IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1429/4/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 15 February 2022

Before:
The Honourable Mr Justice Marcus Smith
Professor John Cubbin
Simon Holmes
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Meta Platforms, Inc.

-v-

Competition and Markets Authority

A P P E A R AN C E S

Daniel Jowell QC, Gerard Rothschild, Richard Howell (On behalf of Meta Platforms, Inc.)
Tristan Jones and Emma Mockford (On behalf of Competition and Markets Authority)
Joe Williams (On behalf of CCIA)
Sophie Bird (On behalf of PI)
Julian Gregory (On behalf of ADA)

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Tuesday 15 February 2022

(10.30 am)

THE PRESIDENT: Good morning. Before you begin, just a couple of housekeeping matters. First of all, these hearings, whilst they are in person and in public, are also being live streamed and I therefore make the usual warning that these proceedings are in open court, they are being recorded by us, officially, so that there is a formal transcript to be produced, but it is prohibited for anyone else to make an unauthorised recording or to photograph or transmit these proceedings further.

Secondly, you will notice that we are sitting in person as a twosome and that Professor Cubbin is joining us remotely. That's because of issues of health which precluded his coming to London today, but he is able, as you can see, to fully participate.

But I know that will add to all our burdens if he has, as I am sure he will have, points to make, so I have told him to wave if he wants to say something. Failing that, just jump in, but, please, do bear that in mind.

Thirdly, thank you to all the parties for their written submissions, which we have read with care and attention. We have read a little bit more widely but it's to the written submissions and the CMA's most recent letter that we've paid the most attention.

Lastly, we have a couple of declarations of interest to make, which we do, just so that they are on the record.

First of all, it will come as no surprise to you that we are, to a greater or lesser extent, users of services provided by Meta. I would like to think in my case it is lesser but, nevertheless, there is that use. That is true, I think, for all of the panel, and I suspect will come as no surprise to any of them that that is the

case.

The other point is I saw, reading the application notice of Meta, that Margot Daly was a member of the group. Margot, of course, was an ordinary member here and I have sat with her on at least two occasions, I think it may be more than that. I don't think that is an issue but I think it is something that the parties ought to know, that I have that past relationship with her, when we were sitting in this Tribunal.

Subject to that, Mr Jowell, I will hand over to you.

MR JOWELL: I am grateful, sir. May it please the Tribunal, what I would plan to do is to simply go through the agenda that the Tribunal so helpfully provided. I think the first issue, one can safely say is a matter of consensus, and that is that the appropriate forum is England and Wales.

THE PRESIDENT: That was our view also, though oddly, it struck us that in this case, it was rather harder to justify a decision than in other cases because of the nature of the issues arising. It seemed to us that it was justified because of the size and economic scale of England and Wales compared to Scotland or Northern Ireland, rather than anything more specific than that.

MR JOWELL: Indeed, sir, yes.

THE PRESIDENT: Well on that justification, so ordered.

MR JOWELL: Which then, I think, leads to the interventions and there have been three requests to intervene. One from the Computer & Communications Industry Association, one from the Application Developers Alliance and one from Privacy International.

Rather than my giving our take on those interventions, I would propose to hand over to each of those in turn.

THE PRESIDENT: Yes, well that's very helpful. Broadly speaking, Meta opposes

PI's intervention on, essentially, lack of interest and is supportive but appropriately supportive, let's call it that, in relation to CCIA and ADA, whereas the CMA's position is perhaps the converse.

MR JOWELL: That is a fair summary. I can elaborate on our reasons but I think it might be more appropriate to hear from the interveners themselves first and see how they put it. -- I think in relation to Privacy International, I think our key objection, really, is not so much lack of interest per se but it's, rather, that they have no expertise to contribute -- no added value to contribute to any of the grounds of appeal that we've made. And that's the essential point.

THE PRESIDENT: What we will do is we will hear from you and the CMA in reply, if we may. Mr Jones, if that's acceptable to you?

MR JONES: Yes, of course, sir.

THE PRESIDENT: In that case, strictly in alphabetical order, Mr Gregory, we will hear from you first.

Submissions by MR GREGORY

MR GREGORY: Mr President, the decision and the challenge in these proceedings was remarkable. It was the first application of the CMA's new approach to digital mergers, as set out in its revised guidelines. The CMA found a substantial lessening of competition in the UK, despite the fact that the target, a US company, had no UK presence and no UK revenues and the CMA not only blocked the merger between two US companies, it also imposed highly interventionist remedies, requiring a number of specific steps to be taken outside of UK territory, including the transferring of funds and the rehiring of US based staff.

Such a decision is without precedent and it has been a subject of considerable global interest and comment.

The eyes of the world's antitrust and business communities now turn to these proceedings before the Tribunal, where you will determine the lawfulness of the CMA's new approach. In this context, it is perhaps unsurprising that applications to intervene have been made by two organisations representing the views of large and small digital software interests around the world.

It would, in our submission, be strongly preferable for the Tribunal to hear their perspective. Regardless of the Tribunal's conclusions, it will send out a message that you are aware of the level of global concern and have taken it into account rather than shutting it out.

But it is not simply a matter of appearances. The decision has attracted worldwide interest because of three specific aspects of the CMA's approach, which will be the focus of the Alliance's intervention.

First, the decision comes at a critical juncture. Over the past few years, the global antitrust community has reflected on how the competition rules should be applied to the digital sector. Proposals have been made to adapt the legal framework, including the framework for UK mergers, but these proposals are currently subject to consultation.

Given the proposed changes would entail serious risks, the consultation process should be allowed to run its course and Parliament should be allowed to scrutinise whatever proposals are brought forward. We do not know what, if any, changes will be made to the statutory SLC test.

And we do not know what legislative checks and balances Parliament will consider it appropriate to put in place, in order to ensure compliance with international law, given the increased potential the changes will have for remedies with extraterritorial consequences.

But, we say, the CMA has jumped the gun. It has pre-empted Parliament's

consideration of these issues. It has reinterpreted the statutory SLC test in line with the more interventionist approach it now believes is warranted for the digital sector, before the necessary changes to the legislation had been made and it has simply assumed that no additional checks or balances are required.

This point, which we say is of constitutional significance, is only raised by the Alliance.

Second, there is global concern that the CMA has blocked a merger between two US companies and required detailed remedial action to be taken on foreign soil, even though the adverse impact on competition within the UK was, at best, speculative.

The CMA's approach is significant in its own right, but if all national merger authorities behaved like this, a huge number of deals would become unviable and the relationship between national legal systems could become soured by conflicts and antagonism.

The corresponding legal points which we are raising are that the CMA misdirected itself as to the relevance of international law principles of comity and exercised its jurisdiction in breach of international law.

Again, this point is raised only by the Alliance.

Third, by making it more likely that the CMA will block digital acquisitions, regardless of where in the world they take place, the prospects of exits by sale for early stage companies will be reduced and that, in turn, will reduce the incentives for venture capital to provide the funding on which most early stage companies depend and which constitutes the lifeblood for the dynamic ecosystem that has produced so much of the digital innovation that is transforming our lives.

This point is raised by the CCIA, as well as by the Alliance. The CMA has adopted

the startling proposition that the potential for such harmful consequences for innovation is not relevant to how it interprets and applies the statutory test set out in the Enterprise Act. I will turn now to the two stages of the Tribunal's analysis.

Does the Alliance have a sufficient interest? And if it does, should you exercise your discretion so as to allow the intervention?

Your decision is likely to turn on two other questions:

1. First, do the points raised by the Alliance add anything to those raised by Meta? We say they do.

2. If you agree, are the Alliance's points arguable? I say arguable because while the CMA, no doubt, does not share our analysis, this CMC is plainly not an appropriate moment to debate the issues in great detail.

If you agree that the Alliance's points are distinctive and arguable, then I respectfully submit that it would be quite wrong to refuse the Alliance's application to intervene.

It is raising very serious issues in which there is considerable global interest and they warrant the Tribunal's consideration.

Turning to the sufficient interest test, this is a threshold requirement applicable in a wide range of different circumstances. It should not be interpreted restrictively, in particular as the Tribunal can control the number and scope of interventions through the exercise of its discretion and case management powers.

The CMA says the Alliance does not have a sufficient interest based on points of principle raised by the decision.

First, it says no points of principle arise on the basis that the CMA's reasoning was highly fact-specific. That is plainly wrong.

This, as I have noted, is the first time that the CMA has applied its new approach to digital mergers which represents a significant change and these proceedings will determine whether that new approach is lawful.

In reinterpreting the statutory merger provisions, the CMA took into account the benefits that it has included would result from a more interventionist approach, based on its review of recent digital mergers, even though those benefits and those mergers could not have been in the contemplation of Parliament when it passed the Enterprise Act two decades ago.

Conversely, the CMA has determined that the potential adverse effects on innovation of its more interventionist approach were not relevant to the statutory interpretation exercise. It has also adopted the position that considerations of comity are exhausted by the share of supply test and place no constraints on how the CMA exercises its jurisdiction, for example when applying the SLC test and its remedial powers. These are all issues of high level approach, with significant implications for future mergers and not only those in the digital sector.

Second, the CMA says that even if the decision did raise points of principle, that is not enough to provide interveners with sufficient interest.

That submission is based on the Tribunal's judgment in the *Flynn / Pfizer* proceedings, which the CMA may want to take you to in due course.

The case concerns interventions by Concordia, a pharmaceutical company, which was also being investigated by the CMA for excessive pricing and the BGMA, a trade association representing UK suppliers of generic medicines.

At paragraph 8 of its skeleton, the CMA appears to rely on the *Flynn* intervention judgment for the proposition that an interest in high level principles at stake in a case, can never be sufficient to confer a sufficient interest on a party, even

a trade body, whose members would be affected by their future application.

Had the Tribunal made such a finding, it would have erred because it would have been inconsistent with the case law on judicial review.

But the Tribunal did not establish any such general proposition. The Tribunal chairman in that case, Mr Freeman, in fact noted that past authorities, at best, provide examples of where a split in interest has and has not been found but they cannot be decisive. He found that on the specific facts of that case, the pharmaceutical company's interests and the general principles at stake in the *Flynn / Pfizer* proceedings were not sufficient to give it a sufficient interest to intervene, including because it could put its case to the CMA during its own ongoing investigation.

The Tribunal in fact left open whether the industry association had a sufficient interest, noting that its case was stronger than the individual company because it could potentially assist the Tribunal as to how prices were set in the relevant markets.

But in any event, the *Flynn* judgment is clearly distinguishable because, with due respect to the parties involved in that case, the high level issues of legal approach at stake here, are of greater and wider consequence.

Flynn concerned the application of the law on excessive pricing to a single sector, generic pharmaceuticals, within a single country, the UK, in circumstances where the appropriate legal approach was influenced by the existence of Department of Health price regulation. That led the Tribunal to conclude that there were no fundamental issues that could be divorced from the particular facts and circumstances of the case.

In contrast, as I have just noted, there are principles at stake in this case, relevant to all future mergers and not only digital ones.

Even if the principles at stake were only applicable to the digital sector, that is now such an important sector of the global economy that it has prompted a fundamental rethink of whether our competition rules are fit for purpose in the modern age.

If held as lawful, the CMA's new approach to digital mergers will affect decision making in board rooms all around the world, including in the venture capital companies, which need to decide whether to provide a new generation of digital start-ups with funding.

Further, we say the Alliance's intervention raises important points of constitutional principle. Has the CMA usurped Parliament's consideration of whether a new approach to digital mergers is appropriate? Is the decision contrary to international law, such that the CMA has exceeded its jurisdiction? It is necessary for the Tribunal to consider these issues in order to ensure compliance with the rule of law. An intervener which raises such issues should be regarded as having sufficient interest, in particular if they have relevant expertise which it is not disputed that the Alliance has.

Such a conclusion follows from the principles applied by the administrative courts which this Tribunal must follow. I would be grateful if you could turn to page 4 of the Alliance's skeleton argument.

Could I ask you, please, to read from the start of paragraph 11, at the top of the page, to the end of the first passage quoted in paragraph 13.

(Pause)

The next chunk of text that's quoted identifies various factors which were of importance in the World Development Movement case, including the importance of vindicating the rule of law and the importance of the issue raised.

If you can now turn over two pages, please, and read paragraph 20, starting at the bottom of page 6.

(Pause)

The Alliance is a responsible organisation that could assist the Tribunal in relation to the operation of digital markets, the start-up ecosystem and the role played by venture capital but more importantly, it should be regarded as having sufficient interest to intervene because it is raising issues of considerable importance that the Tribunal should consider, to ensure compliance with the rule of law. Those, sir, are my submissions in relation to sufficient interest. I was now proposing to move on to the exercise of discretion.

THE PRESIDENT: Yes. Mr Gregory, before you do that, let me give a couple of indications.

