IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1306-1325/5/7/19(T) 1349-1350/5/7/20(T), 1383-1384/5/7/21(T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Friday 14th May 2021

Before:
The Honourable Mr Justice Roth
Tim Frazer
Paul Lomas
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dune Group Limited and Others

-v-

Visa and Mastercard

A P P E A R AN C E S

Kassie Smith QC, David Wingfield and Fiona Banks (On behalf of Dune, Adventure Forest Limited and Westover Group)
Laurence Rabinowitz QC, Brian Kennelly QC, Daniel Piccinin, Jason Pobjoy and Isabel Buchanan (On behalf of Visa)
Matthew Cook QC and Hugo Leith (On behalf of Mastercard)

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Friday, 14th May 2021

(10.30 am)

MR JUSTICE ROTH: Good morning. I am sorry to keep you waiting. For the benefit and with respect to anybody who may be observing the proceedings today and was not doing so yesterday or the day before, I shall just repeat the warning that it is strictly prohibited to make any unauthorised recording, whether audio or visual, of these proceedings, and that constitutes a contempt of court.

Mr Kennelly.

Submissions by MR KENNELLY (cont.)

MR KENNELLY: Thank you, Sir. Before I open Mr Holt's third report, I would like to return briefly to the Tribunal's query on commercial cards, and what the Commission's decision said about them. The reason why I thought initially that the Commission had not addressed commercial cards was because the Commission did not include commercial cards in its final decision. They are not covered by the operative part of the Commission decision. I see Mr Lomas nodding. Perhaps this is something the Tribunal was aware of already. I will give the references.

MR JUSTICE ROTH: Yes.

MR KENNELLY: Because it is important, I will show you --

MR JUSTICE ROTH: We would appreciate that.

MR KENNELLY: If you take up volume 2 of the authorities bundle and go to the back of the commission decision at page 789.

MR JUSTICE ROTH: Yes.

MR KENNELLY: Do you see article 1, the operative part, the MIFs that are referred

to, you see the MIFs are then described in the second half of that paragraph.

MR JUSTICE ROTH: We appreciate they are not included in the remedy.

MR KENNELLY: Indeed, and the reason it appears is if you go back to page 586, the summary, the executive summary of the decision.

MR JUSTICE ROTH: Yes.

MR KENNELLY: The Commission there says at recital 13 -- they are describing their remedy, and they say, five lines down:

"This remedy excludes one aspect of MasterCard's MIF as far as commercial cards are concerned. The Commission will further research the possibility of efficiencies in this respect."

So further work on commercial cards.

MR JUSTICE ROTH: That was only as regards Article 101(3), as they explain.

MR KENNELLY: Indeed, but the point you have is that no decision was actually taken on commercial cards.

MR JUSTICE ROTH: They did decide -- it is not in the operative part, but as regards 101(1) or 81.1, as it then was, they restrict competition, but say they need to do more work in looking at efficiencies.

MR KENNELLY: Indeed.

MR JUSTICE ROTH: They analyse, of course, the evidence on commercial cards and the arguments on objective necessity and so on, don't they?

MR KENNELLY: To an extent, yes, but the point, Sir, is that if they are not covered by the operative part, there is no binding decision in relation to them at all. Overnight, Mr Cook circulated your judgment in the Trucks case. He will address you later on the extent to which recitals which do not support an operative part of a decision do not bind the court in any way, but I will leave that for him, since he circulated that authority.

The important point is there is no decision that binds you, and there is nothing about commercial cards in that operative part.

MR JUSTICE ROTH: Well, the operative part, as we held, is not the only part that binds us. I mean, that's what the whole Trucks decision was all about.

MR KENNELLY: It is the extent to which the recitals --

MR JUSTICE ROTH: You may want to leave it to Mr Cook. Can I just ask you, and we will hear Mr Cook on it, suppose you are right and there's nothing binding. Does that mean we just cannot pay regard to it? We have to disregard it completely?

MR KENNELLY: Well, yes, because it's a decision about different facts.

MR JUSTICE ROTH: I mean the recitals -- the reasoning clearly does cover commercial cards. Your point is the operative part doesn't. What I am saying is does that mean that we can pay no attention to the reasoning on commercial cards?

MR KENNELLY: Yes, indeed.

MR JUSTICE ROTH: That's your submission?

MR KENNELLY: That's my submission. It is particularly appropriate in the case of Visa, because, of course, those are, we would say, non-binding recitals in relation to Mastercard, and Visa had no opportunity to make submissions about them. Even if there had been a decision, it wouldn't have bound Visa.

MR JUSTICE ROTH: The operative part has been held to apply to the Visa scheme. That's in the Court of Appeal and the Supreme Court, isn't it? They base themselves entirely on the European proceedings, and then they go on to say they have reached the same decision anyway.

MR KENNELLY: Yes, because they found that the material facts were the same --

MR JUSTICE ROTH: Yes.

MR KENNELLY: -- in both the Commission decision and in the proceedings before them. We say it is different, and you have my point, in relation to interregional MIFs, commercial cards and Italian MIFs.

MR JUSTICE ROTH: Are you saying Visa commercial cards are different from Mastercard commercial cards? Can you clarify, what's the difference between a Visa commercial card and a Mastercard commercial card. I understand your point, saying whatever the Commission said, it is only about Mastercard.

MR KENNELLY: That's going to be a matter for evidence. I would be speculating now. I will show you what Mr Holt says about commercial cards in general.

MR JUSTICE ROTH: Yes. That is what I thought he was dealing with, in general, yes.

MR KENNELLY: I am not going to -- forgive me, Sir. I don't want to concede now there is no material difference between Mastercard commercial cards and Visa commercial cards without any evidence going either way. So I am afraid I can't make that concession. I can rely on the evidence I have before you.

MR JUSTICE ROTH: Yes.

MR KENNELLY: In any event, the important point is this is a summary judgment application, where Ms Smith's submissions rely on the binding nature of the European judgments and the Supreme Court. She says those six tests are satisfied, because the facts are the same. You can assume that the facts in this case, in relation to commercial cards, interregional MIFs and Italian MIFs are exactly the same as the facts before the Commission and the General Court, and so forth, in the Mastercard case. It is important to say they were bound because the facts are materially the same. I have looked at the facts and shown you what they are. Now I will turn to the evidence of Mr Holt to show how they are not the same in this case. That's sufficient for the

purposes of summary judgment, we would submit.

The third report of Mr Holt is in bundle 1A behind tab 10L. I will start, if I may, at page 533.

MR JUSTICE ROTH: 10I, isn't it? I think you said 10L. 10I, isn't it?

MR KENNELLY: Sorry. It is 10L. Page 534. I go on to paragraph 17. I am beginning, members of the Tribunal, with the second factor in paragraph 93 of the Supreme Court judgment and the price floor requirement.

MR JUSTICE ROTH: Yes.

MR KENNELLY: Mr Holt, at paragraph 17, summarises the questions raised by the EU court's judgments and Supreme Court findings. He says:

"It is necessary to consider whether merchants are unable to restrain the level of MIFs sufficiently because they can't refuse to accept cards as a means of payment, whether MIFs limit the ability of merchants to exert downward pressure on MSCs, by reducing the possibility of prices dropping below a certain threshold, and MSCs generally exceed MIFs, that is whether MSCs generally exceed MIFs, which might be said to show that the latter set a floor under the former."

He says, in his view, those findings won't hold or may not hold in relation to the MIFs that we are about to look at.

At footnote 12, he says he is not suggesting that acquirers wouldn't take account of interregional MIFs or commercial cards when setting MSCs. My learned friend placed reliance on that. That reflects what we said in our defence.

Of course, I think as Mr Lomas suggested, that's obvious. The MIFs are an input cost. So obviously the acquirers will take them into account, but whether they ultimately feature in the MSC, and to what extent, depends on the type of MIF, amongst other things, and the bargaining power of merchants. It is that

question which is critical for the restriction of competition analysis, not merely that the acquirers will take them into account.

Then we look at the sixth factor. This is addressed from paragraph 20 on page 534. Again, having summarised paragraphs 52 and 55 of the Supreme Court judgment, which you have already seen, Mr Holt says:

"The applicability to the sixth fact needs to be tested in individual cases. If my understanding of the Supreme Court judgment is correct, the sixth fact would not hold if acquirers did not pass on any counterfactual reduction in MIFs to merchants."

Over the page, at 22, this is an important point of principle, he says:

"If by referring to lower counterfactual MSCs the Supreme Court meant that merchants would pay lower MSCs for their card transactions in the counterfactuals, rather than only on their Visa and Mastercard transactions, it is also necessary to consider the impact of the settlement at par rule for the share of transactions that were likely to be carried out on Visa and Mastercard cards. That is a logical benchmark for the Supreme Court to have had in mind from an economic perspective because it measures the impact of MIFs on prices in the relevant market as a whole, that is the market for providing payment card processing services to merchants, and therefore the impact of prices paid by merchants. The effect of settlement at par rule would be that interregional cardholders choose to use higher cost Amex cards rather than Visa or Mastercards, merchants may have ended up paying more rather than less for card transactions in the counterfactual."

He thinks because the competitive sets of interregional and commercial card transactions are so different, it can't be assumed that a settlement at par rule would have resulted in lower rather than higher MSCs for those transactions.

The claimants say in their skeleton that it is not right to consider MSCs in the acquiring market as a whole. It is only relevant to ask if the MSCs containing Visa and Mastercard MIFs are lower in the counterfactual, but we say two things.

First, we say that's completely artificial and wrong in principle, because if in the counterfactual there will be significant switching to more expensive schemes, and MSCs will increase in the acquiring market, that is highly relevant to the sixth factual question in paragraph 93 of the Supreme Court judgment: would the MSC be lower?

That is not the same as the death spiral argument, as the claimants suggest. The death spiral argument is objective effectively because Visa and Mastercard had to be assumed to be similarly constrained if they were both acting unlawfully in the same way.

Here, the other payment schemes, like Amex, who are charging higher MIFs and leading higher MSCs, would be acting entirely lawfully. That's the first of the two points.

The second point, and this is taking up the discussion the Tribunal raised yesterday, regarding the role of the intersystem market, and whether that should be disregarded, but, of course, competition in the intersystem market directly affects competition in the acquiring market, and it is relevant to competition in the acquiring market if substantial numbers of cardholders switch to Amex and China Union Pay and others, who are more expensive, because the MSCs offered by the acquiring banks to merchants will stay high or be higher, because acquirers offer often a single MSC covering Visa, Mastercard, Amex MIFs, China Union Pay and so forth.

MR JUSTICE ROTH: Is that right? They offer the same MSC? So if Visa's MIF is

3% and Mastercard's is 2%, the acquiring bank will offer the same MSC whether it's a Visa or Mastercard purchase? Is there evidence of that? It seems quite surprising to me.

MR KENNELLY: Somebody will give me a reference if there is one.

MR JUSTICE ROTH: You can take me to the evidence, because there have been periods, of course, and we know the Amex charges are higher, that there is only one single MSC.

MR KENNELLY: My recollection of the trial, and again I will be given a reference, and I apologise --

MR JUSTICE ROTH: Yes.

MR KENNELLY: Certainly some acquirers like Worldpay and iZettle will offer a single MSC to their customers, like the merchant saying: "This is the MSC you pay, and it will cover all card transactions".

MR JUSTICE ROTH: If it goes through Worldpay. I am thinking of an acquiring bank.

MR KENNELLY: I am speaking about the acquirers that are offering MSC to merchants in the acquiring market. They offer a single --

MR JUSTICE ROTH: Yes, the acquiring banks. Suppose you are a merchant. You have a shop. Your bank is Barclays. You put your credit card purchases you get from customers through Barclays. Some customers pay with a Visa card. Some customers pay with a Mastercard. You are saying Barclays will charge the same MSC to you as the shop, whether it's bought with a Visa or a Mastercard, even though the MIFs that Barclays has to pay to the issuing bank might be appreciably different.

MR KENNELLY: Again, I will be given a reference.

MR JUSTICE ROTH: That's not something that has been indicated anywhere that

I can see.

MR KENNELLY: It is a single --

MR JUSTICE ROTH: I know there is a reference to blended MSCs based on different Visa cards, but that's a different thing from saying it's a blending as across card issuers.

MR KENNELLY: Yes.

MS SMITH: On the pleadings, there is also obviously the position that there are a number of acquirers who pay MIF plus plus MSCs, where the MIF is set and then there is an agreed margin on top of that. That's paragraph 19 of Visa's defence. They are definitely an aspect of the market as regards the blending. I am not sure what -- I don't think there is a detailed pleaded position on that.

MR JUSTICE ROTH: Yes.

MR KENNELLY: I will wait for the reference. I wouldn't wish to speculate. The point is MSCs in the market as a whole will be higher if card holders switch in large numbers to more expensive --

MR JUSTICE ROTH: Yes, that I understand.

MR KENNELLY: Now, having taken the point of principle on the second and sixth factor I want to turn to the particular MIFs. The interregional MIFs are addressed in section 3 of Mr Holt's report.

Before I go on to that, I am given the reference that hopefully makes the point. It is in the Commission decision, page 656.

MR JUSTICE ROTH: Yes.

MR KENNELLY: See if it is there. 656, recital 249. The reference there is to an acquiring party accepting Visa or Mastercard transactions. They blend both the Visa and the merchant with Mastercard in a single fee.

MR JUSTICE ROTH: Yes. 60% of them do that. Then they say the exceptions

sometimes, percentage plus, etc, but it is only Visa and Mastercard. It is not Amex, is it?

MR KENNELLY: That's what's said there. I will see if I can get a better reference with others. That was evidence from 2004. Again I would caution the Tribunal from carrying that factual finding across to the present day.

MR JUSTICE ROTH: No, I appreciate that, but we can't just have statements from the bar. You have put in quite a lot of evidence in this case.

MR KENNELLY: Yes.

MR JUSTICE ROTH: If you wanted to make a point on evidence, then it should be put in. It doesn't seem to me it is open to either side to say: "You should not grant summary judgment because we might have some evidence that might come saying this". Equally, Ms Smith can't say: "This is what we are going to say in our evidence, or would say, so I should get summary judgment." We have got to have the evidence.

MR KENNELLY: I will give you a better reference.

MR JUSTICE ROTH: That's helpful. It does support what you say as regards Visa and Mastercard, yes.

MR KENNELLY: I will then turn to the evidence I do have, which is Mr Holt's third statement, and what he says specifically about interregional transactions.

If you could turn to paragraph 30, where he deals with the competitor dynamics for interregional payments. He said in his first report, which you have already read, that:

"The sense of competitive space by Visa/Mastercard in the interregional payments market differs markedly from intra EEA or UK domestic markets. A reduction of Visa/Mastercard's inter-regional MIFs to zero could have led to very different outcomes, when compared to reduction in UK domestics MIFs.

A reduction of Visa and Mastercard's MIFs to zero could have led to a large shift in card issue and usage patterns as these competitors could have seized the opportunity to promote their products to issuing banks and consumers for high tendency to travel."

You see at 31:

"Also the cost structure of interregional transactions", because issuer fraud costs for interregional transactions are significantly higher, and having looked at the European Commission's investigation, he is aware that those issuer fraud costs, because they are higher, make it more likely that a reduction in Visa and Mastercard's interregional MIFs to zero would divert transactions to alternative payment methods.

That means, he says, at 32:

"That would have important implications for the counterfactual analysis and in particular it is possible that a reduction in Visa and Mastercard's interregional MIFs to zero could have led to an increase in prices in the acquiring market, that is the MSCs paid by merchants. That could have occurred if a large share of interregional travellers switched from Visa and Mastercard to competitors, and the cost to merchants associated with those competitor payment methods exceeded the cost of using Visa and Mastercard cards."

Then he says:

"How far that is relevant depends on the correct interpretation of the Supreme Court findings."

That's a caveat which he made, and perfectly properly.

MR JUSTICE ROTH: Yes.

MR KENNELLY: But the relevance of it we say is clear from the sixth factor of the Supreme Court's judgment: would MSCs be lower? That is a separate factor

that the Supreme Court raised. This evidence goes directly to that.

MR JUSTICE ROTH: I suppose it depends whether it means MSCs generally or MSCs for Visa and Mastercard.

MR KENNELLY: Indeed.

MR JUSTICE ROTH: I think Mr Holt's point is you should look at the general position of merchants, and even if the Visa and Mastercard MSC is lower, they will end up paying the higher MSCs of other payment systems.

MR KENNELLY: Indeed.

MR JUSTICE ROTH: So they will be worse off.

MR KENNELLY: Indeed. That does require, of course, an interpretation by you of paragraph 93, sixth factor. We say the determination that makes sense, when one considers the theory of harm, the harm, the theory of harm, and the only reading that makes sense is to look at MSCs in the market as a whole, if one is concerned about what merchants will be facing in the acquiring market.

With that, we turn to paragraph 34 and the relative level of interregional MIFs and MSCs. He makes the point, based on the evidence that you have already seen, that the Commission's quantitative analysis show that MIFs set a floor on MSCs, because in the evidence that the Commission examined, even the larger merchants were charged MSCs that were higher than the MIF, and that was the case for the smallest merchants also. So it was a floor in the true sense. He says it is unlikely --

MR JUSTICE ROTH: So 12 out of 17. Is that right?

MR KENNELLY: Yes.

MR JUSTICE ROTH: Yes.

MR KENNELLY: Then he says, at 35:

"It is unlikely a similarly analysis would lead to the same conclusions in the case of

interregional transactions."

He tells us what the MSCs for debit and credit cards in the UK were.

Then he says:

"The average MIF applicable to interregional transactions was significantly above the MSC levels."

So if the MIFs exceeded average MSCs, the evidence is very different from that which the Commission considered, and that requires a more detailed analysis.

He says at the end of his paragraph 36:

"The Tribunal might need to compare the relative level of interregional MIFs in MSCs and the impact of one on the other", which is the key question on restriction, "to determine whether interregional MIFs truly limit the ability of merchants to exert downward pressure on MSCs by reducing the possibility of prices dropping below a certain threshold."

That language of "reducing the possibility of prices dropping below a certain threshold" is taken directly from the General Court's judgment, which was quoted by the Supreme Court at paragraph 62.

So that's about the relative level.

Dr Niels makes a separate point, that the small volumes of interregional MIFs -- and I am sure Mr Cook will take you to this -- I am only going to give you one reference to Dr Niels -- the small volumes of interregional MIFs mean they may not have an appreciable effect on the negotiation of the MSCs.

If you turn very briefly to that, it is in tab 10K of the same bundle. I will show you one paragraph from his report, paragraph 3.7 at page 284.581. He says:

"The small volumes of interregional transactions call into question whether interregional MIFs would constitute a price floor. It is likely in many situations, particularly in sectors of few interregional transactions, and in the absence of

MIF plus plus contracts", noting the point that Ms Smith made a moment ago, "to an acquirer and a given claimant, acquirers will not have set separate MSCs for interregional transactions."

