**IN THE COMPETITION APPEAL TRIBUNAL**

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 18 March 2022

Before:
The Honourable Mr Justice Butcher
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Euronet 360 Finance Limited & Others

**Claimants**

v

Mastercard Incorporated & Others

**Defendants**

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# A P P E A R AN C E S

Mr Jon Turner QC and Mr David Bailey (instructed by Constantine Cannon LLP) appeared on behalf of the Claimants.

Mr Matthew Cook QC and Mr Hugo Leith (instructed by Jones Day) appeared on behalf of the Mastercard Defendants.

Mr Daniel Jowell QC and Ms Khatija Hafesji (instructed by Linklaters LLP) appeared on behalf of the Visa Defendants.

**Friday 18 March 2022**

**(10.30 am)**

**Housekeeping**

MR JUSTICE BUTCHER: Good morning, everybody. These proceedings are being live-streamed, so I am going to start with the customary warning. These are proceedings in open court, as much as if they were being heard all before the Tribunal physically here in Salisbury Square House. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

Yes.

MR TURNER: May it please the court. I appear today with Mr Bailey for the Claimants, Euronet; Mr Cook, to my right, appears with Mr Leith for the Mastercard Defendants; and to his right, Mr Jowell, Queen's Counsel, and Ms Hafesji, appear for the Visa Defendants.

My Lord, may I begin with the housekeeping? There is an E bundle. I believe you also have hard copies behind you --

MR JUSTICE BUTCHER: I have.

MR TURNER: -- you are going to be using.

MR JUSTICE BUTCHER: Yes.

MR TURNER: Essentially, there is bundles A to G, which have the case documents; there's a bundle H with authorities; there's a slim bundle I, which contains certain contemporaneous documents, some of which have being designated as "confidential". And I will avoid reading confidential material loud.

My Lord, the agenda is at A3, at page 25, and the Tribunal identified four matters for your consideration today.

MR JUSTICE BUTCHER: Yes.

MR TURNER: Apart from AOB, and the good news is that the parties have reached agreements on items 1B and 2, which were about the deadline for the service of witness evidence and further pleadings on the foreign law issues.

The parties' agreement is recorded in a draft order, which our solicitors sent the Tribunal on 15 March, and it should be in your bundle at B33.1.

MR JUSTICE BUTCHER: Yes.

**Submissions by MR TURNER**

MR TURNER: So essentially, there's effectively only one live issue today, and that is our application for separate trials on liability and quantum, which is agenda item 1A, and dependent on the outcome of that application, there's the listing of the main hearing, item 1C.

In the order, if you have that in front of you --

MR JUSTICE BUTCHER: Although there's an issue as to the listing of the main hearing, as I understand it, you're all agreed that it should take place, whatever is taking place, starting in October 2023, aren't you?

MR TURNER: Yes, and it's the scheduling of the skeleton arguments ahead of that; we've made provision for that in the draft order before you.

The split trial point is in paragraph 5 of the draft order, in front of you, and it's framed by reference to the issues, as they were articulated by the parties in the list of issues. It could just have well have been framed directly by reference to the paragraphs on liability in the pleadings themselves, which I'll come to.

And our essential submission is that when you properly appreciate the legal and the practical issues that need to be grasped in this case, there's a compelling reason to order a split trial and it furthers the Tribunal's governing principles, essentially modelled on the overriding objective.

If it pleases the court, the Tribunal, I propose to organise my submissions in this way. First, I'll take stock as to the point that we've reached in this litigation, look at how matters now stand, and I'll do that in view of the Defendants' arguments that it's now too late to raise the proposal of trying liability ahead of quantum.

May I just pause there to ask if your Lordship has had the time to do any pre-reading for this hearing, and if so, what you've covered? You've seen the skeletons, I don't know if --

MR JUSTICE BUTCHER: I've read the skeletons; I've read the pleadings; I've read the list of issues. I think I'm ready to deal with this point.

MR TURNER: Yes, thank you. It will help me to go faster.

Second, I'll deal with the Defendants' argument that the issues of liability and quantum are so entangled that there can't be a clean split, which is really the main point.

And I propose, with your permission, to tackle that in three stages. The first step which is necessary is to recall the legal framework, and in particular I need to clarify what a claimant, such as Euronet here, needs to show to establish a breach of the treaty and the equivalent national laws of the three countries.

The second step after that is to show you the specific issues between the parties in this case, as they are articulated on the pleadings.

The third step is to show you, briefly, a small number of the contemporaneous documents intended to illuminate the shape of a liability only trial, which does not involve any detailed assessment of the quantum of losses, and to show how we see it would be adjudicated.

The third matter that I'll address is the practical litigation questions, which the courts have repeatedly emphasised need to be weighed up when making a decision about whether to order a split trial of liability and quantum. And there's no issue between the parties as to the principles to be applied; the question is their application in this case.

So I'll begin then by taking stock, looking at the stage we've now reached and what remains to be done.

For the pleadings, these have not yet formally closed. The parties propose to amend their statements of case to plead further points of foreign law. It's agreed and the draft order proposes that that process will be completed by 8 July this year.

Main disclosure took place at the end of September last year with inspection on 7 October. The Defendants, you will have seen, emphasised that disclosure covered both liability and quantum as a factor against ordering a split now.

They're right that disclosure covered liability and quantum, and it's relevant to our application, but not for the reason that they give.

What the disclosure revealed was an enormous amount of data about the Claimants' ATM transactions in each of these three foreign territories, and what it brought home to the Claimants and our economic experts is that the expert evidence on quantum will be extremely demanding, time-consuming and expensive to prepare.

MR JUSTICE BUTCHER: Hadn't you realised that before?

MR TURNER: We had not appreciated it until we saw the sheer volume, no, and we had not fully considered what would be involved.

So, you know, your Lordship is right to say that it's something that had we been thinking forward from the start, perhaps we could have scheduled. But this has crystallised, we have reached it and we are now thinking forward as to what the implications are, rather than looking back to what might have been done.

So what we wish to show you is that what we now see will need to be done is something that is a major task, which is effectively detached from the liability assessment.

And you get a good indication of the scale of this task from the sheer volume of the data that has to be processed, searched and analysed. If I may take you to our witness evidence from the solicitor, Mr Pike, that's at B1, page 7 in the bundle. In it, if we go to paragraph 26.

MR JUSTICE BUTCHER: Yes.

MR TURNER: So if you run your eye over that, you'll see that he explains the size of the material that was disclosed, which was daunting and had not been anticipated on the experts' side. 1.5 billion rows of the transaction data, which they have to organise and interrogate. And what they have sought to do is to write bespoke computer code to process and search that data.

But even on the basis of doing that, the modelling of quantum, being able to organise it into categories, to manipulate it and to be able to respond to different arguments and assumptions about how it changes in various scenarios, will be a very large exercise, and very costly. And this is something that we -- on the adviser side, the external

advisers, and the legal team -- came to appreciate when we saw this. And all -- or almost all of this work lies ahead for all of the parties.

The litigation timetable as it stands was ordered by Mrs Justice Cockerill in June last year, and you will find it at E3 in the bundle, if you turn that up.

MR JUSTICE BUTCHER: The first CMC was in June 2020?

MR TURNER: Yes, it was.

MR JUSTICE BUTCHER: Then there was another CMC --

MR TURNER: That was on the paper -- not a hearing.

MR JUSTICE BUTCHER: There wasn't a hearing. The first directions order was in 2020 --

MR TURNER: Yes, in 2020, that's right.

MR JUSTICE BUTCHER: -- of the CMC last year -- no, I've got that the wrong way round.

MR TURNER: Well, the CMC, I believe, was 2020 --

MR JUSTICE BUTCHER: Are you I going to show me the documents?

MR TURNER: The one that matters was the most up-to-date order.

MR JUSTICE BUTCHER: There was an order in 2020 --

MR TURNER: That's right, that's right, and we can go to that. There was a directions order, also in tab E, at E1, if you have that, November 2020, and that laid down provision for disclosure by a certain date, in November 2020; factual evidence beginning at paragraph 6; expert evidence provision from paragraph 11 forward. So that was the original order that was made at a hearing.

MR JUSTICE BUTCHER: Yes, and Mrs Justice Cockerill said that the trial should be fixed to commence not before 23 January 2023?

MR TURNER: Yes.

MR JUSTICE BUTCHER: At that stage?

MR TURNER: Yes.

MR JUSTICE BUTCHER: In November?

MR TURNER: Yes.

MR JUSTICE BUTCHER: Then you were going to refer me to the June 2021.

MR TURNER: That's at tab 3, June 2021.

MR JUSTICE BUTCHER: Yes.

MR TURNER: This has updated provisions for the steps to be taken. You'll see at the top of page E11, upon the Claimants' application and the court considering the application on the documents, at this stage.

MR JUSTICE BUTCHER: Right. It's by consent. Was there a CMC, as it were, fixed and then --

MR TURNER: I --

MR JUSTICE BUTCHER: -- then not proceeded with because there had been agreement, or was all of this just done by way of CE file?

MR TURNER: It was done, I understand, by way of CE file. There was not an arrangement for a further hearing. Yes, I'm reminded it happened in parallel to the transfer from the High Court to the Tribunal.

So this the up-to-date order.

MR JUSTICE BUTCHER: Yes.

MR TURNER: And if you go in it to paragraph 7, which is E12, you see what lies ahead on the experts' side. The experts are to serve reports in eight months hence, on 17 November. Paragraph 8 provides -- that's on the Claimants' side. Then paragraph 8, the Defendants' experts, unusually it's sequenced in this case -- I'll come to why that's odd -- paragraph 8, the Defendants' experts serve reports three months after that, 10 February 2023. Paragraph 9, the Claimants serve supplemental reports in April 2023. So that's what lies ahead for them and the time frame.

It's very, very extended. Moreover, as matters stand, these economist experts are going to have to consider quantum of loss across all of the three territories, Poland, Greece, Czech Republic, and they will have to cover a number of different possible findings which might be made on liability. For example, a rule that prohibits differential treatment of Mastercard transactions from Visa transactions could be found to be lawful, and the rule prohibiting operators from setting access fees for users who withdraw cash, unlawful, under competition law.

And that possibility will need to be factored in, among others, in deciding how quantum is to be estimated.

MR JUSTICE BUTCHER: Yes. You said that the timetable is very, very extended. Is that right; is that what you said?

MR TURNER: The timetable -- well, the expert reports are not due from the Claimants until 17 November, which is eight months away from -- I'm looking at it from today.

MR JUSTICE BUTCHER: Yes.

MR TURNER: Then what one gets is a staggered approach, whereby there's no exchange of expert reports; the Defendants come in three months after that. And that's unusual for reasons that are going to become clear in a few minutes, because under the structure of this provision, Article 101 of the Treaty, both sides have a burden to discharge at the first liability stage.

So the Claimants have the burden of showing a restriction of competition exists; and then the Defendants have a burden of showing that if there is one, that it's justified. And that's clear on the case law, but under this arrangement --

MR JUSTICE BUTCHER: But you agreed this order --

MR TURNER: Yes, yes -- I'm not seeking --

MR JUSTICE BUTCHER: Heads have been shaking behind. I was just told it was a consent order.

MR TURNER: Well, I'm not seeking to -- may I just ... **(Pause)**

Yes, I'm reminded that this was argued about at the earlier CMC, at the hearing before Mrs Justice Cockerill, and then at this point the by consent was that they agreed simply to roll it over to later dates.

MR JUSTICE BUTCHER: I see, okay, but so Mrs Justice Cockerill ordered this?

MR TURNER: That's right, she ordered that sequence.

MR JUSTICE BUTCHER: Right.

MR TURNER: Yes.

MR JUSTICE BUTCHER: A different reason for you not really being able to complain about her.

MR TURNER: Yes. As I say, I'm drawing it to your attention because this a case management opportunity --

MR JUSTICE BUTCHER: Yes.

MR TURNER: -- but I'm not seeking to re-open that now.

MR JUSTICE BUTCHER: Right, but you say that it doesn't reflect what might be the burden of proof.

MR TURNER: That's right. That's right. It's unusual in this sort of --

MR JUSTICE BUTCHER: -- this sort of part?

MR TURNER: Yes, yes. I wasn't myself present at that first hearing. I don't know how it was argued, but it's not entirely normal for this sort of case.

MR JUSTICE BUTCHER: No.

MR TURNER: I'm not aware of it being done in this way in the previous case in recent years.

MR JUSTICE BUTCHER: Right.

MR TURNER: There we are.

Nonetheless, the position is that looking ahead from where we are today, expert reports on a combined basis are due, with the Claimants going first after eight months; then after another three months they have their reports; and then we reply, both on the matters where we bear the burden and in response to the matters where they bear the burden in April 2023.

As regards the factual evidence, according to the order made at the first CMC, those are also due to be served sequentially, and the proposed revised date for our witnesses, by consent, is mid-April.

Now, our split-trial application doesn't turn on the factual witness evidence either. What we're seeking to draw to your Lordship's attention to, even before you reach trial itself, is that there is a daunting amount of work and cost on the quantum side which lies ahead for the experts. Much of that could be entirely wasted if the Tribunal were to find no liability or narrower liability than alleged by the Claimants, whether you're talking about geographic scope, the rules in question or the time period, and different permutations need to be considered.

So pausing there, it is fair to say that a significant amount of work has been done. However, the pertinent point for today's application is that there is a huge amount of work still to be done.

It's important to keep firmly in mind too, that there's one and a half years left to go until the trial, which is slated to start, as your Lordship says, in October 2023.

MR JUSTICE BUTCHER: Yes, and that is a point which is very present to my mind. Now, that would, undoubtedly, it seems to me, give time for people to be ready to do everything --

MR TURNER: Well --

MR JUSTICE BUTCHER: -- wouldn't it? I understand your point about costs and saving of work. Those are obviously very important points.

MR TURNER: Yes.

MR JUSTICE BUTCHER: But the timescale is, as I think you said just a moment ago, extended.

MR TURNER: Yes. Your Lordship is absolutely right. We are not complaining -- at least as matters appear now, there isn't sufficient time to do it together. That's not our point.

MR JUSTICE BUTCHER: But the problem then is this: this timescale is extended and it leads up to a hearing really quite a long way away, in October 2023. If I were then to bifurcate this case, the possibility is that quantum would then have to be resolved --

MR TURNER: Subsequently.

MR JUSTICE BUTCHER: -- subsequently, in relation to a timetable which is already extended. That is a point which has been troubling me.

MR TURNER: Yes, no, I understand that and I will need to put that into the balance your Lordship will need to take into account along with all the other points.

I am not seeking to say that there aren't points to be considered on both sides; what I do seek to say is that when you consider --

MR JUSTICE BUTCHER: The pros outweigh --

MR TURNER: The pros very definitely outweigh the cons --

MR JUSTICE BUTCHER: Yes.

MR TURNER: -- when you consider, looking ahead, what is going to be required for this litigation, what the savings will be in terms of cost and efficiency for the parties and the court going forward, if the liability issues are settled, and the permutations are resolved and the question of breach is clear, as a platform for the further trial on quantum.

I'll come to this, it's also a point that we are not only seeking damages as the relief in this case. The declaratory relief which is sought is, itself, of great importance because that determines the behaviour of everybody going forwards in this industry, and it has a real value in and of itself.

MR JUSTICE BUTCHER: Mm.

MR TURNER: And that goes together with the other points you've seen trailed in the skeletons, about the size of the burden and the strain on everybody. But I'll develop those in a few moments.

What we've done is to take stock in view of this colossal disclosure, which was given in October last year, and we've sought to consider how the Tribunal's governing principles are best furthered.

We rely on all the points spelt out in our skeleton, the pros over the cons. And may I say immediately, this is not a case where we are running away from anything. Our point is that we don't want this litigation to become, as it may well otherwise do, unnecessarily costly, complex and burdensome for the court and the parties if there's a single trial on everything, now that we better appreciate what is involved.

Now, on the other side, the Defendants, essentially, say three things in opposition.

First, it's too late in the day to order this; second, that liability and quantum are too tangled up to allow a clean, sensible split; and third, that a combined trial of 12 weeks -- and I'll come to that, we've indicated -- we flagged in the skeleton that that, itself, now appears tight -- can be held from October 2023, and that we're not proposing an earlier trial on liability, but just a somewhat shorter trial, the point your Lordship just picked up with me.

Now, I've largely dealt with the Defendants' complaints about lateness. I'll just add the following. The Claimants' expert, Mr Coombs of Compass Lexecon, has estimated the

enormous amount of work that has to be done on quantum between now and trial. And if I could show you that, that's at bundle B, tab 9, page 247.

MR JUSTICE BUTCHER: Yes.

MR TURNER: You don't need to read it in detail. If we skip to the fourth paragraph to towards the bottom, he says:

"We estimate conservatively that the number of hours needed to assess the quantum is approximately 2,000 hours leading up to the submission of the first report. This work would be in addition to the work required for the assessment of whether the restraints have the effect of restricting competition ..."

Which is essentially the Claimants' burden:

"... and harm consumers ..."

Which is looking at the Defendants' side:

"... following submission ..."

That might be argued:

"... additional effort would be needed to deal with criticisms of estimated quantum of loss. Taking into account such efforts, we estimate the total number of hours of quantum of loss to be approximately 3,000 hours."

That provoked a response in a similar format from Visa's expert economist, a Mr Derek Holt, and in the same bundle, you have that at tab 11, page 253.

MR JUSTICE BUTCHER: Yes.

MR TURNER: So this is an email that was written from him to Visa's solicitors on Wednesday.

MR JUSTICE BUTCHER: Yes.

MR TURNER: If you look about seven lines up from the bottom of that page, he says:

"I agree that substantial work is required for the assessment of the quantum issues ahead of the preparation of expert reports and that such work will be complex and time-consuming.

However, Mr Coombs' email doesn't explain how much of the work required for the quantum analysis is in fact incremental to the work required for the liability analysis. As explained above, in his view:

"... a substantial amount of the data analysis required for the quantum analysis will, in my view, need to be done to determine whether the contested restraints restrict competition ... And/or are exempt under Article 101, paragraph 3, in any event. Such that the number of additional hours he cites for the quantum piece alone is significantly inflated."

So there's a difference of view between those experts as to what is needed because Mr Coombs, on our side, does consider that this is additional, whereas Mr Holt is saying that he considers that the two are mixed together.

So that then leads directly to the second issue that I have to cover, perhaps the main issue, which is the extent to which issues of liability and quantum in this case do cover different terrain, meaning in particular that the work the economists have to do will be much less costly and burdensome if you order a split trial.

What I would propose to do, as I indicated, is to begin by just recalling the relevant legal framework. It is what the settled case law requires for a claimant to show, to demonstrate a breach of the prohibition on agreements having anticompetitive effects.

So if I may, if we can begin by turning up the text of Article 101 itself, which is -- a convenient place is in the judgment of Lord Hamblen in the Supreme Court in the recent judgment about Mastercard and Visa's interchange fees, the H files, H, tab 17, at page 1299. I'm afraid it wasn't separately identified.

My Lord, I do appreciate that you will be familiar with this provision, but there's no harm having it in front of us, so you can see how the different parts of it fit together.

Page 1299, the Supreme Court sets out the article at paragraph 19 of their judgment.

The first paragraph sets out the basic prohibition on agreements that restrict competition, and this equates to what the Claimants have got the burden of proving to establish infringement. It refers to all agreements have between undertakings and decisions by associations of undertakings. And you will have seen from the pleading that our case is that Visa's and Mastercard's rules are either multipartite agreements with their members, or else decisions of associations of undertakings.

