**IN THE COMPETITION APPEAL TRIBUNAL**

Case No:1590/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

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Tuesday 30th May 2023

Before:

The Honourable Mr. Justice Marcus Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Microsoft Corporation **Applicant**

v

Competition and Markets Authority **Respondent**

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# A P P E A R AN C E S

Daniel Beard KC, Robert Palmer KC and Stefan Kuppen (On behalf of Microsoft Corporation)

Lord Grabiner KC, Lord Pannick KC, Brian Kennelly KC and Douglas Paine (On behalf of Activision Blizzard Inc.)

Rob Williams KC, Daisy Mackersie and Richard Howell (On behalf of Competition and Markets Authority)

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**Tuesday, 30 May 2023**

**(2.00 pm)**

**Case management conference**

**THE CHAIRMAN:** Mr Beard, good afternoon.

**MR BEARD:** Good afternoon. In terms of appearances, I appear today with Mr Palmer KC and Mr Kuppen. For Activision, you have Lord Pannick KC, Lord Grabiner KC and Mr Kennelly KC. For the CMA, you have Mr Williams KC, Miss Mackersie and Mr Howell.

**THE CHAIRMAN:** Thank you very much, Mr Beard. Before one of you begins, a few housekeeping matters. First of all, this hearing is being live streamed on our website, so I must start with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is prohibited for anyone else to make an unauthorised recording, whether audio or visual, to transmit the proceedings or to broadcast them in any other way or photograph them, and a breach of that provision is punishable as a contempt of court. I know you all know that, but nevertheless, that's the usual rule.

Thank you all for attending on what is very short notice. It should, however, come as no surprise to anyone as to why we are here today. The guide is very clear about how applications for review under section 120 are to be run. I am not, so far as possible, going to make any specific orders today, we'll see how we go, but I am very keen to set a clear direction of travel, so that everybody knows what they are tilting at. Looking at the agenda, it seems to me that the first point is to consider in broad terms when the substantive application can be heard, how long the hearing will need to be, and what obstacles exist in order to achieve that. Let me put my own cards on the table: in terms of feasibility of dealing with this, it will require some consideration of both available courtrooms and the composition of the tribunal itself. We can do

the weeks commencing 24 July or 31 July, not the 17th, that is not a date or week that we can manage. It seems to me that I ought to hear from Microsoft and I think the only intervener that is before me, as to whether that is a date that we should strive for. I know that the CMA is not keen on such a date, but I would like to hear from you, Mr Beard, as to why it is important that we try to achieve this. I will then go on to the obstacles that exist, at least to my mind, as to achieving that date. So first of all, I want to know whether it's worth the candle of actually pushing that hard for what would be a pretty tight timeframe for dealing with the matter, and then if it is, we'll work out whether it can actually be done.

**MR BEARD:** Yes. Thank you, sir. I anticipated that we would be starting with timing, so I was going to pick that up directly. I think the broad position is sooner the better, so far as Microsoft, and indeed I'll leave it to Activision to speak, are concerned. The CMA has suggested in its submissions not before the summer and it should be in the autumn. We say that outcome would not be acceptable, as sir, you're well aware and have already referred to by reference to the guidance, merger control in the UK, and indeed elsewhere, is time limited for a very good reason. It's to provide certainty and commercial practicability in relation to review processes, and that is because it is recognised by the legislature that delay jeopardises deals and jeopardises the benefits to customers and consumers that can result from deals like these. We have a full in depth investigation process here, that takes 24 weeks, can be extended by eight. If we were to be dealing with this matter in the autumn, we would be looking at, effectively, having a second phase two period in relation to this merger. Now that is just wrong, we say. Parliament clearly intended these things to be dealt with swiftly. The tribunal recognises that in its guidance. That is why we're here today. We're not pressing for the sort of timetable one saw in cases like HBOS/Lloyds, where it was ten days from start to finish. We are looking, particularly

if we're talking about the week commencing 24 July, as being a two month process. We consider that is entirely feasible, and is one that should be possible for all concerned, subject of course, to the tribunal's availability.

Let me just, in dealing with these matters, pick up the objections that have been raised, if I may, to our dealing with this matter quickly. The first is that the appeal that we've lodged is long. Let's take a step back. The CMA provided a 480-page decision on 26 April. We had four weeks to digest it and prepare and lodge our appeal. They protest the appeal is long. I'm sure, to paraphrase Blaise Pascal, if we had had more time, it would have been shorter. But we actually wanted to make sure that it was full enough that we could essentially do away with a second round of pleadings here, because we anticipated that that would be one of the ways that things could be moved along. We do hope it is clear the five grounds show just how badly wrong the CMA has gone here. We have indicated in our skeleton, of course we're happy to provide summaries and route maps, and we will do that, but we don't think the substance is in any way unclear and, therefore, we think that objection is not well served.

**THE CHAIRMAN:** We'll, obviously, come on to how we can make the job more manageable, so that's something certainly, we'll want to discuss.

**MR BEARD:** Yes.

**THE CHAIRMAN:** Just to identify the road blocks that I perceive, there is first the question of expert evidence, which at some point, but I think perhaps not now, we are going to have to discuss.

**MR BEARD:** Yes.

**THE CHAIRMAN:** It does seem to me that the expert evidence is a potentially derailing question. I will want to hear from you on that, and obviously from the CMA. The second area that potentially can derail is interventions, the extent to which there

are interventions on both sides which may slow matters down. Then, with less seriousness, there is the question of disclosure and the question of confidentiality. Now, to be clear, we'll go through all of those in order to work out what the problems are. At the moment, I'm really interested in why it's important to move fast, not whether we can't move fast. We'll come on to that, as I say, separately.

**MR BEARD:** No, certainly. I'll pick up, if I may, just towards the end of my points, some of those issues and in particular, just to outline our position in relation to the expert evidence. I think the fundamental issue here is that if this process does not move forward quickly, it jeopardises this merger being completed. The CMA, in one of its other objections, has said: well there's no rush here, because other regulators are considering this matter, and they haven't yet cleared the deal and so it can't be closed, and so a longer appeal is fine. I think it's worth just dealing with that issue, because the CMA is being highly selective in the jurisdictions it cites in this regard. There are ten clearances now, including in the EU, China, Brazil, Japan, and, of yesterday, South Korea. The CMA is the outlier here in its position, and it creates the uncertainty that risks derailing this deal, and it's for that reason that speed is of the essence. Unless we can resolve these issues, the prospects of this deal being disrupted increase over time, as the delay in the appeal continues.

Just to deal with the three jurisdictions that the CMA refers to, it says: well approval has not been granted by Canada and New Zealand, but of course, the CMA doesn't know the outcome of those processes, or we assume it doesn't, because we don't. In those situations, with Canada, for example, in fact the waiting period that exists under Canadian law has expired, and so far as Canada is concerned, although there is a pending investigation, in fact the deal can be closed so far as Canadian law is concerned at the moment. As for New Zealand, we believe that any investigative processes will be completed well before the summer there. And so in terms of

saying: well there are other regulators investigating, there isn't any particular rush because you can't close the deal over, that's not correct.

That takes me, I think, to the US, where the CMA have said: well, the FTC is objecting to this deal. But to be fair to the CMA, paragraph 6 of its skeleton recognises, Microsoft is free to close with Activision in the US because the Hart-Scott-Rodino waiting period has expired there. A question is raised by the CMA whether or not there would be prosecution by the FTC to seek an injunction, but I made enquiries in relation to this, in the light of seeing the skeleton this morning. The usual practice of the FTC is to seek an injunction, if it's going to do so, at the start of the administrative period. And, of course, that hasn't happened in relation to the FTC process, so of course, unless the CMA, again, knows something that we don't because of its contacts with the FTC, there is no injunctive application in the US. And, again, that operates as no bar to our closing this deal in relation to those regulators. So the point here is we are getting clearance in relation to other jurisdictions. It's a worldwide merger. We are getting clearance. We want to be able to close this deal as quickly as possible. The CMA's decision is the outlier. It creates the uncertainty as to whether or not this deal can close, and in those circumstances, it is important that that uncertainty is removed, because if it were to be the uncertainty generated by a continuing appellate process in the UK that jeopardised this deal, that would be wholly inappropriate, because it would be the transaction of appeal that was undermining these matters rather than the substance of the analysis.

**THE CHAIRMAN:** It can feed in one of two ways, depending on how it ends, but let's suppose you are successful in your substantive application. Is that likely to have a bearing on how, let us say, the US authorities would view the transaction?

**MR BEARD:** I don't want to make a presumption that I know enough about the

views of the FTC in relation to these matters. I can take instructions in relation to these issues, but I know that there's an evidential hearing that will occur in relation to these matters in the FTC in August, but of course, the FTC process is rather different. The FTC does have to prosecute a merger, it has to go before the administrative law judge within the system, and the administrative law judge does not necessarily accede to what the FTC wants. In the last major vertical merger that occurred before the FTC which involved Illumina and GRAIL, that I'm aware of, the administrative law judge wholly rejected the way in which the FTC decided it was going to pursue these matters.

So I think there is a danger with all of this. What we say is the CMA can't say: well we can delay things because other regulators might do X and Y, and in particular, might prohibit, because the evidence we see from all these other regulators is they're clearing this deal. In those circumstances, that's the working assumption we should be proceeding with. I'm not asking, of course, the tribunal to make any assessment of the position in these other jurisdictions, but it would be quite wrong to assume that it's okay to wait until the autumn because someone else might block this deal.

**THE CHAIRMAN:** What you're saying, Mr Beard, is that although you don't want to be too specific in your crystal ball gazing, closing out uncertainty in this jurisdiction, one way or the other, is a decided benefit?

**MR BEARD:** It is an enormous benefit, and as I say, it is only here that we have this uncertainty, in terms of there being a decision which we say is fundamentally wrong and purports to stop this merger worldwide in relation to a tiny part of the gaming industry. It is a remarkable decision that has been made and remarkable is not a term I use as a necessary compliment to the CMA and its analysis here.

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

**MR BEARD:** The third point I think it's worth picking up is the reference in the CMA

skeleton at paragraph 7, that Activision has referred to a so-called drop dead date in relation to the arrangements. I think it's rather dangerous to use that sort of language. This is obviously a public offer, and there is a time limitation in relation to that public offer, but we don't see the relevance of that issue here, because the idea that, somehow, because there is currently a time limit in relation to this offer, we should push the time for hearing this appeal back, is almost perverse, with respect to the CMA. The truth is that the drop dead date, as it's referred to, or the time limitation in relation to the public offer, is something that encourages the importance of dealing with this matter as soon as possible.

Now, of course, we recognise that the date that's referred to by Activision would fall before 24 July, but of course, what you have here are commercial parties who recognise that there may need to be some sort of attenuation of that timing, in order to be able to accommodate this tribunal reaching its conclusion. But as I said at the outset, the longer that period continues, the greater the uncertainty, the greater the chance that parties say: well, actually, this is not worth the candle, or: we're going to have to do something radically different here, and that is what is so inappropriate about the CMA's approach to delay. This reference to a date doesn't assist the CMA at all, and of course, it's entirely contrary, as I say, to the idea that from a commercial perspective, you need to get these matters resolved as fast as possible and that is what the statutory scheme does. That's what it's there for. That's why we have the 24 week phase 2 time limit, with a strictly limited extension. That is why it exists. The idea that because parties put in place timings for public offerings, that one should simply defer the consideration, is simply the wrong way round. It speaks to actually doing it as soon as possible, but as I've said, we recognise that we can't be in HBOS/Lloyds territory here, and that we recognise that there may have to be discussion about that date between commercial parties. But as I say, it just reflects

on the commercial unreality of the CMA's approach in relation to these matters.

So it goes back to the same point I made at the outset, it is engendering uncertainty, it is undermining the proper operation of the system and the expedition that this system of merger control in the UK has.

If I could just pick up one or two other points, and in fact, move on slightly into some of the road block issues, because those road block issues are to some extent raised by the CMA as a reason to push all of this back into the autumn.

**THE CHAIRMAN:** Yes, do keep that brief, Mr Beard, because I want to do this in a phased way. I want first of all to understand the in principle problems with moving fast and then we'll move on to the practical issues.

**MR BEARD:** Of course, I completely understand. The headline here is insofar as we're talking about expert material, the concerns being expressed by the CMA are just grossly overblown. We have focussed on the Law Society case criteria here. We have one expert report from a US lawyer, talking about the interpretation of US law terms in the relevant agreements. That's a long report, it runs to 25 pages.

But that is by far the longest of the expert reports. The report from Professor Fiona Scott Morton has a sum total of six and a half pages of substance. Dr Foschi's report, 14 pages, and a lot of -- I refer to them as pictures, I know economists see them differently, but it's pictures and diagrams and tables. Dr Caffarra is a whole 12 pages. We've explained what is going on in those reports. We say there is no difficulty in dealing with these. We'll come back to how they should be dealt with, but we say plainly the issues, if the CMA has any concerns, can be aired at the hearing. We're not in the territory of cases where you're lodging, effectively, a recapitulation of factual arguments or opinion arguments that were run during the course of the inquiry itself, the investigation itself. That is not what any of this material does, and indeed, the material from Dr Foschi, for example, is dealing with data that was only

provided after the final report to Microsoft. So in those circumstances, with respect, it is preposterous to say that the CMA needs more than the month to deal with these issues, and certainly no more than the two months that would be envisaged by a hearing at the end of July.

As to the suggestions that the CMA may want to respond in relation to these matters, I'll perhaps take you to the Somerfield case in due course, where it is made very plain that the CMA is required to stand by its decision, it can't elaborate those matters. The references, for example, to BGL in the CMA skeleton, are just misplaced. Yes, Dr Mike Walker did give evidence for the CMA in those proceedings. As, sir, you are very well aware, vastly different proceedings, a full appeal and a range of considerations that meant that there was extensive cross-examination by both sides in relation to that. It's not a relevant comparison here. The references to the Banks Renewables cases, indeed a number of these cases are, frankly, not of assistance because they deal with case management situations where, to put it euphemistically, the procedural wheels have dropped off, and therefore it was important that there were early hearings dealing with these matters rather than dealing with expert material de bene esse. And one of the authorities that is referred to, the Dye & Durham case, that one actually does give rise to a slight concern, because it appears that the tribunal there wasn't cited on the Law Society case at all, because there's no reference to it. And in those circumstances, we think that those submissions are, frankly, not to be relied upon.

Now, in those circumstances, we say the expert material can be dealt with. The factual material is clearly justifiable that we've put in, and we can come back to that. In terms of disclosure, we will ensure that these matters are limited. But to put it in simple terms, if this tribunal were to be saying: well, if it's because of the expert material, we'll have to move to October or November, we would be in a position

where, because we need this hearing to be early, that material would have to be dropped. Now that is not of assistance to the tribunal, given the nature, terms and brevity of that material. It is not of assistance to the fair disposal of this case, and it is not justified here. It would be grossly unfair to us, as appellants, to deal with it on that basis. So in those circumstances, we say it is our absolute imperative to get this dealt with quickly. We will take the steps to ensure that can happen before this tribunal, but these road blocks, they are surmountable, and what the CMA are describing as lions and tigers they face in their process to trial are in fact, very much smaller pussy cats here. In those circumstances, we reemphasise uncertainty needs to be overcome, needs to be overcome quickly. We are enormously grateful to the tribunal, both for today's hearing and for the indication that it would be able to sit in July, in the weeks that you have indicated, because those seem to us to be the latest that this matter should sensibly be dealt with.

Unless I can assist, I will perhaps hand over to Lord Grabiner.

**THE CHAIRMAN:** I'm grateful, Mr Beard. Lord Grabiner, I appreciate we haven't dealt with your application to intervene yet, but we'll come to that in a moment. If you have anything to add to what Mr Beard has said, then of course --

**LORD GRABINER:** My Lord, no, I don't think so, and we're certainly not in the business of wasting your Lordship's time by repetition, but essentially, we agree with what my learned friend has been saying. I'm not commenting about the expert materials, that's nothing to do with me, but we do respectfully urge on your Lordship the importance of speed in this exercise, as I think must be obvious to everybody.

**THE CHAIRMAN:** Thank you. Mr Williams, I appreciate you have a number of points to suggest and go to, in fairness to the CMA, about having a matter expedited. We'll come to those, you don't need to address me on those at this stage, but if you have anything to push back on the reasons why Mr Beard has articulated the need

for speed, then now's your time.

