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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1301/6/12/18

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

25 March 2019

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**B&M EUROPEAN VALUE RETAIL SA**

Appellant/Claimant

- and -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

- and -

**TESCO PLC**

Proposed Intervener

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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

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

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

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

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1 THE CHAIRMAN: Good morning, Mr Moules.

2 MR MOULES: Good morning, Sir.

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

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

10 MR MOULES: Certainly.

11 THE CHAIRMAN: Good morning, Mr Armitage.

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

17 THE CHAIRMAN: Yes, we have.

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

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

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

31 THE CHAIRMAN: We do.

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

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

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

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

20                    THE CHAIRMAN: Yes.

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

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

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

3 THE CHAIRMAN: Yes.

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

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

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

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

18 THE CHAIRMAN: Okay.

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

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

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

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

3 THE CHAIRMAN: Were not disputed.

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

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

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

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

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

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

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

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

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

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

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

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

16 THE CHAIRMAN: Yes, all right.

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

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

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

30 THE CHAIRMAN: Level playing field.

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

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

34 Tesco has been designated since 2009.

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

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

10 THE CHAIRMAN: You can read it to us.

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

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

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

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

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

21 THE CHAIRMAN: We have the point.

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

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

28 THE CHAIRMAN: Yes.

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

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

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

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

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

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

18 MR ARMITAGE: You are right, yes.

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

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

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

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

27 THE CHAIRMAN: The old test?

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

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

31 MR ARMITAGE: A useful approach to the discretion.

32 THE CHAIRMAN: Yes.

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

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

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

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

12 THE CHAIRMAN: Yes.

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

19 THE CHAIRMAN: Good, yes.

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

32 THE CHAIRMAN: It is paragraph 11.

33 MR ARMITAGE: Yes, exactly.

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

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

5 Thirdly, on the discretion----

6 THE CHAIRMAN: This was thirdly.

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

8 THE CHAIRMAN: You will not be disruptive.

9 MR ARMITAGE: Will not be disruptive.

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

11 MR ARMITAGE: You are quite right.

12 THE CHAIRMAN: Three was can add real value.

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

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

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

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

34 THE CHAIRMAN: All right.

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

2 MR ARMITAGE: I am very grateful.

3 THE CHAIRMAN: Yes, Mr Lask?

4 MR LASK: Sir, thank you. As you will have seen from the correspondence, the CMA is neutral  
5 on Tesco's proposed intervention, subject to two points. The first is that the intervention  
6 does not hinder the speedy resolution of the case, and as you will have heard there are  
7 agreed directions----

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

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

11 The second is that there is no duplication of the CMA's submissions, and that Tesco does  
12 not, in effect, seek to re-run the defence. Tesco has been very clear, both in writing and  
13 indeed this morning, that they will not be seeking to do either of those things.

14 THE CHAIRMAN: Yes.

15 MR LASK: Coming to the point, to the question that you asked, there is a degree of speculation  
16 involved, but from the CMA's perspective we can see force in the submission that Tesco  
17 will be able to add some value in terms of evidence: firstly, on Tesco's experience of being  
18 designated, and what in practice designation involves from the retailer's perspective; and  
19 secondly, on the issue raised by B&M in relation to their business model, and whether it is  
20 right, as B&M say, to argue that B&M's model is sufficiently different from the business  
21 models of the existing designated retailers to undermine the substantive basis for  
22 designation.

23 THE CHAIRMAN: Thank you. I think it is fair to say that we have reservations about this. I am  
24 not indicating a decision. Our current thinking is that - let us take it in stages - the sufficient  
25 interest test is the first hurdle. The second hurdle is the discretion. My understanding and  
26 reading of the provision is that that is a discretion as to whether to allow the intervention at  
27 all, not just a discretion as to the manner in which that intervention is allowed.

28 Our concerns are informed by the tight timetable and two matters arise really. One is, and  
29 this is highlighted by what Mr Lask has just said, that the value which is being added is, or  
30 may be, confined to evidence, and we are concerned about whether or not, in fact, the actual  
31 intervention as an intervening party will merely replicate the position of the CMA. In that  
32 regard we have well in mind the *Replica Kit* case, the *Umbro* case, where this Tribunal  
33 declined to allow what was then known as Sports World to intervene on grounds that they

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

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

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

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

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

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

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

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

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

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

8 MR ARMITAGE: Yes, I understand.

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

10 MR ARMITAGE: I understand. That is our position. In my submission, if that is the Tribunal's  
11 concern, there are measures that can be taken. There could be an express requirement not to  
12 duplicate, and so on and so forth. I take your point, Sir, that once you get to the discretion  
13 stage, that is not just the discretion as to the terms of the intervention, it is a broader  
14 discretion. We understand that. In our submission though, we can add real value, including  
15 potentially on the legal points in relation to this immature regime, if I can put it like that.  
16 We do not know at this stage, but we say that having a single intervener in these  
17 proceedings, the time limit for interventions now having expired, will assist.

18 On confidentiality: I understand from discussions with Mr Moules this morning and from  
19 the correspondence that the pleadings and evidence from my friend's clients does not  
20 include any confidential material. I understand the same is true, or very likely to be true, of  
21 the CMA's defence. So, as we understand it, that particular concern does not arise in this  
22 particular case. I can see in other cases that would be a real consideration.

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

28 MR MOULES: Indeed.

29 THE CHAIRMAN: Where are you on that?

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

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

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

4 MR MOULES: No.

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

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

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

13 THE CHAIRMAN: Yes, of course.

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

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

17 (Short break)

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

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

1 to happen. We also think that skeleton arguments for the hearing should be sequential.

2 That is our provisional view. I do not know whether, between us we can work out where  
3 we go from here. Mr Moules, yes?

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

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

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

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

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

15 THE CHAIRMAN: Have you got copies for us?

16 MR LASK: Yes.

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

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

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

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

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

26 MR LASK: Yes.

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

29 MR LASK: Indeed.

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

34 Mr Moules?

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

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

7 MR MOULES: Indeed.

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

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

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

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

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

19 MR LASK: Yes, and accompanying evidence.

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

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

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

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

29 THE CHAIRMAN: So that is 12 April.

30 MR LASK: If it was the 8<sup>th</sup>, it would then----

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

32 MR LASK: Yes.

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

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

4 MR LASK: No.

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

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

11 THE CHAIRMAN: 30 April?

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

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

18 MR MOULES: And then the 30<sup>th</sup> for the reply to the evidence.

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

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

23 MR LASK: Keep step 4 as the 8<sup>th</sup>.

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

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

29 MR LASK: Yes, that is true.

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

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

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

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

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

15 THE CHAIRMAN: Replying to?

16 MR MOULES: To the further evidence.

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

18 MR LASK: It is.

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

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

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

26 MR MOULES: Yes.

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

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

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

31 MR MOULES: Yes.

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

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

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

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

9 MR LASK: It is the 8<sup>th</sup> as well.

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

20 MR LASK: We will.

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

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

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

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

29 THE CHAIRMAN: Yes, it is a helpful thought, but it is another thing to seek to agree. I get the  
30 impression that everybody is being eminently reasonable and sensible, but I know, from  
31 your end, it is just another thing on the agenda to agree, and probably not necessary. I think  
32 we will, hopefully, get out from the skeletons what the issues are. Thank you.

33 Any other matters? No. Thank you very much.

34