MR JUSTICE BUTCHER: That's not in issue, is it?

MR TURNER: That's not in issue -- well, in fact without the need to go there perhaps, there is a dispute about aspects --

MR JUSTICE BUTCHER: There is --

MR TURNER: There is.

MR JUSTICE BUTCHER: -- we probably don't need to go into that.

MR TURNER: No, but there is.

Second, what has to be shown is that the agreement's got as its object or effect the prevention, restriction or distortion of competition.

And it's crucial to understand what needs to be shown. The question is whether there are restraints that gum up, which restrict the competitive process, that interfere with the freedom of individual undertakings to set their prices or compete in other ways, and that therefore have a market impact.

If you do have such restraints on the process of competition, those are prohibited, subject only to the possibility that they are justified by the Defendants, who need to adduce evidence that the four conditions in paragraph 3 of this Article, which you see on the facing page, page H1300, are met.

So that's the second step under Article 101 and what needs to be shown. Each side, therefore, has a burden in a case where the Claimants show that there are provisions that gum up the competitive process.

And the underlying philosophy was summarised by the Court of Justice in the T Mobile case, very crisply, at tab 5 in the H bundles. If you go in that, please, to page 187.

MR JUSTICE BUTCHER: Yes.

MR TURNER: At the top -- this is the Advocate General's opinion -- she says in the much quoted paragraph:

"Article 81 of the Treaty [which is now Article 101] forms part of a system designed to protect competition within the internal market from distortion. Accordingly, that Article, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such as an institution. In this way, consumers

are also indirectly protected because where competition as such, the process is damaged, disadvantages for consumers are also to be feared."

So to establish infringement, it's not necessary to prove any particular adverse outcome to consumers or customers, or particular losses to the victims of the anticompetitive agreement.

For completeness, if you turn in the same tab to page 205, you have the judgment of the court, and you'll see halfway down at paragraph 38 that that proposition of the Advocate General is specifically endorsed at paragraph 38.

So that's the general philosophy and how it works.

There have been cases already now in which the scheme rules of Visa and Mastercard have been litigated, both in the European setting and in national courts in Europe and abroad.

And in the specific context of proceedings brought against Visa's and Mastercard's rules, the courts have specifically recognised again that the central concern is whether these are rules which distort a competitive process.

Here, it would be whether the rules prevent competitive pressures from being applied within the ATM -- the cash dispensing -- industry.

Now, the competitive process is of course liable to lead to different outcomes in the marketplace. You would have different levels of price, different deployments and distribution of cash machines. But the key question for the Tribunal adjudicating this at the liability stage is on whether there is the suppression of competitive pressure liable to cause these impacts.

And it's clear, as a matter of law, that the Tribunal does not have to establish what the level of prices would have been for particular operators, or at all in the absence of the restraints.

You see this very clearly if you look at the recent litigation over Mastercard's scheme rules, both in the European Court and in our appellate court here, over the last few years.

If you still have the H bundle in front of you, if you go in it, please, to tab 8, there you have the case brought by the Commission against Mastercard, concerning what were called its

"multilateral interchange fee rules", that affected retailers. And this is the European General Court.

Now, the litigation, concerned -- I'm not sure if you your Lordship is familiar with this, it's absolutely understandable if you are not --

MR JUSTICE BUTCHER: I have -- I am --

MR TURNER: You are familiar with it?

MR JUSTICE BUTCHER: -- familiar with it.

MR TURNER: Yes.

MR JUSTICE BUTCHER: But take me to what you want.

MR TURNER: Yes. Well, it concerns this collectively set fee, the interchange fee, and in the course of this litigation Mastercard argues that the complainant, the European Commission, must show that the effect of this collectively set fee had certain effects on the prices paid by the end user.

The point I'm going to take your Lordship to is that that's firmly rejected by the court. If you go, please, to page 269, and go to the foot of the page, paragraph 166, lastly in the fourth place --

MR JUSTICE BUTCHER: Sorry, where?

MR TURNER: The foot of the page.

MR JUSTICE BUTCHER: Which page?

MR TURNER: H269.

MR JUSTICE BUTCHER: H269.

MR TURNER: H269, I'm sorry.

MR JUSTICE BUTCHER: Yes, yes.

MR TURNER: So there it says:

"Lastly, in the fourth place, the court must also reject the applicant's arguments concerning the Commission's failure clearly to establish the effect of the rule, the MIF, on the prices paid by the end-user. First, it's reasonable to conclude that the merchants passed the increase in the amount of the service charge that they bear, at least in part on to final consumers. Secondly, such arguments are, in any event, entirely irrelevant since the

fact that the MIF is capable of restricting the competitive pressure which merchants are able to exert on acquirers is sufficient to show that there are effects restrictive of competition for the purpose of the rule."

So it's a very clear articulation of the point.

And this case also illustrates a further point relevant to the argument before your Lordship today, and that's whether to prove liability a claimant, such as Euronet, has to descend into detail about how different market participants would have acted in the absence of the arrangements under scrutiny.

You'll have seen that Mastercard suggests in its skeleton -- the reference is paragraph 31B -- that the Court of Appeal's judgment recently on multilateral interchange fees in 2018 here shows that this is part and parcel of what has to be demonstrated by a claimant.

But that is not right. It's clear that when you turn to our appellate courts too and look at what the Court of Appeal did, it simply asked itself whether in a world without the restraints -- the scheme rules that set the MIF, it was called -- there would be a different competitive process.

You see that in the same bundle, H, at tab 13. If you go in that, please, to page 662, paragraph 129, it summarises, very shortly:

"It is necessary to ask whether in a world without the rules that set a MIF in default of bilateral interchange fees being agreed, there would or would not be more competition in the acquiring market."

Then if you go forward to page 674, you have paragraph 186 where the Court of Appeal is digesting the analysis of the Court of Justice in the further appeal on the Mastercard side in Europe, and they said:

"The CJEU's decision also made clear [at 195] that Mastercard's MIF, which resulted in higher prices, limited the pressure which merchants could exert on acquiring banks, resulting in the reduction in competition between acquirers as regards the amount of the service charge. It is not a decision from which this court either can or should depart. It answers

the scheme's argument that whether as a matter of evidence or not, the competitive process will not differ in the counterfactual."

So that was their argument:

"The default MIFs may be a transparent common cost which is passed on by acquirers to merchants and which does not figure in negotiations between them, but it doesn't follow that acquirers nonetheless compete as strongly for merchants' business in relation to the acquirers' margin and the additional services they offer, as they would in the absence of the default MIFs."

So, the way that they're putting it is: we see that this operates as a constraint, we see that people may compete differently, but it's not necessary for them to go out and work out exactly what would have transpired and what the resulting levels of prices or distribution of effort would have been.

MR JUSTICE BUTCHER: But isn't the court likely to be assisted by knowing how the competitive process would have been affected in deciding whether it was affected?

MR TURNER: Yes, absolutely, we agree with that.

MR JUSTICE BUTCHER: So where is the dividing line, as it were? You are suggesting that the court can reach a sort of fuzzy conclusion at one stage, and then revisit the matter and reach a more definite conclusion, if it needs to, at a later stage?

MR TURNER: My Lord, first, when I said how it would be affected, I mean the way in which it would be affected. If your Lordship meant how it played out, how things would've ended up, no, we say that's not part of the liability assessment.

MR JUSTICE BUTCHER: But isn't that the same question, really?

MR TURNER: No, it's not, in my submission.

MR JUSTICE BUTCHER: It's just a more -- isn't it -- and you really will have to help me on this -- just a more detailed version of the liability question?

MR TURNER: It's not, no.

So let me make it concrete in this case.

If you take the restrictions in this case, take the clearest one, a prohibition on ATM operators from imposing access fees when people withdraw cash at their machines, if that

restriction is lifted, the proposition is that the operators then are able and have the incentive to cover their costs by opening more machines in different locations where there's a demand for it; and the market process enables consumers to decide whether they're willing to pay the charge in order to withdraw the cash or not, given all of the other pressures.

If there's a blanket ban on operators from behaving in this way, that competitive impact is missing. So at the liability stage -- and it's similar to what happened in the interchange fee case -- what one does is consider, looking at the market as a whole, how people would be likely to behave to that extent if this restriction was lifted and if --

MR JUSTICE BUTCHER: That's as I understood it, so it's how people would have been likely to behave if this restriction didn't exist?

MR TURNER: Yes.

MR JUSTICE BUTCHER: But isn't it going to be very illuminating to look exactly at how they would have behaved?

MR TURNER: Well, we're looking at the market as a whole. And there -- I'll need to come to this, but you'll see that there's a lot of market-wide evidence about what would be likely to happen and how people would be likely to behave. One of the big points to bear in mind, which I was going to come to, is that the ATM operators should not be equated with Euronet. Euronet is in at least of two of these three territories, a small player, accounting for 10 or 13 per cent of all the operators. It has its own distinct business model. It's not, in some respects, typical. What you're looking at is a market-wide effect, in which you are considering how consumers behave across the piece, if they are faced with the possibility of charges, how operators are likely to behave, which doesn't just include Euronet.

But what one doesn't have to do -- and this is why the quantum piece for Euronet is separate -- is look at the existing distribution of their ATM estate and work out if these restrictions were removed on different permutations, how that then plays out in terms of what they would have done in -- this particular individual player -- in particular areas,

what the impact on their costs would have been and how things would have worked out, and looked at all of the implications for their profitability across the board --

MR JUSTICE BUTCHER: I fully take on board that that exercise is a more detailed one. The thing which I'm trying to get my head round is if you are actually looking into the question of whether there is an effect on competition, you are going to be very much in this sort of territory and doesn't it make sense then to continue and look at what the effect would be in relation to the Claimants? I think that's where the -- that's where the heart of this is because, although I can see that you could possibly arrange matters differently, isn't it better for the Tribunal, if it can, to look at that question in the round because it's in that territory already?

MR TURNER: In my submission, it is only in a very general way in that territory because the -- and again, I'll try to illuminate this for you -- but the questions that it will need to answer are if it lifts these restrictions -- and again, focus at the moment only on the access fee -- how is it that generally people are likely to behave, not just Euronet, which as I say is a small player, but lots of other operators? How would it be likely to have an effect?

As you've seen from the -- well, partly from the way that the Court of Justice dealt with it in the interchange fee case, you don't have to look at a specific player and try to consider for their particular situation how it would have played out.

Would it have illustrated that there was an effect on competition or helped the analysis? In my submission, no, because you can reach those conclusions without looking at the detailed question of how a particular minor operator in some countries would have reacted.

That involves, in itself, a huge, further workstream, which is unnecessary, and which will therefore involve a great deal more work that does not need to be done.

So would it be of assistance? In the sense that working any particular matter out in great detail might be useful to know, then one would say "yes", but in terms of whether it helps the court, the Tribunal, reach a decision on whether there is a restraint in the marketplace and its effect overall on consumers, no, it does not, it will not help that.

MR JUSTICE BUTCHER: But you say that this work will in fact have to be done, if you are right --

MR TURNER: On the -- if we're right on liability --

MR JUSTICE BUTCHER: If you are right on liability --

MR TURNER: -- on all fronts, yes.

MR JUSTICE BUTCHER: -- this work will indeed have to be done, barring a settlement.

MR TURNER: That's right.

MR JUSTICE BUTCHER: And so, in a sense, on your case you're just putting off the incurring of all of these costs.

MR TURNER: On our side, what we're doing is we're partly looking at this from the point of view of our client, and also from the point of view of the court. We are recognising that there are numerous different possibilities and findings that the court may arrive at on liability, that in order to do that, much less effort and cost can be incurred in order for the court to reach its decision. And then we will know, not in a binary way, are we right or are we wrong, but if we are right perhaps we are right on a different or narrower basis in a way that affects one of these three countries -- and perhaps there's nothing to say about two of them -- or for particular time periods, or depending on particular market circumstances affecting two of them at a particular time.

MR JUSTICE BUTCHER: But you are claiming something like £700 million, aren't you -- or I think that's one estimate of what your claim is? It would seem to me very likely that whether your claim is settled or not is going to depend very much on the amount that it's worth. And although of course I see that the point which you just made might mean that it was curtailed in some ways, isn't it better to find out, as soon as reasonably practicable, what the claim is worth?

MR TURNER: If there is a liability-only trial, then the platform for assessing what the quantum will be will be clear, and there will be a basis for the parties to settle then.

MR JUSTICE BUTCHER: But if there's a combined trial, the quantum will indeed --

MR TURNER: Yes, absolutely, but in order to reach that point, you will have to consider --

MR JUSTICE BUTCHER: Of course, and that's the issue as to whether it's worth taking the risk of having to do all of that later, again, by comparison with the expenditure -- the saving which you say would be effected if it was not done at the first stage and it never became necessary to do it; in other words, if, effectively, you lost at the liability stage.

MR TURNER: Or it was narrow -- yes. You'll recall, we haven't gone to it yet, but the recent decision in the bundles of Mr Justice Zacaroli in the Ede & Ravenscroft case, he makes a point that if you do have a full trial on all issues, one might have a remittal on the quantum side, and then you have to have a further consideration of that too. This is on the issue of whether there would need to be a bifurcated appeal process, and so forth.

One point which is, in my submission, a real practical point, is that if you do it in the way that we suggest, and you assess the scope of the liability in order to determine then how the quantum should be calculated, the prospects, both of the parties being able to settle, with a clear awareness of the parameters of the issues that they need to grapple with, and also of the court being able to focus on it and reach a clean and robust decision on quantum, are stronger.

MR JUSTICE BUTCHER: That's -- I mean, that's something which can be argued -- is argued --

MR TURNER: Yes.

MR JUSTICE BUTCHER: -- both ways --

MR TURNER: Yes.

MR JUSTICE BUTCHER: -- because one obvious way in which parties address whether to settle their case is when they're ready to fight the issue of quantum, and the question is very much in their minds as to what the arguments are on both sides on quantum. So that's a point which could be argued both ways.

MR TURNER: It can, although the fact -- and therefore, what your Lordship needs to do is really to try to assess that in the particular context of this case.

MR JUSTICE BUTCHER: Yes.

MR TURNER: What I would say is that one of the facts referred to in the skeleton is that in the multilateral interchange fee litigation, there has been a bifurcated process, so there was separate trial in relation essentially to liability -- as your Lordship knows, that went all the way up to the Supreme Court -- remitted for quantum, prior to the quantum stage, at least one of the major claimants, Sainsbury's, has now settled in relation to Visa.

So that is an example --

MR JUSTICE BUTCHER: Does that count for you or against you?

MR TURNER: Well, it counts for me because it shows --

MR JUSTICE BUTCHER: It might be said to count against you mightn't it? If quantum had already always been something which people were preparing for, it might have settled earlier?

MR TURNER: Well, what it does show is that where you have had a trial -- and that was a long trial on the liability issues and heavy in its own right, which led to a great deal of debate -- a settlement was achieved after the decision on the liability had been clarified by the courts. So it's helpful to the extent that it shows that that is not a fanciful possibility, that in an area not dissimilar from this it's a real point.

MR JUSTICE BUTCHER: But these are the questions which the courts always have to grapple with in relation to split trials, as to whether a unitary trial is more likely to affect settlement than -- and it's a familiar argument.

MR TURNER: Yes, yes. I'm just reminded, that's true for Sainsbury's and Visa, which was a split trial. Sainsbury's and Mastercard was a combined trial in the Competition Appeal Tribunal, and then there were all sorts of appeals from that. But in a sense -- I'm not sure if your Lordship is familiar with that particular piece of litigation -- both sides were critical of the judgment of the Tribunal in that case on appeals, and it may be said to be emblematic of the difficulties of trying to do too much all in one go. Whereas my submission is that this case, as I'll try to explain, is one where the liability issues themselves, both can be resolved without needing to go into the detailed questions of this particular player's costs, and revenues, and profits and

various assumptions, and it would be helpful to do so because you'll get a result that will help everybody at the end of it.

MR JUSTICE BUTCHER: Yes. But it is (inaudible) because your own case is you then (inaudible), you have to proceed with everything, all the quantum issues.

MR TURNER: If we win on everything, then, yes, we will press ahead. But I am not able to rely on the fact that that's the case. What I can see, as well as the court and all the parties, is that there may well be dispute -- there may well be findings, that will lead to different results and different findings of liability.

MR JUSTICE BUTCHER: But there may not.

MR TURNER: Well, there may not, but this is a case where we are considering across the piece, three different territories, issues which are not issues of pure law that necessarily apply in the same way, in every sphere, the provisions of Article 101 may apply differently in the different territories and at different times leading to different results, and it's far better therefore not to consider that it's really a binary question of win or lose across the board and sweeping the jackpot. It's not that at all, it --

MR JUSTICE BUTCHER: -- you do sweep the board and --

MR TURNER: Yes, absolutely. Obviously that's what we hope to achieve, but I am recognising that looking at the litigation from 10,000 feet up or objectively, this is a case where there are numerous permutations. It's not a single territory, a -- single time period --

MR JUSTICE BUTCHER: I can't take a view as to any of those are weaker than the others at the moment, can I?

MR TURNER: No one can't, but what one can do is see that there are this sweep of possibilities and it's a particular feature of this litigation.

MR JUSTICE BUTCHER: I do see that, I absolutely see that. It's an unusual feature of this litigation.

MR TURNER: Yes.

So I've dealt with Article 101(1) and I will, if I may, come back to this in more detail in a moment when I've shown your Lordship of the sort of materials that I have in mind, which would inform a liability-only trial and what it would look like.

But what I want to do now is turn to a second step in the liability assessment under Article 101, and that's paragraph 3, which is the provision where it's the Defendants who bear the burden. So if we go back to H, tab 17, page 1299, that's the Supreme Court setting out the provision.

Here, I believe it's common ground that the burden of proof shifts decisively to the schemes, so for what's at the bottom half of page 1300 is a matter for them to establish; it's not the Claimants' burden at all.

What the schemes have to do, if we've shown the restriction on competition in the sense that I've explained, is to show that any restrictions are indispensable for achieving certain efficiencies, and crucially, that consumers across the market as a whole are better off.

That's the issue for the court.

And moreover, it is only at this second stage that there's any form of weighing-up of anticompetitive effects against supposed pro-competitive effects. There's no rule of reason under our competition law.

And the weighing exercise concerns the affected market or markets overall. And a good authority showing this is, again, the case about Mastercard's rules, the interchange fee rules. If you go to tab 10 in the H bundle, please.

MR JUSTICE BUTCHER: Sorry, tab 10?

MR TURNER: In tab 10 -- bundle H, tab 10, which is the Mastercard judgment in the higher court, the Court of Justice -- go to page 437.

MR JUSTICE BUTCHER: Yes.

MR TURNER: So here, they are considering what the lower court, the General Court, had found. At paragraph 126, halfway down, they set out at paragraphs 181 and 182 -- 181 said that in the second place, with regard to the criticism concerning a failure to take the two-sided nature of the market into consideration, it must be pointed out in that context the appellants highlight the economic advantages that flow from their rule, thus

in essence the appellants state that the MIF enables the operation of the system to be optimised in various ways by financing expenditure intended to encourage card-holder acceptance and use.

They deduce from this that it's not in the interest of banks to set it at an excessive rate. And moreover the merchants benefit from the rule. The appellants also complain that the Commission overlooked the impact of its decision on card-holders by focusing exclusively on the merchants alone, and a number of the intervening banks add that in the system operating without the MIF, they would be compelled to limit the advantages conferred on card-holders or even to reduce their activity.

