** Yes, thank you.

26 **MR LASK:** If I may turn next to two related issues, first being the time of the

1 defence and the second being the timing of the trial.

2 **THE CHAIRMAN:** Yes.

3 **MR LASK:** You of course have an application for an extension of time in relation to  
4 the defence. It may be that I don't need to make that application in full, given  
5 the indication the Tribunal's given and the helpful indications from Mr Beard.  
6 But may I just summarise the four key building blocks for the application, just  
7 to be clear where we're coming from.

8 **THE CHAIRMAN:** Yes, of course Mr Lask, though let me give you an indication that  
9 we are -- never say never, but we are minded to order 23 April 2021. I think  
10 Mr Beard's position was that his clients could live with that and his position  
11 was that if it assisted you to instruct new leading counsel in order for to the  
12 trial to take place at the beginning of November rather than at the end, then  
13 his endorsement of that date was verging on the even enthusiastic, but  
14 maybe -- he's raised his eyebrows at that, I can -- but I think there was  
15 a linkage to timing of the defence and the timing of the trial. So I think the  
16 point you really do need to assist us on is the timing of the trial. By all means  
17 explain why you need the further time, but we have read your skeleton and we  
18 are sympathetic to the points you make there.

19 What I think is the issue that is troubling us is what appeared to be a happy form of  
20 agreement as to when the trial might take place has been undermined not by  
21 the parties but by the Tribunal's own availability which makes those three  
22 weeks regrettably simply not possible.

23 **MR LASK:** Thank you, sir. I don't need to take up the Tribunal's time with my  
24 further submissions on the timing for the defence, save to say this: whilst we  
25 are grateful that the Tribunal has indicated that it's minded to grant until  
26 23 April, we are conscious that the proposals we've been discussing do add

1 somewhat to the CMA's homework and that the timing for those steps  
2 coincide with the timing for the defence. So I would ask in those  
3 circumstances, even leaving aside the issues I'm going come on to, I would  
4 ask in those circumstances we do have until at least 28 April to do the  
5 defence, which in my submission is appropriate and fair in the circumstances.  
6 That's the timing for the defence.

7 Then coming on to the timing for the trial, we've obviously heard what the Tribunal  
8 has said and it may be you've seen the correspondence that the CMA sent to  
9 the Tribunal and to BGL shortly before the hearing.

10 **THE CHAIRMAN:** Yes, I've seen both an email from CMA and a letter from  
11 Linklaters in response to our reaching out to the parties in the course of this  
12 morning.

13 **MR LASK:** It may be that all I can really do is emphasise the point the CMA has  
14 already made in writing, which is to say that the CMA is, with respect, strongly  
15 opposed to having to change leading counsel at this stage. Ms Demetriou is  
16 of course standing counsel and she has also been instructed on this case for  
17 a long time, having advised during the investigation. As things stand, she  
18 simply can't do a trial in October or indeed the first half of November.

19 So our primary position would be that we ask the trial do take place on the dates  
20 agreed provisionally between the parties, if at all possible; or alternatively that  
21 it is pushed back a short period to the start of 2022 because we think the  
22 alternative does put the CMA in a difficult position, and particularly given that  
23 work has already started on preparing responsive evidence and the defence  
24 and to have to change leading counsel at this stage will cause some  
25 disruption and will, I say, prejudice the CMA's position more generally on the  
26 appeal.

1 So we do ask if at all possible that a solution be found that allows Ms Demetriou to  
2 continue in leading the team on this case.

3 **THE CHAIRMAN:** Indeed, Mr Lask, you are pressing at an open door in terms of  
4 the desire we have to ensure that both the parties have the leading counsel of  
5 choice.

6 The problem I have is that if both parties said, "We can do three weeks in  
7 January 2022", then probably that's what I would order. But Mr Beard's point  
8 is that he can't do the first half of 2022 and it would it seem to me a little  
9 unfortunate if we were to adjourn into 2022 in order to accommodate your  
10 leading counsel with the consequence that the appellant loses their leading  
11 counsel. It seems to me that that is --

12 **MR BEARD:** Before we go further, what dates would be contemplated in early 2022  
13 if this was to be moved further forward? Because I think our strong position is  
14 we do not want it in 2022 at all and we don't think it's reasonable for the sake  
15 of some disruption to the CMA that it is there moved. I don't think it would be  
16 right to say there can be no period during the first half of 2022 when there will  
17 be no availability by members of the counsel team on this side. But I am  
18 concerned that that is not our primary submission in any event; it is the  
19 concern that this matter should be dealt with within the year.

20 **MR LASK:** Sir, I'm very grateful for that clarification from Mr Beard. To answer his  
21 question, on our side we could do, I think, any time in January or  
22 February 2022.