**MR WILLIAMS:** Yes, sir. Can I start by putting this question in the wider context of proceedings of this nature in this tribunal. All applications for review of merger decisions are heard by this tribunal on what is an expedited timetable by any normal standards. The recent Dye & Durham case refers to the period being around three months from the issue of the notice of application to the hearing, and that's certainly consistent with my experience. If one applied that three months in this case, it would fall at the end of August, which obviously creates its own issues, but it's a useful benchmark nonetheless. The timetable to bring a case on that timescale, to bring it on to a hearing, is necessarily very compressed. The CMA has one month to prepare its defence. That's a short and intense period at the best of times. In this case, we have an atypically large and complex application with a very significant amount of supporting material. Mr Beard focussed on the expert reports, but of course, there are ten witness statements as well, and those raise significant issues in themselves. The CMA and the tribunal are going to have to grapple with all of that, and we say that, standing back, the idea that this case can fairly and sensibly be brought on considerably more quickly than most cases, is not plausible, and that proves to be the case when one looks at detail.

So we agree that the case should be heard speedily, the question is how speedily does the case need to be heard in the particular circumstances of the case and how long is needed to bring the matter on, on a timetable which is fair to the CMA and which will assist the tribunal. Obviously, the timing of the hearing is a balance between those two considerations.

Focussing first on urgency, of course we accept as a general matter that this tribunal will want to resolve the uncertainty created by proceedings of this nature as quickly as is practicable, and the question really is, what's the specific urgency on the facts

of the case? There isn't particular evidence on this issue. The points taken by Mr Beard are broad points about the need for certainty in the regime generally and about the regulatory position in other jurisdictions, and he emphasises the fact that the matter has been cleared elsewhere, and so he says a completion is being held up by the CMA's decision. Well, he has mentioned that in Canada and New Zealand there are ongoing proceedings, but that's probably not the main point. The main point is that proceedings are about to get underway in the United States in August, with an evidentiary hearing, as part of the prosecution brought by the FTC. Our general understanding is that a resolution of those proceedings is several months away and is likely to take months after the evidentiary hearing takes place in August. Although Mr Beard has emphasised the absence of any impediment to the merger proceeding as a matter of US regulation, our understanding is that it's not seriously suggested that the merger may proceed pending the completion of the FTC's proceedings. The FTC doesn't have an injunction, but at the moment, it doesn't need an injunction, because the merger can't complete because of the regulatory position elsewhere, including in the UK. And so whether the FTC would seek an injunction in a world where there was no other impediment to the transaction proceeding, that's a different question, sir, and I think Microsoft's submissions presume the answer is it wouldn't seek an injunction. That's not our understanding of the position.

**THE CHAIRMAN:** Well no, but isn't that the problem, that if the position in the United Kingdom is one that is feeding through, for instance, in the United States, in that one can say there's no need for an injunction out of this jurisdiction because things are in process in the United Kingdom, well isn't that an excellent reason for removing that uncertainty, whichever way it goes, so that one has as much clarity as one possibly can? At the moment, people will be saying: well why bother with

an injunction in the US, nothing's going to happen because one has a road block here.

**MR WILLIAMS:** But, sir, there are two different questions, in my respectful submission. The first question is what mechanisms might be adopted in the United States by the FTC in order to deal with the position as it stands in the US, having regard to the position in other jurisdictions. Obviously, as you say, it's possible that in a world where the transaction could otherwise proceed, the FTC would bring proceedings to obtain an injunction. That's one question. That's really a question of process and mechanics. The biggest question that we're focussing on, sir, is the position in the UK causing incremental delay to whether the transaction proceeds, in circumstances where regulatory scrutiny is ongoing in the United States, and they're about to embark on a process which will take a period of months to conclude. One proceeds on the basis that, in fact, as a matter of practical reality, the transaction's not going to conclude while that process is ongoing, then the real point, sir, is that the UK position isn't the road block, it's not causing incremental delay. Those proceedings need to reach their conclusion in the same way that the proceedings in this jurisdiction need to reach their conclusion.

Mr Beard emphasises the fact that the transaction has been cleared in other jurisdictions. It is, of course, the case that the FTC has chosen to prosecute the merger. That is the FTC's decision. Those proceedings need to reach a conclusion. But that's the starting point. The merger requires scrutiny from a US perspective. And, of course, we aren't being selective when we refer to other jurisdictions, we're focussing on ones where proceedings are ongoing and there is this prospect of incremental delay. So that's our position in relation to other jurisdictions and, in particular, the FTC. Microsoft, in my respectful submission, isn't able to show you, sir, that the UK position is what's holding the transaction up, because of the position

in the United States, which is of course, the home territory for the merger.

The other point that's made, and FTC half suggested in Microsoft's letter last week, is that the transaction's at risk for as long as there is uncertainty. Of course, one can see that in the most abstract terms. The question is, is the transaction really at risk? Is there really a prospect that this deal is going to fail over the sorts of time horizons we're talking about, in the context of these proceedings and in the context of what's going on in the United States? And, of course, the FTC proceedings are going to be ongoing over the whole of this period, so to the extent that there's a suggestion that the transaction is at risk, well that's not simply a matter of the UK proceedings, the FTC proceedings are relevant to that too. But in reality, there's no evidence that the deal's going to fail or is at real risk of failing. I think Mr Beard misunderstood our point about the drop dead date. We were acknowledging that that was a point that might be relied upon against us, the point that at a contractual level, the deal could be terminated after a certain date. And we were picking up the argument at that stage and saying: but in reality, even if the matter were to be heard on 17 July, which was the date being countenanced at that point, that wouldn't allow the proceedings to be resolved before the drop dead date, and as such, the parties are going to have to take a view about the position. That is also true of the other dates that the tribunal has suggested to the parties in argument this morning.

So the date's going to have to be extended. The only question is until when, and in my submission, one has to look at that in the context of the global picture, including the FTC's proceedings.

So our position on this question of urgency is that we've suggested a hearing in late September/early October, and as we understand it, that transaction will not, in reality, lead to any incremental delay to the transaction proceeding. That is a really critical point, sir, in my submission, when one's weighing up the need for an urgent

hearing against what you've described as the road blocks or impediments to an urgent hearing. Because absent that compelling need, obviously it's particularly important that the tribunal considers the factors on the other side of the scales.

I'll pause there, but that's where the next part of my submission goes, sir.

**THE CHAIRMAN:** We'll certainly be going there, Mr Williams. Thank you very much.

**MR BEARD:** Might I make just two brief remarks in response?

**THE CHAIRMAN:** Of course.

**MR BEARD:** The first is I don't know if Mr Williams is able to identify it but as far as we're aware, all of the cases that he's referring to were in relation to deals that had closed, in terms of timing. It's not the case here, and that does change the question of commercial uncertainty.

Secondly, I think the tribunal has the point, but Mr Williams praying in aid the FTC is essentially circular. He seems to be saying: well, because the FTC didn't need to seek an injunction because of the UK proceedings, you can assume that the FTC might seek an injunction if these proceedings are concluded. Well it might or it might not. The position in law at the moment is that we can close over in the US, and the quicker the position in the UK is resolved, the better. On the basis of Mr Williams's account, it is better both for the UK and for the position in the US, and therefore, it is certainty in spades that will be achieved by dealing with these matters sooner rather than later.

**THE CHAIRMAN:** Thank you very much, Mr Beard.

**LORD GRABINER:** My Lord, I wonder if I might briefly respond just on a couple of points to my learned friend Mr Williams' observations. First of all, if I may respectfully say so, the reality is that if the CMA has to be ready in whatever it is, eight or nine weeks' time, it will be. It's obvious that they will be, and it will be able,

on that occasion, to present its case. That's the reality. And so, obviously, they're very keen indeed at this stage to delay matters if they possibly can, but the important point is that they can, and I'm sure will be ready, if your Lordship were to direct that the matter should be dealt with either on that 24th or on the 31st.

The other point is this: my friend Mr Williams says that there will be no incremental delay if this case is not heard until September, but there's every reason to believe that if the CMA objections are overturned, the deal will be closed. So it all depends upon the ultimate outcome of the appeal, and that's all that I wanted to say.

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

**MR WILLIAMS:** Just in terms of the points Lord Grabiner was making, so far, we've only talked about one side of the scales.

**THE CHAIRMAN:** I'm not going to make any order, Mr Williams, we'll certainly hear about the CMA's take on Lord Grabiner's point about you being ready, come what may. We're coming to that.

**MR WILLIAMS:** I'm grateful, sir, thank you.

**THE CHAIRMAN:** Yes. I want to be very clear, I'm not making a direction that we have a trial at the end of July or beginning of August. What I am going to say is that if it can fairly be done, that is what we are going to strive to do. There are a number of reasons why we should strive to achieve this. First of all, as Mr Beard has said, this is intended to be a swift jurisdiction. The merger investigation is time limited, and it follows that any challenge to that jurisdiction needs to follow with equal pace. That is a general proposition which applies to these matters generally.

More specifically, it does seem to me, this being a worldwide merger, that it is important to resolve this matter quickly, one way or the other, in order to minimise regulatory uncertainty. Quite properly, no party has sought to identify any particular regulatory uncertainty that arises out of the matter here, in this jurisdiction, not being

resolved, but it seems to me plain that uncertainty is, in any event, a damaging matter, even if it cannot be predicted how that damage will arise. So it seems to me that that is an excellent reason for proceeding as swiftly as one fairly can.

Thirdly, there is the potential risk to the deal itself. I fully appreciate that the drop dead date, as it is unfortunately known, is not actually any such date, but it must follow that there are risks to the deal, the greater the uncertainty continues. I appreciate, of course, that the uncertainties are not solely arising out of this jurisdiction, and I can do nothing about the uncertainties that arise in other jurisdictions. But we can do something about the uncertainties here, and if we can fairly do so, then that is what we should do.

Finally, there is the question of the judgment that follows any hearing. It is inevitable that there will be a reserved judgment. This is clearly a complex matter, there cannot be an ex tempore judgment after this. My aspiration would be to seek to have a judgment during the course of the summer, handed down, rather than one that drifts into October and November, when there are a number of other commitments on a number of other chairs, including myself, in the tribunal. So it is not simply a question of picking which chair is the least busy, the fact is that if you want a swift judgment, appropriate to these proceedings, then there are significant advantages in dealing with it at the end of July, than at the end of September.

So for all those reasons, we are going to try, and I do not want anyone counting their chickens, Mr Beard, we are going to try for those dates, but we are now going to see whether the road blocks that Mr Williams, in particular, will be articulating, are such that can be overcome. The road block that I want to begin with is the question of the evidence, the expert evidence. My first question, Mr Beard, and just take this as an indication of what I would be assisted on, is -- Mr Williams?

**MR WILLIAMS:** Sir, if we're moving to the next stage of the argument with

Mr Beard, I should say at this stage that the way the argument's been broken up so far, there are important points that I haven't made to you, sir.

**THE CHAIRMAN:** Well, yes indeed.

**MR WILLIAMS:** In the context of your indication that we should be striving for July, I mean just to make two points at this stage: the first is that, obviously, as we move forward, we will need clarity about what the date is, so that we can resource the case and allocate a team to it, and obviously, I think your Lordship's aspirations by the end of this hearing, we will have that clarity one way or another.

**THE CHAIRMAN:** Mr Williams, I hope I made it very clear that I wasn't making a ruling. My plan is that if it can be done, we will all be leaving this courtroom with a date clearly in mind, to the fortnight that I have articulated. Whether we can be more concrete within that fortnight rather depends on things like length of hearing and so on, but much more importantly, there are the practical questions of fairness, upon which I really do want to hear from you.

That we do need to resolve, because let me be clear, if we can't do it in the nine or so weeks that we have, fairly to all concerned, then we won't do it. If you want, the way I was minded to do it was to go through with Mr Beard the problems I had identified, but if you want to set out the reasons the CMA have, as to why, as a matter of practicality, it can't be done, then of course --

**MR WILLIAMS:** No, I don't want to take you out of your course at all sir, it's only just to make this point: the CMA, as you know, has a panel of leading standing counsel. None of them are able to do a hearing on the dates that you've suggested. In one sense, that's a point that comes at the end of the argument, but I thought it's a point that's worth making now. The CMA thinks that as things stand, it's going to have incredible difficulty instructing suitable counsel for proceedings of this nature on the dates that you've suggested. We can come back to that date in due course, but,

obviously, the way things are moving forward, you want to explore a series of discrete topics with Mr Beard. In our submission, that's a fairly fundamental issue. We can come back to it, sir.

**THE CHAIRMAN:** We certainly can. That's very helpful, Mr Williams, to know. Just so that you know where I'm coming from in terms of difficulties, I'm afraid counsel convenience is not very high on my list of priorities. We are blessed with a remarkably capable bar, and you are going to be given quite a lot of notice for what I accept is a very important case, but obviously, I will want to hear you on manning difficulties, but as I say, it can't feature very highly on these matters. And I'm afraid if Mr Beard were to say: look, I can't do the two weeks that you've outlined, well he would receive -- I don't know, he may be saying that -- he would receive similarly short shrift. And the same goes for any interveners who are permitted to involve themselves in this matter. The fact is, we are going to have to do some quite careful jockeying in terms of the manning on this side of the tribunal. Certainty is necessary for all concerned. I think the CMA thought that because we mentioned before the summer as the aspiration in our communication to the parties, there was an assumption that the week commencing the 17th was doable by the tribunal. As it happens, it isn't. For a variety of reasons, it can't be done, whether with me presiding or anyone else. So we are working with a very difficult geometry which isn't going to get easier, whether one talks about September or late August. So these are problems which we will obviously want to hear you on, but they're not fundamental problems to a fair hearing.

**MR BEARD:** Obviously, a hearing coming on at this remove is going to cause inconvenience, and I think shrift may be short, no doubt, from this court, but also domestically, for many of us, in having the negotiations about being available for these issues. But I think that is something that we all, and the clients involved, have

to recognise. In those circumstances, we're very much in the position that it may not be me, it may not be Mr Palmer, who is appearing for Microsoft at that time but we also recognise that it is imperative that these matters occur, and I don't speak for those to my right.

But in terms of the overall fairness, we agree, much against our own personal position, that counsel convenience is not to be a priority in relation to the disposal of these matters. When it comes to the other road blocks that, sir, you indicated, I'm obviously conscious that you don't want to have, as I understand it today, a full discussion of the whys and wherefores of the justification for the particular pieces of evidence that are submitted, but you want some sort of sense of a process by which these matters can be dealt with. And that is what we've been endeavouring to work out through the position in our skeleton argument. Obviously, I'm very happy to make submissions on the basis of, in particular, the Law Society case, as to why the four expert reports are entirely admissible and entirely relevant and appropriate, but I also recognise that that wasn't the indication of what the tribunal wanted to do today. To some extent I'm in your hands in relation to these matters. I've already outlined in broad terms what the expert materials go to. The first report I've referred to is a report on US law which goes to the interpretation of the relevant agreements which we say, under our grounds, are being wrongly attributed no material weight in the consideration of the assessments undertaken by the CMA. And we say how is it the CMA can make assertions about the interpretation of specific terms without evidence on American law contracts, and here is the evidence that shows why they're wrong. That is, self-evidently, relevant material. If there are particular paragraphs in this material that somehow the CMA says: no, this should be struck through, I'm not sure that is going to be a sensible use of this tribunal's time to work through, whether today or on any other date, because those sorts of debates are

much better dealt with in the course of a full hearing, where the argument in relation to the particular terms can be considered and whether or not a particular paragraph or section in a report is or isn't relevant can be dealt with. But as a matter of principle, the idea that that evidence is not admissible, just seems to us very difficult to understand. It's thrown out there as something that may be objected to, but we don't see it. It seems to us much more sensible in those circumstances, just taking this as an example, that the CMA has, if necessary, as long as we had to put in our appeal. We had to deal with a 480-page decision, we put together our appeal. 22 June would give them four weeks in order to put in their defence. It cannot be that the CMA should be afforded longer than the appellant dealing with this lengthy decision, to prepare any material that it wants to put forward. I think this has to be also considered, and I do just want to take you briefly to this, to the Somerfield decision in relation to these matters. One of the points that's made is that in relation to this expert material, the CMA may want to respond. But as we well know, and I don't know if we have copies of Somerfield for the tribunal ...

**THE CHAIRMAN:** Just pausing there, Mr Beard. When I read over the weekend, the decision again, and your notice of appeal application, I had in particular mind the extent to which I felt that I didn't understand the economics, for example, that was going on, in order to see whether I would be assisted by expert evidence. Now, it may be a sign of the haste of my reading, but I didn't detect any particular areas which were taking the tribunal outside its comfort zone in terms of economic evidence. One of the points that I do have for you is the extent to which the points that you would like to make by way of the expert economist evidence that you have appended to your application, the extent to which that can be done by submissions, either in writing or orally, given that you have an economically literate tribunal before you.