So, there you see that the case made by Mastercard and the Member banks was you have to look at all of these intricate questions, in order to decide whether there's a restriction on competition. And at 182, the lower court said:

"Such criticisms have no relevance in the context of a plea relating to infringements of [what is now Article 101] in that they entail a weighing up of the restrictive effects on competition, legitimately established by the Commission with any economic advantages that may ensue. However, it's only within the specific framework of paragraph 3 that the pro and competitive aspects of a restriction may be weighed."

So, that is what the lower court had said. And then the higher court, if you go to 446, essentially endorses that in paragraph 181 at the bottom of page 446.

So the legal position is crystal clear. From the Claimants' side, if we establish a restraint on the competitive process which affects the market -- and I would not refer to that as "fuzzy", it's a general or a qualitative assessment, not a quantitative matter -- then the spotlight shifts to the Defendants and they have to carry out this weighing-up exercise in the context of the third paragraph. Which is all a matter of liability, but so that your Lordship sees how this would play out at a trial on liability only, that is what we would have to establish and then you move to what they would have to establish.

If I may return to this point, paragraph 3, and what would be an issue there is, again, not about Euronet's costs and profits, and how Euronet specifically would have found itself

without the restrictions, it's a consideration of the interests of consumers and of all affected consumers across the relevant market.

So you're not focusing on this player's costs or revenues; you don't need to look at the fraction of the market that this player accounts for in any of the three countries; you're looking more broadly at the whole of each relevant territory.

MR JUSTICE BUTCHER: But why wouldn't that fraction be relevant to what is the position as a whole?

MR TURNER: It's relevant in the sense that it's a --

MR JUSTICE BUTCHER: It is a component of the whole.

MR TURNER: It is a component of the whole, but it is entirely practicable to assess the whole without looking at that small piece, so it's unnecessary in order for the liability issues to be adjudicated for you to do it.

I think that's the point.

You can carry out this exercise, you can decide liability without having to go through what will turn out to be an extremely complicated and contingent exercise for one player.

I think that's --

MR JUSTICE BUTCHER: That is the point.

MR TURNER: That's really the heart of it.

MR JUSTICE BUTCHER: You say you can do that exercise -- you can do the liability exercise without conducting that more granular -- much more granular, you would say -- exercise, in relation to a particular participant?

MR TURNER: Yes. In relation to this particular participant. And to come back to the point I made at the outset, which I must lay emphasis on, it is a very heavy exercise. And looking ahead at what will be needed in order to do this, I apprehend, as Mr Coombs has said in the email that your Lordship has seen, it will be an extremely expensive and time-consuming process that will occupy a large fraction of the efforts of the parties all round. And it will be done on a basis where, as I say, the particular permutations are all to be argued about. And they won't have to do that, obviously, if the liability issues are settled -- or --

MR JUSTICE BUTCHER: Or they settle --

MR TURNER: -- or if I lose in part on a narrow basis --

MR JUSTICE BUTCHER: Yes.

MR TURNER: -- in any of these many ways, yes.

So that's really what the issue comes down to.

Now, in the Particulars of Claim we have pointed out that Euronet accounts in each of these three territories for the minority of the market -- I won't invite you to turn it up --

MR JUSTICE BUTCHER: What are the percentages?

MR TURNER: The percentages are, Czech Republic -- feels a bit like the shipping forecast -- we accounted for less than 10 per cent in 2017; in Greece, 2017, we accounted for about 13 per cent. So that's 10 per cent, 13 per cent. In Poland, it's larger, Euronet accounted for about 30 per cent of ATMs.

And the figures are given in paragraphs 95 to 97 of our Particulars.

So, our essential point is that there is no reason to think that the adjudication of liability of Visa and Mastercard in respect of these nationwide rules does involve a detailed examination of the quantum of loss of this one particular player.

As I say -- and your Lordship is right to pick it up with me -- will it not be relevant? It's relevant only in a very minor way, in the sense that without it, you can perfectly well reach the conclusion, and it in itself will be a very time and cost-hungry exercise --

MR JUSTICE BUTCHER: In relation to Poland, for example, if that is nearly a third of the market, the question of competition overall is going to depend quite a lot on the position of Euronet, isn't it?

MR TURNER: With Poland in particular, the argument is somewhat stronger, yes, because it's not a small fraction, but overall -- and as I say, I'll come to this -- you don't need to do the exercise for Poland either.

MR JUSTICE BUTCHER: No, I understand that.

MR TURNER: That's the point.

So, as in the retailer interchange fee litigation, which we now had in this jurisdiction, Euronet can succeed on these liability issues by showing that the scheme rules do place these

fetters on the commercial freedom of the operators, and thereby distort competition in a way liable to affect the market as a whole.

They affect our ability and operators generally to negotiate with the issuing banks; with the schemes to set higher interchange fees; the ability to install more machines to meet demand in high-cost locations; and to improve in various ways the functionality of our services.

Mr Bailey draws to my attention that even in relation to Poland -- and it is something that I am about to develop too -- we are, in a way, a different animal from other operators.

I mentioned earlier that our business model is different. We don't operate in the same way as the Member banks, who also act as ATM acquirers, and also have an issuing arm, so that it will not answer the question to look at us, even in Poland, for that reason.

So that's our task.

And on the Defendants' side, their task is to consider the market as a whole. Their focus is also on consumers and they have to show that their rules leave consumers at least no worse off.

There's no need to model how Euronet's profits would have been different on these contingent bases in any or each of the territories.

So that's the scheme, as a matter of principle.

If I may, secondly, then turn to the pleadings to show you how it's put, and invite you to go to our particulars, which are in bundle C.

And in those, if you go, please, to page 34, I will just focus on the critical paragraphs.

This is the section that begins, E:

"Infringement of Competition Law."

MR JUSTICE BUTCHER: Sorry, which page?

MR TURNER: It's page C34.

MR JUSTICE BUTCHER: Yes.

MR JOWELL: So there's the heading, "Infringement of Competition Law". The two key paragraphs are 98 and 100. Go to page 43, you have 98.

MR JUSTICE BUTCHER: Yes.

MR TURNER: And if you just run your eye down the subparagraphs (a) to (f), you will see that in each case the allegation is that the disputed rules restrict the freedom of the operators in (a) to decide their own pricing policies, or to exert various forms of competitive pressure on other market actors, or to improve their competitive position.

So subparagraph (c) concerns the restriction of the ability to exert competitive pressure on the issuers, as you see from the first line; subparagraph (d), the restriction on the ability to exert competitive pressure on the schemes, and so on.

And the last subparagraph, (g), at the foot of page 44, concerns the distortion that affects the final consumers and the case there is that because the schemes, essentially, deprive the operators of necessary revenues, their deployment of the ATMs is degraded and consumers are impelled to make payments using cards rather than cash. So it pushes consumers away from making payment using cash to cards.

Then paragraph 100 is the flip side. This is the pleading that removing the restraints would cause appreciably more competition in each of the three countries.

And this paragraph does not allege, and doesn't need to allege, that Euronet, that particular market player, would take any specific steps in the absence of these restraints. These allegations are generalised and they can and they will be established with a range of factual materials, including, for example, strategy papers of the schemes, as well as expert economic opinion based on the empirical material.

Now, Visa and Mastercard you will have seen focus on subparagraphs (c) and (d), and they suggest that our liability case does involve the detailed consideration of Euronet's revenues, costs and profits, and a modelling exercise to see how those would change.

But those subparagraphs -- top of page 46 -- don't involve that at all. You have subparagraph (c) at the top:

"Acquirers/operators would exert greater competitor pressure on Mastercard, Visa and other networks by in particular charging lower or no access fees when the scheme provides a higher default interchange fee than other schemes and/or lower scheme fees and other commercial benefits."

You have a general proposition about how operators would choose to behave in the absence of the restraints vis-a-vis the networks.

And subparagraph (d) below it is, again, not about Euronet, it is a general proposition about how operators would behave in making decisions about how to deploy the machines in the marketplace. So again, it does not depend on a detailed consideration of Euronet's revenues, costs and profits. So that's infringement.

If you go forward to page 48, halfway down is the new section, H, "Causation and Loss". Now, by contrast with what has gone before, that section, as with section I on the facing page, which concerns compound interest, those do relate to Euronet specifically.

And if you look at the foot of page C48, page 48, you see the pleading of loss of profits relating to Euronet specifically, and the foot of page 49, paragraph 116, the financing loss or compound interest claim, that relates to Euronet specifically.

So that is the Claimants' pleading. On this pleading, there is a clear division to be made. Essentially, paragraphs 29 through to 109 are liability, and as you see, 110 to 118, those are quantum, including the finance losses.

So that's the Claimants' pleadings.

If you go to the schemes' pleadings, in the interests of speed -- they are quite similar, so you can focus, for present purposes, on Visa and go to tab 4, C4.

In it, the relevant part is the pleading on Article 101, the third paragraph, which is where they have the burden. You find that on page 78, paragraph 73.

So, without going back over the jargon about what the first, second and third conditions are, the first condition is about whether there are efficiency gains. And in subparagraph (a), what they allege is that their ATM restraints do count as an efficiency because of three things: they reduce the costs, they say, of withdrawing cash; they increase the predictability of charges at cash points; and they, supposedly, increase competition between banks for consumers as well.

So those are their propositions.

It cross-refers back to paragraph 71, which is a couple of pages earlier, on page 76.

Now, this is a paragraph where, as you see from the introduction, at least in my submission, they commit the heresy of arguing that there isn't a restriction of competition in the first place, if you have pro-competitive effects that outweigh restrictive effects. And you will have seen that they repeat what we see as a clear error in their skeleton. But I leave that to one side.

In paragraph 71, an additional proposition for the trial is there, which is presumably incorporated by reference at paragraph 73, and that's at 71(b). And it's the claim that Visa -- the bottom of the page, 76 -- is supposedly preventing the risk of exploitation of consumers by ATM operators by means of the ban on any access fees anywhere in the territories. So, the idea is that they are preventing operators, in particular local monopoly situations, from being able to rip off consumers.

So those, together, are the main propositions that they, and indeed Mastercard, are relying on and what they will seek to establish for their case on liability under Article 101, paragraph 3.

Standing back, as you would expect, none of those hinge on a detailed investigation and modelling of Euronet's costs, revenues and profits as a single operator with its distinct business model, and in two of the three cases, a small player.

It's quite true that there's a weighing exercise that needs to be carried out under this paragraph because Visa needs to show that there are real efficiencies and consider the benefits and the costs. But again, the Tribunal will be considering all of this, looking at the market as a whole.

Now, for completeness, 73, paragraphs (b), (c) and (d), I should just mention, they don't add to the point either way that I am making. What I've sought to do is to draw out what are the issues that would need to be adjudicated on liability.

So, my third and final step to try to assist the Tribunal to see our perspective, that liability and quantum can be properly split, is to show you a small number of the contemporaneous documents in order to illuminate these issues that will be in play in the liability trial and how they will be litigated in that trial, distinct from economic modelling of Euronet's quantum of loss.

And I will take this very lightly, but that is the only matter that I seek to get from these materials. So that is bundle I. Now, the first issue on looking at liability, which is live between the parties, is that the Defendants seem to intend to suggest as part of their case that these restraints on operators are an inherent and necessary part of their rules; they're not discretionary measures.

And if that is so, your Lordship may be aware there is authority that in that particular sort of case, then it doesn't count as a restriction of competition at all. That is if you have restraints, which are, essentially, inherent or necessary for a particular kind of competitive arrangement to function in the first place. So it was tried in the merchant interchange fee cases.

Now, this point will be litigated at the liability trial in significant part by reference to the schemes' own strategy documents. So your Lordship will appreciate that in deciding whether a particular structure, particular rules, are necessary, the schemes' own strategy documents are going to be extremely important.

Purely to illustrate, if you look at tab 2, you have a 2010 document of Mastercard's, and if you look at the top, you see in red it's Outer Confidentiality Ring, so I won't read any of this out loud, to show you a few extracts to show you how we would propose to see this being deployed in the liability-only trial.

If you go to page 9, the first page of this, it's labelled "I 9", and look at the executive summary, you see what the proposal there was, essentially, for a variation in what we have called the "interchange fee" and what they call the "service fee". You see that proposal.

If you go over the page to page 10, and you read the bullet at the very bottom of the page to yourself, down to the words "below measured costs".

**(Pause)**

MR JUSTICE BUTCHER: Sorry, where?

MR TURNER: Page 10, last bullet, right at the bottom.

MR JUSTICE BUTCHER: Yes.

MR TURNER: Just read the last three lines, down to the words "below measured costs".

Now, I want to pause there because your Lordship asked me: well, surely it's going to be of assistance to look at detailed the costs and modelling in order to work out whether there is a restraint; it will cast light on that?

You see that by looking at these sorts of materials, which don't descend to that quantitative examination of a particular player, you already have all the tools for the parties to be able to engage on this issue because it's looking at the matter at a market-wide level.

If you go to page 11, there's a table, and below that table you will see the phrase, "finally the following consequences are expected". If you look at the first of those bullets, just the first one, you see what Mastercard saw as the consequence of their proposal for their rules -- and I should say the phrase "POS volumes" means consumers making card transactions at the point of sale, not using cash.

So, I draw this to your attention in order to show the court something which may not have been immediately obvious, that the question of these acting as restraints for the purpose of showing liability comes out of a range of factual material entirely separate from qualitative modelling of Euronet.

So, the issue of the necessity of the rules, the first significant liability question, can clearly be litigated on the basis of factual evidence, like this, and witness and expert opinion, quite aside from investigating the one player's finances.

The second issue on liability is whether these sorts of restraints by Visa and Mastercard which are complained of -- to come back to what I said was the principle -- suppress competitor pressures, prevent market forces from working by stopping card-holders, generally, from being able to decide whether to make cash withdrawals, if there are these fees, and they prevent operators from being able to decide whether to set these fees.

So, again, we say that that will not depend on some complicated modelling exercise. The incentives and the question of whether operators would act on those incentives comes from other documents and other kinds of material. It will be litigated by reference to contemporaneous materials, largely from the schemes, as well as the factual and expert witness evidence. This has nothing to do with investigating the transaction data.

To the extent that that helps illuminate it, it's an extremely remote matter, quite disproportionate to the time and cost involved.

To illustrate that, if you go to tab 7, which is a non-confidential document --

MR JUSTICE BUTCHER: But this is your claim. You are saying that these will all have to be investigated at some point, unless you're wrong about all of this. And so the stronger your points are here, the more obvious it is that quantum is going to have to be dealt with.

MR TURNER: Ah, well, my Lord, I'm not seeking -- I should say, I'm not seeking to argue the merits --

MR JUSTICE BUTCHER: You are saying, you have all these good documents which can help you at stage one.

MR TURNER: What I mean to do is not -- well, when I say "help" -- what I mean to do is to show you, because one needs to know what are the materials by which these liability issues will be adjudicated by at Tribunal.

MR JUSTICE BUTCHER: Presumably, you are showing them to me because you say: well, there's material there which would allow the Tribunal to decide in your favour at stage one.

MR TURNER: I am doing that in part. I am also showing you -- or my intention is to show you that the issue, the fundamental issue, when you're looking at it from the court's point of view, about what materials you would need in order to take a view on the restraints, because there will be arguments on both sides --

MR JUSTICE BUTCHER: Well, of course there will.

MR TURNER: Yes, but what you will need does not depend on the detailed modelling.

There will be counter arguments, and they will have their own separate points and evidence to deploy. But what I am trying to show you is that in answer to your initial question, which is a very fair one, "Will one not need to look at the complicated issues in any event in order to decide these issues?" What I'm seeking to do is to show you that that doesn't need to be done, that from the point of view of the decision-maker of the

Tribunal, there's a range of other materials once you understand what issues are involved that enable you to look into that.

I am, therefore, not going to the stage of trying to say: look, we can all fast forward to the assessment of quantum anyway, so let's get it out of the way --

MR JUSTICE BUTCHER: Is it not a difficult position? You say I should assume there are all sorts of difficulties with your case, and therefore at stage one you should have every opportunity of losing, as it were, and you never get to the assessment of your quantum.

MR TURNER: Well, it's not as simple as that at all. There are three countries, different time periods, different rules; they interplay in different ways, in different permutations --

MR JUSTICE BUTCHER: But you are not saying that I should take the view you are weak in relation to any of them?

MR TURNER: I am not saying that, but what I am saying is that the court must assume that each of these need to be tested and that the final decision that the court may make will need to be taken --

MR JUSTICE BUTCHER: Couldn't I assume that your case is -- I mean, wouldn't you say your case is strongly arguable in relation to all of them?

MR TURNER: Yes, of course we say that our case is strongly arguable in relation to all of these. But what I'm trying to develop now is the point that these are matters that are going to be adjudicated, by reference to a whole range of factual materials -- and I'll develop what is going to be involved in the trial itself. It's going to be a heavy trial covering many issues, including the foreign law issues; the economic issues; the market issues -- they have experts on that too -- and three different territories. So, that even without the complicated modelling exercise, for the court conscientiously to consider, "What should we find on liability in each of these territories and in what way?", is a big job.

And all I'm saying is -- of course I will say that our position is strongly arguable, but what I am saying is that, first of all, these matters can be adjudicated using a whole range of materials that have nothing to do with the exercise that's now in question; and secondly, that if you do it this way, you will arrive at the end of the process at a platform,

a result on liability, which will, itself, then enable the quantum exercise to be much more carefully tailored and done. So that's really why I --

MR JUSTICE BUTCHER: It may not. It may leave you in exactly the same position, may it not?

MR TURNER: There will be a finding, but if your Lordship means I may win overall --

MR JUSTICE BUTCHER: Yes.

MR TURNER: -- that is right. As I say --

MR JUSTICE BUTCHER: You want me really to discount that as being the most likely?

MR TURNER: Not at all --

MR JUSTICE BUTCHER: But I mean, in which case, this exercise is going to have to be done anyway.

MR TURNER: The exercise will have to be done anyway, only if one makes the assumption that I am going to succeed on liability for all three territories and across the board. And all I am saying is that of course that is our case, but I am recognising that that is not the only permutation that may arise on liability, that there are many of them, and that it's therefore not safe to assume that we may as well proceed on that basis.

MR JUSTICE BUTCHER: It's not safe to assume you won't, is it? I mean, it's your case -- you come to the court and say you're going to succeed in relation to all of these points. You don't say that any of them are inherently weak or can be discounted, and so the case which you're presenting means that the quantum exercise will have to be done. Anyway, I think --

MR TURNER: No -- yes, I understand the point. In a way, this is a curious situation because very often it's a defendant which wants a split trial --

MR JUSTICE BUTCHER: Indeed.

MR TURNER: -- and the claimant that wants to achieve --

MR JUSTICE BUTCHER: That is very often --

MR TURNER: -- a result as soon as possible. The distinctive features of this case include, first, as I say, that the relief that is sought is not only about damages --

MR JUSTICE BUTCHER: I think you should develop that point because I'm interested in it.

MR TURNER: Yes.

So in our pleadings we also seek declaratory relief. We can turn that up. That is at C3, tab 3, at the end, paragraphs 119 and 120 on page 50.

MR JUSTICE BUTCHER: Yes.

MR TURNER: So the point here is that current -- this is not a past situation in relation to which the Claimants are seeking only to recover compensation for wrongs. This is a situation where there is an ongoing market problem, as the Claimants see it, which affects their ability to operate in the future.

It is a matter of European as well as national laws and it's an important problem. Therefore, the liability question in this case itself is extremely important, both to our client, to Visa and Mastercard and to the public.