23 **THE CHAIRMAN:** Yes. My understanding, Mr Beard, was that that was something  
24 which was not possible because the letter we received from Linklaters -- let  
25 me just find it:

26 "BGL would struggle to offer dates before Michaelmas 2022".

1 **MR BEARD:** I have a series of hearings in the first half of 2022. But if there are  
2 particular dates the Tribunal has in mind, then obviously I'll go away and look  
3 at that. But if that were the desire of the Tribunal to move it, then it wouldn't  
4 be right to say there is no possibility. But that is very much our second  
5 preference in relation to these matters.

6 **THE CHAIRMAN:** Well, that's very helpful for you to say and we may need to rise to  
7 consider this. My expressed desire in the speaking note was that we actually  
8 wanted it sooner rather than November. We said October.

9 **MR BEARD:** Yes, we do too.

10 **THE CHAIRMAN:** The dates we had in mind were the 1st, 8th and 15<sup>th</sup>  
11 of November as the three weeks to run, conscious as we are that your expert  
12 is not available in the latter part of October. So that's what we were thinking  
13 about and I was raising the question of January as something that we would  
14 contemplate, but it is definitely second best and the reason I wasn't pressing it  
15 very hard is because my understanding was that wasn't really an option. The  
16 one thing I think I have to make clear is that Michaelmas 2022 is really not  
17 an option, that's not going to happen.

18 So can I suggest that we leave it like this: I think we can do as a Tribunal any date in  
19 January, so the question would be: do you have three weeks in January to  
20 deal with this?

21 **MR BEARD:** And then going into early February. I'm sorry to be intrusive, but if  
22 the Tribunal -- I have capacity there.

23 **THE CHAIRMAN:** So it would be what, from late January to ...

24 **MR BEARD:** Yes. I think -- I want to go and check exactly what the position would  
25 be for all of our team in relation to this. But I think -- I don't want to leave  
26 the Tribunal with a false impression that if what was happening was

1 a consideration by the Tribunal of those two periods. We would emphasise,  
2 and it is our primary submission, that given we are talking about the best part  
3 of nine months for trial, we do not see a significant difficulty with the CMA  
4 switching counsel in circumstances where there would be an extended period  
5 for the defence. But if the Tribunal is specifically asking about particular  
6 weeks towards the end of January and beginning of February, the statement  
7 made by Linklaters is perfectly accurate; that there would be a range of  
8 difficulties in the first half of 2022. But it's not right to say that, for instance,  
9 I am in trial or just preparing for trial at all points throughout that six months.

10 **THE CHAIRMAN:** I'm extremely grateful, Mr Beard, for that clarification. In one  
11 sense it makes the question harder. I think it would be helpful to identify and  
12 confirm whether you do have not just the three weeks that you would be in  
13 court for, but sufficient preparation time. I'm not saying that if you can find  
14 that time, we are automatically going to take it up. I think what it means is it  
15 makes the timing question a little bit harder. Because I'll be frank: my thinking  
16 when I was of the view that January/February was not a runner was that this  
17 was actually a fairly straightforward decision.

18 **MR BEARD:** I understand. Obviously our primary position is that it should remain  
19 a straightforward decision. But I also don't want the Tribunal to act on a false  
20 basis because that would be wholly inappropriate, so I'm very happy to  
21 confirm that position. But if I may, I'd like five minutes to take instructions on  
22 that.

23 **THE CHAIRMAN:** Of course, that is understood. What I suggest we do is we allow  
24 Mr Lask to finish his submissions and then we'll rise for five minutes to  
25 discuss the question of -- well, to enable you to take instructions on this, the  
26 (inaudible) point. Mr Lask, back to you.

1 **MR LASK:** Thank you, sir, I'm very grateful for that.

2 There was really only one other point that I think I need to cover at this stage, which  
3 was the question of further CMCs. We agree with BGL that the most sensible  
4 time for our second CMC would probably be after the filing of the defence,  
5 notwithstanding the point I've already made about the timing of the defence,  
6 but not least because of the need to focus in the interim on the steps  
7 the Tribunal's indicated and indeed ...

8 **THE CHAIRMAN:** Indeed, I understand. Mr Lask, unless I see violent dissent on  
9 the screens from my fellow members, I think Mr Beard's point was actually  
10 very well made and you are certainly not going to get any pushback from me  
11 about timing it then.

12 Professor, Ms Lucas, are you happy with that?

13 **PROFESSOR ULPH:** Yes, I'm content.

14 **MS LUCAS:** Yes.

15 **THE CHAIRMAN:** You don't need to address further then on the timing of the CMC.

16 **MR LASK:** Thank you, sir. The third CMC/pre-trial review, if I can call it that, I think  
17 was proposed for some time in July which seems sensible to us, assuming  
18 that by that point -- I think it's almost certain that by that point BGL would have  
19 served any reply, then that seems sensible in terms of timing for that hearing.

