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IN THE COMPETITION

APPEAL TRIBUNAL

(T)

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 5th – Friday 28th July 2023

Before:

The Honourable Mr Justice Roth

Jane Burgess

Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE

Class Representative

v

Mastercard Incorporated and Others

Defendants

A P P E A R A N C E S

Marie Demetriou KC, Paul Luckhurst and Crawford Jamieson (On behalf of Walter Hugh Merricks CBE)

Joe Smouha KC, Matthew Cook KC, Hugo Leith, and Stephen Donnelly (On behalf of Mastercard Incorporated and Others)

Wednesday, 5 July 2023

(10.02 am)

Housekeeping

MR JUSTICE ROTH: Good morning. These proceedings, like all proceedings in this Tribunal, are being live streamed, and it is appropriate I therefore start with a warning. An official recording of the proceedings is being made. It is strictly prohibited for anyone to make any unauthorised recording or any image of the proceedings, and to do so is punishable as a contempt of court.

We will, as usual, take a short break for the benefit of the transcribers at about 11.30, and similarly in the middle of the afternoon, especially as we are sitting until 5.00 at the parties' request today.

The only other thing I'd mention right at the outset is we're grateful for the timetable and for the agreement between the parties as to how the case will be managed. There are some days off for the preparation of written closings and for the Tribunal then to read the written closings, so that we then have two days at the end of oral closings on the 27th and 28th of this month.

Because of the pressure on courtrooms here, those two days will be held in the Rolls Building. But we have four non-sitting days before that, so there's plenty of time for people to move all their equipment,

1 papers and so on to the Rolls.

2 So, Ms Demetriou.

3 Opening submissions by MS DEMETRIOU

4 MS DEMETRIOU: May it please the Tribunal, I appear with
5 Mr Luckhurst and Mr Jamieson for the Class
6 Representative, Mr Merricks, and Mastercard are
7 represented by Mr Smouha KC, Mr Cook KC, Mr Leith and
8 Mr Donnelly.

9 Sir, in relation to a small housekeeping matter, you
10 quite rightly said that the parties had requested we sit
11 till 5.00. On reflection, I'm not going to have a day's
12 worth of cross-examination for Mr Sideris. I think we
13 don't need to sit until 5.00 and I think there will be
14 space, if necessary, for the oral opening submissions to
15 overrun somewhat into tomorrow.

16 MR JUSTICE ROTH: Fine. We're always happy to sit for less
17 time.

18 MS DEMETRIOU: The starting point for Mr Merricks' case on
19 causation is of course the decision of the European
20 Commission which establishes Mastercard's liability in
21 this case, and the decision establishes conclusively in
22 these proceedings that Mastercard infringed competition
23 law when it set fallback multilateral interchange fees
24 for intra-EEA transactions.

25 The Commission found that the MIF in Mastercard's

1 scheme restricted competition between acquiring banks by
2 inflating the base on which acquiring banks set charges
3 to merchants and thereby setting a floor under the
4 merchant fee and in the absence of the MIF, there would
5 have been more competition between acquiring banks, and
6 the merchant fees set by acquiring banks would have been
7 lower.

8 Mr Merricks alleges that the infringement
9 established by the Commission caused interchange fees
10 for domestic transactions in the United Kingdom to be
11 higher than they would otherwise have been in the
12 absence of the infringement, and that causation
13 allegation is routed in the Commission decision, which
14 found in general terms that the intra-EEA MIF was
15 a benchmark for domestic markets.

16 And perhaps we can just turn that up to remind
17 the Tribunal of where that's said. So it's {A/27/125}
18 and it's recital 421. If we could make that a little
19 bigger, please.

20 We see there that:

21 "... some of MasterCard's member banks view
22 Intra-EEA fallback interchange fee rates de facto as
23 a minimum starting point for setting the rates of
24 domestic interchange fees. Due to MasterCard's network
25 rules issuing banks have the certainty that in the

1 absence of their consent to the adoption of a domestic
2 MIF the Intra-EEA fallback interchange fees will always
3 automatically apply as domestic MIF in their country.
4 Issuing banks have no incentive to agree to domestic
5 interchange fees below this default rate because
6 interchange fees are revenues. Both the adoption of
7 a domestic MIF and of a bilateral agreement requires,
8 however, the consent of the issuing banks ... Hence,
9 even in countries where MasterCard's Intra-EEA fallback
10 interchange fees do not apply as such as domestic MIF
11 ... the cross-border interchange fees may act as minimum
12 benchmark for setting the level of domestic interchange
13 fee rates."

14 Then you see at 422:

15 "This was, for instance, the case in the
16 Netherlands. [The] Dutch member banks view the ...
17 fallback interchange fees as a 'starting point' for
18 setting domestic MIFs."

19 And if we look at 423, if we can perhaps scroll, we
20 see the evidence there from one of the Dutch banks that
21 they would use the fees as a starting point and then
22 receive something extra on top.

23 Now, the Commission's finding and Mr Merricks' case
24 on causation, the basic case on causation, follows
25 naturally from basic economic theory regarding

1 bargaining power. Bargaining power in a bilateral or
2 a multilateral negotiation turns to a significant extent
3 on the parties' outside options. In that context, the
4 default rate is a crucial consideration.

5 If the default rate is zero, then that strengthens
6 the hand of the parties who have an interest in lower
7 rates, namely the net acquirers, and there is no dispute
8 on the pleadings or on the evidence that net acquirers
9 have such an interest; that they have an interest in
10 lower rates.

11 So, for example, our case is that in what we've
12 called the early and middle periods, the default MIF for
13 domestic transactions was the intra-EEA MIF in the
14 rules. If the banks could not agree a bilateral rate,
15 then the intra-EEA MIF would apply. The intra-EEA MIF
16 necessarily, therefore, formed the backdrop to
17 negotiations.

18 So, in particular, where an issuing bank and
19 an acquiring bank were negotiating interchange fees, if
20 there's a default rate, both banks know that if their
21 negotiations fail, then the applicable rate will be the
22 default. So if they don't reach an agreement, the
23 agreement set will be at the default rate.

24 The issuing bank will therefore have no incentive to
25 agree to an interchange fee that's below the default

1 rate because otherwise, the issuing bank could obtain
2 a higher interchange fee simply by walking away from the
3 negotiations. The default rate thus plays an integral
4 role in the level of bilaterally agreed interchange
5 fees.

6 Now, it's trite law that causation requires
7 a but for analysis.

8 MR JUSTICE ROTH: Can I just stop you to ask, because you've
9 referred to net acquirers. Do we know somewhere -- and
10 we'll get to it in due course; we need not go there
11 now -- how many banks actually were net acquirers over
12 this period? Because, of course, a lot of banks were
13 issuers and acquirers.

14 MS DEMETRIOU: Sir, yes, that's something that will have to
15 be explored in the evidence. We did ask Mastercard by
16 way of an RFI for that information and they say they
17 don't have it.

18 MR JUSTICE ROTH: Yes, they probably don't know.

19 MS DEMETRIOU: So it will have to be explored in the
20 evidence. Our case is that there were net acquirers.

21 MR JUSTICE ROTH: In significant numbers?

22 MS DEMETRIOU: In significant numbers, or in sufficient
23 numbers for our causation case to work.

24 So going back to what causation requires and the
25 but for analysis, our case on causation is that but for

1 the infringement, so but for the amount of the intra-EEA
2 MIF that was unlawful, and we say that's zero as
3 a result of the tribunal's exemptibility judgment,
4 but for the infringement, that default fee would have
5 been zero. That's our case.

6 And we say that that would necessarily have
7 strengthened the hand of acquiring banks, of net
8 acquirers, in those bilateral negotiations. They would
9 have been negotiating on the basis that if they did not
10 like what was on offer from the issuer, they could have
11 walked away from the negotiating table and
12 a zero interchange fee would have applied.

13 Accordingly, had the default interchange fee been
14 zero, as we say, the bilateral agreement concluded
15 following a negotiation would have been lower than those
16 concluded in circumstances in the factual world where
17 the default interchange fee was the unlawful intra-EEA
18 MIF. That's our essential case.

19 And if we look at this document -- I'm not going to
20 take you to many documents in opening because we take
21 the view that those are really for exploring with the
22 witnesses, but I did want to show you this. So at
23 {C4/135/5}, and you can see that these are minutes of
24 a meeting of a sub-group of MEPUK held in April 1997.

25 And if we could scroll down towards to the bottom of

1 the page -- sorry, let's go to the top so we can see the
2 participants. So we see that Mr Hawkins, who is going
3 to be one of the witnesses in this case, was there and
4 also Mr Warren from Midland Bank was there.

5 And if we go down to the bottom of the page, you see
6 this. So:

7 "Mr Warren said that in the past, the use of the
8 intra-regional rate ..."

9 Intra-regional, that's the EEA MIF:

10 "... as the fallback rate had worked to
11 Midland Bank's advantage ..."

12 And he goes on to say he was uncomfortable with the
13 rate.

14 Now, why could it have worked to Mr Warren's
15 advantage? Well, we say it would have worked to
16 Mr Warren's advantage because Midland Bank had a large
17 acquiring business and the fallback rate worked to his
18 advantage in negotiations. It represented his outside
19 option.

20 MR JUSTICE ROTH: But you say they're a net acquirer.

21 MS DEMETRIOU: We say that they're a net acquirer and that
22 when he was negotiating as an acquirer, as an acquiring
23 bank with issuers, then the intra-EEA MIF worked to his
24 advantage because it represented his outside option.

25 And Mr Hawkins will explore this -- we'll explore this

1 with Mr Hawkins, but he says as much in his witness
2 statement. He says he suspects the reason why Mr Warren
3 was saying that, why it might have worked in
4 Midland Bank's advantage, was because they could have
5 threatened not to conclude agreements bilaterally and to
6 have applied the fallback rate in order to push issuers
7 to accept lower bilateral interchange fees.

8 Now, we say what Mr Warren articulated here is
9 a rather obvious point. The rules provide for
10 a fallback in the absence of agreement. Two parties
11 negotiating a bilateral rate know that the rules provide
12 this fallback. Indeed, the parties are contractually
13 bound by the rules.

14 The level of that fallback, the outside option, will
15 therefore have an impact on the outcome of the
16 negotiations. That's our simple and intuitive case.

17 Mastercard's case on this point, by contrast, is
18 stark, we respectfully submit. It steadfastly refuses
19 to accept this proposition of basic economic theory
20 regarding bargaining power. Instead, what Mastercard
21 does is it urges the Tribunal to disregard the fact that
22 the contractually binding rules specified a fallback
23 rate which would apply if no agreement were reached
24 between the banks as to a domestic rate.

25 Mastercard's case is that the fallback rate had no

1 influence whatsoever. Instead, Mastercard advances
2 a case that the critical benchmarks for agreeing
3 bilateral domestic interchange fees were so-called
4 reference rates determined centrally by MEPUK; reference
5 rates which were never written down and were never
6 promulgated to the banks.

7 And the very idea that a sophisticated entity such
8 as Mastercard would not have recorded these rates if
9 they were so important, if they had been so important to
10 bilateral negotiations, we say beggars' belief. But in
11 any event, it's counterintuitive and incorrect to
12 suggest that these written reference rates, which were
13 not binding on banks, somehow usurped the influence of
14 the default rate, which was written down in the actual
15 rules and which was contractually binding on the banks.

16 And what Mastercard has done is it's pleaded
17 an elaborate factual defence to try to insulate the
18 UK market from the EEA MIF and to try to persuade
19 the Tribunal that Mr Merricks should not be able to
20 proceed to the ordinary counterfactual analysis of
21 but for causation.

22 Mastercard's key pleaded points are three-fold.
23 They say that there was no structural connection with
24 the EEA MIF in terms of the applicable Scheme Rules.
25 That's the first point. Their second pleaded point is

1 that the UK rules -- rates were determined by
2 UK-specific cost studies. The third pleaded pointed is
3 that Visa acted as an important competitive constraint.

4 Now, the first of those points, their allegation
5 that there's no structural connection with the EEA MIF
6 in terms of the applicable Scheme Rules, is something
7 that will be explored at this trial, but we say that
8 Mastercard's case on the rules is clearly wrong.

9 The EEA MIF was the fallback between -- throughout
10 the earlier middle period. The notion that they put
11 forward that the fallback could only apply and only ever
12 applied if there was an arbitration on foot is wrong and
13 commercially unworkable.

14 And even when you get to the later period where
15 domestic MIFs were in place, the 90% and 75% rules,
16 which I'll come on to, give you the relevant causal link
17 through to at least 2004 because they enabled a bank or
18 group of banks to trigger a default to the EEA MIF.

19 The second plank of Mastercard's pleading, that the
20 domestic interchange fees were based on cost studies,
21 has, we respectfully submit, quietly been abandoned.
22 The undisputed expert analysis is fatal to those. There
23 is no correlation at all between the cost studies and
24 the domestic interchange fees.

25 Thirdly, as for Visa, this does not take Mastercard

1 very far because we say that the counterfactual Visa MIF
2 is inevitably lower than the Visa MIFs in the real
3 world. In the counterfactual, the lower EEA MIF, the
4 zero EEA MIF, and the lower, we say, zero Visa MIFs are
5 complementary and pull in the same direction. And
6 the Tribunal will need to work out in due course what
7 the lower domestic rates would have been, but that's not
8 for this trial.

9 Now --

10 MR JUSTICE ROTH: In this trial, we are looking at to what
11 extent the Visa MIF affected the decision-making of
12 Mastercard.

13 MS DEMETRIOU: We accept that, but I don't think there's
14 going to be very much dispute about that. We accept
15 that they took Visa into account, but we say it just
16 doesn't go very far because what you can't do is
17 extrapolate from Visa's MIFs in the real world what
18 would have been the case in the counterfactual.