And that is why we are focusing both on the cost issues that I've referred to, the permutation issues -- your Lordship has that well on board -- but also on the objective of focusing on these liability questions, to the greatest extent to get these resolved.

It does enable one to go on and consider quantum as well, but it also leads to a resolution of what are difficult issues that have been litigated -- or similar issues litigated -- both in Europe and more broadly, and to get clarification of the legal situation in the interests of the public as well as the parties.

The sooner that the liability issues are decided, the sooner that these market forces, if we're right, are unlocked as a matter of the public interest, because competition law is an arm of public policy --

MR JUSTICE BUTCHER: -- will be decided any later whatever I do today -- because you are agreed that the trial is going to start in October 2023 --

MR TURNER: That's right, but what I am saying --

MR JUSTICE BUTCHER: -- give or take a week or two, plus the more complex judgment.

MR TURNER: Yes, we see it as being -- well, I'll come to this directly -- somewhat more than a week or two.

MR JUSTICE BUTCHER: Yes, you haven't addressed me on that.

MR TURNER: Not yet. But it is more complex, it is longer. But also, in my submission, experience does show that if one focuses on the particular issues of liability, the prospects of a clearer appreciation being given to it are higher than if there are also very detailed elements of the trial, which may occupy a great deal of time and effort at the trial as well, and also in the writing of a judgment, which therefore affects the overall quality of the process. This a general observation about adjudication --

MR JUSTICE BUTCHER: You could (inaudible) examples on both sides of that argument.

MR TURNER: Yes. Well, I appreciate that. But nonetheless, my submission is that in this particular context, there will be a benefit to having a shorter trial, focusing on central issues of public importance.

MR JUSTICE BUTCHER: Yes.

MR TURNER: I think that's --

MR JUSTICE BUTCHER: Yes.

**(Pause)**

MR TURNER: If I may, I'll just draw your attention to Mr Justice Zacaroli's recent decision in Ede & Ravenscroft. That's in the H bundle at tab 18, please.

MR JUSTICE BUTCHER: Yes.

MR TURNER: If we go to 138 to look at paragraph 24, he was, again, considering a competition case, a far smaller one than the one before your Lordship today, and he, at 24, is addressing the permutation point, or part of it, that conclusion on counterfactual sub-issues will have a direct bearing on quantum.

And he says towards the end:

"Until you know the correct counterfactual, then you don't know how to calculate the precise loss suffered, but the strength of this point goes primarily, if not completely, to hiving off only the quantification of damages. Balancing the two main considerations against each other, therefore [this is at the top of 1383] I am of the clear view that the appropriate course is that infringement and quantum should be dealt with --"

MR JUSTICE BUTCHER: And to causation.

MR TURNER: And to causation, I'm sorry, quite right.

"... but that the quantification of damages should be hived off to a separate trial as necessary. I have taken into account all the other factors identified in Mr Justice Hildyard's judgment."

So he resolved the matter in that way in that case, taking into account, again, the permutation issues.

MR JUSTICE BUTCHER: Yes.

That was an application by the Claimants.

MR TURNER: That was indeed. That was indeed.

So my Lord, I'll very briefly show you one or two more documents, but I have your point on the contemporaneous documents and their relevance. I'm showing them to you, partly, in order to address the point you raised about how relevant --

MR JUSTICE BUTCHER: I understand your point that I should assume, you say, that there is material which goes to the issues of liability which doesn't depend on the position of Euronet and doesn't involve any investigation of its precise circumstances. There will be general material.

MR TURNER: It goes to it, and indeed it is the primary way of resolving it, that the role of a detailed investigation of the finances of this one particular player are relevant only in a very limited sense in that exercise --

MR JUSTICE BUTCHER: Tangentially relevant.

MR TURNER: That's right.

MR JUSTICE BUTCHER: And certainly you would say the matter can be resolved without going into that minutiae.

MR TURNER: Yes.

Now, I have made the point. I can illustrate it by reference to different documents, but I think if your Lordship already has it --

MR JUSTICE BUTCHER: I have that point. I thought those documents that you showed me made that point -- I mean, I understood the point from the documents, certainly.

MR TURNER: Yes. What I was going to do -- I shan't then -- I can show you for each of the further issues that arise on liability, the sort of documents that equally shine a light on

how to address it and how those would be tackled, which have nothing to do with an investigation of the quantum of loss of this player. That's the essential point.

MR JUSTICE BUTCHER: Well, if something is said which you think requires further -- by Mastercard or Visa -- something is said which you think requires you to illustrate that further, you can do that in reply.

MR TURNER: I'm grateful. I think -- I think, however, perhaps I'll just show you one of them to make one point, which I apprehend will be made because of the case that's been trailed in the skeletons.

MR JUSTICE BUTCHER: Certainly.

MR TURNER: Let me just find my bundle I.

So this is a point that you find, essentially, emerging from Visa's pleading of the case, if I can start there, please. In Visa's pleading, which is at C4, page 74 --

MR JUSTICE BUTCHER: Yes.

MR TURNER: -- you see a long paragraph, which is part of their defence, 68(e). If you look seven lines down on that page in subparagraph (e), you see that Visa alleges that when setting the level of their interchange fee to ATM acquirers, Visa gathers and takes into account the market average cost of providing cash withdrawal services, including adding a return on capital employed based on the best information available.

Now, in terms of forensics and proof, what that indicates is that the schemes themselves have wide information on financial matters, including ATM providers' costs. So this is not just focusing on Euronet; this is an indication that, from the schemes' perspective, they themselves do cost studies and gather lots of financial information.

So if one is considering, "Well, how does this play out in terms of market operators as a whole?", these schemes also have information and are disclosing information concerning those costs.

Now if, we go to bundle I, and look at tab 3, this is the documents -- this is a non-confidential document. It's very short. It's a document from Visa about a cost study into ATMs in Poland in 2010.

At the bottom of this page, which is page 15 of the numbering, the author, you see, asks:

"Hi Tim, Bank Zachodni is asking whether we can include independent ATM providers in our cost study."

We are one of those, so we are an independent.

And if you look at the emails above, no, so they're not included in this cost study.

So that when they're considering the market, they have data, but this is to indicate that, at least in our case, operators such as us aren't even treated as relevant to factor into these decisions, when you are setting what is the only source of remuneration for operators in a world with these disputed rules.

That is in tension with the contention in their skeletons, that detailed scrutiny of our costs, our volumes, our profits are required to assess the justifiability of these rules under Article 101(3). So they (a) gather lots of cost information about the market as a whole, so the court has that for the liability exercise; and (b) our own costs aren't even considered to be relevant for the exercise that they're carrying out when they do this --

MR JUSTICE BUTCHER: The point that has been sort of going through my mind, that what you are objecting to is the detailed analysis of your position --

MR TURNER: Yes.

MR JUSTICE BUTCHER: -- which comes out of the disclosure which was given -- or you started by saying that it was because of the amount of disclosure that you have refocused as to what is the appropriate way of dealing with the trial. That has to be your disclosure, doesn't it? If your point is that it's an investigation of your position that is the one which really causes the problem --

MR TURNER: Yes.

MR JUSTICE BUTCHER: -- that must come out of your disclosure, and it must always have been obvious to you as to what volume of disclosure that would be?

MR TURNER: Yes. So, my Lord, I'll come back to the point we canvassed at the outset about this. Your Lordship is right --

MR JUSTICE BUTCHER: -- until you were showing me this and I was focusing on it, it must be your documentation which is so voluminous.

MR TURNER: Yes, my Lord, that's right. To come back to the point I made on this at the outset, you're right to pick that up, however, we, the client, is not the same entity as the advisers or the economists who received this material. And it was when the advisers, Mr Coombs said, received this material in October last year that it brought home to them what was involved.

So yes, there is disclosure too from the Defendants on a range of cost issues, but his email was referring -- and Mr Pike's witness statement -- to the advisory team receiving this material and appreciating what is involved in the exercise.

Appreciating too that what is involved, according to Visa at any rate, not Mastercard -- you may have seen a difference in their skeletons -- is that we need to show which ATMs in each of these three countries over time would have been in place without the restraints, which additional ones would have been there, and in a very granular way, how things would have played out. So they say that's what needs to be shown.

Now, I hope I have explained to the court why it doesn't need to be shown, certainly on the liability side, at all. That's entirely wrong. But their case is, on the quantum side certainly, "We are going to expect you to descend to this level of detail".

So we were faced both with their approach this issue, and then the economic advisers receiving this very large amount of information and appreciating the sheer scale of the exercise. And it's not fanciful to look ahead and see that this will be a major and time-hungry part of the case.

So your Lordship's right, it has come, largely, from disclosure that has been given to the team from the client on our side, but that's how it's arisen.

For all of that, it is a real point.

MR JUSTICE BUTCHER: No, I see that, but I am just thinking how it had arisen.

MR TURNER: Yes, yes, absolutely.

So if I may then just draw the strands together, and now I can be much briefer.

We say it's a case where it is eminently practicable to try the liability issues first. So, the first point taken against us, which I have spent much time on, is the question of the split

and whether it can be a clean split. At least on that, which was the main point, I hope I've made our position clear.

Now, the schemes have focused in their skeletons on one of the issues in the list of issues, issue 31, which you'll find in the bundle at A2, page 19.

MR JUSTICE BUTCHER: Yes.

MR TURNER: Mr Bailey reminds me I should, first, start with page 11, the first page, where in the ordinary form the list of issues is introduced by the statement, that it's intended as a tool to assist case management and is not intended to be a comprehensive statement of the matter in issue or supersede the pleadings.

Now, with that, issue 31, which is on page 19, is what has caused the concern.

Issue 31 is listed under the heading on the prior page, "Alleged Infringement of Competition Law", and what we are saying, today, is that those questions -- and we can look at them now -- you will see are in fact quantum issues about Euronet. They are not these general market questions, either on the 101, paragraph 1, side or where they bear the burden, paragraph 3, the impact on consumers across the three markets.

So, 31(a), to what extent, if at all, would the Claimants have imposed different charges, and what would those charges have been? They want it quantified.

(b), to what extent, if at all, would the Claimants have made different bilateral agreements, and what would be the terms?

(c), to what extent, if at all, would the Claimants have installed additional machines?

(d), to what extent, if at all, would the Claimants have retained machines in the counterfactual that they be installed in the relevant period?

And (e), to what extent, if at all, would there have been additional functionality?

Now, pausing there, all of those are quite clearly pure quantum issues concerned with that side of the case.

The remaining five concern, in a general sense, how other market actors would have acted, which in a general sense is a matter arising for liability. But these paragraphs are asking for specific details of who would have done what, by reference to the matters

set out above. And when they do that, then those are quantum questions focusing with precision on asking what would have happened.

So, to the extent one is focusing on the list of issues rather than the pleadings, that is why we have said that issue 31 should be viewed as a matter on the quantum side; and issue 32 -- if you look at the following issue, those are the liability questions. Issue 32 concerns the effect of preventing restricting and distorting competition, and then sets out the relevant questions for liability.

So this fuss over issue 31 is, essentially, a red herring and is not something that should trouble the Tribunal.

That's all I wish to say about that.

Then, the final matter I need to address is to round up, by looking at the practical litigation questions which are relevant, the pragmatic questions, when making a case management decision about whether to order a split trial or not.

The principles aren't in dispute. Your Lordship has seen them trailed in the skeletons. Mr Justice Hildyard's decision in the Electrical Waste Recycling Group case is important. The question is the application of those principles here.

And in my submission, there is a strong case for making a decision now to separate liability only to be tried first.

And I make the following points to amplify what was said in the skeleton.

Number one, for the reasons I've given, a colossal source of complexity and cost will be removed from trial preparations which span the next year and a half. And that is the expert evidence in the case dedicated to estimating what loss this player, Euronet, will have suffered in the three territories. And you've seen also from Visa's skeleton, and indeed from issue 31, the entirely granular way in which they say the issue needs to be addressed.

The quantum case also includes detailed evidence on the compound interest, the financing losses, from dedicated experts.

So those are the costs that would be saved.

Second point, is the point that, my Lord, we've now covered in argument: if there isn't a split, then the expert work necessarily on quantum has to cover all three territories, even if I am wrong and I don't succeed in all three, and it will have to cover these many different permutations of liability; for example, if a non-discrimination rule is lawful in one territory and the access ban is not, and the different effects that would flow from that.

The third point is that the split will serve a useful purpose. That's the point that we have also canvassed, about clarification of legal rights and obligations generally in this area, and therefore leading to the market operating in a different way.

The fourth point is this, that our current best estimate, which I will need to unpack, is that the liability trial itself will occupy, as you've seen from our skeleton, we now think up to nine weeks of court time and that a combined trial could, will require more than 12.

And I will want to explain that. I am making the following assumptions for a liability-only trial. The first is that we're dealing with four-day trial weeks, as the letter from the Tribunal has indicated we will. I am taking these assumptions: that you have a week for judicial pre-reading, a week for openings and closings respectively, and a week for preparing the written closings and for the Tribunal to read the closings.

MR JUSTICE BUTCHER: Sorry, one week for pre-reading?

MR TURNER: Yes, one week for openings.

MR JUSTICE BUTCHER: One week for openings?

MR TURNER: Two days apiece. Your Lordship may consider that too much --

MR JUSTICE BUTCHER: Well, I think that would be generous.

MR TURNER: Yes.

MR JUSTICE BUTCHER: But one week for closings does not appear to be generous.

MR TURNER: One week for closings, certainly after a case of this kind, two days apiece must be right.

MR JUSTICE BUTCHER: I agree with that.

MR TURNER: Let us say one day for openings. And a practice which I've now seen, your Lordship will be far more familiar with, a week for preparing the written closings

after the hearing of the evidence and then submitting them and a week for the Tribunal to read them before the oral closings. So that is either four weeks and two days or five weeks.

Then what has emerged from the debate that's led to this hearing is that on liability alone, there will be the factual witnesses and the schemes have two ATM industry experts. It appears that there may be at least 14 factual witnesses and those experts as well, and that is why we are, broadly, allowing for three weeks for the oral examination of all that evidence. Three court weeks.

Then you come to -- so that's four -- four weeks, two days, let's say, and three weeks on top.

Then you have the economic evidence. Now, this is an important point because my experience has been that if one is not dealing with the quantitative modelling, then it is possible and better for the economic evidence to be hot-tubbed for there to be concurrent evidence.

And we put in our skeleton the point that at least in one case, the former president of the Tribunal, Mr Justice Roth, in litigation here in 2017, Paroxetine litigation, drew a distinction between the sorts of cases where you can have a hot tub, where you're not needing to go through intricate modelling with the experts, and cases where there is such modelling and where it's better for counsel to take the experts to it in cross-examination individually.

So if you have a liability-only trial, you are much more likely to be able to achieve that with the economists in hot tubs, and to achieve that and let us say in one court week. Your Lordship may see that as too narrow, but we see as a hot tub concurrently with the experts, that that is achievable. Without hot-tubbing, it's longer.

And finally, the last piece is evidence from foreign law experts. I'm going to assume that they simply use up some of the time allowed already in the estimate that I've now given. So that amounts in total to around nine weeks. That's how I'm currently getting there, looking at a liability-only hearing.

My Lord, if you open our skeleton up and go to paragraph 53, which is at A, [page] 42, unless you have it separately.

MR JUSTICE BUTCHER: A42?

MR TURNER: A42, yes.

MR JUSTICE BUTCHER: Yes.

MR TURNER: We there set out -- so I'm not going to repeat it -- all of the different issues that will arise for a liability-only trial anyway, that will need to be covered.

It is already, therefore -- now looking at the factors that Mr Justice Hildyard articulated, and before him, the former Chancellor in relation to the Leaflet Company case, it's already a very heavy burden for the Tribunal in its own right.

Now, what happens if you add the quantum ... if you have to do quantum as well, at the same trial, it does add a significant additional burden -- so to conceptualise what will be involved, you have now got in court as well, the quantum debate among the experts, so that involves all of the permutations, all of their modelling, and all of the cross-examination about the assumptions they've made and how things change, if it's one permutation rather than another.

That's not, in my submission, suitable for hot-tubbing; it's far more suitable for individual cross-examination of each of the three experts. Their work will need to be assessed on its own merits. That in, itself, does add considerable time, and one might consider there that it could be a day or two apiece on the modelling for the three experts each.

On top of that, you then have the financing loss claim, where you have three experts again to be cross-examined -- the borrowing costs.

MR JUSTICE BUTCHER: Three experts?

MR TURNER: Well, ourselves, and Visa and Mastercard.

MR JUSTICE BUTCHER: I'm not likely to allow duplicative expert evidence from Visa and Mastercard on the same point. I'm not sure how far this would be duplicative.

MR TURNER: That's -- well, I'm grateful to your Lordship for that, that's a fair observation --

MR JUSTICE BUTCHER: I mean, I'm not going to say that they can't put in expert reports --

MR TURNER: No.

MR JUSTICE BUTCHER: -- but I would be astute to ensure that I don't hear the same expert evidence twice.

MR TURNER: Yes, yes. It would, in my submission, probably require a direction, because otherwise they will say that they have their own different perspective that differs from the other scheme --

MR JUSTICE BUTCHER: Well, if we do need directions in relation to that, you can reply to it because my usual inclination in relation to this is to make sure that Defendants do not duplicate expert evidence unnecessarily, or indeed -- well, it's usually the Defendants.

MR TURNER: My Lord, I'm very grateful for that indication because as this litigation progresses, it will be something that will need to be borne in mind very closely, irrespective of the outcome --

MR JUSTICE BUTCHER: Of course if the Defendants' experts have different points to make, that's a different matter, but if they are simply making the same point, then that isn't, in my view, very satisfactory.

MR TURNER: I am obliged.

Now, we've talked about the quantum debate among -- there will be likely three experts and the large amount of work that that will require.

On top of that, as I say, you have the financing loss claim.

I am told that we had applied at one point for the Defendants to be limited to a shared expert and this was rejected by Mrs Justice Cockerill.

MR JUSTICE BUTCHER: Right, okay. Well, I am not limiting them to one expert, but I will need a lot of persuasion if I am I going to hear the same expertise from two different experts, but we don't need to go any further into that. I just raise a question mark over your point, that there is going to be three lots of experts which are going to take up significant time in relation to the financing aspect, but that's the only reason it came up.

MR TURNER: No, I understand.

So we've covered the expert evidence on the individual modelling. Then the financing losses. Then potentially additional time to cross-examine at least our factual witnesses on the quantum issues.

And finally, foreign law points on quantum, type of recoverable loss and so forth, that have already been indicated.

Now, our assessment is that this renders a 12-week single trial perhaps achievable, but certainly tight, and that it would be sensible, if there were a single trial, to allow more than that.

MR JUSTICE BUTCHER: How -- 12 weeks take you from the beginning of October until when?

MR TURNER: It's the end of December, the conclusion of the term --

MR JUSTICE BUTCHER: Does it fit into that term or does it go over?

MR TURNER: My understanding is that it does fit within the Michaelmas term, yes. Yes, I'd need to check that. 2 October through to the conclusion in December before Christmas, it does fit --

MR JUSTICE BUTCHER: 12 weeks --

MR TURNER: -- it does fit, yes.

Technically, one day short. If you go further, then you're into January.

Now, for these reasons we see that the single trial could realistically need more than the 12 weeks. And this accords with Visa's own submissions that it made at the first CMC, if I may just show you those. They're in bundle F, tab 2, and if you go in that to page 31, you'll see the heading "Trial Length".