20 **THE CHAIRMAN:** To be clear, I think even on the according of you to 28 April and  
21 six weeks to Mr Beard, we get to somewhere late June, I think --

22 **MR LASK:** That is correct.

23 **THE CHAIRMAN:** -- so we can fit something in. Obviously the third CMC, or PTR  
24 perhaps I should call it, would only make sense if we had everything in apart  
25 from the written submissions, which would obviously come, I would imagine,  
26 assuming without prejudice a November date, they would come I would

1           imagine some time in early October. But that's something which we'll debate  
2           when we've sorted out the question of trial.

3 **MR LASK:** Thank you, sir. Those were the only other submissions I had to make.

4 **THE CHAIRMAN:** Well, thank you very much. I think then what we'll do is we'll rise  
5           for five minutes to enable Mr Beard -- will that be enough time, Mr Beard, to  
6           check your diary?

7 **MR BEARD:** I need to check my diary, but I also need to check one or two other  
8           team members' diaries, so I will do that. I'm sure we could do a quick Webex  
9           call and be back in five minutes.

10 **THE CHAIRMAN:** Very good. We will say five minutes. If you need more time,  
11           then do let the Tribunal know and we will obviously give it to you.

12 **MR BEARD:** I'm most grateful. Thank you very much.

13 **THE CHAIRMAN:** Thank you very much.

14 **(4.12 pm)**

15 **(A short break)**

16 **(4.20 pm)**

17 **THE CHAIRMAN:** Good afternoon. We'll just see if we have everyone in the  
18           courtroom who should be there.

19 **MR BEARD:** I can hear you sir. This is Daniel Beard speaking.

20 **THE CHAIRMAN:** Thank you very much. Yes, Mr Beard, what's the diary like?

21 **MR BEARD:** I've taken instructions and if the hearing were to be fixed for some  
22           point starting in the latter two weeks of January, preferably the final week of  
23           January and into the first two weeks of February, those are dates which the  
24           key members of our team would be able to attend. But I do wish to stress that  
25           we don't think it is appropriate that there should be more than a year since the  
26           relevant decision was put in place. And with respect to Ms Demetriou, we

1 have look at Mr McInnes' email again. The indication is she was involved at  
2 some point advising during the administrative phase. She is of course the  
3 standing counsel, it's quite common for standing counsel to advise in the  
4 course of investigations. That does not mean, and to be fair to Mr McInnes he  
5 is not saying, that she has been heavily involved in the preparation of the  
6 decision. And given what we have said in relation to the shifting of the  
7 timetable for the defence, it is plain that, absent that consideration, November  
8 is very much the relevant and appropriate period for this trial. It is also plain  
9 that nine months out from that trial and with the best part of two months  
10 before the defence is to be served, alternative leading counsel can be  
11 engaged to assist Mr Lask and Mr Armitage. The CMA has a very substantial  
12 team and it has already, as I have indicated, at least two counsel deployed on  
13 this matter who are well versed in it.

14 In those circumstances, we think it would be quite wrong to move it from November  
15 and mean it's been well over a year before the trial is heard, and then of  
16 course there is a period for judgment, and so on. So we would continue to  
17 stress that November is the appropriate time. But I have checked the diary  
18 and those are my answers.

19 **THE CHAIRMAN:** Well, that's very helpful.

20 Just to be absolutely clear, and I'm afraid the position is even more complicated than  
21 I thought, but the dates we'd be talking about would be 24 January,  
22 31 January and 7 February, weeks commencing.

23 **MR BEARD:** Correct.

24 **THE CHAIRMAN:** Is that --

25 **MR BEARD:** Those are the three that -- those would fall within the parameters of  
26 the three weeks I was referring to.

1 **THE CHAIRMAN:** Okay. I mean, I don't think it is any problem -- well, subject to  
2 one point I'm going to come to -- we can move those around. It's just my  
3 understanding of what you were saying was those are three weeks that were  
4 the best three weeks in that period.

5 **MR BEARD:** Yes, I think that would be right. We can start slightly earlier than that if  
6 necessary.

7 **THE CHAIRMAN:** That's very helpful.

8 To the problem that we have. The reason we could not do the dates that the parties  
9 can do, that is to say the three weeks commencing 22 November, was  
10 because of a commitment that Professor Ulph has. He has a role in working  
11 up the budget for Scotland and he was concerned that the budget work he  
12 has to do might fall within the weeks that the parties had agreed were  
13 sensible.

14 The problem is that there is no guarantee that the Scottish government will call  
15 a budget in early December requiring him to work for those three weeks. The  
16 position as I understand it from him is that 12 weeks' notice is given but that's  
17 it. So if we had a trial on 22 November, you would expect to get notice on  
18 I think 30 August if my calendar is right.