Thus, importantly:

"The MSCs will be set with reference primarily to domestic MIFs, and acquirers' own costs and margins."

So there's a question there about whether the interregional MIFs generally constitute a floor at all.

You saw how the General Court dealt with the blending argument, because, of course, Ms Smith's response to this is well, the Commission looked at the situation where MSCs are blended, and therefore the fact that in some cases the MIF may be higher than the MSC doesn't answer the allegation of restriction of competition.

That's why I took you to paragraphs 162 to 165 of the General Court's judgment, where that was treated as a pure question of fact. The Commission -- I will not take you back to it, you recall the passages -- found that it didn't matter. There was still a restriction, because the MSCs were below the MIF level only for a proportion of large merchants, and in Spain, where that appeared to be the case, there were special features in that national market that were distinguished by the Commission.

Again, issues of fact that we should be able to address in the trial. The General Court never said the submission which my learned friend makes, that where a type of MIF sets no floor at all, it can still be said that this type of MIF distorts competition. That was her submission. There is nothing to that effect in the General Court's judgment or in the Supreme Court. On the contrary, the Supreme Court does refer to floor as a different factor from prices being

lower.

Mr President, this is a point you took up with me yesterday. Is floor simply some appreciable impact on the level of the MSC? But there are two separate factors in the Supreme Court judgment. One is, is there a floor? That is factor two. Factor six is would the MSCs be lower? The only question was if there was an appreciable effect on the level of the MSC, why bother with the second factor? In our submission, it ought to be given a separate meaning, otherwise the Supreme Court wouldn't have used it as a criterion, and they use it as a criterion because of its importance in the earlier decisions.

Now I turn to commercial cards.

MR JUSTICE ROTH: Just before you do that, can you remind me, for my note, when was it that -- was it the General Court or the Commission that looked at Spain?

MR KENNELLY: Well, obviously both but the General Court looked at it in paragraph 165 of --

MR JUSTICE ROTH: 165. Right. I just wanted to make a note. That's all. Thank you. 165.

MR KENNELLY: Let me just make sure I have got that reference right. It is from memory. Yes. 165 at page 903.

MR JUSTICE ROTH: Sorry, this is the General Court?

MR KENNELLY: Yes, the General Court.

MR JUSTICE ROTH: And the Commission?

MR KENNELLY: The Commission addressed it in recitals 452 and 453.

MR JUSTICE ROTH: 452. Thank you.

MR KENNELLY: Now I turn to commercial cards and Mr Holt's report. Going back to him and paragraph 58 of his third report -- sorry. That's wrong. 42 on

page 284.539. So at 42 he discusses the competitive dynamics in the commercial card market segment. He deals first with the higher MSCs point, the Supreme Court's sixth factor. He says:

"The competitive dynamics for commercial cards differ markedly. Amex is the market leader in this segment, and decisions by a few large businesses to switch can lead to significant charges in market share.

43. It has important implications for the restriction analysis. A reduction of MIFs to zero could have led to an increase in prices in the acquiring market."

The same point I made earlier.

He says at 44:

"That might explain why regulators have repeatedly chosen to omit commercial cards from both anti-trust cases and from regulation."

Then over the page, this is the second factor now. 4.3:

"The ability of merchants to decline commercial cards."

This is to do with merchant power and their ability to negotiate with acquirers. This is a critical factor of difference between the facts you saw in the Commission decision and the General Court, and what we say arises in the context of commercial cards, because at 45 he says:

"One of the findings that underpinned the Court of Justice conclusion ... the merchants surveyed, the vast majority, 91% of merchants had never refused to accept a card as means of payment."

They must have -- they were forced to accept payment cards.

46. "It does not hold in the commercial card segment, since the introduction of IFR at least, retailers and businesses who are in a position to selectively decline or surcharge commercial cards."

Of course, they were always able to surcharge commercial cards:

"And they can restrain the level of MIFs or steer the customers towards alternative payment instruments."

MR JUSTICE ROTH: Did the IFR affect this? He says:

"Since the introduction of the IFR."

Is that when this came about, that they could decline?

MR KENNELLY: Yes. Since 2016 they can decline.

MR JUSTICE ROTH: I see.

MR KENNELLY: They were able to surcharge at all material times commercial cards, and they did so. So they can restrain the level of MIFs or steer their customers.

That is because holders of commercial cards will almost always have a consumer card as a back-up, so the incremental cost of failing to accept commercial cards is likely to be significantly smaller than the incremental cost of failing to accept consumer cards, making it harder to read across the logic from the Commission decision.

47. "That is particularly pronounced in the business to business payment segment."

If you could read that, please, to yourselves down to 47, and please also read 48 and 49.

MR JUSTICE ROTH: Yes. We have all read it, but we can pause and read it again.

MR KENNELLY: Thank you. (Pause.)

MR JUSTICE ROTH: Yes.

MR KENNELLY: So the Tribunal can see for commercial cards in particular merchants do have market power. You can see 52:

They may well be able to restrain the level of MIFs. So this is a scenario where the evidence may be able to show that the merchants are able to negotiate with acquirers to force acquirers down towards their marginal costs and mark-up,

in distinction from the point that was made on that question and Commission decision. Right away, the basis of what Mr Holt is saying, merchants don't need to accept commercial cards. It is a fundamental pillar of the Commission's analysis taken away, because they can say to their acquirer "Tell me what your MSC would be if I didn't take commercial cards". The merchants can shop around between acquirers.

That, of course, constrains Visa too, because Visa needs to set the commercial card MIF sufficiently low relative to the benefits the merchants receive to dissuade merchants from refusing to accept --

MR JUSTICE ROTH: Yes. This is since, as I understand it, I think that is Mr Holt's evidence, the honour all cards rule was varied to allow this, since the Commission decision.

MR KENNELLY: Yes. But the point he makes about commercial cards and merchant power has been the case throughout the claim period. That point he makes --

MR JUSTICE ROTH: The ability to decline came with the variation of the rule, didn't it?

MR KENNELLY: Yes. Sorry. To decline, the variation of the rule. The fact they could surcharge, the fact that they could penalise commercial cards in that way demonstrates their market power, and that's a critical factual difference between the situation in the Commission and for commercial cards.

The next point he makes on commercial cards is relative level. Again, he says:

"According to the data from Visa, the average MIF applicable to domestic commercial cards again was significantly above the average level of MSCs paid by merchants."

So again a more detailed analysis is required, as I said, for interregional MIFs.

I pass on --

MR JUSTICE ROTH: When it says "the average level of MSCs", that's an average covering commercial and domestic.

MR KENNELLY: Yes. It is completely credit --

MR JUSTICE ROTH: Credit cards, yes. I am saying when he says "the average of MSCs", that's MSCs which would cover both commercial cards and consumer cards, because we know the MIF for commercial cards is higher than for consumer cards and it is, of course, not capped by the IFR.

MR KENNELLY: Yes, I think you are right. Again if you are not, I'll --

MR JUSTICE ROTH: I think it must be, must it not? Yes.

MR KENNELLY: The point is the relative levels are obviously extremely varied and different from that which the Commission and General Court found to be relevant in the Mastercard case, and again that is something which requires analysis, because it certainly doesn't look like a floor, which is the second criterion, as you saw in 93.

Then pass on MIF reductions by acquirers. A question about materialities. If these are small volumes, and you see that over the page:

"Commercial cards account for a relatively small share of overall transactions. For Visa only 2.3% of transaction volume, 8.6 of value, and 15.1 of total MIFs."

So if they account for a small value, taking up the point that Dr Niels made about interregional MIFs, query the extent to which they do influence the MSCs and the extent to which the acquirers are absorbing them.

MR JUSTICE ROTH: Yes. It is the same point you took us to for the interregionals.

MR KENNELLY: Indeed. With that I move on to the Italian MIFs on page 284.543, paragraph 58. Here again, critical factor of difference between the situation addressed by the Commission in Mastercard, because in Italy there is

a domestic payment system. So merchants are able to decline:

"59. Because of the presence of a domestic debit card scheme, the Italian merchants are able to decline Visa and Mastercard cards, as most consumers also hold a domestic debit card that they could use instead. So the merchants are able to restrain the level of MIFs to such an extent there may be no restriction of competition."

Again, because of that domestic scheme, which obviously doesn't exist in the UK, the Italian merchants are in a much stronger position.

Here again, the evidence may well show that the merchants can negotiate with acquirers in the Italian national market down towards their marginal costs and mark-up.

MR LOMAS: Mr Kennelly, can I just understand this, because it goes both to the surcharge and refuse point. I think it is put against you that these are differences of degree. There may be a strengthening of the bargaining power of the acquirers because of these effects, and that may change the outcome, and it may be relevant to quantum and things like that. But in relation to a 101 analysis, because the MIF is effectively set, there is still a degree of distortion of competition. Now, your answer to that may be the floor decision from the Supreme Court, but do you accept this is a difference of degree rather than a difference of kind, if I can put it that way?

MR KENNELLY: It's a difference of degree, true, but that question of degree is critical to the competition analysis. That's why the Commission examined the degree to which the MIFs operate as a floor and the degree to which there was space in the MSC left for competition. I mean, if it hadn't been necessary to look at degree, the Commission wouldn't have undertaken that analysis. That's why the extent to which the merchants exercise bargaining power may

vary, but that variation, that difference, does need to be examined.

That's why we say there's no authority for my friend's submission that simply setting collectively a default MIF is sufficient, because that's where that argument is going. If that were the case, the CJEU, General Court and Supreme Court have said it. That's precisely what they did not say. They listed six factual questions which need to be addressed and they put floor and lower MSCs in two separate criteria, indicating they should be given a separate meaning.

Mr Lomas is right to the extent that it is degree in the sense that one has to look at the degree to which merchants can exercise bargaining power for the purpose of that particular factual examination, which is not the exhaustive examination.

We see what else Mr Holt says about what needs to be examined, but that's exactly the examination which the domestic court needs to undertake before finding there is a restriction of competition.

MR JUSTICE ROTH: Can I just understand this? The Commission decision concerned EEA MIFs, but it covered the Italian market as well -- well, all the national markets.

MR KENNELLY: Yes.

MR JUSTICE ROTH: I thought that Visa has an "honour all cards" rule, so that if a merchant accepts Visa they have to accept all Visa cards. They can't say "I will take this Visa card and not that Visa card. Are you saying that "honour all cards" rule -- if it doesn't apply to Italy, then I don't see how the Commission decision could cover Italy for the EEA cards, because the "honour all cards" rule is fundamental to the Commission decision.

MR KENNELLY: Obviously, the EEA MIFs were covered by the decision, as you say, Sir, but how the Commission grappled with the operation of these rules in Italy -- is that your question, Sir?

MR JUSTICE ROTH: No. What I am asking is I don't understand how merchants in Italy could decline Visa domestic cards, unless there is evidence that there is some special different "honour all cards" rule under the Visa scheme for Italy. They might wish to do so, but I understood that the Visa scheme rules, which are in this respect common, don't allow them to select which Visa cards they will accept and which they'll reject.

MR KENNELLY: Okay. So three points to make. First, I don't know the answer to the question about how this operated in Italy, and I'll take instructions on that if I can.

MR JUSTICE ROTH: Mr Holt seems to know, because he gives some evidence on it, although it is tentative. I mean, this is the evidence, but I am just trying to understand what he founds that conclusion on.

MR KENNELLY: He is basing that on the presence -- the point you are making is, is the presence of an Italian payment scheme enough? How else, notwithstanding --

MR JUSTICE ROTH: No, I think you misunderstood my question. My question is: does the honour all cards scheme for Visa not apply in Italy? Because if that's so, then there's a gaping error in the Commission decision.

MR KENNELLY: Well, Sir, on that first point, I will take instructions. I don't know how it works --

MR JUSTICE ROTH: That's the question.

MR KENNELLY: Indeed. The second point -- I said I had three -- is regardless of the ability to decline, of course, there is a point of steering. The presence of the Italian domestic payment scheme gives the merchants bargaining power, even if they are not allowed or cannot decline Visa cards. Finally, Sir, this is a question of evidence. We put forward this evidence, and I think also you

could look at what Dr Niels says about this in his report, and I will take you to it, but if there was an answer to this in evidence, we would have something from the claimants. The claimants are in Italy, and they are there as well. If they had evidence to address this point, they could have put evidence in to oppose what Mr Holt and Dr Niels have said, and they have not. In a summary judgment application the Tribunal can draw its own inferences from that failure to meet the evidence that they are putting forward.

With that, I will take you to Dr Niels. That's at page 284.599 behind tab 10K. If you could read paragraph 5.3 to 5 .6.

MR JUSTICE ROTH: Yes.

MR KENNELLY: Thank you. (Pause).

MR JUSTICE ROTH: Yes. He doesn't make that point. He doesn't suggest they could decline. He is focusing on a different point about the behaviour of issuers and then the effect of how that feeds through, as I understand it.

MR KENNELLY: On the point --

MR JUSTICE ROTH: But it would apply, of course, to Visa as much as Mastercard.

MR KENNELLY: Indeed, Sir, but on that point you raised with me, looking back at paragraph 59, what Mr Holt is saying is that because cardholders in Italy have a separate card in their pocket, they have the Italian domestic payment scheme card, they can use that instead of Visa/Mastercard. That allowed the Italian merchant to say: "We will not accept the Visa or Mastercard card. We will take the payment from the Italian payment card, the domestic scheme." His words are:

"... decline Visa/Mastercard cards because they have domestic cards they could use instead."

MR JUSTICE ROTH: My point was that if you are a foreigner coming in to the

merchant, you won't have an Italian card, and if the merchant accepts your Visa card, therefore, it has to honour all cards.

MR KENNELLY: Absolutely.

MR JUSTICE ROTH: That was the point I was making.

MR KENNELLY: I understand that. That must be the case under the "honour all cards" rule. The point he is making here is that, putting those people to one side, looking at the vast majority of the Italian population who are in Italy, one would expect that to be a significant number -- these are domestics MIFs.

MR JUSTICE ROTH: I understand.

MR KENNELLY: They will use the domestic payment card, and that allows merchants to decline Visa and Mastercard entirely. This again allows us to say that the evidence may show that the merchants, in negotiating with their acquirers have far more bargaining power than the acquirers had in the Commission case.

MR LOMAS: Mr Kennelly, can I just pick this up again, picking up on what the President was saying. I understand your point that the logic of the difference in degree, difference in kind argument takes you down a certain path, but doesn't the logic of your argument also take you down a certain path? You have looked quite closely at potential dynamics in Italy. When the Commission was reviewing this market and forming its decision, it was taking a view across all of the 28 domestic markets, and it had that data, or at least had the ability to look for data in relation to the competitive environment in each national market, as you've been positing in relation to Italy. But the Commission then abstracted from that and reached a relatively general decision based on the broader dynamics, which it applied across all national markets.

If your analysis was right, surely the Commission decision would have had to have looked at 28 different markets in detail, Romania, Denmark, or whatever, looking at the precise nature of cards and the issuing and the acquiring market that operated in those markets, but it didn't do that. It abstracted from it and reached more general conclusions.

MR JUSTICE ROTH: It did look, of course, at some national markets, particularly where it thought there might be some differentiating features, and found that they didn't detract from this general analysis.

MR LOMAS: Exactly.

MR KENNELLY: Indeed, but the question is does that give the claimants a basis for summary judgment on questions of fact against Visa? Against Visa, who was not a party to the Mastercard decision at all.

MR JUSTICE ROTH: But they are looking at these points that -- well, you have taken us to Dr Niels, who is giving evidence on behalf of Mastercard. I don't get the impression that Mr Holt, or indeed Dr Niels, they are really not making narrow Visa points or narrow Mastercard points. They are making points that apply to both schemes and, quite reasonably, you are relying on bits of Dr Niels' evidence and no doubt Mr Cook will say he is happy to rely on Mr Holt's evidence because Mr Holt refers to Visa and Mastercard quite frequently. These points are not narrow Visa points. These are points about the Italian market.

MR KENNELLY: Yes. I think the question you put to me is did the Commission look at this, or they must have looked at this? Although we don't see anything specific about Italy, for example, in the Commission decision, are we to assume that they looked at all these issues and then determined them at a pan European level, and then that was found to bind through the General

Court, and the Court of Justice, bind the Supreme Court? How then can we go behind the analysis, which we are to assume the Commission undertook? I think that's the point being put to me.

The fact is we are not bound by that at all. The Supreme Court found that the Commission decision and the Court of Justice judgment bound them because the material facts were the same, and they highlighted what those were.

To the extent that there are facts that were not found by the Commission decision, these points they are making about the Italian MIFs are not expressly addressed in the Commission decision, and there was no argument about them at all. It is entirely inappropriate to just assume that such findings were made, and made against us in the Commission decision, which then bound the Supreme Court sub silencio, and then that's sufficient for summary judgment against us today.

It is entirely inappropriate on questions of fact, which is what these are, all questions of fact. True it is that the Commission must have looked at Italy, among other things, but what findings they did, what analysis they undertook, we don't know, and we are perfectly entitled to adduce our own evidence before the domestics courts on these issues now, on points that were not found to be binding in the Supreme Court judgment.

That's the whole point of 93. The Supreme Court in 93 is not saying collective default MIF equals restriction of competition. There is a list of criteria which have to be satisfied on the facts, and that's the task for the Tribunal, and can't be determined summarily against us.

I am coming to the end of my submissions on that point, unless there is anything else my team want me to say. I will just check whether there is anything else my team want to tell me to say. No.

My final point on this is that these points that have been raised by the Tribunal demonstrate, if I may say so, the significance of the absence of the evidence from the claimants.

There are questions of fact that have to be raised in response to the points we make, interesting questions of the situation in Italy, questions of how the markets operate there, for example, how the commercial cards market operates, the extent of merchant buyer power. Those are questions for trial. Those are classically questions for trial.

The fact that the claimants have not put any evidence in to address them and to address these points tells you that they are suitable for trial. If they had a knock-out blow on the factual questions, they would have produced it, and they did not. They had an opportunity to do so. So for those reasons we say these are eminently questions for trial and not suitable for summary judgment.

Those are my submissions. I am sorry I took longer than I said I would.

MR JUSTICE ROTH: No.

MR KENNELLY: I am going to hand over to Mr Cook.

MR JUSTICE ROTH: Just a moment. As that concludes your submissions, I think we will take a ten-minute break and we will be back at 11.45.

MR KENNELLY: I am grateful.

(Short break)

MR JUSTICE ROTH: Mr Kennelly, there is one question which, in fact, was asked yesterday, and I think Mr Rabinowitz said he would take instructions and come back to us. We hope you are therefore in a position to do so for Visa, which is about the nature of the obligation as between acquirers and issuers in the Visa scheme, by which the payments are made, because we understand the payments go direct.

MR KENNELLY: As far as I am aware, we are still looking into that. Unless I am corrected, I think we will respond in writing. Yes, we are going to respond in writing. Apparently it is quite complicated. So it is better for the Tribunal to have it from us in writing.

MR JUSTICE ROTH: Okay. Right. Fine. Thank you.