MR JUSTICE BUTCHER: Yes.

MR TURNER: The Defendants propose the trial be listed for a period of 12 weeks, including one week of pre-trial reading, one week for preparing written closings, and so forth.

“53: Visa submits this is already a relatively tight timetable and it may well become necessary to eat into some of the closing preparation time if the evidence takes longer to hear, by way of comparison, Sainsbury's and Visa, which only concerned interchange fees in one market, not three, and only concerned liability and not quantum and only concerned Visa and not Mastercard was heard over about 12 weeks.”

So they took the view even at that earlier stage that 12 weeks was likely to be tight.

We agree with their benchmark -- the rough benchmark of the Sainsbury's and Visa litigation and how long that took. And for the reasons that I've now explored with the court, it does seem that 12 weeks could be too tight an estimate for a combined trial, and that therefore if there were to be a single trial, it would be better to allow for a provision for that to extend into January, into the Hilary term as well.

MR JUSTICE BUTCHER: Yes.

MR TURNER: So those are the reasons why we say that on that fourth point I was making, that there is a realistic, genuine estimate of a liability trial that fits within the Michaelmas term estimate, that could well be nine weeks, that will, in itself, be heavy for the court and the parties, and for that reason too it would be sensible, on pure practical grounds, to envisage a trial on liability issues in that slot.

The fifth point is the simple point really responding to the Defendants, who say that we will have to go into matters twice, that the liability findings will create an issue estoppel, there will not be re-litigation. And I hope that I have -- or I have sought to explain why the liability issues do not involve going over the same territory. And this was emphasised by Mr Justice Lewison, as he then was, in the Harvard International case. We quote it in our skeleton. I don't believe I need to take you to that.

MR JUSTICE BUTCHER: No, there will be -- things which are decided, there will be an estoppel.

MR TURNER: Yes, that's right.

And sixth is the problem of bifurcated appeals which we've now touched on, if there are split trials. Here the issue cuts both ways, and that was -- I've referred to it now in general terms, we say very crisply addressed by Mr Justice Zacaroli in the Ede & Ravenscroft case, and you see that in H, tab 18, at page 1383.

It's at the bottom of page 1383, internal numbering 8.

He says:

"The Claimants point out that the Tribunal retains a discretion as to what to do about quantum, even if there's an appeal after the first trial. But the point cuts both ways, particularly because an appeal on a composite trial runs the risk of the matter having to be remitted

to re-investigate quantum, depending on the appeal court's determination as to liability."

So that's simply repeating the point that I adumbrated earlier, that the apparent advantage of a single trial may turn out to be illusory if something like that occurs.

And my seventh point, which I won't labour because I've already made it, is that the prospects of settlement are certainly good if the liability issues are crystallised and resolved. And that is what has just happened with Visa in the merchant interchange fee case brought by Sainsbury's.

So my Lord, I'm grateful for your patience in hearing me out on this. I did need to explain it in some detail to show you how the issue arises.

MR JUSTICE BUTCHER: That has been extremely useful Mr Turner, thank you very much. Yes, who is going to go first?

**Submissions by MR JOWELL**

MR JOWELL: Mr Chairman, it has been decided that I would kick off. Could I start by going back to put this application in its procedural context?

This is an action that was issued in May 2019, so almost three years ago. The first CMC was, as you've heard, before Mrs Justice Cockerill. It was not heard in November, as my learned friend suggested, it was heard in October 2020, so more than a year and a half ago.

There were various matters that were in contention at that first CMC, but one thing that was never contended was there was no suggestion by either side that there should be a split trial between quantum and liability.

Indeed, the list of issues that was agreed in advance of that CMC included issue 31, and as you've seen, the location of that issue in the agreed document indicated that it was mutually recognised as being relevant to infringement. And the same is true of issue 17.

Now, directions were given at that first CMC through to trial, and on the basis of a trial consisting of both liability and quantum. As you've seen, that was originally meant to

take place on the first date after 23 January 2023, with an agreed estimate of 12 weeks.

Now, at that CMC, Visa were seeking answers to its RFIs, various RFIs, which were in particular relevant to the issues identified in issue 31. It was never suggested in response, by the Claimants, that the RFIs only related to points of quantum and didn't also relate potentially to liability.

The judge, in any event, dealt with that RFI not by ordering answers to the RFI, but instead through the device of ordering sequential exchange of both witness statements of fact and of expert reports.

So that's the origin of the order that my learned friend noted of the sequential exchange. It was so that the Defendants could be put in a position where they could understand the detail of the Claimants' case before giving their evidence.

The Claimants were, for their part, at that first CMC, seeking disclosure, and that disclosure related both to matters of liability and to quantum.

Now, there's been a transfer to the CAT and there's been some slippage in the timetable. But nevertheless, after that first CMC, the parties have spent considerable time liaising through their solicitors and agreeing the categories of disclosure that are relevant to all issues in the claim, both liability and quantum.

Indeed, lists of issues for certain of the experts have been agreed, again based on the assumption that the issues included quantum.

Now, as my learned friend has acknowledged, disclosure, the main disclosure, has already taken place over six months ago, and that disclosure and inspection of documents included documents relating both to liability and to confirm.

There's a little bit more top-up disclosure to come to get, to make things up to date, to make the disclosure, bring it up to the present time, but the disclosure exercise is substantially complete.

The factual evidence, meanwhile, is due to be served by the Claimants just next month, and will include, unless, Mr Chairman, you take a different view, the witnesses potentially relevant to quantum.

Now, our experts certainly have already commenced the detailed examination of the documents, including a review of the transaction data of Euronet and Mastercard, for the preparation of their expert reports in relation to both liability and quantum issues.

Now, against that background, it must be clear that any advantages, any potential advantages, of a split trial adverted to in the case law, or indeed as a matter of common sense, have already been lost.

MR JUSTICE BUTCHER: Or may have been.

MR JOWELL: Well some --

MR JUSTICE BUTCHER: Some part of it will be lost.

MR JOWELL: Yes, that's right, a significant part -- I mean, we're six months after disclosure and disclosure itself, it's not just -- it's the process of disclosure and reviewing that disclosure.

Now -- and that ship has definitely sailed.

Now, it's not suggested by my learned friend that in any way the trial date needs to be vacated or that we can't achieve the hearing in 2023.

So this is not a case where it can be said, "Well, if you split liability and quantum, the trial of liability will occur any earlier". It clearly won't.

And although there is some concern about the 12-week estimate, it's been agreed, and there's no -- we have -- we believe it can -- with some discipline and effort, it can be achieved.

And the difference between that and a nine-week trial on liability is simply not significant in the larger scheme of things. And one will not achieve a resolution of this matter materially earlier as a result.

So this is a very late application, and indeed the first time that a split trial was even floated was in correspondence in December of 2021, so just a few months ago.

If I may just show you that because it is relevant to see how they initially put it. It's in bundle G, at tab, page 13.

MR JUSTICE BUTCHER: G13?

MR JOWELL: G13, yes.

MR JUSTICE BUTCHER: Yes.

MR JOWELL: They started by suggesting, as you see at the bottom, that -- they proposed:

"... issues relevant to liability should be determined at a six-week trial..."

Well, that's now a nine-week trial.

MR JUSTICE BUTCHER: One moment, yes, a six-week trial.

MR JOWELL: Yes:

"... starting in October 2023. The remaining issues that are relevant to causation and quantum should be tried at a later stage."

You'll see over the page, do you see the fourth paragraph down, they say this:

"In the present case, the Claimants propose a straightforward division of issues. Issues 16 to 34 from the agreed list of issues would be determined at a liability trial in October 23. The remaining issues that are relevant to causation and quantum would be tried at a subsequent stage. There is therefore a clean and logical split of the issues between the parties."

So you see no suggestion at all that issue 31 is not relevant to liability or, indeed, issue 17.

If one goes forward, we see our reply, which is at G20 -- well, it starts at G19 but the part I would like to show you is at G20 -- and you see we point out in the first paragraph of G20 that we fail to see how that split would offer a clean and logical split of the issues between the parties. Several of the issues listed at paragraphs 16 to 34 go to both liability and quantum, and we consider, for example, issue 31, and we go through it. We say:

"Such matters, while crucial to any analysis of liability, will also play a central part in any causation and loss analysis. To the extent that it is suggested that issue 31 could be dealt with in a broad brush manner for the purposes of determining liability and then subsequently revisited, such an approach would be unsatisfactory."

And we explain why.

Now, the response to that letter we'll see -- and forgive me but Mastercard wrote in similar terms, that's at G17. I don't think I need to go to it -- if you go, Mr Chairman, to page 24, we see their response. You see at the top (a):

"To address the specific points in your letters, clean split, issues 16 to 34 concern the factual background, applicable law, the alleged infringement of competition law and objective necessarily/exemption. They are all concerned with the Defendants' alleged liability. Moreover, the Tribunal's conclusions on issue 31 as part of liability can and should inform its determination of quantum issues, such as issue 37."

So they double down and they reiterated their point that issue 31 goes to liability.

Then it really was only later on that, when they brought this application, I think the first suggestion that 31 wasn't relevant to liability came as early as -- as late as 17 February this year when we --

MR JUSTICE BUTCHER: That was 17 February, wasn't it?

MR TURNER: Forgive me. It was when we received the application, shortly after that. 4 March, I'm told, forgive me.

So they now say, well, issue 31 doesn't concern liability at all and can all be hived off to quantum.

Now, as Mr Justice Hildyard noted in Electrical Waste Recycling case, it is of particular importance, when considering whether to split liability and quantum, to consider whether there can be a careful demarcation between the two. Can there be a clean split? We simply don't accept that the Claimants are correct, that the matters identified in issue 31 do go solely to quantum.

Those matters, on our case, are also centrally relevant also to liability, both to what's called the counterfactual, the question of what would be the position absent the restriction in relation to Article 101(1), and also as to whether it falls within exemption provisions in Article 101(3) and also to the question of objective necessity.

My learned friend seeks to persuade you that they are not relevant, and he does so essentially on the basis of, I think, a number of contentions -- which I'll come to -- but in part they are contentions of law, which are at least in part contested, in part they are contentions of fact, he says, well, this could all be resolved by other documentary evidence. But we make essentially three points in response. First, we say that the Claimants' position is inconsistent with the parties' stances and understanding to date in their

correspondence, in the list of issues and also we do say in the parties' pleaded cases when you look at them in full, which I will need to come back to. Secondly, we say that it is based upon a highly contentious proposition of law, and we don't for one moment invite the Tribunal to resolve that point of law today.

MR JUSTICE BUTCHER: Well, I am certainly not going to --

MR JOWELL: But sufficient really for the Tribunal to just regard the point as arguable, or indeed not appropriate to resolve today. Because if it's going to be -- if it's an arguable point of law then the relevant evidence that we wish to rely on will --

MR JUSTICE BUTCHER: How would you define that point of law?

MR JOWELL: Well, it's whether -- I suppose the point of law -- well, in part it's a point of law as to whether, within 101(1), there is any room for a substantive assessment as opposed to a formalistic assessment of whether there is a restriction of competition. Or, to put it another way, whether one can look at different parameters of competition in the context of 101(1).

In fact, even putting it that way, to say that it would all turn on that, is too narrow, because there's also the question -- in any event, these issues become relevant also to exemption and indeed to objective necessity.

It's not enough for my learned friend to say, "Well, I want to prove my case a different way"; one is entitled to look at the entirety of all the evidence which is relevant.

So, I mean, I think part of what he says is that it must be determined on a market-wide basis and he says, well, we are only a small fraction of the market. But that doesn't suffice because the crucial market here is the Polish market, and that accounts for, I think, over 90 per cent of the quantum of their claim -- 96 per cent, thank you.

MR JUSTICE BUTCHER: Poland is 96 per cent.

MR JOWELL: Yes, yes, yes, sir.

Of course, in that market they constitute a very sizeable chunk, 30 per cent of the market. Of course, one has the advantage of their data, and so one wants to look at their data as a very useful insight into the market as a whole. Of course, it's very difficult for us to

get the data of other operators of ATMs, but one does have the advantage of having their data and of course it's therefore centrally important to look at it.

The final point I'll come to briefly is that we do have concerns that what is really going on here is that the Claimants are seeking to use a split trial as a means of achieving an illegitimate tactical advantage.

If I may start coming back to the pleadings but I do see it's 1.00, I don't know if that would be a convenient place to stop?

MR JUSTICE BUTCHER: It would. Right. Thank you. We will resume -- may we resume at 1.45.

**(1.00 pm)**

**(The short adjournment)**

**(1.45 pm)**

MR JUSTICE BUTCHER: Yes.

MR JOWELL: Mr Chairman, I was going to go back to the pleadings, if I may. Could I start -- it's in bundle C, page 35. One needs to see how Euronet build up their case.

They start in paragraph 94 on page C34 to describe the factual and economic context of the Mastercard and Visa rules in each of the relevant countries.

Over the page at page 36, you see little paragraph (h), and they note:

"ATM operators incur costs in operating ATMs in each of the relevant countries."

And they describe those operating costs, and they say:

"The provision of ATMs therefore has a cost that needs to be funded whether through access fees, interchange fees ..."

And so on.

And if one then goes forward to page 38, C38, one sees in 95, they're describing the market situation in the Czech Republic. And they note at (i) on page C38:

"The level of the default interchange fees are insufficient for the third Claimant to operate profitably ATMs, other than those installed in the major city and tourist locations, such as central Prague and airports. In the premises, the third Claimants' ATM deployment has been disproportionately skewed towards major cities and tourist locations. ATM

deployment by other IADs is also likely to be similarly skewed. In the premises, there has been a less than optimal deployment of ATMs in non-tourist areas and smaller towns. The number of ATMs in the Czech Republic is significantly below the average for central and eastern Europe and for western Europe."

So they are using themselves as an example, if you like, of ATM operators generally, and they are alleging that the deployment of ATMs has been both skewed from a location standpoint and also skewed from a numerical standpoint, by reason of the rules.

And if one goes forward in the bundle to C40, one sees at the bottom, essentially the same allegation is made in relation to Greece. You see (k), (iv):

"The deployment of ATMs, including by the fourth Claimant, has been disproportionately skewed towards larger cities, such as Athens, and major touristic islands. In the fourth Claimants' experience, deployment of ATMs in smaller towns has not been profitable."

So again, they are using themselves as an example.

And at C42, one sees the same sort of allegation made in relation to Poland.

You see at (h):

"The level of the default interchange fees were significantly reduced in 2010. Since then, Visa and Mastercard's interchange fees have been insufficient for the profitable operation of a significant proportion of the second Claimants' ATMs."

Then they describe the number and deployment of ATMs, and again you see, at number 3, the disproportionate skewing towards larger cities, and as they say, in their experience, the deployment in smaller towns and rural areas has not been economic.

That's all important because when it then comes to the effect of the rules, which you see in 98, the alleged effect, one sees that -- if one picks it up, one sees various effects that are pleaded, (a) through to (c), and over the page, (d).

And then, crucially, on page C44, (e), we see they allege:

"... the effect is to restrict the ability of acquirers/operators from using reasonable access fees to cover the cost of ATM deployment, network services and other inputs, necessary to complete transactions plus a reasonable margin, which restricts or distorts the ability

of acquirers/operators to compete by increasing ATM deployment in locations other than tourist areas in the relevant countries ..."

They refer back to some of the paragraphs I've shown you:

"... and/or deploying ATMs in deploying ATMs in more convenient locations and/or by investing in more innovation."

If one then goes to C45, paragraph 100, my learned friend showed you that -- this is where they say there would be, appreciably, more competition in the absence of the rules. And you see this is then the context in which one sees, over the page in C46, (d), which is:

"As a result of the conduct described, acquirers/operators would be able and willing to offer more ATMs and/or more conveniently situated ATMs and/or ATMs with better functionality [and so on] ... including in locations that are not, or are no longer profitable, thereby increasing competition in the relevant markets for cash withdrawal services in the relevant countries."

So yes, that is a general plea, but the foundation for it is laid by allegations relating to their costs, and their profitability and their ability to deploy in greater numbers and in these various locations.

And if one goes on to the defences, one sees in Visa's defence in the next tab, at C75, we deny 100(d), which is the paragraph I just showed you -- this is in 70(c) -- the charging strategies described in paragraphs 100(a) to (c):

"... would not lead to the deployment of appreciably more or more conveniently situated ATMs, or ATMs with more or better functionality. Rather they would lead to higher costs for consumers, and in particular the exploitation of market power at ATMs that face limited competition, and the exploitation of particular classes of card-holders that are less able to protect their own interests by finding alternative lower cost means of obtaining cash or paying for transactions, in particular, older and more vulnerable card-holders and tourists would be disproportionately affected."

Then if one continues in the defence on C76, one sees at 71(a) and (b) where we portray the beneficial effects of the rules, which are to decrease the prices paid by card-holders,

which we say is an improvement in a price parameter of competition, and tends to increase output by increasing the number of ATM transactions by card-holders, because if you can get your cash for fee, you will get it more often than you would otherwise.

And in (b), we again refer to the unfairness and exploitation that could come from giving free rein to operators to set their own charges at ATMs.

And of course as my learned friend has shown you already, we also rely on that paragraph by way of cross-reference, when it comes to Article 101(3) in paragraph 73.

And in the reply, if I could show you that. It starts at C134, and if you could go, please, to C145, you see they say:

"On the Defendants' [paragraph 15] cases, if CDFs and service fees do not cover ATM acquirers' efficient costs, that will lead to distortions of competition. In particular it would mean efficient ATM acquirers/operators would be unable to maintain, or deploy or improve ATMs in locations where there is demand for obtaining cash."

They say:

"Visa's alleged market average costs of providing cash withdrawal services for setting its CDFs disregard differences in the costs of operating ATMs in different locations in the relevant countries."

And again, they say that it didn't cover the efficient costs of cash withdrawals at numerous ATMs and led to a reduction in the number and geographic diversity of ATMs in the relevant countries, including ATM deserts in some areas.

One then sees at [page C]147, (e), paragraph [15] (e) at the top of the page of C147:

"Insofar as Visa maintains that its CDFs were set at levels that allowed ATM deployment in locations other than tourist areas in the relevant countries and/or in more convenient locations, that is denied. The Claimants' installations in [forgive my pronunciation] ...(Reading to the words - Czech spoken)... will be addressed in evidence insofar as necessary."

Then one sees, at C149, they deny the allegation that they are exploiting market power in their ATMs, and they say it is further denied the Claimants would exploit any market power

at their ATMs in the counterfactual world. It is the Claimants' case that insofar as any excess fees would be imposed in the counterfactual world, they would be set at reasonable and competitive levels.

So there are therefore allegations about what the fees would be in the counterfactual world without the rules.

And they also say that it's not necessarily the case -- you see at (c) -- that access fees would be imposed, but they say -- or they also deny of course that the imposition of access fees is always to be regarded as an exploitation or abuse of substantial market power.

So, we say to the extent of any fees, the extent of additional ATMs, the location of additional ATMs, all of these are clearly issues on the pleading and they are all clearly relevant to the parties' pleaded case on liability.

And it's the Claimants themselves in fact who pray in aid their own experience, their own costs and their own experience of inability to deploy more ATMs or in more convenient locations, as exemplifying the likely wider market situation and the wider market effect of the rules.

And it's also the case that we make allegations about the possibility of exploiting the levels of fees at the ATMs that would be charged in the counterfactual, and they say that there is an issue between the parties as to whether those counterfactual ATM charges would be reasonable fees or not, or whether they would be exploitative fees.