19 Now the interesting point is that when I was exploring with Ms Lucas and  
20 Professor Ulph the feasibility of 24 January, 31 January, 7 February,  
21 Professor Ulph said exactly the same problem arose because it's quite  
22 possible there may be a budget for mid-February, in which case he would be  
23 in trouble.

24 It struck me therefore that we could perhaps take advantage of the movable feast  
25 that is the budget in this way, and I raise it as a suggestion and it's this: we  
26 book two dates for the trial, we book the date that the parties can do, that is to

1 say the three weeks from 22 November, and we fix that as the primary date  
2 for the trial, but we fix at the same time an alternative, which is the three  
3 weeks commencing 24 January.

4 Now if the budget is fixed for early December, then we'll have to switch to the later  
5 date. But we would make that decision on 1 September 2021 and if at some  
6 point the Scottish government decides that they do want a budget in early  
7 December, then Professor Ulph is happy to make clear that his primary  
8 commitment would be to the trial.

9 So what we're doing is we're taking advantage of the fact that there is --

10 **MR BEARD:** I understand, sir.

11 **THE CHAIRMAN:** -- a floating question. It's very unusual, I don't think Chancery  
12 listing will like it at all, but it is doable. I'm not going to order it, but I want to  
13 hear --

14 **MR BEARD:** Can I raise a problem --

15 **THE CHAIRMAN:** Sorry, professor, you have your hand up.

16 **PROFESSOR ULPH:** To clarify that if the budget was called for, say, the second  
17 week of December, it would be the 12 weeks before then that they would  
18 have to give us notification, so you are talking more like mid-September. So  
19 I couldn't guarantee that we would know at the start of September if there  
20 were to be a December budget.

21 **THE CHAIRMAN:** I understand, that's helpful. I've calculated my 12 weeks wrong.  
22 Mr Beard you clearly have reservations, but I would like to hear them.

23 **MR BEARD:** I think there's a very significant practical difficulty with this because if  
24 you effectively book out two trials in late January and in November/December,  
25 essentially we will have to book out the prep time for all of the first trial, and  
26 then assuming that that doesn't go ahead, prep time for the second trial. At

1 the moment, that will end up looking like you are going to be booking up four  
2 or five months in the diary. And with respect, sir, I simply cannot do that at  
3 the moment because I know that I have a series of other matters which are  
4 going to be listed and whilst obviously I ensure that I have booked out  
5 sufficient prep time in relation to any trial that is going to be put forward, it is  
6 extremely difficult to do these things on a contingent basis and the difficulty  
7 arises, for example, I have matters that are listed in the European Courts  
8 where you get relatively short notice of listing.

9 You can communicate with the European Court and say, "Well look I have a trial  
10 running through this period, please do not list the hearing during this period".  
11 It is very difficult for me in good conscience to write to the European Court  
12 and say, or have my solicitors write to the European Court and say: "no  
13 actually, can you postpone Google's hearing in this or that because actually  
14 I might have a trial here or I might have it there" because perfectly legitimately  
15 they say no.

16 And of course it isn't just a European Courts issue, it's a Domestic Courts issue  
17 because all of us are involved in -- just as you are sir, and the other members  
18 of the panel will be -- other work, whether it's in relation to multiparty damages  
19 cases, other judicial review matters, other commercial cases.

20 Talking to listing in relation to all of those matters is in a great difficulty because you  
21 can't be saying to them in all good conscience, "No, I'm not going to be  
22 available". So with respect, the difficulty comes that we actually need  
23 certainty. That's why I would say that given the completely understandable  
24 difficulties that Professor Ulph is faced with, that is a factor that is strongly  
25 militating in favour of actually fixing those November dates because whatever  
26 happens in relation to the notification in September, we know that

1 Professor Ulph is going to be available to do this and since the CAT is  
2 empanelled in these circumstances, I think we are going to be making for  
3 ourselves a real problem if we are effectively booking out two trials,  
4 particularly when they are effectively quite close to one another. What it  
5 means is effectively you will be sterilising diaries from mid-September,  
6 possibly the beginning of October, through to the middle of February and that  
7 is highly problematic, I imagine, for all involved.

8 So I completely understand the desire of the Tribunal to do this, and if we had no  
9 other activity, if there were no other knitting to be getting on with, then of  
10 course that would be perfect. But that is not the reality I think for any of us.  
11 I think in those circumstances, conditional booking, I'm sorry, would create  
12 very significant difficulties for planning. I'm very sorry because I would like  
13 to -- as you can perhaps tell from the submissions I've made, we do want to  
14 be amenable in relation to these things, but up to a point.

15 **THE CHAIRMAN:** Yes, thank you very much, Mr Beard. Mr Lask, what do you have  
16 to say?

