Neutral citation [2024] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 February 2024

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
JANE BURGESS
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Defendants

Heard at Salisbury Square House on 5 to 28 July 2023

JUDGMENT
(CAUSATION AND VALUE OF COMMERCE)

APPEARANCES

Ms Marie Demetriou KC, Mr Paul Luckhurst, and Mr Crawford Jamieson (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Class Representative.

Mr Joe Smouha KC, Mr Matthew Cook KC, Mr Hugo Leith, and Mr Stephen Donnelly (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

CONTENTS

A. INTRODUCTION

1. These are collective proceedings pursuant to section 47B of the Competition Act 1998 ("CA 1998"), for which a collective proceedings order was made on 18 May 2022. Mr Merricks as the class representative ("CR") brings the proceedings on an opt-out basis for a class comprising all individuals who between 22 May 1992 and 21 June 2008, when aged 16 and above and resident in the UK, purchased goods and/or services from businesses selling in the UK that accepted Mastercard cards. The class is accordingly vast: it is estimated to comprise some 45.5 million people. The CR seeks aggregate damages pursuant to section 47C(2) CA 1998. Those damages are now estimated to be about £10 billion, including simple interest to 6 June 2023 and on the most generous assumptions about pass-through. On any view, as the Tribunal has observed previously, this is a gargantuan claim.

2. The First and Second Defendants are companies incorporated in the state of Delaware in the USA, and will be referred to, respectively, as "MCI" and "MCII". The Third Defendant is a company incorporated in Belgium and will be referred to as "MCE". Where it is unnecessary to distinguish between them, we shall refer to the Defendants collectively as "Mastercard", which is also the name of the payment card scheme with which these proceedings are concerned.

3. On 19 December 2007, the European Commission ("the Commission") adopted a decision finding that the Defendants had infringed Art 101 of the Treaty on the Functioning of the European Union ("TFEU") based on the rules and decisions concerning the cross-border intra-EEA fallback multilateral interchange fees ("MIFs") to be charged by banks issuing Mastercard consumer credit and debit cards to merchants' acquiring banks: COMP/34.579 and COMP/36.518 *Mastercard* ("the Decision"). Mastercard was ordered to repeal those MIFs with effect from 21 June 2008. Appeals against the Decision to the General Court and subsequently the Court of Justice of the EU ("CJEU") were dismissed. The CJEU judgment was issued on 11 September 2014: Case C-382/12P *Mastercard v Commission*, EU:C:2014:2201.

4. The present proceedings are follow-on claims for damages alleged to arise from the infringement found in the Decision. The CR contends, in summary, that the EEA MIFs which were the subject of the Decision were causative of the domestic interchange fees, whether agreed bilaterally between domestic banks or set multilaterally for the UK; that those interchange fees ("IFs") were passed through by acquiring banks in the charges which they levelled on merchants processing card transactions (the merchant service charge or "MSC"); and that the merchants passed through in whole or in part the MSC in the prices charged to their customers in the UK.

5. Following the Tribunal's ruling on an amendment sought by the CR to incorporate a 'run-off' period (see [2022] CAT 43), the proceedings are concerned with UK interchange fees over the period 22 May 1992 to 21 June 2009 ("the relevant period").[1]

6. In the case management of these proceedings, and with the agreement of both sides, the Tribunal decided that the trial should proceed in stages as that would be more manageable and efficient, with potentially very significant costs savings according to how those stages were resolved. Accordingly, a trial of certain preliminary issues concerning limitation and the appropriate counterfactual EEA MIF resulted in a judgment of the Tribunal on 21 March 2023: [2023] CAT 15. The question whether the limitation period could begin to run only from the cessation of the infringement as stated in the CJEU judgement in Case C-267/20 *Volvo AB and DAF Trucks NV v. RM* was heard as a distinct issue in these proceedings combined with the 'Umbrella proceedings' comprising the many individual merchant claims against Mastercard and against the operators of the Visa scheme (in which the same issue arose), resulting in a judgment of the Tribunal on 26 July 2023: [2023] CAT 49. The present judgment follows the trial of two issues: (1) whether the domestic IFs and MIFs charged in the UK were as a matter of fact caused by the EEA MIFs which were the subject of the Decision; and (2) the value of commerce to which the UK IFs and MIFs applied.

[1] The CR alleges that the effect of those interchange fees on the MSCs charged to merchants continued for a further year, so the total claim period extends to 21 June 2010; but that is not relevant for the purpose of the causation issue addressed in this judgment.

7. Issue (1) therefore relates to the first stage in the chain of causation set out in paragraph 4 above; but it does not address the hypothetical question whether there would have been an effect on the level of IFs and MIFs charged in the UK if the EEA MIFs had been very different. The answer to issue (2) was resolved between the parties prior to the hearing, subject to one question of principle as explained below. Issue (2) is accordingly addressed in section L of this judgment. Sections C-K concern issue (1).

8. Separate interchange fees are determined for credit cards and for debit cards. The Decision applied to the EEA MIFs for both kinds of card. In the Re-Re-Amended Claim Form, the overcharge for which the claim is made is based on the value of transactions on both Mastercard credit and debit cards, alleging that the EEA MIFs for each kind of card, respectively, caused the domestic UK interchange fees applying to that kind of card. However, by a footnote to his written opening submissions, the CR abandoned his claim in respect of domestic debit Mastercard transactions.[2] As regards debit card transactions, the claim is maintained only in respect of cross-border debit Mastercard transactions. Since the EEA MIF applied directly to cross-border transactions, issue (1) concerning causation of domestic interchange fees does not arise.

B. FACTUAL BACKGROUND

(1) Mastercard and Eurocard

9. Until 2002, the Mastercard scheme and the Eurocard scheme were formally distinct. The Mastercard scheme was operated by MCII, which owned the "Mastercard" brand. MCII itself was owned by the banks which participated as principal members in its business worldwide. The Eurocard scheme was operated by a wholly separate company called Europay International SA ("Europay"), owned and controlled by the European banks which participated in its business. Europay owned the "Eurocard" brand. There was a 'strategic

[2] The CR said that this was done in the interests of proportionality since such transactions comprise less than 0.01% of the value of commerce. Mastercard suggested that this was done because it was clear that UK domestic IFs for debit Mastercards were significantly lower than the EEA MIFs for such cards, so that the alleged contention that the level of the former was caused by the level of the latter was hopeless.

alliance' between MCII and Europay in respect of credit cards, whereby Europay had an exclusive licence for the Mastercard brand in Europe.

10. In 2001, MCII and Europay agreed to merge and MCI was incorporated for the purpose of the merger. From the start of 2002, the shareholders of MCII and Europay became the shareholders of MCI, and MCI and Europay became wholly owned subsidiaries of MCI. Europay changed its name to MCE. Following an IPO in May 2006, Mastercard introduced a new governance structure, which was more centralised in MCI.

(2) The Mastercard scheme and Interchange Fees

11. The Mastercard/Eurocard scheme, like the Visa scheme, is what is known as a "four-party" scheme, involving (i) the cardholder/customer, (ii) the bank which issues to them their card (the "issuing bank"), (iii) the bank which deals with the merchant and pays them for their transaction with the customer (the "acquiring bank"), and (iv) the merchant from whom the customer purchases goods or services. An outline of the arrangements can be found in the judgment of the Supreme Court concerning the issue of a CPO in these proceedings: [2020] UKSC 51 at [6]-[10].

12. A much more detailed description is set out in the Decision, and the service offered by acquirers is there explained at recital (246):

> "Acquirers credit merchants by transferring funds to the merchant's bank account after receiving the funds from an issuing bank as consequence of a payment card transaction. To enable this transfer of funds, acquirers equip merchants with payment terminals and provide other technical and financial services to the merchants, which typically are all sold in one single contract to merchants…."

The Commission held that the acquiring market was distinct from the issuing market.

13. Until 2002, issuers and acquirers that wished to join the Mastercard/Eurocard schemes had to obtain licences from both Mastercard and Europay. Under the terms of each licence they agreed to be bound by the scheme rules of Mastercard and Europay, respectively. After 2002, only a single licence was required. In

the description that follows, reference will be made to the Mastercard scheme but the same points applied to the Eurocard scheme before the merger.

14. For any credit card transaction where the issuing and acquiring banks are distinct, there have to be terms governing the relationship between the two banks. Those terms will include such matters as the timing of payment, who bears the risk in the event that the transaction is fraudulent or the cardholder defaults, and whether an interchange fee is payable and if so in what amount.

15. The IF is the fee charged on each transaction by the issuing bank to the acquiring bank as the consideration for processing and transferring payment and contributes to the issuer's cost of funding an interest-free period of credit for the cardholder. One of Mastercard's witnesses (Mr Keith Douglas) said that IF income generally accounted for around 20% of issuers' income on consumer credit cards. The IF is typically, but not always, set as a small percentage (i.e. 2%) of the amount involved, sometimes combined with a flat *ad valorem* fee. IFs are obviously not negotiated and agreed for each card transaction but are at a uniform rate, which may be changed periodically. There may be different IFs for different kinds of transaction: e.g. over the relevant period there were typically different levels of IF for transactions processed on paper and those processed electronically.

16. An IF can be individually negotiated and agreed between particular issuing and acquiring banks (i.e. a bilateral IF) as part of the terms on which transactions will be settled. But if there is no such bilateral IF, the schemes provided under their rules for a default or 'fallback' IF that will apply: i.e. the MIF. That is because of the "Honour-All-Cards" rule which is a feature of the Mastercard scheme (and similarly of the Visa scheme). Each acquiring bank must "honour" (i.e. accept and pay for) any valid Mastercard transaction properly presented to it by the merchant, according to the terms of its agreement with the merchant, irrespective of which bank had issued the card; and each issuing bank must accept and process such a transaction when passed to it by an acquiring bank, irrespective of the merchant at which the card had been used. Therefore a rule setting the terms on which the transaction is to be settled between issuer and acquirer in default of an agreement between them is necessary. And if no

positive IF is applied, the issuing bank would have to reimburse the acquiring bank 'at par', i.e. without deduction.

17. Since consumer banks generally operate on a national market, for cross-border transactions there is a vast number of possible combinations of issuing and acquiring banks. In view of the practical impossibility of all acquiring banks having bilateral agreements with all foreign issuing banks, the schemes set cross-border fallback MIFs that will apply in the absence of such a bilateral agreement. There may be different MIFs for different regions and different kinds of payment card. The Decision was concerned with Mastercard's intra-EEA fallback MIFs (i.e. the fallback IFs which would apply to cross-border card payments within the European Economic Area) for consumer cards. Formally, as the name indicates, these cross-border MIFs were fallback MIFs: i.e. they would apply only in default of the issuing and acquiring bank having agreed a bilateral IF. But since there seem to have been virtually no such bilateral cross-border IFs, in practice the cross-border transactions were subject to the cross-border MIFs.

18. From the start of the relevant period to 14 September 2006, the EEA MIFs were set by Europay/MCE, and from August 2003 it acted on proposals from its European Interchange Committee ("EIC"). After 14 September 2006 to the end of the relevant period, the EEA MIFs were set by the president and CEO of MCI,[3] who delegated this power to the Chief Operating Officer ("COO") of MCII. But it seems that since at least January 2007 this power was exercised on the basis of a recommendation from the EIC (which included staff of MCE).[4]

19. For cross-border transactions extending outside Europe, an inter-regional MIF would apply. The inter-regional MIFs for Mastercard were set by MCII.

20. For domestic UK transactions (i.e. where the point of sale and the issuing bank are both in the UK), since a limited number of banks are involved the position

[3] The Decision states that this was the CEO of MCI: recital (161), but the evidence at this trial indicated that it was the CEO of MCII. Nothing turns on this distinction and the Decision is clear that it is the COO of MCII to whom the power was delegated: recital (137).
[4] See the Decision, recitals (161)-(167).

is and was very different.[5] As set out in more detail below, for the early part of the relevant period there were many bilateral agreements but from November 1997 onwards Mastercard had specific UK MIFs. Prior to the introduction of the UK MIFs, it was nonetheless necessary to have a fallback IF which would apply in circumstances where the issuing and acquiring banks had failed to agree a bilateral IF.

(3) The UK market

21. In the Decision, the Commission found that for both issuing and acquiring the relevant geographic market is national: recitals (317)-(329). The UK payment market was very credit-oriented compared to continental Europe where the majority of cards were debit or charge cards. Use of credit cards expanded in the UK in the 1970s and 1980s, overtaking charge cards to become the most widely used type of payment card. Mr Douglas said in unchallenged evidence:

> "Even by the end of the Claim Period in 2010, cheques and cash, including from ATM withdrawals, were the dominant payment methods in mainland Europe. In the period covered by the EC Decision, 1992 to December 2007, the use of payment cards in mainland Europe generally was very low and the share of those card transactions that was on credit cards was negligible—well below 1%.
>
> The UK's rapid development and focus on credit cards meant that the UK was a much larger and more mature credit card market. The UK banks and merchants also had to heavily invest in infrastructure and technology throughout the 1990s and early 2000s to support technological advances with credit cards and to address the high level of fraud."

As a result, the UK was by some margin Mastercard's largest European credit card market in the relevant period.

22. Perhaps because credit cards were much more significant here, the UK was a pioneer in Europe in implementing new payment technologies. For example, the UK was the first market in Europe to adopt a mass introduction of Chip and PIN cards.

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[5] A UK merchant almost always has a UK acquiring bank.

23. The evolution of the Mastercard scheme in the UK was helpfully summarised in the Defendants' closing submissions in a passage which is not controversial:

> "Until 1989, there were two domestic credit card schemes in the UK: Barclaycard, which had been co-branded with Visa for many years for international acceptance purposes, and Access (operated by the Joint Credit Card Company ("JCCC")). Lloyds, Midland, NatWest, RBS, Bank of Ireland, Clydesdale Bank and Northern issued Access cards, and JCCC was owned by NatWest, Lloyds, Midland, and RBS. Access cards were co-branded with the Eurocard and Mastercard brands, allowing them to be used on the Eurocard network in the rest of Europe, and on the Mastercard network outside Europe. Mastercard and Eurocard were distinct card schemes, which operated under a strategic alliance until 2002, when they merged. At times, these two distinct card schemes had different (and conflicting) approaches on aspects of the scheme. Both Barclaycard's arrangement with Visa and Access's arrangement with Eurocard/Mastercard were exclusive.
>
> Under these pre-1989 arrangements, interchange fees applied only to cross-border transactions. There were two sets of cross-border MIFs: (i) the intra-European MIFs, set by Eurocard, for cross-border transactions within Europe;[6] and (ii) the inter-regional MIF, set by MCI, for cross-border transactions involving other regions. There was no scope for interchange fees in relation to domestic transactions, since both Barclaycard and Access were exclusive acquirers/issuers.
>
> In 1989, Barclaycard became a Mastercard/Eurocard licensee, and the banks that had been involved in Access became Visa licensees. A decision was taken to phase out Access cards and issue Eurocard/Mastercard cards instead, with the banks taking over acquiring and issuing from JCCC. As a result, JCCC became just a centre for processing transactions and was subsequently bought out by First Data Resources ("FDR"). In June 1989, the former members of JCCC, and banks with newly obtained Eurocard/Mastercard licences, established a members' forum to discuss and manage the operation of the new domestic Eurocard/Mastercard scheme…
>
> Since there would now be multiple banks participating in both the Visa scheme in the UK and in the Eurocard/Mastercard scheme in the UK, it became necessary to have UK domestic interchange fee arrangements for the first time…."

24. The Visa scheme had adopted a domestic UK MIF by the start of the relevant period. This was originally set at 1% for all transactions, and it was raised from 1 April 1992 to 1.1% for standard transactions while remaining at 1% for electronic transactions. There was little evidence at trial as to how it was determined since this case does not directly concern the Visa MIF, but it was apparently arrived at with the assistance of costs studies carried out by the large

[6] These were the EEA MIFs.

accountancy firm, Arthur Andersen. By contrast, there was no domestic MIF in the UK for Mastercard/Eurocard prior to November 1997.

25. As regards cross-border MIFs for Mastercard/Eurocard, the position that applied pre-1989 (para 23 above) continued after 1989. Europay set EEA MIFs that applied to transactions within Europe and MCII set inter-regional MIFs for transactions between a European bank and a bank elsewhere (e.g. the US).