And so if one then goes back to issue 31, which is, I believe, in bundle A, at A18, we say that these are all squarely issues that arise on the pleadings. And I think that really the gravamen of my learned friend's case was that they are -- because they are framed by reference to the Claimants, rather than all ATM operators, they only related to quantum.

But that's not correct, first, for the reason I've given already, that they put in play, as it were, their own experience as exemplifying the wider market; and then, secondly, because of course, at least in Poland, they are a very significant chunk of that market, and so once one has their data, that is highly relevant.

And if it's accepted that the questions from (f) onwards on page A19, how would the Claimants' competitors have reacted to any changes, including those of the kind referred to at (e) in the counterfactual, if that is accepted as being relevant to liability, it's very difficult indeed to see why it wouldn't also be relevant to liability to consider the questions in (a) to (e), from the Claimants' perspective, because they are, after all, at least one competitor on the market and a very major competitor in the Polish market.

So we do say that there is clearly an overlap on the pleaded case in the issues that go to -- in -- identified in 31 -- in issue 31 that goes to both liability and to quantum.

Now, we accept that up to a point it might have been possible to deal with these issues at a slightly less detailed level when it comes to liability by comparison with quantum, but I stress it would only be slightly less detailed.

And in our respectful submission, my learned friend greatly understates the extent of the detailed consideration of these issues that will be required, or at least would be desirable or at least would be permitted for a proper assessment of liability. And at the same time, he rather overstates the level of detail that is likely to be required when it comes to quantum.

We respectfully consider that to resolve the liability issues, the Tribunal will need to delve into some detail into the key issues of what, in the counterfactual world without Visa's rules, the access fees would have been, and how else the markets would have changed, the charging structures would have changed, the quantity of ATMs would have changed and the location of ATMs would have changed.

Now, we don't know go so far as to say, or to insist, that it would necessarily be essential to specify the precise access fee to the last pence, of every single precise location of every additional ATM, but that is true for both liability and also for quantum. For when it comes to quantum as well, the parties and the Tribunal will probably need, at least to some extent, to use the broad axe in resolving those issues. But of course the precise level of granularity could only be resolved after expert evidence, and it's really for the Tribunal's consideration.

But what is clear, in our submission, is there is bound to be a very considerable overlap and where one draws the line is most unclear.

Now, given that, really the legal position is something of a sideshow, but I do think it's necessary for me to make a few remarks, just clarifying our position and what our position is on the law.

At the heart of Mr Turner's submissions, it seems to us -- and perhaps I am oversimplifying -- but they seem to be suggesting that in order to succeed on liability, all they need to show is a restriction on the freedom of action of the parties' conduct on the market. If --

MR TURNER: That's not what I said.

MR JOWELL: Well, forgive me if I'm oversimplifying it -- perhaps it's an appreciable freedom of action of the parties -- on the market.

In any event, we disagree with that proposition, and there is a far more complex analysis that needs to be gone through both in Article 101(1) as well as in 101(3).

But before I come back to that in a little more detail, I think it's important just to step back and make a few fundamental points about the position of card scheme operators, like Visa and Mastercard, and the position that they find themselves in.

They operate their schemes according to a set of rules. Now, how those rules are set will inevitably affect a number of different types of participants and customers of the respective schemes; and those rules inevitably have to balance those various and sometimes competing interests of the various participants and customers. If the rules are set one way, they may benefit one participant or type of user; if they are set another, they may harm them, but benefit different types of participants or users.

And corresponding with that, the scheme operators may be accused of acting anti-competitively by one participant, but if they are set in the opposite way, they may be accused of acting anti-competitively, or facilitating anticompetitive conduct, by another participant.

One can see from the Mastercard judgments that my learned friend has taken you to that the courts are not averse to saying that a card company's rules may be assessed by

reference to another alternative rule. In that case, it was a prohibition on ex-post pricing, but even if that rule has never been adopted either by the scheme operator or by the regulator.

Now, in the present case, the rule that is under attack -- the principal rule that is under attack, is the rule that prohibits ATM operators, like the Claimants, from charging access fees to card-holders.

So unlike in interchange, where Visa and Mastercard were condemned for setting a rule that set positive interchange fees instead of imposing an ex-post prohibition on pricing, here they are attacked, albeit in a different context, I accept -- but they are attacked for doing in a sense the opposite, for prohibiting any pricing.

And the rule in this case functions to ensure that card-holders, who are the end consumers in this market, are protected when they withdraw cash because it means that access to ATM cash dispensing services is free at its point of delivery.

Despite this rule, of course, the Claimants are not unremunerated for their services. They receive cash disbursement fees and they receive income also from other sources, foreign exchange income.

And what they want, really, here is to be able to charge card-holders and consumers more, to increase the price at the point of delivery from zero to an undefined and uncapped amount.

They say that by prohibiting them from doing that, Visa has caused them loss. And their loss, their loss which I think we don't need to go to it, but their loss is rather enormously stated as being from some 200 million to 465 million for Visa alone, and that is predicated on the assumption that most of the Claimants' ATMs would have charged fees.

Perhaps I should show you. That's in bundle D at pages 48 to 49.

MR JUSTICE BUTCHER: Do you need to show me that? I'll take your word for that.

MR JOWELL: I appreciate that time is short.

But what is important not to lose sight of is that those fees that the Claimants allege they would have received in the counterfactual world, and that they say they would be entitled to

receive if a declaration is granted in their favour going forward, those are not fees that would not be paid by Visa or Mastercard, those are fees that would be paid by card-holders from end consumers. So on their quantum case, what is their gain is a direct cost to consumers by paying direct access fees. So one can understand in that context why it may be that Euronet are a bit coy about quantifying their loss.

And in the absence of the rule, it's also important to appreciate that when, as I showed you through the pleadings, that once there is a price paid at an ATM, there will also be fewer transactions per ATM, so there will be a decline in the number -- the output, if you like, of transactions at ATMs.

So prices go up to consumers; output goes down.

Now, the fundamental aim of competition law is not to protect individual competitors, it is to protect the welfare of the final consumers of the product in question.

Again, for your note, that is in the -- we can see various quotations to that effect in the Bookmakers Association case, which is in bundle H at pages 102 to 103, paragraphs 312 to 314.

One might be forgiven for thinking that in this sort of context, it's bound to be the case that a wider economic analysis is going to be required, at at least some stage of the analysis.

It's going to be bound to be the case that the Tribunal will need to consider -- in order to resolve this issue to make a proper overall assessment – to consider a range of factors about how consumers would be affected in a counterfactual world absent the rules. And those factors would include how many additional ATMs there would be, where they would be located, and what additional prices consumers will have to pay at each ATM -- or at ATMs overall.

In order to assess whether there is truly overall an anticompetitive effect on consumers, it will be necessary at some point in the analysis at least to balance the size of the harm to consumers from having to pay more for accessing cash, against the size of the potential benefit in the form of any additional ATMs.

My learned friend, as I understand his case, seems to be suggesting that no such balancing is to be undertaken perhaps at any stage of the analysis of liability. He seems to be suggesting that it would suffice, I think, if his client could establish that there would be some additional ATMs and that that is all that is required.

And therefore --

MR TURNER: That's not what I said.

MR JOWELL: Well, if that's not his position, if there is a balancing exercise to be undertaken, then the issues on quantum and the issues on liability clearly intersect.

I think what my learned friend did say was that anything that he said that gums up competition is a restriction within Article 101(1).

That does come perilously close, in our submission, to saying that competition law takes a purely formalistic approach to Article 101(1).

That is not correct for a number of reasons.

First of all, it's not alleged in this case that either Visa or Mastercard are in a dominant position, so we're not concerned with Article 102 and the special rules and considerations that apply in that context.

Secondly, under Article 101, an agreement or a decision can be alleged to restrict competition either by its object or by its effect. Now, if it's restricted by object, then it's a type of agreement that is likely by its very nature to amount to a restriction.

But here the Claimants have expressly disavowed any allegation that this is an object infringement. That was clarified by way of an early request for information. So the only infringement they allege is an infringement by effect.

Perhaps I can just show you that it is a more complex analysis when it comes to in particular effect infringements, simply by reference to the Commission's Guidelines on the application of Article 81(3) and by reference to perhaps two cases.

You'll find --

MR JUSTICE BUTCHER: I don't want to go too much into the detail of this.

MR JOWELL: Yes.

MR JUSTICE BUTCHER: But yes, go on.

MR JOWELL: I don't -- I am going to try to keep it very short.

The first point I make is this is not the occasion on which to resolve this --

MR JUSTICE BUTCHER: You are right about that.

MR JOWELL: -- but one sees if one goes to -- it's H1543, the start of the --

MR JUSTICE BUTCHER: Which tab is that?

MR JOWELL: Forgive me, this is tab 21.

**(Pause)**

One sees --

MR JUSTICE BUTCHER: Just a second.

**(Pause)**

Yes.

MR JOWELL: If I can pick it up perhaps at paragraph 11 on the second page, 1544, it starts by saying that there are two parts to the assessment. The first is:

"... to assess whether an agreement is capable of affecting trade and has as an anticompetitive object or actual or potential anticompetitive effects ..."

And the second step, which only becomes relevant when an agreement is found to be restrictive of competition, is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the anticompetitive effects. The balancing of anticompetitive and pro-competitive is conducted exclusively within the framework laid down by Article 81(3).

But then we see in 13, it reminds us that the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare, and of ensuring efficient allocation of resources.

Then you see, at 17, it notes that the assessment of whether an agreement is restricted of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions.

So that is the need, therefore, to consider the counterfactual.

If one goes on to paragraph 21, it reminds us that restrictions -- having introduced the distinction between -- in paragraph 20 between restrictions by object and restrictions

by effect, noting that it is an important difference, it then notes in 21 that restrictions by object are those that, by their very nature, have the potential of restricting competition.

And if one then goes on to paragraph 24, one sees:

"If an agreement is not restrictive of competition by object, it must be examined whether it has a restrictive effect on competition. Account must be taken of both actual and potential effects; in other words, the agreement must have likely anticompetitive effects. In the case of restrictions of competition by effect, there is no presumption of anticompetitive effects."

So there is no presumption that they have no anticompetitive effects:

"For an agreement to be a restrictive effect, it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices and services can be expected with a reasonable degree of probability. Such negative effects must be appreciable."

That's a very important point because in the context of effects, there is an appreciability requirement, so -- and that alone really shows that there is not a purely formalistic approach; at the very least it must be established that the anticompetitive effects are appreciable.

It goes on to say:

"The prohibition does not apply when the identified anticompetitive effects are insignificant."

It then notes:

"Negative effects on competition within the relevant market are likely when the parties have market power."

And you see at paragraph 27:

"For the purpose of analysing the restrictive effects of an agreement, it is normally necessary to define the relevant market; it is normally also necessary to examine and assess the nature of the products, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the entry barriers."

So we see that what is involved here is a form of economic assessment. It's not a formalistic exercise -- even at the level of 101(1), certainly when one is considering a restriction by effect.

Then of course once one comes to 101(3), as the guidelines go on, one is, effectively, into a full-blown balancing of the anti and pro-competitive -- effectively means anticompetitive and beneficial effects of the agreement.

And we see that in paragraph 33 of page 1548:

"The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may, at the same time, have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value of lowering the output ..."

That's what we have -- we say the rules have the effect here:

"... improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anticompetitive effects, the agreement is, on balance, pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreement is to promote the very essence of competitive process, which is namely to win customers by offering better products or better prices than those the offered by rivals."

It's important also to appreciate that when one undertakes this analysis, that the court doesn't -- even in 101(1), does not look solely at matters from one parameter of competition alone. Even in the case of 101(1), there is some ability to look at different parameters of competition. And I'll just give you one example if I may to show you that. It's the AEG-Telefunken case, which is in -- I believe it's -- I have H25.40, so I think it's in the -- volume 1 of the H bundle. You might have to bear with me because I'm afraid my hard copies are not entirely in line with the hard copies available on the electronic system.

It's tab 1.01, tab 29. I don't know if your Lordship has that.

MR JUSTICE BUTCHER: Yes.

MR JOWELL: This is a case about a selective distribution scheme, and if one goes to the judgment of the Court of Justice, at paragraph 33, which you'll find at page H25.40, it says this:

"It is common ground that agreements constituting a selective system necessarily affect competition in the common market. However, it's always been recognised in the case law of the court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, insofar as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition, which is in conformity with Article 85(1)."

And if you go on to paragraph 42, which is on page 25.42, it puts it in even clearer terms:

"A restriction of price competition must however be regarded as being inherent in any selective distribution system, in view of the fact that prices charged by specialist traders necessarily remain within a much narrower span than that which might be envisaged in the case of competition between specialist and non-specialist traders. That restriction is counter balanced by competition as regards the quality of the services supplied to customers, which would not normally be possible in the absence of an appropriate profit margin, making it possible to support the higher expenses connected with those services. The maintenance of a certain level of prices is therefore lawful, but only to the extent to which it's strictly justified by the requirements of a system within which competition must continue to perform the functions assigned to it by the Treaty."

So there are circumstances where the courts are prepared to balance even within the context of Article 101(1), the different parameters of competition, in this case price and quality, and nevertheless find -- acknowledge that one parameter price is reduced, but nevertheless say that overall there is no anticompetitive restrictive effect within Article 101(1).

So it's oversimplistic to say that there are no circumstances where that's possible. And I don't suggest that our case is directly comparable to that or on all fours with that, although there are some resemblances between the scheme rules and the selective distribution system. But I just simply take you to it for the proposition that my learned friend has, I'm afraid, advanced an oversimplistic approach to Article 101.

But the fundamental point that we come back is to that whether -- whether it's -- whether it's within the context of 101(1) or within the context of 101(3), the court is found at a certain stage to have to consider these different factors: the extent to which prices would go up at the ATMs; the extent to which there would be greater numbers of ATMs; the location of any additional ATMs. It's going to have to weigh those up, and the Claimants' evidence about this is going to be, in our submission, central.

It's no answer for my learned friend to say, "Well, we would like to prove our case and disprove yours based on this subset of the evidence", because the fact is that we will wish to rely heavily on the other evidence, on the quantitative evidence, on the data, and therefore that will be in play, whether they like it or not, in determining liability as well as quantum.

We see nothing in any of the interchange cases that really is informative on this issue.

So the final point I wish to make, really, is just this, that we are concerned that the real reason for this very belated attempt to bifurcate the proceedings is tactical, and that is because there is a rather fundamental tension in the Claimants' case. If they contend that access fees would be high and widespread in the counterfactual, then that will undermine their case on liability. Because we will be able to say, "Well, yes, indeed, they would be high and widespread and therefore consumers would lose out, consumers would be exploited, and the overall balancing of pro and anticompetitive effects will firmly be in favour of the existing rules".

But if, on the other hand, they say, "Well, access fees would be low and not very widespread at all", then they will of course harm their case on quantum.

And what concerns us is that the Claimants' belated volte-face on the structure of the trial is really motivated, in large part, by this fundamental tension in this case, because it could

be rather convenient for them to avoid grappling at the liability stage with a thorny issue of how much more they say consumers would actually have to pay at their ATMs, and reserve that over to a quantum trial.

Now, it's true of course that they will be bound by any findings on liability at the quantum trial, but what one apprehends is that they intend any findings of this nature at the liability stage to be so vague and in such wide range that they would be able to, as it were, be essentially free to argue what they wanted at a later quantum trial.

We say, actually, it's rather important for this reason alone, that liability and quantum are heard together in order to ensure that they are held to a consistent standard on the two aspects of the case.

So those are our submissions on the central issue of a clean split and why they shouldn't be split off. Mr Cook may address you on some further points, including the extent to which this would aid settlement and other matters.

I think the final point I should address you on is this question of the supposed savings that would be made on permutations. This is not really a case where -- like some of the others that are considered in the authorities -- there are infinite number of different permutations on which liability could be decided. Rather what one has here is more akin to building blocks of liability, if you like. So there's liability in relation to each country; there's liability in relation to each rule and different types of transaction. So, yes, one can see that if some of those are knocked out at a liability stage, there would be fewer building blocks for quantum, one can see that, but it's not the sort of exponential effect that one has when one has lots of the different permutations.

And really when one just sort of stands back and says, "Well, where would it leave one if one hives off quantum?" It leaves one in a very unsatisfactory situation because one comes back to the fact that this is a claim that was issued in May 2019, there would be no resolution of liability until 2024, even -- one then has the extraordinary inconvenience in these types of cases if the liability then goes on appeal, as it surely would in this case, and then that leaves the difficult position of what to do about quantum.

But even if one assumes that quantum then goes forward, one doesn't have a resolution of quantum until perhaps late 2025, 2026. And one really has to ask oneself, how can one say that one is truly following the Tribunal's rules of ensuring that the case is dealt with expeditiously, when a case which starts in May 2019 is not possibly even complete until seven or eight years after?

So those are our submissions, Mr Chairman, and I think Mr Cook may have a few points to add.

**Submissions by MR COOK**

MR COOK: Firstly, my Lord, I obviously gratefully adopt Mr Jowell's submissions and I am going to try to skim through my points relatively briefly, with the advantage of your Lordship having heard the points he has made, which reflects the position of both schemes.

Briefly, my Lord, we say this. This is an application which is made too late in the day when a large proportion of the costs associated with quantum have already been incurred, so most of the potential savings from the split have been lost.

Secondly, this a clear example of the old saying that shortcuts make for long delays. The court has a choice between a single trial resolving all issues in Michaelmas 2023, or having a liability trial in 2023, and then unless Mr Turner fails on all issues, a quantum trial, which realistically couldn't take place before 2025 at the earliest, and potentially later with appeals.

And it won't have been lost on the court that this one of those strange cases where a claimant comes to court, promoting the merits of a split trial on the basis that we may never get to quantum because they may lose on all liability issues, whilst still telling the court there is a strongly arguable -- ever strongly arguable case. But we simply say factor eight in Daimler --

MR JUSTICE BUTCHER: -- is everything, isn't it?

MR COOK: Well, it's the best course to ensure the whole matter is adjudicated as fairly quickly and efficiently as possible.

MR JUSTICE BUTCHER: I don't actually see what that leaves out.

MR COOK: Yes, I mean the facts overlap to some extent, but we simply say a single trial of all the issues -- speed -- in most split trial cases one actually deals with the situation where the court is faced with: well, we could have liability six months -- you know, as opposed to taking our situation, you have a full --

MR JUSTICE BUTCHER: -- the party comes and says: if you have a split trial, I can do this bit in six months' time and the whole in 18-months' time, that would be --

MR COOK: Absolutely, my Lord, and that is the classic split trial situation where you say smaller issues, you do it faster, and if you split, quantum might take a little bit longer, but fundamentally, actually you advance some of the resolution of some of the issues much more quickly. That's not being suggested at all, so a lot of the classic reasons for a split trial we simply say don't exist. And what I do emphasise in Daimler is the whole matter is adjudicated as quickly and efficiently as possible, but quickly that we have a claimant again who is suggesting that this case should be allowed to elongate potentially to run 18 months longer than would otherwise be the case.

The third point I'd make is, in some sense, the point I've just made. This is not a case in which splitting off quantum allows there to be some earlier clarification of the parties' legal right to an obligation. And Mr Turner made submissions to you and took you to the declarations which Euronet seek, declarations essentially that parts of our rules are void. I mean, in essence that is simply the effect of what Article 101 says. An anticompetitive agreement is under Article 101(2) void. It simply follows as a result of -- that declaration might be said to some extent is, you know, it's --

MR JUSTICE BUTCHER: -- I have to ask this question and I think it's probably right to ask it now: does the Tribunal have the jurisdiction to grant declarations?