17 **MR LASK:** We have heard everything that Mr Beard has said and indeed what the  
18 Tribunal has said and we are very grateful to the Tribunal for coming up with  
19 a pragmatic solution. From our perspective, the proposal of two provisional  
20 bookings would work and would be appropriate and does represent  
21 an appropriate and proportionate solution to what is a difficult conundrum.  
22 There are obviously a number of moving parts and there is no perfect  
23 solution. But what we wouldn't accept is that the disruption and the  
24 inconvenience should fall primarily at the CMA's door because of the  
25 difficulties Mr Beard would have in complying with the pragmatic solution  
26 the Tribunal has proposed.

1 **MR BEARD:** I'm sorry, these are not entirely solipsistic submissions on my part.  
2 These are submissions made in relation to counsel, solicitors and those that  
3 are preparing for the trial. It creates significant difficulties for all concerned  
4 and that is what I'm talking about. If it were merely me, I can see there might  
5 be different submissions to be made, but that is not the position.

6 **MR LASK:** I'm grateful for that. The point I'm making is there is no perfect solution  
7 to this conundrum, but what we oppose is the suggestion that the best  
8 solution is one in which the CMA is (distorted audio) and that the CMA's  
9 preparation is disrupted by it having to (distorted audio) its leading counsel to  
10 work around (distorted audio) with its own preparations.

11 **THE CHAIRMAN:** Mr Beard, if you have anything by way of reply, I'll hear you, but  
12 I think the positions are pretty clear.

13 **MR BEARD:** Yes, I have made my position. It's not solipsism here. We have  
14 a practical problem here that would create a huge sterilisation. If we could be  
15 sure we could bank on January then -- as we have tried to be amenable and  
16 find what we could do in relation to that. But I completely understand the  
17 difficulty that Professor Ulph is in, but it's beyond his control as to when  
18 budgets are triggered and I think the only safe course is to avoid that  
19 uncertainty if we are going to hold on to this triumvirate hearing this case.

20 **THE CHAIRMAN:** Mr Lask, did you want to say anything?

21 **MR LASK:** Sir, nothing further from me, thank you.

22 **THE CHAIRMAN:** We'll rise for five minutes to consider our decision. Thank you  
23 very much.

24 **(4.36 pm)**

25 **(A short break)**

26 **(4.40 pm)**

1 **Ruling (see separate transcript)**

2  
3 **Post-ruling discussion**

4 **MR LASK:** Sir, thank you.

5 If I may, the CMA is obviously disappointed at the ruling but grateful to the Tribunal  
6 for taking the time and trouble to explain its reasons so clearly. You  
7 mentioned at the end that if there was anything the Tribunal could do to assist  
8 the CMA's process of having to instruct a new leading counsel then you would  
9 be willing to --

10 **THE CHAIRMAN:** Yes, of course.

11 **MR LASK:** -- listen to suggestions. The deadline that we have sought for the  
12 defence of 28 April was premised on the basis that Ms Demetriou would be  
13 leading counsel on this case. It seems to me likely, if not certain, that if the  
14 CMA is going to have to instruct new leading counsel it will need longer than  
15 that to complete the defence. So I would ask for an extension to the  
16 extension please, sir, perhaps until the middle of May, to give the CMA  
17 adequate time to get a new leading counsel in place.

18 **THE CHAIRMAN:** Let's see how that would work in terms of the diary. I'll obviously  
19 hear from you, Mr Beard, if necessary. But having said that I will listen  
20 sympathetically, I think I am pretty much obliged to do that and I think that if it  
21 can be accommodated then we should try and do that. But we absolutely  
22 must have all of the stages completed for the beginning of the long vacation,  
23 including an ability to have the "teach-in" which may or may not take place.

24 If we look at 14 May as the date on which the CMA would serve its defence, you  
25 then want I think six weeks which frankly I would be minded to give, from  
26 14 May which I think takes us to 25 June; is that right?

1 **MR BEARD:** Yes, I think so.

2 **THE CHAIRMAN:** 25 June.

3 **MR BEARD:** Yes.

4 **THE CHAIRMAN:** For your reply evidence. I think I've got that right.

5 **MR BEARD:** Yes on my calendar you have sir.

6 **THE CHAIRMAN:** So we would be able to fit in a two-day CMC probably middle of  
7 July. It's quite tight. There will be absolutely no room for slippage.

8 **MR BEARD:** Yes. I think the other thing to raise in relation to this is you'll have  
9 seen -- and I must apologise, we managed to drop off the sort of amended  
10 order that accompanied our submissions. But I think it was provided to  
11 the Tribunal.

12 **THE CHAIRMAN:** Yes, I have it somewhere. Let me find it.

13 **MR BEARD:** It might just be worth having it. The CMA did get it, we just managed  
14 not to send it to the Tribunal, I apologise for that.

15 **THE CHAIRMAN:** I have it.