We are conscious of the level of global concern and the arguable novelty of the points that are going to be in issue at the substantive hearing. That, I think, inclines us, and I speak generally here, not simply in relation to the ADA's position, to take a rather more broader based approach to interventions than perhaps we might otherwise do. I am not saying if this was an ordinary case, you would not get an intervention but it does seem to us that you, all three, have more of a following wind than you would elsewhere.

Partly, that is because we do see the advantage in having a broader range of submissions than otherwise. I don't think I want to be drawn -- it wouldn't be right -- on which parts of your various submissions we would find more useful than others. In a way, the points that we are more sceptical about are perhaps the ones you ought to be spending more time on.

I don't think at this stage, we will hear you on discretion, because I think we are, broadly speaking, with you, subject, I think, to two points which are, we think,

significant.

First of all, we are very conscious that the CMA has made the point very elegantly, if I may say so, that there is potentially a degree of overlap of interest between Meta and ADA and CCIA.

Now, we don't regard that as a precluding factor, but we take it that there wouldn't be a problem in the ADA stating in its written submissions in support of intervention -- or, rather, ADA's intervention -- a clear articulation of Meta's involvement in their organisation. That wouldn't be a problem, would it?

MR GREGORY: That would not be a problem at all.

THE PRESIDENT: Secondly, what I said about looking favourably on intervention really goes to intervention in writing. What we think at the moment, and you may want to come back on this, is that we would be minded, and this would go for all three, to permit intervention in writing, subject to a clearly defined page limit, something like, say, 20/25 pages, with the presumption that there would be no oral participation, no participation in confidentiality rings and no evidence but with the Tribunal having the ability to call, at a certain point in time, for oral submissions, if it thought it might be assisted.

I mean, we are very much an orally based tradition here and elsewhere. I, for one, find oral submissions on particular points extremely helpful. But we think that that might be a point best left to the control of the Tribunal, to work out what it's interested in, than otherwise. We appreciate you would need enough time to ensure you knew when you were attending, but that is what we are minded to order, subject of course, to anything you've got to say about the detail on that, and also anything that both the CMA and Meta have to say about that approach, but I think in the first instance, it would be right that we have your views on that.

We don't need to hear you from discretion. If we change our mind on that, of course we will. But it's more the mechanics that I think we're concerned with now.

MR GREGORY: Thank you, sir, I'm grateful for that indication. In relation to the written length of the statement of intervention, we have no objection to that in principle. We are conscious that one of the points we want to develop relates to international law and we would be reluctant to have too tight a page limit imposed on us because that may take some time to develop because it's not as familiar to the Tribunal as matters of domestic competition or ...

In relation to oral submissions, what we proposed in our skeleton is more or less what the Tribunal has suggested, which is that you should form a view about whether we should make oral submissions at the hearing, once you have had an opportunity to review our statement of intervention and also the CMA's response.

There is perhaps a relationship between this question and also the issues that we will come to later regarding timetable. What we do not want to happen is for our arguments and the CMA's arguments to be sort of ships that pass in the night. We do want there to be a sufficient opportunity to engage with what the CMA has to say in response to the points we raised, and I think it's, therefore, probably quite important for that to happen, that the CMA does respond in writing to our statement of intervention, before we produce a skeleton for the hearing because that will allow a certain amount of engagement with the issues. The more engagement there can be in writing before the hearing, the less need there may be for oral submissions at the hearing itself.

THE PRESIDENT: Just walk me through the timetable you envisage so that we've got dates in mind which will, I think, assist when we come to the timetabling of matters, which we will come to at the end of this case management

conference.

MR GREGORY: The CMA and Meta both put forward suggested timetables. The CMA's timetable is at paragraph 48, page 16 of its skeleton.

THE PRESIDENT: I have before me, and it may assist, the table in the CMA's letter of 11 February, which has CMA's proposal, Meta's proposal and the potential compromise. Could I prevail upon you to use that because that gives us in one place, what the two main protagonists, at least, think.

MR GREGORY: I can try and find that. I am not sure if that's been sent to us --

MR JOWELL: I think the CMA didn't copy their letter to the interveners and in addition to that, we have had some discussions just shortly before the hearing, where things have possibly moved on a little because the CMA now also wishes to adduce a witness statement and we've actually provisionally reached agreement on an alternative timetable. Subject of course, to the Tribunal's agreement, and of course, to the interveners being slotted into that.

THE PRESIDENT: In that case, Mr Gregory, I'll abort my invitation for you to discuss the timetable. Let's say that we have well in mind the importance of an interaction, if only in writing, and we will debate, I think, the specifics of that interaction when we get to the timetable generally, and I have made a ruling on interventions more generally.

So if, I think, that is the only extent of your concern, you don't want access to confidential material. As I understand your points, they are on a different plane to that.

MR GREGORY: Yes.

THE PRESIDENT: Very good. Is there anything more you want to say?

MR GREGORY: Not unless the Tribunal has any further questions.

THE PRESIDENT: No, we are very grateful. Thank you very much, Mr Gregory.

I think next, following the alphabetical line, it's Mr Wisking.

Mr Wisking, we have read your written submissions and what we have said to Mr Gregory actually goes very much for you, so I do not want to cut you short in any way but you may want to cut your cloth to fit those indications.

Submissions by MR WILLIAMS

MR WILLIAMS: I am grateful for the indication, sir. Just for the benefit of the transcriber, I am Joe Williams of Herbert Smith Freehills, because Mr Wisking is -- he is watching the live stream but from Adelaide in Australia, so less convenient for doing the advocacy, unfortunately.

Sir, I had intended to address the Tribunal both on the question of sufficient interest and on the question of your discretion, but I have no desire to take up any more of your time or any more of anyone else's time than you would find helpful or necessary, so I would only ask whether you would like me to canvas those points or whether you would prefer -- I am sure the CMA may have something to say and I may wish to address those matters in reply.

THE PRESIDENT: I think that, given our indication, it would be better if we were to be persuaded by either the CMA or, in the case of PI, Meta, that we should reverse ourselves, that we'll hear from you in reply, but I think for present purposes, Mr Williams, you can take it that we will, to the extent I have outlined with Mr Gregory, permit the intervention and it's really a question of whether you want us to go further than that, and if so, why.

MR WILLIAMS: I'm grateful for the indication. I think just to cover briefly then, the matters you addressed in your exchanges with Mr Gregory, whether the CCIA would be willing to cover in its statement of intervention, its decision-making structure and Meta's role within the membership. Very, very happy to cover that in that document, sir. Page limit, I believe, sir, you proposed 20 or 25

pages. That would be sufficient for our purposes, based on what we intend to cover.

You will have seen again in our skeleton argument, sir, we did not propose to make oral submissions in any event. I say that. Of course, if the Tribunal would find it helpful, with an adequate amount of notice, we would be more than happy to appear before you and assist you in expanding on those matters orally.

I suppose the only point I would want to address a little bit more fully, sir, is the question of new evidence.

We do not propose to adduce any further new evidence. I say further, sir, because of course, we included an academic article which was supported by CCIA, alongside our application, which I think the CMA has taken issue with. Sir, first, that was adduced as evidence in support of the application itself. I won't dwell on this, given the indication you have given but it supports, in my submission, both our case on sufficient interest and on the exercise of your discretion, sir.

We would want to make a reference to it in any statement of intervention, sir. I do consider it relevant to the legal questions raised by Ground 1of Meta's application, in particular, as Mr Gregory has alluded to, the importance of the role of exit by acquisition in fostering innovation, and therefore, ultimately, consumer welfare in digital markets and the importance that has, and we say it has a significant importance, for the interpretation of the SLC test, particularly in the context of dynamic competition and the legal question of the evidential and investigative burden that falls upon the CMA in those cases.

So we would not propose to adduce any further evidence, sir, but we would seek to rely upon that article which is already before you. We just didn't want there to be any doubts about that, sir.

THE PRESIDENT: Well thank you very much, Mr Williams. What I think about evidence is we have a very peculiar and wide sense of what is evidence in these proceedings, understandably, given the subject matter.

For our part, we are minded to be pretty liberal in terms of --

[break in audio relay for 21 seconds]

-- keep that to the essential rather than the "time-consuming to no purpose".

When we have a prohibition of evidence, what we really mean is material that is put together for purposes of this hearing. And that is something which we consider to be rather different.

So, to the extent that it is material that, as it were, sits as the third or fourth tab in a bundle of authorities, then we are pretty relaxed. If it goes beyond that, then we are not relaxed and minded to say no, without very specific justification.

The only other point I would say, just so that you, and indeed Mr Gregory and Ms Love, when she comes to it, know, we would impose a page limit but that would be subject to the usual let out of asking for more pages if you need it. But we think it's important that we manage the parties' expectations as to what we think it would be useful for us to read in terms of quantum in advance, but we obviously understand that some points may take more time or space to unpack than otherwise, and that may not become evident until later. Mr Gregory has put a marker down in that regard already. You haven't but you should both have the flexibility that that process affords.

I had no further points in respect of your very helpful submissions, Mr Williams, unless you have any more.

MR WILLIAMS: I think the only point I left off the list that you raised with Mr Gregory was the matter of the confidentiality ring and CCIA does not propose to seek access to the confidentiality ring. I'm grateful.

THE PRESIDENT: Thank you very much. Ms Love?

Submissions by MS BIRD

MS BIRD: Thank you, sir. For the benefit of the transcript as well, I am actually Sophie Bird.

We are also grateful for the Tribunal's indications. As with the other interveners, I was planning to address both the sufficient interest limb of the test and the Tribunal's discretion. I am mindful that my learned friend for Meta has indicated sufficient interest is not an issue they wish to raise but they do question the value that PI proposes to add to the proceedings. With that in mind, would it assist the Tribunal for me to make some submissions on that point or to come back in reply, as with the other interveners?

THE PRESIDENT: We think, given the indications we have made, that it would be a question of reply, if we are minded to take a different course. Obviously, if we were to do that, then you would need to have a right of response.

So, I won't repeat myself, but we do consider that this is an instance where both the level of concern, or interest, about the decision and the fact that this is a novel -- not a novel merger but a novel market in which a merger is taking place, both incline us towards erring on the side of caution, by which I mean widening the test of intervention, so you don't need to address us on those points at this stage.

MS BIRD: I'm grateful.

In terms of the practical matters raised then, Privacy International is amenable to the Tribunal's suggestions on page limit. I am also instructed we don't anticipate needing to make oral submissions although, as the Tribunal has indicated, if it would be helpful, in time, we would obviously be happy to do that.

In terms of the confidentiality ring, in our skeleton we had suggested that for reasons

of expedition, we at least have external counsel added to the confidentiality ring as part of the submissions we wish to make on Ground 5, obviously concern redacted work or may concern redacted elements of the final report and the notice of application and defence. Although again, in the interests of expedition, we are in the Tribunal's hands as to how best to deal with that and Privacy International has indicated that they do anticipate being able to make helpful contributions without necessarily being entered into the confidentiality ring.

THE PRESIDENT: Thank you very much, Ms Bird, we don't have any further points for you, unless you have any more for us. We will hear from the CMA first. Mr Jones?

Submissions by MR JONES

MR JONES: I am very grateful for that and we are grateful for the Tribunal's helpful indication of your likely approach to the applications. The CMA does have a concern about that approach and so I need to take you through that.

In summary, sir, in an ordinary case, as the Tribunal is aware, when applications such as these are made, the Tribunal has to go through them very carefully to look at whether or not the points which are being made are relevant and admissible to the grounds which are being run. Of course, on a judicial review standard.

So the concern which we have with widening that approach here is that it raises questions about the future conduct of the proceedings and about the points which may be put in issue.

So, sir, I am going to try to persuade you to reverse your position, but even if I fail in that, it's relevant to go through these points because, as I say, they do have wider knock-on consequences for what happens next in the litigation.

So, sir, with that in mind, the point of principle, the main point of principle, which both CCIA and ADA have identified, is a point which they say goes to Ground 1. You heard Mr Gregory refer a few times to new principles of interpretation.

We are concerned that that does not, in fact, capture the dispute between the parties in Ground 1. Could I just show you how Ground 1 is put, please. It's in the notice of appeal at page 10 of the bundle. We are here looking at the summary of Meta's grounds. You will see at the bottom of page 10, Ground 1, and there's a reference to the horizontal SLC finding and then it's split into Grounds 1A and B. The main battleground for the applications to intervene is A although they also make some points about B. But if one looks at A, what is said is:

"The decision does not contain any finding that it is probable that GIPHY would have become a meaningful competitor to Meta on any UK advertising market in the future ... it seeks to rely on a concept of dynamic competition. The respondent misdirected itself in law as to the meaning of an SLC in section 35(1)(b) Enterprise Act 2002 and/or misapplied the test in finding that a substantial lessening of competition could result from a loss of “dynamic” competition without an assessment of (i) whether GIPHY would, on a balance of probabilities, have become a significant competitive threat on a relevant UK advertising market(s) and (ii) Meta or other competitors would, on the balance of probabilities, have responded to any such threat by materially changing their own competitive conduct or investment decisions on any such markets."