MR COOK: That's something we need to check -- as a practical matter, the effect of saying something is unlawful under 101 is, in practice, that 101(2) says it's void. So whether the court needs to do so or not may be a moot -- or the Tribunal needs to do so -- may be a moot point.

But the critical thing, my Lord, simply is, you know, as Mr Turner put it, the sooner the liability issues are determined, the better. But of course that's not the case because, other

than the possibility of it being a few weeks later for a more complicated judgment, the reality is liability is going to be determined at a trial in October 2023 and the court will issue a judgment, you know, thereafter. We're not moving matters forward on that at all, my Lord.

Fourth, my Lord, this a case in which split trial will hinder settlement dramatically. And Mr Turner's argument was that what's going to happen is once we get a determination of liability, that will make settlement terribly easy. Of course that acknowledges the fact that what that means is, you know, in practice we can't settle these cases sensibly until we've had a nine-week liability trial, because you know regardless of the declarations, in reality this is a claim for £850 million --

MR JUSTICE BUTCHER: The more right Mr Turner is on his points of law, in a sense -- essentially, the less indication it will give as to the actual quantum of his claim --

MR COOK: To some extent, it doesn't give any indication at all --

MR JUSTICE BUTCHER: -- because it would be at a level of generality on his case which wouldn't actually -- he will tell me if I'm wrong about this -- but it would be a level of generality which wouldn't really help to say what the financial consequences were.

MR COOK: My Lord, I'm going to come to it, and this may be as good a point as any, to come to paragraphs 40 and 41 of Mr Turner's skeleton. And if I may open them up now, my Lord, and I'll make some more detailed submissions in a moment about them. That's bundle A, tab 4.

And Mr Turner then makes the point that, essentially, as long as his clients can show, on the balance of probabilities, the Claimants would have been able to and willing to install more cash machines in response to consumer demand, that's enough to show a restriction. I think he probably accepts that me adding the words as it appears in 41 "appreciably more" -- if all he can show is two more ATMs, that probably isn't going to be good enough, but as long as it is "appreciably more", that seems to be the point he's making.

But for quantum purposes, my Lord, that is almost meaningless. The fact they might have installed a few more machines might lead to a very small level of quantum, whereas if they were potentially going to install another 10,000, that might lead to rather more by way of quantum.

But my Lord, the reality is the claim, on the face of it, is a very big sum, 850 million at the top end. You know, my Lord, we cannot or we are very unlikely to settle a case of that kind of level without having, firstly, a particularised quantum case. At the moment we have some completely headline numbers, as Mr Jowell [for] Visa said Visa sought to try and get more particularisation, and the decision was that that would come in witness statements and expert reports.

So we simply won't get that on the split trial proposal at all, just left with this number that we think is absurdly high, but until we actually understand how it's quantified and analysed, we're in no more a position than that to say so. So we need a detailed evaluation of those numbers, and what one always does then is the experts need -- our experts will want to go through that evaluation and that particularisation in detail, kick it around, see where we think the errors lie. One always finds errors -- obviously that's what Defendants do, it's fine what you say the problems were, and we can start internally to form a view of what the realistic potential exposure in this claim would be. And it's a rare case where the Claimant starts off with a number, which is the one which the court ultimately awards, unless it's something very obvious, like a price claim, for example.

So until we're in a position to know what the realistic exposure is, it's almost impossible to advise a client to offer any particular sum of money. What Mr Turner is, essentially, suggesting is we won't get even that particularised quantum case, let alone the evidence in support of it, until after we've gone through a nine-week liability trial, which as I said, paragraph 40 and 41 says, he's going to be urging the court or the Tribunal to issue a decision at a level of generality, which effectively will tell us nothing about our exposure on quantum at all.

So this is a case where a split trial will, essentially, put off settlement until we've gone through the bulk of the trial process. Whereas if we go ahead on a full trial basis, over the course of this year we will get, firstly, you know, a particularisation of their case in their witness and expert evidence; we'll be in a position to kick it around, and there is a respectable chance, as experience shows, that no trial at all will need to happen. That may or may not be the position, but that option is almost, essentially, being completely removed until we get that quantification process.

Just quickly, my Lord, I'm told the answer as to whether the CAT has the power to make a declaration, that Mr Justice Roth in the case of Epic Games v Apple held that he found that submission completely unsustainable, so the Tribunal does have the power to make --

MR JUSTICE BUTCHER: It's unsustainable that it does?

MR COOK: Yes, he dealt with the suggestion that the CAT had power to make a declaration; "I find that submission completely unsustainable." That's paragraphs 84 and 85.

MR JUSTICE BUTCHER: Right. It looked to me as if there was at least a significant argument to that effect on the basis of section 47A. But I mean I'm not going to decide that, but it is at least a question which I thought I should canvas at this stage in case anyone was under any sort of -- in case they wanted to consider that issue.

MR COOK: My Lord, but again -- so on that point, if the Tribunal does rule it has the power, it's not going to move the matters forward in any event.

My Lord, you might say the core of what your Lordship is considering today is the question of, is this a case in which there are real difficulties in defining an appropriate split or making a clean split of the issues, and as you know we say -- and Visa agree with us -- that this is a situation in which the court is fundamentally then going to have to consider what is going to happen in the counterfactual, both for liability and for quantum. And that is common ground, that counterfactual analysis will have to take place for both.

The disagreement between the parties is, essentially, between in your Lordship's words, the "fuzzy conclusion" and the more --

MR JUSTICE BUTCHER: -- there's a slightly less sharp focus or slightly less granular -- I think that part is -- I think that's how Mr Turner would put it, a less granular approach.

MR COOK: Yes, I think that's accepted on this side that certainly for the purpose of liability, one is not going to perhaps need to go down to the nearest Euro -- go down to the nearest ATM, et cetera, but what we say is essentially a very large part of the same work is going to be required for the Tribunal to reach, essentially, that fuzzy conclusion, in any event.

And a few points on that.

Firstly, in relation to Mr Turner's points about the legal test and his submission was the Tribunal didn't need to consider, for restriction purposes, impact on price, we disagree with that analysis, with respect to Mr Turner.

Now, Mr Jowell made the point that this is not an object case, and what Mr Turner took you to was the T Mobile case, [which] was an object case. So dealing with something -- and the whole distinction between object and effect is in an object case is you don't need to consider effect, because it seemed to be so obviously inherently problematic, you don't need to worry about effect. So that's the point. This is an effect case, and in an effect case the Tribunal inherently has to consider what would happen in the counterfactual and is there that appreciable effect on competition, including we would say in relation to prices.

So the quotations from T Mobile -- and it's H1, tab 5, my Lord -- all are -- relate to -- it's under a heading "Object Infringements", and each time they say, you know, this is what happens or this is what is required for an object infringement, this is an effect case and none of those matters assist Mr Turner.

My Lord, you were also taken to the English authorities in relation to -- well, the interchange for litigation, the term that becomes unhelpful when we deal with this case which deals with a payment the other way round, where there's no challenge to the legality.

Now, in relation to that, my Lord, far from when Mr Turner was submitting, actually both at the Court of Appeal stage and at the Supreme Court stage there was a finding that there was an effect upon prices, and that was seen as being very, very significant.

And I can take it, my Lord, by just going to the Supreme Court, which is bundle H2, tab 17 -- that might be H3, tab 17, my Lord. It's paragraph 93. The reason, my Lord, I can go to this rather than going to -- I'll go back to the European Court briefly -- is at paragraph 93, so H1320, my Lord. This is setting out what the Supreme Court said is what is the essential factual basis on which the Court of Justice held there was a restriction of competition, and decided essentially that it was the same in those cases and therefore the analysis must apply.

And there were six of them which had to be met, six essential facts. Number six of those, my Lord, at the end is in the counterfactual the whole of the merchant service charge, which is the charge that actually goes to merchants would be determined by competition and the MSC would be lower. That is an effect -- the basis, I think, was an effect on pricing.

And the same point is then picked up at paragraph 103 where the Supreme Court said even if we weren't bound by the European Court, we'd have reached the same conclusion for, essentially, the same reason, they say, putting it in their own words is at the end of paragraph 3:

"Instead of the MSC being, to a large extent, determined by collective agreement, it is fully determined by competition and significantly lower."

So -- and the same point you get in the Court of Appeal. It was paragraph 186 Mr Turner took you to, and the conclusion was that the MIF resulted in higher prices. So each of these cases have looked at the impact on prices, which is the exact opposite of what my learned friend suggested was the relevant test.

What he also took you to was one of the European Court judgments, which is in bundle H1, tab 8, and it was paragraph 166 that he took you to.

MR JUSTICE BUTCHER: Sorry, which tab?

MR COOK: It's bundle H1, tab 8, and it's the General Court judgment, my Lord.

MR JUSTICE BUTCHER: Yes.

MR COOK: And it says:

"Lastly, in the fourth place, the court must also reject the applicant arguments concerning the Commission's failure clearly to establish the effect of the MIF on the price paid by the end-user."

With respect, there is a point of confusion here. This is dealing with the question of whether or not higher prices paid by merchants, who were the immediate consumer, are in fact passed on to -- well, consumers buying in shops, the end-users.

And we can see that there:

"It's reasonable to include that merchants do pass on ..."

So it's dealing with that later stage. So you know -- but that is not saying effect on price is irrelevant, it's simply saying whether it's ultimately passed down to the consumer, as opposed to the immediate party in the market in question, doesn't matter.

As I've shown you, the position in the Supreme Court and the same in the Court of Appeal was that an effect on price was something that was significant and one of the key aspects of the -- of the analysis both before the European Court and before the English courts.

So with respect to my learned friend, and again, my Lord, obviously no one is suggesting you determine these points, but we spent a lot of time on this and we disagree with the analysis that he suggested the court should apply. There isn't some easy aspect of it being dealt with at some, you know, global basis, which doesn't sort of descend into detail; you do have to look for an actual effect upon the parameters of competition, one of which is, obviously, price.

Secondly, the question of what will the court actually need to determine at the liability stage and how far it will need to consider Euronet's position. And this is where, my Lord, I had planned to take you to paragraphs 40 and 41 of Mr Turner's skeleton. What is interesting of course about this, my Lord, is at that point he sets up the argument for what the court will need to consider by reference to what the Claimants themselves would do; would the Claimants install additional ATMs? I mean, that's -- he's shifted away from that to say it's all a market issue.

But the reality is that we are primary focused on the Claimants asserting that they would've done different things, and that would've produced different results. They are not saying somebody else in the market would have done it and they wouldn't. So it is going to be largely their evidence of what they would have done, which is going to be important here, and that is reflected in paragraphs 40 and 41.

But my Lord, even if one looks at the level of what he's saying, that he's not interested to know exactly how many ATMs will be installed, it's enough that they would have been able and willing to install more, my Lord, just think for a moment about what the court is going to have to consider, even at that level of generality, which I'll be coming on to say is inappropriate in any event.

The court is going to have to start off by looking at the economics of ATMs in different locations; what are the costs involved in installing and running them? What are the transaction volumes? What are revenues? Because those are going to be the matters that will then feed into the question of if you add an additional cost, which of course is an additional revenue for someone like Euronet, what is going to happen to the economics of running ATMs? You start off with the economics --

MR JUSTICE BUTCHER: Mr Turner wouldn't disagree with any of that, would he -- he wouldn't disagree that you have to look into the economics of that?

MR COOK: No. And my Lord, my point in relation to that is you start off with the economics actual, look at what would happen with access fees, what that will result in terms of the conduct of competitors and consumers, and then it's common ground that if you introduce access fees, transaction volumes will go down.

The Claimant, Euronet, pleads it could be as high as up to 56 per cent, it says. We actually say rather higher. We say at least a 90 per cent reduction, which is consistent with the position in the UK, we plead, where ATMs with access fees have only 7 per cent of the cash withdrawals of free-to-use ATMs. So there is a 93 per cent reduction, essentially, by imposing access fees here.

But you know, those are the issues that one gets into to, you know, consider what are the economics of installing these additional ATMs with access fees.

So that is all going to involve a lot of elements of what are the costs involved, what's the impact going to be? But my Lord the core data on all of those issues is going to be primarily, if not almost essentially exclusively, Euronet data --

MR JUSTICE BUTCHER: That's the point which Mr Jowell made, which was that there isn't out there vast quantities of this data which you have access to, so you would be wanting to use their data to illustrate those points.

MR COOK: Absolutely, my Lord -- partly with respect to my Lord for lots of reasons. One, it is about the only data resource we're going to have. Clearly, this is highly confidential and they are the only parties -- the only party present that has --

MR JUSTICE BUTCHER: Because you don't have all this data?

MR COOK: We don't, my Lord, and I'll come to what Mr Turner said in terms of showing you Mastercard's confidential documents. But I'll come back to that in a moment, my Lord, but we certainly don't have granular data at different locations, how it changed over time -- all the things we get from the disclosure that is being given in this case by the Claimants, which is of course the reason why it was agreed that that should be disclosed because it is that kind of granular data, which allows us to analyse those as the starting point of that kind of analysis.

So my Lord, that's why we say, you know, that is the source of the information. And also, my Lord, it's an efficiency thing. There's not a great deal of point in analysing a completely separate set of data. We have the Claimants' data, which is going to feed to quantum anyway, so of course that's going to be the main starting point for that analysis, in any event.

Mr Turner says it's a market-wide analysis here. So there's a bit of a sleight of hand, with respect to Mr Turner -- Mr Jowell said the claim was primarily about Poland, 96 per cent of it is Poland. In Poland they operate one third, essentially, of the ATMs. They are the major player in that market. You simply can't do that kind of analysis without considering in very large measure what is Euronet itself going to be doing, particularly when they are the ones we have data for. And even in the --

MR JUSTICE BUTCHER: Are there two other players in Poland or are there then a lot of other players?

MR COOK: I mean, it's pleaded in the Particulars of Claim the number of other banks, but I think in general terms -- what you have, my Lord, in each of these markets is, as you might expect, you have the equivalent of a High Street bank, which is somewhere between sort of five, six, seven or eight, depending which jurisdiction we're looking in, who largely operate ATMs in their branches, as you might be familiar in the days when you could walk into a bank branch in London, if you could find one. But these are countries that still have a somewhat larger cash culture than perhaps the UK does post-pandemic. So most of the other competitors are banks who largely operate ATMs outside their own branches, and Euronet is then either at the sort of sole or certainly the major operator of stand-alone ATMs, ones that are sort of dotted around a city because of course it doesn't operate -- because it's [not] a bank as such it doesn't operate its own services. So other banks are primarily providing services to their own card-holders. I take my Lloyds Bank debit card into Lloyds Bank to withdraw, cash because it's often the case it's expensive to use your card in other banks in these jurisdictions.

Then Euronet is, effectively, the other player in the market you could potentially go and use. So in each one of these cases even if it only has 10 per cent -- only 10 per cent, even then it's a very major player in Greece and Czechia. It's going to be central to look at what Euronet would have done as the principal operator of these additional, stand-alone ATMs.

But in any event, even if we had full data, one might look at the market more as a whole -- well, in fact what we're going to have is going to be, you know, their data is going to be the principal basis.

So my Lord, it's [paragraph] 97 or so of the Particulars of Claim which goes through -- so in Poland, for example, I think there are six large banks and then 15 or so operators in total. But one is largely looking at it being spread between sort of names of BNP Paribas, Santander --

MR JUSTICE BUTCHER: So what one has -- is this right -- you have -- Euronet has 30 per cent and the other 60 per cent is split between some 15 or so?

MR COOK: 15 or so, I suspect what you are going to get in each of these, my Lord -- when we look at some of the other jurisdictions is you probably have, as you might have here four, five, six major banks and then a number of smaller banks.

MR JUSTICE BUTCHER: So it may be that Euronet is the biggest --

MR COOK: Certainly in Poland, my Lord.

MR JUSTICE BUTCHER: -- in Poland is the biggest player?

MR COOK: My Lord, I think it's likely that it would be. And in any event, it is, to some extent, the disrupter, it's the one which has set up networks of ATMs which are not linked to bank branches. So it's the one most likely to sort of change business operations, which is why partly it is bringing this litigation and other banks are not.

But in any event, they are absolutely central. They are the ones we are going to have data about. The focus is all going to be upon what Euronet would've done, if only as an exemplar of what banks generally might have done. There may be some consideration of whether they would've done different things, but Euronet is going to be the primary focus here, my Lord.

So we do say that there is simply no getting away with the fact the focus from our side is going to be on Euronet's costs, Euronet's revenues, what Euronet itself would have done because, you know, even though the claim is put in terms at paragraph 100 of acquirers and operators would have charged access fees, it's going to be Euronet putting forward a positive case, which is largely what Euronet itself would have done. So it's going to be their evidence about those matters, and then evaluating based on their costs whether that's right or viable.

Now, that brings me to Mr Turner's point by reference to the schemes' disclosure, which is in bundle I. And Mr Turner made a couple of points by reference to that material -- I mean, firstly, to some extent suggesting that this issue could be litigated by reference to our documents. Well, he may have some bits of those documents that he likes. In turn we will of course seek to show by reference to the data that his clients

disclosed, that actually their suppositions simply don't make sense and they would've lost so much revenue from access charges that, you know, this simply wouldn't have been cost-effective to do. And that's our pleaded case in relation to this, which we could only make good by reference to looking at their data and their quantification.

So my Lord, the starting point is just Mr Turner might have some material he wants to refer to, but the material we want to refer to does involve looking at his client's position in some detail.

Also my Lord, the point was fairly made in exchange with the bench, which is either these documents are so fantastic to Mr Turner, in which case we may as well get on with quantum straight away because he's clearly going to win, or the position is rather more complicated, in which case we definitely would need to look at the position in relation to Euronet's financials in any event, in terms of the question of what they would have done in terms of more ATMs.

My learned friend did point to within that data information where it showed that we had some aggregated costs information in relation to -- you know, in relation to our members, and he showed you the results of an ATM cost study, that -- the numbers that were shown there. That was at tab 2, page 10, which shows on the right-hand side of that column, ATM cost study, Poland results, and obviously it's the numbers that are confidential here.

Now, my Lord, a number of problems with saying that the data is there. My Lord, that's a snapshot of general average costs at a very aggregate high level. Unsurprisingly, Mr Turner didn't say in his submissions that he agreed those were right or that he's going to accept that those were clearly correct and it would be a rare case where he agreed that our quantifications were entirely correct. In fact, my Lord, unsurprisingly he took you to tab 3 in this bundle, which was email exchanges disclosed by Visa, which actually show that Visa's numbers are incomplete, because at the bottom email it says -- shows that independent ATM network providers, and that's predominantly Euronet, it's said there they make 20 per cent of the total number of ATMs and should they be included in the cost study? Answer: no. So 20 per cent of the operators of the

market are not included in the cost study, which is the problem then that the data that he's pointing to is essentially, on his case, incomplete.

He made submissions about, you know, this shows that -- certainly in this context -- Visa obviously didn't think it was necessary to consider the position of independent operators such as Euronet, but he's coming before the court as an independent operator, asking the court to show -- to conclude there was a restriction of competition. Of course we have to look at the position of the market as a whole and not a subset, even if a subset was used internally.

So, my Lord, these kind of snapshots that exist don't have the granular detail that is going to be needed, that is going to be necessary, in order to allow an evaluation of the economics of charging access fees and the viability in different locations of operating ATMs. And, once we're beyond that, the detailed data is Euronet data.