16 **MR BEARD:** The only reason I turn to it is because, having regard to one of  
17 the other issues on the Tribunal's agenda we have this issue of trying to  
18 identify issues in relation to data that are not in dispute, or what is in dispute,  
19 and that process is only really going to be possible involving experts. And we  
20 think naturally that is a process you engage in after you've closed pleadings.  
21 So on our timetable -- and I realise this is going to shift to some degree -- we'd been  
22 starting that process in a fortnight after the reply, so everyone has had a  
23 chance to digest the reply. Then you have interactions between the experts  
24 rolling forward. I think my concern is that the more that one moves the reply  
25 into June the more difficult it is for the experts to engage in that process. And  
26 the reason I raise that now is because if there's going to be something comes

1 up in the course of those interactions between the experts that needs to be  
2 dealt with at the CMC, we are at risk of not having that process closed by  
3 then. So that would be my concern.

4 Sir, you had originally, I think, talked about ... 23 April?

5 **THE CHAIRMAN:** 23rd, yes.

6 **MR BEARD:** If Mr Lask -- I'm assuming the Tribunal has a sympathetic ear, were to  
7 move out to 7 May, that would bring the reply to 18 June. It might then be  
8 possible to commence the witness expert interaction at the beginning of July  
9 at least. Because I think we should be cautious about trying to list CMCs for  
10 right at the back end of July as well. For my part, because I know I'm absent  
11 for a week during July but that may not be the critical factor for a CMC, but it  
12 always seems to me that it is better to have these CMCs in the first half of  
13 July rather than the second half, particularly this year when everyone is no  
14 doubt going to be wanting to flee as far as (inaudible) they possibly can if that  
15 is feasible.

16 **THE CHAIRMAN:** Yes.

17 **MR BEARD:** I'm just talking about the pragmatics.

18 Of course it's the case that if we set down these deadlines and the CMA encounter  
19 some kind of overwhelming problem with hitting them then they do have  
20 liberty to come back. We understand that. And we recognise that these may  
21 be circumstances where that liberty may need to be sought. But I do wonder  
22 whether we are better off having a slightly tighter timetable than Mr Lask is  
23 suggesting for these reasons, and that we try and point towards a CMC some  
24 time like 14 July.

25 **MR LASK:** Sir, in case it assists, I'm looking at the time that BGL's draft order  
26 allows for between the filing of the reply and the beginning of the expert

1 process, and I think it currently provides for a fortnight. And I wonder whether  
2 it might be possible to shave some of the time off that and bring it down to  
3 a week, rather than shave some of the time off the extension for the defence  
4 that I've been seeking and save time that way instead.

5 **MR BEARD:** I'm just --

6 **MR LASK:** And work forward from there and see if it all fits. But it seems to me that  
7 on Mr Beard's case it must do. If saving a week on the defence works  
8 (distorted audio) to be fair.

9 **MR BEARD:** Sorry, I completely understand Mr Lask's point. I think it's important  
10 though that you have three stages that are almost a month long in our order.  
11 Unless Mr Lask is thinking somehow we can get rid of them. I don't have any  
12 objection to Mr Lask's suggestion actually that we start the expert process  
13 a week earlier. But ironically I still think that militates in favour of the 7 May  
14 deadline and 18 June reply. The expert process commencing the week  
15 commencing 28 June, and actually having to compress that across three  
16 weeks, so that we're getting close to the conclusion of it during that period of  
17 late June and early July. Because it's still two weeks longer than the Tribunal  
18 had suggested.

19 **THE CHAIRMAN:** Indeed.

20 **MR BEARD:** And I just think -- we might want to go away and discuss, Mr Lask and  
21 I, the modalities of that expert process, but I think we need to allow at least  
22 three weeks for it. So if it's starting only on 28 June we will at least be some  
23 way through it by 14 July.

24 **THE CHAIRMAN:** Yes, thank you. Okay.

25 What I'm going to propose -- I'm not going to order it because I want to see the  
26 reaction of Ms Lucas and Professor Ulph, see if they disagree -- but what I'm

1 minded to order, subject to consent, is that we go for 7 May, 18 June, 28 June  
2 for the expert process to commence, and the PTR to be listed for 19 and  
3 20 July.

4 **MR BEARD:** Thank you, sir. I will discuss with Mr Lask I would not be able to  
5 attend on the 19th and 20th but that's a separate issue.

6 **THE CHAIRMAN:** That's a separate issue, and I don't think, given -- I mean I would  
7 very much hope that actually you'll be spending those days either not having  
8 a hearing at all, or just having a "teach-in", because if things go well we  
9 shouldn't need a PTR. It's only if things go wrong that the need for the  
10 hearing arises. So I'm sure that your very capable junior would be able to  
11 deal with matters on those two days. The fact is I can't do the week  
12 commencing 12 July.

13 **MR BEARD:** I understand.