26. Until November 1996, there were no Eurocard/Mastercard IF rules specific to the UK. However, from before the start of the relevant period, both MCII in relation to the Mastercard scheme and Europay in relation to the Eurocard scheme had scheme rules which applied to domestic transactions. The MCII general scheme rules applied to the Mastercard scheme throughout the world (the "MCII Rules"). The MCII Rules which applied at the start of the relevant period (the "1989 MCII Rules") were revised in December 1993 (the "1993 MCII Rules"). The rules issued by Europay which applied to the Eurocard scheme ("Eurocard Rules"), and included provisions dealing with domestic transactions, were issued in September 1991 and re-adopted in May 1993. But following the amendments introduced in the 1993 MCII Rules, Europay regarded the application of the Eurocard Rules to domestic transactions as redundant and those provisions were deleted from the Eurocard Rules in June 1994.

27. As stated above, in 1989 when the operation of the Mastercard scheme in the UK fundamentally changed, the UK bank licensees of Europay and Mastercard established a members' association, in the form of a company owned by the banks. This was originally called MasterCard & Eurocard Members (UK & Republic of Ireland) Forum Ltd, and changed its name in 1992 to MasterCard/Europay UK Ltd ("MEPUK"). In 2002, its operation was transferred to a new company which was re-named MasterCard UK Members Forum Ltd. For simplicity, we shall refer to it throughout as MEPUK. All UK (and initially also Republic of Ireland) licensees of MCII and Europay were entitled to apply for membership of MEPUK. As well as its Board of directors, MEPUK had a Rules & Compliance Committee (later called the Rules & Conciliation Committee) ("RCC"), which was responsible, among other things,

for reviewing and advising the Board in relation to IFs. MEPUK itself did not carry out any issuing or acquiring business.

28. In November 1996, MEPUK introduced UK domestic scheme rules for Mastercard, which were then issued by Europay as binding on UK licensees of Mastercard/Eurocard. However, in their original form those rules did not include a domestic UK MIF. With effect from 1 November 1997, those rules were amended by MEPUK to include a UK MIF.

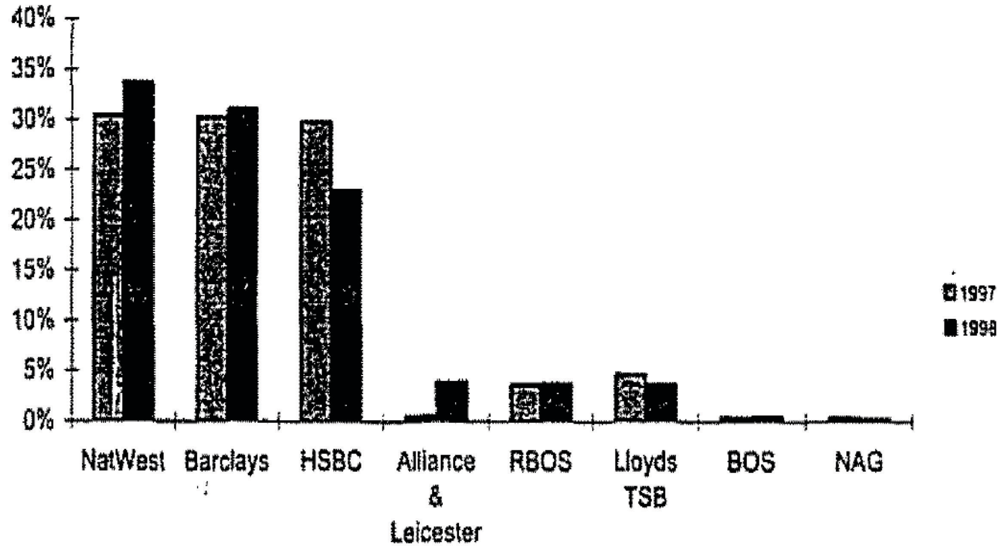
29. In November 2004, Mastercard revoked the entitlement of MEPUK to set a UK MIF. With effect from 18 November 2004, the UK MIFs were set by the President and CEO of Mastercard, acting on a recommendation from the EIC. This position continued for the rest of the relevant period.

30. In the UK, over the relevant period there were only a small number of banks carrying out an acquiring business. Until at least October 1996, when Alliance & Leicester entered the acquiring market, they were all major banks: National Westminster Bank ("NatWest", which in 2000 became part of the RBS group), Barclays, Midland (which became HSBC in 1999), Lloyds (which became Lloyds TSB in 1995), Royal Bank of Scotland, Bank of Scotland ("RBS"), and the National Australia group (comprising Clydesdale and Northern Banks).[7] Moreover, as shown in the chart below, the acquiring market was highly concentrated: the five largest banks (NatWest, Barclays, Midland, Lloyds and RBS) together held close to 100% of the acquiring market in 1997, and the first three of these accounted for about 90% by volume of transactions.[8]

<u>Acquiring market shares by volume, 1997-1998</u>

[7] Alliance & Leicester had only a 0.5% market share in 1997.

[8] Chart 3.4 from the Report on Competition in UK Banking, March 2000 ("the Cruickshank Report").



31. All these banks acted as acquirers for both Visa and Mastercard card transactions. However, the acquiring bank's contract with a merchant would generally be for a single MSC covering both Mastercard and Visa transactions. Some, but not all, of these banks also acted as acquirers for American Express ("Amex") cards, for which the merchant arrangements might be different but they are not material to this case.

32. Although concentrated, the acquiring market in the UK over the relevant period was nonetheless very competitive, in particular as regards the custom of major merchants. Where a merchant conducted its general banking with one of the acquiring banks, that relationship might lead it to use that bank for acquiring services. But even then, and of course as regards merchants whose bank was not an acquiring bank, Mr Michael Hawkins, who was Head of Card Schemes at NatWest from 1989 until his retirement in 2002, said that a major retailer might move its business to another acquirer for just a few base points difference in the MSC, because of the volume of transactions being put through.

33. These acquiring banks were also all issuing banks. However, a significant number of other banks acted as issuers of cards to their customers, so there were many more issuing banks than acquiring banks. Most issuers obtained their revenue by offering a wide range of retail and commercial banking products and services. But from the late 1990s the UK market saw the entry of so-called 'monoline' issuers, i.e. issuing banks which derived their revenue mostly from

their credit card business, in competition with the established banks. MBNA and Capital One were notable examples. This led to increased competition between issuers, as the monoline issuers sought to attract cardholders away from the more established banks by offering low cost 'balance transfers' at significantly promotional interest rates (or with an interest-free period). The major retail banks responded by similarly offering such transfers, which became a feature of competition in the UK issuing market for consumer credit cards.

34. Although in the UK issuers were usually exclusive to either Mastercard or Visa for debit cards, very few were exclusive for credit cards. Most UK issuing banks, and all the major ones, held licences under both the Mastercard and Visa schemes. However, they would not necessarily issue credit cards under both schemes: they generally decided which card to offer or promote according to financial considerations. Mr Douglas, who worked between 1998 and 2005 in the consumer payment card business of NatWest/RBS, and then between 2005 and 2018 in Mastercard's UK business on the issuing side,[9] explained in his evidence that an issuer can switch its customers between schemes either on a "forward flow" basis, by issuing the other scheme's cards for any new cards or new card promotions and when replacing cards on their expiry (typically cards have an expiry date of two or three years), or by "flipping" the entire existing portfolio of cards. A forward flow switch involved minimal incremental cost, and although a portfolio flip involved some cost (on average about €2 per customer in the relevant period) the competing card scheme seeking to win the issuer's business would often subsidise or even pay the whole cost. Mr Douglas said:

> "It is my view that with an interchange fee differential of around 5 bps issuers are likely to start forward flowing away from MasterCard, with all issuers doing so with a differential of around 10bps. While this is not a portfolio flip, it amounts to the same thing albeit over two to three years."

And he added that if the card scheme funded part or all of the cost of switching, he considered that an issuer would undertake a portfolio switch for a similar differential in the IF.

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[9] In 2011 Mr Douglas became responsible for all Mastercard's issuing business in the UK and Ireland.

35. Since the acquiring banks were also issuing banks, according to the relative size of the two sides of their business, each would be, on balance, either a net issuer or a net acquirer. But since they acted as acquirers for both Mastercard and Visa, this might vary as between the two schemes: a bank might be a net acquirer on Mastercard but a net issuer on Visa, or vice versa.

(4) Transaction Processing

36. In view of some of the evidence relied on in this case, it is necessary to explain how credit card transactions were processed. The description below is largely based on the evidence of Mr Patrick Van den Bergh, who has extensive experience of the processing of Mastercard transactions. There are essentially three elements involved in processing:

(1) Authorisation: this is the process whereby the merchant receives approval for the transaction. When a cardholder presented their card to the merchant, the transaction was transmitted by the merchant to its acquiring bank, which then forwarded it via the authorisation network to the issuing bank. The issuing bank checked the transaction (e.g. whether the card is valid, whether the cardholder has sufficient account balance, and if it is a PIN transaction, whether the PIN is correct). The issuing bank's response (approval or decline) for the transaction was transmitted back to the acquiring bank, which communicated it to the merchant. As will be seen, the rules, or bilateral agreements, generally provided that below a specified value such authorisation was not required. And prior to the late 1990s and the introduction of electronic clearing, there was no prior authorisation process for most transactions, with a paper form only being submitted by the merchant to its acquiring bank after the purchase by the cardholder.

(2) Clearing: this involved the exchange of transaction data to give issuing banks the information needed to post details of individual transactions to the relevant cardholders' accounts. Following authorisation (if required), the merchant sent transaction data to its acquiring bank, which consolidated data from all its merchants into an "outgoing" clearing file.

That file was sent to the central clearing system of the scheme, which validated the file and individual transactions, ensured that the correct IF was applied to each transaction, and calculated the total for each issuing bank. The clearing system periodically created an "incoming" clearing file for each issuing bank, including all transactions received, which was sent to the issuing banks.

(3) Settlement: the settlement system maintained for each bank a net position. At settlement cut-off, the system informed each bank the amount they have to pay or will receive. Banks in a net issuing position transferred funds from their settlement account whereas banks in a net acquiring position received funds into their settlement account.

37. In the 1990s, the authorisation stage of processing transactions under the Europay scheme was carried out by an electronic transmission network called "EPS-Net". European Payment Systems Services SA ("EPSS"), a company jointly owned by MCE and Europay, carried out clearing and settlement of cross-border European transactions through the European Common Clearing and Settlement System ("ECCSS") which it operated, and for non-European cross-border transactions it served as a gateway to MCII's own processing system. Mr Van den Bergh said, and we accept, that at the start of the relevant period, the ECCSS almost exclusively cleared cross-border transactions: domestic transactions in Europe were mainly processed by domestic processing systems and each country had its own system. In the UK, domestic transactions were generally cleared by an entirely separate company, First Data Resources ("FDR"). However, Mr Van den Bergh said that over the course of the 1990s, ECCSS processed also an increasing share of UK domestic transactions.

38. After MCE and MCII merged in 2002, the ECCSS was replaced by Mastercard's Global Clearing Management System ("GCMS").

C. THE CR'S CASE ON CAUSATION

39. The CR's allegations as regards the causative effect of the EEA MIFs on domestic IFs and MIFs in the UK as set out in the Claim Form, which was most

recently re-re-amended on 7 June 2023, are as follows. (Paragraph references below are to the claim form but we set out the allegations in a slightly different, and in our view more logical, sequence.)

40. The CR contends that under the relevant Mastercard rules the fallback MIF for UK domestic transactions was the EEA MIF. This would therefore be the applicable IF for any such transaction in the absence of either a bilateral IF between the banks or a UK MIF: para 103(a).

41. On that basis, the CR alleges that:

(1) In the period 1992-1997, prior to the setting of UK MIFs, for transactions in respect of which no bilateral IF was agreed, the relevant EEA MIF would apply directly: para 103(bA).

(2) Where bilateral IFs were agreed, and once UK MIFs were introduced in November 1997, for the setting of both such IFs and of the UK MIFs, the EEA MIFs "operated as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level": para 103(b).

(3) More specifically, in MEPUK which set the UK MIFs the voting structure favoured the issuing banks, who "had commercial incentives" not to accept MIFs which were lower than the EEA MIFs; and insofar as they did so in the later part of the relevant period that was due to regulatory concerns but they sought "the smallest possible reduction" from the EEA MIFs: para 103(c). This was referred to as the "Weighted Voting Argument".

(4) The acquiring banks in MEPUK would not have consented to the setting of UK MIFs which were higher, or appreciably higher, than the EEA MIFs and would thereby have removed the authority of MEPUK to set UK MIFs, so that the EEA MIFs applied instead: para 103(e). This was referred to as the "Hierarchy Argument".

(5) The bodies setting the UK MIFs did so by reference to the IFs which had previously applied, so that the IFs agreed bilaterally prior to the introduction of the UK MIFs affected the level of the new UK MIFs, and each successive UK MIF was "influenced" by the level of the previous UK MIF: para 103(f). This was referred to as the "Infection Argument".

42. A further allegation, which had not been pleaded, was introduced in the CR's submissions at trial. This concerned the period post-2004, to which it was accepted that the Weighted Voting and Hierarchy Arguments could not apply. However, the CR alleges that since in this later period the UK MIFs and the EEA MIFs were set by the same body, the determination of EEA MIFs would have affected the determination of the UK MIFs. Although Mr Smouha KC for Mastercard stressed that this was a new allegation, he sensibly did not seriously object to it being advanced and we will address it below.

43. We should state for completeness that as regards UK cross-border transactions, the CR relies on the EEA MIF as applying directly to virtually all such transactions: para 100(a). That is not contested by Mastercard, but it is common ground that such transactions account for a much smaller part of the overall value of commerce falling within the claims (although they are nonetheless significant, given the volumes involved). This trial was not concerned with such cross-border transactions.

D. THE TRIAL

44. Mastercard put forward evidence from seven witnesses of fact, of whom six were called for cross-examination:

Mr Michael Hawkins, who for over 13 years was Head of Card Schemes at NatWest/RBS. He was also chairman of the RCC of MEPUK from 1993 to 2001, a director of MEPUK from 1994 and chairman of its board from 1998 until his retirement in 2002. Prior to joining NatWest, Mr Hawkins had worked at the JCCC in various roles, on secondment from Midland Bank.

Mr Graham Peacop, who between 1997 and 2009 worked at RBS, first as Senior Relationship Manager (Payment Schemes and Cards), responsible for managing RBS' relationship with Mastercard and Visa, and then between 2002-2009 as Head of Schemes and Industry Management (Card Business). He was the alternate representative of RBS on the Board of MEPUK from 1998 to 2004, and thereafter its primary representative, serving as chairman of MEPUK from 2005. Mr Peacop was a member of the RCC. In May 2010, Mr Peacop moved to MCE where he was Head of Acquiring and Merchant Services until September 2012. He is now an independent consultant.

Mr Keith Douglas, who before joining Mastercard worked at NatWest/RBS for over six years, first as a Senior Product Manager responsible for consumer credit card issuing and product development, and from March 2000-end 2002 as Head of Product Development which meant he was part of the team deciding across the RBS Group consumer business on which scheme new credit card products should be issued. In early 2005, Mr Douglas joined the Mastercard group where, as mentioned above, he worked on the issuing side of the business. For the first five years he was responsible for managing its issuer relationship with Barclaycard, first in the UK and then globally across 14 markets. Between 2009-2014, he was a member of Mastercard's UK and Ireland executive management team, and from September 2010 to early 2014 he was responsible for its issuing business in that territory, first for a number of banks and then, from 2011, for all its issuing business in the UK and Ireland.

Mr Jean Sideris, who held various roles at MCE between 2002 and 2011, before moving to Mastercard France to become Vice-President, Head of Sales. At MCE, Mr Sideris between 2002-2004 was Manager, Interchange and Customer Profitability, in which role he was involved in preparing proposals as to the rates at which EEA MIFs and, from November 2004, UK MIFs, should be set; then in 2005-2006 he was Associate Vice-President, Interchange. From 2006 to January 2010 Mr Sideris was Head of Interchange, responsible for all MCE's interchange and business model strategy-related activities in Europe. He sat on the EIC from its inception, and from 2006 chaired its meetings. Mr Sideris left Mastercard in 2014.

Mr Patrick Van den Bergh, who gave evidence by videolink from Belgium. He is currently director of market delivery for the Netherlands at MCE. However, from February 1992 to September 2007 he worked at EPSS. Between late 1993 or early 1994 he worked in the applications support team, of which he became the manager in 2000. He was heavily involved on the operations side of the ECCSS (and subsequently the GCMS), overseeing its bi-annual software releases and configuring UK banks onto the system.

Mr Peter Sidenius, who is now the CEO of Edgar Dunn & Company ("EDC"), a global financial services and payments consultancy. He has been a director of EDC since 1999, and previously was partner in a specialist consultancy firm focused on payments and benchmarking analysis in the financial sector.