**MR BEARD:** Yes, we obviously have that in mind, and that's partly why these expert reports are so short. Let's just park the statement of Dr Foschi for a moment, because that is obviously dealing with material that was provided to us after the final report, where we're saying: you have some of this stuff wrong and you hadn't put it to us, and it's material. That, I think, is relatively straightforward. I think the two reports you're then referring to are the six and a half pages from Professor Scott Morton. You'll have seen from that that what she is articulating are the reasons why the market definition errors matter, from the point of view of economic analysis as a whole. Now, that is a point, of course, we can make by way of submission, I'm not denying that that is possible, but what that evidence does is explain the significance of the failings in relation to market definition errors made by the CMA in the context of this particular case, by someone that is external to it. We think that those matters are better spelled out by an independent economist than simply by way of submission, but if the point that is being made here is: well, actually, this doesn't add anything to submissions, then in due course this evidence is not going to be problematic for the CMA in dealing with these matters. But what it does do is it explains from the background of someone with real expertise, why, even though you're dealing with a technology related merger, where the CMA is talking about the development of future markets, or competition, which is the way that Professor Scott Morton deals with it, nonetheless, what has been done in relation to market definition is significant here. We say that's very important. If the tribunal says: well we understand all of this, there is no problem here, there is no difficulty with us understanding these points, then of course we recognise we can deal with them by way of submissions, but you're in the territory where, because these are matters where you're looking at the technical context of why this is such a significant error, the assistance of someone with that sort of technical competence, we considered

was of assistance here. So we're not suggesting that there is some bright line between what can be covered in submissions and what can be covered in relation to the expert material, but ironically, the more that there is an overlap here, and given the concision, the idea that this should be treated as, somehow, a big issue or stumbling block, becomes less and less significant. And actually, what we say is, this is the best way of this material being presented. It gives the tribunal, both expert economists, those with a lot of economic expertise but also, potentially, business members who don't necessarily have that sort of background, an authoritative account of why those things matter. So I think in relation to Professor Scott Morton, we say that when we go back to the Law Society criteria, as we've articulated here in our skeleton, in particular at paragraphs 9 through to 12(a), the criteria that they would be relying on in relation to this, what we have as 9(c) and (d), we are saying that not only did the CMA fail to take into account a relevant consideration, but it acted irrationally in the way that it operated its market definition. In explaining why that's a relevant consideration and why what it did was irrational, having that economic context in perspective from an independent expert, seemed to us to be of assistance.

**THE CHAIRMAN:** Mr Beard, the reference in your skeleton at 9(c) to technical matters does elide with the concern that I do have in relation to technical fact. I very nearly began this hearing with the reverse of the usual declaration of interest, in that I don't spend many hours on Xboxes, PlayStations or Switches, and I am finding the distinction between a platform gaming scenario, whatever that platform might be, whether it be mobile gaming, PC gaming or console gaming, where you download and don't use the cloud, versus cloud gaming, quite a difficult one.

**MR BEARD:** Yes, I think that may be the essence of our point here, sir, in due course, that there isn't, materially, a difference in relation to these matters when it

comes to market definition. In relation to that, given the agenda we have today, I haven't dealt with this in the skeleton and I haven't discussed it with the CMA, but of course, if it would be of assistance to the tribunal, and obviously, we would have to discuss the topics covered, we have within our organisation, as do Activision, people that are able to provide the tribunal with a brief teach-in in relation to these matters. Now I know that that would be unusual in the context of judicial review, but ironically, that would go to some of the technical issues that we are talking about here. We would be very happy to provide that. As I say, I haven't raised that with Mr Williams or the CMA team, it was something that we thought about, but unfortunately, that's not one of those things that it's great if we put in a further witness statement. Obviously, we do have the witness statement from the people involved in cloud gaming. So we have the Edwards witness statement in particular, but however well spelled out, that doesn't necessarily quite bring to life how these computer and video games work.

**THE CHAIRMAN:** No. I mean I am very reluctant to go down the path of creating further material, because that's not what JR is all about. On the other hand, I do think that an agreed glossary of terms, in particular what the CMA understood by those terms in the decision, is going to be quite important. So I looked, before coming in, to the glossary definition in the decision of cloud gaming, and it was brief and in and of itself, not particularly helpful. I have a concern that unless we nail what is on the one side platform gaming and what on the other side is cloud gaming, because there's going to be a software exchange, whatever you do, it's a question of how much you're doing, unless we have an understanding of that, we're not going to get our market definition right, and from that, certain consequences follow. So we need, I think, to understand what the CMA understood by these terms of art. Whether you agree with them or not --

**MR BEARD:** Of course.

**THE CHAIRMAN:** -- it doesn't matter. We need to know the building blocks for the decision. We then need to know what market definition arises out of the decision, ideally have that agreed. Not agreed that it's right, but agreed as to what the decision says, and then we can start working out how far the determinations on those factual questions by the CMA are susceptible of challenge on a JR. But until we get those building blocks right, that I think, is going to be a difficulty, and it seems to me to have nothing to do with the economic evidence. Indeed, it's the sort of stuff that one wants the economists to have locked down before they ever venture to express an opinion on the way the market works, because it's outside their area of expertise.

**MR BEARD:** I'll take that in two stages. First, if the CMA is going to provide that sort of glossary and try and pin down its market definition or terminology, that's perfectly to be welcomed. I think we have a reasonable understanding of the way the CMA is approaching this. Our concern is their understanding is flawed and the way that they analyse it in terms of market definition. One of the essential points, as you will have seen, is that we say they haven't considered potential switching between what's called native gaming, in other words downloading the game and playing it, albeit with some connections to further services, with effectively, playing the game live on an external server. We say that it is self-evidently wrong, but we do then ask the economists how do they see that as significant here. And that is what Professor Scott Morton is essentially doing, and she is grappling with the fluidity of some of these issues and why that, nonetheless, is an important component in any rational analysis. But I don't want in any way to deter the tribunal from ensuring that the CMA is absolutely clear about what it's saying in relation to these matters. But that doesn't, I think, move immediately to the second step of saying: well the material

put forward by this expert economist isn't grappling with these issues, because she is grappling with these issues, given the fluidity of these definitions, not trying to pin particular matters down in that way. Therefore, I think there may be two issues arise there, and certainly it doesn't go to whether or not Professor Scott Morton's evidence, we would say, is relevant or admissible in that regard.

**THE CHAIRMAN:** In terms of the framing of the admissibility question, you aren't going beyond just saying -- and I appreciate that the "just" is perhaps not appropriate in JR -- but all you want is the reports admitted for the tribunal to read, for better or worse, you're not going any further than that, you don't want live witness testimony?

**MR BEARD:** No, we don't see any need for that. Obviously, once an expert report is put in, the person recognises that they may exceptionally, in judicial review proceedings, be cross-examined, and they will stand ready to do that, but no, it's no part of our application that this is necessary for this process at all. Indeed, we don't think that's appropriate because what we're trying to do is spell out the context and ramifications of the errors we've identified in the CMA's decision. That is what this material is intended to do. That is true both of Professor Scott Morton's material, which focuses on the market definition issue in ground 1, but in relation to Dr Caffarra's material, that focuses on ground 4 and the issues of ability and incentive. What you see there is her saying: well look, I have been representing Microsoft, but actually, I have also been engaged in a much broader policy discussion about how these sorts of mergers should be dealt with. And what I am very conscious of is the importance of how one defines the nature of foreclosure, and one shouldn't just move from the idea that something might be exclusive, to the idea that that exclusivity itself forecloses. Those steps are important, and she does that by reference to economic literature. In doing so, of course, those are matters that we could refer to in submission, to set the context for where we say the CMA has gone

wrong in conflating exclusivity and foreclosure. But, again, we say it is much better for an expert economist, even though she has acted in presenting matters in these proceedings, nonetheless understands her duties to the tribunal and has set out her position in relation to these matters by reference to economic materials which we think are of assistance to the tribunal.

And then the second part of her report is essentially saying: well look, these errors are material when one comes to consider the economics of whether or not a merger creates a substantial lessening of competition. So it's contextual material. Yes, I can stand up and say many of the points that are put forward by Dr Caffarra. Do I come at those submissions with the same authority as someone like Dr Caffarra? No, I don't. And I recognise that that is the position in relation to this sort of material. But, again, if we take a step back, the reason why I said these were not major obstacles, these are not lions and tigers, is precisely because of that material. It is essentially trying to contextualise the errors by reference to the economics here, and that doesn't engender some need for extensive responsive material from the CMA, nor indeed, would it be appropriate.

I've tried, if I may just take you to Somerfield just in that regard. I'm trying to not take you to many cases, so I haven't gone back to the Law Society, and I think Dye & Durham, I'm very reluctant to deal with because I think it's not a sound legal basis that was used there and in any event, the particular pieces of evidence were very, very different, but I can take you to those materials if that's of use. But in relation to Somerfield, the tribunal will probably be well aware of it. It concerned divestments in the grocery sector. The point I want to just go to was actually in relation to -- it's at page 24, paragraph 58 onwards. It's concerned with when it is appropriate for the CMA to submit further material, given that the guidance that applies, or the law that applies here, is to be derived from the relevant administrative case law, and in

particular ex parte Ermakov. I just invite the tribunal to read, if you would, from 58 through to 69, rather than me reading it out. **(Pause)**.

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

**MR BEARD:** I think it's relatively self explanatory, but I'll just draw attention to a couple of points. Obviously, one of the things the tribunal highlights is the length and detail of the report. I won't highlight the irony that 70 pages there was seen as long and comprehensive, as opposed to the 480 with which we're dealing. But what is important is the essential proposition that a regulator has these powers to carry out its investigation. That is what it is charged with doing under the statutory scheme. It does that, and then it is required to stand by its decision and not gloss it. We accept that, as said here, there may be circumstances where further evidence is required for technical clarification. We also accept that there can be occasions where responsive evidence is appropriate, but they will be very limited. We say here it is not appropriate, because if we think about the US law issues, these were matters that were missed by the CMA in its analysis. If we think about the data points from Dr Foschi, those were matters that were put to us later. We need to put in evidence to explain our position as regards material that was set out in the final report.

In relation to the economic material from Dr Scott Morton and Dr Caffarra, those are contextualising and explaining why the errors that we're identifying as significant, those are errors that exist in the report. The idea that there should be an economic response that somehow glosses the analysis in the decision would be entirely unacceptable. It would be wrong and inappropriate. We cannot have a moving target here.

In those circumstances, the idea that there should be, on the part of the CMA, an opportunity to put in some sort of extensive expert material, or indeed, any expert

material, when none has been put to us to date, would be quite inappropriate, unless there are absolutely exceptional circumstances, and we do not see what those could be here.

In those circumstances, I'm not for a moment, trying to keep the CMA out of raising whatever objections it wishes to do, and protesting that it needs to put in further material, but it needs to be done within the context of the decision making framework that the statute lays down. And indeed, cognisant of the fact that we, here, have tried to narrow and limit what we're putting forward in this material, so it doesn't create an undue burden on the CMA. Because, as I hope I made very clear at the outset, time is of the very essence for us, and we do not want to do things that risk in any way impeding the resolution of this matter quickly.

Just one final point. If there are really exceptional circumstances, we had 28 days to prepare this. The CMA will have 28 days to come forward, seek to apply to put in expert material, just as we have done. If they think they fall within the scope of those exceptions articulated in Somerfield v Ermakov, we're not trying to stop them doing it. They can lay down, or the tribunal can indicate dates by which that should be done. What it should not do in any circumstances is derail or justify the derailing of what you put forward as being what we should strive for in relation to the timing here. Unless I can assist on you the expert material, I perhaps should pause there.

**THE CHAIRMAN:** I'm very grateful, Mr Beard, thank you. Lord Grabiner.

**LORD GRABINER:** My Lord, I'm grateful. I do not want to get involved in the question of the expert materials, for the reasons I previously explained. Could I just make one point: we are of course concerned, as your Lordship pointed out right at the outset, with the direction of travel here. If I may respectfully say so, your Lordship has honed in on an absolutely fundamental aspect of this case and the matters that will be dealt with in the appeal, namely the market definition and the

question of switching. In its bare essentials, the point is that the platform business that your Lordship referred to, that really leads to what we call native playing. You play on those platforms, you play on a PC, you play on a mobile phone, you play on a console, but you do it by downloading. You can also do it by the insertion of a disk into the hardware. That's all native playing.

On the other hand, you have cloud streaming, and that comes straight down and it's streamed down in the way that we all understand, I think, by that expression. The key point here, or a key point here, is that our contention is that cloud playing is not a distinct market. The other side, the CMA, says it is. That bears both on the question of market definition, obviously, but it also bears upon the distinct question which we respectfully suggest was hardly and certainly not properly dealt with by the CMA, namely switching, which is the ability of the player to move between the streaming process onto, say, the console, onto the native playing. But we do need absolute clarity on this question, as your Lordship indicated, because it really is -- it's not the only matter at the heart of the debate, but it is a critical part of the matters that will be discussed at the appeal.

**THE CHAIRMAN:** I'm grateful, Lord Grabiner. Thank you very much. Mr Williams.

**MR WILLIAMS:** Can I just start with that point, the questions of definitions. As you appreciate, I've been involved in the matter for just a couple of days, so I'm not going to say anything about matters of substance.

**THE CHAIRMAN:** No.

**MR WILLIAMS:** In terms of the process issue which you raised, though, and how we might arrive at a position where the tribunal feels it has a clear statement from the CMA as to how it's defined these concepts -- of course we are about to embark on the preparation of our defence, and if we know what the exam question is, we can of course address these matters as part of our defence, and I think, actually, the

specific point you've raised is, of course, a point we would inevitably have been --

(Overspeaking)

**THE CHAIRMAN:** I'm quite sure you would have done, Mr Williams, yes.

**MR WILLIAMS:** But to the extent that what you have in mind, sir, is some clear point of reference, obviously the defence is an obvious opportunity to deal with that, as long as we know what we're aiming at. And you've identified one issue and we will obviously now take that firmly on board. If there are others, then of course the defence is probably the vehicle in which to do that.

**THE CHAIRMAN:** It is. I'm quite sure, Mr Williams, that these answers lie in the decision itself, and it's really a question of extracting out of the decision, the key parts which inform these issues. I think when I was, in my own mind, trying to articulate where the difference between native play and cloud gaming lay, it struck me that this was not necessarily a clear cut matter, and that led me to the need for some form of education on the part of the tribunal, so that we would know where the decision draws the line. Before one gets to any question about the correctness of the line, we need to know where it exists. Because whatever way in which the gamer games, you are going to have some form of technology either side of the divide. As I understand it, you can, on a native platform, play interactively. Equally, you must have some form of technology at the player end, in order to enable cloud gaming to work. You're going to need some form of graphics handling, some form of monitor, some form of software that enables that to work. So it's something of a fuzzy line, I suspect, upon which we're going to need a degree of education. That's nothing to do with the economics, that's simply to do with how the market works. I'm very reluctant to go down the route of a teach-in. If this were an on the merits hearing, then I suspect we would be agreed that that was a helpful course to undergo, but that isn't the question that will be framed for the tribunal to resolve, it's

much more is the decision defensible on rationality grounds, given the articulation of the market that the CMA has taken. And it's unpacking that which we need, which is why I've rather swivelled round on these points, to ensure that it ensures that when we're talking about a particular concept, we're all talking the same language. What I really wouldn't want to happen at the hearing, whenever it takes place, is for the tribunal to use the term "cloud gaming" in one sense, for you to understand something different, and for the other parties to have all kinds of different views as to what exactly we're talking about. So we're going to have to have some sort of clarity before we get into the argument about whether you've done it rationally or not. We just need the language of the debate clarified.

**MR WILLIAMS:** Yes. I think you've provided a helpful explanation of the concerns that you have and the matters that you want to resolve by the time we get to the hearing, and obviously, we will have that on the transcript and those behind me will consider it. Obviously, just to be clear, there are two discussions going on here. One is a question of fact, and it's effectively a question of definition and explanation. The other is the economic question of market definition, and the point you've made to me, sir, is one has to be clear about the facts before one gets to the question of market definition, and we would agree with that.

I think Mr Beard, though, for his part, saw this part of the discussion as separate from the discussion about expert evidence, and if I may respectfully say so, I agree with that position. They are different points. As you have seen from our skeleton, there is a concrete issue which arises from the way in which Microsoft has presented its application, relying on, first of all, four expert reports and ten witness statements of fact. I think we have had the material for one working day at the moment. All I can say today is that there are, on the face of it, serious questions about the admissibility of much of that material.