19 Sir, members of the Tribunal --

20 MR JUSTICE ROTH: I don't know if, at some point, we need to
21 see is there much dispute about to what extent they took
22 it into account, because Mastercard place a lot of
23 emphasis on Visa.

24 MS DEMETRIOU: They do, and I will come it that, sir.

25 What I propose to do in the remainder of our opening

1 submissions is, first of all, identify and make some
2 brief submissions on some of the key themes that emerge
3 from the parties' competing arguments.

4 Then I'm going to turn to our case on the early,
5 middle and later periods in turn, identifying the key
6 factual issues that arise between the parties at this
7 trial and explaining the main elements of our case.

8 So I want to summarise the themes first so that
9 the Tribunal knows where I'm heading. The first
10 two issues I wish to draw out relate to Mr Merricks'
11 fundamental case on the effect of the intra-EEA MIF on
12 bargaining.

13 And the first point is that Mastercard tries to
14 neutralise the point about competing incentives of
15 issuers and acquirers by arguing that the two-sided
16 nature of the market means in fact that the interests of
17 issuers and acquirers were aligned, and we say that
18 that's wrong.

19 Secondly, I want to say something about the role of
20 bilateral agreements. Mastercard's case is that
21 bilateral agreements were concluded across the board
22 during the early and middle period, and I want to
23 address you on the relevance of that submission.

24 The third issue I wish to address you on is the
25 distinction between the factual questions that will be

1 determined at this trial and the counterfactual
2 questions that will need to be addressed in order to
3 determine but for causation.

4 I appreciate that the Chairman has heard some debate
5 about this at the two recent CMCs, but I would like to
6 make some submissions about this delineation both
7 because the other two members of the Tribunal were not
8 at those CMCs, but also because it's important in terms
9 of the scope of this trial. And you can see that play
10 out in the competing list of issues which unfortunately
11 the parties have not been able to agree and, really, the
12 dispute between the parties comes back to this
13 difference between the factual and the counterfactual
14 and how this maps onto the causation pleading, the but
15 for causation case.

16 I want to, under this head, address you on the scope
17 and nature of the factual findings that we invite the
18 Tribunal to make and the bearing that this distinction
19 between factual and counterfactual has on the evidence
20 and disclosure one is looking for.

21 The fourth theme I wish to address are the cost
22 studies and the fifth theme I want briefly to address is
23 Visa and really the point, sir -- the question you put
24 to me just a moment ago.

25 So if I may start with the two-sided market, this

1 issue is crystallized at paragraphs 14-16 of
2 Mastercard's written opening submissions, and if we
3 could turn up {A/2/6} and if we could start at
4 paragraph 16 and work backwards. So paragraph 16:

5 "The economic logic behind Mr Merricks' factual case
6 is, therefore, fundamentally flawed. In fact the
7 evidence of how UK [interchange fees] were agreed and
8 set accords with the behaviours that would be expected
9 in this two-sided market (looking at Visa's UK MIFs, as
10 the most significant and more powerful competitor, and
11 other [UK] factors ...)"

12 So they say the economic logic, the economic logic
13 about outside options and bargaining, is flawed. And if
14 we go back to say why -- to look at why Mastercard says
15 that and look at paragraph 14, so paragraph 14 purports
16 to set out Mr Merricks' case that there was a tension
17 between the interests of issuers and acquirers and it
18 says:

19 "The fundamental failing of that economic analysis
20 and in turn in Mr Merricks' case is that it assumes that
21 there is an inherent tension between issuers and
22 acquirers, with acquirers (as the paying party) wanting
23 the lowest possible [interchange fee] and issuers (as
24 the receiving party) wanting the highest possible
25 [interchange fee]."

1 And then at paragraph 15:

2 "However as Mr Parker explains ... payment cards are
3 a two-sided market. In a two-sided market,
4 a transaction needs both sets of customers - here,
5 merchants and cardholders. As a result, both acquirers
6 and issuers have the same interest, namely in having
7 a scheme which is attractive to merchants and to
8 cardholders. It is not, therefore, the case that
9 acquirers necessarily want a low [interchange fee] - if
10 this makes the scheme unattractive to cardholders, there
11 is little business. Similarly, it is not the case that
12 issuers necessarily want a high [interchange fee] - if
13 this makes the scheme unattractive to merchants, again,
14 this will result in little business. Both acquirers and
15 issuers, therefore, had a shared interest in having the
16 right UK [interchange fee] which maximised total demand
17 regardless of whether it was lower or higher than the
18 EEA MIF."

19 Now, the problems with these paragraphs and with
20 Mastercard's argument as set out here is that Mastercard
21 both overstates Mr Merricks' case and overstates the
22 impact of the two-sided nature of the market.

23 Now, we agree, of course, that this is a two-sided
24 market and that this may place some limitations on the
25 incentives of issuers and acquirers respectively and so

1 Mastercard overstates our case at paragraph 14 when it
2 says that our case necessarily implies acquirers wanted
3 the lowest interchange fee possible and issuers wanted
4 the highest interchange fee possible. Our case does not
5 hinge on any such thing.

6 The two-sided nature of the market may mean that
7 there eventually comes a point in these competing
8 incentives where an issuer is disincentivised from
9 pushing any higher and an acquirer is disincentivised
10 from pushing any lower.

11 But Mastercard overstates the implications of the
12 two-sided nature of the market. It's simply not the
13 case and it's not Mastercard's pleaded case, nor is it
14 Mastercard's evidential case, that the interests of
15 issuers and acquirers were aligned such that they were
16 both incentivised to achieve the same level of
17 interchange fee.

18 The true position is that issuers and acquirers
19 obviously had different incentives. An interchange fee
20 is a payment from the acquirer to the issuer. Issuers
21 were, as a general matter, incentivised to achieve
22 higher fees and acquirers are incentivised to pay lower
23 fees.

24 If we turn to Mastercard's pleading, if we go to
25 {A/4/23} and 54(b), this is where Mastercard is pleading

1 back to Mr Merricks' averment that the Mastercard scheme
2 was a four-party scheme.

3 MR JUSTICE ROTH: This is the Amended Defence, is it?

4 MS DEMETRIOU: This is the Amended Defence.

5 And Mastercard says this. It says:

6 "A bank with a larger portfolio of acquiring
7 business than issuing business would have the same or
8 a similar incentive to act in the best interests of its
9 acquiring business as an acquiring bank without
10 an issuing business."

11 If you're just a sole acquirer or a net acquirer,
12 the incentives are the same:

13 "In particular, such an acquiring bank would have
14 the same incentive to attempt to negotiate a lower
15 interchange fee from the default fee, in order to reduce
16 its own input costs, particularly since this would allow
17 it to undercut other acquiring banks and increase the
18 size of its acquiring business."

19 So here, Mastercard acknowledges, because it must,
20 that an acquiring bank has an incentive to negotiate
21 lower interchange fees because an interchange fee isn't
22 an input cost. Even if an acquiring bank can pass on
23 those input costs to merchants, if it can negotiate
24 lower interchange fees, it can then charge lower
25 merchant service fees, thus undercutting other acquiring

1 banks and increasing the size of its business.

2 By the same token, an issuing bank has an incentive
3 to negotiate higher interchange fees because interchange
4 fees are a revenue for issuers, and that's also part of
5 Mastercard's pleaded case. So in the same tab, if we go
6 to page 27 {A/4/27} and 57(b) -- sorry (c):

7 "However, it is admitted and averred that issuing
8 banks have an incentive to promote types of cards and
9 card brands which yield higher total revenues and that
10 higher interchange fees will be an important factor in
11 that analysis. As set out below, this is an important
12 consideration in relation to the Class Representative's
13 contention that Mastercard's domestic interchange fees
14 would have been set at a lower level if alternative
15 EEA MIFs had been set at a lower level (or zero)."

16 So Mastercard's pleaded case is that both -- that
17 issuers and acquirers did have divergent incentives, and
18 that's obviously right, and that's flatly inconsistent
19 with what it says now in its submission; that both
20 issuers and acquirers had an incentive to agree the same
21 level of interchange fee.

22 We'll explore this in the evidence, but Mastercard's
23 witnesses -- witness evidence is to the same effect as
24 its pleaded case. So their witnesses accept that
25 issuers, as we'll come to see in the trial, and

1 acquirers had divergent incentives.

2 And these are points which Mastercard made
3 forcefully in the context of the Commission
4 investigation. Perhaps I'll just show you one document
5 at this stage. If we go to {C18/37/70}, and this is
6 Mastercard's response to the Commission's letter of
7 fact. If we look at paragraph 182, they say:

8 "There is no such 'commonality of interests' on all
9 issues between all the banks represented on the
10 European Board. Certainly [they] all ... want the
11 scheme to be successful in terms of generating high
12 levels of issuance and acceptance and therefore high
13 levels of transactions. However, some banks are 'net
14 issuers' and therefore have a short-term financial
15 interest in a higher interchange fee, whereas some banks
16 are 'net acquirers' and therefore have a short-term
17 financial interest in a lower interchange fee. The
18 interchange fee is therefore not 'guaranteed revenues
19 for all': it is a short-term source of revenue for 'net
20 issuers', but it is a cost for 'net acquirers'. There
21 is therefore no 'commonality of interests' in a high
22 level of interchange between the banks represented on
23 the ... Board; their only common interest is that the
24 fees be set at the transaction-maximising rate. When
25 deciding on the level of the interchange fee, the CEO

1 ... needs to take into account a series of elements in
2 order to set it at the level that he considers as the
3 most appropriate ... One of these elements is the
4 situation on the acquiring and issuing side, and in
5 particular the situation of 'net issuers' and 'net
6 acquirers', and their conflicting interests: short-term
7 financial interest in a lower interchange fee on the
8 acquiring side, short-term financial interest in a
9 higher interchange fee on the issuing side."

10 And we see these submissions noted in the Commission
11 decision at recital 337. That's at {A/27/104}. I'm not
12 going to read it out, but it's recital 337, if
13 the Tribunal quickly reads that to yourself. This is
14 the decision and the Commission is noting the
15 submissions made by Mastercard that we just looked at.

16 And Mr Parker -- it's Mr Parker's evidence -- so
17 Mr Parker, the expert economist who is called by
18 Mastercard, his evidence is that net issuers and net
19 acquirers would naturally have competing incentives.
20 And if we turn to {A/16/26}, which is Mr Parker's expert
21 report on the causation issue, at paragraph 2.48,
22 Mr Parker explains that the incentives of two banks in
23 a bilateral negotiation of interchange fees:

24 "... would depend on its net issuing/acquiring
25 position vis-à-vis the other bank."

1 And Mr Parker explains that if bank A is a net
2 issuer and bank B a net acquirer, then bank A would seek
3 the highest possible interchange fee whereas bank B
4 would seek the lowest possible interchange fee. So he
5 agrees issuers and acquirers have competing incentives.
6 So that's --

7 MR JUSTICE ROTH: Tell me: which report is it? Is this his
8 initial report or reply report?

9 MS DEMETRIOU: This is his first report.

10 MR JUSTICE ROTH: First report, thank you.

11 MS DEMETRIOU: So that's what I wanted to say about the
12 two-sided market point and how -- and why we say it's
13 just simply not an answer to our fundamental point about
14 bargaining incentives.

15 The second thematic point that I wanted to take
16 relates to the question of bilateral agreements, and
17 you'll have seen from their written opening submissions
18 that Mastercard's case in relation to the early and
19 middle periods of claim is that bilateral agreements
20 were in place, they say, across the board. And just --
21 we don't need to turn it up, but just for your
22 reference, we see an example of that at para 60 of their
23 written opening submissions.

24 Now, that factual question will be explored with the
25 witnesses. The short point I wish to make now is about

1 the relevance of that submission, because when reading
2 Mastercard's written opening submissions, the Tribunal
3 will be forgiven for thinking that if Mastercard were
4 right about that, so if they were right that bilateral
5 agreements comprehensively -- there was comprehensive
6 coverage in the early and middle period, this would
7 somehow disprove Mr Merricks' case, but, of course, that
8 isn't correct.

9 As I've explained, Mr Merricks' case is that the
10 bilateral agreements were concluded in a context where
11 the fallback fee was the unlawful intra-EEA MIF and that
12 a lower fallback fee, a fallback fee of zero, stripped
13 of the illegality, would have led to lower bilateral
14 rates.

15 And that is Mr Merricks' primary case as to the
16 causative effects of the intra -- unlawful intra-EEA
17 MIFs on domestic interchange fees. Indeed, that has
18 been Mr Merricks' case since the claim was first pleaded
19 and that case is, of course, completely consistent with
20 Mastercard's submission that there was -- that there
21 were bilateral agreements agreed across the board;
22 completely consistent with that.

23 So there's nothing, therefore, in the suggestion, if
24 that suggestion is being made, which we apprehend it is,
25 that if every interchange fee was agreed bilaterally,

1 that would somehow undermine Mr Merricks' case on
2 causation. As I say, Mr Merricks' case was initially
3 pleaded on that basis.

4 Now, following disclosure from Mastercard, it became
5 apparent that not only were some interchange fees
6 negotiated bilaterally, but some domestic interchange
7 fees in the early and middle period were -- some
8 domestic transactions in the early and middle period
9 were processed directly on the basis of the intra-EEA
10 MIFs. And it was thus only once Mr Merricks received
11 disclosure that this more direct route for establishing
12 causation in respect of certain transactions became
13 apparent and so Mr Merricks therefore re-pleaded to
14 include this allegation in addition to his primary case.

15 MR JUSTICE ROTH: Sorry, can you just explain? I'm sure
16 it's my failing. When you say "were processed on the
17 basis", I think, what does that mean?

18 MS DEMETRIOU: So what that means is that we have
19 an additional point in respect of the early and middle
20 period that where there was no bilateral agreement in
21 place that set a domestic interchange fee, the intra-EEA
22 interchange fee applied directly to those transactions,
23 because, of course, there's an honour-all-cards rule, so
24 there has to be an interchange fee for every
25 transaction. The rules provided for the EEA MIF to be

1 the default.