Mr Cook.

Submissions by MR COOK

MR COOK: Yes, Sir. Sir, can I just check you can see me, on the basis that -- yes, my screen has now gone back to working properly.

MR JUSTICE ROTH: Yes, we can.

MR COOK: Sir, I am going to start with the status of the Commission decision.

MR JUSTICE ROTH: Yes.

MR COOK: I am going to turn to the decision itself shortly, but just to recap on the relevant law, which I am going to take from your decision, Sir, or your decision with two colleagues in the Trucks litigation, which I hope came through early this morning.

MR JUSTICE ROTH: Yes.

MR COOK: The point I am obviously addressing here -- I am going to come to several points on the Commission decision, but for the moment I am addressing what is the significance of parts of those decisions, parts of the decision, with a small "d", for present purposes, in relation to points they make in relation to commercial cards.

So, Sir, if you have a copy of the Trucks decision available to hand.

MR JUSTICE ROTH: Yes. I am sure you'll appreciate that although I am familiar with it, Mr Lomas and Mr Frazer are not in the same way.

MR COOK: I was exactly about to make that point that of course you were the President on that occasion, but Mr Lomas and Mr Frazer were not involved in that particular Tribunal. So I will work through it with one eye on the fact that two of you are coming to it slightly fresher than perhaps one of you is, Sir.

Essentially, the point that arose in this case was the question of what parts of a Commission decision, in that case a settlement decision, but that doesn't matter for present purposes, are binding upon parties and upon a Tribunal, the court that comes to look at the issues in due course.

If we can pick it up, Sir, at paragraph 6, it starts with an explanation of the decision and the fact that, as is usual for decisions of the Commission, the decision comprises of relatively short operative part, declaring what the Commission has decided, the French dispositif, and a large number of antecedent recital paragraphs explaining the background and reasoning.

As Mr Kennelly showed you this morning, of course the Mastercard decision follows the same approach, that we have 200 pages plus of recitals, but actually the dispositif, the actual decision itself, is two pages which essentially come at the end, although there are some annexes that come afterward. That, of course, is just the standard practice, you know, of the Commission in making these kinds of decision.

Then, if we go down to paragraph 19, it was common ground in that case, and it is common ground since I accepted it, and of course it will be urged upon you by Ms Smith that the operative part and, as usual, it is the article 1 which is often the most significant bit, but the operative part is binding on the parties and, indeed, on the Tribunal, and the dispute there in that particular case concerned the extent to which the recitals and in particular sort of the important parts of the recitals were binding as well.

We can go down to paragraph 34, which essentially is the analysis that the Tribunal carried out in that case in relation to the case law. There's only a couple of the cases I need to take you to on the basis, of course, that I will then come to the Tribunal's reasoning, which is based on the analysis of the cases. One or two of them are particularly helpful in terms of the issues that we are addressing in the present situation.

The first one is paragraph 34, which concerned the High Court decision in BritNed, the decision of Mr Justice Marcus Smith, regarding the bindingness of Commission decisions. If I could ask the Tribunal to read the extract from Mr Justice Smith's judgment that is set out there. (Pause.)

MR JUSTICE ROTH: Yes.

MR COOK: A distinction is drawn there and the distinction is ultimately picked up by the Tribunal in this judgment, between recital of constituting an essential part, basis for a decision and recitals not constituting an essential basis for the decision. Recitals that are an essential basis for the decision are likely to be binding, because they are the operative part of what is the act, the act being the dispositif, the decision at the end, and an important part of that, which is what Mr Justice Marcus Smith says at the start of that quoted extract is the fact that recitals are not generally acts, governmental acts, capable of review by the courts, but there is an exception when they are the essential basis for what is the governmental act, which is the dispositif at the end, but where a recital is not part of the essential basis for the decision, it is not binding on the court.

I will be saying that is indeed the conclusion one ultimately reaches in relation to this ultimate decision. That was from Mr Justice Marcus Smith. If I could also take you down to paragraph 36, which deals with the so-called Dutch banks

case. That was a case in which the Commission had granted negative clearance to two Dutch banking associations, holding that then article 85.1, now article 101.1, didn't apply to their interbank transfer agreement. We see that very narrow point, that it had no effect on trade between member states.

The dispositif, the final decision part, the true decision part of it is there's no breach of article 85.1, but in the statement of reasons the Commission concluded, noted, that the agreement restricted competition to an appreciable extent, and even though the Dutch banks had got their negative clearance, then they wanted to challenge those aspects of it, those aspects of the recitals, the reasoning.

The court of first instance rejected that application as inadmissible, because the applicants weren't calling into question the operative part of the decision which had granted them negative clearance.

As you see there, the explanation, and we can just deal with the first couple of sentences, is that the Court of Justice consistently held that proceedings provided for in Article 173 of the treaty at that stage can be instituted only against an act adversely affecting a person's interest, in other words, against an act capable of affecting a given legal position.

The fact that the definitive decision part was that there was no breach of Article 85.1, meant that it was inadmissible. It simply was not possible for the Dutch banks to challenge essentially conclusions in the recitals that there was a restriction of competition which would prima facie be a breach of Article 85.1, other than the fact that the inter-requirement for an effect on the trade was not met.

It shows, we say, the important aspect that a Commission's recitals may say all sorts of things which are, on the face, unpalatable to the person to whom the decision is addressed, unwelcome, but you simply don't have a general right

to challenge them.

Of course, the same position arises in relation to English law. That classic statement you can only challenge orders, not judgments. The fact that something is said that you don't like in the course of the judgment, you can't challenge that unless it actually feeds into the part of the order, and you disagree with the final order that's reached and want to challenge that order. The same thing applies as a matter of European law.

Those are two parts of the historic or previous case law that I wanted to take you to. Then we come to the conclusions of the Tribunal in the Trucks case, which starts at paragraph 51. The heading is "the analysis". It starts with the position of the parties.

At paragraph 55 we get the discussion and in turn the conclusions, which significantly start at paragraph 56. This comes obviously from the perspective where the decision bit of the decision, i.e. the final seven or so paragraphs, is accepted to be binding, and what is being looked at is the recitals.

So the Tribunal concludes first at paragraph 56:

"The recitals can be used as an aid to interpretation of the operative part insofar as it is unclear or ambiguous."

In the facts of that case, it was about what constitutes a medium or heavy truck in relation to that.

Secondly, at paragraph 57, the Tribunal concludes:

"It is clear from the European jurisprudence that the legal effect is not limited to cases where the operative part is ambiguous or unclear."

Then paragraph 58:

"Although the application for annulment must formally be directed at the operative part, such an application may be made where the substantive challenge is to

an assessment in recitals which affects the substance of what's decided in the operative part."

That's where we get the language of essential basis, or provides the necessary support for the operative part. Essentially, the Tribunal concludes that those are synonymous terms for these purposes.

So you can bring a challenge, paragraph 59, even though you don't dispute the determination in the operative part. Of course the Dutch banks' case is a situation where they were not able to do so on the facts of that particular case.

But paragraph 60:

"The finding in a recital will not constitute the essential basis for the operative part if without the recital the conclusions as to the nature, scope and extent of the infringement are substantiated by other recitals."

So you end up with a test of what is truly essential, which is a relatively narrow one, and the Tribunal rejects the formulation that Mr Brealey QC suggested there of any factual finding that directly relates to the finding of infringement. No. The test is one that is essentially -- well, that is about whether or not it is essential, it is a necessary part of the reasoning which leads to the operative part of the decision.

Then, at paragraph 61, also points that go in relation to the imposition of fines. That is not relevant for present purposes. That is in terms of what is formally binding as a result of a decision.

The Tribunal also went on to consider at paragraph 63 onwards the questions of what is essentially -- what then is article 16, in terms of how far the duty of the courts to take account of decisions means that even though they are not binding, they should essentially be ones that should be given high regard, and you should comply with them, unless there's a good reason not to do so. The

Tribunal says, at paragraph 63:

"The principles derived from the EU jurisprudence discussed above are significant in two respects, in establishing the answer to the question before us."

It explains at paragraph 64 that the obligation resulting from Article 16 is that a national court must not make a decision that's inconsistent with a decision of the Commission. But again what we are talking about is what I would describe as decision, lower case, i.e. the operative part of the decision, including those recitals which are part of the essential basis for the operative part.

It goes on to quote a decision of the English Court of Appeal in Enron Coal, which is a distinction which we will see the quotation -- I needn't ask you to read it -- which explains the distinction in English law between a paragraph that is something that is an essential part of the finding, so challenging that, as we see in italics, tantamount to challenging the finding of infringement, but other parts where the undertaking may simply not be concerned for the purpose of the regulatory proceedings to contest such points, but it may be upset about them being treated as binding in the context of future proceedings.

Then if we go on to paragraph 66, about seven lines from the bottom, they say:

"It does not really matter if Enron is considered as binding. As regards Article 16 in EU law, the force of those observations clearly apply to EU decisions and not domestic decisions."

The language is simply saying that the logic of that, there is a distinction between parts of a decision which are so central essentially -- if you were challenging them, it would be tantamount to challenging the finding of infringement, and other points which are essentially subsidiary and are unlikely to be challenged.

Then, at paragraph 67, it makes what I say is essentially a critical point here, that if a finding, a decision, cannot be challenged in proceedings before the EU courts, then it would ordinarily be a denial of justice for that finding to be binding in national proceedings. But, of course, if it can be challenged on an application in Luxembourg, it falls within the jurisdiction of the EU regime, and thus outside the realm of the national courts.

That's a critical point I would say. Essentially, you can challenge, by way of a challenge to the General Court, the operative part of the decision, and the essential parts of the reasoning. What you can't do is challenge parts of the recitals which are not part of the essential part of the reasoning.

Then, for that reason, paragraph 68, the Tribunal concludes:

"Accordingly, we consider that the principles which determine whether a finding in a recital to the decision is susceptible to challenge before the EU courts are appropriately applicable to determine whether a finding is binding for the purpose of Article 16. The criterion is that the finding in the recital is an essential basis for a determination in the operative part, or necessary to understand the scope of the operative part."

That's in accordance with the view expressed obiter by Mr Justice Marcus Smith in BritNed. So the Tribunal concludes the distinction I showed you at the start between paragraphs that are not part -- recitals that are not part of the essential basis for the operative part are not binding on courts or parties.

So that is the legal position. If I can just take the Tribunal down to paragraph 148 of this judgment, just a short numerical point, that actually when the Tribunal came to carry out the very detailed analysis, which is what they do in the next sort of 70 paragraphs, we conveniently can skip over, what they actually conclude is the operative part of the decision turns out to be 22 articles, 22

recitals out of over 120, but that's something that involves a very detailed consideration of, you know, essentially recital by recital, and as well to some extent within individual recitals, not every part of it will necessarily be part of the essential reasoning, and that is something that the Tribunal, with considerable care, goes through and analyses those parts to determine what is truly the essential basis for that decision.

So that's the legal position.

Just briefly to say what I say, and I will take you to the Commission decision now, is the outcome of applying those principles to the decision we have before us now.

It is probably best if we have the decision open, which is authorities bundle 2, tab 8.

Of course, Mr Kennelly took you to the dispositive part of the decision this morning, which is at page 789, the operative part of the decision, at page 789 of the bundle. This is the Decision, capital D. This is the operative part of the Decision. As Mr Kennelly showed you, the operative part of the Decision is that there is a breach of Article 81, now 101. It is identified very specifically.

Firstly, it is identified in relation to a time period of May 1992 to December 2007. I emphasise the time period simply because, of course, we are looking at a case here which the earliest relevant date is 2011, a full four years further on, and going up to the present day.

Secondly, it is in relation to the intra EEA fallback interchange fees. It is in relation simply to cross-border interchange fees. That's important when we talk -- there were some questions asked of Mr Kennelly at the end of his submissions today about how far the Commission will have considered individual national markets. Of course, all it was interested in was cross-border transactions, largely. It had no reason to consider in any

particular detail, though it is right to say there were a couple of countries in which the cross-border MIF was also a domestic MIF, but other than that it explicitly said it was not considering domestic MIFs. So there was --

MR JUSTICE ROTH: It was considering national markets, because it was considering whether the EEA MIF might not restrict competition in Spain or the Netherlands because of the features of the national market.

MR COOK: Sir, I will come back in relation to that. I am just going to finish this point in relation to commercial cards and I will come back to where we get on a more general basis about the impact of the decision.

Secondly, it's about cross-border and, more importantly, intra EEA cross-border, not interregional interchange fees and, as we have seen, consumer credit and charge cards. So that is the operative part of the Decision, and it is only those parts of the recitals which are the essential basis of that operative Decision in relation to consumer credit and charge cards that is binding or authoritative for these purposes.

Now, right it is, when one looks at this document as a whole, that on page 1 it lists commercial cards as being one of the investigations that the Commission was carrying out was in relation to commercial cards. That's page 580. That was one of the investigations that was listed.

Right it is as well that if one reads the recitals as a whole, that there are, for example, as was picked up yesterday, the definition of payment cards is drawn in very wide terms, and that's in the glossary. We find that on page 589. It explicitly includes in this general sweeping term "payment cards", commercial, credit and charge cards. That's sub-paragraph (v) at the top of 590. It is right that in various places in the recitals.

MR JUSTICE ROTH: I think in that recital, that's the same categorisation, isn't it, as

Dr Niels gives of corporate business, purchasing and fleet?

MR COOK: It is similar I would say.

MR JUSTICE ROTH: He says there are these different kinds and they explain that you have those different kinds.

MR COOK: Yes, they do, yes. With respect to the Commission, I think there actually may be a little bit of confusion in the sense it talks about those, but a number of those may turn out to be debit cards, because certainly, as the market is now in place, a number of commercial cards are, in fact, instantaneous deductions, so debit cards.

MR JUSTICE ROTH: Well, I think these are debit cards and credit cards. Is it charge cards? They say it is a delayed debit, which is slightly different.

MR COOK: It is, Sir. A charge card is a product, and traditionally Amex operated on this basis, although it has expanded into credit in more recent years, being the last 20 plus years, charge cards were something where you received your monthly bill and you were required to pay it off within 30 days. But there was no opportunity for extended credit. One of the points Dr Niels makes is that changes the economics of these cards, because there is not going to be an alternative pot of money coming from interest revenues, because you are, by definition, saying people are not allowed to borrow money on an extended credit basis. So they are talking about credit and charge. Both of those are deferred payment products, pay later products, but actually I think the terminology -- some of the products they talk about would certainly in today's market also include debit products, and Visa in particular has Visa purchasing cards, which again I note in the evidence as being debit cards.

Again, right it is that there are places in the recitals where the Commission talks about payment cards by reference to this definition in wide terms, where the

Commission specifically addresses commercial cards and rejects arguments which Mastercard had made about whether or not that analysis in relation to consumer cards could also apply across in relation to commercial cards.

We get conclusions couched in general terms that there's a breach of Article 81.1, as it was, 101.1, as it now is.

MR JUSTICE ROTH: They do say specifically, don't they, that the commercial cards are the subject of this decision?

MR COOK: The problem is, Sir, you have to be very careful about "the subject of this decision" --

MR JUSTICE ROTH: It is a quote from the Commission decision.

MR COOK: Which, with respect, Sir, I would say is legally wrong, because the operative part of the decision, as I have shown you -- what I would say is the only thing -- it comes down to what is actually a governmental regulatory act, and a regulatory act, you know -- that is the thing you can legally challenge.

MR JUSTICE ROTH: Just to understand, if we look at recital 123, the level and the structure of intra EEA fallback interregional, which are the subject of the decision set out in annex 1, you say that's legally wrong, as I understand it. Is that right?

MR COOK: Well, I think, Sir, to be clear, you know, there is a difference between what one is talking about in terms of a decision with a little "d", and one talks casually about this as being a commercial decision, versus the operative part of the Decision, which I would say is the Decision -- the thing that is actually a regulatory act with legal force.

MR JUSTICE ROTH: You say it is not the subject of the operative part? It is just the subject of the discussion in the decision. Is that right?

MR COOK: Yes, Sir.

MR JUSTICE ROTH: Would that be the right way of putting it?

MR COOK: It is, Sir.

MR JUSTICE ROTH: Yes.

MR COOK: I think if one reads through this, what I would characterise this as being, there are strong signs that this is written on the basis that the Commission was going to make an operative decision in relation to commercial cards, but, for whatever reason, and certainly large parts of the early parts of the decision are written possibly with that intention in mind, but for whatever reason they bottled that and ultimately did not do that. They did not make an operative Decision in relation to commercial cards. And, of course, a mere 13 and a half years later they still haven't made an operative Decision in relation to commercial cards at all. We will come to the paragraph you talked about in relation to the remedies section, where they talk about they have not completed their analysis in relation to efficiencies. Well, that's analysis that 13 and a half years later they still have not completed.

MR JUSTICE ROTH: Well, I think Mastercard changed its arrangements, didn't it? Then we have the IFR.

MR COOK: There are various changes in the market. It is not my intention to be rude about the Commission unnecessarily. It is simply noting the fact this is not something where we have a follow-up decision shortly thereafter. 13 and a half years later there is still no Decision in relation to these points.

I said I would take you to recital 760, which I think, Sir, is one you have been alluding to in some of the questions you put to Mr Kennelly yesterday.

MR JUSTICE ROTH: Yes.

MR COOK: About whether or not this is about remedies. While it is right to say this paragraph is in the section headed "remedy", where it talks about the fact, in

order to remedy the restriction of competition, Mastercard must cease and desist from setting basically the EEA MIF, and then says that obligation shall exclude the EEA MIF insofar as it affects commercial credit and charge cards, because the Commission has not finalised its investigation of possible efficiencies in that regard. That is in a section of the recitals headed "remedy". The reality is what that actually says is the Commission has not completed -- reference to efficiencies is its 101(3) analysis. So it is basically saying it has not come to a final decision on whether there is a breach of Article 101(1).

So it has put in "remedies" like it is something dealing with the remedies for what it has found, but essentially there is no finding in relation to a breach of 101 at all, even in the recitals.

MR JUSTICE ROTH: Well, there is a finding, isn't there, in its conclusions on Article 81.1?

MR COOK: That's why I said in relation to 101, which is the ultimate position on --

MR JUSTICE ROTH: It splits it, as usual, but first it looks at 101(1), finds an infringement for all cards, including commercial cards. Then looks at 101(3), and there is saying: "We have not reached a conclusion on commercial cards, therefore we don't find an infringement of the treaty, and therefore they are not part of the remedy". That's the structure, isn't it?

MR COOK: It is, but the end outcome of this is what we have in terms of the operative decision is findings simply in relation to commercial cards, and exactly what we saw in relation to the Dutch banks case is because points it makes in relation to whether or not there's a restriction of competition in relation to commercial cards are no part of the essential reasoning in relation to whether there's a restriction of competition in relation to consumer cards.

There sort of logically can't be. If one looks through it, what happens consistently is they say: "This is our analysis on consumer cards. Would it also hold good in relation to commercial cards?" So it is never part of the essential reasoning in relation to consumer cards.