45. We found that, as one would expect, all these witnesses were honest and sought to be helpful, although some were rather defensive in their responses. Altogether, as regards the early part of the relevant period (i.e. 1992-1996), that is now a very long time ago and it was clear to us that some of the witnesses, while doing their best to reconstruct the position on the basis of documents, unsurprisingly had no clear recollection of the factual position at which their evidence was directed. In some instances, witnesses were asked in cross-examination to interpret documents concerning matters in which they were never involved at all. We consider that evidence of that kind has to be treated with considerable caution. Moreover, the documentary position as regards, in particular, the earlier years is patchy and manifestly incomplete.

46. Mr Douglas had given evidence for Mastercard in two of the previous MIF trials of claims brought by supermarket chains and it became clear that a section of his witness statement dealing with Maestro cards was largely copied from his witness statement in one of those earlier cases. The CR criticised him for this on the basis that Mastercard's solicitors had prepared the statement for him and omitted certain words from his previous statement. However, we are satisfied from Mr Douglas' explanation that he had discussed his previous statement with Mastercard's solicitors when preparing his evidence for the present case and agreed with them that it still represented his view and so could be incorporated. We accordingly reject any suggestion that he was acting deviously or in bad

faith as regards the few changes that were made. Moreover the relevant passage concerns Mastercard's debit card, which is now of little relevance to this trial. We found that Mr Douglas gave useful evidence as regards the issuing side of the business and the difference between the credit card market in the UK and continental European countries.

47. Mr Hawkins had retired over 20 years ago and we bear in mind that he was being questioned about events as long ago as 1993-1996. In that regard, he was relying on his memory, although he had re-read the contemporary documents. He held firm views as to how the costs studies should have applied to the determination of default rates, and on that we found that he failed to distinguish between the role he considered that they should have played and the role which they in fact played. However, he had great experience and knowledge of the negotiation of bilateral agreements with other UK banks on behalf of NatWest, and indeed of Coutts and Ulster Bank as well. We found that he was able to give valuable insights into the nature of those negotiations and as regards the early years of MEPUK.

48. Mr Van den Bergh had no knowledge about the setting of MIFs or how bilateral IFs were agreed. His evidence was directed at how far transactions involving UK banks were processed by the ECCSS, to what extent they had bilaterally agreed IFs and how the system dealt with default rates in the period prior to 1997. So for him too, this was a very long time ago. While we think he was doing his best to be helpful, it became clear to us that, quite reasonably, he had no recollection after all this time as to how various arrangements were dealt with in the ECCSS, and was speculating on the basis of documents that were shown to him during his oral testimony. Moreover, while he could give good evidence on the processing side, on which he had worked in the application support team, the inputs of fees to be used in that processing were provided to that team by another part of EPSS and Mr Van den Bergh had not been involved in the provision of that information. We therefore found that only limited parts of his evidence were reliable and of real value.

49. EDC is the company which carried out costs studies for MEPUK and for MCE and MCI in other national markets. As noted above, Mr Sidenius has been a

director of EDC for over 20 years. He has been closely involved in analysis of the nature of inter-bank payment card operations and the costs involved over an extended period. We found that he showed impressive knowledge and understanding of the banks' credit card operations in the Mastercard system.

50. The evidence of Mastercard's seventh witness, Mr Jason Langevin, was not challenged and so he did not give oral evidence. But his testimony was directed at the value of commerce issue and therefore was not in the end referred to at trial.

51. The CR called one witness of fact, **Mr Leon Dhaene**, following the Tribunal's ruling on 6 June 2023 on the CR's application to admit his evidence out of time, partly as evidence of fact and partly as expert evidence. The Tribunal recognised the difficulties the CR had experienced in trying to find a witness able to give relevant evidence and admitted Mr Dhaene's factual evidence but significantly restricted the scope of opinion evidence because of the prejudice it would otherwise cause to Mastercard: see [2023] CAT 39.

52. Since June 2004, Mr Dhaene has been running a consultancy he established dealing with all forms of payment systems, including Fintech. Previously, between 1989 and 2004 he worked in various roles at Eurocard and then Mastercard. From October 1989 to January 1993, he was one of Eurocard's three Regional Managers, covering Central Europe (i.e. Benelux, Germany, Austria, Switzerland, the then Yugoslavia and Turkey). Between 1993-1997, he was Head of Business Services at Eurocard, dealing with the services that Eurocard developed for its member banks, and led the project to combine Eurocard and Mastercard systems. In 1997-1999 he was Senior Manager, End-to-End Quality, in which his role was "to test and review the lifecycle of the payment scheme from origination of the card in the hands of the consumer to the end payment posted by the issuing bank to its customer, the cardholder." He explained that he was involved in end-to-end testing of the system to ensure that all transactions worked smoothly, and said that as this role covered the whole European region he worked closely with the UK banks "and gained detailed knowledge and expertise of the mechanics of the UK market, both from a business, financial and technical point of view". In 1999-2000, Mr Dhaene was

Head of Acceptance Management, focused on the acquiring side of the business, working to boost merchant acceptance in Europe; and then in November 2001, he started working for MCI as part of the Mastercard Global Key Accounts department in New York, responsible for ABN AMRO which was one of MCI's six key global accounts but had nothing to do with the UK.

53. Mr Dhaene's contract with Mastercard terminated in May/June 2004 and in a letter he wrote later to the CEO of MCI, Mr Dhaene stated that he had been dismissed. He started proceedings against Mastercard in the Labour Court in Belgium seeking over €400,000 in compensation, subsequently revised, when he had to re-file the proceedings, to incorporate an additional claim bringing the total sued for at over €1 million. That case was ultimately dismissed. Mr Dhaene suggested that this financial claim was necessary in order to obtain certain papers that he needed. We cannot comment on the intricacies of Belgian labour law, but we can state that we do not accept that a claim in that amount, or making the allegations which Mr Dhaene expressed in writing to the CEO, were necessary steps in order to obtain papers to which he said he was entitled. Moreover, in the application to the Tribunal to admit his evidence as an expert, to which a draft statement was exhibited by way of his report, he did not disclose that he had engaged in personal litigation against Mastercard. This clearly should have been disclosed and it was only revealed by Mastercard. But although this conduct was unsatisfactory, having heard Mr Dhaene's evidence we do not find that he was animated by bias which distorted his testimony. However, although Mr Dhaene had considerable knowledge of the Eurocard/Mastercard scheme and was well-informed about credit cards generally, he had very limited direct experience of the UK market. Altogether, we found that he ventured evidence on the decision-making within Mastercard which went beyond his direct knowledge and was either based on what others told him or was speculative.

54. In addition to the factual witnesses, each side called expert evidence from an economic expert:

- for the CR: **Mr Justin Coombs**, from Compass Lexicon;

- for Mastercard: **Mr David Parker**, from Frontier Economics.

55. Both Mr Coombs and Mr Parker are very experienced economic experts in competition litigation. They served detailed reports, and gave their oral evidence largely concurrently in a 'hot-tub' responding to questions from the Tribunal, followed by limited cross-examination by counsel. They gave some valuable assistance, particularly in gathering and presenting data. But as we explain below, some of the detailed analytical work which they carried out, by way of regression analysis (Mr Parker) and a weighted averages correlation (Mr Coombs) was not in our view of any real help in view of the limitations in the data. Quite separately, the experts were of great assistance in calculating, and then agreeing, the value of commerce, which had the effect of very significantly reducing the scope of the trial on that distinct issue.

E. RELEVANT PERIODS

56. By the end of the trial, it was common ground between the parties that the relevant period for the causation question should be divided into three distinct periods:[10]

(1) <u>22 May 1992 – 30 October 1997: "the early period"</u>

In this period there were no UK MIFs. The applicable interchange fee for domestic transactions was accordingly either a bilateral IF or, if no such bilateral was agreed, a default MIF determined under the relevant scheme rules.

(2) <u>1 November 1997 - 18 November 2004: "the middle period"</u>

The UK MIFs set by MEPUK applied, unless there was a bilateral agreement.

(3) <u>18 November 2004 - 21 June 2009: "the late period"</u>

[10] In his opening submissions, the CR had set out a somewhat different division of the periods, but that distinction fell away.

The UK MIFs were set by the COO of MCI/MCII as delegate for the President and CEO,[11] on the advice of the EIC.

F. THE EARLY PERIOD: MAY 1992 - OCTOBER 1997

(1) MEPUK and its "reference rates"

57. After the end of JCCC's exclusive licence to issue and accept Eurocard/Mastercard in the UK, the banks which had formerly been members of the JCCC as well as some other UK banks all obtained direct licences under the Eurocard and Mastercard schemes. MEPUK was established as the forum where they discussed the operation of those schemes as regards the UK. That included issues arising under the respective Europay and Mastercard rules, and MEPUK also nominated delegates to represent its members on the relevant boards and committees of MCII and Europay.

58. All the UK licensees of MCII and Europay were entitled to become members of MEPUK and most did so. The shareholding of MEPUK was distributed according to each member's total annual weighted turnover of all domestic issuing and acquiring transactions on Mastercard and Eurocard. However, each member was represented on the Board by a single director, irrespective of its shareholding. Representatives of MCII and Europay generally attended MEPUK Board meetings.

59. As noted above, MEPUK did not set any UK domestic MIFs prior to 1997. However, by 1992 it had developed a practice of determining indicative levels of domestic IFs which were known as "reference rates". In that regard, EDC was engaged by MCII on behalf of MEPUK to produce periodic costs studies in relation to UK domestic transactions on Mastercard/Eurocard cards. EDC was an independent consultancy which was retained by MCII more widely to evaluate the costs of issuing banks, and MCII apparently used EDC cost studies in regard to setting IFs in the US and inter-regional MIFs.

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[11] See fn 3 above.

60. For costs studies in the UK, EDC sought significant information from the UK banks, which information it kept confidential from the individual banks but used to calculate the average costs, showing the components of those costs, and then suggesting costs-based IFs. The first such report from EDC was produced in September 1991,[12] based on data gathered from the banks for 1990 and their forecasts for 1991; and in January 1992 EDC produced a further report separately analysing costs for electronic and "standard" (i.e. non-electronic) transactions, resulting in different suggested IFs for those two types. In its studies, EDC took into account the costs of fraud and credit write-offs, the "financial carrying costs" (i.e. the interest-free period for cardholders) and processing costs). EDC produced further costs studies for MEPUK in 1994 and 1996, with increasing sophistication in its analysis of the data.

61. Mr Hawkins said that by 1993 the MEPUK Board agreed "reference rates" of 1.3% for standard transactions and 1% for electronic transactions, and these rates remained the same up to the time when MEPUK was given authority to set UK MIFs in 1997, although the succeeding EDC studies showed changes in various costs. Thus in May 1996, following the EDC report for the 12 months to 30 September 1995 which showed cost-based rates of 1.09% (electronic) and 1.45% (standard), the RCC discussed the possibility of raising the reference rates to 1.05% and 1.35% respectively, but in the event no changes were made.

62. We consider that it is clear that the MEPUK reference rates were not cost-based in any true sense. In reality, what MEPUK did was to review the costs studies to make sure that its reference rates were below costs. Mr Hawkins said that the discussions in MEPUK as to appropriate reference rates took account of market factors, such as the competition from Visa (which had UK MIFs at this time that the members of MEPUK would all know) and the need to justify the level of MSCs sought from large retailers who put pressure on acquirers in their bilateral MSC negotiations. We accept that evidence and note that from April 1993 to the end of this period the Visa UK MIFs were at 1.3% standard and 1% electronic.

[12] A preliminary report was presented to the MEPUK Board in July 1991.

63. The reference rates were clearly not binding on the MEPUK members and, curiously, they were not written down. Still more surprisingly, Mr Hawkins said that the reason why they were not circulated in writing was because it was thought that this would give them a formality that might infringe competition law. But whatever the reason, Mr Hawkins' firm evidence on this was not challenged and we accept, as he said, that these reference rates were agreed and would have been known to all members of MEPUK.

64. Although MEPUK itself could not formally introduce scheme rules, it appears that in 1996 MEPUK prepared domestic scheme rules for the UK which it put forward to Europay. Europay then issued a UK Rule Book, which became binding on UK licensees, with effect from November 1996. The Rule Book comprised a comprehensive set of rules, divided into 50 chapters covering a wide range of matters, including processing procedures, chargebacks and settlement. Those UK domestic rules did not contain any UK MIFs.

65. With effect from 1 November 1997, Europay agreed that MEPUK could set UK domestic fallback MIFs and adopted as those MIFs 1% electronic and 1.3% standard. The UK rules were accordingly amended to provide that these MIFs would apply in the absence of bilateral agreements.

(2) The governing fallback rates

66. It will be necessary to look at bilateral IFs and to consider how prevalent they were prior to the introduction of the specific UK MIFs. But we first address the fallback position which would govern in the event that no bilateral IF was agreed. For that purpose, the early period should be divided into two sub-periods.

(a) 1992 to 30 November 1996

67. Over this time, both the MCII Rules and the Europay Rules applied to UK licensees, i.e. the UK issuing and acquiring banks. The relevant provisions of those rules are somewhat convoluted. In the section of the 1989 MCII Rules dealing with IFs, rule 11.09(b)(3) stated:

> "With respect to those transactions in which a member is issuing MasterCard cards to residents within a country outside of the U.S. and the card is used by such a cardholder to effect a transaction at a merchant within the same country, the interchange fee shall be that amount agreed to by the members doing MasterCard business within the country. Subject to the requirements of the next following sentence, if, at any time, members within a country are unable to agree, after a good faith attempt to do so, on the interchange fee for such intracountry transactions, MasterCard shall submit the dispute to the International Advisory Committee of the Board of Directors ("IAC") which shall establish an interchange fee for such transactions. It shall be a condition to submission of an interchange dispute to the IAC that members having at least 10% of the total (issuer and acquirer) MasterCard volume within the country disagree with the then effective interchange fee. During the period prior to the IAC's decision, the then effective intracountry interchange fee shall apply to all members doing MasterCard business within the country. Absent a disagreement regarding interchange by members having at least 10% of the total MasterCard volume within a country, the intracountry interchange fee in effect shall apply to all members doing MasterCard business within that country."

68. The 1991 Europay Rules addressed intra-country IFs in section E7.02.4 (which was unchanged in the May 1993 re-issue of these rules). Rule E7.02.4(C) made clear that member banks can reach a bilateral agreement. Rule E.7.02(A)-(B) stated as follows:

> "**A) Situation where no intra-country interchange fee is in effect in a given country**:
>
> With respect to those transactions in which only one Member is issuing Eurocard-MasterCard cards to cardholders within a country to effect a transaction at a merchant within the same country and a new Member is authorized to do Eurocard-MasterCard business within that country, the amount of the interchange fee has to be agreed upon by the Members doing Eurocard-MasterCard business in the country no later than 60 days after the admission of the new Member. After a good faith attempt to do so, if the Members in that country are unable to agree on the interchange fee for such intra-country transactions, the following procedure shall apply:
>
> Upon notification to Eurocard International by one of the Members involved in the dispute that the Members are unable to agree during such 60 days, the international fee will temporarily apply to the intra-country transactions and a study will be undertaken on the appropriate intra-country fee amount to be applied. The study costs will be equally borne by the Members involved. Should no agreement be reached at the end of a 60 day period following the notification to Eurocard International, Eurocard International will arbitrate the dispute according to the outcome of the study. The agreed intra-country interchange fee shall be applicable only to the Eurocard-MasterCard Members who are party to the agreement and shall be effective for at least one year, unless during that period the Members in such country agree on a different rate.
>
> **B) Situation where intra-country interchange fee(s) are in effect in a given country**:

> With respect to those transactions in which a Member is issuing Eurocard-MasterCard cards to cardholders within a country to effect a transaction at a merchant within the same country, the amount of the interchange fee has to be agreed upon with the Members doing Eurocard-MasterCard business within the country. Upon notification to Eurocard International by any one of the Members involved in the dispute that no agreement can be reached, the amount of the interchange fee shall be the international interchange fee, until one or more intra-country interchange fee(s) is (are) agreed upon with the Eurocard-MasterCard Members within the country. The present provision shall apply until, after a good faith attempt to do so a disagreement on the intra-country interchange fee in effect is notified to Eurocard International by those Members that comply with Section 11.09.B.3 of MasterCard By-Laws and Rules."