The fourth point, my Lord, I'd make in relation to this -- and this all under the heading of can we separate out the issues -- is that the arguments here in paragraphs 40 and 41 of Mr Turner's skeleton ignore exemption. For present purposes, at a high level, it seems to be common ground that while the burden is of course on the card schemes, but essentially what we need to show is that the benefits to consumers from our restrictive rules, as it would be at that stage, outweigh the adverse effects. So that's a weighing up exercise, benefits outweigh disadvantages. And this is not in terms of the disputed point about can you way up pro and competitive advantages at the 101(1) level, this is 101(3), where it's common ground -- and we have a great deal of authority on it -- that that weighing up exercise does take place at the 101(3) level.

The problem with that, my Lord, is that the court can't simply, for the purposes of 101(3), finish at the level that my learned friend suggests at paragraph 41, 40 and 41 of his skeleton, of saying, on the balance of probabilities the Claimants would have been able and willing to install more cash machines. Because in order to carry out the evaluation, throw some sort of, you know, some numbers around, my Lord, if the cost to consumers from access fees was 100 million Euro a year, and since the claim is for £850 million over ten years or so -- that's broadly the kind of numbers one's talking

about here -- and they end up with ten more ATMs, clearly that's not the kind of, you know -- clearly consumers are spending a huge amount of money there for very little benefit.

So we would say the weighing up exercise clearly goes in our favour.

What that shows, my Lord, is that kind of analysis can't take place without the court reaching, you know, some quite specific conclusions about what the level of access fees would be and what the impact on the number of the ATMs would be. It's not going to be sufficient at that stage simply to say there would be more, there's going to need to be some element of quantification. Does it need to be absolutely precise down to the nearest ATM? No, my Lord, I acknowledge that. But it's going to be need to be a lot more specific than simply saying there would be more.

So again, all of this, my Lord, leads to the idea that the fuzzy conclusion is going to have to be quite a sophisticated one and involve a lot of detail and much of the same questions, issues and evidence, that will then go to a -- I agree is a slightly more granular but nonetheless still aggregated conclusion on quantum, if we ever get there.

My Lord, there simply isn't some convenient split here. The effect of there being no clean split is this is not a case in which there's some colossal source of complexity and cost, as Mr Turner put it, which would be removed from trial preparations. The experts are going to have to consider all three territories, they are going to have to consider the effect of each of the alleged restrictions, they are going to have to consider in quite specific detail how many more ATMs there would be, looking at Euronet's cost to do that. My Lord, that is the complexity, that is the cost, and it's there whether we're just doing liability or we're doing quantum as well.

The next point, my Lord, viability of the trial. Now, Mr Turner made some quite detailed submissions about how he sees the trial length and the trial structure operating. My Lord, I wouldn't agree with much of the detail, still less would I agree with potential advantages of hot-tubbing, you know, in any context.

But for present purposes, my Lord, I don't think the detail of the trial is something we need worry about at this point. It seems to be largely common ground that a full trial can be

accommodated in Michaelmas term 2023, and the reality is that the shorter length of a quantum trial, the distinction is going to be relatively limited. So my Lord, with respect, none of those points actually assist Mr Turner particularly, I would say.

Then finally, this a case where a split trial is essentially going to lead to the court doing the issues twice. And I obviously agree any findings the court makes can't be re-litigated, but ultimately there's a fuzzy conclusion and then the court has to make detailed conclusions. The court is essentially going to have to consider, largely, the same kinds of issues, by reference to the same kinds of evidence, both factual and economic, twice.

And that my Lord, is just simply inefficient; it's an unfair double burden upon factual witnesses; and it is an inefficient double burden upon the court and a waste of the court's resources.

Factor three in Daimler is whether a split trial will impose an unnecessary inconvenience and a strain on the witnesses, and it very much will because, you know, at whatever level of generality we deal with in liability, and whatever level of deal we do it in quantum, it's going to be the same individuals giving similar kinds of evidence in order to get those two levels of conclusion.

My Lord, and that is simply an unfair and unnecessary burden, given all the other disadvantages that rise from this proposal.

So My Lord, unless I can assist you further.

MR JUSTICE BUTCHER: No, thank you very much. We will take a ten-minute break now.

**(3.10 pm)**

**(A short break)**

**(3.20 pm)**

**Reply submissions by MR TURNER**

MR JUSTICE BUTCHER: Yes, Mr Turner.

MR TURNER: My Lord, I'm going to confine myself to the practical points and to the significant points of law that bear on the argument today and nothing else. And I'll take this roughly in the order of my learned friends' arguments.

So the first point is a practical, factual point. Mr Jowell referred to the fact that the disclosures essentially had been given, that there would be what he called "a little more top-up disclosure". In fact, that's not right. I'm instructed that as we sit here today, there are approximately -- on the Claimants' side -- 50,000-odd documents that require to be reviewed for further disclosure, covering the period up until December last year.

And of some importance, there is due to be further disclosure of transaction data at the end of June this year, and that is going to be a very significant slug too. It will cover the period June 2001 to March 2022. So there is ... 2021 -- did I say 2001? -- to March 2022, so there is quite a lot still to come.

MR JUSTICE BUTCHER: Are you saying that that won't happen if your proposal is adopted?

MR TURNER: I am saying that certainly in relation to the transaction data, if our proposal is adopted, that the material that goes to quantum will not be required, that's right.

MR JUSTICE BUTCHER: Because I don't think that's been part of your application to now, has it?

MR TURNER: I've just been informed that this is in train, and that there is therefore some transaction data still in the pipeline, I'm saying that responsively and on instructions. So there's that first point.

Second point is quite again something that was drawn to my attention, which is a significant practical point that I hadn't been aware of. It was said to be common ground that the full trial, the single combined trial, can be accommodated in the Michaelmas term, and this is on the assumption that it's 12 weeks, and on looking at it, that takes you up until the week, I think, of 21 December.

Now, I made submissions to say that that appeared tight and we went through the process looking at that. It is tight. I didn't realise that I had been instructed -- I had been told on the Defendants' side, it's been made clear that at least one of their counsel, I think Mr Jowell, is not available at all from January 2024 until --

MR JUSTICE BUTCHER: Well, I saw something saying they're not available in 2024.

MR TURNER: Yes, until October.

MR JUSTICE BUTCHER: Until October, I saw that.

MR TURNER: Yes.

MR JUSTICE BUTCHER: I didn't know whether that meant, for example, the first two weeks of January are included in that, I --

MR JOWELL: Perhaps I could confirm, I could make myself available at a push in the first two weeks of January. I have a long trial that starts in -- I think it is April 2024, for which there will be preparation, but I could squeeze in, you know, the closing submissions.

MR JUSTICE BUTCHER: Yes.

MR JUSTICE BUTCHER: I wasn't planning to address that at this juncture, but I saw the reference to 2024 and I wasn't sure whether that meant every single day of 2024. And it doesn't necessarily.

MR TURNER: Yes. If I can take that for confirmation, I should say for both Mastercard and Visa that that isn't a difficulty. I think that's important because otherwise we might run into difficulties if your Lordship were to be against me on the main application.

MR JUSTICE BUTCHER: Mr Cook is studiously quiet.

MR COOK: Only on the basis, my Lord, that I have nothing to add.

MR TURNER: I'm grateful.

A third point, a point of clarification in relation to Poland. So I gave you what our position was on that. What is drawn to my attention is that Mastercard push back reasonably strongly, and you should see what they say about our position in Poland, which is in their pleading in the C bundle at C108. So that is C5/108.

The bottom of that page, paragraph 70(b):

"Although the Claimants operated approximately one-third of the ATMs in Poland in 2017, based on data for transactions on Mastercard cards, the Claimants' market share as a percentage of total acquiring cash volumes was significantly lower, approximately 22 per cent. The average acquiring volume at the Claimants' ATMs was therefore only 60 per cent of the average acquiring volume at the ATMs operated by the other operators in the market, the main Polish banks. The Claimants' ATM estates are therefore likely to have included the much higher proportion of marginal ATMs with low transactional volumes than its competitors."

MR JUSTICE BUTCHER: Right.

MR TURNER: I draw that to your attention because of the direction of your questioning on this.

MR JUSTICE BUTCHER: Yes, but do you dispute that some 96 per cent of your quantum relates to Poland?

MR TURNER: Only marginally -- it's correct, we have a slightly smaller amount, but yes, it is very high, yes.

MR JUSTICE BUTCHER: Right.

MR TURNER: Yes.

Fourth point is the points of law, which I'll take very shortly. There were two significant points of law, essentially, that were canvassed by my friends, and I'll dispose of them quite briefly. The first one was the suggestion that there was a weighing-up exercise that sometimes takes place in the context of the restriction on competition. You'll recall that Mr Jowell took you to a case called AEG.

The second point was the question majored on by Mr Cook, concerning the extent to which an effect on price is a factor in Article 101(1) analysis. And Mr Jowell said that we were taking a formalistic as opposed to a substantial view.

So I can deal with those very quickly, taking each in turn. The weighing-up first and the AEG case, that is irrelevant, we wouldn't wish the court to be misled otherwise.

If we go back to that, that's at H25.40 --

MR JUSTICE BUTCHER: Page 20 -- sorry, 20 ...

MR TURNER: H25.40 is the page and it's paragraph 33.

MR JUSTICE BUTCHER: Yes, I am with you now.

MR TURNER: Yes. So this is a point concerning a selective distribution system, and the point that rings out loud and clear from the paragraphs that my friends took you to -- and look at paragraph 34 and how it begins in particular, and if we go to paragraph 42, a little further down, where he also took you -- is that these are situations where you have particular restraints that are inherent in a legitimate type of arrangement.

So if you look at 34, the limitations inherent in a selective distribution system are acceptable only on certain conditions.

If we go to 42, the restriction of price competition must be regarded as being inherent in any selective distribution system.

So it's akin to the objective necessity ground for not falling within Article 101(1) at all. And this to not that sort of situation, because your Lordship's already, I think, seen and heard enough to appreciate that this a case where the application and operation of these rules is, to some extent, discretionary. And it's not a question of something that is inherent in a particular type of arrangement, so it's a different type of case.

And the proposition that there is no weighing-up exercise in Article 101, first paragraph, I've given one very clear example, it's purely for your note. In an extremely recent case of the Court of Justice, they say this in terms again, and that is a case called Generics (UK). It's a reference from this Tribunal a couple of years ago, and you'll find it in H15, at paragraph 104. Unless your Lordship wishes to, I won't bother to take you there.

MR JUSTICE BUTCHER: No, because if you do take me there, then no doubt --

MR TURNER: Well, yes, okay. We say, look, that point is absolutely clear.

MR JUSTICE BUTCHER: You say that is completely clear --

MR TURNER: It's completely clear.

The second point is the effect on price. This wasn't a question of substance over form in any way at all. The first proposition is that the question of the magnitude of any extent -- in the changing price, is certainly, even on the basis of what my friends have said, not something that is required. And I have shown you the authorities on that. They are -- they leave no room for doubt on it whatsoever.

But the second point is that the effect on the parameters of the competition, including in particular price, only matter because they are the manifestations of the restriction of the competitive process.

And that is what Lord Hamblen in the Supreme Court specifically recognised in the paragraph that my friend did not take you to. And I think I can refer to this without opening a new authority, so if we go back, please, to that, and that's at H, tab 17, and go to page 1321.

MR JUSTICE BUTCHER: Yes.

MR TURNER: Look at the paragraph at the top of the page 100:

"There is a minimum price which was not negotiable ... immunised from competitive bargaining."

So that sets up the blockage or gumming up of the competitive process:

"Acquirers have got no incentive to compete over that part of the price."

Then 101 says:

"While it's correct that higher prices resulting from a MIF do not in themselves mean there's a restriction on competition, it is different where such higher prices result from a collective agreement and are non-negotiable."

In other words, effects on price are only important because they are the manifestation of the change in competitive pressures.

So those are the two significant points of law that I wanted to draw to your attention to make sure there is no doubt about it. There's nothing about a formalistic approach we're adopting whatsoever.

The next point was Mr Jowell's reference to our pleading for the proposition that quantitative allegations concerning Euronet in particular are matters that arise in the liability assessment.

Those matters were matters that are relied on as illustrative, as the context made clear of the position. And for the general Article 101(1) analysis, there's no question but the ones looking at the wider market picture.

Next point was the question of the costs information that would be required at the liability stage. I've given already a picture to the court of the cost studies that the parties -- the schemes carry out and use to determine their business decisions. Those are what matter primarily in assessing the validity of the arrangements that they've entered into. It's the information that they gather for their purposes. The information that we hold about ourselves is primarily going to be relevant for the assessment of the quantum of our loss.

Now, Mr Jowell, in his address, majored on the question of the extent of the need to take into account a balancing of the interests in the rules, and Mr Cook followed him in that. What are the detriments and what are the pluses? He referred to the points of fact that will need to be examined in that connection, and to an extent we would agree with that. What he was doing, however, was merely showing how much there is to be argued about on the question of the matter of liability.

It did not go to the point, which is the real issue that we wish to isolate for the court's attention today, which is the question whether a detailed analysis of the Claimants' costs, revenues and profits across the board on different assumptions is needed for the liability assessment.

That is the single issue which preoccupies us and which we are drawing to the court's attention, because there is no question that that is not required for a liability trial. It is something that is far more detailed and far more difficult and which will raise costs.

Nor did my friends, either of them, particularly address the question of the permutations that would arise, and the difficulties that will arise in that context for us, and for them, and the burden that it will place on the court.

The final point that I need to draw to your Lordship's attention concerns the question of the determination of liability as an endpoint in itself and the value of it.

Your Lordship raised the question whether it's possible for this Tribunal to issue a declaration. The answer that Mr Cook gave is in part correct because in the Epic case, it is true that -- Mr Justice Roth said that in a case that originates in the Tribunal, it's not possible to give declaratory relief. In a case of this kind which has been transferred from the High Court, it is possible because this Tribunal does not exercise that power, but it can return it to the High Court. And your Lordship would, at the end of the day, were we to reach that point then --

MR JUSTICE BUTCHER: I could reconstitute myself --

MR TURNER: You could then reconstitute yourself, and you would be the High Court and make that declaration --

MR JUSTICE BUTCHER: I thought you were about to canvas this at this juncture. I am not expressing any final views, but I can see that that might well be a possibility.

MR TURNER: Yes. Mr Bailey has rightly drawn to my attention there's a kind of precedent. There's a case called Agents' Mutual from 2017, where a case was transferred to this Tribunal from the High Court, and the Tribunal decided it by making in its judgment dispositions in which it decided what the legal position was. I'll give your Lordship the reference because it's not necessary for the argument today. It's 2017, CAT 15, and the dispositions begin at paragraph 282.

But there, having made --

MR JUSTICE BUTCHER: The CAT, as it were, decided what the dispositions were and then they were made by the High Court?

MR TURNER: They could have been. In that case -- in that case what happened was that there was an undertaking given to comply with the dispositions that were made by the Tribunal, and it wasn't necessary for the High Court therefore to give those declarations. But that's the mechanism by which that would be done.

So we return, essentially, finally, to the essence of the point and whether it's been satisfactorily addressed by the schemes. First, that there is a trial here which, on quantum, is going to be a heavy trial if it's combined with liability, which proceeds on different assumptions and permutations, and which is likely at least to spill into 2024, if it's tried together.

Secondly, that it will involve a great deal of cost and effort in order to arrive at that point, which could be avoided, in circumstances where the decision on questions of liability will -- and this is where I differ again from my friends -- will be of value in two ways.

First, because, as I say, it will lead to a clarification of rights and obligations which will be of great benefit for all parties in market behaviour going forward.

And second, although I am not going to labour the point, it will lead to a platform for settlement. And we have one recent example in the Visa v Sainsbury's case where the determination of rights and obligations following a liability trial produced precisely that result.

My Lord, those are our reply submissions.

MR JUSTICE BUTCHER: Thank you very much, Mr Turner.

**Ruling**

(For Ruling, see [2022] CAT 15)

**Costs**

MR JOWELL: Mr Chairman, this is of course a CMC, but it is a CMC on which everything else is settled. There was only one application outstanding and it has occupied a full day. Therefore, we do respectfully seek our costs of the application.

MR JUSTICE BUTCHER: Yes.

MR COOK: My Lord, I am joining that application as well, on behalf of Mastercard.

MR JUSTICE BUTCHER: I think this is a CMC and I am going to say that the costs should be in the case because these matters do require to be carefully reviewed.

**Housekeeping**

MR JUSTICE BUTCHER: Right, now, is there anything else we need to discuss? I mean one issue which has been canvassed is as to trial length.

MR TURNER: My Lord, the draft order, apart from the part that your Lordship has ruled on, which is paragraph 5 -- this is at B33.2 -- did contain, at paragraph 6, a proposed direction that the parties file and serve skeleton arguments 14 days before the commencement of the trial or another date agreed at the PTR. I don't know if --

MR JUSTICE BUTCHER: Yes. There is a PTR which -- because that hasn't been fixed.

MR TURNER: 1 July next year.

MR JUSTICE BUTCHER: It has been fixed?

MR TURNER: I'm not sure if it's ... it's not in the diary yet, it needs still to be fixed.

MR JUSTICE BUTCHER: Right. Well, that should obviously be fixed as soon as possible. But if there is such a PTR it might not be necessary to fix these dates for the skeleton arguments now. One would have a better idea --

MR TURNER: It's better to do it then.

MR JUSTICE BUTCHER: -- a better idea of parameters at that stage.

MR TURNER: Yes.

MR JUSTICE BUTCHER: What I am really concerned about is the issue of whether 12 weeks is enough, because if people are really saying that 12 weeks is not enough then that is something which needs to be addressed sooner rather than later.

MR TURNER: Yes. Well, my Lord, you've heard our position, it has been argued, we say that it would be sensible to allow at least one more week, although it will mean spilling over the Christmas period which no one wants.

MR JUSTICE BUTCHER: No.

MR JOWELL: One possibility, I just canvas this just as a possibility, would be -- I mean, it's slated to start, I think, on 2 October. Might it be possible for the Tribunal to read in that prior week in September? In particularly given that the CAT does sit in September, in theory, at least. I don't know whether that would be helpful for you, Mr Chairman.

MR COOK: My Lord, similarly I was going to say that the suggestion of a week to write closing submissions and then a week for the Tribunal to read them does seem very luxurious in the context of a case where --

MR JUSTICE BUTCHER: I've never been given a week to read closing submissions.

MR COOK: My Lord, also in the context of a case that is operating on Commercial Court timetable, again one wouldn't normally require that much time because you have a week to at least catch up on it and be on top of it. So, my Lord, those matters I think could be compressed significantly in a shorter period than simply two weeks.

MR JUSTICE BUTCHER: Thank you. Mr Turner, do you want to say anything about any of that?

MR TURNER: Mr Jowell's suggestion is constructive if the Tribunal will accept it.

MR JUSTICE BUTCHER: You should at least look to see whether it's going to be possible to have, as it were, the reading week as the last week of September.

MR TURNER: Yes.

MR JUSTICE BUTCHER: And so, as it were, the start date may be 2 October or whatever it is.

MR TURNER: Yes, my Lord.

MR JUSTICE BUTCHER: Right. Is there anything else which needs to be addressed today?

MR TURNER: Not on our side.

MR JOWELL: Not on our side.

MR JUSTICE BUTCHER: Well, thank you all very much indeed.

**(4.10 pm)**

**(The hearing concluded)**