As a result, we say none of those recitals are binding on this Tribunal or on Mastercard at all and, more importantly, Mastercard, as in the Dutch banks case, could not have brought a challenge in relation to them, because nothing in the regulatory act, the operative part of the Decision, made any reference to commercial cards. None of the paragraphs that were the operative part of the conclusions in relation to consumer cards had any impact upon those commercial card points.

So what I say in relation to this ultimately is yes, it is right the Commission seems to, in the recitals in various places, you know, make statements that would lead up to an operative Decision. It does not go ahead and make an operative Decision. As a result, the outcome of this is those are legally meaningless, because they amount to analysis and conclusions that Mastercard was legally not entitled to challenge, however much it disagreed with them, and, of course, we do.

MR JUSTICE ROTH: You said the Commission never took a follow-up decision on the question of article 81.3. Suppose it had, and said: "Well, we have now examined efficiencies, more argument. We have concluded there are no efficiencies." You could have appealed that?

MR COOK: Absolutely.

MR JUSTICE ROTH: And the Commission would be relying on all its findings on 81.1. They wouldn't go through it again. But you say that --

MR COOK: They would probably do it by cross-reference, rather than avoid the

duplication. If it didn't incorporate that reasoning into its Decision, the operative Decision in relation to commercial cards, there would be a failure of reasons, which might be resolved on the basis of everyone knows what we are really talking about, but nonetheless at that point it would be a very odd situation.

At that point we would be saying, you know, we are entitled -- the operative parts of that Commission Decision are to be found in a different document.

MR JUSTICE ROTH: And then you could appeal it?

MR COOK: And then we would appeal it, absolutely, Sir. For other cases you examined in Trucks, the name for a moment escapes me, was one where the Commission had produced a supplemental decision which didn't alter the operative part but changed its reasoning in certain respects. You do get an odd situation where they basically said: "Our reasons in document 1, including the operative part, are no longer right. You have to look in document 2 to find our essential reasoning." You can get that situation. The point, Sir, is only if and when, and of course it has not happened, there was an operative decision about commercial cards, that is when Mastercard would have been in a position to say: "We disagree with this analysis. It is wrong for whatever the reasons" -- you know, in relation to that.

For present purposes, the other point to make, of course, is we are not concerned in relation to that. This is going back to a world which is pre-2007. In this case we are looking at a world from 2011 to date. So whether something is right or wrong on particular facts now 14/15 years old, if not older, because the Commission is often quoting data that's much older when it puts forward its reasoning, you know, we simply don't need to get into whether or not it was right to say in 2004 something was right. The question is in 2010/2015 is

what is, in fact, the position.

I say in relation to all these recitals the Tribunal must place no material weight on them. They are essentially --

MR JUSTICE ROTH: When you say "no material weight", are you saying we should not have any regard to the Commission's reasoning at all? Is it inadmissible or is it just no better than the man in the street saying "I don't like Mastercard", or can we take it into account?

MR COOK: I say you shouldn't take into account something that Mastercard has never had the opportunity to challenge. Basically you have untested assertions. Essentially, it is argument from somebody?

MR JUSTICE ROTH: It is more than argument, because, of course, you did argue the case very strongly at the time, and this is the reasoning of the competition authority. So it's reasoning following full argument. You may say some of the reasoning doesn't apply because the facts have changed. I understand that. But if it is not fact dependent or if the facts appear to be the same, do you say we must disregard it and cannot take it into account?

MR COOK: I say, Sir, if the facts appear to be the same, that very much begs the question. The fact the competition authority forms a view --

MR JUSTICE ROTH: Some of it is legal analysis, you see.

MR COOK: I think a little of it is legal analysis which adds anything to what is said in the consumer part of the claim. In all the sections I have looked through overnight it is often factual analysis of whether or not factual propositions hold true in relation to commercial cards or not, and those are exactly the kind of points that are evidential.

The other point to make, Sir, is at no point in preparing for this hearing has Ms Smith or her clients ever said: "Look at paragraph recital" whatever it might be" of

this. We consider that that remains right, is a proper factual basis for this hearing".

So Mastercard has not done the work for this hearing of going through every single paragraph of a non-decision in relation to commercial cards that relates to a period that's cross-border and predates this by many years in order to see whether it disagrees with them.

MR JUSTICE ROTH: We have all got it now. A lot of time has been spent looking at it. I understand your point where it is fact based. I just want to be clear what your submission is where it is just legal reasoning. I mean, do you say we should disregard it or can we take it into account. I understand the point. We are not bound by it. We are not, of course, but can we take it into account?

MR COOK: Sir, I think when you come to something like this --

MR JUSTICE ROTH: That's a submission that goes way beyond the submission you referred to in Trucks, because the general view of all counsel in Trucks was that we can take into account the recitals in the Trucks decision, but we are not bound by them, but you may be making a bolder submission. I don't know. That's what I am trying to understand.

MR COOK: Yes. What I am saying in relation to this is, you know, ultimately, of course, Ms Smith can read out a section of this and say to you: "I consider that is legally the right argument". She can try and substantiate why she says that it's, "legally the right argument", or she can put in some evidence, try and say that she thought her evidence would back up those propositions as remaining true today. She has not, so I say she can't do the latter. I would say it has no greater force, the fact that Ms Smith reads it out from the Commission decision, than it would if she reads out a section from her

skeleton argument. It is an argument, and if it is, you know, a proposition of law and she makes it and you agree with it, you will no doubt adopt it in the way you would a paragraph of Ms Smith's skeleton argument.

MR JUSTICE ROTH: So you say it's no greater view that it is the view of the competition authority than if it is the argument of an advocate?

MR COOK: It is simply at that stage an argument which Mastercard has not had the opportunity to challenge. All sorts of situations where --

MR JUSTICE ROTH: I understand that but it doesn't quite answer the question. Do you say it is no more than an advocate's argument, or does it have some weight because it is the considered view, after considering a lot of argument, of the competition authority? That's my question.

MR COOK: I would say certainly not a great deal more in circumstances where we have not had the opportunity to challenge and test it, and where there has been no attempt to say this is something you should particularly give account to, such that we could have responded to it in order to put in contrary views and argument.

MR JUSTICE ROTH: Right. Thank you.

MR COOK: Sir, that may be a point really on where you get -- you know, on the stage of the case we are at and the fact the claimants have not applied it. It might be different in a case where somebody has said throughout: "We are going to advance this proposition", which happens to fall in recital number X of this decision, and one gets to trial and everyone knows they are fighting that particular bit out, but that's not where we are. It has never been suggested any of these paragraphs have any particular force at all.

That is in relation to the commercial card section of the decision.

The other one which came out of some of the questions asked by the Tribunal at the

end of Mr Kennelly's submission concerns the overall relevance of the Commission Decision. This is the national markets point.

MR JUSTICE ROTH: Yes.

MR COOK: In relation to this, it is obviously right that the Commission, as part of its Decision, and that has been pleaded by the claimants, and is accepted by Mastercard and Visa in their defences, concluded that there are separate national markets across the EU, which at the time meant 28 separate national markets.

Now, the Commission found that Mastercard's cross-border EEA MIF was a restriction of competition. That doesn't mean that it was incumbent upon the Commission or the Commission suggested it had carried out detailed analysis in relation to all 28 national markets. Something can be a restriction of competition, provided there is an effect on trade, whether it affects two national markets, five, ten or all 28. If one reads through the Commission Decision, one can tick off a number of countries, but certainly not all 28 member states. As I say, there was simply no need for the Commission --

MR JUSTICE ROTH: It does a survey of all member states, doesn't it? I thought there is a table setting out the position. That's in the bits we can see. There are bits, of course, we can't see. You will have seen them.

MR COOK: Yes. Certainly, Sir, the extent to which there is actually detailed analysis of the operation of 28 national markets, I would say there was certainly no need for the Commission to do so, nor is there any indication that whatever headline information it had --

MR JUSTICE ROTH: (Overtalking) any market that you would have relied on, and no doubt you drew attention to the position in Denmark, in Finland. I am sorry. Recital 116, is it? 112. Yes. That's the table, isn't? That's where they

go through. I am not sure there were -- were there 28 at the time? In any event, they go through the member states and look at the market shares, and then, no doubt because Mastercard placed reliance on the position in certain national markets, they then do a detailed analysis of Denmark and so on.

MR COOK: But to some extent, Sir, in relation --

MR JUSTICE ROTH: Yes. You gave some detailed figures about the position in different member states. Yes.

MR COOK: But, Sir, for those purposes it was something that was going to be -- the reality is if the EEA MIF, for example, was a floor in relation to 20 of the markets, it wasn't going to help Mastercard in any great detail to say: "But in Latvia and Estonia or in Malta it might not be a flaw." The reality is it is still a restriction of competition.

MR JUSTICE ROTH: That wasn't the Commission's approach, was it, because if you look at the detail in which they looked at Denmark, Finland and I think there was one other country, Netherlands, Luxembourg even, talking about small member states, I mean, they went down to the level of individual countries where -- Norway, because of the EEA, and we have, you know, quite detailed analysis, and I imagine that Mastercard will have put forward all the countries where it thought it had a good case.

MR COOK: Sir, in relation to those countries, just as a matter of fact, those are actually points -- those were specific domestic card schemes that the Commission was using as an example of schemes that operated without MIFs. So those were particular sections in relation to particular domestic card schemes the Commission liked.

My point in relation to this is simply that, you know, this is not a situation where the Tribunal can assume that there has been a detailed full market analysis in

relation to all 28 markets, or that there was a reason for the Commission to do that because, as we saw, for example, in relation to Spain, and in relation to the floor point, you know, this was a case in which the evidence arguably showed that there wasn't a floor in Spain, and the General Court's answer to that point is to say: "Actually, it doesn't matter, because the Commission's analysis, which it has done in relation to a number of other European countries, shows that the EEA MIF is a floor in a number of other markets".

MR JUSTICE ROTH: Mastercard put in country by country information, didn't it? One can see that from the decision. If we look on page 621, footnote 134, including Italy, if we look at recital 559 again, we have got the reference to the CartaSi, which I think is the point, footnote 654, that Dr Niels refers to as being distinctive about Italy. I mean, they are looking at -- they are not just saying "this is Europe or this is the EEA". They are looking at it because they are national markets as an agglomeration of national markets. It may be the basis of the Court of Appeal's comment, which of course you are familiar with.

MR COOK: My short point in relation to this, Sir, is that none of this ultimately takes the Tribunal anywhere in terms of whether or not when we come to look at a different time period in relation to the operation of something very different, which in relation to the Italian MIF is the domestic market, not cross-border, that the extent of the analysis carried out by the Commission in relation to a different time period, for a different purpose, even insofar as they had some information on Italy, knew about CartaSi, that it existed, simply does not take us anywhere in knowing whether or not some of the points we make in relation to that national market, for example, you know, are contradicted by the Commission's analysis. It is a different time period for a different purpose.

MR LOMAS: Sorry, Mr Cook. Could you help me with this. The Supreme Court

decision in the Sainsbury's case was based on domestic UK MIFs and tracked back through the Court of Justice and General Court to the same Commission decision we are talking about. So it was taking that and applying it to a domestic MIF in a certain market, in this case the UK. I am just trying to understand how that application by the Supreme Court of these materials relates to the argument you have just been making.

MR COOK: Yes. So what happened there is, obviously, at the first instance trials there was a great deal of UK-specific factual and expert evidence in relation to that.

MR LOMAS: Oh, I see.

MR COOK: Which results in a whole series of conclusions. For example, you know, there was a lot of evidence about the market share of Amex in the consumer market, the threat posed by Amex in the consumer market, whether that meant that could knock out Mastercard, which they accepted Amex alone could not.

So, you know, having had each of those judges at first instance carried out detailed factual analysis with the benefit of experts of the UK domestic market, they reached certain conclusions, and the upshot of the Supreme Court is that the Supreme Court concludes that the essential facts are ones which are on fours with the six essential facts in the Court of Justice.

So one of the facts, as found in relation to the UK domestic consumer MIF, was it puts a floor under the MSC. That simply tells us nothing about whether in a different market the same factual conclusion will follow. And it tells us nothing from the fact that the Commission reached a conclusion in relation to EEA MIFs about the importance of those, you know, whether or not they, in fact, as set, were a floor in all 28 states.

One simply does not see that kind of conclusion there, because it was not necessary for their decision to conclude that it was a floor in all 28 states. It was enough to conclude that it was a floor in enough states to make it appreciable and had an effect on trade.

MR LOMAS: Thank you.

MR COOK: With respect to the Commission Decision, in at that regard, while notionally -- I say "notionally" only in the sense there is no claim in relation to the subject matter of the decision, it is binding upon Mastercard, but it is simply not relevant for these purposes, in terms of the factual questions that will need to be addressed at trial, and recognising as well that we are all aware of the fairly dramatic changes that have taken place in our own payment market in recent years, development of contactless, for example, what that means in terms of the demise of cash, and there have been substantial changes as a result of the IFR.

One of those changes Mr Kennelly referred to. We often talk about the IFR as being as though all it did was impose caps on interchange fees. Just to be clear, it imposes caps on all interchange fees, not on MIFs. It doesn't actually mention MIFs at all. It actually imposes a restriction on issuers receiving interchange fees of more than the caps. It is nothing to do with MIFs per se.

Among the many things that it does, it changes processing and all sorts of other things, is it actually imposes and requires changes to the “honour all cards” rule. That is the reason why we see in Mr Holt's report he says there was a change following the IFR, because the IFR specifically says the “honour all cards” in the future cannot -- I think it is recital 14 or so -- basically says the “honour all cards” rule cannot extend to mean that where you have capped MIFs you can insist that somebody, because they accept capped cards, cards

with capped MIFs, also has to accept non-capped cards, which is why the "honour all cards" rule at that point allows people to say "I decline commercial cards", whereas previously the all cards rule did not, although it did allow previously in terms of surcharge, as Mr Kennelly said, the opportunity to basically discourage use of those cards by putting a 5% surcharge on it, for example. So there was a lot of scope for discouragement.

So these are all significant changes alongside all the evolution of payment markets that has been taking place, you know, recognising we are now coming up to 14 years after the Commission Decision.

So those are the points in relation to the Commission Decision. I am sorry it has taken a little while to work through them.

MR JUSTICE ROTH: No. It is very important. Thank you.

MR COOK: Turning now to the specific MIFs in consideration, which are the commercial MIFs, interregional MIFs and foreign domestic MIFs, although at this stage the evidence is primarily focused on the Italian market, and particularly the Italian domestic MIF, because, as we heard yesterday, Malta and Gibraltar are tiny parts of the overall claim.

Mastercard's arguments in relation to these MIFs fall into two categories. First, we say, in relation to each of those specific MIFs that the MIF is a lawful ancillary restraint and, second, we say that not all the six essential factual propositions identified by the Supreme Court either hold good or necessarily hold good at this stage, the early stage in the proceedings, in relation to those specific MIFs, and obviously each one of those is dealing with a separate MIF, separate market, separate products, and at trial will need to be made good in relation to the evidence in relation to each one of those separately.

They don't -- unless there is some legal objection, which is what Ms Smith takes,

they don't stand or fall as a whole. They are separate points in relation to the features of each of the separate products and markets.

In terms of the legal points, starting with ancillary restraint, and just to identify the battleground here, Mastercard's argument is that it would simply not be possible to operate a four-party card scheme in each of the relevant product and geographic markets that are under consideration here, without the relevant MIF.

To put that in specific terms, we say, for example, it would not be possible to operate a four-party commercial card scheme in the United Kingdom. So the UK commercial MIF, which we say amounts to a separate product from a consumer card without the commercial MIF.

Essentially, we say that involves an entirely different factual enquiry from the position in relation to consumer cards, because, and Dr Niels sets a number of them out, there are a number of important differences between the commercial card market in the UK and the consumer card market in the UK. There have been trials that looked at the consumer card market here but at the moment we have not looked at the commercial card market here.

My learned friend does not dispute the evidence of Dr Niels, Dr Holt in relation to these points. She seems to accept that it is at least properly arguable, for today's purposes.

What she says is that material is legally irrelevant. She says the key question is whether the main operation could survive. It is common ground that the legal test is the main operation. The disagreement between us is what is the main operation for these purposes?

She says the main operation is a four-party card scheme of any kind. It doesn't matter if you can only operate a consumer card. It doesn't matter if you can

only offer a card product in a single jurisdiction rather than worldwide.

She says, essentially, and this is the logical extension of her submissions rather than how she chooses to characterise them, but essentially says, provided some kind of four-party card scheme can survive somewhere without MIFs, then the specific MIFs under consideration are not ancillary restraints. They are not objectively necessary.

I say, with respect, that is legally wrong, and it is certainly wrong for the purposes of this summary judgment -- arguably wrong for the purposes of this summary judgment stage.

We say the critical starting point, as with any competition analysis, is what is the relevant product and geographic market? Where you have an agreement which is secondary to operation in a particular product or geographic market, the critical question for ancillary restraint, objective necessity, is whether it is impossible to operate a four party scheme in that product or geographic market -- in geographic market without that agreement, without that MIF agreement?

So if the evidence shows that it is impossible to operate in the Italian market, and just thinking for the moment in broad terms, and I will come back obviously to different products within a national market in due course. So if the evidence shows it is impossible to operate in the Italian market without the Italian MIF, we say the Italian MIF is objectively necessary. The logic of my learned friend's argument is, if it's the case that you can't operate your card scheme in Italy, she says it doesn't matter. You can operate one in the UK without a UK MIF. So that's good enough.

So that's essentially what we say is the battleground, that we say the main operation when one looks at the Italian MIF is operating a four-party card scheme in

Italy, not operating one in a completely different jurisdiction, whether or not factually you can do so in the consumer markets as we have shown in the UK. We say, with respect, that entire approach is legally wrong. It would undermine competition law completely, because all too often cooperation between competitors is about entering new geographic markets. It is entering or creating new products so entering new product markets. That is often what ancillary restraint and objective necessity is about. It is always about the specific product, the specific geographic market.

The same thing we say is true of commercial cards. That is a separate product or at least for today's purposes arguably a separate product from consumer cards.

I also note that Dr Niels says here that it's a matter that's going to need investigation, but, as he says, there are a whole variety of products which come within the loose umbrella of commercial cards, but actually perform quite different functions. So it may turn out that there is more than one commercial card market. There are several different distinct types of products within there, because there are competitors that operate in very narrow products, for example, fuel cards, and, you know, depending on the nature of the product, some competitors like Amex have a much higher market share than others.

So it may be possible to operate one particular type of product without a MIF. It may not be possible to offer another without a MIF. Again, we say this is something that is going to be about product and market definition in due course, and the critical question is is the relevant MIF objectively necessary for the operation of that particular kind of four-party card scheme, whether that's a commercial card, whether that is a business deferred payment card, whether that is a business debit card. That will be a something that will be a matter for market definition in due course. It is certainly arguable for the

moment.