Just pausing there, if one asks the question what is the alleged dispute of law here, it's difficult to find because the CMA, of course, accepts that the lessening of competition must be substantial, so that of course, is agreed.

The CMA, of course, agrees that its finding must be reached on the balance of

probability. So that is also agreed.

Meta, for its part, accepts that the CMA is entitled to rely on a concept of dynamic competition. It makes that clear at paragraph 26. That is also agreed.

So the focus of the challenge is on these two findings, which are identified at (i) and (ii). Meta's argument is that those two findings are necessary stepping stones to a finding of SLC.

In paragraph 35 of this document, it describes them as logical prerequisites to a finding of SLC. That is a good description of Meta's case because the dispute here is, in essence, a dispute about logic and whether or not those two steps are logical prerequisites.

The CMA's own approach on this can best be seen in the decision. There's one paragraph in which the key findings are summarised, and that, in this bundle, is at page 444, sir. It's paragraph 7.254. This is where the CMA sets out its various findings, and you'll see at A, the view that "Facebook has significant market power in display advertising." At B:

"GIPHY's premerger activities were valuable to the dynamic competitive process in themselves and in driving other competitors' efforts."

And then various things are set out, including, you will see, at (v), a finding that:

"Absent the merger, GIPHY was likely to have entered into the supply of paid alignment services in the UK."

I highlight that because you will see that, although the CMA didn't reach exactly the findings that Meta says it should have reached, it made findings which are similar and go some way towards them. That contrasts with what Meta says the CMA would have had to have found, that it would have had to enter the market and become a "significant competitive threat". Then at C:

"Absent the merger, GIPHY would have had a significant impact on dynamic

competition by Facebook and other players in the relevant market."

And various things are set out, including at (i), that it would have been a close competitor and relevantly at (iii) that:

"Absent the merger, as GIPHY continued to develop its GIFs for monetisation, Facebook would increasingly have had an incentive to respond to the dynamic threat of competition."

Again, that contrasts with the way that Meta puts it, which is stronger, that the CMA had to find that Facebook would have responded by materially changing its approach.

I highlight all of that to show you that there are some similarities in the CMA's findings, when contrasted to what Meta said. There are some differences, and you will see here that in some respects, the CMA also reaches other findings that Meta doesn't say were necessary.

The question, really, on this first ground, 1A, is whether it was logical, in the light of the findings that the CMA in fact made, for it to conclude, on the balance of probabilities, that there was an SLC.

There is not a point of legal principle that we can discern of the type which one would ordinarily expect when an intervener wants to say, "I have a different approach to this point of legal principle". It's a question of logic and that's why we have said Meta makes the points in its submissions, which go to the issue. And the arguments which the interveners want to make operate on a different plane.

You will have seen, of course, that what they want to say is that this logical chain is undesirable. That's essentially what they want to say. If this is permissible as a chain of logic, then it would lead to a loss of investment in the sector. That's the argument.

But that isn't, in my submission, the relevant question which is before the Tribunal. The question, as I have said, is whether it's logical, not whether it is a desirable chain of reasoning.

THE PRESIDENT: Well let's take one of the anterior points that Mr Gregory ran and let me make clear first of all, that we are in the very foothills of this argument, and so anything that I say about the substance of arguments has got to be taken with a shovel full of salt. But Mr Gregory made the point that what the CMA had done by its focus on dynamic competition was illegitimately anticipating a new regime for digital markets and effectively jumping the gun.

Now, let me be clear. On an impressionistic basis, it seems to me this is actually a pretty bad argument, in that the CMA ought to be entitled to act on the law, as it is at the moment, without having to hold fire, to look at how the law might be after consultation.

So cards on table, I don't think much of this point.

But, it's not a point that Mr Jowell is making, I understand perhaps why, but it does go to a point about overreach, in the sense that the reliance on the concept of dynamic competition, which is in dispute, is something which is being attacked in an altogether different way by this particular intervener and not by Meta.

Now, I do not want to say anything about the merit of the points, save to flag up that I'm pretty sceptical about it. But in a sense, the more sceptical I am, the less Mr Jowell is inclined to push this point, doesn't that indicate that we ought at least to ensure, particularly because this is a matter that is going to be looked at not just by the parties in this case but more widely, we should ensure that at least the point gets a due hearing? And I stress, due hearing means prima facie in writing only.

MR JONES: The answer is no because it rests on a false premise. Mr Gregory,

when he talks about interpretation of the statute, hasn't identified in his submissions to you and I appreciate he didn't get as far as discretion but he hasn't identified what the principle is, but one sees from the written submissions that he is under the impression that there is a dispute of principle regarding the interpretation of the statutes. We have not seen, certainly not from Meta but also not from Mr Gregory, a different interpretation of the statute, for example, one which says, "dynamic competition cannot be taken into account."

When pressed, I think what is said is that the statute does not permit the CMA to reach a finding without these necessary prerequisites. In other words, they would say the statute does not permit the CMA to make an illogical finding but, of course, that isn't a point of interpretation, we agree with that.

If one looks in Mr Gregory's skeleton argument, sir, the point you were just asking me about to see what the basis of it is, it's on page 17 of his skeleton argument, where he's describing the concerns that the CMA has pre-empted Parliament. He's describing there the discussions which are happening for the new bill. What it hinges on is his comment in paragraph 61, that the things which are under consideration include a balance of harm's approach which would take into account the scale of potential harm, as well as its likelihood, and the lowering of a probability threshold to a situation where there's a realistic prospect. But those aren't things that the CMA has done here. So the premise is the CMA has done things that Parliament is now considering, but it's just wrong. That is not a correct premise on which to challenge the CMA's decision.

So that's the difficulty that we see with these grounds, is that they raise -- that particular ground raises a point that isn't relevant for that reason, and also, sir,

for the reasons that you've summarised.

Back to the first ground, and the question of whether or not it is desirable. If that were a relevant consideration for this Tribunal, and if this Tribunal did have to ask, as a matter of policy, does this sort of reasoning cause us to have concerns about investment, well then, the next question is, does the CMA need to respond to whatever is going to be put in by the interveners? The CMA, of course, does not agree with what is being said by the interveners on that particular question. It would need, if it were relevant, to have an opportunity to respond and, of course, the Tribunal then, on this hypothesis, would need to decide this quite large policy question: does this sort of reasoning cause policy concerns around investment and market exit and so on and so forth?

We say that is not a route which this Tribunal should go down. It's not relevant to the determination of the issues.

Just to return to what I said at the outset, standing back on this particular point, I do urge the Tribunal to reverse your initial inclination but, sir, if that doesn't find favour --

THE PRESIDENT: Just pausing there and to test it a little more, it's quite clear that the concept of dynamic competition is a matter that is going to be debated at some length at the hearing. I entirely accept that Meta says that you are entitled to apply a concept of dynamic competition, provided you are very clear as to what it says and provided that using that concept and approach complies with the black and white of the statutory test that you are bound by. In a sense, there's glorious agreement between the parties, Meta and the CMA, on that point but there is I think substantial disagreement in relation to precisely how much dynamic competition can, as it were, enable the CMA to

reach a conclusion that is different to the conclusion that, let us say, a view of static competition would deliver.

Now, it's there, I think, that the points that were articulated by Mr Gregory may have assistance because if you're saying, look, what you're trying to do is pull out of shape a regime which really isn't focused on digital markets, and you are anticipating a new regime that is currently being debated. What that really is doing is giving a different prism or different viewpoint for the argument about what actually is the concept of dynamic competition and how far it enables you to meet the statutory tests. And you say, of course, it's not speculation upon speculation upon speculation, as Mr Jowell says in his submissions. You say, no, it's a concrete point that can inform the conclusion that you have reached, to enable you to meet the statutory points.

I don't want to get into who is right and who is wrong, it would be wrong and unwise for me to do so. But it does seem to me that, although I am speaking from the present standpoint, quite sceptical about the merits of some of the points that are being articulated by Mr Gregory, I do see a fairly close nexus between the difficult articulation of the statutory test that we are going to have to go through. The words are clear, but precisely what can be deployed to satisfy those words is, as it seems to us, a matter for significant debate. It's for that reason that, in addition to the general interest, that we feel that exceptionally -- and I do want to make this clear, that we are not setting a precedent for the future, we are seeing this as an exceptional, not an ordinary case -- exceptionally, it does seem to us that a wider discussion, and the expenses associated with that, will assist us rather than not. We fully appreciate what you say about additional work for the CMA and additional work for the Tribunal.

But if it helps us get a better grip of the issues, then that, as it seems to us, is something of a good thing.

So that's my pushback on your point.

MR JONES: That is very helpful and I -- of course, reluctant -- I do not want to repeat myself but, sir, you will have the central thrust of my response to that which is, of course, that Meta is not taking issue with dynamic competition as a concept. It is not being said by anyone that the statutory framework as it currently exists can't deal either with the digital sector, of course, or with dynamic competition, of course, which is a concept which applies in many sectors, not just digital, and the argument, as I have said, really is an argument about the logical steps which are needed.

But, sir, on the practicalities, the concern which we have with letting material go in on what I have called the desirability of the CMA's approach, is that, in an ordinary case, if the Tribunal were to take, as it were, the strict ordinary approach and if it were to decide that these interveners should not come in because what they are saying is not relevant to the precise issues in dispute, then that would be, of course, an end of the matter. If you were to let it in, then we would all know that that is because it's been decided it is relevant and the CMA would then need to respond in some detail to the evidence and submissions which have been put in.

What I am concerned to make sure is we know where we stand. If they are let in now on a more flexible approach, because of the circumstances of this case, the question then will be, to what extent should the CMA, and is the CMA then expected, to respond? Of course, the context here is a context where there's an awful lot of work being done on dynamic competition and the appropriateness of intervening in these sorts of contexts. It's been done at

a policy level but there's a lot of work out there that could be drawn on and could be put before the Tribunal, if it were thought to be helpful.

On the other hand, for reasons I've explained, the CMA's instinct might be that for reasons I have already touched on, this really isn't actually relevant to the issues before the Tribunal and the CMA might therefore be minded to take something of a light touch approach to those things.

As I have said, I would invite the Tribunal to reconsider generally but on a practical level, if this material is allowed in, the CMA would certainly benefit from some indication as to what the Tribunal is expecting by way of response.

THE PRESIDENT: That, I think, is a very fair point, Mr Jones, and the difficulty that we have, of course, is debating relevance and what one would want by way of response from the CMA is very hard to debate in advance of actually seeing the materials in question.

But can I make this clear, and it may be that we embody it in an order, so that the CMA know exactly where they stand, that we give the interveners, including Mr Gregory's clients, the right to intervene in the manner that I've described, and we make clear that, whilst we are expecting a response from the CMA, we do not want the CMA to be distracted by what may be quite a long document or quite a detailed document.

So I'll say this: the CMA can take whatever approach it thinks best in responding to, hypothetically, Mr Gregory's approach, and if you want to respond by way of a one liner, to say "this doesn't assist anyone, it's irrelevant", then we will take that.

If, when we get into this matter more deeply, we consider that the one liner response "this is irrelevant", doesn't help and that there is a point that requires further consideration, then we would, before the oral hearing, ensure that the CMA is

on notice, so that the point can be addressed by it. Now that, I think, squares the circle of a wider latitude for points the CMA really feel shouldn't go in but which, for the reasons I have articulated, we feel should, but without forcing the CMA to incur an enormous amount of expense, unless it feels it is appropriate to do so. Of course, you want to see the colour of the interveners' money in due course. But that, I think, is a process which can fairly be undertaken because, of course, we don't envisage there being oral submissions.

But if there would be, then they would be sculpted by reference to specific points where we would be assisted and that, of course, would be an indication which could be anticipated in additional written submissions by the CMA, on points where we think expansion would be made.

So we will put in place a timetable for notice of intervention and successive documents. We will make clear that the CMA should be robust in its response as to what it thinks is and is not helpful and we will make clear that we do not regard such a response as being the CMA's last word, in that we would invite, where there needs to be further material adduced to deal with a point which we think has greater traction than the CMA might, to ensure that the CMA can address that point.

MR JONES: Sir, thank you, that is very helpful. Before I sit down, can I make two further points?

THE PRESIDENT: Of course.

MR JONES: One of them is a targeted attack, if I can put it that way, on the international law argument in ADA's document because the two arguments which I have already touched on, go in a general sense to dynamic competition.

The international law argument is a different type of point. It starts in the skeleton argument at page 13. If I could ask you to have a look at that. It's ADA's document.

THE PRESIDENT: Yes, of course.

MR JONES: You will see the heading is "The decision is contrary to international law", and the argument is then developed over a few pages, that it's contrary to comity and international law.

I make two points about this and I will make them shortly.