69. There was no clear hierarchy as between these two sets of rules. It is notable, and perhaps not surprising, that MEPUK itself was unclear as to the position, and Mr Hawkins acknowledged that the position was rather confused. MEPUK had raised this with the Senior Vice-President of MCII, Mr George Strachan, in 1992. His response, dated 9 June 1992, referred to the above sections of both sets of rules and did not really clarify the position. But he noted that as regards the UK, a costs study had been prepared (i.e. the costs study conducted by EDC), and that this was held by both MCII and Europay "as a reference document should it be required" for an arbitration under rule 11.09(b)(3). It seems that in early 1993 MEPUK went back to Mr Strachan seeking further clarification, but his response has not been preserved or at least could not be found.

70. None of these rules, it seems to us, clearly addressed the question of what the fallback fee should be in the UK, where no domestic MIF (i.e. intra-country fee) had been determined, in the event that the issuer and acquirer could not agree a bilateral IF. The 10% threshold requirement in MCII rule 11.09(b)(3) might preclude reference of an individual dispute to arbitration, but it seems clear from the contemporary documents that the UK banks operated on the basis that the arbitration mechanism would apply to such a dispute: see para 75 below. And although the UK would fall within rule E7.02.4(A) of the Europay Rules, the terms of that rule appear to apply only to dealings between an existing and a new Eurocard licensee. However, both sub-rules (A) and (B) of Europay Rule E7.02.4 state that until the dispute is resolved by arbitration the amount of the fee shall be "the international interchange fee".

71. Rule 11.09(b)(3) of the MCII Rules was amended in December 1993. The revised rule substituted for the IAC, which determined the fee upon a dispute under the previous rules, the Executive Committee of the MCII Board. More significantly, the amended rule made referral to that committee in effect an appeal from a prior ruling by the regional board or other authorised regional entity ruling on the dispute. The rule set out provisions for the submission of the dispute to that Regional Authority, and introduced the following paragraph:

> "In the event there is no intracountry interchange fee(s) applicable to all members doing business in the country in effect at the time a dispute regarding intracountry interchange fee(s) arises, the international interchange fee(s) applicable to transactions for such MasterCard region in which the country is located shall apply to such intracountry transactions until the Regional Authority, or Executive Committee on appeal, as the case may be, makes a final determination as provided herein or the dispute is otherwise resolved;…"

72. The UK was part of the European region, and the Regional Authority in Europe was Europay. We think that "the international interchange fees applicable to transactions for" the European region would therefore be the EEA MIFs. Although Mr Hawkins, while recognising that this was the literal meaning of the words, said that it was not understood to refer to the EEA MIF, we think he was wrong in this regard and that his recollection was coloured by his strong preference for the MCII inter-regional MIFs since they were based on costs studies. The memo to the Europay Board for its meeting on 22 June 1994 noted that the new MCII rule had been drafted in consultation with Europay. And Europay considered that the introduction of this rule made rule E7.02.4 of the Europay Rules redundant and it was therefore repealed at the meeting of 22 June 1994. Accordingly, thereafter the only rule setting a default in the absence of bilateral agreement and prescribing arbitration was the MCII rule.

73. The CR submitted that the default or fallback in the early period was the EEA MIF (the *intra*-regional rate). Mastercard submitted that it was the *inter*-regional MIF set by MCII.

74. We accept that the terms of the relevant rules are ambiguous, and it is perhaps surprising that a point of such potential importance was so unclear. However, for reasons we discuss below, the question of what interchange fee would apply in the absence of agreement was of more theoretical than practical significance.

And we observe that until 31 March 1994, the standard rate[13] of EEA MIFs, at 1% was the same as the MCII inter-regional rate applicable to cross-border transactions to or from Europe, so that the distinction between the two was perhaps not seen as important. In any event, we find that the default or fallback rates applicable in this period were the EEA MIFs.

75. We reach our conclusion for several reasons:

(1) In its notification to the Commission in May 1993 of its arrangements for the Eurocard-Mastercard system, Europay said that in the absence of bilateral agreement for domestic transactions within a country, under its rules the reference fee established by Europay would apply as default. That is a reference to the EEA MIFs, as Mr Hawkins accepted.

(2) In response to a query from First Trust Bank (a trading name of Allied Irish Bank), Europay wrote on 25 October 1995 to say that if two UK members did not have a bilateral agreement, its system would apply the intra-regional rates, specifying the EEA MIFs as amended from 1 April 1995.

(3) At a meeting of the RCC on 2 October 1996, there was discussion about the fallback rates used by Europay in the absence of bilateral agreement. The minutes record that Mr Turner (from Bank of Scotland) advised that it was the intra-regional rate (i.e. the EEA MIFs). There is no indication that this was not accepted as correct, although the minutes record Mr Hawkins' view that this was not the logical rate to use since it did not reflect the EDC cost studies.

(4) At a meeting of another committee of MEPUK (the Governance Sub-group) on 28 April 1997, in discussion of what might be the UK fallback rate going forward, Mr Warren of Midland Bank referred to the fact that "in the past" the intra-regional rate had been used.

[13] There was a reduced rate of 0.5% for electronic transactions provided that authorisation requests were generated for all electronic transactions. It is not clear how often that applied in practice.

(5) The Cruickshank Report[14] recorded information received from Europay regarding the changes in IFs over the previous five years, as follows:

> "The fallback interchange fees for intra European transactions have remained constant over the period under consideration. The UK domestic fallback interchange fees were set at the same level as the Intra European fallback fees until December1997, when higher specific UK cost related fallback fees were introduced."

(6) In its written response sent on 8 September 2000 to questions from the Office of Fair Trading ("OFT"), MEPUK set out the levels of fallback IFs which applied for the previous five years. For the year 1995-1996 (as well as 1996-1997), MEPUK stated that no specific UK MIF was set for that period and that in the absence of bilateral agreement the EEA MIFs would have been applied.

(7) As from December 1993, we consider, as stated above, that the position under the revised MCII rule 11.09(b)(3) was clear. The fact that the Board of Europay repealed its rule E7.02.4 on the basis that this rule was redundant in the light of the revised MCII rule indicates that it saw the MCII rule as encompassing what had been covered by its own rule. That was expressly stated as regards the arbitration provision, but we think that it would apply also to the default MIFs. If revocation of the Europay rule had the effect of changing the applicable default, we would have expected that to be mentioned in the background paper to the Europay Board recommending the change. The absence of any reference to this reinforces our view that the default position did not change.

(b) 30 November 1996 – 1 November 1997

76. November 1996 saw the introduction of the first UK Domestic Rules, proposed by MEPUK and adopted by Europay. It is common ground that those rules, when introduced, did not include a domestic MIF but provided that in the absence of bilateral agreement, the EEA MIFs would apply.

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[14] See fn 8 above.

77. Accordingly, we find that the default or fallback MIFs applicable in the UK throughout the early period were the EEA MIFs.

(3) The extent of bilateral agreements

78. There was a significant dispute between the parties as to the extent to which UK banks had bilateral agreements as to IFs. The CR argued that in a large number of cases no bilateral IF was agreed, so that transactions between UK banks were subject to an IF at the default rate. In his closing submissions, the CR invited the Tribunal to find that 50% of domestic transactions in this period were at the default rate through lack of a bilateral IF. By contrast, Mastercard contended that in almost all cases a bilateral IF was agreed.

79. We emphasise that, at least in this period, there were only a small number of acquiring banks in the UK: para 30 above. All domestic IF transactions would accordingly have been with one of those banks. Therefore it was by far not the case that for bilateral IFs to prevail, each UK bank needed to have agreed a bilateral IF with every other UK bank. The major acquirer for Mastercard was NatWest. Mr Hawkins negotiated the bilateral IFs for NatWest, and also for Coutts and Ulster Bank which were part of the NatWest group. He said that those three banks[15] had such bilateral agreements with all the UK issuing banks up to the time when UK MIFs were adopted in November 1997. That evidence was not challenged.

80. As it prepared to take on the clearing of UK domestic transactions, Europay told Midland Bank in August 1992 that it had received forms for domestic IFs from all UK banks except for Bank of Scotland and TSB; and it clearly received the forms from Bank of Scotland and TSB afterwards since a comprehensive record of their respective bilaterally agreed IFs was sent by Europay to each of those two banks on 21 April 1993. On the same date, Europay similarly wrote to Midland Bank enclosing a table showing its bilaterally agreed IFs with all the other UK banks.

[15] The significance of the NatWest group banks in the issuing and acquiring of Mastercard transactions is shown by the fact that their combined shareholding in MEPUK was 35.2% in 1996.

81. Mr Hawkins also said that as chairman throughout this period of MEPUK's RCC, which was responsible for advising MEPUK in relation to IFs and which, as described above, set the reference rates, he would have been made aware by the member acquiring banks if there was any significant inability to agree bilateral IFs with other UK banks, but that this was never suggested. That evidence was also unchallenged.

82. While the documents in evidence from this period are manifestly incomplete, they contain numerous references to IFs being negotiated bilaterally and none identifies any failure as between UK banks to agree a domestic IF.

83. Mr Van den Bergh joined EPSS in 1992 and was clear that as at that time EPSS generally did not process domestic transactions. UK domestic transactions were processed by FDR and only cross-border transactions involving UK banks were processed on EPSS (which received them from FDR). On 21 April 1993, Europay wrote to NatWest informing them that it would be able to clear and settle domestic transactions from May 1993. That accords with Mr Van den Bergh's recollection that NatWest came onto the ECCSS system for its domestic transactions in 1993 or 1994 and, he said, it was the first major UK bank to do so. (Although Mr Dhaene said that he believed that EPSS was processing NatWest domestic transactions in 1988/1989, that was based on his recollection of what he was told by others and, as he accepted in cross-examination, that cannot be correct.) Therefore, at the start of the relevant period, all domestic transactions were processed by FDR (or in-house). But it appears that the FDR system was configured to support only bilateral domestic IFs: when UK MIFs were introduced in November 1997 FDR noted that it would now have to introduce a domestic fallback programme into its system.

84. It seems that by 1995, about a third of domestic UK transactions were cleared through ECCSS, although as the NatWest group accounted for about a third of the market it may be that this simply reflected its presence on the ECCSS. By the end of the decade, the proportion of UK domestic transactions processed on ECCSS had greatly increased; by 2001, over 95% of UK transactions were cleared by ECCSS. Mr Van den Bergh said that he was heavily involved in setting up new banks on ECSS and said:

> "I recall clearly that the UK banks that cleared their transactions through ECCSS had bilaterally agreed interchange fees in place. The reason I can recall this is because: a) The UK was unusual in implementing bilateral interchange rates, whereas the rest of Europe either had an exclusive licensor, a domestic MIF or used the EEA MIF; b) I frequently worked with new UK banks in my role as application support engineer and implemented their bilaterally agreed interchange agreements;…"

85. A UK bank that settled transactions on the ECCSS would notify its agreed bilateral IFs (including for debit cards and ATM transactions) to Europay on a form; Europay would check that the bilateral IFs stated on the forms from the respective banks matched and then implement them into the ECCSS system. There was also provision for two banks to notify jointly their agreed bilateral IFs to Europay.

86. Based on those forms and other documents, Mastercard prepared a schedule for the purpose of these proceedings which sought to show the bilateral IFs between all UK banks over the period 1993-1997. This schedule went through a number of iterations as more information came to light, and was subject to critical comments from the CR. The difficulty is that the schedule is based on documents from 25-30 years ago, formerly held by Europay and now in the possession of Mastercard, whose surviving records are manifestly incomplete, which after all this time is hardly surprising. Moreover, some of those documents, while no doubt readily understandable by those involved at the time, are unclear or open to different interpretations, and there is no-one now available to explain them. For example, there are various gaps in the table. The CR sought to suggest that this shows that there are many instances when no bilateral IF was agreed, such that the fallback MIF would have applied. But Mastercard said that a blank in respect of a pair of banks in a particular year simply meant that no document could be found recording the bilateral IF that applied. Furthermore, Mastercard submitted that where the table showed bilateral IFs between a pair of banks for one or more years followed by a gap, this was because the existing IF would continue to operate until either the banks notified a revised IF or that they had terminated their agreement: it was wholly implausible that the explanation for the 'gap' year was that those banks ceased to operate on the basis of an agreed bilateral IF.

87. In our view, Mastercard's submission makes sense, and it is supported by the unchallenged evidence of Mr Hawkins, who stated:

> "… until the bank wishing to terminate the bilateral agreement also notified its transaction processor (where a third-party processor was used) that its bilateral agreement had come to an end, the processor would continue to implement the bilaterally agreed rates previously notified to it."

We accept this explanation. By way of example, the columns for 1995 as regards both standard and electronic transactions for NatWest and its two sister banks (Coutts and Ulster Bank) is almost entirely blank;[16] but we have found, based on Mr Hawkins' unchallenged evidence, that those banks had bilateral IFs with UK issuing banks so that a fallback MIF did not apply. Indeed, it is in our view inconceivable that Mr Hawkins would not recall if there was a whole year when he had failed to conclude a bilateral IF with such major UK banks as Barclays, Lloyds and Midland. Altogether, the table supports Mr Hawkins' view that the great majority of the UK acquiring banks' domestic transactions were governed by bilaterally agreed IFs. That is the case not only as regards transactions with the major issuing banks but also newer entrants onto the UK credit card market. It is notable that after MBNA obtained its licence to issue Mastercard cards around November 1993, by, at the latest, August 1994 it had bilateral agreements in place with NatWest and Midland.

88. Some of the rates of IF used to populate the table were derived not from specific notifications but from codes used in contemporaneous schedules prepared at Europay for the ECCSS system, which served to identify the rate applying as between any pair of banks. Mr Van den Bergh was cross-examined extensively by Ms Demetriou KC for the CR in an effort to show that use of the code "UC00" for a pair of banks meant that no bilateral IF had been agreed and that the ECCSS, which had to apply an IF for the transaction to clear, was therefore applying a default MIF. We reject that suggestion:

(1) We think it is clear, as Mr Cook KC submitted for Mastercard, that the various UC codes were internal codes used to identify different combinations of IFs as between UK banks, which would be applied

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[16] Save only as regards TSB.

accordingly in the ECCSS processing system (Mr Van den Bergh said that the "U" prefix referred to the UK). Thus in 1993, UC00 represented 1% for both standard and electronic transactions, whereas UC02 represented 1.3% for standard and 1% for electronic transactions.

(2) Mr Van den Bergh explained that he worked in the operations team which received the codes, in what he called a "release schedule", from the customer implementation team (first called the "interchange team"); and it was the latter team which verified the banks' bilateral agreement as to IF levels and translated them into the appropriate codes, or supplied a code in default of agreement. Mr Van den Bergh could speak authoritatively as to how the clearing and settlement system operated, but it became clear to us that, while he was doing his best to be helpful, he was not really familiar with the way the customer implementation team worked (as he himself acknowledged), and therefore of how arrangements between the banks were translated into the codes resulting in the schedules found in the contemporary documents. For example, Mr Van den Bergh believed that there were UK MIFs, before 1997, and that UC00 was a domestic fallback code, distinct from the EEA fallback which would be represented by a different code. But it is common ground that there were no distinct UK MIFs until November 1997.

(3) We accept Mastercard's submission that where two UK banks came to a bilateral agreement in 1993-1994 that their IFs should be 1% for both standard and electronic transactions, the UC00 code would be used. If banks failed to reach a bilateral agreement, then if the fallback MIFs (which we have found to be the EEA MIFs) corresponded to the rates represented by UC00, then the UC00 code would similarly be used. The code would then tell the operations team what rates of IFs to input into the system. Use of the UC00 code is accordingly irrelevant to the question of whether there was or was not a bilaterally agreed IF. Thus, in May 1993, an internal Europay schedule showed the UC00 code applying to transactions between NatWest and Allied Irish Bank, Bank of Ireland, BOS, Lloyds and Midland. But it is clear that NatWest had

bilateral agreements with all those banks, as set out in the attachment to a letter from Europay to NatWest of 21 April 1993.

(4) We note that the CR sought to rely on an internal Europay memorandum of 22 December 1995, prepared after a query from NatWest. That memorandum attached a consolidated schedule of UC Codes corresponding to NatWest's bilateral agreements, and another schedule which showed the UC00 code giving revised IF rates corresponding to the revised EEA MIF rates. The schedule showed the "domestic agreements" between NatWest and, respectively, Allied Irish Bank, Bank of Ireland, Frizzell[17] and Robert Fleming as "Agreement UC00". However, following this memorandum, Europay wrote to NatWest on 30 January 1996, attaching a list of "Domestic Bilateral Agreements set up for [NatWest]" (dated 1 January 1996), which showed the Allied Irish Bank, Bank of Ireland, Frizzell and Robert Fleming rates as 1% for both paper [standard] and electronic. Those rates correspond to the original UC00 code values, not the revised UC00 code values. In view of this lack of clarity, and the clear statement in the external letter to NatWest of 30 January 1996, we find it impossible to draw any conclusion from the 22 December 1995 schedules; but in any event, the letter confirms Mr Hawkins' evidence that NatWest had bilateral agreements with all the Mastercard issuing banks.