**THE CHAIRMAN:** I'm conscious that we didn't have the factual questions on the agenda specifically.

**MR WILLIAMS:** Yes.

**THE CHAIRMAN:** And just to flag up the point that you make at paragraph 28 of your written submissions, the need for a direction as to new versus old material, I probably should have put it to Mr Beard, but it does seem to me that that is a direction to which -- Mr Beard, you are on your feet. You have no problems with that?

**MR BEARD:** No.

**MR WILLIAMS:** Yes, so that's one aspect of it.

**THE CHAIRMAN:** Yes, I thought I would get that out the way.

**MR WILLIAMS:** I'm grateful. There are other aspects of that discussion, but I will put them on one side for the minute.

As I say, I'm not in a position to deal with the substantive issues which arise in relation to the expert evidence, and I don't think there's any expectation that I do so. I do have to say this, though: we don't at all accept Mr Beard's attempt to play all of this down. Different issues will arise in relation to different experts, and indeed, potentially different sections of their reports, but there are various things going on in these reports. Some of it is an allegation of technical errors, which falls to be dealt with under one set of principles. A lot of it, in our respectful submission, looks at the moment like commentary and argument, and we say you really shouldn't be assured by Mr Beard's platitudes about how this is all likely to be neutral, helpful material, but we need to consider the position. We've had it for one working day, and we will revert in relation to it.

**THE CHAIRMAN:** Mr Williams, first of all, your point about this all going somewhat over your head and my head, probably not Mr Beard's head, but that is a point that is

well taken.

**MR WILLIAMS:** It's not about me personally, though, sir, the CMA has had the material for only one working day.

**THE CHAIRMAN:** Fair enough, I'm speaking to you as the advocate of the CMA, just as I'm speaking for my yet to be appointed colleagues on this side of the bench.

**MR WILLIAMS:** Fair enough.

**THE CHAIRMAN:** So clearly there's a way to go in terms of understanding, and let me also be clear, I'm not anticipating that neutrality will be at the very fore of the expert reports that are submitted by Mr Beard. I'm sure they will comply with their expert obligations, but they will have been deployed to a purpose, and I think you can expect the tribunal not to be naive about that either. The question is, to what extent can we deal with the question of expert evidence now, at least by way of broad brush signals? Is it the case that we have to regard it as a derailing factor that means we can't, as I have indicated we want to do, hear the matter in the fortnight that I've articulated, or is there something that we can do to ensure that we proceed on the basis that that fortnight is used, but ensure that the CMA is in the best position it can be to respond, so that we have a fair process?

**MR WILLIAMS:** I think that is the point, sir. I was going to address you on the steps that are likely to be needed --

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

**MR WILLIAMS:** -- given where we are. But before I come to that, I was just going to start with, I'm afraid, an advocacy point, which is this wasn't an inevitable problem. Microsoft has chosen to present its application in this way, and it's chosen to present its application in this way in the face of clear statements from this tribunal about the way in which it generally receives expert evidence. And we've quoted the formulation that I think came from Tobii, which was then repeated in Dye & Durham

about expert evidence being strongly discouraged. It's strongly discouraged in part because of the expertise of this tribunal in dealing with these matters. But, nevertheless, Microsoft has chosen not to follow that steer, notwithstanding the clear line of authority which was available to it. And so the issue now needs to be grappled with.

I think it's clear from the submissions there are two ways around the issue, in principle. Admissibility can be dealt with as a preliminary matter, or it could be dealt with in the manner that Mr Beard is suggesting, which is that it should all be in play for the hearing, and the tribunal should deal with it then. We have real reservations about that, as we have indicated in our skeleton, but the point is however you deal with that issue, it has a timetable impact, and that is the point I'm going to develop.

Just starting with what the tribunal can do today, we've indicated our real reservations about the evidence being admitted de bene esse, but we do need time to consider it and we need time to consider it because in part, it's possible when we look at the material, we consider it in the context of the evidence that was before the CMA and the arguments that are developed by Microsoft, that the problem may be more rather than less manageable. It might be. So we don't want to take an absolutist position on the basis of the very short period that we have had the material to review but we do need time to consider it. It is right to say that the course that Microsoft is urging upon you is contrary to the ordinary and default position. I don't know, sir, whether you have had a chance to look at any of the authorities that we cited on this point. I can take you to perhaps one, if that would be of assistance.

**THE CHAIRMAN:** You can. Let me indicate where I am at on this question. It seems to me that there can be no question, given the time that has elapsed since the application was served on the CMA, of my saying: carte blanche this stuff goes in, and I don't think Mr Beard is actually pressing for that. The choice that I have is

either to say: no, it doesn't go in, that's that, which gives you a degree of clarity, and of course, what you say about the normal course is pertinent to that --

**MR WILLIAMS:** Yes.

**THE CHAIRMAN:** -- or we acknowledge that since we are just setting the direction of travel, we say that it is provisionally in, not even de bene esse in, but provisionally in, to enable the CMA to take stock, to see what it, as a responsible regulator authority needs, in order to be able to either say: “look, this absolutely can't go in because we can't deal with it by the end of July”, or: “we need the following directions in order to ensure that it's a fair process".

That's where I'm at at the moment, that we don't see it as a derailing question, that we allow matters to proceed on the basis that it isn't a derailing question, but that if it does, on the CMA's mature consideration, become such, we knock the evidence out rather than lose the hearing. I'm sure I'll hear in reply from Mr Beard, but that's where I'm seeing the geometry at the moment.

**MR WILLIAMS:** If I may respectfully say so, sir, that's a difficult position for me to deal with, because I'm dealing with the application as it stands now, and all I can do is -- I think, when you say "we knock the evidence out", obviously that, to some extent, comes down to what Mr Beard's client's position is in relation to the evidence, when you've given an indication of how you see matters unfolding, and in part comes down to legal questions of admissibility. But we're not there yet. All I can do is deal with the application as it stands today, and with Mr Beard's clearly stated position that his clients rely on the expert evidence. They're not shrinking from it, they've seen what we say about it and they've seen what our concerns are. So at the moment, all I can do is address you on what steps would be needed in relation to the application as it stands and in relation to the evidence that Mr Beard relies on.

**MR BEARD:** Obviously, I don't want to leave Mr Williams in an awkward position,

but is what Mr Williams saying, that if he had a week to identify whether or not he was actually objecting to any of this material being considered de bene esse at the hearing, and that we would not be keeping him out from making objections to particular parts of it at the hearing, but if he's saying: no, no, we must have some prior application, if he had a week to do that, I'm very happy to defer our application, if that's what's needed in order to get through this, because I'm really not trying to stop this. As I indicated, we do not want this to hold things up. If the CMA come up with unreasonable objections, we're going to resist them, but if they have sensible points to make, we're going to listen, because we don't want this derailed. If it takes a week so Mr Williams can have a fun week reading all of this, then that's not a problem for us.

**THE CHAIRMAN:** I think, but we'll hear from Mr Williams in a moment, I think his point is that there is an application for the admission of evidence before the tribunal today.

**MR BEARD:** Yes.

**THE CHAIRMAN:** Technically speaking, that is right.

**MR BEARD:** Yes, it is.

**THE CHAIRMAN:** But I hope I've indicated that I'm going to shy away from making decisions.

**MR BEARD:** That was my understanding as well.

**THE CHAIRMAN:** So far as I can. Mr Williams, I think the position is, if you want to press for the matter to be excluded today, then --

**MR WILLIAMS:** No, sir, that's not my position.

**THE CHAIRMAN:** -- I'll obviously hear you. Mr Beard is not pressing for the matter to be unequivocally admitted today, and I'm not going to hear him on that today, so it's a question of how we manage it. What I'm indicating to you is that it seems to me

that, particularly given the fact that the CMA has had one clear working day to look at this stuff, it's entirely reasonable for the CMA to say: we'd like a little bit longer, and we will then, hopefully, not at another hearing, but the plan is to have another CMC at which these matters can be fully aired, the 12th is I think at the moment, the date we're looking at, but I don't think we can take that as set in stone, but we're looking at a CMC coming very soon down the line, at which these things can be very fully argued out. So what I'm trying to do is to ensure that we have a really effective CMC after this one. That's where I'm coming from. I quite understand if you can simply say no more than: we need to look at this and we may very well have some root and branch objections in the future. That's completely understood.

**MR WILLIAMS:** The position I want to develop, sir, if I may, is that as we stand here today, questions arise about the future conduct of the proceedings, and about what is the pathway, if there is a pathway, to a hearing at the end of July. That's what we're debating. I think where we are, sir, is that Mr Beard accepts, I think, he accepts in paragraph 13 of his skeleton argument, that the pathway to a hearing at the end of July is the evidence coming in de bene esse. That's his position. He says he's not trying to shut me out from bringing this to a hearing but that's the way in which he sees things moving forward.

**THE CHAIRMAN:** Yes, de bene esse though covers a multitude of sins, in a way. What I mean by de bene esse is you admit it, you hear the whole thing, and then you decide whether to kick it out after the hearing has taken place and you're writing the judgment. That is not what I'm considering today. What I'm considering today is we have an application, we're not explicitly hearing it, we're working out what we do with this stuff, whether it gets kicked out altogether, whether it gets admitted fully or whether it gets admitted de bene esse on another day. That's where I'm at at the moment.

**MR WILLIAMS:** I do understand that, sir. The point I was making a moment ago is I think Mr Beard's position in his skeleton argument was that if we went down that road, that wasn't a practicable route to a hearing in July, that is what paragraph 13 of his skeleton was saying, as I understood it, but I was going to go on and make my submissions about how we see the thing working.

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

**MR WILLIAMS:** The reference is paragraph 13, I think.

**THE CHAIRMAN:** Yes.

**MR WILLIAMS:** If you see at the end of that, he says:

"Given the short time available, it is unrealistic to suppose any admissibility dispute can properly be resolved at a preliminary hearing in advance of the substantive hearing."

So I thought his position was the course that you're now suggesting wasn't practicable, and I was going to basically make submissions about how we think that would work and what the implications would be, but we agree with what he says in his skeleton argument.

The point I was on before we got into that, sir, was what's the default position in relation to this? And the submission I was going to make was that the default position is not to leave questions of admissibility to a substantive hearing, it is to deal with matters on a preliminary basis. I can give you one reference or I can perhaps take you to the authorities. Do you have the authorities bundle?

**THE CHAIRMAN:** I have, yes.

**MR WILLIAMS:** It's tab 15, is the Banks Renewables case. I was going to refer you to this because it has the relevant quote from Mr Justice Sales in this tribunal in BAA. That's at paragraph 9. If you want to see the context, the context of the case is at paragraph 2, but it really doesn't affect the point I make.

**THE CHAIRMAN:** I'll just read the relevant paragraphs.

**MR WILLIAMS:** So paragraph 9 cites Mr Justice Sales, as he then was, and one can see that the practice of this tribunal in relation to these issues has a wider impact on the conduct of judicial review in the Administrative Court, because that's where this case is being heard. If you want to look at then, paragraph 16, I don't need to read it out, that's Mr Justice Lewis's take on this issue, as he then was, now Lord Justice Lewis. So these are the reasons why one doesn't leave the matter until the substantive hearing, so that would militate in favour of the sort of course that you were just suggesting to me a few moments ago. And we've made points in our skeleton argument about why we think those issues are real, but it's not just about the time and cost that's expended, it's about the complexity of the final hearing, because the materials that Microsoft has relied on in its notice of application, they're obviously woven into the fabric of its argument, and obviously, it's going to affect the way in which those arguments proceed at the final hearing, as to whether those arguments are made on the basis of and with the support of that material or not. Are we grappling with that material on its own terms, or are we just grappling with the arguments which it's intended to support? In my submission, it's not going to be helpful to the tribunal to be hearing these arguments with reference to this material and then to, if you like, have to strip the material out, if it turns out not to be admissible, in order to work out what the argument really is.

So we say that the default position is that admissibility should be determined as a preliminary matter, and four expert reports -- there are also ten witness statements, which would need to go through the same process of analysis and consideration, and we have referred in our skeleton argument to the Dye & Durham case, which reiterates the point that this is not a kind of broad brush assessment of the sort that Mr Beard was presenting to you, it really is a granular paragraph by paragraph,

section by section analysis. So that's going to take time. It's going to take time at a hearing of the sort that you described. The question is when could that hearing happen, sir? If you're talking about another CMC, we would be dealing with the expert evidence, we would be dealing with the factual witness statements, and in my respectful submission, seeking for us to take a position on that and for the matter to be ready for full argument by 12 June, it's just too soon. There's too much to do. We suggested in our skeleton argument we would need two weeks to do that, and so one would be looking at a timetable that was built up on that basis. Of course, that's time consuming work, it's obviously a distraction from the main process, which is getting on with working on our defence and defending the main arguments, and obviously, this process of going through all this material, it is an unwelcome distraction.

That's the sort of process we have in mind. If, at the end of the process, the tribunal decides to admit some of the evidence, you then get to the question of whether we might be entitled or might wish to put in responsive evidence. In my respectful submission, Mr Beard is wrong to submit at this stage that there's no realistic prospect of the CMA being able to respond to the evidence. It really depends on what the evidence is and for what purpose it's admitted, what issue does it go to. We accept, obviously, what's said in Somerfield that we shouldn't be putting in expert evidence or, indeed, any evidence, in an attempt to replace the reasons given in the report. That's, of course, not what we would be seeking to do, but if one looks at the specific purposes for which the expert evidence has been put in play, it is in some respects to allege technical errors. As we've cited in our skeleton argument, there's authority in the Law Society case about how the court or the tribunal ought to deal with evidence put forward for that purpose, I think it is worth looking at that. It's tab 13 in the authorities bundle, page 137 in the pagination.

**THE CHAIRMAN:** Yes.

**MR WILLIAMS:** Really we pick it up -- it's 40 and 41 for your purposes, sir.

**THE CHAIRMAN:** Yes. **(Pause)**.

**MR WILLIAMS:** Just as a matter of principle, to the extent that the evidence is relied upon for the purposes of establishing a technical error or, indeed, an incontrovertible technical error, clear authority there that that may well be an appropriate matter for an authority in the position of CMA to have the opportunity to respond with its own responsive expert evidence. I think Mr Beard has misread a point that we made in our skeleton argument when we referred to the BGL case. What we were grappling with in that reference was the question as to whether that evidence would come from an independent expert or an internal expert, and I'll explain why that matters in a minute. But the point we were making there is if one's dealing with the question as to whether an error's been made, we will have to ask ourselves the question as to whether that ought to be addressed by independent evidence rather than internal evidence, because of the nature of the allegation. So we weren't relying on BGL --

**THE CHAIRMAN:** You weren't making an allegation in any --

**MR WILLIAMS:** The public law sense, yes.

**THE CHAIRMAN:** It's simply saying that the reasoning process in the decision doesn't stack up. It's no more than that, isn't it?

**MR WILLIAMS:** Yes.

**THE CHAIRMAN:** I've had a note that we ought to rise for a transcriber break, and I think we should do that shortly, but I think I am going to need to hear a little bit more about why an independent expert economist could be needed. For my part, I would rather hear from the economist whose reasoning has informed the panel, if it isn't a panel member at all, in terms of how the decision has been put together. I am conscious that it actually takes longer to put things in writing than actually to explain

matters orally. I should, I think, make clear that this tribunal is quite prepared, provided it is fair and consistent with the spirit of judicial review, to look at different ways of dealing with these questions. For example, speaking entirely for myself, I would not have an issue with the economist involved in the decision being called to explain his or her take on the expert material that was produced, without necessarily being admitted, by Microsoft. In other words, one has not an exchange of papers, which the tribunal reads without being able to ask questions, but one has the person whose thinking is, in part at least, incorporated in the decision, saying: well, I've read the reports that Mr Beard's clients have produced, we disagree. The disagreement is one which is within the reasonable range of experts to disagree, and on that basis, of course, the CMA would prevail. Now, that's something which I throw out there for consideration, because I don't want the sheer burden of: this is the way we do things normally, to derail better and quicker ways of doing things, if that is a better way of doing it.

**MR WILLIAMS:** I didn't completely follow what you were putting to me, sir. Were you effectively suggesting an appearance at the oral hearing to deal with these matters?