The first one is that is clearly not a ground of appeal. The word "comity" does not appear in the notice of appeal nor does the expression "international law."

The second point is it is not an argument which, even on its face, has any merits. I heard my learned friend say that it's arguable and one shouldn't apply a higher test than that, but I do respectfully say it isn't even arguable.

Sir, if one looks at paragraph 52 of the skeleton argument, please, you will see this is really the meat of the point, where if one asks the question, why is it against international law, what is the principle of international law -- you pick it up in the second half:

"In particular, comity requires that if a merger between two parties located outside the UK is to be blocked by the CMA, this should be done on the basis of, A: a transparent and predictable legal test, in this instance, the test applied by the CMA for the purposes of its SLC analysis."

At B:

"Clear and obvious evidence that the test has been breached."

And C:

"A proportionate remedy that does not have a stronger impact outside the UK than inside."

That is quite an arresting submission because if that last one were true, it would be a point which would have arisen in many jurisdictional cases, where comity arises in the context of jurisdiction but this would have been a much easier basis to, in a sense, quash the CMA's decision in lots of those cases.

There isn't a single authority cited in support of any of these wide-reaching propositions. Mr Gregory has had time to look into this. There's an authority in paragraph 49 stressing the importance of comity. There's then a citation from the OECD, which isn't a legal body, but anyway doesn't make these points. And so they are just put forward as ideas. Before requiring the parties to address a wholly new argument on international law, the Tribunal should, in my submission, ask whether there really is any merit to this and for the reasons I have given, there isn't and this particular ground, for that reason, should not be allowed in.

THE PRESIDENT: I understand. I will give you our -- or my -- short response to that, because I think it will assist both you and Mr Gregory going forward.

You're right that comity is in one sense, a slippery and extra legal concept, but it has, I think, two relevances in domestic law generally.

First of all, that domestic law is interpreted in light of the United Kingdom's international obligations, including comity.

Secondly, there is, in some cases -- and you mentioned service out and by strange coincidence, I handed down a judgment on Friday which dealt explicitly with comity and service out under the Hague Convention, so you have got me at a bad time, I fear. The fact is, for those two reasons, comity does potentially have the relevance to assist in the construction of a piece of domestic legislation. And that, of course, can contain, and I say no more than this, a fetter in terms of how one integrates something like dynamic competition

into the black letter statutory framework.

Now, I don't want you to read into that that what Mr Gregory says about comity requires more than a two line response. You should exercise your judgment and we will, as I indicated earlier, make clear if we think that judgment has been too brusque in the way it treats Mr Gregory's points.

But we are not minded at this stage, given the nature of the issues, to strike out, as it were, the points of intervention. We would rather that they were articulated and that the strike-out, if I can call it that, operates at the level of the CMA's response, subject again to our ability to say: actually, we think there's more to this point than you think and we would like to hear a little bit more.

MR JONES: I understand that, sir. My last point then was simply this, that in my own experience of intervening, it is generally the case -- I think this is right -- that interveners put in a statement of intervention but not also a skeleton although that could be done. We will come to the timetable later but, sir, it must be right in general terms that these statements will come in reasonably late in the process, before our skeleton arguments, but I can't see any reason why there would need to be a statement which then shortly thereafter, is followed by skeleton arguments making the same point in a different way.

THE PRESIDENT: Well, given the subject matter of all three sets of interventions, the fact that they are not party to the confidentiality ring, they are not putting in, in the strict sense, evidence, I think that is right. We'll hear from the interveners in response but I would be certainly inclined to roll up the statement of intervention and the written submissions, so that there is one round of document.

I wouldn't want to close out the ability to respond to the CMA's response to that document, so that we have, as it were, a final position. But I do think that, in

this case, at least, the number of rounds of documents doing the rounds is kept to a minimum rather than maximised.

So that point, I think is well made. Do any of the interveners have a problem with that?

MR GREGORY: Not as such. My only comment relates back to the one I made earlier, which is what we actually want to do is have some sort of engagement with the CMA on these issues, so I don't really mind what form these written documents take but if we put in a statement of intervention and then the CMA responds in writing at some point, we would like an opportunity to respond to the CMA's response.

And if we're not to do that in oral submissions, then that would require a written document at some point.

THE PRESIDENT: I don't think Mr Jones is saying anything inconsistent with that. I think that we would want a statement of the colour of your money, to which the CMA will respond in the manner that I have described.

For my part, I don't have a problem with there being a further response from the interveners, but at some point, the mound of written interventions has to stop. What we would have in mind is that if there is a point of expansion, we would make that clear to the CMA for further material to be put in by the CMA which then would probably result in you being invited to address us orally. That's how I would see that working.

MR JONES: Yes, I understand. Well, sir, I do not think we would object to that, provided that there are tight page limits placed, not only on the initial intervention but a considerably shorter limit on the rebuttal because otherwise, there are going to be an awful lot of documents for us all to contend with at the hearing.

THE PRESIDENT: What we are going to say is 25 pages for the statement of intervention/skeleton, however you want to call it, and five pages for the reply. That will be subject, of course, to what I said earlier, an ability to apply to extend. But reply submissions, absolutely, should be reply submissions and not fresh submissions on new points.

MR JONES: Sir, those are my submissions, I'm grateful.

THE PRESIDENT: Mr Jones, I am very grateful to you, thank you very much. Mr Jowell.

Submissions by MR JOWELL

MR JOWELL: I am not going to seek to dissuade you from the course that you have taken but I should just make certain clarifications or corrections in a way. Because Mr Jones has very carefully sought to summarise our case for us, which is kind of him, but I do want to -- and we don't entirely dispute the way that he summarises it as containing, if you like, the gist of our argument. Because the principal gist of our argument on the first ground is really very straightforward, in that we say if one considers the position as at the time of the merger, there was no presence of GIPHY on the relevant market, on the UK market. It had posed no competition at all on the relevant market, and indeed, there is no evidence, as the decision acknowledges, there's no evidence at all that Meta considered it to be a competitive threat on any market, anywhere in the world.

So we say, well, how does one get from that to a position where there's not just the lessening of competition but a substantial lessening of competition, without the intervening step of seeking to assess how that competition would grow and how it would grow to such an extent and such a scale within a reasonable time, as to amount to substantial competition?

We say that there is simply a logical failure there to make that assessment. One can put it as a failure of logic or a failure to take into account a relevant consideration, but it is clearly a significant failure and omission. One cannot use, we say, the concept of dynamic competition, as though it were a magic wand to get you from A-to-Z in that way.

So that is indeed the essence of our argument. But, it's also important to appreciate that one shouldn't be too reductive about these arguments because there is also an aspect of our first ground that does relate to extra territoriality, and although it is correct to say that we don't use the term "international law" or "comity", we do make, in substance, a very similar point.

If I could just show you that. It starts at page 26 of our submissions, our notice of application, and you'll see that in paragraph 53, we note that the decision also apparently concludes that competition for display advertising takes place on the global market, with only a knock-on effect in the UK. And we quote from the decision to that effect.

Then we go on, in paragraph 55, to say: if it is indeed the respondent's hypothesis that it would be competition outside the UK, presumably largely in the US, that would drive innovation and new products from Meta and other incumbents in the market, then the competition that is supposedly lessened is not UK competition but global or US competition.

And we say that, on that basis, there is no substantial lessening of competition, properly so-called, in the UK.

So there is an element to our argument on the first issue that takes issue with parts of the decision on the basis of extra territoriality.

We do say that, actually, it's a rather classic example of a useful form of intervention for an intervener to come in and to say: well, yes, indeed and that argument is

bolstered by considerations of international law and comity. So we do strongly support Mr Gregory on both of the points that he mentions, which are useful contextually and perhaps also more specifically in the case of the international law arguments.

So that's all I wanted to note on those interventions.

In relation to Privacy International, you have our point. We say that, essentially, there's nothing in our grounds that relates to data, so on what basis do they have something useful to contribute here? Now, of course, I am not going to seek to dissuade the Tribunal from the course it's indicated, but we do just put down a marker that we do wish to avoid these statements of interventions being, in effect, misused as an opportunity for grandstanding on points that are not of any relevance to the proceedings. So we do just put down that marker. We hope that that will be taken into account.

THE PRESIDENT: Mr Jowell, what we said to Mr Jones, so far as the CMA's responses to interventions are concerned, goes of course, also for Meta and we are really not very keen to oblige either Meta or the CMA to play a safety first approach and to say: well, because an intervention has been permitted, we're going to have to go to town on this and sort it out. We think that we would rather have a two line "this doesn't matter", with the proviso that the Tribunal, if it thinks it does matter, or may matter, or would like to know more to see if it does matter, it can say so and invite further materials going on.

I appreciate that imposes a degree of additional work on both Meta and the CMA, but the reason we are being, I hope not unduly, but certainly more generous in interventions, it ties in very much to your comity question, or international law question. It is trite that one reads statutes generally, but competition law statutes are a tricky problem here, but statutes generally, one reads as having

only intra-territorial effect, and exceptionally, they may have extraterritorial effect but usually, only when that is said in terms. But competition law is very much an exception to that. One has an effects doctrine which applies so as to give an extraterritorial reach to vast swathes of competition law, and this is an area which, in many cases, we don't grapple with but try to sweep under the carpet.

I don't think the sweeping will work in this case and it seems to me that is the point that is squarely raised in your notice, but that the interveners, from different angles, are shedding a light on this point. Although I share, I think, both the CMA's and Meta's concerns about the relevance of some of these points, I would rather not, for reasons I have articulated with Mr Jones, have them out now.

So your point about the relevance-date is, we think, entirely properly and perhaps rightly made, but we are, for the reasons we have given, inclined to allow this matter, subject to the safeguards in terms of page length, non-participation in the hearing, prima facie, and the ability for both Meta and the CMA to be robust in dismissing points that they regard as irrelevant. We think it's the proper course to go down.

MR JOWELL: We fully accept that.

THE PRESIDENT: I am grateful.

Well in that case, I don't think there's any need for the interveners to reply, unless there's a point that particularly strikes you as needing a response. I can see -- Mr Gregory?

Further submissions by MR GREGORY

MR GREGORY: Can I say a few words, partly because I do not want to be in a position where the CMA gives a one line response to our arguments, based

on assumption that may not actually be correct.

I partly want to challenge the premise of some of Mr Jones' submissions because he said that in order to intervene, the intervener had to sort of be supporting the grounds of the applicants and there seemed to be a sense in which you have to sort of fit quite tightly within the grounds set out in the notice of application.

Section 120 does not constrain the grounds on which the Tribunal can quash or remit decisions under challenge, under that provision, and the Tribunal rules and guides proceedings clearly envisaged that interveners will rely on different arguments to those of the main parties. And the CAT authorities which you've been referred to which require interveners to add value, also assume that interveners will, and perhaps even must, raise additional points.

So if interveners cannot simply duplicate the arguments of the main parties, but also cannot advance additional grounds, then the scope for interventions would be vanishingly small. Might perhaps it be said, as Mr Jones may have done, that interveners could advance distinctive arguments in support of an applicant's grounds but not additional grounds themselves?

Unfortunately, any clear distinction between arguments and grounds is likely to prove elusive. It is trite to say that judicial review grounds can be articulated in different ways. The same substantive point could be articulated as a failure to take into account a relevant consideration or an error of law in construing the statutes.

Similarly, the same substantive point could be framed as an argument in support of an existing ground or, as an additional ground.

Here, for example, the Alliance's point that the CMA has pre-empted Parliament's consideration of merger reform could be characterised as a ground in its own rights, with the CMA having departed from the original intention of Parliament,

or it could be characterised as a distinctive argument in support of Meta's Ground 1.

In my submission, the real issue for the Tribunal is whether the interveners' arguments, while distinctive, bear at least some reasonable relationship with the applicant's grounds, such that they can be accommodated in the proceedings without too much difficulty.

If, on the other hand, an intervener's arguments are so radically different from those of the applicants that they would fundamentally change the nature of the proceedings and take them off at a tangent, then that would be a reason for the Tribunal to be more cautious.

I think, for the reasons that the Tribunal has articulated, there is a nexus between the points that we are raising and also for the reasons given by Mr Jowell. I just wanted to make those submissions on that sort of question of approach to interventions, just to avoid the situation where the CMA says: well, we are not going to address this issue at all because we say it does not fall within the scope of Meta's grounds. We say the arguments that we are raising do bear a close relationship to Meta's grounds and, therefore, the CMA shouldn't simply dismiss them on the basis of a sort of narrow, reductive reading of what Meta said in its application.

THE PRESIDENT: I do not think Mr Jones was saying that, I think Mr Jones was saying the CMA needed to know where they stood, in order to calibrate their response. I do not think it's open to Mr Jones to say these matters shouldn't be responded to because they're not properly the subject of an intervention because (inaudible words) and so they've got to be dealt with to that extent because we're permitting you to intervene.