Again, my learned friend's argument is essentially it is good enough that we can operate a consumer card. Again, we say the consumer card is not the product that a commercial card MIF is intended to support.

MR JUSTICE ROTH: Yes. You say you have got to ask the relevant question by reference to the relevant market.

MR COOK: Absolutely, Sir. That in a nutshell, as so often is the case, is my submission.

MR JUSTICE ROTH: Yes. We understand.

MR COOK: Just with interregional, because interregional is a bit different, that is an additional feature, and therefore a different product, which a card may or may not offer. One would need to look at the main jurisdictions that provide customers into the UK or in Europe, but there may be separate markets for consumers who want to use their cards internationally. Some card schemes do operate only domestic card products, they don't have international functionality. So operation interregionally is a separate feature. It is arguably a separate product.

MR JUSTICE ROTH: Just to follow that, because I didn't -- I don't know, is that in the evidence? You say there are some cards you can't use outside your country?

MR COOK: It depends on whether or not they actually have, firstly, an international acceptance network, and we see some of the evidence talking about, for example, some of the Chinese cards, that they have massively increased their international acceptance network in recent years. So there's the binary question of whether or not you have international acceptance. So some of the domestic card products in Italy, for example, the card product itself does not

have international acceptance. Its whether or not that particular card is co-badged with Mastercard or Visa for international acceptance. The domestic card is not the same.

MR JUSTICE ROTH: If it is a Mastercard, are there Mastercards where you can't use them outside -- you can't use them if you go abroad?

MR COOK: Sir, I am in the territory of giving evidence which --

MR JUSTICE ROTH: It is has always been the assumption that you can. If you are saying it's a different product market because --

MR COOK: You are offering a different product compared to possibly a domestic card scheme which doesn't have that functionality.

MR JUSTICE ROTH: I see.

MR COOK: As a factual matter, historically, and I don't know how far still -- there were various products under the umbrella of Mastercard, one of which was a product called Solo, which, Sir, you may have heard reference to in the Merricks litigation, which was a type of card that was offered to students, young people and people with poor credit history, for example. People do offer cards that have restricted functionality, for example, can't be used online, can't be used internationally, can't be used for particular kinds of transactions. So that is certainly possible to do that with a product that's under the Mastercard umbrella. Solo was an offshoot of Maestro, but it was deliberately a limited product. For example, if you wanted a debit card for a teenager, you would get them a Solo card on the basis that if their card was stolen, it couldn't be used internationally, for example. So those products have existed historically. I am now giving evidence.

MR JUSTICE ROTH: Just to understand, it may be discussed in the Commission Decision somewhere, because there are a lot of facts there or in one of the

judgments. I don't know. I think all the judgments were based on European as well as domestic law. So they'd have to find an effect on trade.

MR COOK: Effect on trade has always been conceded by Mastercard at least, Sir, just on the basis that there's enough presence of cross-border banking for an effect on trade.

MR JUSTICE ROTH: Yes, but it wouldn't apply necessarily to those cards.

MR COOK: It is not a distinction that has been drawn particularly, Sir, but that's what we say is the argument, the battleground on these points.

Obviously, the questions of are they separate products, geographic market is at least common ground, but those are matters we say for another day. The evidence is sufficiently arguable for those purposes. It is the legal question of what is the right test.

If we can pick up the Court of Appeal decision, because again that's where the battleground lies particularly on this, bundle 3, tab 20. It is paragraph 58 in which the Court of Appeal starts off its summary of the relevant law in relation to ancillary restraint, objective necessity, with the principle we are all very familiar with, which is although it is not expressly stated in Article 101, it is well-established in EU law that a provision of --

MR JUSTICE ROTH: I am so sorry. I missed your reference.

MR COOK: Paragraph 58, Sir.

MR JUSTICE ROTH: 58.

MR COOK: "Although not expressly stated in the wording of article 101(1), it is well-established in EU law that a provision of an agreement which has the effect of restricting competition does not constitute an infringement if it is objectively necessary for the implementation of the main operation of the agreement, provided the main operation does not itself infringe Article 101."

Stop there. The legal test is what is the main operation of the arguably infringing agreement. What I will be saying is when you talk about something like the Italian MIF, the main operation is the operation of a four-party card scheme in Italy, commercial MIF likewise.

Paragraph 59. That simply sets out that the test is impossibility. It is not difficulty. It is impossibility. We accept that is the threshold we will have to meet in due course.

It sets out below a quotation from Mastercard's CJEU, paragraph 91 and 93. It is simply a different formulation of the same point.

If we go to paragraph 93, as quoted there:

"The objective necessity test concerns the question of whether, in the absence of a given restriction of commercial autonomy, a main operation or activity which is not caught by the prohibition and to which that restriction is secondary is likely not to be implemented or not to proceed."

So there it talks about whether the restriction is secondary to the main operation or activity. So that's the battleground there which is essentially what is the operation that we are talking about? We say that simply reflects standard competition law principles, separate products, separate markets, and that's what you look at where you have an agreement which is specifically limited to a particular product or particular geographic market.

I wanted to take you to the Commission guidelines on the applicability of Article 101 to in this case the horizontal cooperation agreements. I hope we can perhaps deal with that before lunch, Sir, because it is a relatively short point.

MR JUSTICE ROTH: Yes.

MR COOK: That hopefully came through yesterday afternoon to the Tribunal. Do you have a copy of that?

MR JUSTICE ROTH: We do. No, that's something else. The Commission -- are they in the bundle?

MR COOK: No, Sir. It was something that should have been sent through mid to late yesterday afternoon, when I feared I might be on yesterday afternoon.

MR JUSTICE ROTH: I think it is just coming up to us. I have got the P&I. No, I haven't. Just one moment. Yes. Thanks. We have got it.

MR COOK: The Commission guidelines in relation to Article 101 in relation to horizontal cooperation agreements.

MR JUSTICE ROTH: Yes.

MR COOK: If we can start at paragraph -- I am just checking I have the right one -- it starts off talking at paragraph 23 onwards about the application of Article 101.1. These are just sort of general statements of the law of which we are all very familiar.

MR JUSTICE ROTH: Yes.

MR COOK: Paragraph 30 is the standard description of the ancillary restraint doctrine . It is there talking about whether or not the horizontal cooperation between competitors would not be able to independently carry out the project or activity covered by the cooperation, not normally giving rise to restrictive effects.

I was going to take the Tribunal to -- there are various specific bits where they talk about particular kinds of horizontal cooperation agreements. I don't suggest those particular kinds are of any great relevance. It is more the general principles that we see from those.

If we go to paragraph 155, this is in the section that's dealing with horizontal production agreements. As I say, in my submission, that doesn't matter, but in section 155 it is obviously right that in order to assess the competitive

relationship it is necessary first to define the relevant market or markets directly concerned by the cooperation in production, that's to say where the markets to which the products manufacture and the production agreement belong.

We say an obvious point, the starting point is market definition, and what is the relevant market for these purposes, both geographic and product.

Then, if one goes down to paragraphs 162 and 163, it explains the obvious point that whether or not a possible competition concerns that production agreements can give rise to a restriction depends on the characteristics of the market in which the agreement takes place as well as the nature of the market, coverage of the cooperation of the product it concerns.

Again, we say, obviously that's how you analyse effects on competition.

“These variables determine the likely effects of production agreement on competition, and therefore the applicability of Article 101(1)."

163. “"Whether a production agreement is likely to give rise to restrictive effects on competition depends on the situation that prevails in the absence of the agreement, where there is alleged restrictions. Consequently, production agreements between companies which compete on markets in which the cooperation occurs are not likely to have restrictive effects on competition, if the cooperation gives rise to a new market, that is to say if the agreement enables the parties to launch a new product or service which they wouldn't otherwise be able to do so."

Again, we say the direct relevance here is if Mastercard and banks that are licensees to Mastercard, couldn't operate in Italy, couldn't operate a new product or commercial card, for example, that is the reason why there's no restriction of competition, because we couldn't operate in that product or geographic

market without the element of cooperation.

Again, just simply based on that set of guidelines, we say these are general principles which shows it must be linked to the right product, both geographic and the nature of the product itself.

Sir, if that's a convenient moment, I was just then going to go to the P&I Club case or decision in due course.

MR JUSTICE ROTH: Yes. We have finished with the guidelines.

MR COOK: We have, Sir.

MR JUSTICE ROTH: Then we will say 2 o'clock.

MR COOK: Thank you, Sir.

(1.01 pm)

(Lunch break)

(2.00 pm)

MR JUSTICE ROTH: Yes, Mr Cook.

MR COOK: Yes, Sir. The next thing I wanted to take the Tribunal to was the Commission's Decision in P&I Club, which again was sent through this morning and I hope the Tribunal have that conveniently to hand.

MR JUSTICE ROTH: Yes, we do.

MR COOK: Again, Sir, we simply say this is just an example of almost how narrowly the ancillary restraint doctrine can be implied in practice by reference to the concept of what is a main agreement. I mean, this decision, just briefly, what it concerns is P&I Insurance.

At paragraph 5, Protection & Indemnity Insurance, that is naval insurance, primarily for shipowners, and in this case it concerned a pooling agreement. We see that from recital 14. So that was the agreement that was under consideration, the central purpose. It was a pooling agreement, which was a claim sharing

agreement between mutual associations, and the purpose (inaudible) amount. Do you have that, Sir, recital 14?

MR JUSTICE ROTH: Yes.

MR COOK: That was what the focus was of the Commission Decision, whether that was a lawful agreement or not. One part of that involved considering whether, on the face of it, restrictive aspects of that agreement were nonetheless lawful ancillary restraints to the main lawful objective of having a pooling agreement. Just to show you how that was approached at recitals 76 and onwards. So we can see the heading there is "Minimum common level of cover". What the Commission is looking at there is restrictions that they conclude are inherent in the pooling agreement.

One of them, at recital 76, and it previously was in different terms, which we need not be concerned about, and then the second sentence at recital 76 was:

"The amended version of the pooling agreement therefore no longer provides for a single level of cover but merely a minimum level of cover to be offered in common by all parties to the agreement."

The Commission goes on to conclude, recital 77:

"A claim share agreement cannot function properly without at least one level of cover to be offered being agreed by all of the members."

It explains why no member will be willing to share claims brought to the pool by other clubs of a higher amount than the ones it can bring to the pool. It explains there that in a commercial pool that's possible, because all members pay pure premiums to the pool, and those vary on the basis of the level of cover provided. It's a claim share agreement between mutuals, where that simply doesn't work.

So what we have here is a situation in which you have a provision which the

Commission concludes is necessary to allow a pooling agreement between mutuals to work, even though it is quite clear that operating on the basis of a commercial pool doesn't involve the same kind of requirement at all. But the Commission concludes at recital 79 that it must be concluded that the law provided for a common level of cover does not include a restriction of competition. The clubs have only agreed to offer a minimum level of cover for their claim sharing agreement, which is a necessary agreement for the functioning of such a system.

We are not worried about the specifics obviously of that decision, so much as it shows, with respect, how narrowly the concept of ancillary restraint operates. What one has there is a conclusion that in order to operate claim sharing between mutuals in P&I insurance, and aspects of that which is inherent, objectively necessary, for that main pooling is a legitimate ancillary restraint, even though, of course, there is no suggestion that P&I insurance wouldn't operate without that pooling, or there aren't other ways to provide P&I insurance.

In the language of the case law, the main operation is as narrow as the specific pooling agreement between those mutuals, and not focused on the fact that they can offer P&I insurance entirely separately on their own, without needing that feature.

We say that's an illustration which confirms the principle that the main operation can be allocated very narrowly, and in this case we will be looking at the specific product in geographic marketing question.

My learned friend's answer to that is paragraph 200 of the Court of Appeal's decision. So we are back to authorities bundle 3, tab 20. This is a very short section considering ancillary restraint. The reason it's a very short

section was because essentially the only point of disagreement between the parties was the question of the asymmetric counterfactual, which the Court of Appeal had dealt with earlier on in the judgment, ruling against Mastercard in relation to the asymmetric counterfactual. It is because Mastercard had relied upon competition from Visa, which it found was an equivalent four-party scheme, or the Court of Appeal found was an equivalent four-party scheme, and that was the justification for its objective necessity argument.

So, as we see at paragraph 198, having earlier made the ruling in relation to the so-called death spiral argument, and the asymmetric -- that's the end of paragraph 198:

"Such questions relating to the asymmetric counterfactual are not for the ancillary restraint issue under 101 but for the issue of exemption under 101(3)."

Essentially, this point can be dealt with very briefly.

The Commission does say at paragraph 200.

MR JUSTICE ROTH: The Court of Appeal.

MR COOK: The Court of Appeal. Yes, Sir.

"The only question in relation to the potential application of the ancillary restraint doctrine in the present context is whether, without the restriction of a default MIF, which is the relevant counterfactual, this type of main operation, namely a four-party card payment scheme could survive. The short answer to that question is the affirmative. The contrary was not suggested by Mastercard or Visa. There are a number of other schemes in other parts of the world which operate perfectly satisfactorily without any default MIF earlier settlement par rule."

My learned friend draws from the fourth line there the type of main operation, namely a four-party card scheme, and she said that is a conclusion that the main

operation is simply a four-party card scheme writ large, of any nature, and provided that there is some four-party card scheme, even if it is a different product, if it's in a different jurisdiction, that is good enough.

With respect, we say, in relation to the Court of Appeal that that is the danger of trying to develop a proposition of general law from a single sentence in a case in which the issue did not arise.

In that case the parties were only concerned with a single product, consumer cards, and while there were strictly two geographic markets, the UK primarily and also a small claim in relation to Ireland, by some of the other merchants in AAM, there was nobody suggesting that there was a relevant difference between those geographic markets, such that the ancillary restraint was a stronger one in one market than the other.

So this was a point simply where the issue of product market, geographic market did not arise.

With respect, we simply say you cannot read that reference there as a ruling on a point which was not being argued and was not being fought out.

I think Mr Rabinowitz and Mr Kennelly have quoted in their skeleton argument -- I think it is paragraph 61 or so -- the well-known quotation from Frozen Valley v Heron Foods, which repeats the dictum from the Earl of Halsbury, Lord Chancellor, in Quinn v Leathem, that every judgment must be read as applicable to the particular facts proved or approved or assumed to be proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

With respect, we say that is exactly appropriate. That's exactly applicable to what's going on here. This is not an exposition of the whole law in dismissing a point

that essentially wasn't being argued, because once the asymmetric counterfactual was off the table, which is dealt with in some detail, neither Mastercard nor Visa suggested there was an ancillary restraint defence, and we didn't suggest there was a defence because in the consumer market at least there was no major non-four-party player which was going to knock us out, because Amex had a percentage -- we will come back to the numbers -- but it was simply not a big enough player for that to be a realistic prospect.

We simply say, in relation to that, my learned friend is trying to turn a sentence which the Court of Appeal are not turning their minds to the relevant issue, as being an exposition of the law, when the entire emphasis in all the case law, in all the analysis is on product and geographic market, and focusing on what is the specific main operation in question. That we say is legally the right approach, and where there is here separate product and geographic markets, or at the very least it is properly arguable that there are separate product markets -- geographic markets is not disputed -- the main operation is a four-party card scheme in that particular product and geographic market.

MR JUSTICE ROTH: Can I just ask you -- I understand commercial cards and Italian cards. For the interregional MIF, what is the product and geographic market do you say?

MR COOK: Sir, one of the things that -- I think Dr Niels alludes to this -- there's going to be a need to look at the markets where significant numbers of tourists come from into Europe, because we are looking here at circumstances where -- they don't have to physically visit. Some of these transactions are ones where somebody buys through the internet, for example. But look at what are some of the most major sources of interregional transactions. That's going to be Middle Eastern, China, North

America, for example, Australia, and in those circumstances the interregional MIF will potentially be necessary, and there are different interregional MIFs, depending on the region, and the question will be is an interregional MIF a necessary ancillary restraint in the context of allowing Mastercard to have an interregional product in China, for example, in competing with domestic products there.

So it will require looking at a number of separate geographic markets worldwide and, as I said before, in terms of the products, what I suggest is essentially a product with international functionality is at least arguably a separate product from one that is purely providing domestic functionality.

MR JUSTICE ROTH: I don't know if Dr Niels alluded to that, whether there really are an appreciable number of Mastercards without international functionality. You referred me to the old Solo debit card. I mean, is it really an appreciable part of Mastercards in issue, those without international functionality?

MR COOK: No, Sir. What I am suggesting in relation to those countries is essentially that there is a separate market for the kind of consumers who want international functionality, and there will be some consumers who have no interest in it at all, but essentially there is an area of competition for consumers who want international functionality, and that can potentially be separated into a separate market, because you are providing an add-on product there with international functionality.

So the point, Sir, is not whether Mastercard would offer a purely domestic Chinese product. The point is whether Mastercard can compete for those consumers in China, for example, can it persuade Chinese consumers who want international functionality to use Mastercard, or whether essentially, if it didn't have an interregional MIF, it would lose out to China Pay and those other

products who basically have an ability to subsidize the costs.

MR JUSTICE ROTH: Yes.

MR COOK: So it is not about whether Mastercard has a domestic only product. It is about whether Mastercard's product with interregional functionality in China is competitive with other products, because if we end up being -- take away the interregional MIF, we become far more expensive, and is that viable or does it simply mean that nobody will want a Mastercard in that particular region?

I do say there are lots of circumstances where you define product, whereby adding an addition to that product, an additional feature, means for purposes of competition law analysis that the product with the feature becomes essentially a separate product, aimed at a separate or different set of consumers. I would say that there is a sufficient basis to say consumers who travel internationally from China, there is a basis to say at least arguably, for present purposes, that is a separate product market there.

MR JUSTICE ROTH: I thought you were saying you don't have to travel. You can just shop online.

MR COOK: As you fairly say, Sir, that's right. People who travel or want to purchase from things other than Chinese websites, which again in China may be a relatively small number of consumers.

MR JUSTICE ROTH: Well, by the time you have a credit card in China, I suspect you may be shopping internationally on websites, but I don't know, but I understand what you are saying.

MR COOK: Yes. So, Sir, that's what we say in relation to that.

Sir, I was not intending to take the Tribunal through the detailed evidence in relation to these points. It is all in Dr Niels' reports.

MR JUSTICE ROTH: Yes, and we have read it, yes.

MR COOK: Absolutely, Sir. To be fair to my learned friend, you know, she is not suggesting that my evidence is insufficient to establish an arguable case. If I am right on the legal question, her answer is the legal one.

I did just want to give you one stat, and it is the one set out in my skeleton argument at paragraph 95. It is there really just to show the reality of what we are talking about here. Sir, you don't particularly need the skeleton. It is paragraph 95, though. It is a piece of information that comes from one of Mr Holt's reports, that over 56% of corporate cards, and that's in the UK, are issued by American Express and that's to be compared with less than 10% of consumer cards.