**THE CHAIRMAN:** Yes.

**MR WILLIAMS:** In addition to, or instead of a written witness statement? Presumably --

**THE CHAIRMAN:** I mean what one could do, and let me be clear, I am articulating a possibility, which we're very far from saying is anything more than a possibility, but one could have a situation where the reports that Microsoft want to rely upon are not admitted, but are used as ways in which one can put questions to your expert to explain why they are misconceived, in terms of understanding the decision. That would be in a form of flagged questions, or flagged topics at least, to the economist

in question. I don't, on that basis, actually see the need for a written report at all.

**MR BEARD:** Can I just -- obviously, sir, we're very much open to any sorts of innovations that can make this process work fairly, but I think there are two points that it's important to flag in relation to that proposal: first of all, I think we would need, as I think Mr Williams' tentative question indicates, some sort of written statement of what was being talked about, in advance. Obviously, it's a matter for the CMA and I do not want to step into their shoes in any way, but there is an issue here about the extent to which the commentary of an economist who forms part of the team in relation to the CMA is able to speak to what is actually done in the decision, because of course, the decision is taken by a group of persons. And so I don't want to undermine innovation, but I do place two caveats that (a) we would need proper notice of what it was that was being said and (b) the CMA would want, I have no doubt, to reflect on whether that was an appropriate representation of what was in the decision, and we would deal with that under advisement, because an economist within the CMA staff team may have all sorts of particular views. They may not, of course, be reflected in the final decision because the panel doesn't have to agree with them.

**THE CHAIRMAN:** I don't want to get bogged down in what is simply an effort to indicate that we're not, if we have a nine week run to the hearing, in the business of going through the usual steps of: let's work out whether we have an objection, let's deal with the objection, let's then have, if we lose on our objection, time to put in a responsive report. All of these things, as you rightly say, Mr Williams, distract from the essence of matters, and I think those distractions need to be kept to the absolute minimum. I'll say again what I said a moment ago: we're not in the business of following prescriptively what is ordinarily done, we're in the business of ensuring that a proper hearing takes place in the minimum time that it can fairly do so, and in order

to achieve that, we're quite willing to contemplate different ways of doing things. I'm sure there are all sorts of difficulties which arise out of that, and if they are difficulties which make the job bigger rather than smaller, we won't do it. But if they're difficulties of detail, which require careful consideration but remove the workload from, in particular, the CMA, then for our part, we will give them very serious consideration. So I extend that as an indicator to the CMA that we're not necessarily going to follow the usual course if that is generative of work that doesn't need to be done on the CMA's part, because you're absolutely right, if this process is going to work, the four week period for defence is the period that we're working to. We can of course extend that, and there's probably some time to extend it, even on the nine week process, but four weeks is what it is at the moment, and we don't want you getting bogged down in two weeks of trying to work out just how far you object to the expert evidence, and indeed factual evidence, that Mr Beard's clients are adducing. That's really not helpful for anyone.

I'll leave you to think about that. I've thrown a lot at you, Mr Williams, but we'll rise now until 4 o'clock, to enable the shorthand writer to take a break.

**(3.48 pm)**

**(A short break)**

**(4.00 pm)**

**THE CHAIRMAN:** Mr Williams.

**MR WILLIAMS:** Dealing with a few of the points that we were discussing before the break, I've taken preliminary instructions, if I can put it this way, as preliminary as is allowed, and like Mr Beard, we have reservations at this point about the suggestion that the question of what I've called the technical errors could be dealt with through the sort of oral process that you were describing, sir. I do not really want to make detailed submissions about that at this point, I just want to put down that marker. In

broad terms, ultimately what we're grappling with is how the CMA ought to put evidence before this tribunal on what is a mixed question of fact and economics, and at the moment I think we would have reservations about the idea that that's dealt with in a manner which departs from the ordinary way of proving one's position in proceedings of this nature, for a combination of reasons, which we may or may not need to get into on another occasion.

**THE CHAIRMAN:** I don't think you need get into it now. The reason I've raised it is because questions, particularly actually, from this tribunal, directed to experts unintermediated by counsel, can be of peculiar use in working out what actually is in issue, and when one has technical questions, that is significant. The problem with JR in a competition context is that one has extraordinarily difficult issues which one is grappling with, which generally speaking, are of an order of magnitude at least harder than the sort of pure policy questions that one tends to get in judicial review in the Administrative Court. To take, for example, the Heathrow Airport JR, which I had the pleasure of dealing with, we had a 600-paragraph statement as to how it was done. It was really very hard to see how that made the process more efficient, given the wealth of fact that was thrown at the tribunal there. So the last thing we want is a situation where we say the only way we can fairly deal with Mr Beard's points, be they factual or expert, is by churning out our own volumes of paper, when there are other ways of dealing with it. That's really as far as I wanted to go.

**MR WILLIAMS:** Yes.

**THE CHAIRMAN:** We're clearly not even in the realms, the ballpark, of articulating a new process for this case. The furthest I'm going is to say that if there is a better way of doing things, because of the particular factors arising in this case, then we're open to debating those.

**MR WILLIAMS:** Yes, and in fact that's I suppose, the next point I wanted to come

to, that that's the spirit in which this was suggested, sir, and essentially what you're saying is you're open to means of alleviating what might otherwise be a burden on the CMA in the first instance and then the tribunal, potentially, in due course, particularly if that's causing delay.

And my response to that is really a point I made before the break, which is to say we are grateful for that. Obviously, anything that within reasonable bounds alleviates the burden on us as a party to litigation is a good thing, but we are dealing with the application for judicial review as it stands, which involves reliance on this body of evidence, four expert reports, ten factual witness statements. What we are doing is grappling with how, as a matter of fair and due process, one gets from where we are now, to a final hearing where it's clear to everybody what material is in play and admissible and what's not, so that the argument can proceed on a fair and informed basis. The point I was developing before the break is that we, at the moment, don't really see an alternative to the sort of step wise process that I think you were putting to me, sir, and the point I'm developing is that, actually, we think that sort of step wise process is necessary, and the question is, where does that go, where does it leave you in terms of timing? The steps that we've gone through so far have the need for the CMA to consider the evidence, to take a position in relation to it, to then have some sort of preliminary hearing, and then possibly, subject to the outcome of that hearing, for the CMA to need to respond to that evidence as appropriate. So questions of practicality and timing arise in relation to all of those stages, and our position is this: I've indicated that our position coming into the hearing was that we needed two weeks to digest the material because of the volume and, frankly, everything else that's going on. We don't resile from that position. Obviously, the tribunal has in mind a particular date for a hearing, and one has to think practically about how that would work, given the volume, and when we would need to have

a position by, when we would get Microsoft's position in response and so on. One also has to think about what else is on the agenda for a CMC, what steps would be taken before that, how long they would take, and how long the CMC would need to be, because we all have experience of these questions of admissibility. I've been involved in a number of them myself, never on this scale, and they tend to be, you know, half the day to a day hearings and here we've got fourteen of the things and that's quite apart from any other CMC business. So there are really serious practical questions about whether this sort of hearing can happen sufficiently quickly in order to maintain the timeline that I think -- the idea you're exploring would require, sir, which is to get the matter on for a July hearing. As I said, that's the step wise process that we have in mind, and that's why we say this sort of timeline isn't practicable, because what one has in mind is a hearing sometime, putting it neutrally, in the middle of June, possibly further back in June if your Lordship's persuaded by what I say, and that is the point at which we have definition as to what is the proper scope of the application. Given the volume of the material, it's capable of making a material difference to what it is we're dealing with. We're not saying that that would be day zero for the preparation of the defence, of course we're not saying that, but we would have had a significant period of distraction and disruption prior to that, and then we would have a new level of clarity about the scope of the application from that date. Obviously, and I'm not making submissions on particular dates, the submission we make is that that is pushing the process back, its pushing it back towards the end of June and into July, and if one looks at that in conjunction with other issues which I will come to, the idea that we're all going to be ready for a hearing at the back end of July isn't realistic, sir.

So that's really the overarching submission. If I can go back to my notes and see whether there are other points I haven't picked up.

**THE CHAIRMAN:** Of course. **(Pause)**.

**MR WILLIAMS:** Yes, independence. I did need to come back to that. Again, sir, it's difficult, really, to make anything by way of a very concrete submission. The point we've made in our skeleton argument, and which I'm afraid I will just repeat for present purposes, is that if the question is whether the material relied on by the CMA contains an incontrovertible error, it's possible that we wouldn't feel able to defend our position on that issue, based on internal evidence. It's possible, and, indeed, when you raised the possibility of the CMA putting forward an individual economist to explain the CMA's position on those issues, Mr Beard was very careful immediately to reserve his position as to whether that would be a proper way for the matter to be dealt with. So as we stand here today, all we can do is say that on the principles in the authorities, expert evidence which seeks to establish the sorts of propositions that Mr Beard's clients want to establish may well be the subject, or may well need to be the subject of responsive evidence going to the question of whether there is an incontrovertible error. And we would need to consider in due course whether that needed to be an independent expert. I think you made the point before the break, sir, which is that that would necessarily introduce delay, and we agree that that would introduce delay, and we have made points in our skeleton argument about the sort of steps one would need to take. There would have to be a procurement aspect and there's a process of instruction. I fully recognise, sir, that your position is that these sorts of burdens, to use your word, ought to be avoided where possible, if they're impeding the smooth progress and speedy hearing of the case. But as we see it, as we stand here today, it's really difficult to see a clear way through which avoids these issues and bypasses them. So if you're establishing a direction of travel today -- and of course, another point I should make in a minute -- then that has to cater for the difficulties and contingencies that arise in the case. And I repeat the

point, these are issues generated by Microsoft's approach to the application. It didn't need to present the application in the way that it did, but it has chosen to do it in that way. It's not resiling from that position and the issues all need to be grappled with.

In terms of direction of travel, it is important for me just to make this point: I've explained to you, sir, that the CMA has real difficulties, very serious difficulties, with counsel, in relation to a hearing in July, and we can come back to that point in due course, but we are concerned at the possibility in this case that the tribunal might, for understandable reasons, want to feel its way towards the best possible outcome, subject to review in due course. Of course, this is a CMC heard at very short notice, but if the tribunal were contemplating a hearing as soon as July, then all sorts of things need to happen in order to make that happen, including not least, the instruction of counsel. At the moment we have real difficulties as far as that's concerned. In my submission, it's not a matter of the convenience of counsel. Three standing counsel aren't available. Who is realistically going to be available to commit the time that's necessary to a case of this nature between now and the end of July? Counsel with development expertise, no commercial conflicts, no technical conflicts, and indeed, frankly, willing to act for the CMA as a public body, having regard to the commercial constraints. So serious issues do arise, and in my submission, the idea of a slightly inchoate direction of travel is going to cause us very, very significant difficulties, sir. At the moment we don't have counsel available for that date, and the matter can't proceed on the basis that the hearing takes place on a date to be fixed, where one counsel team could do it if it was one date and it would be a different counsel team for another date. That's a completely unworkable situation, and as I understand it, it's not a predicament that would be faced by the other parties, so it would be unique prejudice to the CMC. I'm not making points about the convenience of counsel, sir, I'm making points about the availability.

**THE CHAIRMAN:** I entirely take your point that you're wanting a target to tilt at that is clear.

**MR WILLIAMS:** And part of the reason I say that, sir, is because you talked about making no orders, and we are very concerned that we end up in a situation where nothing's determined until everything's determined, and we have no clarity, and therefore we're just not able to plan the case.

**THE CHAIRMAN:** That's an entirely fair point, Mr Williams.

Before, Mr Beard, you begin, two points. First of all, you have very helpfully addressed me on both the expert and the factual evidence that Microsoft are relying on. The factual evidence is, as I understand it, Mr Beard will be able to correct me if I am wrong, is intended as a helpful statement of that which was before the CMA prior to the decision being made, so that the tribunal knows what -- and I'm taking the way Microsoft look at it -- what material that was material was disregarded by the CMA. Now whether it was or wasn't is neither here nor there, but that's my understanding of its intention. Do I have that right, Mr Beard?

**MR BEARD:** There are two elements. One is some of the statements are that, so there is a statement, for instance, from Miss Hulsmann, that's talking about the process, how it worked. There is a statement from Miss Edwards that talks about what evidence was before the tribunal. Already there are four statements, for example, very short ones, that are from third parties who are cloud gaming providers, and the point that those statements all made are, "We do not agree with the market definition". Our understanding is the CMA didn't ask any of those people those questions, so it wouldn't be right to say that is material that was before the CMA. They're, obviously, totally relevant in the sense that we say you should have asked those questions, that was material you omitted. The European Commission actually did that, it came out with a different conclusion. This is the evidence of the

sort of thing you would have got if you'd asked those questions.

**THE CHAIRMAN:** Yes, I see.

**MR BEARD:** So there's some of that, and that is also true in relation to some of the material in relation to Mr Stuart's statement on profitability and also the Bond and Lucero statements which are just to do with the agreements and how they were settled. Some of that is: this was what was before you, but it makes clear on occasion, there are additions. So there are two categories. It wouldn't be right to say that -- but in the main, they are either: this is what was before you and you missed, or: if you hadn't made the mistake, this is the evidence that's relevant. Because otherwise, the CMA's going to turn round and say: oh it wouldn't have mattered anyway. And so we went away and we talked to these third parties and said well actually, what do you say about market definition if you'd been asked? And this is what they came back with. So I think it's right to explain that. I think it is important that although there are ten statements, it's only because they fit within the parameters of what we say is appropriate for judicial review. We're not throwing out hundreds and hundreds of pages for these purposes. We're not, as I tried to emphasise, trying to impede the CMA in hitting the deadlines that are required in order to make it through to the July hearing.

**THE CHAIRMAN:** In any event, you will be providing a statement as to what this material is going to?

**MR BEARD:** Absolutely, that's absolutely fine. It is completely obvious from the start of each statement, but we are very happy to provide that material and to say what is, in substance, new. For instance, those four statements, they are, in substance, new, because we say the CMA should have taken that stuff into account.

**THE CHAIRMAN:** Obviously, it's a matter for you how you meet the direction that I have indicated is one of the few ones I will be making today. If you can do it in

a manner that explains what the material goes to, and do it on a page of A4 rather than more than a page of A4, that would, from our point of view, be very helpful.

**MR BEARD:** We can certainly do that. We can cross refer to the parts in the application it goes to. It may be fairly broad brush in places to get it within the A4 constraint, but if that helps both the tribunal and the CMA, we're more than happy. If there are other documents of that sort that we can usefully provide, we're very happy to do that. I think there's an extent to which there's a degree of shadow boxing going on here. Where, for instance, one can understand that from Mr Williams' statements about wanting an independent expert to deal with an incontrovertible error. This is all, with respect, a degree of fiction. The challenges in the grounds are: you have failed to take into account relevant considerations, you've taken into account irrelevant considerations, or your reasoning doesn't stack up. None of that stuff requires an independent expert. Indeed, under the Ermakov / Somerfield approach, it would be inappropriate. Now to start saying: oh well, it's going to be difficult to go through a procurement process for something like that, you're just conjuring obstacles where they really don't exist. The same is true of this factual material, because when you read it, it's much, much more limited, as indeed is the expert material.

**THE CHAIRMAN:** Thank you, Mr Beard. That's, from my point of view, a helpful articulation of the factual side. The expert side --

**MR WILLIAMS:** I'm bound to say, obviously, to really reiterate the points I've made, we've recently received the material, we don't at the moment agree with -- anyway, I think you know what our position is, sir.

**THE CHAIRMAN:** You have every right in the future to disagree in the most extreme terms with what Mr Beard has said.

**MR WILLIAMS:** I look forward to it.

**THE CHAIRMAN:** And I think it is appropriate to put on the record that this entire hearing, in terms of what the CMA may or may not do in the future with regard to objecting to the material that Microsoft is relying upon, you have the full reservation of rights in relation to that. You're not going to be shut out from making any points that you appropriately can make now, because we all recognise that this is an attempt to get a grip on an important hearing that, for the reasons I've given, if it can appropriately take place when I would like it to, is what we're trying to achieve.

So just one point on the expert evidence. For my part, and I put down my own marker here, I would take some persuading that an independent expert would be appropriate in the circumstances of this case. It seems to me, and the reservation that I just articulated applies in spades, but it seems to me that it would be positively counterproductive to have someone coming in afresh to say: well, here's a decision which I had nothing to do with, but it seems right to me. What we want is someone who can say: this is what the decision was. It was based, as you can see from the terms of the decision, on this material. Here's what it means. The tribunal will be very astute to prevent a back filling of a decision, to articulate that which was not there, to say that it always was. But, frankly, it is either a panel member with the economic credentials or an in-house economist, who can explain what's going on under the bonnet, that this case I suspect needs, if it needs reply economic evidence at all. So again, that's something you will, I'm sure, want to push back on, if so advised in the future, but it seems appropriate that I put down my own marker in regard to the quality of economic evidence that is required if Microsoft's evidence comes in and if the CMA gets the right of reply.