2 So what we saw when we got disclosure was that some
3 transactions went through directly on the EEA --
4 intra-EEA MIF at the default rate, domestic
5 transactions, and this would occur -- this would occur,
6 for example, whenever there was no bilateral agreement
7 in place -- arrangement in place at all, and the
8 intra-EEA MIFs would also apply if there was a bilateral
9 arrangement in place providing for domestic interchange
10 fees, but certain categories were left blank with the
11 intention that default rates would apply.

12 So the point, sir, is that it became apparent on
13 disclosure that there's not complete coverage of
14 bilaterals, whether it's because sometimes a bilateral
15 wasn't in place or whether it's because the bilateral
16 agreement didn't provide for fees for all types of
17 transaction. And for those transactions, those domestic
18 transactions, the fallback intra-EEA MIF applied
19 directly, because that's what the rules provided for.

20 So the question of what proportion of
21 UK transactions were covered by bilateral agreements, so
22 Mastercard's submission that it's all across the board
23 and we say, well, we don't think it was across the
24 board, that's relevant to identifying what is the
25 causation mechanism that's in play, but it's not

1 relevant as to whether the intra-EEA MIF had a causative
2 effect at all.

3 MR JUSTICE ROTH: It will be a different effect.

4 MS DEMETRIOU: A different causal mechanism, if I can put it
5 that way, yes.

6 MR JUSTICE ROTH: So clearly if you're right that it always
7 affected the bilateral interchange fee because of the
8 bargaining dynamics you've explained, it wouldn't
9 matter. But if you're wrong on that, then what
10 proportion were covered by bilateral wasn't -- how
11 significant the cases where it actually was the EEA MIF
12 becomes more important.

13 MS DEMETRIOU: Sir, yes, I'd agree with that.

14 In relation to that and what the Tribunal can and
15 can't do now, so we say that there is some documentary
16 evidence establishing that some transactions were
17 processed directly on the basis of the intra-EEA MIF,
18 and we've set some of this out in our written opening
19 submissions. Perhaps if we turn those up at {A/1/19}.

20 So subparagraphs (2) and (3), so we've said there
21 that we've identified, for example -- this is
22 correspondence between First Trust Bank and Europay in
23 September 1995 where First Trust Bank asks EPI why
24 certain transactions are being processed at the new
25 intra-EEA MIF secured electronic category and EPI

1 replies explaining that it's because there is no
2 bilateral agreement in place for the category so the
3 intra-EEA MIFs are applied by default.

4 So that's evidence, we say, that the EEA MIFs were
5 indeed the fallback rate and that they applied
6 automatically in the absence of a bilateral agreement,
7 and we see from this some transactions at least were
8 processed directly on the basis of the intra-EEA MIF.

9 And we also see that there are examples, and this is
10 subparagraph (3), of bilateral arrangements where
11 categories of transactions are left blank. So, for
12 instance, the details of the bilateral arrangement
13 between Bank of Scotland and Beneficial Bank were sent
14 to EPI on 21 June and the covering letter states that
15 where the fee structures have been left blank, current
16 default rates should continue to apply.

17 Now, what does Mastercard say about this? If we
18 look at their written opening submissions at {A/2/34},
19 so 97(2), as to the correspondence between EPI and
20 First Trust Bank, Mastercard say, well, this only
21 relates to very few transactions and First Trust Bank
22 didn't process many transactions. So it's notable there
23 that that's a submission about size. It's not the scale
24 of the issue. It's notable that they don't deny that
25 it's clear evidence of the EEA MIFs applying directly to

1 certain transactions.

2 And as to the correspondence between Bank of
3 Scotland and Beneficial Bank, Mastercard says again
4 similarly -- I think this is -- if we scroll up so we
5 can see (1). So they say similarly that Beneficial Bank
6 did very little business, so the volume of transactions
7 would have been small. So it's a response which goes to
8 scale rather than existence, if I can put it that way.

9 Now, we say that the suggestion that the disclosure
10 shows there was complete bilateral coverage is, in any
11 event, wrong.

12 If we go to {B/55/11}, this is part of Mastercard's
13 schedule of bilateral interchange agreements. If we
14 look at -- for example, if we look at the bottom of the
15 page, Save & Prosper as an acquirer, so the banks in the
16 first column -- you can see at the top of the page,
17 those are agreements where these banks are acquirers and
18 you see that they had no bilateral arrangements until
19 1994. We know from other documents that they were
20 active in the market because they responded, for
21 example, to an EDC cost study in 1991.

22 So we say it's wrong to state that there is evidence
23 of complete bilateral coverage. In fact, there are
24 gaps, and this is something which we'll explore further
25 in cross-examination. I want to come back a little bit

1 later, when I'm looking at the early and middle period,
2 and make a few submissions about evidence and what we
3 say the Tribunal can and can't do in relation to this
4 issue at this trial, but I just want to carry on with my
5 sort of key themes at the moment.

6 So the next theme on which I'd like to make
7 submissions is the factual/counterfactual divide and,
8 of course, the starting point is that the Tribunal has
9 ordered that this trial will not consider matters in
10 relation to the counterfactual at all.

11 And just to pull up the tribunal's recent order at
12 {E/11/4}, paragraph 13:

13 "The Causation Issue to be determined at [this
14 trial] is limited to the question whether there is
15 a causal link as a matter of fact, without recourse to
16 any counterfactual enquiry. The ... Causation Trial
17 will not consider what the UK MIFs might have been had
18 the EEA-MIFs been significantly lower."

19 Now, I wish briefly to develop three points here.
20 The first is how that division between factual and
21 counterfactual maps on to the causation allegation that
22 Mr Merricks makes in these proceedings as a whole.
23 The second is where this leads us in terms of the
24 factual findings we're asking the Tribunal to make at
25 this trial. The third is the implications of the

1 delineation between factual and counterfactual in terms
2 of the evidence and documents that one would expect to
3 see. I'm going to look at those three things together,
4 as it were.

5 The starting point is that in the proceedings as
6 a whole, Mr Merricks will need to establish but for
7 causation and legal causation, and we've set this out at
8 paragraph 8 of our written opening submissions. If we
9 can turn that up, please, at {A/1/14}. I think that's
10 the wrong reference. It's paragraph 8, I want. Page
11 {A/1/4}, so sorry.

12 So we say there that:

13 "The relevant test for the claimant to establish
14 causation ... is principally twofold:

15 "... The claimant must demonstrate 'factual
16 causation', i.e. that the claimant has suffered
17 actionable loss which, 'but for' the infringement, would
18 not have occurred ... Factual causation necessarily
19 involves a counterfactual enquiry because it requires
20 the Tribunal to consider 'the counter-factual scenario
21 or - in plain English - what would have happened, had
22 the Infringement not occurred' ..."

23 And then secondly:

24 "If factual causation is established, the claimant
25 must further demonstrate 'legal causation'. This will

1 require the claimant to show that the defendant's
2 infringement was an operative or predominant cause of
3 the claimant's loss ... It will further be necessary for
4 the claimant to show that its loss was sufficiently
5 proximate (i.e. not too remote) from the defendant's
6 infringement ..."

7 So if one has a number of but for causes, then at
8 the legal causation stage, one would be assessing
9 whether or not one of them is so de minimis as to not
10 satisfy the threshold for legal relevance. But in
11 relation to -- and I want to leave legal causation aside
12 entirely for now because that really is the last stage
13 of the causation analysis.

14 And it's common ground -- if we go to paragraph 11,
15 please, on the next page, I think, of our written
16 opening submissions {A/1/5}. So it is common ground
17 that neither factual causation nor legal causation can
18 be determined at this trial; factual causation because
19 it comprises a counterfactual analysis necessarily, as
20 we've just seen at paragraph 8, and legal causation
21 because it's a subsequent issue.

22 Then you see there the Chairman saying:

23 "Well, we can't determine full but for causation
24 without looking at what might have happened had the
25 EEA MIF been at a different level."

1 And we say that's obviously right.

2 So I want to focus at the moment -- so I want to
3 leave aside legal causation, because that's for another
4 day, and I want to consider Mr Merricks' but for
5 causation case and the interrelationship in the context
6 of his but for case between the factual and
7 counterfactual and then the implications of that for
8 this trial. I want to take the later period first and
9 the 75% rule, because there is some measure of agreement
10 between the parties about how all of this works and what
11 can be decided at this trial.

12 The 75% rule forms the basis for one of the causal
13 mechanisms relied on by Mr Merricks in relation to the
14 period from 1997 to 2004 and during this period, the
15 Tribunal may have picked up, there were domestic rules
16 in place and MEPUK had adopted a UK fallback MIF.

17 Now, our case in relation to this period is
18 explained -- we can see it most easily from our reply.
19 So if we pick up -- this is the most amended version,
20 the most recent version of the reply, {A/5/33}. If we
21 go to -- I'm going to look at it in hard copy because
22 I find it really hard to read the yellow on the screen.

23 So page 33, and we see there this is paragraph --
24 one has to go back to see what the paragraph number is
25 because there are so many subparagraphs, but we're in

1 paragraph 46 and it's 46(c)(ii) and (2) to (3), so at
2 the bottom of -- so what we see at (ii)(1), we plead
3 there the 75% rule and that this -- we say that the
4 effect of the rule was that Mastercard's implementation
5 of the UK Domestic Scheme Rules and the MIFs contained
6 therein was conditional on MEPUK remaining
7 representative of banks with -- first of all, it was 90%
8 or more of issuing and acquiring volumes of UK
9 licensees.

10 And then from February 1999 until November 2004, or
11 around then, MEPUK's authority to set domestic MIFs was
12 conditional on the 75% rule being satisfied, so ie that
13 MEPUK had support from 75% or more of issuing and
14 acquiring volumes of UK licensees.

15 Then you see at (2):

16 "The Class Representative avers that if either of
17 these criteria were not met the [UK] Domestic MIFs would
18 have ceased to take effect within Mastercard's scheme.
19 Pursuant to the provisions of Mastercard's scheme rules
20 pleaded ... the applicable fallback/default interchange
21 fees would then have been the Intra-EEA MIFs."

22 So had the 90% rule or the 75% rule been triggered
23 by acquiring banks who wanted a lower domestic MIF, the
24 applicable MIF would have been the intra-EEA MIF.

25 Then we say {A/5/34}:

1 "Accordingly, the Class Representative avers that
2 ... net-acquirers responsible for a sufficient share of
3 the volume of Domestic Transactions had the power from
4 December 1997 ... until November 2004 ... to abolish the
5 [UK] Domestic MIFs and replace them with the Intra-EEA
6 MIFs; and (2) net-acquirers would in the counterfactual
7 have used this power to abolish the Domestic MIFs or,
8 alternatively, to obtain Domestic MIFs at the same level
9 or a similar level to the Intra-EEA MIFs."

10 So we say that -- so that's essentially how the
11 causal mechanism works. And to explain the alternative
12 pleas, in case it's not 100% clear at (3) -- I think it
13 is clear, but just to explain it a bit further, we say
14 that the lower default rate under the counterfactual
15 EEA MIF, which we say of course is zero, might have
16 caused one or more of the acquiring banks with
17 sufficient volume, so either one bank with sufficient
18 volume or collectively more than one with sufficient
19 volume, to actually trigger the 75% rule and collapse
20 the significantly higher domestic MIF, or it might have
21 caused the parties to the multilateral negotiation to
22 recognise that the domestic MIF had to be significantly
23 lower because of the power and incentive of one or more
24 acquiring banks to trigger the default.

25 So while the rule provides the causal mechanism for

1 the influence of the EEA MIF, the rule itself doesn't
2 actually have to be triggered for the EEA MIF to have
3 a gravitational effect. That's our case. And in our
4 written opening submissions, we've called this the
5 hierarchy argument; hierarchy because the 75% rule, if
6 triggered, then leads to a default MIF, which is the
7 unlawful intra-EEA MIF.

8 Now, if we go to our written opening submissions at
9 {A/1/43}, we see at paragraph 111 that what we've said
10 is that:

11 "It is plain from the above summary ..."

12 Where we've explained how this causal mechanism
13 works:

14 "... that the Hierarchy Argument turns principally
15 on what would have occurred in a counterfactual world
16 where the intra-EEA MIFs were set at zero."

17 So we say that had the outside option, namely the
18 fallback rate, been zero, then this would have
19 strengthened the hand of acquirers and resulted in lower
20 domestic MIFs and that question, what would have
21 happened had the fallback rate been zero and how that
22 would have affected incentives and actions of net
23 acquirers under this rule, is clearly a question for the
24 counterfactual.

25 And Mastercard agrees with that. If we look at

1 their written opening submissions at paragraph 145 --
2 that's at {A/2/49} -- you can see there above -- if we
3 scroll up a little bit so you see the heading above
4 paragraph 144, "The Hierarchy argument/75% rule", and
5 then you see at 145:

6 "While the Hierarchy argument is primarily
7 counterfactual, Mr Merricks invites the Tribunal to
8 determine certain aspects of it ..."

9 And we do. We do invite the Tribunal to determine
10 that, for example, the rule is as we say it is and that
11 it was capable of being triggered in that way, and we
12 ask the Tribunal to make findings about what the
13 relative incentives of issuers and acquirers would have
14 been.

15 So it follows that there's agreement between the
16 parties that whether a causative effect can be
17 established on the basis of the 75% rule is primarily
18 a counterfactual question and therefore not for this
19 trial.

20 But we do say, as I've said, that this trial can and
21 should determine whether there is a relevant causal link
22 in the sense of Mr Merricks being able to establish that
23 the causal mechanism on which he relies exists and was
24 capable of functioning in the manner in which he
25 alleges; in particular, that the provisions in the rules

1 existed and would have enabled net acquirers to withdraw
2 their consent to the UK fallback MIF so as to ensure
3 that the intra-EEA MIFs would apply.