89. The CR further relied on the response of Europay to the questions put by the OFT as part of its investigation in 2000 (see para 75(6) above) and reproduced in the OFT's decision. Europay explained that it did not process all domestic traffic in the UK and therefore could provide information only as regards participants in the ECCSS. On that basis, the OFT asked:

> "… what percentages of transactions are made (i) on the basis of fallback interchange and service fees; and (ii) by way of bilateral agreements between issuers and acquirers for interchange and service fees? Please provide this information by value and volume of transactions made for the previous 5 financial years."

[17] Frizzell Banking Services was subsequently renamed Liverpool Victoria Banking Services.

Europay's written response stated:

> "It has only been possible to calculate the information for the last three financial years.

	1997	1998	1999
POS			
Volume	0.01%	0.003%	0.001%
No. of transactions	0.02%	0.003%	0.001%
ATM/Cash Advance			
Volume	0.58%	0.24%	0.20%
No. of transactions	0.44%	0.31%	0.12%

90. The answer is somewhat confusing since there should be no distinction between "volume" and "no of transactions", whereas the question sought percentages also by value. It seems that "volume" may be a mistake for "value", and the OFT summarised the figures on that basis in its decision.[18] Nor is it made clear whether these figures give the percentages of transactions at the fallback rate or at a bilaterally agreed rate. But the CR pointed out that the sharp decline in 1998 (following the introduction of UK MIFs) suggests that the percentages refer to the proportion at a bilaterally agreed rate, and the OFT decision made the same assumption.

91. However, when put to Mr Van den Bergh, his reaction (never having seen the document before) was that these figures "look very, very low." Although the OFT decision assumed the position was as set out in this table, that is of course not binding on us and there was no evidence explaining or speaking to the figures in this table. The figures appear to be wholly inconsistent with the evidence that all the transactions of such major acquiring banks as NatWest and Midland, accounting for a large share of the market, were at bilaterally agreed rates, unless it is the case that in the period covered by these figures ECCSS was clearing only a very small proportion of UK transactions. We do not think it is necessary to speculate on how these figures were arrived at, although Mr Cook suggested that part of the explanation might be a failure to distinguish between authorisation and clearing, and the fact that by the mid-1990s it seems that Barclays and NatWest had brought their clearing business in-house, while many

[18] Table 1 on p. 21 of the OFT's Decision of 6 September 2005 on the Investigation of Multilateral interchange fees provided for in the UK Domestic Rules of MMF.

banks were still on the FDR system so that transactions between a pair of banks where both were outside the ECCSS would not be included. As Mastercard pointed out, the fact that ECCSS was processing a very high proportion of UK domestic transactions by 2000 does not mean that its increase in share was a linear growth, and as NatWest had started using ECCSS for clearing in 1993/94, and may thereupon have accounted for the great majority of transactions through ECCSS, but then took its processing in-house (it seems around 1996), the ECCSS may have experienced a sharp drop in UK domestic business.[19] But whatever the explanation, we conclude that those figures cannot be relied on as a reflection of the overall UK market.

92. In contrast, we think that Mr Parker's analysis of the weighted average IFs for 1995-1997 is relevant and helpful. It is common ground that UK MIFs were first set with effect from 1 November 1997 at the rates 1.3% standard and 1% electronic. The data indicates that UK bilateral IFs from 1 April 1995 to 31 October 1997 were generally set at the rates of 1.3% standard and 1% electronic: i.e. the UK MIFs were introduced at the prevailing rates of bilateral IFs. The EEA MIFs in 1995[20]-1997 were lower at 1.15% standard, 0.9% electronic and a further category of "secured electronic" at 0.75%. There is information available, used by both experts, of the relative value of standard and electronic transactions, from which weighted average IFs can be calculated using the different rates.[21] There is also information produced by MEPUK of the *actual* weighted average IFs applied by the four largest UK banks for 1995 and 1997 (from which Mr Parker interpolated the figure for 1996 in a linear fashion).[22] As Mr Parker explained:

> "The differences between UK bilateral IFs and the EEA MIFs in the period from 1995 onwards mean that if a significant proportion of UK domestic transactions conducted using Mastercard credit cards during the period 1995 to

[19] Europay's response also stated that clearing between Barclays and the FDR banks came onto the ECCSS in July 2000 to take advantage of Europay same day settlement service. Given Barclays' prominence as an acquiring bank, that would have significantly boosted the proportion of UK transactions on the ECCSS.
[20] With effect from 1 April 1995.
[21] Save only that the two EEA categories of electronic and secured electronic cannot be distinguished so Mr Parker used a blended rate, calculated according to the relative weighting of all EEA transactions as stated by Mastercard in its response to the Commission's Statement of Objections.
[22] Data submitted by MEPUK to the OFT in 2002 in response to a notice under s.26 of the Competition Act 1998 for RBS Group, HSBC/Midland, Barclays and Lloyds. By that stage, RBS Group included NatWest, so the data covered what had been five banks in 1995-1997 (i.e. RBS as well as NatWest).

1997 were subject to interchange fees at the level of the EEA MIFs rather than the level of the UK domestic bilateral IFs ["BIFs"] in the available data, then the actual UK weighted average IFs would be expected to reflect the level of the EEA MIFs rather than the level of bilateral IFs, weighted by the proportion of transactions in the relevant categories."

93. The analysis produced the following figures for the estimated and actual weighted average IFs:

Year	Scenario 1 (assumes UK BIFs applied to all transactions)	Scenario 2 (assumes EEA MIFs applied to all transactions)	Actual weighted average UK domestic IFs
1995	1.132%	0.957%	1.148%
1996	1.114%	0.937%	1.118%
1997	1.096%	0.927%	1.105%

94. As Mr Parker pointed out, this shows that the actual weighted average UK IFs are comparable to those in his scenario 1, which assumed that the prevailing UK bilateral rate applied to all transactions, whereas they are substantially higher than those in his scenario 2, which assumed that the EEA rates applied. We recognise that there are some deficiencies in the underlying data, which were explored by Ms Demetriou in her cross-examination of Mr Parker.[23] As Mr Parker readily acknowledged, the figures therefore cannot be regarded as perfect or precise, but we do not regard any of those limitations as so significant that they undermine the essential thrust of Mr Parker's analysis and conclusion: that these figures are inconsistent with the contention that a significant number of transactions were at the EEA MIF rates. Indeed, the only comment on this analysis by the CR's expert, Mr Coombs, was to query how the figures calculated for scenario 1 could be below the actual weighted averages; but Mr Parker explained the slight discrepancy on the basis that different sources were used for the weighting.[24]

[23] E.g that the data used for column 3 is derived from only the four/five largest banks and not all banks; that the figures used for column 3 included also transactions in the UK on foreign issued cards; and that the HSBC data included also Visa card transactions (so if HSBC had agreed different IFs for Visa from Mastercard or carried out a different proportion of standard/electronic transactions on Visa from the proportion on Mastercard, that would have some impact on the figures).
[24] The fact that the data included what would be a relatively small number of transactions on US issued cards, to which the higher inter-regional MIFs would apply, may also partly explain the discrepancy.

95. There is also a more fundamental point. If, as the CR submitted, many transactions were carried out at the EEA default MIF prior to the introduction of the higher UK MIFs of 1.3% standard and 1% electronic in November 1997, then one would have expected a strong reaction from the acquiring banks to this rise in the level of IFs. Given the vast multitude of transactions, even a few points on the rate make a very significant difference in financial terms. But there is no evidence at all in the MEPUK documents of any such reaction.

96. The closing submissions for the CR noted the paucity of evidence regarding bilateral transactions between banks, in part due to the fact that there was no disclosure from the banks themselves. The banks are of course not parties to these proceedings. However, the CR could have applied for third party disclosure by one or more of the major acquiring banks of their bilateral arrangements, to find documents that might support his case on causation. Such limited third party disclosure would not have been disproportionate for a claim of this vast scale. But no such application was ever made.

97. We have to reach a view on the evidence as it stands. We accept that there were probably some instances where transactions would have been at the fallback rate for lack of a bilateral IF. We think that may well have applied:

(1) for a new entrant, such as MBNA,[25] for a short period before it concluded bilateral IFs;

(2) it seems that some of the smaller banks may not have concluded bilateral IFs with each of the acquiring banks: we note that the table suggests that MBNA did not have a bilateral agreement with Barclays, Lloyds or RBS,[26] and a number of banks that became Mastercard licensees only in 1995-1996 do not appear on the table at all. For example, the CR pointed to a letter from BoS to Europay of 21 June 1996 enclosing the form for its domestic interchange fees with Beneficial Bank, which indicated that

[25] E.g., HFC Bank only became a Mastercard/Eurocard licensee in October 1993 and is shown as having bilateral IFs from January 1994.

[26] The table also shows that National Mortgage Bank and Nationwide had very few bilateral agreements for Mastercard IFs, but it seems that neither was a Mastercard licensee in this period and so they would not have been issuing Mastercard credit cards; we believe that Nationwide issued Visa cards.

the IF to paid by Beneficial Bank should be at the default level since no IFs had been agreed.

98. Altogether, we conclude that the CR has failed to prove that any significant volume of domestic transactions was not covered by bilaterally agreed IFs. On the contrary, we find, on the balance of probabilities, that only an insignificant minority of UK domestic transactions was not subject to such a bilateral IF. Furthermore, we accept the final iteration of the bilaterals table as the best indication of the prevailing levels of IFs applicable as between the UK banks.

99. We should add that we were not deflected from this conclusion by the CR's reference to the answer given by Mr Nicholas Green QC (as he then was) to a question from the Tribunal at a case management conference on 31 March 2006 in preparation for the hearing of an appeal against the OFT's decision. Mr Green's oral response ("In the early part of the '90s there were some bilaterals"), in which the CR emphasised the word "*some*", was obviously not evidence; the OFT's decision related to a later period so the parties were not focused on the early 1990s; and the CMC was obviously not the substantive hearing of the appeal.[27]

(4) The basis of bilateral agreements

100. The CR's case that the default MIFs acted as a floor/guidance/benchmark/minimum price recommendation for bilaterally agreed IFs sought to rely on bargaining theory (which was referred to as "basic economic theory") whereby two parties entering into a negotiation would take account of the outside options that would be available or apply if they should fail to reach an agreement. The CR emphasised that some banks were net acquirers, who therefore wanted lower IFs, whereas others were net issuers, who therefore wanted higher IFs, and both would be aware of the level of the default MIF applicable in the absence of agreement. Since their incentives were thus opposed, the CR submitted that a pair of banks negotiating an IF would see the EEA MIF as the benchmark since it would apply in default of agreement.

[27] No substantive hearing ever took place as the OFT agreed to set aside its decision.

101. However, we consider that in reality the position was much more complicated, as the experts indeed came to agree in response to questions from the Tribunal in the 'hot-tub'. Bargaining theory acknowledges that parties negotiating over one matter would see that matter in the context of their overall negotiations comprising also other matters. They might negotiate the IFs for credit cards alongside the IFs for debit cards and cash transactions. Moreover, the evidence was that where banks issued both Mastercard and Visa cards, their negotiations with acquirers would cover the IFs for both cards.[28] The acquiring banks may be net acquirers for one card scheme but net issuers for another: we understood that NatWest, although a net acquirer for Mastercard was a net issuer for Visa, so the incentives were not all one way. Moreover, the two banks may have a broader commercial relationship, of which the processing of credit card transactions was only a part, and their compromise on the level of IFs would be influenced by the agreements they reached, or were seeking to reach, on other aspects of their business.

102. Mr Parker made the point, with which Mr Coombs agreed, that where the subject of negotiations was not a one-off, but likely to recur, parties would have regard to the effect of any deal on their future negotiations. That has particular application as regards IFs, since a bank may be a net acquirer at one point but have the objective of developing its issuing business so as to become a net issuer in future, and vice versa. A further factor influencing negotiations, the experts agreed, was the threat of regulatory scrutiny and intervention if rates were too high. MEPUK and the banks were well aware that the British Retail Consortium had submitted a complaint against Europay to the Commission in 1992.

103. Moreover, if the parties failed to agree on bilateral IFs, the position was not simply that the default MIFs (which we have found to be the EEA MIFs) would apply. We find that throughout this period, the understanding of MEPUK and the participating banks was that, under the terms of the rules, in the absence of a bilateral agreement the parties should go to arbitration under the MCII rules. Hence at the meeting of the RCC on 12 February 1997, there was discussion of

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[28] Although Visa, unlike Mastercard, set specific UK MIFs in this period, those were default MIFs and Mr Hawkins said that the bilateral negotiations he conducted between UK banks covered the IF for Visa along with the IF for Mastercard.

> "…the arbitration procedures to be followed where a Member was unable to agree on the fee for intra-country transactions."

And we consider that the expectation was that, if there were an arbitration, the EDC cost study would there be used as a reference point. That was indicated already in June 1992 in Mr Strachan's letter to MEPUK (para 69 above). And on 7 May 1996, the minutes of a meeting of the RCC attended by Mr Strachan recorded that:

> "In response to Mr. Hawkins's query, Mr. Strachan thought that the arbitrators would tend to find that the interchange rate should move towards the cost-based rate, not immediately but over a period of years."

And in 1997, Mr Warren of Midland Bank is recorded in the minutes of a MEPUK Governance Sub-group as stating:

> "the MEPUK Board's view of the significance to be placed on the Edgar, Dunn Cost Study rates in any arbitration process."

We do not think that Mr Douglas' evidence about the likely rates that would be fixed by arbitrators under the Maestro scheme in the early 2000s has any bearing on this, and in any event he was not involved in any negotiations of IFs.

104. Although it seems that hardly any arbitrations took place, whether in the UK or elsewhere, the experts agreed that this did not mean that it was not a credible alternative that would have influenced the parties' bargaining. Arbitration was clearly regarded as very relevant by the UK banks. Since the first version of the UK Domestic Rules did not contain specific provisions for arbitration on IFs, the MCII rules continued to apply in that regard. At the meeting of MEPUK's sub-group on 28 April 1997, Mr Hawkins reported that he had written to MCII seeking clarification that the rate determined by the arbitrators should apply retrospectively to the date of the request for arbitration. It appears that MCII replied that this would be the case only if the two parties involved agreed, and that otherwise the new fee would not take effect until the arbitrators gave their decision. In June 1997, the RCC therefore resolved to ask Europay to amend the UK Domestic Rules to provide that the effective date would be the date of commencement of the arbitration. The next version of the UK Domestic Rules,

issued shortly afterwards, included a new provision expressly providing for this in rule 13.2:

> "Where two UK Members cannot agree on the Interchange fee to be used, the dispute may be referred to MasterCard by either Member, for an arbitration decision. Members should refer to the *MasterCard By-Law and Rules*, Chapter 11, sub-chapter 11.09. During the arbitration process, in the absence of an existing Bi-lateral agreement, Intra-Regional Rates will apply. Once the arbitration decision has been made, the arbitrated figure will apply with effect from the date that the arbitration request was received by MasterCard."

If the right of arbitration had been regarded as of no practical significance, MEPUK would hardly have bothered to seek this amendment to the rules. And the fact that parties to an arbitration would be expected to adduce evidence regarding costs seems to us one reason why arbitration was viewed as such an expensive option.

105. Mr Hawkins gave evidence regarding the many negotiations he conducted with other banks concerning the NatWest IFs (and the IFs of the other banks in the NatWest group, Coutts and Ulster Bank). He said that in those negotiations the parties referred to the reference rates determined by MEPUK, and that he never had regard to the EEA default MIFs.

106. As against that, the CR placed great weight on the comment by Mr Warren of Midland, in the meeting referred to in para 103 above, that "in the past, the use of the intra-regional rate as the fallback rate had worked to Midland's advantage." Mr Hawkins acknowledged that Mr Warren appeared to be saying that Midland would have been able to threaten not to agree interchange fees bilaterally with other UK licenses and therefore to apply the lower intra-regional rate [which we consider is a reference to the EEA MIFs] pending arbitration, thereby boosting its acquiring business.