**MR WILLIAMS:** Yes, we've all heard what you've said.

**THE CHAIRMAN:** It's on the record. You don't need to respond.

**MR WILLIAMS:** We were on the subject of steps that we've suggested that

Microsoft needs to take, given the way that it's presented its application. We also suggested that there was a need for another exercise, which we dealt with at paragraph 39 of our skeleton argument. I don't know whether you have that in mind, sir, or whether you just want to refresh your memory.

**THE CHAIRMAN:** Yes.

**(Pause)**.

**MR WILLIAMS:** We dealt with that in the section of the skeleton argument which you identified as how can the CMA's response best ensure that the tribunal's focus is on the adequacy of the report, not extraneous material. I'm not sure it completely goes to that agenda item but it's obviously closely related to it and I don't know whether that's opposed. If it is opposed, I would be happy to develop the point, but in short, these are judicial review proceedings. If we failed to have regard to something, it needs to have been material that was put to us. There are instances where one gets into the witness statement, tracking back, and one can find what it is that the CMA is said to have disregarded, but there are other instances where it isn't clear. I could give you examples of both if I needed to, but it seems to us, to streamline the process, it would be much more helpful to have this on the face of the NOA, given the case that's made.

**MR BEARD:** I think rather than refiling the NOA, because it's in, it's dealt with, we're very happy as part of this process, of indicating what is new evidence, what is not new evidence, what it goes to, to run through any references where it appears that they're concerned that we're referring to witness evidence as a shorthand, which might actually be to material that was before the tribunal, and identify those. That's absolutely fine, we'll do that, and if there are particular concerns that the CMA has, we will answer them. We are happy to clarify. We dealt with this within four weeks, it was extensive. Mr Williams keeps saying it is Microsoft's choice as to how it put its

case. It is Microsoft's choice, in the face of the CMA's choice as to how it took its decision, that we are answering in this appeal, and there is only so far we can make sensible choices, given the significant errors in this decision. We have tried to be helpful with the evidence. If our references to the evidence are impeding the CMA, who have all the material, then obviously, we're very willing to help.

**MR WILLIAMS:** I would urge you to accede to the application as we put it, sir. The application for review is set out in the notice, and allegations are made that the CMA failed to have regard to evidence. And it seems to me that the pleaded case ought to identify the evidence to which we failed to have regard, and doing it indirectly through a witness statement. And in some cases, a witness statement that doesn't lead to the answer, is not the best way to present the application. It is putting us to more work, and it's going to take longer to respond to. That's why we put the application in that way, otherwise we're just tracking back.

**THE CHAIRMAN:** I'm not going to direct a refiling, but I am going to direct that in the most straightforward way, Microsoft articulate what it is they are saying was not used by the CMA, culpably, if you like, in reaching its decision. I am not going to stipulate the form. What I am going to say is I would like Microsoft to address the substance of the point in paragraph 39 as swiftly as possible. I see nodding, and I know it is in Microsoft's interests to ensure that questions from the CMA are answered helpfully and quickly, and both of those are important.

Mr Williams, I think I should make clear that the CMA should feel at liberty to ask for clarification of whatever it needs from Microsoft, and should do so clearly in writing to Microsoft, in the expectation that Microsoft will respond both as helpfully as it can and as swiftly as it can, bearing in mind that although these are contentious proceedings, it is in Microsoft's interests to ensure that the CMA's job is, in process terms at least, as easy as possible. So I put that on the record. I don't think it needs

any kind of order, I don't think that would be appropriate, given its lack of specificity, but that is how, if we go forward in the aspiration I would like us to do, that is what the tribunal will be looking to achieve.

So paragraph 39 you get in that modified form. Anything else that you are concerned about, that you don't know what you're tilting at, well that is something which you should ask, and it will hopefully be given.

**MR BEARD:** Thank you, sir. If it assists, that's no problem. Those behind me hear the indications of the tribunal, and we will try to deal with any requests as quickly as possible. I will leave aside the irony about the extent to which we don't have the evidence relied on by the CMA, but that's a discussion for another day.

**THE CHAIRMAN:** That's a discussion for another day, Mr Beard.

Mr Williams, is there anything else you want to say?

**MR WILLIAMS:** Not on expert evidence.

**THE CHAIRMAN:** Or on factual evidence?

**MR WILLIAMS:** No, the point we make about the process applies to both in slightly different -- on the basis of different tests.

**THE CHAIRMAN:** I understand.

**MR BEARD:** Can I just make two quick remarks. Just in relation to the case law that was referred to, it probably doesn't matter, but in relation to the Banks Renewables case, it's worth referring to the fact that at paragraph 8 is a consideration of the Law Society case, and in opening, I rather casually referred to what was happening in that case as the procedural wheels coming off. That is very much what is described in paragraph 15 of that case. It is a very, very different situation.

In relation to the Law Society, it's of course important to have in mind paragraphs 38 and 39, which are the relevant paragraphs about the way in which expert evidence

should be considered in the course of a judicial review proceeding.

But other than that, unless I can assist the tribunal on these issues. I can run through more detail on the experts and fact, but I have a feeling that this won't assist at this point.

**THE CHAIRMAN:** No, I think at this stage I have heard enough to enable me to find a provisional way forward. Thank you very much.

**MR BEARD:** I'm grateful. Our major point is none of this derails, and if, as Mr Williams seeks, he wants to have, essentially, a provisional indication as to when this hearing is going to be, in order to assist with recruiting counsel or rearranging holidays or whatever terrible consequences there may be, then obviously, even if it is only a provisional, pencilled-in diary commitment, that might be useful for all concerned, sir.

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

I have before me a question of difficult case management, for entirely understandable reasons. The CMA, the respondent to this application, desires a degree of certainty in terms of the aspirational trial date that I articulated earlier on in this process. It seems to me that the CMA is entitled to that certainty. It is not absolute certainty, but it is as close to certainty as I can give in the present context.

The hearing of the substance of this application will take place in the fortnight commencing 24 July, so the weeks commencing 24 and 31 July. I am not expecting it to take the whole of those ten days, but I would like the parties to err on the side of longer rather than shorter oral submissions. It seems to me that that is an excess that we can afford. There is a tendency, and it is very much driven by the tribunal rather than the parties, to cut submissions shorter than they perhaps ought to be. I want to do the reverse in this case. I want to have the parties understand that we will want to give them every opportunity to unpack the difficulties of this case in oral

submissions, and for us to have the time to do that.

So although I am very satisfied that ten days will be dramatic overkill, we will use those two weeks to have, let us say, a six day hearing, which is significantly longer than the four days Microsoft have indicated. We can do more than six if needed, but within that window, the CMA will be able to ascertain what availability difficulties there are, and there will be an ability to mark out certain days, if those are days which simply cannot be done. So the aim of this two weeks process is to give a certain degree of flexibility, which I am going to accord primarily to the CMA in terms of what days are actually used for the purposes of this hearing.

I have marked these weeks in the tribunal's diary and in the parties' diary, with a moderately firm pencil. I do so because I am satisfied that there is, as of today, no derailing question that precludes me from directing that a trial take place in this window.

I have listened most carefully to what Mr Williams has said by way of extremely articulate concern about the position that the CMA is placed in. The CMA, to be clear, has had one working day -- yes, it has had a bank holiday and a weekend as well, but one working day -- to consider the voluminous material, and Mr Williams has reserved his position, quite rightly, as to how this can be coped with. I respect that, and we will, I am sure, hear more on how the factual and expert evidence can be dealt with by the CMA at a second case management conference, which will take place on 12 June. That is just under two weeks' time, and is a date which I am going to fix, so that the very difficult questions regarding factual and expert evidence can be dealt with finally at that stage. Although it would be highly regrettable, I do not leave out of consideration the prospect of either adjourning the date that I have put in the diary in very heavy pencil. I would do that with great regret and only if it was absolutely essential for fairness, or indeed, in putting Mr Beard to an election about

whether he would want to retain the hearing and jettison certain evidence, to see where we go. So all options remain open, but, subject to a pretty clear steer that I hope will enable the CMA to deal with the planning questions that have been raised, particularly in terms of the manning of the case going forward, so that there is a target to tilt at, in terms of when this matter will be resolved by this tribunal.

I say nothing more about the issues regarding the factual and expert evidence that has been deployed by Microsoft at this stage. It would be inappropriate to do so, given the quite understandable inability on the part of the CMA to address with any granularity the concerns that they have quite rightly articulated at a general level. Equally, I should put on the record that although the tribunal has had the opportunity over the weekend and the bank holiday to read this material, it has been a single reading at some haste, and the tribunal is not, in and of itself, as fully apprised of the difficult matters that arise out of this case that it ordinarily would be.

So those health warnings are appropriately made, and subject to them, that is the direction I make as to the trial, and the parties should all work on the basis that that is when the trial will take place. It may be that we will revisit it. The usual rules about adjournment will not apply. I am not saying that it is a fixture in that sense, but it is, as I say, a fixture in very heavy pencil.

**LORD GRABINER:** My Lord, should we assume a full day, starting at 10 o'clock in the morning?

**THE CHAIRMAN:** I think 10 o'clock, Lord Grabiner, is a very good suggestion. We will run as long as we need to, to sort the matters out. I am obviously expecting the parties to prioritise the most important matters and to leave either for a later date, or even better, agreement, the less important matters. So we will have to cut our cloth, but if you need longer, I am sure we can find the time.

**MR BEARD:** I am most grateful to the tribunal. I realise this might be going slightly

backwards, but I suppose if we are in that position in relation to the second CMC, there are one or two particular matters that need to be picked up. Obviously, the position of Activision as an intervener.

**THE CHAIRMAN:** Interveners is on the list, yes.

**MR BEARD:** There is an issue in relation to disclosure, but I think that that matter might sensibly be dealt with by an indication from Microsoft to the CMA in the next day or so, as to the particular categories of disclosure it is continuing to pursue, without prejudice as to whether or not the CMA has behaved appropriately, more generally, in relation to disclosure of information, that it will pursue, in order for the CMA to respond by, we would say, 7 June, in order that that matter can be crystallised and dealt with at the hearing on the 12th.

**THE CHAIRMAN:** Thank you, that is very helpful, Mr Beard. Can I give an indication on the various matters that are outstanding. I am glad your list and my list are coinciding.

Intervention, clearly I will want to hear, Lord Grabiner, from you on that. There is no dispute that you have an interest. What I am concerned about is to ensure that the paperwork that is produced is as limited as possible, and one of the points that I am going to suggest that one thinks about is that there be a closer nexus between Microsoft and Activision, in terms of how documents are produced and submissions carved up, rather than the usual process, where in effect, the interveners' additions, to the extent they are appropriate, follow what the lead party who they are supporting, produce. So that is something which I put out there for both Microsoft and Activision to consider. I am conscious that there are likely to be other interveners, at least considering their position. I am minded to abridge time for a statement of an intention to intervene to be made, and I am minded to make that pretty short, because I think we need to know where we stand, well before the 12th.

That is all I have to say in terms of interventions, subject to what the parties themselves have to say.

In terms of disclosure, I very much want to ensure that the CMA's in tray is as free as possible of matters. I cannot see, at the moment, why exchanges with other regulators matter at all. It seems to me that what matters is the CMA's decision, not what it has said or not said, or might have said, with regulators elsewhere. That is an indication upon which, perhaps, Mr Beard, you could assist me.

Thirdly, not something that you mentioned but which I have well in mind, is the question of confidentiality. The CMA, unfortunately, bears a significant burden here, and what I am wondering is whether we can kick questions of confidentiality off by having an over-inclusive confidentiality regime going forward, until at least the 12th, so that the CMA doesn't have to engage with the 27 interested parties, and can focus on what is at issue rather than anything else. I am very conscious that that is echoing exactly what I said I would never say again in BGL, but I don't want the CMA to be distracted from the preparations for the 12 June CMC, and, more importantly, the preparation of its defence, which I am not going to extend time for today. Again, I will hear from the CMA on this, but I think for the moment, we should work on a four week basis, with a view to an application to be made to extend time for that document, when the CMA has a better idea of the mountain it has to climb. So I'm absolutely not saying no, Mr Williams, I'm saying not today.

**MR WILLIAMS:** I wasn't asking for one today.

**THE CHAIRMAN:** No, I'm merely setting out my thinking.

**MR WILLIAMS:** If you had said no, that would be particularly disappointing. We see it as a matter for another day, sir.

**THE CHAIRMAN:** It seemed to me something we need to discuss later on.

Mr Beard, I've thrown rather a lot at you.

**MR BEARD:** No, they are all issues that the tribunal had already indicated on the agenda. You have outlined submissions in relation to them. If I take them in order rather briefly. In relation to interventions, just dealing with the abridgement, we strongly agree. Obviously, this merger has had, and the treatment of it by the CMA, has not lacked publicity, and those people that might be interested in polling up, should know whether or not they are doing so. We think abridgement should be to 2 June. We think it should be short, and that if people are going to be admitted, then we are content for there to be an exchange of the papers in advance of 12 June in relation to those matters. It may be that certain issues would roll over to 12 June if necessary, but it may be possible to deal with these matters in advance, but we think a very short abridgement period is appropriate.

In relation to the intervention by Activision, obviously standing. In relation to the issue that, sir, you raised, there have already been preliminary conversations, because for instance, in relation to the ground concerning the counterfactual, for example, it may well be that the sensible division of labour is actually that Activision is taking the lead in relation to submissions in relation to those matters, even though it is one of our grounds of appeal, but since it is focussed upon the evidence given by Activision itself, that may well be an entirely appropriate issue for Activision to lead on. We will discuss further with them whether there are other matters or whether that matter is the sensible course, but those are issues we already have in mind because we can see that we don't want, simply, duplication of submissions in relation to these matters, or just follow on submissions in relation to it. So we have that very closely in mind already. That is in relation to intervention, abridgement and the position in relation to Activision. We have said in the skeleton argument we think that getting the statement of intervention in quickly, unless Lord Grabiner has other things to say about it, is a sensible course, so we know where we are in relation to

these issues and have suggested 9 June for that.

In relation to disclosure, we are seeking to narrow down categories. As I say, there is something slightly remarkable about the fact that we know more about what went to the CMA through the Commission access to the file process than we have had from the CMA, but we are trying to tailor our requests to the particular grounds. Just picking up very briefly on the specific issue you raised about contacts with other regulators. It's not so much what the CMA says to other regulators, although that might be relevant. What is also instructive is what the other regulators have said and provided to the CMA. You will be alive to the fact that the European Commission, in its decision, made very clear that it had received material, for instance, from third parties and had made inquiries of third parties in relation specifically to issues of market definition. We want to understand what was said or discussed in relation to those issues by the CMA with the European Commission, because we think that is relevant. If at any point comments were made by other regulators as to how the CMA should be thinking about this case, those are also relevant because those were never put to us. Now, even if the CMA says: well we didn't actually take those matters into account, it is right that we and the tribunal understand those issues and it is that angle which is more important than precisely what the CMA is saying to others in relation to that material. But as I say, we will set those matters out and the CMA can respond as it feels fit. That is the position in relation to those issues.

In relation to confidentiality, we are very keen not to have confidentiality create undue problems, and we are willing to be flexible about it. Insofar as up until 12 June, we have a more inclusive regime, and we have a set of orders that doesn't press the CMA to be going through the process of, in detail, dealing with 27 parties, then we understand that. We do think it is appropriate that there is a confidentiality regime with the tribunal, and it isn't just a confidentiality regime that the CMA had in

place with the parties, because we think it's important that it is managed by the tribunal, even though we think the order will be in pretty much identical terms. I think there's one variation, which is we would like people in print rooms to be open to be covered by the confidentiality ring as we roll forward in relation to this, but that is a minor wrinkle. In broad terms, we transpose the terms of the confidentiality ring to the tribunal, and if there is a sensible way of dealing with confidentiality, having regard to BGL but also the necessities of this case, we're very happy to ensure that that process is sensibly undertaken.