4 Now, if we go back to what Mastercard say at
5 paragraph 145 of their written openings, having accepted
6 that it's primarily a counterfactual question, they say,
7 well, it is just another theoretical argument which is
8 contradicted by the facts. They make a forensic point.

9 But the key point -- but we say that in a sense, of
10 course, all the causation questions in these
11 proceedings, and not just in these proceedings but in
12 any proceedings, might be described as theoretical as
13 they require an assessment of a counterfactual which
14 didn't exist. Of course the 75% rule requires the
15 Tribunal in due course, though not at this trial, to
16 make factual findings as to what would have happened in
17 a counterfactual world which did not ex hypothesi exist.
18 That might be described as theoretical, but it's
19 essential.

20 But very great care must be taken, in our respectful
21 submission, in relation to what Mastercard say when they
22 say that our case is contradicted by the facts, because
23 the key point that they make here, and we see this at
24 the bottom of the page {A/2/49}:

25 "The decisions in relation to the UK MIFs during the

1 period ['97] to 2004 were not contentious within the ...
2 board; the minutes record that the decisions were
3 'agreed' ... there is no suggestion of any opposition.
4 There is no evidence that any [over the page, please] of
5 the UK banks were minded to, or threatened to, withdraw
6 consent to the domestic rules, and they did not do so."

7 So that's what they say about the factual world, but
8 we say that that point throws no light whatsoever on the
9 essential question of what would have happened in a very
10 different counterfactual where the default was zero.

11 MR JUSTICE ROTH: Well, yes, because we're not dealing with
12 the --

13 MS DEMETRIOU: Because we're not.

14 MR JUSTICE ROTH: But one can quite legitimately address the
15 factual world. Indeed, if you succeed on the factual
16 world, you show that the banks were having regard to the
17 EEA MIF in the factual world. They did in setting with
18 the EEA MIF where it was, either because it was the
19 fallback and it influenced the bargaining in the way you
20 outlined or because they actually consciously said, "We
21 need to be above that MIF". Clearly that will advance
22 your case very significantly.

23 The point you're making, I think, is that even if
24 you lose on all of that, it still, depending on how the
25 judgment comes out, perhaps, may be open to you then to

1 come back and say, "Ah, but if -- there's a further
2 question that has to be addressed, namely if the EEA MIF
3 was zero, would it then have had an effect?" And that
4 we're not looking at.

5 MS DEMETRIOU: Yes.

6 MR JUSTICE ROTH: But we are very clear what we are looking
7 at.

8 MS DEMETRIOU: Sir, yes, and may I make a couple of
9 submissions just to expand on what you've just put to
10 me?

11 So we do absolutely agree that if one were to find
12 evidence in the real world of a threat to invoke the
13 75% rule, that would be relevant and would advance our
14 case because, in a sense, the counterfactual scenario is
15 a fortiori that. And we do absolutely agree that if
16 it's found that in the real world there's no evidence of
17 that, we say that that leaves it open to us to come back
18 and say that things would have been different in the
19 counterfactual.

20 But the point that I want to be crystal clear on now
21 is this: that in the real world, the differential in
22 terms of the UK MIFs that were multilaterally agreed and
23 the default intra-EEA MIF was quite slight. And the
24 question with which the Tribunal will have to grapple in
25 due course at a subsequent trial is very different.

1 It's looking at a very different counterfactual.

2 MR JUSTICE ROTH: Well, it depends, of course, also. At the
3 moment, as I understand it, there's a pending
4 application for permission to appeal --

5 MS DEMETRIOU: Yes.

6 MR JUSTICE ROTH: -- is that right, that has not been
7 resolved? So it may be it's refused, in which case we
8 know what the counterfactual is. It may be it's
9 allowed, in which case we won't know until the Court of
10 Appeal gives judgment. So we have -- that's one good
11 reason, apart from others, why we can't really address
12 it now, because we don't know where it ends up.

13 MS DEMETRIOU: Sir, I entirely agree with that, and so if
14 they were to get permission -- if Mastercard were to get
15 permission to appeal and the Court of Appeal were to
16 overturn the counterfactual finding made by the
17 Tribunal, then that would obviously have -- may have
18 an impact on what I'm saying.

19 But for present purposes, we -- if none of that
20 happens and if, in fact, the counterfactual is as we say
21 it is, which is a zero intra-EEA MIF, then one is
22 looking at a counterfactual world with radically
23 different incentives, radically --

24 MR JUSTICE ROTH: There may be other things that change in
25 that counterfactual world --

1 MS DEMETRIOU: There may be.

2 MR JUSTICE ROTH: -- such as it may be Mastercard says, "We
3 would have had different rules".

4 MS DEMETRIOU: And they do say that. They've hinted at that
5 in correspondence. I'll take you to that.

6 MR JUSTICE ROTH: Yes --

7 MS DEMETRIOU: And there will no doubt be a question in the
8 subsequent trial as to how much change one can have in
9 a counterfactual. There will be a legal battle about
10 that, I'm sure.

11 MR JUSTICE ROTH: Yes.

12 MS DEMETRIOU: But the key point that we want to make now,
13 it relates to what one might expect to see in the
14 evidence and in the disclosure, because we think that
15 Mastercard appear to be trying to have their cake and
16 eat it to a large degree because they're saying, well,
17 this is a counterfactual question, but it's highly --
18 it's all contradicted by the evidence.

19 And that's not a submission which can safely be
20 made, we say, because one wouldn't expect to see in the
21 real world -- necessarily expect to see conflict in
22 MEPUK meetings because everybody at those meetings knew
23 the score. They knew that they were discussing a UK MIF
24 which hovered slightly above the default intra-EEA MIF.
25 So the interactions of these sophisticated players and

1 of the MEPUK board assumed that the intra-EEA MIF was
2 slightly below the level they were debating.

3 And we say that it's simplistic and wrong to say,
4 well, because there isn't any evidence of somebody
5 applying -- saying they're going to trigger this rule,
6 you've got to conclude, the Tribunal must conclude, that
7 somehow our causation argument, which turns on what
8 would have happened in a very different counterfactual,
9 is unfounded or is contradicted.

10 MR JUSTICE ROTH: Well, I didn't understand, and maybe
11 I misunderstood it, Mastercard asking us to make any
12 findings of what would have happened in the
13 counterfactual.

14 MS DEMETRIOU: Maybe that's right, sir, but what they do --
15 I'm going to turn now to look at the earlier period
16 because -- and essentially, sir, I think you have our
17 point, but our point is, if I can just encapsulate it
18 about the factual/counterfactual, that if you have
19 a very different counterfactual, as we say it is, then
20 one wouldn't expect to see, if I can put it this way,
21 imprints of the counterfactual in the factual world
22 purely because it is so different.

23 Now, it might be different if the counterfactual
24 world is not very different. So if one had a cartel,
25 for example, where one is looking at a tiny overcharge,

1 a really tiny overcharge that nobody really much
2 noticed, then one might be able to look at what happened
3 in the factual world and say, well, that's a good guide
4 to what would have happened in the counterfactual world
5 because, actually, the counterfactual world is not very
6 different. But we're not in that case.

7 So we say it's really a note of caution that in
8 making findings about what happened in the factual
9 world, those findings shouldn't obscure the fact that
10 our case on the counterfactual world is that the
11 counterfactual world is very different and one wouldn't
12 expect to see imprints of it in the factual evidence.

13 MR JUSTICE ROTH: Well, I don't anticipate -- I didn't pick
14 that up from Mastercard's written argument, but I might
15 have missed it. I don't anticipate that we will make
16 any findings of what have might have happened in the
17 counterfactual world. We will simply address what led
18 to these decisions being made as they were made --

19 MS DEMETRIOU: Sir --

20 MR JUSTICE ROTH: And that's fairly a straightforward -- you
21 can call it causation or -- it's not but for causation,
22 but it's a form of causation in the everyday sense that
23 people understand it. Why did you make the decision
24 that you took?

25 MS DEMETRIOU: Sir, yes, and there's then a question. Can

1 I maybe elaborate by reference to the early period,
2 because what we say is that Mastercard's exposition, as
3 it were, of its case on the early period is not really
4 consistent with what it says about the 75% rule. So it
5 says, well, that's primarily a counterfactual question,
6 but the early period is different.

7 You've heard me explain that Mr Merricks' case is
8 that but for -- on the early period, but for the
9 unlawful intra-EEA MIFs, domestic interchange fees would
10 have been lower because the unlawful MIF represented the
11 outside option and if that had been zero, the outside
12 option would have been radically different. So as
13 I have explained, our case is that this follows from the
14 structure of the rules and, in particular, the fact that
15 the intra-EEA MIF operated as a fallback.

16 So it follows, we say, that in these proceedings the
17 Tribunal will absolutely have to determine what would
18 have happened -- so in these proceedings, I don't mean
19 at this trial; in these proceedings as a whole, in order
20 to make good our causation, our but for causation case,
21 the Tribunal will need to determine what would have
22 happened had the intra-EEA MIF been set at a lawful
23 level. We say zero, subject to appeals and so on.

24 So the Tribunal will in due course, but not now,
25 need to ask itself and will need to determine whether

1 bilateral negotiations would have resulted in lower
2 rates had the fallback been zero. That's the essence of
3 our causation argument on the early period.

4 And it's an obvious point. We need to show that
5 it's the unlawful element of the MIF that caused
6 interchange fees to be lower. And if, as the Tribunal
7 has found, the MIF should have been zero, then the
8 Tribunal in due course, but not at this trial, will need
9 to determine whether, in that counterfactual world where
10 the fallback was zero, that would have exerted downward
11 pressure on the bilateral interchange fees agreed
12 because it represented a much stronger outside option
13 for acquirers.

14 Now, the Tribunal won't be able to determine that
15 basic counterfactual but for issue at this trial because
16 we're not getting into counterfactual, but we say that
17 the purpose of this trial is to determine -- what the
18 Tribunal can absolutely determine at this trial is
19 whether the causal mechanism on which Mr Merricks relies
20 for that counterfactual analysis exists, and the causal
21 mechanism that we've pleaded for the early period relies
22 on establishing that the rules did indeed provide for
23 the intra-EEA MIF to operate as a fallback.

24 Now, Mastercard seeks on its pleadings to dispose of
25 that causal mechanism alleged by Mr Merricks, because

1 its case is that the rules did not provide for the
2 intra-EEA MIF to be the fallback at all. Instead,
3 Mastercard's case is that the fallback under the rules
4 was the inter-regional fee, and let's look at that in
5 their pleadings. That's at {A/4/47}.

6 MR JUSTICE ROTH: We've seen that, what they said. Is it
7 important to look at it in the pleading?

8 MS DEMETRIOU: You've seen that's what they say?

9 MR JUSTICE ROTH: Well, we know that's what they say.

10 MS DEMETRIOU: You know that, exactly.

11 MR JUSTICE ROTH: It's in the openings, so you don't --

12 MS DEMETRIOU: We don't need to take it up.

13 And they also allege further, and, again, I don't
14 think we need to take it up because you've seen it in
15 the openings and in their pleading, that the fallback
16 fee only applied if the banks had commenced
17 an arbitration and pending the arbitral ruling.

18 So this trial will absolutely determine whether
19 Mr Merricks or whether Mastercard are right on the
20 existence of this causal mechanism, whether this
21 relevant causal link exists, because if the Tribunal
22 were to find for Mastercard that the fallback in the
23 rules was the inter-regional fee, then we accept that we
24 would not be able to establish but for causation in
25 respect of the early period as the mechanism on which we

1 rely would collapse. So Mr Merricks' case on the early
2 period would fall down at this preliminary stage.
3 That's obviously a very important point for the Tribunal
4 to determine.

5 But what is clear from Mastercard's submissions also
6 is that it's inviting the Tribunal to go much further
7 than this and to establish whether or not, in the
8 factual world, bilateral negotiations were affected by
9 the intra-EEA MIF. And it's adduced, as you've seen,
10 a lot of witness evidence designed to establish that in
11 the factual world, those negotiating bilateral
12 agreements didn't take account of the intra-EEA MIF, but
13 instead took account of other factors like reference
14 rates and cost studies and Visa.

15 Now, the first point I want to make is really
16 an analytical point as to Mastercard's position on these
17 things, because its position in relation to what it's
18 asking the Tribunal to do in respect of the early period
19 seems to us to be different to what it's asking the
20 Tribunal to do in relation to the 75% rule where it
21 agrees that the hierarchy argument relating to the
22 75% rule is primarily a counterfactual enquiry.

23 It appears to consider that the guidance -- what
24 we've called the guide allegation in respect of the
25 early period is different and that it is relevant for

1 the Tribunal to work out exactly what the impact of the
2 EEA MIF was in the real world.

3 And the first point I want to make is that analysed
4 properly, both of these allegations made by Mr Merricks
5 are primarily counterfactual enquiries. Both of them
6 are. The only difference between them is that the
7 hierarchy allegation involves multilateral negotiation
8 and the guidance allegation involves bilateral
9 negotiation.

10 But the fundamental question in each case, whether
11 it's bilateral negotiation or multilateral negotiation,
12 is whether, had the intra-EEA MIFs been lawful, we say
13 zero, their operation as a fallback to negotiation, be
14 it bilateral or multilateral, would have led to lower
15 domestic interchange fees, whether the zero MIFs would
16 have strengthened the hand of the acquirers.