Now, that shows two points. I mean, it shows, firstly, even within the UK, the radical differences between the consumer market, which is the one that has been already carefully analysed and fought out in the Sainsbury's and AAM litigations, and the commercial market, which has never been the subject of investigation here, the domestic commercial market.

Secondly, it shows this is a real point. This is not just saying there might be a difference. I mean, you are looking at a competitor that is of a completely different order of magnitude. You can see if somebody has over 50% of the market already, when Mastercard and Visa are free to compete effectively, how that would become impossible if they were not free to complete in the way in which they have done historically. I don't need to take it any more than that, but it is just showing in real terms why these are important points.

Now, Sir, you know, I am obviously alive to the Tribunal's thoughts on the Commission Decision. it is right to say that the Commission took a different view in the recitals to the Commission Decision to the view that I am urging upon you now. You already have my submissions on the extent to which

there is any value in considering the Commission's conclusions in relation to that.

Give me one moment, Sir. I am afraid I have just forgotten the reference to the particular paragraph of the Commission's --

MR JUSTICE ROTH: This is about ancillary restraints?

MR COOK: Objective necessity in relation to -- I am afraid I have the wrong reference.

MR JUSTICE ROTH: Yes. I think it may be -- I think I know the paragraph that you --

MR COOK: It is recital 625, Sir. Given the Tribunal's view, I thought it was important to express it directly.

MR JUSTICE ROTH: That's right. Yes.

MR COOK: It is recital 625. I mean, the short point in relation to all of this, Sir, the Commission is looking at whether Mastercard could survive on a cross-border basis -- cross-border is, of course, a very small part of business -- across Europe as a whole.

Now, it is right to say, if one wants to look at this legally, that what the Commission is to some extent doing is saying: "It doesn't matter if Mastercard would lose all of its commercial card business", which it says is highly unlikely. "That would not endanger the viability of the entire scheme".

So the Commission at least is approaching commercial cards on the basis that the relevant ancillary restraint question is in relation to a payment card scheme generally.

That's not something they seek to justify. We would say that is wrong or at least arguably wrong. It is a matter of product definition, certainly in the context of domestic markets, which the Commission is not looking at, and, you know,

simply this is the kind of paragraph that is, with respect, even if the Tribunal gives it some weight or places some value on, simply doesn't answer or provide any relevant assistance to the issue that the trial Tribunal will have to determine, which are the factual points that are concerned with cross-border transactions in the period pre-2007, and trying to decide whether or not a domestic commercial card scheme could survive in the period from 2011 onwards in the UK or in Italy. There's just nothing in this which shows the Commission was asking itself that question, and certainly, of course, it couldn't have been asking itself that question with evidence in relation to the period that we are concerned with, but obviously you have my principal point that this is simply not binding and of little or no value or weight.

MR JUSTICE ROTH: Yes.

MR COOK: I simply say legally -- and these are exactly the kind of points that if the Commission had made a decision, Mastercard would have challenged -- legally its conclusion that losing all of its commercial card business wouldn't endanger the viability of the card scheme is -- I mean, that's one of those points that we say is simply, insofar as you are looking at the commercial MIF, that's simply the wrong question. Insofar as they were trying to defend their position in relation to consumer cards, it simply does not take matters any further. It's not part of the essential reasoning of the consumer cards.

MR JUSTICE ROTH: Yes.

MR COOK: Beyond that, Sir, we obviously rely upon the evidence which is set out in detail in Dr Niels' and also Mr Holt. We say, in the light of that unchallenged evidence, Mastercard has a realistic prospect of showing that each of the commercial MIFs, each of the interregional MIFs, the foreign domestic MIFs is objectively necessary to operate in the relevant product and

geographic market. You obviously understand in relation to Italy, for example, there are a number of domestic three-party schemes with competitors. In relation to commercial cards, it is Amex and a number of other private label schemes.

You have seen in relation to the international markets a number of the competitors that are out there like China Union Pay and other parties like that. So these are all three-party schemes. So we are not in asymmetric counterfactual territory. It is not relying on these.

MR JUSTICE ROTH: We understand that.

MR COOK: So that is the objective necessity, ancillary restraint argument.

The next point concerns whether the six essential facts set out by the Supreme Court necessarily apply. I say necessarily apply, because at the summary judgment stage that's really the test my learned friend has to meet, that regardless of what the evidence credibly might show, they will apply in any event.

The Tribunal is obviously very familiar with those six essential facts. The important ones are that the MIF has the effect of setting a minimum price floor for the MSC, the counterfactual settlement at par and whether in the counterfactual the whole of the MSC is determined by the Commission by competition, and the MSC would be lower.

One of the particular sets of paragraphs that have been looked at in this regard is paragraphs 173 and 174 of the Court of Appeal's decision. I will just briefly take the Tribunal to that again.

I differ slightly from Mr Kennelly in relation to this paragraph, though I think our submissions end up in a similar place, as you might expect, Sir.

It starts off in relation to the CAT's conclusions about restriction of competition by

effect.

Then 174. There the argument did not give much consideration to this approach, save the scheme argues that demonstrated decision was one of fact.

We absolutely agree with that:

"Submitted that one of the vices in the merchant's submissions that any level of MIF would be unlawful, even one allowed by the interchange fee regulation. We accept that in theory it could have been argued the scheme's actual MIF range during the relevant period were so low as to differentiate themselves from a legal position determined by the CJEU. Plainly the reasoning of the CJEU to which we have referred does not mean that any very small default MIF would automatically be a restriction of competition. The factual premise, however, of the Mastercard scheme, the Commission was considering and the schemes it was considering was that default MIFs made up a large percentage, some 90% of the merchant service charge. The CAT may have been correct to say that not every default MIF, however small will automatically be a restriction of competition violating 101, does not deprive the CJEU's decision of binding effect where the facts of these cases are materially indistinguishable."

In relation to that, my learned friend Ms Smith's argument was essentially that she sort of precised this as being that where the MIFs were so small, they had no effect on the MSC, then they won't be anti-competitive, or won't be restricted for competition. We say that puts the test higher than the Court of Appeal did. The Court of Appeal actually talks about a situation where the MIFs represent 90% of the MSC, and they are certainly not saying the MIF needs to be at or close to zero per cent.

We say it is important to recognise the focus is not on the price exclusively, it’s one

of the six essential considerations, but on the competitive process. The requirement, of course, is for there to be an appreciable effect on competition. It may be something that's difficult to know exactly which number constitutes appreciable. It is a matter of judgment. It will be a matter of judgment for the trial Tribunal. But if there's competition on the vast majority of the MSC, it may well not be right to say there's appreciably less competition between acquirers would be our submission.

MR JUSTICE ROTH: Your point is, so I understand, you are not saying here that the MIF is so small, because I think the evidence is from the experts that for the commercial cards, the MIF is actually higher, not lower. I think ditto the interregional MIF, because they use that as objective justification, risk of fraud and so on. So we have got higher MIFs.

What you are saying is it's the second part of that, that it's a question of do they make up an appreciable part or the majority of the MSC. Have I understood that right?

MR COOK: Absolutely, Sir. That's obviously where I am coming to in the principal thrust of Dr Niels' evidence in this regard, which has two aspects, which I will develop slightly. Firstly, we are talking about a very small number of transactions, as you rightly say, Sir, with a higher MIF, but a very small number of transactions, and an uncertain and a peak number of transactions, and we say that's what's important.

While the Court of Appeal was focused on the idea of a very small default MIF, but a very small default MIF potentially applying to everything or close to everything, the other way of looking at that is a larger MIF applying to a very small number of transactions.

So yes, that is the argument, Sir, that it has a minimal, potentially negligible, impact

upon price, and more importantly, not an appreciable effect upon competition.

The reason I wanted to come to this point was you asked Mr Kennelly a question yesterday, the President, if the MIF involved any part of the price being set, other than by competition, and you added other than de minimis, whether that means there is a restriction of competition.

My answer to that question, Sir, is, of course, that the important thing is one has to bear in mind the need for all six of the essential facts to be met.

One of the considerations, of course, is the counterfactual, and that's a point that goes into post our counterfactual, and I will also come back to commercial cards. If the counterfactual is the MSC and the MIF will be the same, it doesn't matter whether none of it is set by competition, because it will be the same in the counterfactual as well.

So that's the reason why you have a need for all six of the essential facts to be met. The critical question you are looking at is whether there is an appreciable reduction in competition compared to the counterfactual.

But, as you rightly say, Sir, the way we develop this point -- well, Sir, I suppose before coming to this, there is also -- I draw the Tribunal's attention to how the Commission approached this issue in the decision, because it is suggested this is all just about blending, but actually if we look at how the Commission approached it, which is at recital 656 onward, it is considerations regarding blending. So volume 2, tab 8, page 760, in the bottom right and recital 656, the section dealing with considerations regarding blending:

"Mastercard uses the argument in general for the EEA MIF and more particularly for EEA MIFs as far as commercial cards are concerned."

You have my submissions in relation to the second part of that:

Essentially it argues that acquirers blend into one single MSC, and then contest that

it doesn't set a sufficient floor for the MSC, and therefore doesn't appreciably restrict competition.

"The Commission's demonstrated" -- and the reference I think is slightly wrong -- "is irrelevant for the purposes of setting restrictive effect."

Then it goes on to say:

"The overall impact of Mastercard's MIF on individual merchant fees can be considerable, as illustrated in diagram 14", which we don't have, "on the proportion of cross-border usage of Mastercard branded credit and charge cards in the EU, 25."

As I said earlier, it was 25 members back in those days, rather than 28 more recently and 27 now.

What it shows is, in order to address the appreciable effect point, the Commission has actually gone to look at the data in order to test the fact that there is a substantial proportion of the right kinds of transactions, the right kind of cross-border transactions, that they will actually feed through into the MSC.

With respect, that's simply an endorsement of what we say is the right factual question, albeit that we are going to have to look at in a different context, which is you need to see whether or not there is a considerable -- the word the Commission uses -- significant, material, proportion of the relevant kinds of transactions, such that it does have an impact upon individual merchant fees, and that we say is the right factual question that needs to be asked. But it does need to be asked.

There are good reasons, as Dr Niels' analysis shows, to suggest that when you look at interregional, when you look at commercial card, the answer to that question in that domestic context, in relation to commercial, the answer to that question interregionally, as opposed to cross-border in the EEA, may well be

different, which is sufficient, we say, for present purposes to say that there is simply no obvious conclusion that the six essential facts in this court judgment necessarily apply. I think these were a couple of paragraphs that Mr Kennelly did take you to.

It is paragraphs 3.7 and 3.8 of Dr Niels' report at section 10K -- tab 10K. He notes, in relation to interregionals, what a small proportion of transactions they represent. His conclusion is based on that small proportion they may well be a peripheral consideration for acquirers. That we say, for present purposes, is the nub of the issue, and that evidence is good enough to raise uncertainty, and there may well be a basis for saying there is not a floor effect for these purposes.

He also makes another -- he does two sections.

MR JUSTICE ROTH: Sorry. Can you pause a moment? (Pause.) I am just trying to understand 658. They are looking at the overall MIF. They are not looking separately at the cross-border MIF or the commercial card MIF.

MR COOK: Sir, if we look at the heading --

MR JUSTICE ROTH: We have not got diagram 14, of course, but they are looking at --

MR COOK: Yes. Sir, I would suggest in relation to that, what they are looking at we can see from the heading is the proportion of sales volumes which are cross-border. So it is back to sort of -- it is a similar analysis that we say is appropriate here, which is, does the EEA MIF apply to -- and we can get this as well from the argument that Mastercard was making, as recorded in recital 656, is the EEA MIF 10%, 20%, 50% of transactions, in which case one can very readily see it will have a direct impact on even a blended MSC, because certainly across Europe as a whole --

MR JUSTICE ROTH: Yes, I understand.

MR COOK: On the other hand, if it is 1 or 2%, does it really have a substantial impact and, more importantly, does it have an appreciable impact on competition. The Commission does not say this is legally a bad point. It points to the data, which essentially shows, in its words, the impact can be considerable. There was a considerable impact.

MR JUSTICE ROTH: I am trying to understand how that fits with footnote 801, dealing with your evidence. They are saying it is de minimis, because the commercial cards represent such a small part, which is I think the same point Dr Niels is making. It is not going to affect the MSC, because it is such a small part of the business. This looks like the same point, isn't it, 801.

MR COOK: Footnote 801, I think it is right to say that is considering the same argument, but it doesn't look here at least that the Commission's analysis has actually addressed it, that particular point.

MR JUSTICE ROTH: I don't know, what -- as you say, the cross-reference seems to be wrong. There is not a section 7.2.1.1 at all. I am not sure what the cross-reference should be. Yes. It is not clear how they have taken that forward, if we go back to trying to understand what they are saying.

MR COOK: Yes. My short point, Sir, is this endorses the need to prove appreciability, and it shows the Commission has adopted it by admittedly looking at the EEA MIF as a whole. It may include a small amount of commercial within that. That's not relevant for present purposes. And showing essentially that if you look at the data, and no doubt the data includes countries like Belgium, Liechtenstein, where people nip across the border on a daily shopping trip basis, the proportion of cross-border transactions is in the Commission's word "considerable", or at least the impact on individual

merchant fees is considerable.

Again, it shows the point that the Commission has dealt with this by showing the specific percentage of cross-border transactions, and demonstrating that they are, in its view, sufficient to be appreciable, and the question is going to be, and we know, of course, interregional is rare, commercial is a very small part of the market, whether the percentage is going to be enough for appreciability.

We say the Commission shows that is a factual enquiry that must be carried out. We say it must be carried out, in terms here we are looking at restriction of competition. It must be carried out, and the question is going to be what impact does it have? The evidence of Dr Niels is when you do that, it may be a peripheral consideration. It may not have a material impact on the MSC that's charged.

MR JUSTICE ROTH: It may be a reference to 443 to 444 perhaps, where they discuss blending.

MR COOK: That may be what's intended.

Now, as a matter of principle, Sir, I would accept, you know, if you have a situation in which a MIF represents 50% of transactions, then that is probably going to be something that is going to be very important to the MSC, and that may well create a situation in which the MSC is then higher, because that is such a high proportion, more so than 90%, which is the Court of Appeal's figure, that it doesn't matter that you blend two numbers if one of those numbers is very heavily weighted in that process.

MR JUSTICE ROTH: Yes.

MR COOK: You know, I don't push the blending argument in its full terms. You can create a floor, I would accept, if something is, you know, very important into the calculation. The question is whether the same analysis applies where

something is a peripheral consideration.

Dr Niels makes two points. Both the fact that these are a small number of transactions, but also his other point, which is at paragraph 3.12 of his report, is the point about transparency, and the point that the number of transactions in question is unknown, and particularly unknown to competitor acquirers, and also that there are different interregional rates, depending on the issuer country. So the number that apply different rates is also unknown, and again that impacts on the extent to which the existence of particular interregional rates affect competition.

My learned friend's answer to that was that there is transparency, because everyone knows the headline numbers. Dr Niels' point is it doesn't matter if you know the headline numbers. You don't know how many transactions they actually apply to. So you don't know as a competing acquirer what the impact they will have upon the total costs for that particular customer.

Dr Niels' expert view is these are important factors that may result in the essential factual basis identified by the Supreme Court not applying. They may undermine the idea of there being a floor. It may undermine the idea that the MSC would have been lower in the counterfactual. We simply say, in the light of the evidence, that simply cannot be dismissed as a frivolous possibility, a possibility with no realistic possibility of success at this stage.

This is not an argument, as I said, that is about blending. It is about whether something actually has any real impact on these numbers.

We make the point in relation to the analysis in relation to floor that one had in the Commission Decision, and the General Court at paragraph 165, where there was a real possibility that the EEA MIF didn't create a floor in Spain on the basis of the evidence.

Now, to some extent, the point for the purposes of the Commission's analysis is they didn't need to show the EEA MIF was a floor in every one of the 25 member states. It was enough that it restricted competition in some markets. That would make it unlawful.

The need is then to consider, in relation to what are different MIFs in different competitive conditions in different time periods, whether similar arguments to Spain apply. There isn't, in fact, a floor effect in those markets.

My learned friend says it is not open for Mastercard to argue this point, because we have admitted that an acquirer will take account of its costs in setting any MSC. With respect, that simply does not advance matters. Of course the acquirers are going to be alive to their cost. That's just a statement of commercial reality. That doesn't mean that having been alive to them, and particularly something that is on a small number of transactions and a small and uncertain number of transactions, that it was going to be a material difference in the sense the MSC would be materially lower, or also that there would be a material difference in the level of competitions between acquirers.

My learned friend also says we admit that the fees paid by acquirers may impact on the level of the MSC, and that word "may" is important and carefully chosen. It is a possibility and, you know, the reality is a possibility that needs to be tested on the evidence in relation to each specific MIF. Something like the UK MIF, which is 90% of the MSC, applies to the vast majority of transactions. The UK consumer MIF, clearly obviously did have that effect. Where something is a small percentage and it is peripheral, that conclusion certainly does not follow automatically at all, and no decision can or should be made, and clearly that argument simply can't be run, until that analysis has been undertaken.

So that's interregional MIFs. In relation to commercial MIFs --

MR JUSTICE ROTH: That's an analysis that Mastercard could undertake, presumably, for the interregional MIFs. I don't know if the commercial MIFs are blended or not in the UK with the consumer MIF. These are all matters Mastercard knows what proportion the commercial sales volume makes up, commercial card sales volume, total sales volume, and so on.

MR COOK: Sir, what we don't have is information, and where we will get disclosure, and Dr Niels deals with these points in his report -- what we need is Mastercard has no visibility of the negotiations between acquirers and merchants. So, you know, it is that process which the claimants are party to, but we're not. So what we are focused on is does that negotiation result in something different. Mastercard has no direct knowledge of whether those are blended MSCs or interchange plus plus or matters like that. So the claimants' disclosure will be an obvious source of information in this regard. What kind of level of transactions they receive. So that is why we say these are points which need to be developed with the benefit of evidence, which will include either disclosure from the claimants or possibly disclosure that we will need to try to persuade banks to provide us, recognising that these are highly confidential matters that they will be sensitive about. So it is a substantial additional exercise. It is not a situation of Mastercard being simply able to print it off its own computer system to do the analysis.

MR JUSTICE ROTH: You pointed out that the Commission carried out a factual analysis in recital 656 to 658 in that table. We can see what it is from the title, though we don't have the figures. Those would be information Mastercard has, presumably. Indeed, that's where it came from. Mastercard gave the commercial card figure, as we see in 801. You would have the figure of what

proportion of UK business commercial cards represent, just as you had it for intra EU.

MR COOK: Sir, that's probably right.

MR JUSTICE ROTH: And you would have the figure for what proportion interregional has, just as you had it for intra EU.

MR COOK: Yes, Sir.

MR JUSTICE ROTH: But we don't, but you haven't put in that evidence.

MR COOK: We have not put it in specifically. Dr Niels talks about this in relative terms, the fact these are small percentages. We have not done the work over a multi-year period, looking at how this has changed over time, with different categories of merchants, for example. That is a step we will have to do in the future, Sir. They will only advance the process so far until we actually have information in relation to the acquirer negotiation process.