**THE CHAIRMAN:** Thank you very much, Mr Beard. Lord Grabiner, your intervention.

**LORD GRABINER:** My Lord, yes. I'm very grateful. My Lord, when we arrived at the tribunal this afternoon, we were very much hoping that we would persuade your Lordship to direct or make an order in relation to our application to intervene, and at the moment I'm still minded, if I may, to pursue that application. If your Lordship is against us, then in terms of what your Lordship very fairly calls the direction of travel, it no doubt will be helpful to everybody, particularly to my learned friend Mr Williams and his clients, to know exactly what our case is on intervention, and I'm very happy to proceed on that basis. My primary concern, if it's possible, is that your Lordship should give that direction today. Apart from anything else, it's in the CMA's interest to get our statement of case as soon as possible. If your Lordship does not make that direction today, the timetable for the delivery of that document simply won't be triggered, which can't be sensible from anybody's perspective, especially as we are willing and able to deliver it at a time or date when would be convenient to the court. I think we have suggested 9 June, and we are very happy to comply with that. But if it's deferred, it just won't happen before some appropriate time thereafter.

I should deal first with what the other side say in their skeleton argument. Perhaps your Lordship has that handy at paragraphs 11 and 12. I want to deal first of all with what they say in paragraph 12. What they do say is they've not had a proper opportunity to consider my client's application to intervene, and for that reason, they say that there should be a further CMC, when our application to intervene can be, as they put it, considered, alongside any others. We say that neither point has any substance. In the first place, it must have been obvious to the CMA that there would be an appeal by Microsoft. It's as plain as a pikestaff. Equally, it must have been obvious that Activision would wish to intervene and participate in that appeal. As I think your Lordship said earlier this afternoon, we all know why we are here. This is a very substantial case. I understand it's the largest and highest profile merger challenge ever to come before the tribunal, and it has obvious commercial and global implications. I am bound to say also, that from a UK plc perspective, it is a terribly important case, and the apparent lack of urgency on the other side, I must say is rather depressing. The regulator should be concerned to ensure that this matter is dealt with as fast as possible and not try to provide any sort of stumbling block to an early hearing to this very important case. As I say, it is rather depressing that the regulator apparently takes the position that there's not enough time to do this, that and the other, praying in aid all sorts of really curious arguments, to the effect that they don't have access to counsel on their list. My Lord, the English bar is full of extremely clever people, and the earlier they get to some suitable person to instruct, the better. But they don't need me to tell them that, it's self-evident.

Secondly, the CMA has been deeply involved from the outset. They have had our application to intervene since Friday. I know that's not long, but it doesn't tell them anything that they haven't known for an awful long time. We do not accept that they have not had a proper opportunity to consider our six page document. They have

certainly been able to produce their own 14-page skeleton argument, and, indeed, we received this morning, 500 pages of legal authorities from them. They seem to have focussed upon the law rather than the facts in this case, but very succinctly, if you think 500 pages is succinct. But they should have been focussing on what we had to say in our six pages. That's a lot more straightforward than getting out 500 pages of legal authority, much of which, if not all of which, is essentially irrelevant for the purposes of this hearing today.

As to the CMA's other contention, that our application should be considered in conjunction with any other applications to intervene, in my submission there are at least two reasons why your Lordship should reject that suggestion. First of all, there is no other intervener. If there were one, as indeed has been indicated a moment ago by my learned friend, if there were one, that party would, in all likelihood, have appeared by now. Nothing could be better known to the world that matters here, than the fact of this application to appeal. It's obvious. Everybody knows about it, and everybody concerned with it knows about it.

Secondly, even if another applicant intervener were to appear, and as I say, we don't expect there will be one at this stage, your Lordship will have to examine the particular circumstances of that application. Every applicant would be in a different factual situation. Certainly the scope of such an intervention would be bound, necessarily, to be different from ours, because each intervener would have a different context, coming from a different place. So the notion that any intervention application should be dealt with any other application at the same time, is, with great respect, misguided.

So there is no justification, we suggest, to wait for another intervener, beyond the abridged date, and in any event, the circumstances of that intervener would be different from those of my clients. There's no warrant for dealing with any

intervention applications together.

In case it's not already obvious, we would strongly resist the CMA's ill-disguised attempt to delay matters, because that's what, in our submission, your Lordship is being presented with.

Turning to paragraph 11 of the CMA's skeleton, it objects to Microsoft's suggestion that the time limit for permission to intervene should be abridged to 2 June. It suggests in the alternative, no earlier than 6 June. Our concern is to ensure, so far as possible, the effectiveness of whatever date your Lordship goes for. Currently, I think we're looking at the fortnight of 24 July onwards. Our concern is to hold that date and that trial period as the substantive hearing date. I would add that any party interested in intervening is well on notice of what's going on, and there's no justification for unnecessary time extensions.

In an application for permission to intervene, I need to demonstrate first of all that we have a sufficient interest under rule 16 of the tribunal rules. Activision, as the target of the merger, plainly has a sufficient interest in the outcome, which is the language of the rule. Apart from Microsoft, nobody has a greater interest. If the CMA decision is not overturned, my clients would be blocked from a massive global deal. We were also extensively involved throughout the CMA process. So we have been involved from the outset, unlike any other potential intervener, because nobody else was involved.

A distinct part of the CMA investigation concerned the counterfactual. Our case is that, absent the merger, Activision would not have put its games content, and your Lordship will be familiar with some of these games -- I don't know if you actually play them or our children do. Mercifully, we haven't got to that stage yet. I think you have to wait until your dotage to do this stuff but Call of Duty, Candy Crush, World of Warcraft, Diablo and Overwatch. These are things your Lordship would be looking

out for. Activision would not have put its games content on cloud services. That's our position. That's our case. If that is right, there is no cloud competition issue, and the CMA decision, which rejected our case on that point, cannot stand.

Put shortly, and I may need to revert to this point shortly in a little more detail, the CMA's finding on the counterfactual is founded, we say, on unevidenced assertions, misinterpretations of the evidence, and if I may say so, pretty stark procedural unfairness.

Turning on the other bit of rule 16, which is your Lordship's discretion in rule 16.6, the court will be familiar with the decisions in the cases of Gutmann and CityFibre, to the effect that added value is a convenient shorthand for what the court should be looking for from the intervener, so to speak, as a justification for permitting the intervention. What it comes to is there should be some likely benefit to be obtained by the court, given its task, to deal with the case in a just fashion. In the Meta decision in February last year, and your Lordship will recall this because it was your judgment, you helpfully drew some attention to additional pointers leading to, and I quote:

"A rather more broader based approach to interventions."

And:

"A novel market."

And:

"These were considerations which might lead the court to widen the test of intervention."

Your Lordship said that. It's in the transcript at page 18, lines 15 to 18 for the record, but I won't go to it.

In my submission, we don't need the benefit of a wider test in this case, but if we do, we certainly satisfy the points that your Lordship made in the Meta case. First of all,

this case raises significant public concern as to the lack of commerciality in the CMA decision, and I emphasise that. I can't overemphasise the importance of that point.

Secondly, the market suggested by the CMA, namely cloud gaming, as distinct from native gaming, on a console, a PC or a mobile phone, is certainly a novel market. It comes exactly within the words that your Lordship used in that case. Microsoft and Activision say it isn't a separate market at all, and that is a key issue in the appeal.

Thirdly, this case raises novel and important points as to market definition, the approach to remedies, and the procedural unfairness concerning the CMA's treatment of the evidence regarding the counterfactual. I should make it plain, as I think has already been made by my learned friend Mr Beard, that we will not duplicate Microsoft's submissions. That would be inappropriate and time wasting, and we are sufficiently well versed in doing this job that we will ensure we will not waste the time of the court, I promise you.

In this appeal, our focus will be on Activision's own documents, strategy and decision making, and its unique perspective as the global developer and publisher of games, which essentially distinguishes Activision from Microsoft. That's what we have to bring, so to speak, to the party, and that's why the merger makes great attraction, as far as both parties are concerned.

I ought to say next, something about what we say is or would be the likely benefit from our intervention. If permitted to intervene, we would focus principally, as I have said, on the counterfactual, ground 3. We would also wish to make some limited points on market definition, which is ground 1. We would also wish to say very briefly, something about ability and incentives, ground 4, and remedies, ground 5. I can deal with each of those points now, if I may.

As to the counterfactual, ground 3, this is about what Activision would do. That is a question for Activision. We can deal with the context and the relevance of the

documents relied on by the CMA and the evidence of the CMA and the evidence that the CMA failed to take into account. We say that there was no evidential basis for the conclusion reached by the CMA, and that the decision on the counterfactual was irrational. If the relevant points and documents had been fairly put, including to Activision's CEO, Mr Kotick, we can deal with what Activision's responses would have been. I'm not sure if your Lordship has picked up on this, but Mr Kotick has provided a witness statement addressing these points. The witness statement forms part of Microsoft's appeal paperwork. We would deal briefly with market definition, which is ground 1, to show that the CMA failed to consider switching between cloud and native gaming on a console, PC or mobile, and out of market constraints on cloud gaming from native gaming, so that what is never addressed by the CMA, and was certainly not the subject of any questioning, is the notion that the player might be in a position to switch between cloud streaming and native gaming through the very same piece of hardware. This concept is very, very important, because it goes to the key question of market definition, because if in fact, you had the capacity to do the switching, and we understand what that means in mechanic or electronic terms, then the notion that this is a separate market becomes a lot more difficult to explain or justify. That's why the question your Lordship posed earlier this afternoon is, with respect, such an important point in this case.

Activision is uniquely placed, because it knows gamers and the gaming industry better than anybody. Activision will be able to explain why cloud gaming, which is nothing more than simply a delivery mechanism -- through the cloud is just another way of delivering the product to the player, that's all. It's no different -- it's a different way of doing it but it is simply a mechanism of delivery to the player. It is not a separate market.

As to ability and incentives, which is ground 4, the CMA decided that Activision

content would be a particularly important input to cloud gaming services, which would give the merged entity the ability to foreclose cloud gaming providers. Microsoft says that this was an extreme and irrational conclusion. It's also a piece of highly theoretical, and I would suggest, rather unworldly analysis. Your Lordship may have picked up in your weekend reading -- and you do have my sympathy to have got through the 400 pages in the course of the weekend and it shows, if I may respectfully say so, a serious commitment to the job, but the vast majority of the time taken by the CMA in its, whatever it was, 32 weeks' investigation, 28 weeks were devoted to their first concern that there had been some anti-competitive conduct, or would be anti-competitive result if this merger were permitted in respect of the console, what they call the console market. The back end of the 32 weeks dealt with the cloud story, and of course, at the end of the day, contrary to probably many expectations, they decided that the console side of the story was okay, there was no problem there, and so at the end of the day, the reason that we have lost is because of their views in relation to the cloud story. One of the aspects of the console bit of the debate was the foreclosure argument, but that was rejected. So you have at one and the same time, the conclusion that we don't think there's going to be a valid foreclosure argument in relation to the console story, but we do think that there will be foreclosure, or a likelihood of the outcome that there will be foreclosure, in respect of competitors not being able to get access to these Activision games in respect of the cloud.

On the face of it, that is a remarkable pair of conclusions. They're diametrically opposite each other, and one wonders what the purpose of all that would be and why anybody would behave in that way, given that finding in the other way that we know about. It is also, as your Lordship will have noted, flatly inconsistent with the decision reached by the European Commission, who take a completely different view

about what is meant by the market and whether or not there is any validity in the proposition that there would be foreclosure in relation to cloud streaming, which, as we know, they have decided that there is no separate market in their view.

Activision is in the best possible position to comment on the validity of the argument that I have just been identifying. Call of Duty is a popular game, but it is not so successful that if it were withheld from other providers, they would not be able to compete with the enlarged Microsoft. Activision can explain how the CMA wrongly interpreted the evidence and why the particular findings have no evidential support.

As to remedies, which is ground 5, this is a key issue, because it is one of the areas of disagreement between the CMA and the EU Commission. Activision is well placed to explain why the prohibition of the merger was disproportionate and that the proposed behavioural remedies, which have been accepted by the EU Commission, would have fully addressed the concerns of the CMA.

We also say there was procedural unfairness under this heading, and Activision was directly involved in that deficient process.

Ground 2 relates to the contracts which have actually been made by Microsoft with key cloud gaming providers. This is another area of disagreement between the CMA and the European Commission. This is primarily a matter for Microsoft, as party to those contracts. We would wish to make only very limited submissions on the point to the effect that the CMA's treatment of these agreements, essentially to give them little or no weight, which is exactly what they have done, was commercially and legally unrealistic, and I think that would be the only point that we would want to make. But that is our case, and that is a very, very important point, because these are binding legal contracts made between sophisticated parties. Also against the backdrop of users out there in the marketplace, who are very, very smart people, ready to complain, so that if they're not getting their money's worth, they will be

complaining, and they would be complaining to parties who are in a very strong position indeed to do something about enforcing the contract. This is not a contract about some person walking into a bank, who's well beyond retirement age and trying to get some consumer advantage that's been given to them by some promise, by some multinational, who's now broken the promise, it's not that kind of environment. This is a real, hard nosed commercial bargain that's been entered into, or series of bargains, that have been entered into, but the CMA, in its wisdom, has decided these things have no real value, or they're not to be taken seriously into consideration. We respectfully suggest that that is uncommercial, unreal, unworldly, and wrong.

Then turning to some practical issues, if granted permission to intervene, firstly we will fit in with whatever timetable is determined by your Lordship. Secondly, as I have said, we agree with Microsoft's submission that the time limit for other applications to intervene should be abridged, and we would suggest to 2 June. Similarly, we agree with Microsoft's suggestion that the CMA should file its defence by 22 June, with Microsoft's skeleton on 7 July, and the CMA's skeleton on 12 July. I appreciate these dates may be impacted by your Lordship's subsequent decision, because we were then focussed upon the week of 17 July. Fourth, we propose to serve our statement of intervention on 9 June, which is eight working days from today. The CMA would still have two weeks for its defence. Fifth, we will not duplicate Microsoft's arguments. We think our statement will also serve as Activision's skeleton, but we would wish to reserve our position in light of materials from other interveners, so if there is another intervener, unanticipated, and the CMA's defence, we don't know what they're going to say, so we would then, in those circumstances, want to put in a short reply or a short skeleton, dealing only with any new points which come out of those documents which, of course, would postdate

today.

Can I then turn almost finally to Mr Kotick's witness statement that I previously mentioned. As to that statement, which as I say, was served by Microsoft, our position is that his evidence is important. It goes to the counterfactual. That is, what Activision would have done. He explains Activision's steadfast position on cloud gaming, and deals with documents which were relied on by the CMA which were not put to Activision. Really, it's a matter for the CMA and your Lordship, whether they wish to have Mr Kotick give live evidence. It may be that the CMA has no objection to the contents of that witness statement, I just don't know. If they don't, that's fine. If they do, and they want to cross-examine or question Mr Kotick, I presume -- well, I'm speaking for Mr Kotick here, he would have no objection to that being done if necessary. I think it would be an unusual thing to do, but it's something that may well be possible. But it may be that they wouldn't disagree with anything in the statement, I don't know. But that's something that we'll have to wait and see what their reaction is to that.

So far as the hearing date is concerned, we're content with the two week window your Lordship has identified. We understand that there is no earlier available date. If there were one, we would be seeking for that one.

Then we appreciate, finally, that this will, in any event, overrun the 18 July time limitation date. I'm not in a position today to comment on what might be discussed between Microsoft and Activision with regard to that deal date, but as your Lordship will appreciate, the parties are sophisticated and they have the point well in mind, and of course this couldn't go on forever. But these people are very sensible, they are very commercial and they are very clever, and they know where their interests lie, you may be assured of that. One thing is absolutely clear, though it's not very clear to the CMA side of the story, the urgency of this matter is absolutely critical. It's

critical to the success or otherwise of this transaction, and it's critical to the outcome of the issues which arise or would arise on this appeal.

My Lord, I'm sorry to have taken so long on that, but I hope I've given you a fairly clear summary of where we're coming from, and Mr Williams now does understand, I'm quite sure, about exactly what our position is on these matters. If your Lordship felt in all the circumstances, that it would be, in the circumstances, appropriate to make that order, or at the very least, to indicate that you were minded to make the order which would permit my client to intervene, that would be extremely helpful to us, and it would be quite a valuable indication of the direction of travel as well.

My Lord, that's all I wanted to say, but if there's anything that you would like to ask me, please feel free.

**THE CHAIRMAN:** No, that's very helpful, Lord Grabiner. Can I explore the practical question of the form of your statement of intervention. Is it something that you could embed, as it were, in Microsoft's notice? In other words, one could have either an acceptance that you're going to be taking a lead on something that has already been articulated by Microsoft -- you mentioned ground 3, I think, as something which might be appropriate to be handled in that way -- or, to the extent that there is, as it were, new points emerging, whether one can, instead of having a self standing separate document, which is always longer, insert it by way of amendment?