107. Altogether, we find that the EEA default MIFs were not wholly irrelevant, but that they were only a relatively minor factor for the bilateral negotiation and determination of IFs. We note that Mr Hawkins said that in his negotiations and in the discussions at MEPUK on reference rates, the greatest influence was the Visa rates and the sense of "what the market can bear". Even where acquirers favoured lower rates, they were well aware that if rates were materially lower

than Visa's, issuing banks would potentially switch their issuing business to Visa: see para 34 above. It is notable that the Visa UK MIFs were raised in April 1993 to 1.3% standard with electronic staying at 1%, and that almost all the UK bilaterally agreed IFs went up in the course of 1994 to 1.3% standard, with electronic staying at 1%.

108. Furthermore, the lack of influence in practice of the EEA MIFs on UK bilaterally agreed IFs is demonstrated by the movements in the respective rates over this period. Between 1992-1994, the prevailing bilaterally agreed IFs moved from 1% for both categories in 1992 to 1.3% for standard and 1% electronic by August 1994, whereas the EEA MIFs remained unchanged at 1% for both categories until April 1995.[29] Then in April 1995, the EEA MIFs were revised to 1.15% standard and the electronic was divided into two categories: 0.9% electronic and 0.75% "secured electronic".[30] No equivalent changes were made to UK bilateral IFs in 1995, or 1996, or 1997. We do not accept that UK IFs at 1.3% can be correctly described in this context as only "marginally higher" than the EEA rate of 1%; or that IFs at 1.3%/1% constitute "a narrow spread" around the EEA MIFs of 1.15%/0.90%/0.75%, as submitted in the CR's closing submissions. A difference of 0.15%, let alone 0.3%, is significant, given the vast volume and aggregate value of transactions. In our judgment, these differences are not consistent with the EEA MIFs acting as a "guide" or "benchmark."

109. We should add that we do not consider it is appropriate to 'reason backwards' from the situation when specific UK MIFs were set by MEPUK to the situation in this early period when there were no UK MIFs. It is common ground that bilateral negotiations of IFs between the banks ceased once UK MIFs were set. Therefore, the approach of the OFT in 2003 in its investigation of the setting of UK MIFs by MEPUK, on which the CR sought to rely, is in our view of no assistance in determining what happened in the early period.

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29 There was a reduced EEA MIF of 0.5% for electronic transactions where authorisation requests were generated for 100% of electronic transactions; and 0.5% for standard (paper) transactions where the local floor limit for authorisation was below the agreed intra-EEA floor limit for that category.

30 "Secured electronic" referred to an electronic transaction that was authorised using the CVC (card verification code) by the signature strip on the rear of the card.

110. Accordingly, having regard to all the evidence, we find that the EEA MIFs did not operate as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation or starting point, whether by way of the reference rates or otherwise, for the levels of bilateral UK IFs agreed over the early period.

111. We should add that our conclusion is not affected either by what was said in the Notice of Appeal challenging the OFT decision in November 2005 or by recital (421) of the Decision, relied on in the CR's written closing submissions. The former was by way of submission that was never scrutinised further as the appeal did not proceed once the OFT decision was withdrawn. The latter is expressed on a tentative basis ("the cross-border interchange fees *may* act as minimum benchmark for setting the level of domestic interchange rates" [emphasis added]) as regards European countries generally and the example quoted comes from the Netherlands. Our finding reflects the evidence now before the Tribunal regarding the position in the UK.

G. THE MIDDLE PERIOD: NOVEMBER 1997 - NOVEMBER 2004

(1) MEPUK and the UK MIFs

112. In this period, UK MIFs were set by MEPUK. As noted above, these MIFs were set at 1.3% standard and 1% electronic, and those remained the primary UK MIFs until close to the end of this period. Mr Hawkins' unchallenged evidence was that after these specific UK MIFs were introduced, UK banks came to transact on the basis of those MIFs and no longer negotiated specific bilateral agreements.

113. The first UK Domestic Rules were introduced with effect from November 1996 but incorporated as fallback the EEA MIFs, and it was only the following year that the rules referred to UK MIFs. Those rules were drafted by MEPUK and submitted to Europay, which then issued them to Mastercard's UK licensees. In that way the rules were binding on the UK members of the Eurocard/Mastercard scheme even if they were not members of MEPUK.

114. The authority to MEPUK from Europay to produce UK rules was given on condition that MEPUK was sufficiently representative of UK members of the Eurocard/Mastercard scheme. The resolution adopted by the Board of Europay on 3 December 1993 mandating its management to incorporate any rules developed by MEPUK accordingly included the requirement that:

> "MEPUK remains representative of at least 90% of total issuing and acquiring volumes of UK Members."

This condition was referred to in these proceedings as "the 90% rule." If MEPUK lost its authority to set rules, and with them the UK MIFs, it is common ground that the default MIFs would revert to the EEA MIFs set by Europay.

115. By 1997, MEPUK became concerned by the risk that it might cease to satisfy this 90% condition. Membership of MEPUK was voluntary and there had been a number of significant new entrants into the UK market issuing Mastercard cards that chose not to join MEPUK. Mr Hawkins explained that this was particularly the case for some of the monoline banks, which sought to build up a large customer base by attractive offers, including interest-free balance transfers: see para 33 above. On 25 March 1997, Mr Hawkins wrote on behalf of MEPUK to Europay expressing this concern and proposing as a solution that a UK licensee of Eurocard/Mastercard should become a member of MEPUK under the terms of their licence.

116. Europay regarded this proposal in the context of its approach to local organisations generally and was not attracted by the suggestion of making membership of such organisations compulsory, which it considered might give rise to competition law problems. Instead, it responded by lowering the threshold for the authority of MEPUK, and other domestic associations of Mastercard members, to make rules from 90% to 75% on 19 March 1999. The amended Eurocard Rules stated in their preface:

> "Any domestic rules applicable to all domestic transactions in a country, including centrally acquired domestic transactions, must be agreed by a group of Members … representing, in the year preceding the agreement, at least 75% of each of the Eurocard-MasterCard issuing and acquiring domestic point-of-sale volumes in the country. Domestic rules will remain in effect until changed or challenged. If domestic rules are challenged because the group of Members agreeing to them no longer meets the 75% threshold, the international rules

will apply in their place, as from the date when Europay has determined that the 75% threshold is no longer met."

117. There was some dispute at the hearing regarding the correct interpretation of the provisions setting out the 90% and then the 75% threshold, and whether they meant that at least the requisite proportion of members must belong to MEPUK for it to have authority to set rules, or whether *every rule* must have the support of at least that proportion of members, so that 10% or later 25% of issuers or acquirers could challenge a particular rule without withdrawing from the rule-making body. We consider that the former interpretation is correct, and that if MEPUK no longer comprised the requisite proportion of UK Eurocard/Mastercard business, the UK Scheme Rules would cease to have effect, but that the threshold did not apply rule-by-rule. That, indeed, was the interpretation put forward by the CR in the opening submissions on his behalf; it accords with the purpose of this condition which was to ensure that the rule-setting body was sufficiently representative of UK licensees; and it is supported by the context in which Europay decided to reduce the threshold from 90% in response to the representations from MEPUK. The CR sought to rely on an example from Belgium where a major bank challenged specifically the MIF rate, but we have scant information regarding the situation there and derive no assistance from that reference. But in the end, the question of the correct interpretation of the threshold requirement does not affect the conclusions we reach.

118. As indicated above, the CR's arguments as regards this period were placed under three heads: (a) Hierarchy; (b) Weighted Voting; and (c) Infection.

(2) Hierarchy and Weighted Voting

119. We consider the first two of those arguments together. The CR's case was that they operated "in tandem." The Hierarchy Argument is based on the fact that there were a few acquiring banks, all of them large, which held a significant proportion of the total UK acquiring volume. We do not believe that we had figures of the individual banks' proportion of specifically acquiring turnover after 1998, but the figures for 1998 alone set out in the table at para 30 above show that withdrawal from MEPUK by any of NatWest (which in 2000 was

combined with RBS), Barclays or Midland/HSBC would have taken it below the requisite threshold and, with the consequent withdrawal of the UK MIFs set by MEPUK, under the rules the default MIFs for the UK would then have been the EEA MIFs set by Europay.

120. The level of UK MIFs was determined bi-annually by the Board of MEPUK. The Weighted Voting argument is based on the fact that each member of MEPUK was represented by a single director on the Board, irrespective of their shareholding. Accordingly, voting on the Board was heavily weighted in favour of the issuing banks.

121. The CR submitted that it was in the interest of acquiring banks to keep the level of IFs low, whereas issuers, who received the IFs, had an interest in having higher fees. The issuers had no incentive to accept MIFs below the EEA rates, but at the same time they would know that they could not insist on MIFs above, or at least much above, the EEA rates because in that event one or more of the large acquiring banks would have withdrawn from MEPUK. The CR contended that, given the way MEPUK was constituted, this balance of factors therefore led the UK MIFs to be set "by reference to" the EEA MIFs, or at least that the EEA MIFs operated as "guidance" or "a benchmark" for the setting of the UK MIFs by MEPUK.

122. In our view, this line of argument elevates theory over practical reality. It is relevant to consider how MEPUK first introduced these UK MIFs. Between May and August 1996, MEPUK had considered whether to increase its reference rates above the 1.3% standard and 1% electronic, in view of the most recent costs study received from EDC. The RCC proposed a few alternatives to the Board, including raising the rates to 1.35% standard/1.05% electronic (a course supported by Mr Hawkins as he wished to bring rates closer to costs). However, the Board of MEPUK decided not to make any change. The Board minutes of 8 August 1996 record as follows:

> "[The chairman] opened the discussion by stating that he would resist any proposal for an increase in the fallback rates as he did not believe they were sustainable in the marketplace. He also commented that a full review of the card industry may take place shortly at the instigation of the Department of Trade and Industry. Following a lively debate, it was agreed not to ask EPI to

> change the arbitration process and fallback rates and that arbitration should continue to be handled by MasterCard."

At this time, the Visa UK MIFs were similarly 1.3% standard and 1% electronic, and of course all the MEPUK members were aware of that.

123. In late 1997 MEPUK resolved to ask Europay to adopt specific UK MIFs. The minutes of the MEPUK Board meeting of 10 October 1997 record that:

> "It was agreed that MEPUK Board would formally request EPI to incorporate UK Domestic interchange fee rates in UK Domestic Rules with effect from 1st November, 1997 - the rates being those currently in adoption and as modified from time to time."

124. It is not in issue that, in response, Europay agreed to adopt UK MIFs, which took effect from 1 November 1997, at the rates 1.3% standard and 1% electronic. The reference in the minutes to "the rates being those currently in adoption" was accordingly to those rates, which as noted above were the MEPUK reference rates. There was no suggestion from MEPUK that the new UK MIFs should track the EEA MIFs, which were then 1.15% standard, 0.9% electronic and 0.75% secured electronic. The fact that any of the three major acquiring banks could have threatened to leave MEPUK and thereby take it below the 90% threshold required for it to set UK MIFs, clearly did not operate so as to lead MEPUK to propose UK MIFs at, or even close to, the EEA rates. (As we observed above, even a 0.1% move in the rate was financially very significant, and indeed the suggestion of even a 0.05% move in rates had been rejected the year before by the MEPUK Board as unsustainable in the market.)

125. We accept that a threat to withdraw from MEPUK did not have to be voiced in those dramatic terms in order for it to be influential on the minds of the MEPUK Board members. But there were many other benefits for the members from MEPUK's authority to set the UK domestic rules. The rules are a compendious document, covering a wide range of matters other than IFs. In particular, they determine the charge-back mechanism (i.e. when an issuing bank can 'reverse' the payment made to the acquirer because of fraud, failure by the cardholder to pay or a dispute over the goods or services acquired), and set the floor limits below which authorisation was not required. Both of those were very much matters of concern for the acquiring banks. Withdrawal from MEPUK to take

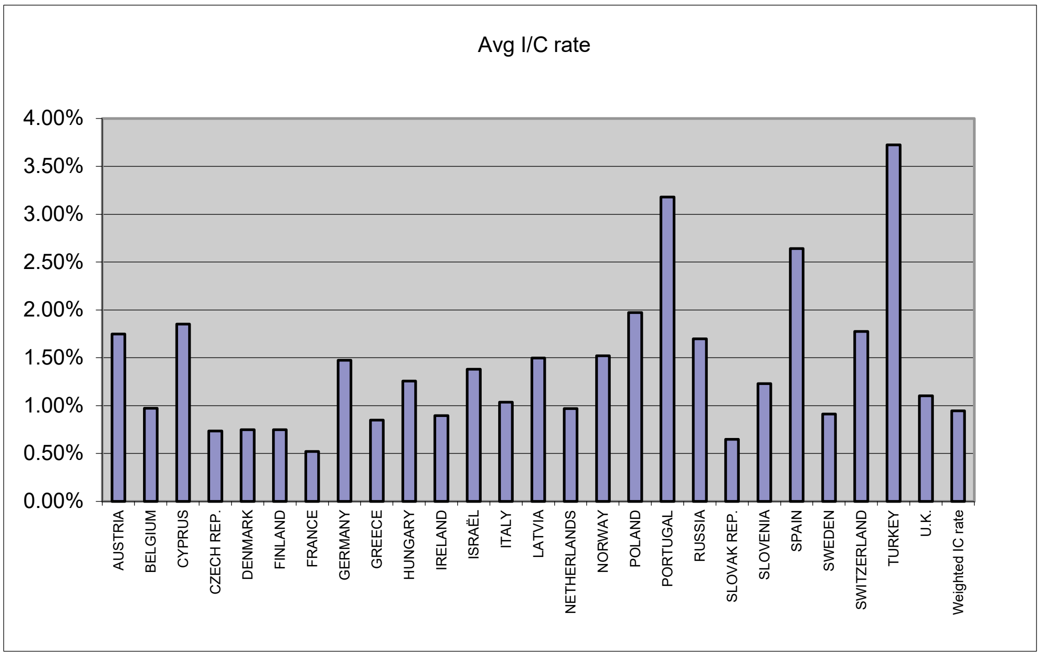
its membership below the 90% or then 75% threshold was very much a 'nuclear option', which an acquiring bank would be very reluctant to use.

126. Even if, contrary to our view, the 90%/75% rule could apply distinctly to the right to set UK MIFs while leaving the other rule-setting authority intact, Mr Hawkins said that NatWest group, as the largest acquirer on Mastercard, never contemplated taking such a step. Nor was there evidence that any of the other major acquirers ever considered this. Mr Peacop, who attended the IF sub-group of MEPUK throughout this period, would have been aware of any suggestion from a bank that the level of UK MIFs might lead it reconsider its membership: indeed, he said that this would have generated a lot of discussion, which he would remember. He was of course aware of the threshold condition and that it was therefore a theoretical possibility that a major bank could, by withdrawal, deprive MEPUK of its authority to set UK MIFs, but despite persistent questioning in cross-examination Mr Peacop said that he never contemplated that this would occur. He was also not aware of the Belgian example to which the CR referred.

127. As explained at para 117 above, when the threshold was reduced from 90% to 75%, that was not to reduce the risk from any of the acquiring banks deciding to leave MEPUK but out of concern that new Mastercard licensees may not join MEPUK. Those new entrants were in particular the monoline banks which had a different operating model, and aggressively sought market share by attractive offers to cardholders of credit balance transfers and also easier eligibility conditions to obtain a card. Those entrants were issuing, not acquiring banks, but as their market shares grew, unless they joined MEPUK the proportionate share of the issuing market held by MEPUK members would decline.

128. Altogether, there were a range of considerations that would drive the attitude of individual MEPUK members towards the level of UK MIFs, and not simply whether each was a net acquirer or a net issuer. Domestic market considerations were particularly important. The 75% condition, as set out in the Europay rule applied not just to the UK but to all the European countries. There were other countries where domestic MIFs were set by domestic bank groups. Under the hierarchy of the rules, if domestic MIFs were not set, then in default of a

bilateral agreement the EEA MIFs would apply. The degree to which local considerations affected the level of the IFs is illustrated by the chart below, showing weighted average domestic IFs for Mastercard credit cards in 1999.



129. The weighted average EEA MIF rate for 1999 was 0.93%. Accordingly, in many EEA countries where that would be the default in the absence of domestically agreed MIFs, the average IF rate diverged significantly from the average EEA rate. Since the 90%/75% requirement by Europay for the setting by domestic banks of a MIF applied across the EEA, this demonstrates the extent to which local market considerations could lead to average domestic IFs or MIFs being set substantially above (e.g. Austria, Germany, Portugal and Spain) or substantially below (e.g. Denmark and France) the EEA MIFs.