17 So in each case, and coming back to the point you
18 put to me, sir, the question of whether in the factual
19 world those negotiating domestic interchange fees had
20 regard, specifically or explicitly, to the EEA fallback
21 fee is of limited, we say, relevance to but for
22 causation. It's of limited relevance, and that's, as
23 I've said, because the --

24 MR JUSTICE ROTH: One can debate whether it's of limited
25 relevance, medium relevance or great relevance. It's

1 not irrelevant and we're going to determine it. And you
2 make your point quite clearly that even if we say it had
3 no effect on the decision actually taken, it may be open
4 to you subsequently to say, well, if, in the
5 counterfactual world, the EEA MIF had been zero, well,
6 then it would have had an effect. That's another
7 question.

8 MS DEMETRIOU: Yes.

9 MR JUSTICE ROTH: It would be perfectly legitimate --
10 indeed, that's what we're going to do -- to say: did it
11 have an effect on the decision as it was taken? And
12 that's where these factual matters come in.

13 MS DEMETRIOU: Sir, yes.

14 MR JUSTICE ROTH: And if you say their position is
15 inconsistent, well, we'll see that when we get to it,
16 but if I may say so, you're making slightly heavy
17 weather of this. I think we all understand what we're
18 going to do and we can proceed.

19 MS DEMETRIOU: Sir, if we all --

20 MR JUSTICE ROTH: I mean, I don't -- and if at some point
21 one seems to be straying into things that seem to be on
22 the supposition of a quite different MIF, EEA MIF, well,
23 then one can say, well, that's not for now, but ...

24 MS DEMETRIOU: Sir, I apologise if I'm making heavy weather
25 of it. I'll cut short what I'm going to say in light of

1 what the Tribunal said. I think our concern, if I can
2 cut to the chase, is that the factual enquiry mustn't be
3 allowed to obscure -- I think there are two concerns,
4 really.

5 The first is that the factual enquiry shouldn't be
6 allowed to obscure the counterfactual enquiry, because
7 we say the two worlds are extremely different and so
8 there must be care taken not to reach, during this
9 trial, any conclusion, which I think the Tribunal is
10 fully on board with, as to what would have happened in
11 the counterfactual world.

12 The second point really does relate to the evidence
13 and disclosure that one would expect to see. It really
14 comes back to the point I was making, which is that when
15 you have a counterfactual world which is radically
16 different, so if we are right and if the Tribunal is
17 right and one is looking down the line at what would
18 have been the incentives at play if the EEA MIF had been
19 zero, then one isn't necessarily going to see, as I put
20 it, imprints in the factual evidence which assist on
21 that. One may see some, but one may not.

22 And, as I say, if one doesn't see -- we don't have,
23 of course, disclosure from the banks which record their
24 negotiations, so we don't have any disclosure which
25 record their negotiations. So, in a sense, one wouldn't

1 really expect to see direct communications referring to
2 the outside option of the default MIF. But even if we
3 had disclosure and we could see what the communications
4 were between the banks, one wouldn't necessarily expect
5 to see in the factual world them articulating that,
6 because the outside option was not very far apart from
7 what they were negotiating, whereas that's different.
8 That doesn't tell you that in the counterfactual world,
9 things would have been the same, and we say the
10 opposite --

11 MR JUSTICE ROTH: Well, I think the question -- there are
12 two questions. One is what would have happened in the
13 counterfactual world. We're not addressing that.

14 MS DEMETRIOU: Yes.

15 MR JUSTICE ROTH: The second question is: given what we find
16 happens in the factual world, how significant is that
17 answer when one addresses the counterfactual question?

18 MS DEMETRIOU: Yes.

19 MR JUSTICE ROTH: And you're saying, well, it may not be
20 significant.

21 MS DEMETRIOU: Yes.

22 MR JUSTICE ROTH: I don't know, but I don't think that
23 argument is for today either. We will just find what
24 happened in the factual world, what caused these
25 decisions in that sense, in the ordinary common sense

1 way of: why did you take the decisions you took?

2 How relevant that is going to be when you come
3 subsequently to look at the counterfactual, I don't know
4 and I think it's impossible to know at this point. It
5 will be open to you to say it tells us very little. It
6 may be open to Mastercard to say, well, actually, the
7 situation is not that different. But that's not part of
8 this trial either.

9 We appreciate -- I think we all appreciate that
10 you've made those two points.

11 MS DEMETRIOU: Sir, with respect, we agree. We entirely
12 agree with how you've just put it, and apologies if
13 I was making heavy weather of it, but one does see, at
14 least in Mastercard's opening submissions, a lot of
15 rather aggressive verbiage about, well, we don't see
16 this in the real world; all -- none of these
17 negotiations ever mention the EEA MIF. Therefore, the
18 factual causation allegation doesn't stack up.

19 And we say -- I just wanted to make crystal clear
20 that that isn't right as a matter of law. That's just
21 not correct.

22 Now, the next point I wanted to look at and say
23 something briefly about is the relevance of cost
24 studies. You'll have seen that Mastercard's pleaded
25 case placed significant weight on the importance of cost

1 studies conducted by EDC and, indeed, they've adduced
2 significant witness evidence relating to those cost
3 studies.

4 If we look at their pleading at -- the Re-Amended
5 Defence at {A/4/63}, so you see there that they say --
6 they plead that:

7 "The setting of rates took account of, inter alia,
8 the reference rates, UK cost studies, and competitive
9 considerations."

10 MR JUSTICE ROTH: This is (v), is it?

11 MS DEMETRIOU: (v) at the bottom of the page.

12 MR JUSTICE ROTH: What paragraph is this?

13 MS DEMETRIOU: This is --

14 MR JUSTICE ROTH: It's hard to work it out.

15 MS DEMETRIOU: I know. It's -- we're both guilty of the
16 same problem. It's 97 -- 98, sorry.

17 MR JUSTICE ROTH: It's 98, v.

18 MS DEMETRIOU: Yes, 98, v.

19 MR JUSTICE ROTH: Yes, it's not 5.

20 MS DEMETRIOU: It's v.

21 MS DEMETRIOU: Again, I'm not making any forensic point
22 about this, but you see because of the amendment that
23 before reference rates were introduced by Mastercard
24 into the analysis, they really did put their case on the
25 basis of the cost studies. That's now been rather

1 relegated in their submissions.

2 And we see over the page at (w) {A/4/64}:

3 "... the UK MIFs in the UK Domestic Rules were
4 determined by MEPUK's board by reference to the rates
5 calculated by the UK cost studies and also taking into
6 account the ... board's views of competitive conditions
7 in the market."

8 So the cost studies were thus said to be an integral
9 part of how the level of interchange fees first
10 bilaterally were agreed and subsequently the UK MIFs
11 were determined, and Mastercard's case was that because
12 EDC's cost studies were UK-specific, they were -- the
13 UK interchange fees were insulated from the effects of
14 the EEA MIFs.

15 But where we've ended up in terms of the expert
16 evidence is that the experts agree that there is no
17 statistically significant relationship between UK
18 interchange fees and cost studies. We can perhaps see
19 this in the agree/disagree statements. That's at
20 {A/22/19}, row 26. I just ask the Tribunal to just to
21 read across there.

22 This is a point which will be explored further with
23 Mastercard's witnesses, but we say it's clear that the
24 results of cost studies have no tangible effects on the
25 levels of UK interchange fees, other than perhaps acting

1 as a ceiling. Instead, their purpose was a response to
2 regulatory scrutiny. There was a widespread belief that
3 if interchange fees were set too high and above costs,
4 they wouldn't be lawful and so cost studies were
5 therefore commissioned in case there was a regulatory
6 investigation, but were otherwise essentially ignored in
7 determining the level of the domestic interchange fees.
8 As I say, that's something which we'll explore with the
9 witnesses.

10 But we do see in Mastercard's written opening
11 submissions that they've now downplayed the importance
12 of the cost studies and so they're referred to in
13 Mastercard's opening submissions, for example, as
14 an initial reference point whereas the further -- they
15 say -- if we look at, for example, {A/2/29}
16 paragraph 83, they say:

17 "... an initial reference point, particularly as
18 interchange fees above the level of costs would have
19 been difficult to justify."

20 That's the regulator point, we say.

21 Then we see that they say that the further critical
22 reference point was the commercial viability of
23 interchange fees in the market.

24 So they have, we respectfully suggest, sought to
25 retreat from their position that domestic interchange

1 fees were set by reference to independent cost studies
2 which took account only of UK-specific factors. Now
3 it's said that both reference rates, which have assumed
4 importance in Mastercard's submissions, and UK MIFs
5 were, in practice, adopted at the same level as Visa's
6 MIFs.

7 So that takes me on to Visa. Mastercard's case as
8 it's developed --

9 MR JUSTICE ROTH: Would that be a sensible point --

10 MS DEMETRIOU: That would be a sensible --

11 MR JUSTICE ROTH: -- because that's probably more than
12 five minutes?

13 MS DEMETRIOU: Yes.

14 MR JUSTICE ROTH: We've been asked to take a slightly longer
15 break because of the earlier start, so if we come back
16 at twenty to.

17 (11.23 am)

18 (A short break)

19 (11.45 am)

20 MS DEMETRIOU: Sir, I was going to turn on to look briefly
21 at Visa. So you'll have seen from their opening
22 submissions that Mastercard's case as it's developed has
23 been to put less emphasis on cost studies and much more
24 emphasis on Visa as being the key consideration in the
25 factual world, and Mastercard argues that the

1 UK interchange fees were influenced by Visa's MIFs
2 throughout the claim period, and this really does form
3 the major plank of its case in its written opening
4 submissions.

5 And, of course, we are content for the Tribunal to
6 make a finding about the relevance of Visa in the
7 factual world. Now, as to what extent there's
8 disagreement between us, we -- there is some
9 disagreement with Mastercard as to the importance in the
10 factual world of the Visa MIFs.

11 So we don't, for example, consider, if this is what
12 Mastercard is saying, which it may not be, that
13 Mastercard considered itself bound to be at parity with
14 VISA's MIFs and the question of the degree to which it
15 took into account VISA's MIFs and the degree to which it
16 considered that it needed to align with VISA's MIFs is
17 a question that can be explored and will be explored
18 with the witnesses.

19 But we don't dispute that in the factual world,
20 Mastercard considered VISA's MIFs to be relevant and
21 took account of them, so that's not an area of dispute
22 between us. We're not going to be seeking to establish
23 that VISA's MIFs were irrelevant in the factual world.

24 But, again, and at the risk of labouring the point
25 further, we do say that this is a quintessential example

1 of a point that's going to be more important in the
2 counterfactual because the fact that Mastercard, in the
3 factual world, took account of VISA's MIFs, considered
4 them to be of relevance, doesn't get it very far at all
5 on but for causation.

6 Mastercard's position will presumably be, on but for
7 causation, that in the counterfactual world, interchange
8 fees would have been set by reference to VISA's MIFs.
9 So in the counterfactual world, they would have taken
10 account of VISA's MIFs in the same way that they say
11 they took them into account in the factual world.

12 But there are two points we want to make about that
13 enquiry. The first point is that even if VISA's MIFs
14 are found to have had a causative effect on Mastercard's
15 domestic interchange fees, that doesn't preclude the
16 intra-EEA MIF also having a causative effect.

17 So both things may have affected the setting of
18 domestic interchange fees and, of course, we say that
19 the intra-EEA MIF did -- that the unlawful interchange
20 fee did affect the level of interchange fees.

21 The second point is that, of course, the Tribunal
22 will have to determine what VISA's MIFs would have been
23 in the counterfactual. Again, it's not a question for
24 now, but it's relevant to consider how it is going to
25 arise.

1 So that will require the Tribunal to consider, for
2 example, what impact a lawful Mastercard intra-EEA MIF
3 set at zero, we say, would have had as a matter of fact
4 on VISA's MIFs, and the Tribunal will have to also bear
5 in mind and apply the legal principles laid down by the
6 Court of Appeal that there can't be an asymmetric
7 counterfactual.

8 And the Tribunal will be required in due course to
9 strip out any unlawful conduct on the part of Visa. As
10 we've explained at paragraph 9 of our written opening
11 submissions, the counterfactual world must be purged not
12 only of the competition or infringement in question in
13 this case, but also of any other unlawful conduct. And
14 we say on any view, VISA's MIFs would be much lower in
15 the counterfactual world. We say --

16 MR JUSTICE ROTH: These are not submissions for now, are
17 they?

18 MS DEMETRIOU: No, they're not, but I want to -- I'm making
19 them now just so that I can make this point: that it
20 follows, we say, that Mastercard can't rely on
21 VISA's MIFs -- the level of VISA's MIFs in the real
22 world to establish that its domestic interchange fees
23 would not have been lower in the counterfactual because
24 it sought to maintain parity.

25 So that can't be a submission that they advance

1 because -- so they can't say, "Well, we took account of
2 VISA's MIFs in the real world. VISA's MIFs are about
3 the same level and so your causation argument fails
4 because we're going to be saying that in the
5 counterfactual --"

6 MR JUSTICE ROTH: We're not going to hear submissions about
7 the counterfactual world, Ms Demetriou.

8 MS DEMETRIOU: No. No, and so --

9 MR JUSTICE ROTH: You keep going on about it. You go on
10 about it quite a bit in your opening. You say
11 Mastercard can't make that submission about the
12 counterfactual world. They're not going to make any
13 submissions to us about the counterfactual world.

14 What they do when we come to, if we do, a trial
15 about the counterfactual world, we'll see what
16 submissions they try to make and you can object to them,
17 but to anticipate what they then might say and say,
18 well, they won't be able to say it --

19 MS DEMETRIOU: No, sir, in a nutshell -- in a nutshell, what
20 we say about Visa is that there will be a dispute about
21 degree in the factual world, but this is essentially
22 something which is going to play out at a later
23 counterfactual stage. That's our position.

24 MR JUSTICE ROTH: I mean, they might -- you might say that
25 you will accept, in the counterfactual world, if the

1 Visa MIF was at the level you say it would have been,
2 they would have taken account of that as well. There
3 are all sorts of possibilities.