14 **THE CHAIRMAN:** I'm doing the Forex draft certification that week.

15 **MR BEARD:** Yes.

16 **THE CHAIRMAN:** And I don't think it would be before 12 July.

17 **MR BEARD:** No, there's no point. There's no point.

18 **THE CHAIRMAN:** I'm afraid it's the 19th and the 20th.

19 **MR BEARD:** Understood.

20 **THE CHAIRMAN:** All right.

21 **MR LASK:** Sir, may I just comment briefly on that proposal?

22 **THE CHAIRMAN:** Yes.

23 **MR LASK:** The initial reaction from those instructing me is that they could live with  
24 that, subject to one point, which is that they would like an opportunity to check  
25 with Professor Baker to ensure that that works in terms of his diary. Because  
26 obviously the dates have been shifting around during the course of this

1 hearing, and it would be helpful if we have that opportunity.

2 **MR BEARD:** I will need to check on our side. Mr Lask proposes a very sensible  
3 point. There are emails going backwards and forwards but I don't have all the  
4 dates for our experts either so that will have to be confirmed. But I anticipate  
5 that is why, sir, you are indicating that this is not an order but a: go away and  
6 see what you can do to sort it out instruction.

7 **THE CHAIRMAN:** That's it. I mean I think that is true of a number of the dates.  
8 I think if we have certain points set in stone, then you can very sensibly work  
9 around the date set in stone, and I know that you will both be, and your teams  
10 of course, sensible in terms of making it work. So if we have set in stone  
11 7 May, 18 June and 19 and 20 July and the trial on 1 November, those are  
12 dates that I am ordering and then you can work out all of the other moving  
13 parts in your own time. I think that makes sense.

14 **MR BEARD:** Yes. And inevitably, as with all these things, it's implicit in the  
15 Tribunal's position there must be liberty to apply.

16 **THE CHAIRMAN:** Absolutely. I think that is something that I include almost as  
17 a matter of course in almost any order. But I think I should put down this  
18 marker. I have I think rightly given the CMA nearly all that it wants in terms of  
19 the timing of the defence. I do think that we have -- and I think this is right --  
20 erred on the side of generosity. The marker I'm saying, it's simply this: I do  
21 regard this as a difficult timetable to extend, given where we're at. And  
22 I would take some persuading that the CMA in particular, but equally your  
23 clients, would need to stretch the dates for the pleadings. Of course  
24 circumstances change, and there will be the liberty to apply but I think that is  
25 a marker that I do need to put down.

26 **MR BEARD:** The marker of course is well understood. I think the only caveat we

1 need to place, and perhaps it's an appropriate moment to deal with this, that  
2 in relation to Professor Baker we hear the indications of the CMA and we hear  
3 the position of the Tribunal in relation to his evidence. And to be clear in  
4 relation to our submissions, we are not trying to take issue with the ability of  
5 the CMA to provide rebuttal evidence and we're not trying to prescribe who it  
6 is that provides rebuttal evidence. But we do have real concerns that the  
7 decisions have to be based -- the challenges to the decision and the reasons  
8 it was based on, and we do put down the further marker that we have  
9 concerns about Professor Baker giving evidence in relation to effects and  
10 coverage, which is what it is suggested he will give, and that there will be  
11 no one from the CMA who is involved in the decision doing that. And instead  
12 the intention is that the witness from the CMA would be dealing only with  
13 market definition, or at least proffering evidence only in relation to market  
14 definition.

15 But those are matters we can raise in due course. And the reason I mention them  
16 now is because if it were to transpire that we thought there were concerns that  
17 needed to be ventilated or created difficulties in relation to our reply then  
18 obviously those are matters we'll have to pick up in due course.

19 **THE CHAIRMAN:** Well, I won't, Mr Lask, invite you to respond to that unless you  
20 feel the need.

21 I entirely understand, Mr Beard, why you say that. For my part I can see if there is  
22 a dispute, whether it's well-founded or not, regarding the CMA's evidence, that  
23 has the potential to derail the whole process and I think I would only invite  
24 your clients, Mr Beard, to raise any question regarding scope as soon as  
25 possible after the defence material is served.

26 **MR BEARD:** Yes.

1 **THE CHAIRMAN:** I'm sure you would in any event. But I will give you this  
2 indication, that we would do our very best to slot a hearing, if it was needed, in  
3 May, rather than to let the matter run. So this Tribunal would want to have the  
4 position resolved as early as possible. Clearly it can't be earlier than  
5 mid-May. And I understand that that is later than one might want. But given  
6 the rulings we've made on the pleadings that's what we have. That's how  
7 we'll proceed.

8 **MR BEARD:** We do too, sir, that's very helpful. And I'm grateful for the dates and  
9 we will go away and discuss the further issues.