130. Although in their pleading, Mastercard contended that in setting the UK MIFs MEPUK was guided by the EDC costs studies, the experts agreed that there was no significant correlation between the level of costs shown in the EDC studies and the level of the UK MIFs. However, we do not regard those costs studies as irrelevant: indeed, if they were, it is hard to see why MEPUK continued to request them. We think that the role of the EDC cost studies was more limited but nonetheless important. MEPUK was acutely aware of the growing regulatory interest in the MIFs and these independent studies enabled MEPUK and its member banks to demonstrate to regulators that their charges were not

above cost. We think the CR was correct in his closing submissions in stating that the costs calculated by EDC set the ceiling for the domestic MIFs. In our view, the costs established by EDC provided a starting point; but thereafter MEPUK took account of domestic market considerations, including in particular the Visa MIFs. If MEPUK had set the Mastercard MIFs appreciably lower than Visa's, then issuers would have switched to Visa, whereas if they had been appreciably higher that would have provoked a strong reaction from, in particular, large merchants in their negotiations of the MSCs with acquirers. By the late 1990s, a number of the larger merchants concluded agreements with their acquirers for an MSC on a "MIF plus" basis (i.e. at the level of the MIF plus a small additional amount).

131. We recognise that in discussions in MEPUK regarding the appropriate level of UK MIFs, there would have been an element of tension between net issuers seeking higher rates and net acquirers favouring lower rates. But that does not mean that they were influenced by the EEA default rates. The simple fact is that when the UK MIFs were introduced in November 1997, they were set by MEPUK significantly above the levels of the Mastercard EEA MIFs: the UK MIFs were set at 1.3% standard and 1% electronic, whereas the EEA MIFs were at 1.15% standard and 0.9% electronic, with a further category of "secured electronic" at 0.75%. And the UK standard and electronic MIFs remained at those levels until almost the end of the middle period,[31] unaffected by the changes in the EEA MIFs. Over that time, Mastercard's EEA standard MIF was increased, first to 1.2% in 2000 and then further to 1.3% in 2001, while the EEA electronic and secured electronic categories were removed in June 2000 to be replaced by a single "enhanced electronic" MIF set first at 0.85% and then increased to 0.95% in 2001.

132. By contrast, it is notable that from November 1997 until September 2003, the standard and electronic Mastercard UK MIFs were at the same levels as the corresponding Visa UK MIFs. And after Visa reduced its UK electronic MIF from 1% to 0.87% in 2003, MEPUK reduced the Mastercard UK electronic MIF to 0.9% the following year. Moreover, Visa introduced other categories of UK

[31] The UK electronic MIF was reduced to 0.9% in October 2004.

MIFs (in 1997), including “card not present”[32]: “cardholder activated terminal”[33] and a special category for airline purchases, at respectively 1.1%, 1.3% and 1.1%. MEPUK introduced the same categories at the same rates with effect from April 1999. But the Mastercard EEA MIFs never included those categories. In our judgment, it was the UK MIFs of the competing Visa scheme, not the Mastercard cross-border EEA MIFs, which influenced MEPUK in its decisions regarding Mastercard’s UK MIFs.

(3) Infection

133. The CR’s Infection Argument was put forward as an alternative to the Hierarchy and Weighted Voting arguments. It was based on the fact that when MEPUK first introduced UK MIFs in November 1997, in setting the level of those MIFs it “adopted the prevailing bilaterally agreed levels as enshrined in MEPUK’s ‘reference rates’”. Since the CR contended that the levels of those bilateral IFs were caused by the EEA MIFs, he submitted that it followed that the levels of the UK MIFs when first introduced were also ‘infected’ by the EEA MIFs. And since thereafter the levels of the UK MIFs hardly changed (as set out above), it followed that this ‘infection’ continued to apply throughout the middle period.

134. However, since we have found that the UK bilateral IFs in the early period were not set by reference to, or materially influenced by, the EEA MIFs (nor were the reference rates), the Infection argument falls away.

135. Accordingly, we find that the EEA MIFs did not cause or exert any material influence, in any of the ways alleged by the CR, on the levels of the UK MIFs in the middle period.

[32] I.e. telephone or postal purchases; internet purchases would fall within this category but they were minimal in 1997 and still only 2% of total transactions in 2002 when MEPUK introduced a distinct category of MIF for internet transactions.

[33] I.e. transactions where the cardholder used a self-service terminal that was unattended (e.g. at railway ticket machines and public phone booths).

H. THE LATE PERIOD: NOVEMBER 2004 – JUNE 2009

136. On 18 November 2004, the global Board of MCI decided that the authority to set UK MIFs should be taken away from MEPUK and be vested in "Mastercard management", with immediate effect. It appears that this decision arose out of competition law concerns, prompted by the investigation being carried out by the OFT: see the Decision at recital (80). From this point until September 2006, UK MIFs were set by MCE and then from September 2006 they were set by the COO of MCI with input from the EIC: para 56 above.

137. As the CR expressly acknowledged, the Hierarchy and Weighted Voting arguments obviously cannot apply once MEPUK was no longer setting UK MIFs. In his written opening for the trial, the CR said that his case on causation for this period rested on the Infection Argument, which applied "mutatis mutandis from November 2004". The CR submitted that:

> "… if the intra-EEA MIFs affected the level of UK fallback MIFs prior to November 2004, they will have continued to affect the levels of UK fallback MIFs thereafter."

The CR added that it may be open to him to submit that in a counterfactual world where the EEA MIFs were very much lower, the structure could have been different and MEPUK might have continued to set UK MIFs (on the basis that there would have been no OFT investigation and so no cause for MCI to revoke MEPUK's authority). But as the CR recognised, such hypothetical scenarios are not relevant to this stage of the trial.

138. Given our findings and conclusion on the Infection Argument for the middle period, the analogous argument for the later period falls away.

139. However, in the trial the CR introduced a further argument. This was that the body which set (or had "control" over) the UK MIFs was the same body that set the EEA MIFs, and that it was therefore bound to be influenced by the EEA MIFs when determining the UK MIFs. Further, the MCE expressed a strategy of aligning UK MIFs with the EEA MIFs.

140. Although not pleaded, as we observed above, Mastercard did not strenuously oppose the introduction of this argument and we will address it. Since Mr Sideris was Associate Vice-President, Interchange, and then Vice-President and Head of Interchange at MCE over this period, he could explain how Mastercard approached the setting of the various MIFs.

141. Mr Sideris said that in August 2003, MCE established the EIC.[34] He attended almost all EIC meetings from its inception until January 2010, and indeed from mid-2006 was chair of the EIC. The terms of reference of the EIC specified:

> "*Vision*
>
> In accordance with MasterCard strategy, develop, review and make recommendations to MasterCard Europe senior management on intra-European interchange programs and, where appropriate, domestic interchange programs for potential submission to the European Boards.
>
> *Objectives*
>
> • Review and propose the MCE interchange strategy and prepare all interchange changes for MCE senior management approval;
>
> • Review interchange at European level, by region, by market and by product on a regular basis and recommend the required repositioning."

Mr Sideris explained that the EIC would make proposals for EEA MIFs but the final decision was taken, until September 2006, by the MCE Board;[35] following the IPO, the final decision rested with the COO of MCI under delegated authority from the CEO.

142. By contrast, the MCE Board was never involved in setting UK MIFs. After the authority of MEPUK to set UK MIFs was revoked in November 2004, those MIFs were set by the COO of MCII/MCI, as delegate of the President and CEO. Thus between November 2004 and September 2006, the UK MIFs and the EEA MIFs were not in fact set by the same body.[36] However, the EIC would present

[34] European Interchange Committee: see para 18 above.
[35] Until the IPO in 2006, prior approval was required from the Business and Marketing Advisory Committee ("BMAC") before being presented to the MCE Board. With the IPO, BMAC was disbanded.
[36] The fact that the distinction could have practical effect is shown by what happened in 2005 regarding the MIFs proposed by the EIC for Mastercard's new Worldcard. The EIC's proposals for EEA MIFs were rejected by BMAC, whereas its proposals for UK MIFs were accepted by Mastercard's COO: see para 150 below.

proposals for UK MIFs to the COO, and so it is the case that the EIC was involved throughout this period in the process that led to the setting of both EEA and UK MIFs.

143. The CR relied on two reports prepared for the EIC in June and September 2005, as part of an overall review of MIF setting. The first report recommended the introduction in the UK of two new MIF categories ("tiers") for secured internet transactions[37] in view of the growth of e-commerce. They were described in the report as "incentive tiers" to encourage the use of Mastercard's secure technology[38] "across the issuer and merchant communities". The report stated the rationale for the proposal as including the following:

> "The proposed fees aim to start aligning the UK domestic MIF structure with the European one in view of SEPA (1st step);
>
> The above proposal is in line with MasterCard global strategy for internet transactions;
>
> …
>
> The Merchant UCAF tier is positioned at the same level as the Electronic tier, consistently with the European approach; …"

144. The second report reviewed the structure of UK MIFs more fundamentally and proposed to simplify that structure by removing four tiers (Pan Key Entry,[39] Cardholder Activated Terminal ("CAT"),[40] Airlines and Internet) and to reduce the standard rate from 1.3% to 1.2%. The report stated:

> "The aim of this proposal is to reduce the number of tiers and start aligning with the intra-European structure in view of SEPA."

The report proceeded to explain that the removals had very little usage[41] and that retaining a separate MIF for general internet transactions was contrary to

[37] Using Mastercard's technology called "SecureCode".
[38] Thus they were labelled UCAF tiers, referring to "Universal Cardholder Authentication Field", where the transaction used Mastercard's SecureCode technology. When the cardholder attempted an online transaction, SecureCode sent a message, usually to the cardholder's mobile device or email, which had to be authenticated before the transaction could proceed. This was seen as significant in reducing fraud, which was a heightened risk for internet transactions.
[39] Transactions where the cardholder was present with their card at the time of the transaction and the merchant manually entered the cardholder's details and obtained their signature.
[40] See fn 33 above.
[41] Indeed the report recorded that no transactions were made attracting the CAT rate.

the strategy of encouraging the use of secure internet transactions as covered by the previous introduction of the two UCAF tiers. The 0.1% reduction in the standard rate was intended to accommodate the volumes from the cancelled tiers which would revert to the standard rate and so retain the overall weighted average MIF rate. The report also contained proposals for the UK MIFs that should apply for two Mastercard premium cards: see paras 148 to 150 below.

145. However, we consider that far from showing that the levels of the EEA MIFs influenced the EIC or Mastercard in setting the levels of UK MIFs, they in fact do the opposite. Mr Sideris emphasised the difference between MIF structure and MIF levels: the former refers to the categories or tiers for which MIFs were set, whereas the latter refers to the specific MIF within any category. The alignment referred to in the first report concerned structure not MIF levels. Moreover, the reference in the rationale to positioning the Merchant UCAF tier consistently with the European approach meant that the level of the Merchant UCAF MIF for the UK was proposed at the same level as the UK Electronic MIF, just as the Merchant UCAF EEA MIF was at the same level as the EEA Electronic MIF. The proposed Merchant UCAF MIF for the UK was notably *not* at the same *level* as the EEA Electronic MIF: the UK proposal was 0.9% (corresponding to the UK electronic MIF), whereas the EEA UCAF and electronic MIFs were both at 0.95%. That reflects a further element expressed in the rationale for the proposal:

> "The proposed fees keep an overall competitive advantage to MasterCard issuers."

It is clear from the report that this is a reference to the position of Visa, which is stated to have introduced a UK domestic MIF for secured transactions of 0.87%.[42] Indeed, the "competitive analysis" in the report for Mastercard UK MIFs is entirely in terms of comparative Visa UK MIFs; there is no reference at all to the levels of Mastercard's EEA MIFs.

146. The second report again referred to aligning the *structure* of UK MIFs with EEA MIFs, which was understandable in view of the planning for the introduction of

[42] This also highlights the significance that was attached to a difference as small as 0.03%.

the Single Euro Payments Area ("SEPA") to which express reference is made. The comparative table of rates set out is once again with the estimated Visa rates and not with the EEA MIF *levels.* Indeed, the report notes that the overall differential with Visa (i.e. Visa's UK rates) is expected to be around 10 base points (i.e. 0.1%). The reduction of Mastercard's UK standard MIF from 1.3% to 1.2% took effect on 7 April 2006 with no corresponding reduction at that time in its EEA standard MIF. The EEA standard MIF was reduced to 1.2% nine months later.

147. As Mr Sideris said, and we accept, that when the EIC proposed the levels of domestic MIFs it did so with the individual markets in mind, which were very different. He said that while the UK was the first national market with which the EIC became concerned, in November 2004, thereafter the EIC was given responsibility to propose domestic MIFs for a number of other national markets, and in each case its focus was on the local factors. He gave the example of France, where Mastercard was seeking to expand its share against opposition from Cartes Bancaires, which was well-established. Therefore it set very low MIFs to expand its rate of acceptance with merchants. He said that Italy was also a country with low MIF levels because of local factors. The levels of EEA MIFs, that applied only to cross-border transactions, had no bearing on these decisions.

148. The CR also sought to rely on the EIC's proposals in the September 2005 report for Mastercard's two premium cards: World Signia and Worldcard. However, the economics of those cards was very different as for both of them the cardholders paid an annual fee, so the issuer had an additional source of income apart from the MIF (but had to provide additional benefits). Moreover, those cards each accounted for a minute part of the market: World Signia accounted for 1.23% of UK consumer volumes in 2004; Worldcard (in 2006-2008) accounted for 0.15%. We consider that they are of little relevance to the questions before us, which concern the Mastercard MIFs for general consumer cards. Nonetheless, as we heard submissions concerning them we shall consider each briefly.

149. World Signia had been launched in 1997 as an "ultra premium" card aimed at affluent customers. It brought various benefits to cardholders, including reward points and discounts on insurance. The EEA MIF rates set by MCE for World Signia were significantly higher (from 2001, they were 1.9% standard and 1.6% electronic) than for standard cards as the EIC considered that it was reasonable that issuers should receive higher interchange revenue for World Signia cards since they were inherently more expensive to provide (because of the associated benefits) whereas for acquirers the cardholders were likely to be bigger spenders. However, MEPUK had not differentiated in the rates and had adopted the same rates to World Signia as applied for standard cards. Therefore, after MCI took over setting the UK MIFs for World Signia, the EIC proposed significantly to raise those MIFs to the EEA levels and this was done in 2006. Accordingly, this was not a case where the EEA rates had been a guide to the setting of the UK rates set by MEPUK at all. And Mr Sideris said that this change was proposed not for the purpose of harmonising with the EEA rates (although that of course was the result) but because those higher EEA rates made sense for the UK market. Significantly, the report to the EIC proposing this change refers to what was believed to be the weighted average rate on Visa's competing premium card, Visa Infinite, which was a little above the proposed increase.

150. "Worldcard"[43] (also referred to as "New World") was a new card that Mastercard was planning to introduce, targeted at frequent travellers, who would be likely to use it in the "travel and entertainment" sector, a lucrative sector for card issuers. This was planned as a "mass affluent" card to compete with Amex, positioned between the standard consumer card and the ultra premium World Signia. It was to be launched in selected European countries in April 2006. Therefore in 2005, the EIC along with the product team developing Worldcard had to consider the MIF structure and levels for a new product, both as regards the EEA MIFs and the UK MIFs. The aim of the product team was to have a simple approach to a developing product. The EIC proposed MIFs for Worldcard ranging from 1.3% for chip transactions to 1.7% as the base rate – which were levels between the standard consumer cards and

[43] These were alternative names in the project stage. When launched, it was called simply "World".

the World Signia MIFs. It is clear from the preparatory documents that in proposing those EEA MIFs, the EIC was in particular looking at the competitive situation in the UK, which Mr Sideris explained was because the UK not only accounted for more than half the premium cards across Europe at the time, but of the five countries where Worldcard was to be launched the UK accounted for 80% of the gross euro volume. The EIC proposed that the MIFs for Worldcard should follow the same structure and rates for UK domestic transactions as for EEA cross-border transactions. However, the proposed EEA MIFs were rejected in October 2005 by BMAC, which advised the MCE Board, and therefore the standard consumer EEA MIFs applied to World from its introduction until beyond the end of the relevant period. By contrast, the higher UK MIFs proposed by the EIC were approved by Mastercard's COO and took effect.

151. Since for Worldcard the proposals for EEA MIFs were developed having regard to particular UK market considerations, it is hardly surprising that when proposing UK MIFs, the EIC on that occasion followed the proposed EEA MIFs. But even aside from the fact that those EEA MIFs were never introduced, we do not think that this particular circumstance can support any wider inference regarding the influence of EEA MIFs on UK MIFs. If anything, it shows that UK MIF levels could be set at a level *significantly* above EEA MIFs in the period when all those MIFs were being set by Mastercard.