4 MS DEMETRIOU: Exactly.

5 MR JUSTICE ROTH: I mean, they are the main competitor by
6 far.

7 MS DEMETRIOU: Yes.

8 MR JUSTICE ROTH: That's pretty much -- there was Amex,
9 but --

10 MS DEMETRIOU: Yes, and so --

11 MR JUSTICE ROTH: -- much the greater part of this market
12 was Visa and Mastercard, so pretty astonishing if they
13 have no regard to each other.

14 MS DEMETRIOU: Sir, yes. We're not going to be saying they
15 didn't have any regard. So, in a sense, the debate
16 about that is going to be --

17 MR JUSTICE ROTH: Brief.

18 MS DEMETRIOU: -- relatively confined.

19 MR JUSTICE ROTH: Yes.

20 MS DEMETRIOU: So having developed those themes, I'm going
21 to move to Mr Merricks' positive case in relation to
22 each of the periods of the claim, and I just want to
23 identify really the key factual issues that arise and
24 summarise our case on those issues.

25 In relation to the early period -- so the early

1 period is from 1992 to November 1996, and you've already
2 heard me explain that we make two causation arguments.
3 The first, which I've discussed already -- the first is
4 the guidance allegation. So but for the infringement,
5 the domestic interchange fees would have been lower
6 because the zero MIF would have acted as a floor and
7 would have increased the bargaining position or improved
8 the bargaining position of net acquirers.

9 The second is that the unlawful intra-EEA MIF
10 applied directly to transactions in respect of which
11 there was no bilateral rate in place. So stripped of
12 the illegality, those transactions would have been
13 processed on a zero MIF, and we've called that the
14 direct application argument.

15 And I want to just address them briefly in turn so
16 that the Tribunal can see what the four corners of our
17 arguments are, but, of course, the documents, we say,
18 will be explored with the witnesses.

19 The guidance allegation: the central factual issue,
20 we say, is what the applicable fallback rate was. Was
21 it the intra-EEA MIF set by Europay, as we say, or
22 whether it was the inter-regional rate set by
23 Mastercard, as is Mastercard's case.

24 As I canvassed earlier, this point is potentially
25 decisive of Mr Merricks' claims, as in potentially

1 decisive against us, so it's particularly significant.

2 MR JUSTICE ROTH: Yes.

3 MS DEMETRIOU: A further important factual issue is whether
4 the fallback rates apply automatically as the default
5 rate in the absence of bilateral arrangements or would
6 they only apply if an arbitration was initiated by
7 a member bank?

8 And Mastercard's case, of course, is that the
9 applicable fallback rate was of limited relevance
10 because it only applied temporarily pending arbitration.
11 We say that the applicable fallback rates would apply
12 automatically whenever member banks failed to reach
13 a bilateral arrangement.

14 The Scheme Rules, if I can just show you what we say
15 about those. We can take them from our written opening
16 submissions, if we go to {A/1/13} and paragraph 34(3).
17 So we say:

18 "Read together, Mastercard's scheme rules provided
19 throughout the Early Period for the applicable fallback
20 rate to be the 'international interchange fee' ..."

21 So the question is going to be: what did that mean?

22 And we see that the 1991 -- we refer first to the
23 1991 Eurocard Rules. So we can see those at {C1/192/5}
24 and if we look at E7.02.4(B). Actually, it's on the
25 next page, I think {C1/192/6}. So what we see, if you

1 look in the middle of that paragraph:

2 "Upon notification to Eurocard ... by any one of the
3 Members involved in the dispute that no agreement can be
4 reached, the amount of the interchange fee shall be the
5 international interchange fee, until one or more
6 intra-country interchange fee(s) is (are) agreed ..."

7 So you see there the reference to the international
8 fee.

9 The 1993 Eurocard Rules are to the same effect.
10 I don't think we need to turn them up.

11 And then what we've referred to as well in our
12 opening is the Mastercard International Scheme Rules,
13 and we'll see those at {C4/25/13} and you see at the
14 top:

15 "In the event there is no intra-country interchange
16 fee(s) applicable to all members doing business in the
17 country in effect at the time a dispute arises, the
18 international interchange fee(s) applicable to
19 transactions for such MasterCard region in which the
20 country is located shall apply ..."

21 Until a final determination has been made.

22 So we see again that there's this reference to
23 the -- well, here they talk about the international
24 interchange fee applicable to transactions for that
25 Mastercard region.

1 Now, Mastercard's position, as you've seen, is that
2 the international fee refers to the inter-regional fee
3 that applied to transactions between, for example, the
4 UK and the EEA. We say that that's wrong and the
5 international fee referred to the intra-EEA MIF and
6 that's why the Mastercard --

7 MR JUSTICE ROTH: Sorry to interrupt you. The
8 inter-regional fee which applied -- so there was
9 an inter-regional fee for transactions between the UK
10 and the EEA?

11 MS DEMETRIOU: I'm so sorry; between -- the inter-regional
12 fee was between the EEA and the US.

13 MR JUSTICE ROTH: Yes, that's right.

14 MS DEMETRIOU: Sorry, I made a mistake.

15 MR JUSTICE ROTH: Yes.

16 MS DEMETRIOU: And we say that the international fee, by
17 contrast, referred to the intra-EEA MIF and we say that
18 that's why the Mastercard International Rules we've just
19 looked at refer to the international fee applicable to
20 the region in which the country is located. The region
21 in which the UK was located was the EEA and the
22 international fee applicable to the EEA was the
23 intra-EEA MIF.

24 Now, this is a point that's going to be explored at
25 trial, but there are three strands of evidence which we

1 rely on.

2 The first are the contemporaneous documents. That's
3 the first strand. And Mr Hawkins, for example, refers
4 in his second witness statement to the document at
5 {C4/26/26}. This shows that Europay -- this is
6 a Europay document; that they clearly thought that the
7 fallback was the intra-EEA MIF. So if you look under
8 "Interchange":

9 "[At] the present time there are 'fallback' rates
10 for inter-region transactions ... There are no such
11 'fallback' rates for intra UK transactions and
12 individual UK members are expected to negotiate
13 interchange fees between one another. In the absence of
14 a bilateral arrangement between two UK members, Europay
15 has ruled that the European inter-country rate(s) will
16 apply."

17 So the European inter-country rate is the intra-EEA
18 MIF. So that's a contemporaneous -- oh, I'm so sorry.
19 I'm told it's not a Europay document. I'm happy -- we
20 can explore what document it was in the evidence, but
21 this is -- I think what I wanted to say is that this is
22 Europay's view, because they say "Europay has ruled".

23 Then we're going to take you in the evidence -- go
24 in the evidence to what Mastercard told regulators, and
25 we say that what Mastercard told regulators is also

1 consistent with our interpretation of the rules.

2 PROFESSOR WATERSON: Sorry, just before you go on, what was
3 the date of this document?

4 MS DEMETRIOU: This is -- I think it's '96 or '97. Perhaps
5 we can just -- it's 1997. I'll try to find the precise
6 date. It's a document which -- if we go to tab -- if we
7 go to the first page of this clip {C4/26/1}, I think it
8 was an attachment for this meeting. So this is
9 a Rules & Conciliation Committee meeting of February
10 1997 and this was a paper that was attached, I think, to
11 the documents for that meeting.

12 So the first strand of evidence are contemporaneous
13 documents -- page 3 of the tab, I'm helpfully being told
14 {C4/26/3}. Ah, yes. So I think that probably is the
15 date, October 1996.

16 So the second strand of evidence is -- relates to
17 what Mastercard told regulators at the time and, again,
18 I don't think we need to take up time with that now. We
19 can explore that in the evidence with the witnesses.

20 And the third strand of evidence is what the
21 witnesses say about how the Eurocard clearing system
22 worked, and the two main witnesses that address this is
23 are Mr Dhaene and Mr Van den Bergh.

24 If we look at Mr Dhaene's evidence briefly at
25 {A/13/11}, paragraphs 16-17, he says:

1 "... from the start of the Full Infringement Period
2 ... Mastercard domestic payments between UK banks (as
3 well as cross-border transactions ...) were typically
4 processed via the Eurocard system (called 'EPS-NET').

5 "... As I also explain below, the default
6 interchange fees levied on those transactions were the
7 intra-EEA MIFs. Member banks which wanted to apply
8 a different interchange fee based on a bilateral
9 agreement between them, or a domestic multilateral
10 interchange fee ... applying to all domestic
11 transactions, had to inform Europay International in
12 order for this to be processed. These different fees
13 would then have to be implemented in the ECCSS (the
14 European Common Clearing and Settlement System ...) in
15 order to take effect. If there was no such notification
16 then the system would simply apply the intra-EEA MIFs to
17 the transaction. This was the case during my entire
18 time at Eurocard/Europay/Mastercard (i.e. 1989-2004)."

19 And then if we go to page 18 {A/13/18}, you see at
20 paragraph 38:

21 "During my entire time at ... Mastercard ...
22 I recall clearly that the intra-EEA MIFs were the
23 default rates in the system. This meant that when there
24 was no particular bilateral agreement nor a domestic
25 agreement in place determining the applicable fallback

1 rate, it was the intra-EEA MIFs that would apply."

2 And he explains -- he gives an example going back to
3 1988.

4 If we look at Mr van den Bergh's evidence for
5 Mastercard at {A/13.5/7} and it's paragraph 25 I want to
6 focus on for the moment.

7 "My recollection is that the interchange fees that
8 applied from a systems perspective to transactions
9 processed through ECCSS would be determined as follows:
10 first, any bilaterally agreed interchange fee; second,
11 if there was no bilateral rate, then any domestic MIF;
12 third, if there was no bilateral or domestic MIF, then
13 the regional cross-border rate (i.e. the intra-EEA MIF).
14 Finally, if there was no cross-border rate, then the
15 inter-regional rate."

16 So the point we make is that both on a construction
17 of the rules and by virtue of how the system, the ECCSS
18 system, worked, which we say reflected the rules, the
19 default rate was the intra-EEA MIF, and we say that the
20 evidence of both of those witnesses is consistent with
21 our case and it's also consistent with our case on
22 whether the fallback could only ever apply in the event
23 that an arbitration was commenced because what we see is
24 that, perhaps understandably given that there was
25 an honour-all-cards rule, that the system would simply

1 default to the intra-EEA MIF if there was no agreement
2 between the banks.

3 And the rules clearly provide for the possibility of
4 arbitration, but we say that they didn't require
5 an arbitration to take place in order for the default
6 MIF to bite, and everyone is agreed that there were no
7 arbitrations, or almost no arbitrations, during the
8 claim period.

9 And, as I say, it's also common ground the scheme
10 operated an honour-all-cards rule. And we say that if
11 we go to -- you see what we say about that at
12 paragraph 46 of our written opening submissions at
13 {A/1/18}, and we say that in circumstances where the
14 scheme did require all licensees to honour all cards,
15 then their argument that the default only applied
16 pending an arbitration simply doesn't work as a matter
17 of practicality because for the honour-all-cards rule to
18 operate, it was necessary to have a default fallback
19 rate to cater for the possibility that member banks may
20 not have been able to agree a bilateral rate. And we
21 say that there are instances where they didn't agree
22 bilateral rates and in those cases, there was a default
23 to the intra-EEA MIF.

24 Now, we say that paragraph 100 of Mastercard's
25 written opening submissions are also telling in this

1 regard. If we turn them up at {A/2/35}. So if we look
2 at paragraph 100, they say:

3 "Importantly, UK member banks did not generally
4 understand the Europay system to establish a default to
5 the EEA MIF. As set out above, the general
6 understanding and widespread practice was that bilateral
7 agreements had to be and were entered into. Insofar as
8 there were circumstances in which a bilateral agreement
9 had not been submitted to Europay and entered in its
10 systems, it was understood that Europay's systems would
11 apply ...the inter-regional rate ... as a default."

12 Well, pausing there, we say that's inconsistent with
13 their evidence:

14 "In the course of agreeing interchange fees
15 bilaterally in ... 1993, NatWest advised HFC Bank that
16 'in the meantime, and until effected in Europay's
17 system, the current Mastercard International fallback
18 rate of 1% for all transactions will automatically
19 apply' (emphasis added). Similarly, it was ..."

20 So pausing there, we say that that's telling
21 because -- so, first of all, we say that the
22 international fallback rate is to be read as the
23 intra-EEA MIF, and we'll explore that in the evidence,
24 but we say that's the proper construction of
25 international fallback rate.

1 But what they're clearly accepting here -- so
2 leaving aside the dispute as to the meaning of
3 international fees for this purpose, Mastercard is
4 clearly accepting here that the default operated without
5 any need for an arbitration.

6 So you see again:

7 "Similarly, it was noted at a ... board meeting
8 that, where banks had failed to submit details of
9 a bilateral agreement, the EPSS system would default to
10 the 'international fallback rate' ..."

11 And, again, they say, well, that must be the
12 international rate set by Mastercard, but we say leaving
13 aside that separate dispute, what they are clearly
14 accepting here is that the default operated
15 automatically even without an arbitration.

16 Then if we look at paragraph 104 of their opening
17 submissions on page {A/2/36}, they say there that:

18 "The claim that interchange fees for a 'significant
19 proportion' of UK domestic transactions were not agreed
20 bilaterally and were processed using the EEA MIF as
21 a default has no evidential support and is
22 comprehensively contradicted by the contemporaneous
23 records. While Europay's clearing systems had a default
24 to the EEA MIF in the absence of a bilateral ..."

25 That seems inconsistent with what they say at

1 paragraph 100, just on the meaning of "international
2 fee", but let's leave that aside:

3 "... this would not apply to transactions it did not
4 clear (which was most transactions), or to transactions
5 covered by bilaterals (which were ubiquitous). The
6 default might have a potential or theoretical
7 application between a new licensee joining the scheme,
8 and establishing its bilaterals: a period of a few
9 months in which few if any transactions would occur."