The point that I was making and I do want to underline this, is that if Mr Jones and

his team consider that your ten pages can be responded appropriately to in two sentences, then we would encourage him to do that.

Now, the reason we say that is because careful legal teams like those of Meta and CMA will always be inclined to err on the side of caution and they will say, "well, if you've made submissions across ten pages, no less than 15 will do on our part, because we must nail every point". What we are trying to do is discourage that course. We are encouraging both Meta and the CMA to be robust in their responses, and we are providing a safeguard to them, lest they fear that they miss a point, that if we find that some of your points have traction and are not sufficiently addressed in the Meta or CMA responses, we will raise that with them in an appropriate way, to ensure that the substance of the hearings are -- the substance of the points are dealt with by us, rather than us simply closing out argument because points haven't been addressed.

So that is how we intend to approach matters, which I hope will give the CMA comfort that if it takes -- and Meta -- if they take a robust view about the points you're making, that will be encouraged, not discouraged, and will not have adverse consequences for either Meta or the CMA.

MR JONES: Sir, from our perspective, that's very helpful and we would not seek to adopt any different course.

THE PRESIDENT: I am grateful. I don't think it's necessary for me to make any form of ruling in relation to what I have said. I think the basis for the order permitting interventions emerges with sufficient clarity from the exchanges we have had in the transcript. If anyone disagrees with that, I am more than happy to make a ruling but I would rather not go on for longer than I have to.

Good, I think we can then proceed to the next agenda item, thank you.

Further submissions by MR JOWELL

MR JOWELL: Sir, I think the next agenda item is confidentiality and the confidentiality ring was established by the Tribunal's order dated 26 January and there has been a recent agreed change to it, subject to the Tribunal's approval, which is the CMA has finally agreed to permit our external economists access to the ring. The terms of that are contained in our draft order annexed to our skeleton argument at paragraph 4, which I think is agreed by the CMA.

THE PRESIDENT: I am very grateful for that, thank you.

MR JOWELL: I think then the next item after that is the conduct of the hearing and I think both, subject again to the Tribunal's view --

THE PRESIDENT: There are no issues of disclosure at all. Is that right?

MR JOWELL: There is one issue, but we could deal with that --

THE PRESIDENT: I am in your hands, I just saw it was number five on the item and I just wanted to check -- I am in your hands, Mr Jowell.

MR JOWELL: It may be more convenient then, to deal with disclosure. The CMA has again acceded to all of our disclosure requests, with one exception, and that is the disclosure of the provisional version of the report -- I say provisional, it was provisional in certain respects. If I could show you -- it relates to the new ground that you will have seen, a draft of which has been annexed to our skeleton argument.

If I could just show you briefly how this point arose. It arose, if one takes up volume 2 of the bundle and goes to --

THE PRESIDENT: We have it electronically.

MR JOWELL: So it's the case management bundle, at tab D, page 1089.

THE PRESIDENT: Yes, we have that.

MR JOWELL: It's in the witness statement of Mr McIntosh and he was seeking to

describe, in relation to our procedural grounds, how the final report came to be made.

Paragraph 115, he said the substance of the final report was approved in a group meeting on 16 November 2021. He then goes on to set out after that, how they considered matters in reaching its decision, as set out in the final report.

He then notes, in paragraph 117, that the CMA has a duty to publish its reasons, which it did in the final report published on 30 November 2021.

Annexed to his statement were the minutes of the meeting on 16 November. You find that at page 1161. You see in paragraph 11 on 1162 -- well, one sees it previous to that, a heading, "Final report, chapter discussion", and they say they discussed various chapters of the report and at paragraph 11 they say:

"The group confirmed that the outstanding final report documents were: the summary of the final report; chapter 11, 'Remedies'; appendix B, 'Conduct of the enquiry', and appendix H, 'Third party responses'. The group considered all other chapters to be provisionally approved."

So just pausing there, what's clear is that it's not correct that the group at this meeting provisionally approved the final report. They provisionally approved most of the chapters of the report, but some important chapters, including the summary and the chapter on remedies, were not yet approved. Even provisionally.

You then see that they then, at paragraph 14, purport to delegate authority to the Chair:

"The group agreed to the delegation of authority to the Chair to agree on the group's behalf, minor changes and additions to the current text of the final report for those approved chapters, noting that the Chair will consult with the other members, should any significant changes be proposed or if any facts in the

current text are significantly incorrect or incomplete."

Over the page, he will also be delegated to agree the text of the press release and also:

"... to decide on any text in the final report to be excised, following any excision requests from the parties."

We say that there was no power to delegate, and you will see that in our -- and, indeed, it is a fundamental principle of administrative law that every law student learns, *delegatus non potest delegare*, those to whom a task has been delegated, in this case the group, cannot delegate that task to someone else, whether that be a member of the group or someone else.

We also, of course, raise the point that, if the final report -- these outstanding chapters that were never even provisionally approved, were never further approved, then of course, the final report has never been approved, full stop. But we assume for the CMA -- we hope for the CMA's part, that they were, because if they weren't, then, really, we should all be going home now, in my respectful submission.

THE PRESIDENT: The delegation obviously excludes the points in paragraph 11.

MR JOWELL: Yes, well indeed, indeed. But there are two points here that we make, and the one we assume will be rectified, we will be shown evidence that these other aspects were approved, at least provisionally approved. But we, of course, also take the fundamental point on delegation.

What's clear is that the power that is being given here to delegate, is for minor changes, not significant changes, whatever precisely that distinction is supposed to mean. We say it actually doesn't affect the basic point, that you cannot delegate and, therefore, it still vitiates the final report.

So that's the context in which we then say: well, we would like to see the copy of the

report that is referred to in Mr McIntosh's statement as being provisionally approved and which is referred to in these minutes.

We understand, of course, there's a certain sensitivity to this, but the fact is that this issue has been raised. It's very difficult to see how we can have a sensible debate about this without being able to see what the actual changes were that were made, because of course, it may be that the changes were purely typographical or administrative in nature or grammatical; that is obviously going to, potentially at least, affect the outcome and it's appropriate that the Tribunal should have before it, the best evidence. That is a basic principle in administrative law, as well as elsewhere.

If I could just show you one authority. I'm sure you will be familiar with the principle, but it's in the authorities bundle -- I believe it is tab 7, and it's a judgment of Lord Justice Sedley in the case of the Crown and National Association of Health Stores and at paragraph 49, Lord Justice Sedley says -- he remarks:

"But for this tactical consensus, we were in agreement that we would have required the briefings to be produced. The best evidence rule is not simply a handy tool in the litigator's kit, it is a means by which the court tries to ensure that it is working on authentic materials. What a witness perfectly honestly makes of a document is frequently not what the court makes of it. In the absence of any public interest in non-disclosure, a policy of non-production becomes untenable, if the state is allowed to waive it at will by tendering its own precis instead."

So, whilst we understand that -- I understand from my learned friend that the intention of the CMA is to summarise the nature of the changes that were made. We say that is not the best evidence, and the Tribunal should have the best evidence before it and, therefore, we do ask for disclosure of this

document.

We understand the sensitivities, we understand that it will have to come within the confines of a confidentiality ring, at least provisionally, but nevertheless, we think it's essential, given that this ground is now clearly on the table, that the Tribunal should order disclosure of that underlying document.

Those are my submissions on the one remaining issue of disclosure.

Further submissions by MR JONES

MR JONES: Sir, we fully appreciate the process of finalisation of the report, because it isn't public, gives Mr Jowell a couple of difficulties. One is he hasn't been able to plead the points he wants to plead until now, and so on the proposed amendment annexed to his skeleton argument, the CMA isn't going to take any issue with that when it forms part of the amendments which are being put in.

Secondly, even now, my learned friend doesn't have a clear view of exactly what happened. We fully accept that. I should make clear that the witness statement of Mr McIntosh, when it was talking about these meetings, was doing so in the context of addressing issues relevant to disclosure. So, it's true to say that it isn't complete on these issues because it's not what he was addressing and it's come in as a side wind -- I am not taking any point about this, but the way it's come about is obviously there's a side wind, Mr Jowell and his team having seen the documents that were disclosed for the purposes -- for other purposes.

We have, at the CMA's end, been giving careful thought to those points, to how we can make sure that the process of finalisation is explained for the Tribunal's benefit and for Meta's benefit as well, in a way which is transparent but also practical and proportionate.

I need to develop the submissions on this because it's not a straightforward point. In summary, we say that it would be appropriate for the CMA to give a witness statement explaining this process of finalisation. I don't believe that that in itself is controversial. The controversial point is the next point, which is that we don't think disclosure is appropriate. I'll need to unpick that slightly.

You have seen the starting point. It was the 16 November meeting, in which certain chapters were agreed -- provisionally agreed, if one wants to put it that way -- subject to the Chair taking forward any insignificant changes which would have taken place over the next couple of weeks -- that was two weeks before the publication of the final report.

The minutes used the word "delegation", and I would use that word today for simplicity, but can I just make sure the precise legal characterisation of this is going to need to be explained in the defence and I am not here using "delegation" as a term of art or conceding that there was a delegation of statutory powers that couldn't be delegated, of course not.

The practical reality was that by that stage, the reasoning of those chapters which were provisionally approved, was settled and the Chair was going to be taking on the function of shepherding it through the final steps.

What happened thereafter -- and this will all need to be in a witness statement, I am simply giving a precis of what will go into the statement but what happens thereafter is a process of dialogue. And there's dialogue between the CMA team working on the document, the Chair and the wider group. And that dialogue included further meetings of the group, it included email correspondence and it also included comments being made on the document itself, because as a matter of fact, how this is done at the CMA's end is that there is a SharePoint document to which members of the CMA's team have

access and members of the group also have access and so there is quite a lot, as I understand it, of ongoing commentary in the document, where things are discussed in a live way, if I can put it that way.

Now, the witness statement will explain those points and we will, of course, need to correct a couple of misapprehensions which have crept in, for entirely understandable reasons, but by way of example, happily, Mr Jowell is right to assume that the other chapters were, indeed, provisionally approved on other occasions. That's the summary and the remedies and the appendices. Some at a further meeting and some over email, so that of course, will need explaining.

But more generally, it will be, we think, important to explain overall the process that was being followed and the timeline for the important events, so that we are all proceeding on a common basis.

That will include a description of the types of changes that were made in this final stage. Including, just to be clear, the types of changes that were, as it were, signed off by the Chair, without going back to the group as a whole, and descriptions of what they were.

Now, I appreciate of course, that what's being said against me is why not go further, why not not simply rely on a witness statement to describe those things but disclose, as Mr Jowell says, the documents as reviewed by the group and then compare those page by page to the final report.

I have three submissions to make on that but before I make those three points, could I make a clarification as a preliminary comment.

Mr Jowell wants the version, he said, that was approved by the group. I've explained that, actually, what the group has access to is a living document on SharePoint. The CMA has been trying to see whether it can actually

reconstruct the precise document that was before the group members on the various occasions when they provisionally approved different chapters. But we are hopeful that we will get them or something close to them -- of course, we need to do that for our own witness statement but if disclosure is ordered, then we would need to do it for that as well. I can't guarantee though, that we will get the exact documents and it might just be something close in time because the way it works is there's an automatic saving by the system at different times and sometimes it overrides earlier versions and so on and so forth. That's a preliminary point. I said there were three reasons why we don't think it's appropriate to go further and disclose the documents.

The first one is this. The main argument that Mr Jowell now wants to make is his argument about the legal power to delegate, as he put it. The question whether or not the group was entitled to leave to the Chair, the approval of minor, insignificant amendments.

That is a legal argument, and that of course, is the argument that is already sketched out in the amended text appended to the skeleton argument. This document is clearly not necessary for that argument to be run.

What Mr Jowell is interested in is running a further additional argument, and you see this -- I do apologise -- in his skeleton argument, if I can ask you to turn to that, in the amended text, the proposed amended text. You will see, sir, the final paragraph of that proposed amendment, which is 120G, it says:

"In the premises the decision was not prepared and published by the group as required by section 34C. Accordingly, it's ultra vires and void. If [and then this is the point], which is denied, the respondent had power to delegate the function of preparing or publishing any part of the decision, Meta reserves the right to plead that the relevant delegate or delegates exceeded the scope of

their authority, in light of further information or disclosure from the respondent, including the version of the report provisionally approved."

So that is where Meta wants to go. It's the further ground or sub-ground, if you will. It is therefore a purely speculative exercise and I will come on to show you Ecolab but the relevance of that is that when the Tribunal assesses disclosure requests, it is necessary to assess them by reference to what is already pleaded and, on the other hand, whether what is being sought is speculative. I am not going so far as to say this is the sort of fishing expedition which should be completely shut down. I have said we do think it's appropriate to give a witness statement which addresses these things. But whether disclosure is appropriate in a context where judicial review principles are being applied, is a question which depends, among other things, on whether or not the point has already been pleaded or whether, as here, it is speculative.