152. Accordingly, in our judgment, neither the fact that from November 2004 the EIC was involved in setting both the UK MIFs and the EEA MIFs, nor the fact that after September 2006 the final decisions for both sets of MIFs were taken by the same person in Mastercard's global management, led the EEA MIFs to influence the levels of the UK MIFs in any of the ways alleged.

I. THE EXPERT EVIDENCE

153. As we observed at the outset, the parties' experts were invaluable in resolving the distinct issue of the volume of commerce and they were also of considerable assistance in assembling and tabulating relevant data. But beyond that, on the fundamental causation question addressed in this judgment, we did not gain

much assistance from the opinions of the experts, save that they showed, and indeed agreed, that the levels of UK MIFs did not move with costs. The causation question turns primarily on the factual evidence.

154. Mr Parker, instructed on behalf of Mastercard, produced a regression analysis and found that it did not support any of the allegations concerning the effect of the levels of EEA MIFs on UK interchange fee rates. However, he put forward this analysis very tentatively and himself raised caveats as to the weight that here can be placed upon it. In our view, with the limited number of changes or variation in the rates, the few data points and the limited data on other explanatory variables, the econometric analysis is not robust and cannot be relied on.

155. For his part, Mr Coombs, instructed on behalf of the CR, plotted weighted averages of the different rates in seeking to show a correlation between UK and EEA rates. However, the weighting is dependent on volumes of transactions at the different levels of MIF: changes in relative volumes could have a significant effect on changes in the weighted averages. Data on volumes was lacking, as Mr Coombs frankly acknowledged. Therefore, we consider that this analysis also is not a reliable basis for any conclusion. Moreover, he omitted from his primary analysis the years 2001-2003 on the basis that there was a "structural break" by reason of the introduction of new categories of MIFs and potential downward pressure on the UK MIFs by reason of the OFT's investigation following notification by MEPUK. We regard those reasons as unsound and inconsistent. The OFT investigation ran from 2001-2005, and it was in 2004 that the OFT served a statement of objections. The investigation started in September 2001, and there were no adjustments to the UK standard and electronic MIF rates until October 2004. Moreover, there was also an inquiry by the Commission over a longer period which by the same logic would have an effect. And as regards new categories, Mr Coombs said that he was referring to the introduction of an "Enhanced Electronic" category of EEA MIF and removal of the "Electronic" and "Secured Electronic" categories (from June 2000), and to the new Chip category introduced for both EEA and UK MIFs in 2001. However, as regards the former, it seems that it effectively absorbed and combined the transactions at the previous two electronic rates; whereas for the

latter, the volume of transactions attracting that MIF in 2001-2003 seems to have been insignificant, so it would have had minimal effect on the weighting. And as Mr Parker pointed out, there were multiple new categories of MIFs being introduced at different points over the full period (e.g. four new categories of UK MIFs were introduced with effect from April 1999). We note that if the years 2001-2003 were not omitted but instead the analysis was applied to the full infringement period (albeit still excluding the run-off in 2009), then Mr Coombs acknowledged that there was no statistically significant correlation between weighted averages for UK IFs/MIFs and the EEA MIFs.

J. LEVELS OF, AND CHANGES IN, MIFS

156. We regard the actual levels of the EEA and UK MIFs, and the way those levels changed, as much more telling than the attempts by the economists to conduct quantitative analyses, and indeed it was the preferred approach of Mr Parker. This covers the period from November 1997 onwards, when there were separately determined UK MIFs.

157. The comparison is subject to the caveat that of the various categories of MIFs introduced in this period for the EEA and for the UK, some are not comparable. But the experts agreed on the categories which can be compared, whereas those for which that is not possible accounted for a very minor share of total transactions.

(1) EEA base rate and UK standard rate

158. The EEA rate was at 1.15% from the start of this period to 2000. In June 2000 it was increased to 1.20%; then increased again to 1.30% in April 2001. It remained at that level until 1 January 2007 when it was put back down to 1.20%. Then, following the Decision, it was reduced to zero in June 2008.

159. The UK rate was set at 1.30% in November 1997 and kept constant to April 2006, when it was reduced to 1.20%. No further changes were made.

(2) EEA Electronic/Secured Electronic/Enhanced Electronic and UK Electronic

160. The EEA rates were at 0.90%/0.75% from the start of this period to June 2000, when the Electronic/Secured Electronic rates were replaced by a single Enhanced Electronic rate of 0.85%. That was raised to 0.95% in April 2001. It remained at that level until, following the Decision, it was reduced to zero in June 2008.

161. The UK rate was set at 1.0% in November 1997 and kept at that level until October 2004 when it was reduced to 0.90%. No further changes were made.

(3) EEA Chip Partial Grade/Full Grade/Chip and UK Chip/Chip PIN/Chip Signature

162. The EEA rates of Chip Partial Grade and Full Grade were introduced in June 2000 at 0.80%/0.75%, and then replaced in April 2001 by a single Chip category at 0.80%. It remained at that level until, following the Decision, it was reduced to zero in June 2008.

163. The first UK Chip rate was introduced in October 2001 at 0.90%. It remained at that level until replaced in October 2004 with Chip/PIN and Chip/Signature categories at 0.80%/0.85%. No further changes were made.

(4) Merchant UCAF[44]

164. This was introduced as an EEA MIF in April 2002 at 0.95%. It remained at that level until, following the Decision, it was reduced to zero in June 2008.

165. A UK Merchant UCAF MIF was not introduced until October 2005. It was set at 0.90% and no further changes were made.

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[44] For the meaning of UCAF, see fn 38 above.

(5) Full UCAF

166. The was introduced as an EEA MIF in April 2002 at 1.15%. It remained at that level until, following the Decision, it was reduced to zero in June 2008.

167. A UK Full UCAF MIF was not introduced until October 2005. It was set at 0.95% and no further changes were made.

168. Mr Parker notably observed in his report of 17 May 2023:

> "I have not identified any example in the data where a change in the EEA MIFs is followed by a corresponding change in the UK MIFs for potentially comparable categories."

Mr Coombs concurred with that statement.

169. None of this supports the allegations that the EEA MIFs acted as a floor, a minimum price, or guidance or a benchmark for the UK MIFs. We found instructive the experts' answers in the 'hot tub' to questions from the Tribunal which we think merit quotation:

> "PROFESSOR WATERSON: So let's suppose that the EEA MIFs operated as a floor or minimum price recommendation. What would you expect to see in the data if this was the case?
>
> MR COOMBS: So if it was acting as a floor or a minimum benchmark, then you would expect to see that the UK MIF would be equal to or higher than the EEA MIF.
>
> …
>
> MR PARKER: Yes, I think that's right. I mean, you could — depending on whether you — how you interpret a floor, whether you mean you have to be above the floor or whether you can be at the level of the floor, would determine whether it's higher or equal to or higher.
>
> PROFESSOR WATERSON: And would that be true throughout the three periods, if we view it as there being three periods?
>
> MR COOMBS: Yes. I mean, if there — if it was the case that the EEA MIF was acting as a floor throughout the three periods, then yes, you would expect to see the same thing.
>
> MR PARKER: Yes.

PROFESSOR WATERSON: So then, again, thinking of it just from the point of view of theory, if the EEA MIF operated as a guidance or as a benchmark, what would we expect to see in the data?

MR COOMBS: Well, would you [sic] expect to see that the UK MIF would be close to the EEA MIF.

…

MR PARKER: I must admit I've struggled really to interpret what — what "guidance" or "benchmark" might mean. So I think it's possible, as Mr Coombs says, that it could lead to it being close to. I don't quite know what "close to" would mean. It could be at the same level. It could be within some level. It could be that it's taken into account, but ultimately not acted on. I think it's just very difficult to determine from that description a kind of clear theoretical prediction.

MR JUSTICE ROTH: You mentioned earlier in response to Professor Waterson's first question that they were relatively stable over this period. If it was a guidance or benchmark, insofar as one moved or changed, would you expect the data to show any change in the other?

MR PARKER: I would expect changes probably to be — a change in one would lead to a change in the other, whether that happens contemporaneously or whether that happens sort of shortly afterwards — if that's what we mean by "benchmark". I think I'd sort of interpreted "reference point" in that way, but you could interpret "benchmark" in that way. I think it's not completely clear . But yes, I would expect them essentially to move together if that was — if that was the hypothesis, yes.

MR COOMBS: Yes, I agree.

PROFESSOR WATERSON: So turning the question the other way round, these two theories, what would be inconsistent with, first of all, the floor or minimum price recommendation?

MR COOMBS: Well, I think if you saw the MIF tended to be below — sorry, that the UK MIF tended to be below the EEA MIF, then that would be inconsistent with the theory.

…

MR PARKER: Yes, if the UK MIF is below the EEA MIF, then that's inconsistent with that theory.

PROFESSOR WATERSON: Right. And would there be things that would be inconsistent with the EEA MIF operating as a guidance or benchmark?

MR COOMBS: Yes, I suppose if they moved in — if they moved differently, then that would be inconsistent with the theory.

…

MR PARKER: Yes, I would agree with that and in particular, I think we're talking here about the EEA MIF being a guidance or a benchmark for the UK MIF and, therefore, as well as kind of close in time, you'd want the UK MIF to respond to the EEA MIF if it was being used as that benchmark. So you'd

> need to see — if there was a change in the EEA MIF, then you'd be looking for changes in the UK MIF at the same time or afterwards, but not the other way around. So if the UK MIF changed, but the EEA MIF didn't, you, I think — and then there was a subsequent change in the EEA MIF, that would be the wrong way for that theory. So –
>
> PROFESSOR WATERSON: So that would be inconsistent?
>
> MR PARKER: Yes."

170. In addition to the levels and movements in the respective MIFs over the periods discussed above, there was the dramatic example of what happened in June 2008, when all Mastercard's EEA MIFs were reduced to zero following the Decision, but the UK MIFs were not changed. Ms Demetriou emphasised that an influence of the EEA MIF on the UK MIF was not necessarily immediate and submitted that there might be a degree of lethargy or time lag in adjusting the latter. The reduction to zero was seen as temporary, and a year later Mastercard set its EEA MIFs at 0.05 plus 0.26% standard and 0.05 + 0.20% electric. However, the corresponding UK MIFs remained unchanged at 1.20% and 0.90% respectively up to at least June 2010. That provides, in our view, a striking example of the lack of connection, whether as benchmark or guidance, between the two sets of MIFs, and shows that the EEA MIFs were not regarded as a floor in any meaningful sense, notwithstanding that at this point the EEA MIFs and the UK MIFs were being set by the same body.

K. CONCLUSION ON CAUSATION

171. We accordingly reject the CR's allegations that the EEA MIFs which were set in the infringement period (i.e. May 1992 to June 2008) had any significant causative influence, as alleged, on the level of interchange fees, whether bilateral or multilateral, that applied to UK domestic transactions.

172. We make clear that we are not making any findings as to whether the position would have been the same in a counterfactual world where the levels of EEA MIFs were zero throughout, or very significantly lower than they were. That would depend on the various assumptions made about that counterfactual world, including whether the levels of Visa MIFs would have been different and whether the Eurocard/Mastercard rules would have been the same (e.g. as

regards fraud protection and chargebacks). We note that in his written opening, the CR suggested that in that counterfactual world the structure whereby UK MIFs were set could have been different and Mastercard might not have removed MEPUK's authority to set UK MIFs in November 2004. We note also that Mr Sideris suggested in his evidence that if issuing banks lacked the income from interchange fees in respect of consumer cards, they might have imposed fees on cardholders. The extent to which such allegations are open to the parties, and what their implications might be, are not matters for this trial.

L. VALUE OF COMMERCE

173. The significance of the value of commerce relates to the CR's calculation of damages. On the assumption of complete pass-through to class members, the aggregate damages comprise the difference between the amount of total interchange fees for Mastercard transactions actually paid and the amount that would have been paid if those fees had been at a lawful level. The CR has pleaded his case on the basis that the lawful level was zero. But whatever the correct counterfactual level, since the interchange fees were set at a percentage of the transaction value, it is necessary first to calculate the total value of transactions to which interchange fees applied. "Value of commerce" ("VoC") is the expression used to express that value. Although, as explained above, there were different interchange fees for different kinds of transactions, for simplicity the claim computes damages on the basis of the weighted average interchange fees. But as the fees changed over time, the VoC has to be calculated year-by-year through the claim period.

174. Although there were previously disputes as to the correct figures, and this was the subject of separate reports from the two experts, as noted above their efforts have fortunately resolved those differences and an agreed table of VoC for each year has been produced.

175. The one remaining issue to be decided concerns what are known as "on-us" transactions. Since the overwhelming share of UK acquiring was carried out by a few major banks, in a not insignificant number of cases the cardholder's issuing bank was the same as the merchant's acquiring bank. There is a question

whether in those circumstances how any fee was paid at all, since that would in effect be a payment from the acquiring side to the issuing side within the same bank. And even if such internal transfers were made, Mastercard contends that such transfers should not be included in the computation of VoC since they are not, in reality, interchange fees forming part of the claims.

176. The experts have agreed the VoC of such on-us transactions. Their significance is shown by the fact that, for the full infringement period, they amounted to some £75.8 billion. If included, they increase the total VoC by almost 18%. However, the issue of whether they should be included within the claims is not a question for expert evidence.

177. We are, on balance, satisfied that an internal fee was applied for on-us transactions, at least for all the banks for which there was evidence before us. The table of bilateral IFs put forward by Mastercard showed an interchange fee for NatWest, Midland, Lloyds and BOS on-us transactions. There was separate evidence that such a fee was applied by Barclays in late 1994, and nothing to suggest that it changed its practice. This was supported by the oral evidence from Mastercard's witnesses. Mr Hawkins said that prior to the setting of UK MIFs, in NatWest on-us transactions "were subject to the same interchange fee arrangements as [transactions with] anyone else." He said that an interchange fee arrangement similarly applied for on-us transactions at Coutts, which was part of NatWest group. And Mr Sideris said that if on-us transactions were processed by Mastercard, the same interchange fee structure would be applied as for any other transaction.

178. Mr Sideris also said that over time some of the major banks took the processing of on-us transactions in house, and that this could lead to lower fees, which might feed through into a lower MSC charged to the merchant. But he was speaking generally about the situation across Europe and could not give specific evidence of this regarding the UK. It is clear that for most merchants, the MSCs charged by acquirers was a blended fee, which did not vary according to the identity of the cardholder's bank, and indeed was a single blend that applied to both Visa and Mastercard transactions. Some merchants were on a fixed fee, paid periodically, which similarly did not vary according to the proportion of

on-us transactions which the merchant conducted. Accordingly, the MSC` would be charged in the same amount for on-us transactions. During the latter part of the claim period (i.e. after the introduction of the UK MIFs), large merchants negotiated MSCs on the basis of the interchange fee plus a small amount (IF plus and IF plus-plus contracts). Although there was an absence of evidence as to whether such arrangements resulted in effectively lower MSCs reflecting on-us transactions, we see no reason to suppose that a similar level of interchange fee was not applied: the bank would have wished to achieve the same revenue on card transactions to support its card issuing business irrespective of whether it happened to be the merchant's acquiring bank.

179. The CR's calculation of aggregate loss is based on the alleged pass through of the MSCs by merchants to consumers in the form of an addition to the prices of goods and services. Since we have found that an internal interchange fee for on-us transactions was incorporated (or passed on) in the MSCs, we consider that on-us transactions should be included in the VoC calculations for the purpose of computing damages.

180. However, Mastercard submitted that this is not open to the CR on the pleadings on the basis that such fees for on-us transactions are not true "interchange fees". We do not agree. An interchange fee is not a legal term. If the issuing side of a bank charged the acquiring side a fee in respect of each credit card transaction being processed which performed the same function as the fee which the acquiring side had to pay when the issuer was a separate bank, and that fee was reflected in the MSC charged to the merchant in the same way, we consider that it would be wholly artificial to exclude it. And we understand that the figures for VoC included in the Re-Re-Amended Claim Form served on 7 June 2023 include on-us transactions.

181. Accordingly, we find that on-us transactions should be included in the VoC for the purpose of these proceedings.

182. We formally record our decision that the VoC throughout the relevant period was as set out in the agreed table produced by the experts.

183. This judgment is unanimous.

The Hon. Mr Justice Roth Chair	Jane Burgess	Prof. Michael Waterson

Charles Dhanowa O.B.E., K.C. (*Hon*) Registrar	Date: 26 February 2024