Sir, commercial MIFs. That's section 4 of Dr Niels. Now, Dr Niels explains there, in the early sections of that part of his report, the different features involved and the multiple products involved in commercial cards. There is said an issue here of the possibility that there are going to be, upon analysis, separate product markets within the umbrella term "commercial cards".

Dr Niels explains the need to carry out something akin to a market definition exercise for those purposes. He identifies a whole series of factual and economic differences, which he describes as economically highly significant between commercial cards and consumer cards. Paragraph 4.7 of his report lists out a number of those.

If we could just pick up Dr Niels' report briefly. 10K, and it is paragraph 4.7.

MR JUSTICE ROTH: We have, all of us, read it with some care. So it is not a very long report, which is by no means a criticism. Indeed, it is grounds for

gratification. We have, therefore, read it all.

MR COOK: I was not intending to go through it in detail for just that reason.

MR JUSTICE ROTH: Because we must leave time for Ms Smith to respond.

MR COOK: Indeed. It was paragraph 4.8. It is simply a quotation from the Commission's – it's the quotation at the end of paragraph 4.8. It is a quotation from the European Commission's impact assessment, its proposal for the IFR, and it is in relation to the decision to exclude commercial cards. Of course, that in itself shows why commercial cards are seen as being by the Commission quite distinct from consumer cards, such that it excluded them from the impact of the IFR, and explains why. They are then limited shares and they are not expected to expand significantly, as a result of possible interchange fee regulation.

"They could not substitute consumer credit or debit cards as they cater for a specific market segments and their needs, not for the average consumer."

Again, just an example of something which points to the fact that these are not substitutable, i.e. these are separate products.

MR JUSTICE ROTH: Yes.

MR COOK: Again a matter for analysis.

MR JUSTICE ROTH: Yes.

MR COOK: Dr Niels takes the same points in relation to pricing. These are small and not very transparent.

MR JUSTICE ROTH: Actually, I think he does give a figure, which he must have got from somewhere, on the proportion, on a European basis, of commercial card transactions.

MR COOK: Yes.

MR JUSTICE ROTH: In 4.12.

MR COOK: 4.12. Thank you, Sir. So Dr Niels' points again at 4.12, and essentially similar points in relation to interregional about small numbers.

MR JUSTICE ROTH: Yes.

MR COOK: And peripheral impact, lack of transparency.

There is then the counterfactual point he also makes in 4.15, and the question is whether or not the counterfactual for commercial cards will be the same, which is the settlement at par counterfactual. He explains -- it is at 4.17 -- that the economic features of commercial cards mean that a three-party card scheme is much more viable in the context of a business to business payment than it would be in respect of consumer payments.

The short point is the competitive threat is much greater from Amex. So it is more likely that Mastercard might have chosen to launch its own three-party card scheme, if it could not operate with positive interchange fees, than trying to continue with a four-party scheme. That would mean settlement at par is not the right counterfactual.

My learned friend's argument is a familiar one, that essentially counterfactual is not open for argument. It has been established as a matter of law. Sir, I dealt with that very briefly yesterday. I wanted to just -- it will take me about ten minutes just to give you -- that is the end of my submissions -- just a bullet point of my answer in relation to that particular point on that point of law.

So, Sir, in relation to that, the lead question of whether another counterfactual is open to us, or whether it's open for us to argue on the basis of the evidence that another counterfactual is possible, and just to draw the threads of the argument together, we say, firstly, rely upon the well-established jurisprudence of the Court of Justice, European courts generally, that restriction of competition must be assessed within the actual context in which

it occurs. Mastercard, CJEU, paragraph 161.

This requires analysis to take into account in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and structuring of the market or markets in question. The Court of Justice, paragraph 165.

The counterfactual must be realistic and it is permissible, where appropriate, to take account of likely developments that would occur on the market in the absence of those arrangements.

We say those are absolutely clear, strict instructions to any party, any Tribunal or court carrying out a counterfactual analysis that says you must look at the actual context. You must look at real economic context, the real conditions of functioning. We say there simply cannot be, in the light of those strictures, some universal counterfactual which will always apply regardless of context, regardless of product, regardless of the actual conditions of competition.

You simply can't carry out those instructions if you simply adopt a counterfactual without having heard that in evidence, having considered that point. So that's point one.

The second point, we say it is quite clear the Court of Justice did not endorse settlement of a par counterfactual as being inherently right or of general application.

On the contrary, the Court of Justice specifically concluded that the General Court had made an error of law by failing to address the likelihood or even plausibility of the proposed counterfactual.

So we say there's a clear statement from the Court of Justice that it is an error of law to adopt a counterfactual without addressing whether it's likely, in the actual

context, including nature of product, real conditions of the market, etc.

What Ms Smith is urging on you is an error of law. The Court of Justice has told us that. You have to ask the question: is it likely?

The third point is the Court of Justice only upheld the General Court's use of the settlement of par counterfactual for restriction purposes because -- this is CJEU paragraph 173 -- it was the only option presenting itself at first instance. So there was only one counterfactual on the table. If there's only one option, the answer is obvious. But if there's more than one possible counterfactual, and Dr Niels is identifying one here -- post-IFR counterfactual is another one -- the selection must be made. The Tribunal must carry out the analysis by reference to the principles I have just set out.

The fourth point concerns the Court of Appeal's statement that the Court of Justice had endorsed settlement to par counterfactual as a matter of law. That's paragraph 156.

We say in order to understand that statement it is important to understand the criticisms that have been levelled at the settlement at par counterfactual. Those are set out in greater detail in the judgment at first instance. I just want to take you to one of them. That is Mr Justice Popplewell at bundle 3, tab 16, paragraph --

MR JUSTICE ROTH: Why don't you just give us the reference rather than take us.

MR COOK: The reference is paragraph 160.

MR JUSTICE ROTH: Paragraph 160.

MR COOK: Which you have been taken to.

MR JUSTICE ROTH: I don't think we need go there again.

MR COOK: I need to open it myself just to read it out. The argument that Mastercard was making there is that:

"It was contrary to principle to assess whether there has been a restriction of competition by assuming a counterfactual which suffered from the same alleged vice as the actual", which is what the court was being asked to do in that case.

"A no MIF or low MIF creates a floor for the MSC just as much as the MIFs at the level set."

Mastercard's argument was that the no MIF settlement at par counterfactual was not an available counterfactual, because it suffered from exactly the same vice, and that was legally unacceptable. When you understand that one of the arguments we were making was that settlement at par is not a legally possible counterfactual, it is entirely understandable why the Court of Appeal essentially makes the point that the Court of Justice endorsed the settlement at par counterfactual as a matter of law, i.e., it is a legally acceptable counterfactual. It is not, as Mastercard was arguing then, simply one that was unacceptable because it had the same vice, but that is completely different from a conclusion that we say would have been completely impossible on the Court of Justice's reasoning that the Court of Justice had endorsed the settlement at par counterfactual as being the only one ever available, and that, moreover, courts and tribunals were prohibited from carrying out the very exercise which the Court of Justice said must be done and, moreover, said the General Court had committed an error of law by failing to do, i.e. assessing whether it was likely on the particular facts.

The fifth point is, whatever the Court of Appeal thought, the authoritative view is that of the Supreme Court, who expressly held that the correct counterfactual is a factual matter, which it manifestly is in the light of the Court of Justice jurisprudence. We get that from both paragraph 42 of the Supreme Court,

where they relied upon the Tribunal's factual analysis of the correct counterfactual as the basis for saying that was the counterfactual that applied, and if the Supreme Court had thought settlement at par was required as a matter of law, they would have said that. They wouldn't have relied on the judge at first instance having found it as a matter of fact and, secondly, the fact that it is expressly listed as one of the six essential facts. Again, that is a conclusion that's a factual matter, not that it is applicable inherently in all circumstances, regardless of the circumstances.

We simply say all of those factors demonstrate this is something that must be done based on the actual context, the products, the real conditions, and that failing to do that would be an error of law. That's what the court of Justice has told us.

So it must be approached on the evidence, and the evidence from Dr Niels is that in commercial cards three-party is a realistic one.

MR JUSTICE ROTH: We have got that. You are starting to repeat.

MR COOK: Thank you, Sir. Sorry, Sir.

Then, in relation also to the Italian MIF briefly, Dr Niels makes similar points, and we again have similar conclusions there are important differences between that market and the UK consumer market, and it is wrong to reach any judgment before that analysis has been carried out.

Sir, those are my submissions.

MR JUSTICE ROTH: Yes. I think we'll take a ten-minute break and then return and hear Ms Smith.

(Short break)

MR JUSTICE ROTH: Yes. Ms Smith, you need not address us on the question of association of undertakings collective agreement, which formed the basis of

Mr Rabinowitz's submissions, but if you could respond, please, to the point about suing the wrong defendant with regard to the Visa interregional MIF, and then what I might compendiously describe as the three other MIFs that we have been hearing about from Mr Cook and Mr Kennelly.

Reply by MS SMITH

MS SMITH: Sir, if I may with your permission also address the first point that I wanted to address, which is the question of whether the Tribunal is bound by the Court of Appeal and Supreme Court judgments as regards the post-IFR period. I want to make brief submissions on that point.

MR JUSTICE ROTH: Yes. We didn't hear any response on the post-IFR period, I don't think.

MS SMITH: You had the question of whether you were bound because the Court of Appeal and Supreme Court judgments related not only to the period before the coming into force of the IFR but also the period after the coming into force of the IFR.

MR JUSTICE ROTH: Yes, I see, which we asked about at the beginning, yes.

MS SMITH: You asked for submissions on -- that's the point on which I wish to make brief submissions in reply.

MR JUSTICE ROTH: I understand. That's fair enough.

MS SMITH: There are three points I will make submissions on by way of reply. The first of those, as I highlighted, is whether the Tribunal is bound by the Court of Appeal and Supreme Court judgments because those judgments related not only to claims that were based on the period before the introduction or the coming into force of the IFR but also the period after coming into force.

MR JUSTICE ROTH: Yes.

MS SMITH: We do continue to rely upon the binding effect of those judgments and we rely upon those judgments as a matter of precedent.

We make the following points. All the first instance judgments post-dated the coming into force of the IFR on 9th December 2015, and they post-date its publication on 29th April 2015, some six months or so earlier.

The IFR was certainly before those first instance courts, and was explicitly mentioned in all of those judgments, and the parties in those cases at first instance made submissions on the interchange fee regulation.

For your reference, the relevant paragraph numbers are the CAT judgment, paragraph 17.4.3 and numerous subsequent paragraphs where they address the IFR. Mr Justice Popplewell's judgment, paragraphs 77-79, and in particular I would highlight what he said at paragraph 79, and I quote. He said at paragraph 79:

"All parties before me submitted that the interchange fee regulations maximum caps are irrelevant to the determination of the present dispute."

So submissions were made by the parties on the IFR and the relevance of the caps, which were said by all parties to be irrelevant to the determination of the dispute in front of Mr Justice Popplewell, even though we know it related to claims that extended after the period, the date when the IFR applied.

The reference for Mr Justice Phillips' judgment, again paragraphs 77-79. I hope that's the right reference.

MR JUSTICE ROTH: It is the same reference, yes.

MS SMITH: I am a little worried that's not the right reference. Let me double-check. It might be. It is on page 1599 of the bundle numbering.

MR JUSTICE ROTH: 1599. We will find it. Don't worry.

MS SMITH: In fact, by wonderful coincidence it is paragraphs 77-79 of Mr Justice

Phillips' judgment as well.

MR JUSTICE ROTH: About the extent of coalescence between the various first instance judgments I think in this case.

MS SMITH: Yes. We would also make the point that the interchange fee regulation was also mentioned in paragraph 28 of the Court of Appeal's judgment as part of the chronological background to the three appeals. So it was in front of all these courts. You heard both Visa and Mastercard accept yesterday that the first instance claims related to periods both before and after the IFR. Therefore the appeals to the Court of Appeal also related to periods both before and after the IFR.

Now, the schemes say: "Well, we didn't make the submissions on post-IFR counterfactuals in those cases", which we now seek to make, because, as I think Mr Cook put it yesterday morning, it wasn't a point we sought to argue because the claims arising from the post-IFR period at that stage were not very substantial.

MR JUSTICE ROTH: Yes.

MS SMITH: But we say, in these circumstances, where the claims did apply to the period after the introduction of the IFR, where it is specifically considered by the court below and by the Court of Appeal, it was in those circumstances that the Court of Appeal held that it was bound, as a matter of law, by the Court of Justice finding that, and I quote:

"For schemes like the Mastercard and Visa schemes before it, the correct counterfactual was no default MIF and settlement at par."

I am not going to take you back to the Court of Appeal's judgment. I would ask you to specifically have regard to paragraphs 151, 156, 180, 185 and 343 of the Court of Appeal's judgment, where it explicitly said that it was bound, as

a matter of law, by the Court of Justice's finding on the default MIF.

We say similarly you are bound, as a matter of law, by the Court of Justice's finding on the correct counterfactual for the period both before and after the IFR, the introduction or coming into force of the IFR. In fact, it was around for a long period before that.

It is true that by the time the appeal got to the Supreme Court the question of the relevant counterfactual was no longer in dispute. That's paragraph 42 of the judgment. It was not no longer in dispute because as a matter of fact it had been found to apply. The Court of Appeal made it clear that it held that it was bound as a matter of law by the Court of Justice's finding.

We say that's the end of the matter. The Court of Appeal's judgment was a finding that in the appeals, where the claim period is extended, after the coming into force of the IFR, it was bound by the Court of Justice judgment to the effect that the counterfactual, as a matter of law, was one of default MIF and settlement at par. The schemes are arguing now, though they could not be bothered last time round -- they now want to argue that the coming into force of this regulation, which was made explicitly without prejudice to the lawfulness under competition law of any positive MIF, allows those prior findings of the first instance judges and the Court of Appeal to be set aside, but we say the IFR isn't of any significance to the legality of any MIF, as a matter of competition law, and, similarly, it cannot be relied upon to set aside a binding decision of law made by the Court of Appeal as to the relevant counterfactual for the relevant periods before and after the introduction of the IFR, particularly not where the only reason given by the schemes for not having sought to argue for that different counterfactual in those cases is because it was not worth their while at that stage, and in those circumstances

we do say the Tribunal is bound as to the Court of Appeal's findings on the relevant counterfactual.

MR JUSTICE ROTH: Yes.

MS SMITH: You have indicated you don't wish to hear on the points addressed by Mr Rabinowitz on the Visa Inc acquisition, so I will move on to the Visa Inc point that was addressed by Mr Kennelly for Visa, and that is that it is Visa Inc alone who has always set the interregional MIF, and therefore he put the point in a slightly different way in oral submissions yesterday. He said: "Well, the relevant counterfactual doesn't work if Visa Inc is not a defendant to the claims".

Our answer to that is short. It reflects what I think the President said to Mr Kennelly yesterday. Our claims are based on the restriction which arises from the obligation to pay a default MIF contained in the Visa rules, the default MIF settlement rule, which we say -- and I developed these arguments in some detail yesterday -- we say that is the restriction that was found for the purposes of article 101 by the Court of Justice and the Court of Appeal and the Supreme Court.

Now, that obligation, the default MIF settlement rule, is imposed on all acquiring banks in the EEA by their licences with Visa Europe, and described in our pleadings as the Visa Europe arrangements -- and I took you to the RFI -- which Visa admit are operated not only by Visa Inc but by Visa Europe, understandably. All our merchant claimants in these claims have EEA acquirers, and we say that's enough.

MR JUSTICE ROTH: So it is the agreement of all the European acquiring banks and therefore the acquiring banks with whom your clients were dealing.

MS SMITH: Absolutely.

MR JUSTICE ROTH: Which comes under the acquiring banks' licence from Visa Europe.

MS SMITH: Yes.

MR JUSTICE ROTH: Because they are all European acquiring banks.

MS SMITH: Yes. The Visa Europe arrangements that we described in our pleadings.

MR JUSTICE ROTH: Yes.

MS SMITH: Finally then, moving to the claims based on the other MIFs, the quantum of which -- they are not actually based on other MIFs. The quantum is calculated by reference to these other MIFs, is perhaps a better way of putting the issue. I'll leave it there.

The defendants say that the claims that we make, calculated by reference to these other MIFs, should be factually distinguished from the Court of Appeal and Supreme Court judgments.

The first point I want to make on this, and this is important not only for this point but I think overall in the way in which Visa and Mastercard have sought to run their arguments again on this summary judgment.

The Court of Appeal and Supreme Court heard appeals from three cases. Those three cases all proceeded on slightly different facts, slightly different evidence and certainly different legal arguments, but the Court of Appeal and Supreme Court chose to hear those appeals together, and their judgments, in our submission, we would say on purpose, seek to reconcile all those slightly different factual situations that were before the first instance courts, and the Court of Appeal sought to look at things at a level of much more fundamental principle, and they sought in their judgments and the way in which they formulated the restrictions which they found, they sought to address, in our

submission, the overriding competition law problems created by the schemes, and created in particular by the schemes' use of the default MIF rule.

The Court of Appeal and the Supreme Court were not just solving some factual disputes which turned on the minutiae of particular facts arising from the three cases before them. They stood back and looked at what they thought was the fundamental problem, as a matter of competition law, with the use by schemes of a default MIF rule.

The schemes we say now are seeking to ignore the principled approach taken by the Court of Justice and the Court of Appeal and the Supreme Court, and are seeking now in front of you to run another slightly different case, on slightly different facts, using slightly different arguments. But we say that is not the approach the Court of Appeal and Supreme Court took, which can be seen, we say, by the Court of Appeal and the Supreme Court's characterisation of what they called the common factual basis of the cases before them. They did not say every single fact is the same. Of course they didn't, because they weren't. That certainly was not the approach that they took in holding that they were bound by the Court of Justice, because the Court of Justice considered different cases, different cases arising on different facts arising from a different period, with different parties. The common factual basis --

MR JUSTICE ROTH: And a largely different MIF.

MS SMITH: And largely different MIFs. The common factual basis that the Court of Appeal identified as arising under the Court of Appeal's judgment, and in the cases before them, was what they described as there being a default MIF rule, which has the effect that the merchant service charge is set by reference to this artificial cost base, that is the default MIF, rather than being negotiated by merchants simply on the basis of the acquirer's individual marginal costs,

and thus being fully determined by competition.

That was the common factual basis of the cases in front of the Court of Justice and the cases in front of the Court of Appeal and the Supreme Court. It is the common factual basis that our claims share with the claims in front of the Court of Appeal and the claims in front of the Court of Justice.

To make that good I am not going to take you back to the judgment, but I would refer you to the following paragraphs. Paragraph 133 of the Court of Appeal judgment and paragraphs 75, 77, 78 and 79 of the Supreme Court judgment.