That's the first point.

The second point is that when the CMA gives its witness statement on these issues, it will be subject to its duty or candour and it is very much aware of that. Sir, you will see from the way that the issues have played out today that the CMA has not been trying to keep these issues off the table, it has not objected to the amendment, it takes a realistic and sensible approach. The same is true of disclosure. Meta dropped some of its disclosure requests but the ones it then maintained, the CMA has thought carefully about and has been prepared to give disclosure of those.

Of course, the Tribunal can have confidence that when the CMA addresses these things in its witness statement, it will be doing so in a way which is comprehensive on these issues and fully in accordance with its duty of

candour.

The third point, and it's really related to the second, is what would happen in practical terms, if this document were to be disclosed? And, really, this is a proportionality point. Because, sir, we are talking about changes made in the last couple of weeks, just before publication, to a document which, of course, runs to several hundred pages and possibly the appendices which run to a lot longer than that. We think it is practical, in the time that we have, to explain, in a witness statement, the kinds of changes that were made, and that will be done by way of giving an overview, as it were, of the different categories of changes but also giving examples to show the sort of thing that we are talking about.

If the provisional -- it would have been called the provisional decisions -- are disclosed as they are, the inevitable next step will be that Meta will say: what about this change on page 34, what about this change on page 73? And the only way for the CMA to answer those kinds of requests will be a detailed account for each individual change. It will need to go back through emails to work out who had suggested what on a particular change, where was this wording used in the document before, can we map it all together? We are, frankly, concerned that it will simply get out of hand, and that is in a context where, as I have said, this is a speculative argument. I accept it's close to the argument that they're going to run. We accept it needs to be addressed on a proportionate basis. But we are concerned that going further and requiring disclosure is simply going to be the first step in what will become an extremely burdensome process for a point which, at the moment, isn't an issue.

I said I would show you *Ecolab*. That's because that of course, has the, I think, most recent summary of the disclosure principles as they apply in this Tribunal. It's

in the authorities bundle, page 382. Sir, I know you will be familiar with this but just to highlight paragraph 17 is where, sir, your predecessor had gone through the authorities on judicial review disclosure --

THE PRESIDENT: Yes.

MR JONES: -- and set out certain principles by way of summary, in paragraph 17. Just running through them.

Number one:

"The principles are those relevant to judicial review."

Number two:

"The decision maker in responding to the substantive application to challenge its decision is under a duty of candour. Where a particular document or documents are significant to a contested decision and relevant to the grounds of challenge, they should normally be disclosed at the outset, rather than a deponent attempting to summarise them in a witness statement."

So we entirely accept that but that's for documents which are relevant to the actual pleaded grounds and that really needs to be contrasted with the other, as it were, end of the spectrum which you can see at paragraph 7:

"Mere fishing expeditions will not be allowed."

I haven't put my case as high as saying it's a fishing expedition but we are somewhere between those two points. And picking up the other paragraphs here, at 4:

"The Tribunal must be satisfied that it is relevant, proportionate and necessary."

At 5:

"The need for request for disclosure must be examined in the light of the circumstances in each individual case."

Then at 6:

"Even in cases involving issues of proportionality and convention rights, orders for disclosure are likely to remain exceptional."

Eight refers to disclosure being burdensome or voluminous which is a factor to be weighed but not itself decisive. And I have made clear it's not so much the volume of material to disclose as the volume of what will happen after it's been disclosed that the CMA is concerned about.

Sir, there are some follow-on points about timetabling but as Mr Jowell has indicated, they are largely agreed, and I think it's a separate category of issues.

THE PRESIDENT: Yes, that's a separate question.

I mean, really what you are saying is that if one takes what I will call the provisionally approved draft, which is the draft as it stood as referred to in paragraph 12, page 1162 of the bundle, and then one jumps to the finally approved version of the decision, one has got an enormous amount of work done electronically, overlaying the provisionally approved decision as it stood at this date and resulting in the final decision as it stood.

What you are saying is that not only do you not have, as it were, physical documents to show each and every change, you've got instead, electronic documents which are not going to be that easy to unpack in terms of the drafting history between the PD and the FD over time.

MR JONES: That's right. And unpacking every individual change -- clearly, Mr Jowell wouldn't, I know, plead every single change but trying to unpack however many he identifies would be a heavy and involved exercise. Sir, if one were to compare those two documents, just to give a flavour of it, there will of course, be a lot of changes which are obviously typographical and obviously --

THE PRESIDENT: Let's look at the changes which are a big jump, where one has

got not an obviously typographical change but one has got something which represents a material shift in terms of what the decision says, when you look at the two end points, the beginning and the end.

MR JONES: Yes. There may be some which are significant, that is true. They, if there are any, would have been signed off by the group, so one would then have to reconstruct that and say this is when they went back to the group.

But there will also be some which are things like text being moved from one part of a chapter to another or text which appeared in one chapter being replicated in a different chapter, to make it easier to read as a whole. There will be those sorts of changes. Those are the sorts of things which can be explained in a witness statement, so that Mr Jowell sees what in fact Mr McIntosh understood to be meant by insignificant. But that's different from going through each one individually and explaining what happened on that particular occasion.

THE PRESIDENT: I imagine they are what -- in the hundreds?

MR JONES: Sir, I think that that must be right, although I would need to take instructions. I think that that is right.

THE PRESIDENT: I see the force in your point. Obviously, I will want to hear Mr Jowell in reply, but -- first of all, it may be an appropriate time for us to take a short break because this is being transcribed and we have run on a little bit long. What I am going to do is I am going to float a possible solution. But I would want you to be able to think about it, and indeed, Mr Jowell to think about it, and it would be this:

It seems to me that you're right, provisionally, that a witness statement is the appropriate way of dealing with matters and that you are also right that the idea that you should be obliged to, as it were, go through each and every

change and explain why -- we are not interested in the insignificant changes, they're obvious -- why a material change has, in fact, been appropriately consulted on by the Chair, with the rest of the group, that is going to be liable to be an extremely onerous exercise, if you have to do it in the case of each and every material change. You might even have a debate about what is a material change. Clearly that's on the cards.

Could one do this: in addition to the witness statement, one discloses the decision, as it stood at the date of this meeting, to the extent you can accurately reconstruct it, so that Mr Jowell has an idea of the beginning points and the end points and we leave it there for the moment, but give Mr Jowell the opportunity of saying, "look, this is something which is sufficiently material that we do deserve an explanation of how you've got from the start point to the end point". We understand the theory. What the witness statement will say is that there will have been email consultation in relation to those material changes, because they're material and not minor changes.

But give Meta the opportunity of testing in -- well, I would think no more than five instances -- whether in fact, what the CMA has said by way of its process is right. In other words, we give Mr Jowell the opportunity to look at the beginning point of this story and the end point. He will have the benefit of a witness statement saying: look, you shouldn't be worried about what even appear to be material changes, because they're either faux material changes because all you've been doing is moving bits around the draft, and we all know how drafting works these days, or they would have been material changes which are material but subject to consultation.

But Mr Jowell will have the comfort of being able to test the general explanation by reference to a limited, and I mean very limited, number of examples. That, to

my mind, and I float it only because I'm speaking for myself and not for my fellow panel members, that would diminish the work on the CMA's part and give, I think, Mr Jowell appropriate comfort that a point that he has raised, but can't obviously raise with specificity, can be tested. In other words, there's a means of testing by way of specific process, a limited number of instances where there's a difference.

I wouldn't say this is an absolutely closed process because we don't know, and Mr Jowell doesn't know, what the provisional draft looked like. There may be scope for further work beyond the sort of five examples I'm thinking of, but it seems to me that if one has got a statement of process, the beginning and end points of that process as defined and the opportunity of just checking that, in fact, that has been followed through, we have got a process that is both fair to Meta and fair to the CMA, in that it keeps the level of work down to a proportionate amount.

MR JONES: Sir, I am grateful, I will take instructions on that.

THE PRESIDENT: No, I think you should and Mr Jowell, of course, you too. But I have to say, again speaking entirely provisionally, the idea of there being free rein across each and every apparently material change in the document, when it is as long and will have been subject to the process described in outline by Mr Jones, seems to me something that isn't consistent with the way we want to do things here. But I think I have said enough about a triangulation between the position of the two parties and I'll leave you to take instructions.

What we will do is we will rise until 20 to 1. It's a rather late mid-morning break but perhaps we can run into the lunch hour a little longer, in order to see if we can finish the agenda by quarter past or so. So we'll rise for ten minutes, back at

20-to. Thank you very much.

(12.34 pm)

(A short break)

(12.47 pm)

MR JONES: I am grateful for that opportunity to take instructions, subject to two points that I should just go through.

The CMA considers that that is a practical solution to the problem that you have identified, sir.

The two points are, firstly, confidentiality. I think, sir, I heard you suggest that it would be disclosed only into the confidentiality ring.

THE PRESIDENT: I don't think I said that but I think Mr Jowell accepted that that would be the case. So I was proceeding on that basis but I don't think I said --

MR JONES: I do apologise.

THE PRESIDENT: No, not at all.

MR JONES: In that case I am agreeing with Mr Jowell rather than with you, sir, because we absolutely wouldn't want to have to get into the process of doing confidential/non-confidential versions of the provisional findings, as well as the final ones.

So that, I think, is common ground.

The second point is that it is important that the number of examples be limited to five. We will look at the timetable in a moment but the CMA is on a track to doing several quite big chunks of work. There's the witness statement, there's the amended defence, there’s responding to statements of intervention. Shortly after all of that, there’s the skeleton argument.

We are concerned that, even looking through five examples, depending on what they are, depending how complicated the context is, could be time consuming. So

the CMA does think that it's a practical solution but very much on the basis that it's kept within those confines, sir, that you have suggested.

THE PRESIDENT: Well, thank you. I'll obviously hear from Mr Jowell, but it seems to me, subject to two points – three actually.

First is Mr Jowell's pushback on five.

Secondly is that, if for instance, of the five, it should turn out that one or two actually can't be justified, there would have to be further investigation in the light of that.

Thirdly, I'm saying five without actually having sight of the document we are talking about and one must never say never. This would be an order made, but if there's a material change of circumstance, then it would change further. So those are the sort of three provisos I have at the moment, but Mr Jowell, I obviously need to hear from you.

Further submissions by MR JOWELL

MR JOWELL: Well, I think if I could wind back a little to my learned friend's submissions, I think that his first point was that this was a sort of speculative exercise because we're simply looking to find further grounds. But actually, it's a bit more fundamental than that because I think that it's relevant also to the existing ground, the one we have annexed to our skeleton argument, to understand what were the changes that were made. I think we are actually agreed on that.

The difference between us really, is, is the explanation of that, those changes, or the description of those changes, going to be given through a witness statement or by the underlying documents?

Now, what the Tribunal has sought to do, I think, is to find a sort of via media here, where we have the starting of the document that is the starting point, then

I understand that the CMA is then going to give a witness statement which explains – I think the intention is to explain the process and also to explain the main changes, at least, and who made them and how they were made, when they were made. Then an opportunity for us to probe further in certain instances.

Now, I think what one does – what is, I think, essential, is that we have to be able – the Tribunal has to know what were the changes that were made by the group, approved by the group, and if so, roughly when and how and in what forum and what were the changes that were just made by the Chairman on his own. Or, indeed, it may be that there were changes that were made by members of staff on their own. We need to know about those as well.

So we do think that the witness statement, at least, should explain, first of all, who made the relevant changes. Then the question is, well, should we also have the underlying documents?

I think that, really, the process that we have arrived at so far, really rather shows the general wisdom of Lord Justice Sedley's approach, which is that when one can, it's better to see the underlying document because we want the best evidence. Where this all started was, of course, Mr McIntosh's saying: well the substance of the final report was approved in a group meeting on 16 November 2021. And he said that, I am sure, fully intending to comply with his duty of candour, I have no doubt, but the fact is that we have now seen the minutes. When one looks at the minutes, one sees it didn't do that at all. It didn't even approve all of the final report at that stage. And we are now told that, actually, there were possibly over one hundred changes made subsequently.

So I think that just shows the danger, really, of just taking the authority's word for it

and not looking at the underlying documents. Because, as Lord Justice Sedley said, what a witness perfectly honestly makes of a document may not be what the court makes of it.

To come back to your proposal, sir. First of all, we, of course, gratefully would accept the copy of the provisional version of the report as it was partially approved on 16 November.

We think also we should have, by the same process of reasoning, we should have the versions of those chapters of the report that were not provisionally approved, as at the date of their subsequent provisional approval. My learned friend said, in answer to our one ground – draft appeal, he said, for example, that the chapter on remedies was subsequently provisionally approved by the group. So, again, if that is correct, then we need to see that version of chapter 11 as at the date of its provisional approval, so that we can then see what subsequent changes, if any, were made by the Chair pursuant to his delegated authority. Or purported authority.