10 So, again, there's -- what they're doing here is
11 conceding in principle, although they make a point about
12 volumes, but they concede in principle that the EEA MIF
13 would -- there would be a default to the intra-EEA MIF
14 if there was no bilateral fee agreed. And we say that
15 that concession can't be reconciled either with
16 Mastercard's case that it wasn't the intra-EEA MIF at
17 all but it was the inter-regional fee or with
18 Mastercard's case that the default interchange fee only
19 applied if an arbitration had been initiated.

20 Now, this evidence on the fallbacks under the
21 Eurocard computerised clearing system also provides
22 important context for Mastercard's submission that the
23 domestic interchange fees were different in structure
24 from the EEA MIFs, and we see that if we go to {A/2/36}.
25 We see that at paragraph 103 of their submissions.

1 So they say that the rates were different -- the
2 domestic rates were different in structure and level
3 from the EEA MIFs. But, of course, we say that the
4 structure was sufficiently similar for the computer
5 system to have an automatic waterfall with domestic
6 bilateral interchange fees at the top, if they existed;
7 domestic MIFs in the middle, if they existed; and the
8 EEA MIFs as the automatic fallback.

9 And Mastercard accept that, subject to the volumes
10 to which it applied, so that really does show that their
11 submission about different structures and this couldn't
12 have been fitted together just doesn't work, because
13 there was an automated system which provided for
14 precisely that waterfall fallback effect.

15 And although some of the categories had different
16 names, they can be mapped across to each other, and this
17 is something which the experts look at. If we look at
18 {A/14/37}, table 7 shows Mr Coombs' mapping. So he
19 explains how the categories are mapped on to each other.

20 And it is true, we say, that the EEA MIFs provided
21 for certain discounts to the headline rate in certain
22 circumstances; for example, for petrol transactions if
23 the acquirer could show that its coverage reached 50% of
24 all main petrol outlets. But this doesn't undermine the
25 point that there's a logical correspondence between the

1 general categories. It was possible to default to the
2 EEA MIF if no bilateral was agreed and it would have
3 been readily apparent to the banks what MIF category and
4 interchange fee would apply under the EEA MIFs if they
5 allowed the default to occur. That was the basis on
6 which the whole automated ECCSS system was founded.

7 Now, Mastercard argues that whatever the rules said,
8 what's important is how they were understood at the
9 time, and so they say if banks understood the
10 international fee to refer to the inter-regional fee,
11 then that's the thing that most matters because that
12 would have guided the banks' understanding as to what
13 their outside option was during negotiations.

14 And we dispute that point as a matter of fact, and
15 that's a point that will be explored with Mastercard's
16 witnesses, but, again, and at the risk of irritating the
17 Tribunal about a further reference to the
18 counterfactual, which is not for now, it's a point that
19 ultimately doesn't avail Mastercard because the but for
20 causation enquiry will, in due course, have to determine
21 whether, in a counterfactual world of a zero intra-EEA
22 MIF, domestic agreed -- domestic interchange fees agreed
23 bilaterally would have been lower.

24 And in a counterfactual with a zero MIF, it's
25 inconceivable that if the rules provided for the

1 intra-EEA MIF to be the fallback that banks would have
2 been in any mistaken belief about that. Now --

3 MR JUSTICE ROTH: When you said, "We dispute that point as
4 a matter of fact", are you disputing -- it's not quite
5 clear to me what you are disputing. Are you disputing
6 the point that it's not relevant what the banks actually
7 thought as a practical matter, or are you disputing the
8 fact that they did think that as a practical matter?

9 MS DEMETRIOU: Well, we're disputing -- I think the evidence
10 before you showing that they did think it was the
11 inter-regional fee is limited, so we are disputing that
12 and we are going to pursue that in cross-examination.
13 We say the rules say what they said, and we saw what
14 Mr Warren thought of the rules. He definitely thought
15 it was the intra-EEA MIF, but that's a point that will
16 be explored in the evidence.

17 But we do also make the point that it's of very
18 limited relevance because, again, one has to see --
19 although one is not deciding the counterfactual now, one
20 has to see how it fits in, and in the counterfactual, if
21 we're right what the rule said, so if we're right the
22 rule said it was the intra-EEA MIF so that's what
23 applied, well, it's obvious that if that rate was zero,
24 there could have been no doubt about it because they
25 would have known that it was zero because that's so

1 different to the inter-regional rate.

2 Now, that's what I wanted to say in opening about
3 the guidance allegation in the early period. Just
4 turning back to the direct application argument,
5 I've already canvassed what this is. It's the second
6 causation allegation we make in respect of the early
7 period and it's that in certain cases, the intra-EEA
8 fallback rate applied directly to UK domestic
9 transactions. That's why we've called it the direct
10 application allegation.

11 And this occurred either because there was no
12 bilateral arrangement in place or because, although the
13 parties agreed a bilateral arrangement, they didn't --
14 they either didn't specify a bilateral rate for all
15 interchange fee categories or they expressly stated that
16 the fallback rate was to apply. So on either of those
17 three hypotheses, then we say that the fallback rate
18 applied directly.

19 Now, we've seen from -- I've taken you to
20 paragraphs 100 and 104 already of Mastercard's written
21 opening submissions, and we see that they concede the
22 principle or they appear to concede the principle of the
23 argument, but their position is that it comes to nothing
24 in terms of the facts because they say that all
25 transactions, or at least the vast majority, were

1 covered by bilateral arrangements.

2 So there will, at some stage, have to be
3 a determination of what proportion of transactions were
4 processed directly at the intra-EEA MIF, and I'm going
5 to come back to that in a minute. But I want to deal
6 first with a technical objection that Mastercard raised
7 very recently in correspondence.

8 It appears to be taking a pleading point that it's
9 not open to Mr Merricks to argue that some bilateral
10 arrangements didn't specify rates for all interchange
11 fee categories and that some arrangements specified that
12 the bilateral rate was to apply. So they say that we
13 haven't pleaded that so we can't run the point, but we
14 say that that objection is unfounded.

15 If I can take you to our pleading, so if we go to
16 {A/3/49}. So we plead in our Amended Claim Form at
17 paragraph 103(a) -- so we say:

18 "... throughout the Full Infringement Period, the
19 ... Defendants' scheme rules provided for the illegal
20 Intra-EEA fallback MIFs to apply by default to Domestic
21 Transactions absent either ... bilateral arrangements
22 between banks, or ... the setting of a Domestic MIF ..."

23 Then we further plead, if we look at page 50 over
24 the page {A/3/50}, at 103(bA) at the top of the page,
25 that:

1 "... the causative effect of those arrangements ...
2 was that the unlawful Intra-EEA Fallback MIFs applied
3 directly to at least certain transactions (i.e. the
4 interchange fees on those transactions were processed
5 and charged by reference to the unlawful Intra-EEA
6 Fallback MIFs), namely transactions which occurred in
7 circumstances where bilateral arrangements between
8 member banks had not in fact been entered into and
9 lodged with the Third Defendant to enable settlement
10 between member banks at bilaterally agreed rates ..."

11 And in the -- in our reply, we plead that the
12 EEA MIFs applied directly in the early and middle period
13 where certain bilateral arrangements didn't specify
14 an interchange fee and/or provided expressly for the
15 EEA MIFs to apply, and we see that at {A/5/29} and this
16 is 46(a) (iv):

17 "In any event, some bilateral agreements ... did not
18 specify an interchange fee for every category of
19 possible transaction."

20 And then we see at (b) (i) over the page -- sorry ...

21 So just pausing there, what we say is that our
22 pleading in the reply provides further particulars of
23 the same allegation that's made in the claim form. So
24 if you go back Claim Form at 103(a) {A/3/49}, we're
25 saying the intra-EEA MIF applied where there was no

1 bilateral arrangement between the banks and then we're
2 providing further particulars of that in the reply. We
3 say that there's no arrangement in circumstances where
4 there might be an agreement in place, but the agreement
5 doesn't make arrangements for particular categories of
6 fees.

7 So it's not a new pleading. All we're doing in the
8 reply is setting out what's meant by the absence of
9 a bilateral arrangement. So we say there's nothing in
10 the claim that we've made that we haven't pleaded this
11 point.

12 MR JUSTICE ROTH: Yes.

13 MS DEMETRIOU: This leads on to the middle period between
14 November 1996 and November 1997 and during that period,
15 the UK Rules applied for the first time and Mastercard
16 accepts that for this period, the intra-EEA MIF applied
17 as a default. So there's no dispute about the meaning
18 of the rules in that middle period.

19 MR JUSTICE ROTH: Is the middle period -- and it may be just
20 a semantic point. Does it run till the end of
21 30 October or are you saying it runs till December?

22 There was some to-ing and fro-ing about that.

23 MS DEMETRIOU: So it may be the end of October or it may be
24 1 November. I think we have to work out exactly --

25 MR JUSTICE ROTH: Yes, but it's not December?

1 MS DEMETRIOU: No, it's not December. So it's -- on any
2 view, it's November to November.

3 MR JUSTICE ROTH: Yes.

4 MS DEMETRIOU: It may be the end of October.

5 MR JUSTICE ROTH: No. Well, that's helpful. Thank you.

6 MS DEMETRIOU: Now, of course, we say that the fact that the
7 intra -- that it's accepted, that it's common ground,
8 that the intra-EEA MIF applied as a default when the UK
9 adopted its own rules is a strong indicator that we're
10 right that it was also a default before that time and
11 that MEPUK simply carried over into the domestic rules
12 the previous arrangement.

13 Now, although Mastercard accepts that the default
14 for this middle period was the intra-EEA MIF, it argues
15 again that in practice, transactions were processed
16 according to bilateral arrangements, which it says
17 applied across the board.

18 Now, we say that Mastercard's submission in 2000 to
19 the OFT indicates otherwise. If we go to {C7/198}, this
20 shows you what the document is, but if we go to page
21 {C7/198/2} and question 5 at the bottom of the page:

22 "In the event that Europay only has details of the
23 bilateral agreements between Participants that do use
24 the ECCSS ... what percentages of transactions are made
25 (i) on the basis of fallback interchange and service

1 fees; and (ii) by way of bilateral agreements between
2 issuers and acquirers for interchange and service fees?
3 Please provide this information by value and volume of
4 transactions made for the previous 5 financial years."

5 Then the answer is:

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

8 And if we go over the page {C7/198/3}, '97 is the
9 one we're interested in, and you see the volumes are
10 tiny. So point of sale transactions, 0.01% and 0.02%.

11 And, of course, this response will have been
12 informed by the contemporaneous transaction data that
13 Mastercard would have had at the time but they now say
14 has been destroyed.

15 Now, Mastercard say it's not clear whether the
16 number refers to bilateral arrangements as opposed to
17 the fallback fee transactions, but what we do see from
18 the response to question 3, if we can go back to the
19 previous page and up to the top of the page {C7/198/2},
20 is that there were very few.

21 So they're asked to provide -- Europay is asked to
22 provide details of the number of existing bilateral
23 agreements in place, and we see that there's very few
24 agreements that have been provided. And then we also
25 see --

1 MR JUSTICE ROTH: This is processed through the ECC system.

2 MS DEMETRIOU: It is, yes.

3 MR JUSTICE ROTH: They may not all be.

4 MS DEMETRIOU: They may not all be, and Mastercard say --

5 MR JUSTICE ROTH: That's what they say. It's just a limited
6 number process.

7 MS DEMETRIOU: So Mastercard say, well, they weren't all
8 processed through their system. They may be right about
9 that. We'll have to explore with the witnesses what
10 sort of proportions were processed through this system.

11 MR JUSTICE ROTH: Unless we know that, it doesn't get us
12 very far, does it?

13 MS DEMETRIOU: Well, we -- it doesn't get us very far in
14 terms of total volumes unless we have some idea, you're
15 correct, as to what the proportion was that was being
16 processed through the ECCSS, but we say that it was
17 sizeable. Again, that's a point that we'll have to
18 explore in the trial.

19 Now, our interpretation of whether -- so whether
20 this tiny number relates -- if '97 relates to bilaterals
21 or to the default is confirmed -- our interpretation
22 that it relates to bilaterals is confirmed by the OFT
23 decision itself, which we can see at {B/6/22}, and it's
24 paragraphs 42-43.

25 You just need to look at the heading of the table to

1 see how the OFT, on the basis of, no doubt, having had
2 access to transaction data, the basis of the -- of how
3 the OFT read the response. So they clearly considered
4 that the small number related to the percentage of
5 purchased transactions made on the basis of bilateral
6 agreements.

7 Now, we submitted in paragraph 97 of our written
8 opening submissions that whilst it seemed on the
9 documents that a substantial proportion of transactions
10 were processed at the EEA MIFs in the middle period --
11 so when one looks at this, it's an indicator, although,
12 of course, subject to the point you just put to me,
13 sir -- that it may be necessary to quantify the precise
14 volumes of such transactions in due course, following
15 disclosure from Mastercard of transactional data.

16 And if we just look at {A/1/20}, which is our
17 opening submissions, at footnote 28 we explain that --
18 on page 19 {A/1/19}, yes. We explain in the footnote:

19 "Mastercard has to date resisted any order for
20 disclosure which requires it to seek to recover historic
21 transactional data from its systems (or backups of those
22 systems). That resistance is no longer sustainable
23 given the documentary evidence that transactions were in
24 fact processed at the intra-EEA MIF default rates and
25 the need to quantify those transactions."

1 And that written opening, our written opening, was
2 filed, of course, on 26 June and this prompted
3 Mastercard to write a letter on 29 June, which we see at
4 {D/219/1}. And this letter explained for the first
5 time -- for the first time in these proceedings that
6 tapes containing transaction data from 1996 to 1999 were
7 destroyed in early 2011. They provided a document
8 called "MasterCard Europe Tape Disposition Proposal"
9 which detailed a proposal to systematically dispose of
10 historical data tape cartridges located in the Waterloo,
11 Belgium facility.