So that we say is the common factual basis, this artificial cost base that is set by the default MIF rule, the existence of the default MIF rule that has the effect of setting an artificial cost base.

Obviously, that effect has to be appreciable, and we say that is what the Court of Appeal meant when it made its comments in paragraph 174 of its judgment, about there may be situations where a default MIF is so low that it does not have, we would say, an appreciable effect on competition in the acquiring market.

In response to a question yesterday from the President, Mr Kennelly accepted, what I heard him say was as long as the effect of the common cost, the MIF, on an MSC, on the merchant service charge, is appreciable, that can be a restriction on competition. He didn't say it had to be a certain level before it became a restriction. But then he went on to say: "Well, it is a question of fact as to whether there is an appreciable impact arising from the other types of MIFs, the interregionals and the commercial card MIFs". He said: "This is a question of fact which has yet to be considered in the proceedings in front of the Tribunal now".

But insofar as this is a question of appreciability, we have taken you to Mr Holt's

report, where he accepts that the interregional and commercial MIFs are taken into account by acquirers when setting their MIFs, and it's also important not to lose sight of the schemes' pleaded cases in this regard.

I referred you to this yesterday, but I think it is worth taking you to paragraph 43 of my skeleton, because the pleaded cases are incredibly important. You don't need to descend to the level of looking at evidence. You have the parties' pleaded cases. As I say in paragraph 43 of my skeleton argument, on page 14: Both defendants admit in their defences that the prices acquirers charge to merchants take into account -- that's the MSCs -- take into account the MIFs. They don't seek to distinguish between the different types of MIF.

If I can take you first to Visa's defence, which we cite in paragraph 43. That's in the original CMC bundle 2A, tab 38.

MR JUSTICE ROTH: Sorry. Tab?

MS SMITH: 38 of the original CMC bundle, not the summary judgment, the original CMC bundle. 38 is Visa's re-amended defence.

MR JUSTICE ROTH: Yes.

MS SMITH: Page 437 of the bundle, the first paragraph on that page, 437, is actually paragraph 71 (a), and it is responding to our pleading that the MIF acts as a price floor to the MSC.

If I can take you to the amendments underlined at the end of that paragraph:

"As to the fourth sentence", that's our pleading that the MIF acts as a price floor, "it is denied that all acquirers pass on the MIF in full."

Then they make arguments about the extent to which the acquirers do so. So they don't deny that none of the MIF is passed on -- of any MIF is passed on. It's a question of extent.

We say the position is even clearer when you look at Mastercard's defence, which is

in the following tab, tab 39, page 469, internal page numbering 22, paragraph 47 at the very bottom of that page:

"As to paragraph 32, in relation to the MSC, unless the agreement between the merchant and the acquirer splits out separate elements of the fee, there is a single fee negotiated by the acquirer and the merchant in competition with other acquirers."

Then I had underlined this following sentence:

"However, its admitted that the acquirer will take account of its costs, which will include any applicable interchange fee, in negotiating its fee."

So there is an admission that in setting and negotiating the MSC the acquirer will take account of its costs, which will include any applicable interchange fee. Again there is no distinction sought to be drawn as to appreciability.

The submissions that were made yesterday by Mr Kennelly and today by Mr Cook about appreciability did at times have a little bit of an Alice-in-Wonderland flavour about them. The President picked up with Mr Cook today the point that, when we are thinking about appreciability, apart from the point that appreciability -- I should make straightaway the point that appreciability is not a point that's made on its face by the experts -- the President picked up the point with Mr Cook that the MIFs about which these arguments are made, the interregionals and the commercial card MIFs, are generally higher, in fact, than consumer MIFs. So in response to that Mr Cook said, "Yes, of course that's admitted by our experts, explicitly said by our experts, but this is a question of blending, because the volume of them might be so small, even though they are extremely high or higher". I take back the words "extremely high". They are higher than the consumer MIFs. It's a question of low proportions. It's a question of blending.

Now, in common with a number of arguments that are now being run again by the schemes, this is an argument that was run and which failed before the commission. Mr Cook, you will recall, when addressing the issue of blending, took you, Sir, to paragraphs 656 through to 658 of the commission's decision on page 760 of bundle 2 of the authorities bundle, page 760 of the bundle numbering. You will recall, Sir, Mr Cook took you to those paragraphs, 656 through to 658. I think you picked up the point in footnote 801 that effectively Mastercard appeared to have been making the point about volumes and blending and de minimis and appreciability in front of the commission, and that was rejected. Mr Cook said, "No, no, no. It is only rejected on the facts", but if you look back, if I could take you in this regard to paragraphs 442 through to 444 of the commission's decision on pages 707 to 708 of the bundle numbering, the commission rejects this blending point as a matter of principle in effectively the terms that we have made that it is enough that it is simply taken into account.

They say at paragraph 442:

"More fundamentally, in assessing the economic effect of a MIF on prices, it is not decisive how individual acquirers precisely account for the artificial input cost."

That is the MIF.

"In certain Member States an acquirer may decide to charge a given merchant separately or it may wait for the respective share of transactions and charge a single merchant fee based on the weighted average."

It may charge them a blended MSC.

"In both alternatives merchants and subsequent customers are harmed by the inflated cost base of merchant fees."

Then they look at the weighting and blending and there is evidence that blending

does take place they say in 443.

In paragraph 444 they come to the conclusion as a matter of principle we say:

"The fact that merchant fees may be blended for cross-border and domestic transactions, or for that matter for payments made using different card types or card brands ..."

So they address the cross-border. They address the different types of cards:

"... does not alter the restrictive and distorted effect of Mastercard's cross-border interchange fees in the acquiring market, since in both situations (blending/no blending) the costs are passed on to merchants and the MIF is a significant" -- we would say more than appreciable -- "element of the price paid by merchants for card acceptance."

Then they cross-refer in the footnote to 453 and 454 and that is the point about even where a MIF is positive -- sorry -- whether it is positive, zero or negative, it always forms a price floor and a restriction.

MR JUSTICE ROTH: Sorry. You were at 4...?

MS SMITH: Simply just for completeness the footnote 506 refers to recitals 453 and 454. Just so it is not said against me I did not close off that point, that is simply the point at 453 and 454 there is the point made that:

"Under article 81.1 there is legally no reason why the negative effect of MIF on prices in the acquiring markets to the detriment of merchants should not constitute a restriction of competition because of the potential benefits which a MIF may create for cardholders."

So it's not a point --

MR JUSTICE ROTH: That's a sort of different point, yes.

MS SMITH: But it is not saying this is a question of fact. It is saying it is a question in my submission of principle.

Now Mr Cook made a number of submissions to you on ancillary restraints.

MR JUSTICE ROTH: Just before you go on to that, one can see they will take it into account and if it is blended -- clearly if it's an appreciable part of the blend, it will have an appreciable effect, and the fact that it is not the whole of the MSC or 90%, but much less, because it is blended with something else, is not going to matter, but if it is a very small part taken into account, it may have no appreciable difference, may it not? I mean, they make the point that just because it's blended, that's no answer. I can see that. It can't be in itself an answer, but don't you still have to go through the process that they go through in the other paragraph or recital that you just took us to -- is it 656 -- of saying how much -- that it is a not insignificant part of the blend.

MS SMITH: Well, Sir, not we say when the defendants' pleaded cases in these claims is that the acquirers do reflect these costs at least to some extent and that those costs will include any applicable interchange fee, and that the rule that we are challenging more fundamentally, the rule or the restriction that was found by the Court of Appeal was a rule that applies across the board to all MIFs. You don't need in my submission, in order to find that that rule is a restriction, find that as a matter of pounds and pence every time that that rule is applied it has the effect -- overall the rule clearly has an appreciable effect.

MR JUSTICE ROTH: Yes.

MS SMITH: As I said, it is the fundamental point about the Court of Appeal's judgment which is the factual basis, being the default MIF rule, having the effect that generally there is this artificial cost base. It is the default MIF rule which is the restriction.

MR JUSTICE ROTH: No, I understand you say that point. Therefore, whatever MIF

is brought within the scope of that rule, that's a factual detail, but it's the rule that is the restriction.

MS SMITH: Yes, Sir.

MR JUSTICE ROTH: That's the point you are making?

MS SMITH: Yes, Sir. That applies with equal force to Mr Cook's submissions on ancillary restraint. We say, following the Court of Appeal's judgment, the ancillary restraint is the default MIF settlement rule. That is the ancillary restraint which needs to be considered alongside the main operation, the operation of the four-party payment scheme, as to whether that ancillary restraint, the default MIF settlement rule, is objectively necessary for the main operation to survive.

That is exactly what the Court of Appeal said in paragraph 200 of their judgment, having found that the restriction -- if I could take you back to paragraph 200 of the Court of Appeal's judgment, which is in authorities bundle 3, tab 20, paragraph 200. You will recall --

MR JUSTICE ROTH: Yes. I mean, Mr Cook took us to it as well.

MS SMITH: -- The section on ancillary restraint came after the section of the Court of Appeal's judgment, which we went through in minute detail, about what the measures in question are for the purposes of the counterfactual, and the measure in question being the rule, and then in paragraph 200:

"The only question in relation to the potential application of the ancillary restraint doctrine in the present context is whether ..."

So before we even get on to questions about whether the default -- the death spiral is a good argument, the Court of Appeal says:

"The only question in relation to the potential application of the ancillary restraint doctrine in the present contract is whether, without the restriction of a default

MIF, which is the relevant counterfactual" -- that is the ancillary restraint, the default rule -- "this type of operation, main operation, namely a four-party card payment scheme, would survive. The short answer to that question is in the affirmative and the contrary was not suggested by Mastercard or Visa. There are a number of such schemes in other parts of the world, four-party schemes, which operate perfectly satisfactorily without any default MIF and only a settlement at par rule."

Again the ancillary restraint is the default MIF rule, and if you take that away, you end up with no default MIF and a settlement at par rule and that is what needs to be considered for the purposes of the ancillary restraint doctrine. That is what the Court of Appeal said.

MR JUSTICE ROTH: Does that mean that if you say, "Well, it could survive for consumer cards, but it couldn't survive for commercial cards", that distinction is irrelevant?

MS SMITH: I will address that point, if I may, and Mr Cook's argument about product markets.

MR JUSTICE ROTH: Yes. Okay. You are coming back to that. Okay.

MS SMITH: We say that fatally confuses the question of what the product or service is being offered by Mastercard and Visa and what the product or service is being offered by the issuing banks, the card issuers, to consumers. Visa and Mastercard don't offer cards to consumers. The issuing banks do. What Visa and Mastercard provide are platform services to acquirers and issuers. They are settlement services over the Visa and Mastercard platform, the technology that allows acquirers and issuers to interact and, if contracted to do so, also clearing services.

Those services are what are provided by Visa and Mastercard through their

schemes. There is one scheme provided by Visa and one scheme provided by Mastercard throughout Europe. That one platform, one scheme, one platform of technology services is provided throughout Europe by Mastercard, and that Mastercard scheme contains the Mastercard default rule and the Visa scheme contains the Visa default rule. There is no interregional payment scheme, no interregional product offered by Mastercard. It's simply that when Mastercard or Visa branded cards issued by the issuing banks are used in a different geographical region to that where they have been issued, a different MIF is paid under the scheme rules.

Similarly there's no commercial card payment scheme. There's no commercial card Visa payment scheme or commercial card Mastercard payment scheme. It is simply that when a card that has been issued with certain characteristics by an issuing bank is used, it attracts a different level of MIF under the same scheme and the same scheme rules.

In fact, the services that are provided by Visa and Mastercard to acquirers and issuers, the platform services, the technology, those services are not actually even paid for by the MIF. Those services are paid for by the scheme fees. The MIF is not a price for those services even. The MIF is simply -- the payment of the MIF is simply a condition of access to those schemes. It's simply a mandated payment that if issuers and acquirers wish to use the schemes, the acquirers need to make that payment to the issuers. It is not even a payment for services provided over the scheme. It is a condition that the acquirers must agree to in order to access the service, but it is not a payment for any service to the acquirer.

Now in that regard it is also, in fact, informative to look at the commission decision, because it would appear that this again was an argument that was run

unsuccessfully by Mastercard in front of the commission. If I could take you back -- I am not saying that the commission is binding -- the decision or these particular paragraphs -- I will come to that point -- are binding on you. It is just to give you the idea that these are all arguments that are being run again and again and again, and the whole point is the Court of Appeal stood back and said, "No. Let's look at this as a matter of principle. It is the potential nature of these rules that's the problem".

So if you just look at the commission decision, authorities bundle 2, tab 8, and this time can I ask you to look at paragraph 560? This is an argument -- paragraph 560 on bundle numbering 736. Page 736 of the bundle, paragraph 560 of the commission's decision, and this is an argument that Mastercard was running before the commission about objective necessity, the same argument, objective necessity, ancillary restraint.

The commission says at paragraph 560:

"Contrary to Mastercard's argument" -- you will see what their argument is in footnote 663 -- "we note that Mastercard's arguments on the objective necessity of a MIF were initially not geared to international payment card systems, but that the alleged need for system pricing in a lot of the interchange fee was identified for open card schemes in general."

That was their initial arguments. Then you will see after the brackets:

"Only after Mastercard was confronted with the SSO on 20th June 2006 Mastercard modified its argument and since then it claims", Mastercard claims, "that a MIF would be intrinsic to the operation of an international four-party card scheme."

So the commission's answer to that is:

"Contrary to Mastercard's argument, the cross-border functionality of Mastercard and

Maestro branded payment cards cannot be a decisive difference between this scheme and the five domestic schemes when it comes to assessing the objective necessity of Mastercard's MIF."

Then over the page that is because:

"If the necessity of a MIF or a default MIF rule was related to the cross-border functionality of a scheme's card, one would expect to see that a MIF" -- the requirement to pay a MIF -- "is set for cross-border transactions only. That is, however, not the case. Mastercard's MIF" -- the requirement to pay a MIF -- "is not limited to cross-border payments but applies also to domestic transactions. Moreover, there is no reason why it should be possible to operate without a MIF in domestic systems but impossible in systems that also switch cross-border payments. For instance, the establishment of interbank claims for cross-border and domestic payments is very similar, as both cross-border and domestic payment card transactions are cleared centrally in a clearing house and claims are subsequently settled centrally at a settlement bank. Once clearing and settlement is centralised, the number of participants does not matter, as interbank debts and claims are established electronically. It simply becomes a matter of IT capacity. Mastercard did not contest this fact."

So what I say is the commission is focusing there on the scheme services offered by Mastercard. The question of IT and IT capacity and the same scheme services are offered for the different transactions, and you cannot say that, in order for these scheme services offered by Mastercard to continue to be offered, there is some distinction to be made between cross-border and domestic payments, because the scheme services, the IT capacity, is the same. It is just a matter of IT capacity.

So we say this is again sleight of hand based on arguments about product markets, which actually when you stand back are just not -- are just wrong. There is one scheme for each of Visa and Mastercard across Europe and one scheme rule requiring the payment of a default MIF at different levels depending on the transaction that goes across the Visa or Mastercard platform, and that we say is the restriction. That is the ancillary restraint, and the Court of Appeal said that it is quite clear that that ancillary restraint is not necessary for the operation of a four-party payment scheme.

So my very final point is this. There were extensive submissions made this morning to the Tribunal about the binding nature of Commission decisions, and I think I can deal with that point very briefly indeed. We don't base our arguments as regards the interregionals and commercial card MIFs and domestic MIFs on a suggestion that the Tribunal is bound by the paragraphs of the Commission decision. The question of the binding nature of the paragraphs of the commission decision is a question that, as the President said, needs to be considered on the basis of the decisions in Trucks judgment and the approach taken to the binding nature of the operative part of commission decisions.

We do, however, need to put it on the record that we disagree with Mr Kennelly's submission in response to a question from the President that if a paragraph of the commission decision does not bind the Tribunal, the Tribunal should pay no attention to it. We certainly disagree with that submission. We also certainly disagree with the submission, as Mr Cook put it slightly differently, that those paragraphs are legally meaningless. Paragraphs of a commission decision, whether or not they are binding, are relevant evidence to be taken into account by the Tribunal and in our submission that is trite law. One only needs to look, for example, to the House of Lords' judgment in Crehan. We

do say that they are relevant particularly when there is reasoning that the commission has engaged in which rejects arguments that have been made by the schemes in front of you, but what we rely upon is the binding nature. The binding judgments we rely upon are the Court of Justice, the Court of Appeal and the Supreme Court judgments and those are clearly binding on the Tribunal. We do say the Tribunal can take into account and should take into account the reasoning of the commission whether or not it is bound by that, those particular paragraphs.

Now our submissions on interregionals, we submitted -- we took you to the General Court's judgment in paragraphs 163 and 165, which in our submission -- and we took you to those to make the point that the reasoning which underlies the essential factual basis of the Court of Justice's judgment and the Court of Appeal's judgment and the Supreme Court judgment that the MIF affects the MSC applies even to the factual situation when the MSC is lower than the MIF.

I do, finally, just need to take you to those paragraphs of the General Court's judgment, because it was suggested to you that those were simply decisions on particular facts. They weren't. If I could take you to the authorities bundle 2 and the General Court judgment in tab 11, page 903 of the bundle numbering, what we took you to was paragraphs 163 through to 165.

MR JUSTICE ROTH: Yes.

MS SMITH: We relied -- it was not on those parts that say, "Oh, there are certain schemes where the MSCs are higher than the MIFs". The parts of those paragraphs that we relied upon are those that say as a matter of principle it doesn't matter whether the MSCs are lower than the MIFs. Particularly the last sentence of paragraph 164:

"The view may legitimately be taken that even in the case of those merchants" -- that is those merchants who charge MSCs lower than the MIF -- "the price charged, the MSC would still be lower if there were no MIF, since the acquiring banks would then be in a position to offer larger reductions."

We also rely on the point in the last sentence of paragraph 165:

"In addition, even in such a case" -- that is where as a matter of fact the MSC is lower than the MIF -- "the bank could reasonably be expected to be in a position to offer lower MSCs in the absence of a MIF."

So those are -- that's what we relied upon and it supports our arguments that the essential factual basis for the Court of Appeal, the Court of Justice and the Supreme Court's judgment is that the restriction at issue is the rule which applies even to a factual situation when MSC is lower than the MIF.

So if you could give me just one moment, Sir, I will just double-check that I have addressed every point I wanted to address you on.

Sir, on the dot of 4 o'clock those are my reply submissions.

MR JUSTICE ROTH: Thank you. We will just take a moment to confer.

(Pause.)

MR JUSTICE ROTH: Ms Smith, thank you very much. We will consider all the submissions that we have heard and our judgment will be produced in due course.

Mr Kennelly, I understand that your solicitors presumably will be writing to us shortly just answering that question about the Visa payment arrangements, and if we could have that in the course of next week, please.

MR KENNELLY: Sir, yes. Thank you. I will pass that on.

MR JUSTICE ROTH: Yes. Thank you all very much for the hard work you have put into this case.

(4.11 pm)

(Hearing adjourned)