MR JONES: I only rise – it might be helpful – I agree with that. I had been proceeding on the basis that we would disclose each chapter at the moment it was provisionally approved, as it were, as far as we are able to reconstruct that. So that would be 16 November for most of them, 19th for a couple more and then the email exchange for a couple more.

THE PRESIDENT: That is very helpful.

MR JOWELL: I am grateful.

THE PRESIDENT: If I could make clear how we understand this process to work. We think that the statement is a very important statement, which, taking Mr Jowell's point in general, that documents are often better than a synthesis of the documents, no matter how carefully crafted, we don't think that is this

case because of the way in which the document was produced. We all know how word processing makes, on one level, things easier, but it makes the paper trail so much harder.

The witness statement, as it seems to us, should, in the judgment of the CMA, append such documents as the CMA thinks are consistent with its duty of candour and we don't, I think, want to stray any further into specifying what those documents might be.

Mr Jowell, you heard Mr Jones. He's made an entirely appropriate response about what he regards as documents that ought to be disclosed over and above the PD, as I call it, and there may be other documents. But I don't think it is incumbent upon either you, or indeed the Tribunal, to speculate what those documents might be. We don't know the process.

I'm quite sure, like you, that the CMA is going to approach this matter in an entirely proper way and we should leave the picking of deficiencies in that process, if there are any, to after the event rather than before because we don't really know what we're talking about.

MR JOWELL: I appreciate that. I think though, that what would be helpful, as I said, is if the witness statement can explain, of course, where proportionally possible, whether particular changes were made by the group or by the Chair or by a member of staff. Because otherwise, when we make our five requests, effectively, we really – of underlying documents – we are very much shooting in the dark. It may be that we will make these requests and then we will be told: well, those were all approved by the group, so it's all irrelevant.

So I think we do need to understand that.

THE PRESIDENT: Again, I don't think it's a matter that one can make a ruling on, but my example/suggestion of five was predicated upon a full explanation of

process, as per Mr Jones' submissions. If one were to get a skeletal or scant description of what's going on, then obviously, the probing by way of looking at the documents would have to be greater. There's a symbiosis between the statement and the document, and it may well be that the CMA takes the view that at a certain point in the story, it's actually easier to exhibit the documents than it is to describe what the documents say.

I'm minded at the moment to leave that to the CMA's good sense. I mean, one might have a meeting which is sufficiently memorialised in a memo to show how a whole raft of changes were debated. The last thing one wants is for that to be simply repackaged into a witness statement, when one can almost simply append the relevant document to the witness statement.

But that, I think, is something we can't make specific provision for now. All we can do is put on the transcript, as we are doing, what we expect by way of the process to produce.

MR JOWELL: I fully understand. So by way of bare minimum, I think it is agreed that the order will reflect disclosure of the provisional decision and also of those other chapters and we will have a right that – we hear what the Tribunal says, which should be limited, ideally to five or so, but with liberty to apply, as it were.

On that basis, I think we are all *ad idem* then, at least at this point.

THE PRESIDENT: Yes, never say never. Thank you very much, Mr Jowell. Mr Jones, you don't strictly have a right of rejoinder but if there's anything that you feel ought to be drawn to our attention, we'll hear you.

Further submissions by MR JONES

MR JONES: Sir, it's an extremely minor point but I'm conscious that sometimes these points get debated in correspondence afterwards, so it's probably

easier just to raise it now.

Mr Jowell referred a couple of times to the provisional report and he said "we will disclose the provisional report and the additional chapters." Just to be clear, we don't quite see it that way, we see that there are provisional chapters, some of which were approved on 16 November, some of which were approved later, and all together, one could call it a provisional report but it's those chapters as approved that we are understanding that we are required to disclose.

THE PRESIDENT: Again, I think that the Tribunal's basis for the order emerges sufficiently from the exchanges that I have very helpfully had with both of you, to make it both otiose and probably unhelpful for me to say a ruling, so I won't, unless the parties think it is appropriate.

MR JOWELL: I think we have sufficient clarity and we will proceed on that basis.

The next item, I think, is conduct of the hearing but it might be that timetable would be appropriately dealt with next. If that would be convenient.

THE PRESIDENT: Yes.

Discussion re timetable

MR JOWELL: So I think Mr Jones and I are in agreement again on this, subject of course, to the Tribunal's view and to submissions from the interveners.

What we would propose is that, on 4 March, there should be a document that comes from Meta and a document that comes from the CMA, and also, I think, a document that comes from the interveners.

The document that comes from Meta will be our reply to the defence and our amended notice of application, save for the ground relating to the delegation of authority, if I can put it that way. They have already seen a draft of that in

any event.

But we will leave that out.

The CMA, on 4 March, will produce its witness statement, with any appended documents.

The interveners, we would propose on that date, would also provide their statements of intervention.

THE PRESIDENT: I am assuming that the articulation you have just made is common ground between Meta and the CMA. Can I just see whether the interveners have any issue with what, on the face of it, seems to me a sensible date, but I think we ought to flush out disagreements as we go.

MR GREGORY: We are fine with that initial period.

MR WILLIAMS: Same for CCIA, sir.

MS BIRD: And we're also fine.

THE PRESIDENT: Good.

MR JOWELL: The next step we have is on 18 March, so two weeks after receiving the witness statement, Meta will file a re-amended notice of application which will include its ground on the delegation of authority as reformulated, in light of the material seen.

Then, on 25 March, we would propose that the CMA would then provide its amended defence to that additional ground on delegation of authority.

THE PRESIDENT: It's quite tight but it's a single ground.

MR JOWELL: It's a single ground. They have already seen a draft of it, so at least the legal aspects will be clear.

THE PRESIDENT: All of this will be subject to liberty to apply but on that basis, Mr Jones, you are happy that that's doable?

MR JONES: We are, sir, on that basis and I should explain it's tight in part because

Mr Jowell has agreed to let us have until 4 March for the witness statement which is because of holiday commitments at our end, so we have taken the flip side of that but there is a little bit of give in some of the timetable, so if we need to come back, we will.

THE PRESIDENT: I am grateful. Those dates seem, on that basis, very sensible. Thank you.

MR JOWELL: I am grateful. Then just a few more, which are the hearing bundles on 29 March.

On 25 March, we propose that Meta and the CMA would reply to the interveners.

THE PRESIDENT: Yes, I see.

MR JOWELL: Then, as I said, 29th, hearing bundles.

Then 4 April, one would have any short replies from the interveners.

THE PRESIDENT: Yes.

MR JOWELL: Then Meta's skeleton argument would come on 8 April.

The CMA's skeleton argument would come on 14 April.

And then the remaining dates would remain the same.

20 April for agreed authorities, bundles to be filed.

Then the substantive hearing commences on the 25th.

THE PRESIDENT: I'm grateful. I understand that sometimes cases warrant exchange of skeletons and sometimes sequential exchanges. You have obviously opted for the latter. The only thing I would throw into the mix is that, of course, this is the Easter period and, in terms of Tribunal reading, the 14th will probably mean that the document won't get read until quite a bit later. So I suppose what I am probing is: is there a prospect of exchanging skeletons with – is the efficiency built in –

MR JOWELL: We had considered it might well be more sensible to exchange

skeleton arguments in the give and take in the run-up to the hearing; we were prepared to concede that.

I think it's very much a matter for the CMA if they wish to exchange with us on the 8th. I would have thought that would be – certainly acceptable from our point of view ... but the question is really for Mr Jones.

THE PRESIDENT: No, I can see there are many different ways to skin a cat, and normally, I wouldn't interfere with what was agreed but I raise it ...

MR JOWELL: I think it's really a matter for Mr Jones.

MR JONES: We do think that sequential is appropriate here because the pleadings are quite lengthy, perhaps not by CAT standards but by judicial review standards, if one contrasts them to that. We are talking about a process of obviously getting more pleadings from the interveners but then replies and amended replies and so on and the reality of these cases is that claimants refine their case in their skeleton argument and we want to be able to present the Tribunal with a response which engages with the points which have been put against us.

There was, of course, the usual give and take before the hearing before you and we have come to this agreement. Of course, unfortunately, that's been done without your input, and so of course, we are in your hands about that but could I just make this point, which is that we initially wanted a two week gap between skeletons, and the other dispute between us was how long Meta really needed for its amended notice of appeal, which of course, one recalls, isn't going to address the delegation point.

We have agreed to give them until 4 March, which they wanted, and in return, they I think, agreed to give us two weeks, which now we have carved down to a week and I am slightly concerned I am going to be caught in a pincer

movement because of that cooperative approach from the outset.

THE PRESIDENT: Mr Jones, please don't get us wrong, we are really making absolutely no criticism of what is clearly a carefully thought out timetable. We will order the timetable that is articulated before us now, and what will happen is we will simply make sure that your written submissions are read as soon as they can be.

MR JONES: Sir, I am very grateful. Could I make just one further observation --

THE PRESIDENT: I don't know if -- you are standing.

MR WILLIAMS: Sorry to interrupt and, of course, I did confirm the time for intervention as was outlined but that was without the benefit of then seeing what follows and I would only just respectfully request, sir, if the time for the statement of interventions could be pushed back by one week, until 11 March. And I see that the Meta and the CMA, of course, have until 4 April to reply. And just on the timetable as outlined, that would give them one month to respond to the statements of intervention in a world where we only have two and a half weeks to prepare them, so I would respectfully request a further week.

THE PRESIDENT: I am inclined to keep you on a short leash, all of the interveners, but Mr Jones, I will hear from you and, if necessary, Mr Jowell.

MR JONES: I think my learned friend may have misunderstood part of the timetable, I'm afraid, because the proposal was statements of intervention on 4 March and in relation to those, the next step was going to be the CMA and Meta replying on 25 March. And 4 April was then going to be the deadline for the interveners' own response at the end of the process.

MR WILLIAMS: Yes, I am grateful, Mr Jones, I had misunderstood it. Sir, I think an extra week may be too great an indulgence on that basis but still, sir,

25 March gives three weeks for a response to the interveners, in a world where we still have fewer than three weeks to prepare those statements. And if I need to expand on that, sir, obviously, before we came in this morning, we had no idea if we were going to be permitted to intervene, and so the reasonable and proportionate thing with regard to costs and so forth is that substantive work had not been undertaken before today. So if there is any scope for a few additional days after 4 March, we would be very grateful, sir.

THE PRESIDENT: No, I can understand that but I'm afraid I think that in this case, I need to have prime regard to the main protagonists, and that is Meta and the CMA, so I'm afraid I am going to hold the interveners' feet to the fire and maintain the timeframe as initially articulated.

That is, of course, always subject to a liberty, but as you all know, that is only to be exercised where there is a material change in circumstance. So I'm sorry, but I think I would want the time to be on the side of Meta and the CMA and that means, I think, a degree of pressure, I only hope it's not unreasonable pressure, on the interveners.

MR WILLIAMS: I'm grateful for the indication, sir.

MR JONES: So two, if I may, quick points on timetabling. One is -- in a sense this isn't a timetable point but it's related -- there was a bit of a spat between us, if I can put it that way, over whether the amended notice of appeal should be pre-emptively permitted by the Tribunal or whether they should have to make an application -- nothing really turns on it and I simply wanted to clarify that we are happy for them to put it in on a, as it were, pre-emptive basis. If we object and say that it goes outside the scope of the permission, we will raise it then.

That was that point.

The second point is this timetable you have just seen does not have the dates for disclosure in it. The order which is appended to my learned friend's skeleton argument, I think has disclosure at the end of this week, the 18th.

The documents that I agreed prior to today to disclose, which are certain identified emails and so on, there's no reason, actually, why that needs to wait until the end of this week, so the CMA can do that as quickly as possible and we think that will be before the end of the week.

The provisional decision is going to be a bigger task because, as ever with IT issues, actually working out what is the best one to provide and doing it on a chapter-by-chapter basis, is going to take time.

Sir, it might be that since the statement is coming in on the 4th, it just gets done with the witness statement, with the explanation. I don't know whether my learned friend would say he would prefer to have it before then. We could do it, if it's sensible, the week before.

THE PRESIDENT: I want to say no later than the 4th.

MR JONES: I'm grateful.

THE PRESIDENT: Let me be clear what I mean by that. I know that the CMA has both IT issues, which we all have when we are trying to track through history, and, as it were, volume or relevance issues, because you want to get the key documents that explain whatever material changes exist between the PD and the FD. So there's an element of selection which is, I think, taken as read in the process we have articulated.

So it seems to me the long stop date should be the date of the statement, but I know that the CMA will appreciate that everything needs to be read and therefore, if you identify a document that you know is going to be appended to the witness statement because it matters, then as soon as you know that, it would be,

I think, helpful if it was sent through to Meta, so that they can take it on board. So that's messy but I think --

MR JONES: We entirely see the point, sir.

THE PRESIDENT: -- appropriate.