**LORD GRABINER:** We will have to use some other lurid colour to distinguish our position from theirs, but I understand your Lordship's point. It will all be contained in one document, basically.

**THE CHAIRMAN:** Indeed, so that you can buy into the articulation of the general position, and we have, quite literally, only the new stuff that you bring to the party, leaving it then to those points where you are completely aligned with Mr Beard, for you to decide in due course who is going to take the lead on a particular point in the

one document.

**LORD GRABINER:** I am sure we can do that, yes.

**THE CHAIRMAN:** Mr Beard, I'm taking a lot as read, but that does seem to me to be a course that at least ensures that there is no clear blue water between Microsoft's position and Activision's, in terms of how the points are made, but I appreciate it's quite an unusual course.

**MR BEARD:** Why don't we take it away and have a look at it. I see the idea would be, effectively, that the Activision application would be us passing over a Word version of the document, and then Activision adding to it in a tracked form, and then that being their application, ours stands as it is. Because, obviously, you talk about no clear blue water. In terms of the grounds, I think that's absolutely true, but obviously, we're independently represented, we take independent instruction, and therefore, they have to be to some extent, freestanding. But if, in term of logistics, that works for Activision and it involves us sending them a copy of a Word document, then I don't envisage there being any problems. I leave it to Activision as to how it wants to put those things forward. I completely understand that what you want to do is avoid duplication, and if that's the most efficient way, I leave it with Activision to decide how to deal with it.

**THE CHAIRMAN:** Yes, otherwise one simply has the foothills being set out in some form in the statement of intervention, which is invariably not helpful.

**LORD GRABINER:** And if, God forbid, there is some difference of view, we will spell it out in our contribution to the document. But my expectation is it will be pretty obvious that we are essentially aligned, and that the contribution that we want to make is in respect of matters that we have something to say.

**THE CHAIRMAN:** Well indeed, and I wouldn't, I think, be suggesting this if it wasn't clear that you were substantially aligned, and frankly, to the extent you're not, that is

quite helpful information to have.

**LORD GRABINER:** Precisely.

**MR BEARD:** My Lord, that's absolutely no problem for us. As I say, I leave it to Activision how they want to use what we send them.

**THE CHAIRMAN:** Pro tem, and obviously I need to hear from Mr Williams, that will be the course I'd be minded to take.

Can I move to my second practical point, which is to what extent can I hold Activision's feet to the fire and press you on 9 June? I don't want to push too hard, but is there a prospect of doing it a little bit sooner, bearing in mind that we have a second case management conference scheduled for the 12th, and the 9th is the Friday?

**LORD GRABINER:** I'm trying to get into a negotiation with your Lordship. I'm minded to say if your Lordship allows us to intervene now, then I'm sure there's plenty of scope for a discussion.

**THE CHAIRMAN:** I'm going to hear from Mr Williams, but I'm going to --

**LORD GRABINER:** He may of course accede immediately, having heard the argument.

**THE CHAIRMAN:** Having heard your silver tongue, Lord Grabiner, he may well do that, but we will see just how receptive he is to your submissions. But if I were to say 2 June for the statement of intervention for other parties, that's this Friday, and something like the 6th or 7th for your statement of intervention --

**LORD GRABINER:** What about the 8th, my Lord?

**THE CHAIRMAN:** That's too close to the 9th, Lord Grabiner. We'll see what Mr Williams has to say, but you can ponder --

**LORD GRABINER:** You know that I want it to be as close to the 9th as possible, that's my position.

Is there anything else I can assist on at the moment?

**THE CHAIRMAN:** No, not at the moment, thank you very much. Mr Williams.

**MR WILLIAMS:** It's exciting to see the opportunities I will have to negotiate with your Lordship in years to come, but I don't think we're quite there yet.

I'm not going to respond to the points Lord Grabiner made about whether we're trying to hold matters up and create obstacles and take curious points, I don't think that's going to help your Lordship, and obviously we aren't saying Activision doesn't have an interest in the merger, that's not our point. The only point that we were focussed on is how does Activision's contribution differ from that of Microsoft, and in what way is it going to supplement that? Our concern really is twofold: first of all, that the tribunal isn't faced with multiple versions of the same case in different words; and secondly, it affects considerations of timing, which we've been focussing on today.

So we weren't seeking to hold matters up when we took the position we did in our skeleton argument, we simply made the point that that's not clear as things stand, and in the ordinary course of proceedings of this nature, we would have a CMC, there would be skeleton arguments, all of this would be ventilated, but that hasn't happened on this timescale.

Before hearing the exchanges between you, Lord Grabiner and Mr Beard a minute ago, my suggestion was going to be that Activision are asked to put in their statement of intervention in draft in advance of the CMC so that we could all consider these questions on an informed basis. We're not going to be taking silly points about Activision's interest in, and the contribution it can make to, the hearing of this matter on specific points, this is just case management.

I was going to suggest -- in fact I wasn't going to negotiate backwards with your Lordship and try and get it before the 9th. Obviously the sooner it is the better

for the purposes that I described, but that was going to be our practical suggestion as to how to take it forward. In that context, it doesn't matter for our purposes whether it's in the usual form of a standalone document or whether it's in the form that you were suggesting, sir. That's our position. Unless there's any other aspect of that I can help you with?

**THE CHAIRMAN:** In terms of other interveners, are you pushing back on a longer date than the 2nd?

**MR WILLIAMS:** No, the suggestion that we have a CMC now on the 12th, when we took the position we did in paragraph 11, was it, of our skeleton argument, we weren't thinking in terms of a CMC on the 12th.

**THE CHAIRMAN:** No indeed, a lot of things are changing.

**MR WILLIAMS:** Yes, so in the context of that obviously we can see it's important to have things dealt with sooner rather than later, whether it ought to be the 2nd or some other date is really a matter for you, sir, but I think although obviously the world is aware of the case and is aware of the fact that Microsoft is likely to appeal, it's a separate question of how quickly people can pull these sorts of documents together, so whether it's the 2nd or some other slightly longer timescale, that's a matter for you, sir.

**THE CHAIRMAN:** I am grateful. It's going to be the 2nd, 5 pm or before for statements of an intervention to intervene. I make that indication because anyone who seeks to intervene I regard as being on very clear notice for some time now that this was going to happen, and if an application to intervene is made, anyone doing so can expect to be given days, not weeks, to put in a full statement, if that is appropriate. So that is the deadline for an indication of a statement of an intervention to intervene.

Lord Grabiner, it's going to be 7 June for your statement of intervention, 4 pm on that

date. That I think gives enough time for the CMA to consider matters. It's a very firm direction of travel point, in other words I do think that the CMA are entitled to say well, we've seen what Activision say, and frankly this is just not appropriate for a statement of intervention. I would be astonished if we got that far, but I am reserving the position to review what you put in, in light of what the CMA may or may not say. I'm quite sure they won't be taking silly points, but they may well, in the light of what you have pleaded and said, have some points which I think need to be factored in.

But subject to that, you have my permission to intervene in that way. So it is permission, but with a bit of a clawback.

That I think deals with intervention. We have a few other housekeeping matters, but on the minor side of things.

**MR BEARD:** Yes. I think --

**THE CHAIRMAN:** Sorry, Mr Williams?

**MR WILLIAMS:** Sorry, we went through confidentiality and I never addressed you on it, I don't know if you wanted me to round that off.

**MR BEARD:** That was actually the next topic I was going to come back to.

**THE CHAIRMAN:** You are absolutely right, Mr Williams, that's my fault.

**MR WILLIAMS:** We dealt with this in our skeleton argument. The CMA has been endeavouring to progress matters in the way we described. That is by seeking representations from third parties on the position. Obviously the making available of information in a confidentiality ring has two aspects. One is making sure parties have the material they need to plead and so on, and we're not in that situation, we've gone through that. So we are, as I understand it, dealing with the question of what is truly confidential and what can be released into the public domain as the proceedings move forward. For the purposes of grappling with that issue, obviously

anything that takes the pressure off would be welcome.

As I understand it, that's where we are in process terms, and if that process isn't time critical from the point of view of the progress of the proceedings, then that would help us.

**THE CHAIRMAN:** I think Mr Beard's suggestion of translating over -- subject to any appropriate amendments that can be agreed -- the ring so that it is, as it were, a tribunal confidentiality ring, so that we have control over it, is sensible. But contrary to what I said in BGL, it does seem to me that whilst I'm sure the CMA will do what it can, I regard confidentiality as something that is to be parked for the moment, because you have rather bigger fish to fry, and I want you to get on frying them, rather than worrying about an important but time consuming, and, in terms of critical path, less important job. So if that is a sufficient indication for the CMA's purposes, I'll leave it at that, but you can --

**MR WILLIAMS:** The work was in train, it's just how much it's pushed forward.

**THE CHAIRMAN:** I know the CMA takes this obligation extremely seriously, and for that reason it is a lot of work, and so I want to do what I can to ensure that that work is put off, and we will deal with any problems of confidentiality and the public domain going forward. You can simply rest assured that I will remember what I have said, and if there is a car crash in terms of public justice versus confidentiality, then it will be a car crash of my making, and not yours.

**MR WILLIAMS:** Thank you, sir. In terms of the process of establishing a ring in the tribunal rather than as part of the CMA's procedure, obviously that needs to be dealt with, and the parties can liaise in relation to that.

**THE CHAIRMAN:** Yes.

**MR BEARD:** We can liaise on that issue, I think. I don't think that should be too problematic. We'll need to provide you with a draft order, and then it might be

possible that those who have already signed undertakings to the CMA, the order could be that those undertakings roll over so everyone doesn't have to sign off again, because logistically that can be a bit of a pain. I think that deals with confidentiality. The only two issues I had beyond that were disclosure, which I think I've dealt with, and then there's the distillation of the application issue that was mentioned by the tribunal in the agenda.

We're very happy to provide that, but this is, without wishing to sound impertinent, a question for the tribunal as to what it is you're looking for. There are different versions. We can summarise in 10/15 pages, but actually we did wonder whether it was more useful for at least there to be headline issues, so a very brief summary of what the grounds were and what we considered were the headline issues, so that there's more of a route map. I'm not going to refer to it as routes to victory, we've already spelled out that any one of them takes us to victory, that's not the point I think that matters for these purposes, it's streamlining the process so the tribunal has an easier and more navigable approach. We're somewhat in your hands as to what would be more useful, but that's the suggestion we tentatively make.

**THE CHAIRMAN:** That's helpful. What I am going to suggest is both the CMA and the tribunal take this away and think about what exactly would be of most use. Rather than your drafting something between now and the 12th, we will give some thought, and I hope the CMA can do the same, as to what will enable the tribunal and the CMA to get to grips with the issues that matter. In other words, if we can get rid of the chaff that inevitably pervades all applications, and I'm not saying ...

**MR BEARD:** There's no chaff.

**THE CHAIRMAN:** Well, I'll take that under advisement. But to really get down to the points that actually matter.

**MR BEARD:** Yes, we're entirely with you, and what we were thinking of was

essentially an abbreviated list of issues under the different headings as potentially a way of dealing with it. Obviously once you get beyond the broad issues, there are a number of sub-issues. That then slightly starts to ramify, and actually detracts from the purpose of what we thought was what the tribunal wanted, and therefore what we were trying to do was identify six or seven key issues for each of the grounds that then make the thing navigable. We think it will turn up around ten pages, something of that sort.

**THE CHAIRMAN:** That does sound helpful, and getting rid of, for instance, contingent issues, where you have a big delta, and only if you go down one root --

**MR BEARD:** That was the way we were thinking. Just the basic branches of the decision tree, not the finer branches or the end leaves --

**THE CHAIRMAN:** The tendrils.

**MR BEARD:** Yes. That's what we were thinking might be most useful for you, and potentially for the CMA as well. But we were thinking primarily with the tribunal in mind at that point.

**THE CHAIRMAN:** That sounds sensible. What we will do is articulate exactly what we would like in the course of the next couple of days, but that does sound like something which is helpful, if you can --

**MR BEARD:** We will perhaps start the work on that. It may be that if the tribunal is thinking about it, we could provide a draft, for example, that might be refined, and that might actually give the tribunal a better sense of what might be asked for. There's always a danger that the tribunal asks for something and it turns out that that particular formulation would be extremely difficult or lengthy or whatever, whereas if we provide you with something in draft, you can perhaps look at it and say no, we'd like the following additions or subtractions.

**THE CHAIRMAN:** Let's do that, it's always better to focus on a draft and critique

that than a blank sheet of paper.

**MR BEARD:** We'll do that as soon as we can.

**THE CHAIRMAN:** That would be very helpful. I think if the CMA has improvements to suggest, then we can feed those in as well, because I see this as a document that is of use to both the respondent and to the tribunal.

**MR WILLIAMS:** Yes. If what we're talking about now is something a bit more like a conventional list of issues, then the question is always at what level of granularity, is the document going to be of assistance, and I can see that that is suitably tested in the context of a draft rather than talking about it in the abstract. That sounds sensible.

**THE CHAIRMAN:** That's very helpful, thank you both.

**MR BEARD:** I suppose the final matter is obviously in our skeleton argument we set out a more detailed timetable through to the hearing, involving skeleton dates and so on. I don't know whether the tribunal wants to deal with that now in outline or not.

**THE CHAIRMAN:** I'm not inclined to, because I think we have our work cut out between now and the 12th, and clearly on the 12th we will want to have a timetable running absolutely clearly through to the last week in July and first week in August, and we will want to crystallise that a little bit more as well, so the parties will need to think about how long, bearing in mind what I have said about generosity of time, how long they will need in those ten days, and probably work back from there to see what dates need to be met. But that's very helpful.

One question that I had, which again we should think about, is document management. There aren't going to be a huge number of documents here, but I do think that it would probably assist if the parties either had imposed on them or could agree a numbering protocol so that we can refer to documents, electronically filed, by the electronic equivalent of a tab, so that they both order in the directory in

a proper manner, and we can actually say in our submissions we're referring to document whatever number, and everyone's talking the same language, so that we don't file, refile and re-refile the same electronic documents under different rubrics, we instead have a common language for document references going forward.

I don't want to cut across any other thoughts the parties might have, but if I'm not cutting across, then we might send a suggestion to the parties as to how that might be done.

**MR BEARD:** We're very happy to do that. We'd already been thinking about this, we were essentially thinking that the application bundle, and then obviously the evidence that goes with it, which actually contains a good deal of relevant background material, would remain, we wouldn't renumber that, refile that, and we would be slightly more following the process that the European Court procedure works on, which is that you have A documents, which are the application documents, the B documents, the defence, and so on, and you have them as separate bundles accretively.

**THE CHAIRMAN:** Are the parties anticipating a paper rather than electronic process? It may depend on who is ...

**MR BEARD:** Yes, there will be electronic versions of all of these things, and we want to make sure that the electronic bundle references work coherently. Whether or not it's some sort of Opus type system is a matter for further discussion, given that we won't be likely using it for cross-examination, which is where that sort of facility is most useful.

**THE CHAIRMAN:** In that case, I'll leave it to the parties to work out what works for them before we engage ourselves.

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

**THE CHAIRMAN:** Is there anything else?

**MR WILLIAMS:** Yes, my Lord, Mr Howell has helpfully reminded me that there is an order your Lordship can make in relation to forum today, if you're minded to resolve that issue.

**THE CHAIRMAN:** Is there any --

**MR WILLIAMS:** I call it an issue, I don't think it is an issue.

**MR BEARD:** We're not pressing for Scotland.

**THE CHAIRMAN:** No. It does raise greater complexities than one might think, which I thought about in Meta, which was you really want to be saying United Kingdom, and that's the one thing you can't say. On the basis that it is being presented to me as a no-brainer, but one which we don't actually have to deal with today, we'll leave it for the 12th. I can't see any alternative to England and Wales, but I do think that the gamers in Scotland are entitled to a degree of consideration as to whether they have an interest.

**MR BEARD:** I don't think the suggestion is that in any way this is not an adjudication that would not affect Scotland and Northern Ireland, it's merely within the scope of the tribunal rules how you sit. As you say, sir, there is a particular wrinkle that you don't sit as a tribunal across the UK simultaneously, or have not done so ever, and it's never been seen to be needed. Of course, the CMA decision applies in Northern Ireland and Scotland just as it does in England and Wales, and you are therefore adjudicating on those matters in any event.

**THE CHAIRMAN:** Thank you very much. It will hopefully be a non-agenda item for the 12th.

Can I thank everyone for their assistance. I am sorry it has gone on so long, but it has been time well spent. Thank you all for making it so. I will rise now.

**(5.41 pm)**

**(The hearing concluded)**