10 And perhaps -- I'm conscious of the time on a Friday as well, in relation to the  
11 process for skeletons and timing for bundles and so on, it might be sensible if  
12 we take those away and produce a draft order in relation to these matters,  
13 rather than trailing through further dates and detaining all concerned now.

14 **THE CHAIRMAN:** I think that's very sensible. We haven't discussed the agenda  
15 items almost at all, but it seems to me that we can take as read that the forum  
16 is England and Wales. Interventions: we're going to do what the parties have  
17 suggested, given the timing for them. The confidentiality ring is agreed.

18 **MR BEARD:** Yes.

19 **THE CHAIRMAN:** We've dealt with timings to the extent I think necessary. The only  
20 point on my list before I invite others to add to it is that we note that essentially  
21 the bundles are going to be electronic. It seems to us that when the parties  
22 have agreed bundles they can provide them electronically, as well as with  
23 an index, and we would then take a view as to whether we wanted any of  
24 those bundles in paper, but you wouldn't have to serve paper bundles unless  
25 we requested specific volumes from the list, just to save the trees.

26 **MR BEARD:** We're very happy to proceed on that basis and that's very helpful,

1           thank you.

2 **THE CHAIRMAN:** In that case I will look around, see if Ms Lucas or Professor Ulph  
3           have anything to say and I will leave it to you, Mr Beard, and you, Mr Lask, to  
4           raise any other points you might have of concern.

5 Ms Lucas, is there anything?

6 **MS LUCAS:** No, I think we've covered everything.

7 **THE CHAIRMAN:** Professor?

8 **PROFESSOR ULPH:** Nothing from me, no.

9 **THE CHAIRMAN:** I am very grateful.

10 Mr Beard, you --

11 **MR BEARD:** I think we've covered most of the issues that we wanted to cover. I'm  
12           just going to put down one quick marker that may need to come back before  
13           the Tribunal but we'll try and deal with it in writing. There are a couple of  
14           issues on disclosure that may arise. In particular we'd asked the CMA for  
15           underlying code in relation to some of the modelling that they have in  
16           Annex R. We asked for this back in December and they refused.

17 In those circumstances we're not content with the position that the CMA have  
18           adopted and indeed we will be raising those matters with the CMA. But if we  
19           don't get co-operation on that sort of disclosure then there may have to be  
20           further applications.

21 And the other matter on disclosure may relate to the somewhat unusual  
22           circumstances in which this investigation came into being, because as  
23           the Tribunal knows there was an enquiry into digital comparison tools which  
24           we very fully cooperated with. There was no intimation that an investigation  
25           was to start as we were producing all that information. But then at the end of  
26           the process an investigation has begun and all of that material used. So we

1           may have one or two queries on disclosure in relation to those matters.

2 But we will liaise with the CMA because obviously in these sorts of circumstances if  
3           they hold material that wasn't provided on access to the file or workings that  
4           may be either non-probative or exculpatory, then that sort of material would  
5           need to be provided in any event. But we can park that. I just mention it for  
6           today, rather than raising it as any sort of order.

7 **THE CHAIRMAN:** Thank you. I'm grateful that you have.

8 Mr Lask, I'm not going to invite you to resist or push back on that because I'm not  
9           going to make any order today. But it does seem to me that if at all possible  
10          we want to resolve this both quickly and on the papers, rather than -- well,  
11          I suppose it could fit in the post-defence CMC but that's probably a bit late.

12 **MR LASK:** Sir, I am in a bit of difficulty because this issue wasn't canvassed in the  
13          skeleton arguments and I have no prior knowledge of it. So I'm limited in what  
14          I can say, other than we will of course wait and see what BGL say in their  
15          correspondence and consider it very carefully.

16 **THE CHAIRMAN:** I'm grateful.

17 Mr Beard, I think probably best to bring this issue to the boil as quickly as possible.

18 **MR BEARD:** Yes, absolutely. That's the reason I mention it today. I didn't want us  
19          to leave the CMC today and then be sending letters next week and the CMA  
20          say: "but you never mentioned this". I think that wouldn't have been right. But  
21          I'm very much content to proceed on that basis.

22 **THE CHAIRMAN:** Thank you very much.

23 Mr Lask, is there anything more that you want to raise?

24 **MR LASK:** Sir, I think you have enough markers laid down for one day so I don't  
25          intend to (inaudible) more or indeed raise any other matters with you this  
26          afternoon.

1 **THE CHAIRMAN:** I'm very grateful to both of you and to your legal teams for  
2 assisting us in what has not been a straightforward directions hearing. So  
3 thank you both very much. I will end the hearing now.

4 **MR BEARD:** Thank you and thank you for sitting late.

5 **THE CHAIRMAN:** Not at all.

6 **MR LASK:** Thank you.

7 **(5.20 pm)**

8 **(The hearing concluded)**

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