MR JONES: That's all I had on timetable. I know there's a couple of other small issues to pick up but I will hand back to Mr Jowell.

THE PRESIDENT: So grateful, Mr Jones, thank you.

MR JOWELL: Can I make one point on disclosure which is relating to the provisional decision. We are a little concerned with what the CMA has said about its inability to be sure as to the identity of the provisional decision that was approved, or partially approved on the 16th.

We understand that there is this SharePoint software, of course, which in a sense means that the decision is a moveable feast internally. But we would also have expected that if the group is to be provisionally approving a decision, which is what they purported to do on the 16th, we would have expected that a copy of that decision that they were approving be made available to them in advance of the meeting, so that they could read it.

So I mean I do put down that marker, that this is a real concern of ours, that it can't be identified. It should be possible to identify it, if the procedure had been run properly.

THE PRESIDENT: Well, Mr Jones, I am not going to invite you to respond to that because I think it's going to be the subject matter of the statement. Put it this way, I can see that there may be force in what you say but I can equally say there may not be force in what you say, it rather depends on how one works.

But if one is working on a rather more iterative and less formal basis than this description of process, which of course was put in place for another reason,

might suggest, then I for one, can quite understand why one has got some difficulty in working out what the state of an ambulatory draft was in a given point in time. But that may be wrong. We'll find out when we see the statement.

MR JOWELL: There are circumstances in which ambulatory drafts may be acceptable, but there are also circumstances where there comes a point where, if you are formally approving something, you have to know what you are formally approving. And that's rather fundamental. So I am a little concerned that we may get, for example, a version of the provisional decision that might be the version that was the most up to date prior to that meeting but one that none of the members of the group had actually read or accessed. So I think it is really an issue that I think the CMA will have to grapple with.

THE PRESIDENT: Let's leave it at that. You have put a marker down. Mr Jones has heard it, but I think that the concern, if it subsists, will very much depend upon the description of process and the witness statement that we are getting, which will explain how these things worked. So it may, at the end of the day, appear odd, it may not but I don't think we can anticipate but I am quite sure the CMA have heard what you say about what you would expect but I think that is very contingent on what they were doing.

MR JOWELL: I am grateful. May I also just make one observation about skeleton arguments in relation to the Tribunal's concern about getting those late. That is somewhat alleviated by the new practice direction which, of course, the Tribunal will be aware of, which means that they are limited to 20 pages. So they will be fairly limited documents which I would expect in large part would refer back to the previous --

THE PRESIDENT: Yes. No, I'm grateful.

MR JOWELL: I think the only matter, unless I have overlooked something -- I think the only matter that is outstanding then, concerns the conduct of the hearing.

THE PRESIDENT: Yes.

MR JOWELL: It may be that nothing sensibly can be said about it today, but I think we are both agreed -- well, I suppose there's the question of hearing length, where we have proposed four days, I think the CMA had a preference for three days.

In our submission, four days is appropriate, particularly now, in light of the fact that there's the potential for -- at least the potential for oral submissions by the interveners. If we go short, all the better. I am not known for my prolixity, I think, and nor are my opponents, so I think you can safely say we will not be going unnecessarily long. But we think that -- we are encouraged, as advocates, always to give accurate time estimates and ours is four days and remains that.

THE PRESIDENT: I would be minded to stick with four days, simply because the one thing that the parties can't budget for are the interventions, whether they are helpful or unhelpful, from the Tribunal.

I think the one thing you can count on is that there will be interventions and that will slow rather than speed things up.

MR JOWELL: Yes, I'm grateful. Unless Mr Jones wishes to ...

MR JONES: There is one further point. My learned friend's draft order had a provision for costs, costs in the case. I don't know whether that's important to my learned friend but we would say costs reserved because, of course, we are all waiting for the judgment from the Supreme Court and costs in the case rather presupposes the sorts of orders which might be made at the end. So costs reserved would seem the appropriate order for today.

MR JOWELL: We have no objection to that.

The only other matter, I think, is the question of closed session which I think --

THE PRESIDENT: That was on my list, yes.

MR JOWELL: I think we are both agreed that it's inevitable, if we are to be able to make our submissions freely, and if confidentiality is to be maintained in the material that the CMA wishes to maintain confidence over, then it will be necessary to have part of the hearing in private. I do not think it's necessary for the Tribunal to say how much of the hearing. We have estimated a day, the CMA thinks less. I think there's no point today in deciding on quite how long that should be.

There is the question though, of whether the Tribunal is persuaded that the material that the CMA wishes to maintain confidence over is confidential. That is really a matter for the CMA to persuade you of, in our submission, but from Meta's point of view, we would, were it not for their submissions, be content to have the matters aired in public. But we note that the CMA takes a different view.

THE PRESIDENT: Thank you, Mr Jowell. Mr Jones, you will know, because we articulated our views quite clearly in BGL -- not that you were before us, but the CMA was -- that we are concerned that there is now a trend towards allowing confidentiality to trump open justice. For my part, I think it should be the other way round.

Now, I appreciate that in this case, without stooping to particularity, there is quite possibly a third party interest, which the CMA is quite rightly concerned to protect in its processes to date.

But we see there exists a significant difference between the processes that apply, quite rightly, when the CMA is making a decision prior to an appeal, or judicial review, where we can entirely understand that the CMA wants to keep things

as tight as possible, and the review process of that decision, where we sit in public for a reason. And that reason is because the confidence in decisions that are made on the basis of private material is less -- in my judgment, significantly less -- where the judgment, even if it is open, is reached in private.

Now, that is particularly the case here, where -- I may be wrong but my sense is that the material that is going to be regarded as not just confidential but requiring in private hearing is, I accept, confidential, and clearly so, and not Meta confidentiality but third party confidentiality, but equally, it seems to us that it may be quite material to the question of an assessment of a dynamic market. I don't want to go further than that, but I can see that we are likely to want to refer to material that is presently going to be characterised as private in some depth and granularity, if the judgment is to have any degree of confidence in terms of public hearing.

The parties, of course, will know what we say, but the public won't, and indeed, one has the whole problem of an appellate court reading matters, and you have to go through the same hoops of ensuring that the material that was private is appropriately released there.

So we are concerned, not that the CMA is raising this inappropriately, far from it, but that the balancing, or the line, is being drawn in the wrong place.

I am not going to make any kind of ruling, nor I think, invite very detailed submissions justifying the CMA's position today, but where we see the line being drawn is the mere fact that a third party is going to be -- well, cross/upset/unhappy that confidential material is aired in public, is to our mind, not enough. The test, we think, has got to be one of material harm before you even get into the debate of in private versus in public.

In other words, we are prepared to hear an argument that we should go in private, if you are satisfied that there is material harm to a third party that is going to eventuate.

At that point, we will consider balancing exercise. But I think, in the first instance -- if there is anything you want to say or Mr Jowell wants to say *pro tem*, we would invite, perhaps, engagement with the third party involved, to make them think not what they would like to have happen, but what is actually their position on what would positively damage them. Because it is the damaging that I am interested in and not the "yes, these things are confidential and we would be unhappy to have this material disclosed".

So that is the ballpark we're in. I confess I don't think we have the material before us today to resolve that. I'm very satisfied that there is confidential information in play and that it is not frivolous; it's a serious confidentiality point. But I don't think that we have yet got the material before us to ascertain whether the sacrifice of open justice is one that is worth paying.

We will leave it at that. I mean, there are, of course, let-outs, even if we hear matters in private. In the first place, what was once in private can be articulated in a public judgment, even if the hearing was in private, so the veil can be released later on.

Equally, I understand it was the practice in the St James' Park case for the judge to require advocates to summarise what had emerged from the private session, so that there was some form of open record after the private session. I confess I think that rather depends on the points in issue, because summaries sometimes work, sometimes they don't. But there are other ways of dealing with this and I would only invite the CMA to engage very seriously with, I think, the stakeholders in this -- which is not the CMA. I do understand

the CMA's difficulty here. You are actually protecting someone else's interests, not your own, and you obviously are entitled to significant latitude in terms of being heard for that reason, because you are behaving exactly as a responsible body should behave.

But I think the third parties, whose interests you are rightly protecting, need to have a certain degree of awareness that if they articulate very broad areas which they say need protecting by way of private hearing, they may not get it. Whereas if they come with something which is much more specific, then we might be able to make things work.

MR JONES: Sir, that is very helpful and we will certainly do all of that. Any third parties we can approach and convey to them, sir, what you have said.

Of course, the reality is, when we move into litigation, the decision -- the focus does then shift from the CMA's own judgment to the Tribunal's judgment and so the CMA really is, as you say, sir, trying to defend third parties' legitimate interests but also simply trying to assist the Tribunal and, ultimately, it is going to be a matter for you to decide what the appropriate measures are.

With that in mind, could I raise a question about the appropriate process. Of course, we will have to see what the third parties say but what does strike me is that it may be that it would help all of us to have, perhaps at the date of skeletons, around that time, sight of what they have said, to share that with the Tribunal, to share with the other parties and so then, these issues will, I think, need to be addressed at the start of the hearing, if they cannot be decided before then.

It also occurs to me, although I'm not, I confess, completely across the detail of this, that the merging parties, I think, have some confidentiality claims themselves and so the same issue, I assume, arises there. So it may be that they also

would want to put in a short document addressing their own claims, so that the judgments can be made across the board for all claims as to confidentiality.

Sir, we're in your hands. As I say, the focus does shift somewhat from the CMA at this stage.

THE PRESIDENT: That's very helpful, if I may say so, Mr Jones. I think that you are right, this is something which needs to be addressed in the run-up to the substantive hearing itself.

The first step is to ensure that we move from the "it would be nice if you could protect this", to what absolutely must be protected at the price of sacrificing open justice. If that can be articulated during the course of the exchanges of submissions, so that the parties have it in mind, so that we don't have, as happened in BGL, a rapid, non-working of process, where in effect, the Tribunal in that case was driven into private session because the problem couldn't be handled.

What I want to be in a position to do is to be quite clear from the very beginning that we are going into private for certain matters, if we are, rather than have it emerge as an unexpected and forced-upon outcome.

MR JONES: Yes. I am grateful.

THE PRESIDENT: Very grateful. Mr Jowell, if you had anything to add to that, then obviously --

MR JOWELL: We share, of course, the Tribunal's scepticism as to the claim for confidentiality. We would propose perhaps it might be sensible, given the desire to resolve this in advance of the hearing, possibly, to lay down some sort of timetable in relation to the documents? But we are very much in the Tribunal's hands.

THE PRESIDENT: I think we will want to not have a hearing but grasp the nettle in terms of just how serious an in-private hearing is, by, I think, around the end of March, so the hearing-bundle-filing time. I think we would want a sense of just how strident the protections required are and what the parties consider is the way in which it can be dealt with.

So it may be that matters scale back sufficiently that one can deal with the confidentiality matters elliptically in open court.

I mean, the parties, quite rightly, have said they don't think that's possible at the moment, and the last thing we want is for counsel to feel inhibited in the making of the points that they want to make in their clients' interests.

But it may be that if things get scaled back, so that one is actually talking about dates or figures or things like that, we can in fact move to elliptical reference rather than in-private.

But I think end of March is probably the time we ought to be base-lining the extent of the problem.

MR JOWELL: I am grateful. On that basis, we would expect any documents from the CMA, with the material from the third party, by the middle of March, perhaps?

THE PRESIDENT: I think I am going to leave it more flexible than that because I think there's a degree of negotiation here, rather than matters that are completely in the control of the CMA.

What I would like, around the end of March, is a sufficiently clear articulation of the degree of the problem that we have. I am not going to say more than that and I am not going to put dates down. Obviously, it needs to be handled well before the hearing, but that is the sort of timeframe I've got in mind, but I am not going to make an order requiring the CMA to produce a document. I think

there are more than enough documents being produced already, but I think the CMA knows exactly where I am coming from.

I know that it is in a sense their problem and in a sense not their problem, because it's a gatekeeper function that they are exercising, and so I am going to give the CMA rather considerable latitude in how they choose to handle this problem, because I think that's the appropriate course.

MR JOWELL: Fully understood, sir.

I think, unless there's anything else the Tribunal or anyone else wishes to raise, I think that deals with all the matters on the timetable.

THE PRESIDENT: Well that deals with all of our points.

The only point I think, for clarity's sake, we would be grateful if the parties could produce the first cut of the order. There's been a lot discussed, and I think that would be the more efficient way of dealing with it. So if you could endeavour to agree a form of draft as to what we have discussed, we will resolve any issues, if there are any, on the papers. But hopefully it's really a matter of drawing up what we have ordered today.

MR JOWELL: Thank you very much. We will certainly do that.

THE PRESIDENT: It remains for me to thank everyone for the very helpful way in which these matters have been articulated; I'm really very grateful to you all. Thank you very much. We will rise now. Thank you.

(1.38 pm)

(The case management conference concluded)