12 Now, we were very surprised to receive that letter
13 because in the correspondence and evidence provided by
14 Mastercard before the CMC on 20 and 22 September last
15 year, we were not informed -- the Tribunal may recall
16 that there was a detailed witness statement. We had
17 applied for transactional data and there was a detailed
18 witness statement from Mr Sansom of Freshfields and none
19 of that explained that potentially relevant data had
20 been knowingly disposed of, and there's now been further
21 correspondence from Freshfields which indicates that
22 they did know at the time about the intentional
23 destruction of data before the September CMC. They knew
24 about that, but they didn't know it encompassed UK data.

25 With respect, there are inconsistencies in all of

1 these accounts and it's a very important matter, because
2 we were led to believe in September of last year at the
3 CMC that this transaction data existed but it would be
4 disproportionate to seek to recover it, and that's why
5 the Tribunal then ordered disclosure of data that was
6 less helpful, as it were.

7 But then in our written openings, we said, well, we
8 obviously now need this data because we know that some
9 transactions went through on the intra-EEA MIF, and then
10 they turned around and they say for the first time,
11 "Well, it is all been destroyed". And they've never
12 told us that.

13 We say it's obvious that Mastercard should have been
14 much more transparent than it has been. We therefore
15 found out on the eve of this trial that the transaction
16 data that would have been able to quantify the
17 proportion of transactions processed pursuant to the
18 EEA MIF has been destroyed and that, of course, places
19 us in a difficult position because our case was prepared
20 on the basis that we would seek to establish as a matter
21 of fact on the documentary evidence that some
22 transactions were processed at the EEA MIFs, but that
23 quantification would have to follow in due course on the
24 basis of the data.

25 What we haven't done is prepared a case which seeks

1 to perform that quantification exercise now. Indeed,
2 nobody is suggesting that it is undertaken at this
3 trial. But what Mastercard are suggesting is that the
4 Tribunal makes findings about proportions.

5 MR JUSTICE ROTH: Well, if the data has been destroyed --
6 and it was destroyed in, what, 2011; is that right?

7 MS DEMETRIOU: Yes, that's what we understand.

8 MR JUSTICE ROTH: Yes, which is before even these
9 proceedings started.

10 MS DEMETRIOU: Yes.

11 MR JUSTICE ROTH: So, I mean, if it's gone, it's gone.

12 Maybe you should have been told in September, but that
13 wouldn't have enabled anyone to bring it back.

14 MS DEMETRIOU: Sir, no, but what it would have enabled to us
15 do -- so I think the question -- there are
16 two questions. One is that we're not sure we've really
17 got to the bottom of this because the accounts are
18 inconsistent and we would, with respect, like
19 Freshfields to write us a letter setting out exactly
20 what was known when and what has been destroyed when,
21 because there are inconsistencies in the accounts.

22 But leaving that aside --

23 MR JUSTICE ROTH: But --

24 MS DEMETRIOU: Leaving that aside, the question is how this
25 affects the present trial. I think that's really the

1 key question.

2 MR JUSTICE ROTH: Yes.

3 MS DEMETRIOU: And the key question from our perspective is
4 that -- the key point is that, first of all, nobody is
5 suggesting at this trial that the Tribunal enters into
6 some quantification exercise of what transactions were
7 processed directly according to the intra-EEA MIF. We
8 don't understand anyone to be asking for that.

9 We were approaching this trial on the basis that --
10 before we got this letter on the eve of trial, we were
11 approaching the trial on the basis that we would be
12 asking the Tribunal to find that a proportion of
13 transactions were processed on the basis of the
14 intra-EEA MIF and then for -- we would then seek
15 disclosure of transaction data and that could all be
16 quantified later on.

17 MR JUSTICE ROTH: But at what stage later on? I mean, this
18 is the trial, so ...

19 MS DEMETRIOU: This is the trial of what happened in the
20 factual world --

21 MR JUSTICE ROTH: Yes.

22 MS DEMETRIOU: -- but it's not the quantification trial. So
23 the question of how many transactions -- we simply --
24 there is simply no evidence before --

25 MR JUSTICE ROTH: This is not dealing with quantification.

1 This is on the argument of what effect the EEA MIF had
2 that the proportion goes to.

3 MS DEMETRIOU: Yes.

4 MR JUSTICE ROTH: Well, that's what we're -- this is the
5 trial of that question.

6 MS DEMETRIOU: Yes.

7 MR JUSTICE ROTH: It's not something that's going to be --
8 on any view, going to be postponed for some later
9 examination.

10 MS DEMETRIOU: No, but there's a question --

11 MR JUSTICE ROTH: You may say that you asked for disclosure,
12 it was refused, and I do not recall this, but I'm sure
13 you're right, because I said it was disproportionate.
14 We're now told that, actually, the data didn't exist, in
15 which case -- or no longer existed, in which case it
16 would also have been refused, but for a different
17 reason.

18 We still have to deal with the question, as best we
19 can, on the best evidence available, of to what extent
20 transactions were covered by the EEA MIF, don't we?

21 MS DEMETRIOU: Well, sir, that's a difficult question. So
22 we -- the evidence before the Tribunal in terms of what
23 proportion of transactions were covered by the EEA MIF
24 is sparse, in our respectful submission. So the
25 question really for the Tribunal is: does it wield the

1 broad axe now and do the best it can, or does it find
2 now that we're right on causation in the sense that
3 we've established that at least some transactions
4 were -- went through on the basis of the intra-EEA MIF?
5 So we've established in principle our causation.

6 But then there'll have to be consideration given
7 later to how that proportion -- which may be
8 an important point, as you put to me earlier, how that
9 proportion is determined. So it may be, for example,
10 that now we know there is no transaction data, it's been
11 destroyed, we'll have to give thought to whether or not
12 we seek disclosure from the banks.

13 But what we can say at the moment is that the
14 material on the basis of which you're being asked to
15 find by Mastercard that this is a de minimis amount is
16 sparse. We don't have proper disclosure in relation --

17 MR JUSTICE ROTH: The idea that the banks are likely -- who
18 have not been, unlike Mastercard, under any hold
19 obligation because Mastercard obviously, once you
20 started the case, will not have destroyed material. The
21 idea that banks in 2023 will have data from 1995 seems
22 to me far-fetched, to put it mildly.

23 MS DEMETRIOU: Well, sir, I think the key -- that may be so,
24 sir, but I think the key point is that we were
25 proceeding on the basis that the transaction data

1 existed. We were proceeding to this trial on the basis
2 that once -- of course, back in September, we didn't
3 know there was a direct application allegation. It was
4 only after disclosure from Mastercard that we found that
5 out. So once we re-pleaded and made that allegation --

6 MR JUSTICE ROTH: You didn't ask to revisit your application
7 for disclosure once you pleaded the direct
8 application --

9 MS DEMETRIOU: We did write to them. Yes, so I think the
10 issue was it would have put the trial out, this trial
11 out, had -- they said it would take six months. So
12 I think we raised it in correspondence, but I'll be
13 corrected if I'm wrong. But I think that,
14 pragmatically, we took the view that this would -- that
15 would put this trial out.

16 MR JUSTICE ROTH: Yes.

17 MS DEMETRIOU: So -- but we proceeded on the basis, as we've
18 said in our written openings, that this transaction data
19 exists and so we'll seek it so that the quantification
20 exercise can be dealt with later, pragmatically so that
21 we didn't put this trial out.

22 And then we were told, after serving our written
23 openings, "Well, it doesn't exist", and so the question
24 is now whether we should be forced to make the best of
25 the very limited information on this point that's before

1 the Tribunal or whether there should be a determination
2 about this which gives -- later on where we have time to
3 take stock as to what further evidence might be
4 available given that we now know belatedly that the
5 transaction data doesn't exist. That's really the
6 practical point.

7 MR JUSTICE ROTH: Yes. Well, I'll, in due course, hear what
8 Mr Smouha has to say about that.

9 MS DEMETRIOU: So, sir, that's the middle period. We
10 of course rely -- continue to rely on the guidance
11 allegation as regards the middle period too and,
12 of course, on that point, we have the concession by
13 Mastercard that the default MIF was the intra-EEA MIF.

14 MR JUSTICE ROTH: Yes.

15 MS DEMETRIOU: Now, in relation to the later period, after
16 1997, the Tribunal will have seen that MEPUK adopted
17 UK MIF fallback fees.

18 And Mr Merricks alleges causation on a number of
19 bases in the later period, and I've already canvassed
20 the hierarchy argument based on the 75% rule and we say
21 the Tribunal should consider at this trial what we say
22 about the 75% rule; that it provides a relevant
23 causative link between the intra-EEA MIFs and the
24 domestic interchange fees.

25 We also explain the infection argument at

1 paragraph 123 of our written opening submissions, if
2 I can just take you to that. So that's at {A/1/47} and
3 we say that:

4 "Mastercard's evidence is that, when the UK fallback
5 MIFs were first introduced on 1 November 1997, MEPUK did
6 not use an EDC cost study to determine the appropriate
7 level but instead adopted the prevailing bilaterally
8 agreed levels as enshrined in MEPUK's 'reference
9 rates' ..."

10 That's their evidence.

11 And we say:

12 "For the reasons given ... above, the levels of
13 bilaterally agreed interchange fees ... were caused by
14 the intra-EEA MIFs."

15 That's our guidance argument:

16 "It follows that the levels of the UK fallback MIFs
17 which were introduced on 1 November 1997 were also
18 'infected' by the intra-EEA MIFs."

19 So the point is that we say that the unlawful
20 intra-EEA MIFs affected the prevailing bilateral levels
21 and those were simply carried over and reflected in the
22 first domestic multilateral interchange fees and so
23 there was an ongoing infective causative effect. That's
24 how we put it.

25 MR JUSTICE ROTH: How long?

1 MS DEMETRIOU: Well, we'll see this in the evidence, but
2 they didn't really change. So at least until -- so they
3 remained pretty static, so we say that it lasted --

4 MR JUSTICE ROTH: Well, the fact it didn't change doesn't
5 mean nobody thought about them.

6 MS DEMETRIOU: Well, again, that's something that would have
7 to be --

8 MR JUSTICE ROTH: I mean, it may be that for 20 years, the
9 banks just don't even think about it or those who set
10 it, and I think the person who set it changed in 2004,
11 in any event.

12 But the alternative may be people did think about it
13 and said, "We see no reason to change it", and that
14 there was consideration of the MIF, but it was said,
15 "Well, it'll stay as it is".

16 An infection I can understand for a year or two, but
17 for how long do you say -- it's a bit vague at the
18 bottom of page 47.

19 MS DEMETRIOU: Well, sir, let's look at {B/12/1}, which is
20 Mastercard's schedule of UK MIFs.

21 MR JUSTICE ROTH: Well, no, I mean, the MIFs may not change.

22 MS DEMETRIOU: Yes.

23 MR JUSTICE ROTH: It doesn't mean it's infected. What

24 I'm looking at is your paragraph 125 on page 47. You
25 say {A/1/47}:

1 "Accordingly, if the level of the UK fallback MIF
2 was infected by the intra-EEA MIFs in 1997, one would
3 expect the effects of the intra-EEA MIFs to persist for
4 several years and potentially until the end of the Later
5 Period."

6 Which is 2009. Well, potentially -- I mean,
7 potentially forever. Anything is potential, but in
8 reality, I just wanted to understand what you say is --
9 on the balance of probabilities, what's the case you're
10 putting as to how long you'd expect the infection to
11 last?

12 MS DEMETRIOU: Well, sir, we say again this is an evidential
13 matter that we'll have to explore, but we do say that it
14 lasted -- our case is it lasted throughout the claim
15 period, because what one sees is a setting of MIFs
16 according to the previous MIF and, sir, that really is
17 the kind of key thinking, and we'll explore this in the
18 evidence that when --

19 MR JUSTICE ROTH: On that basis, forever.

20 MS DEMETRIOU: For the claim period, yes.

21 MR JUSTICE ROTH: Well, and beyond. Forever --

22 MS DEMETRIOU: Well, of course --

23 MR JUSTICE ROTH: -- because if every MIF, you say, is set
24 having regard to the previous MIF.

25 MS DEMETRIOU: Well, if that's what they did in fact. So,

1 you know, if the evidence establishes that they decided
2 to take a radically different view and they were no
3 longer looking at the previous MIF in order to set the
4 MIF for that year, then things would be different, but
5 we say that's not how it worked.

6 MR JUSTICE ROTH: Okay.

7 MS DEMETRIOU: Then the weighted voting argument that we've
8 advanced is based on our allegation that issuing banks
9 had more influence within MEPUK, and the relevant
10 causative link we rely on here is that issuing banks
11 would have had no incentive to agree UK MIFs that were
12 below the ultimate fallback intra-EEA MIF.

13 MR JUSTICE ROTH: Sorry, when you say "issuing banks", you
14 mean net issuers, do you?

15 MS DEMETRIOU: Net issuers. Well, there were some banks
16 that were only issuers.

17 MR JUSTICE ROTH: Yes, but you're not -- that's why
18 I'm asking. Do you mean only banks that were only
19 issuers or do you mean net issuers which would include
20 those that were --

21 MS DEMETRIOU: Yes, exactly, the latter.

22 And Mastercard's response to the weighted voting
23 argument is they say at paragraph 132 of their written
24 opening that there's no substance to the point because
25 the decision to adopt the first UK MIFs and all

1 subsequent UK MIFs was uncontentious within the board,
2 where each member, MEPUK member, was represented by
3 a single director. But we say that that misses the
4 point of the weighted voting argument and is again
5 a simplistic understanding of how incentives of banks
6 would reveal themselves in the minutes of MEPUK board
7 meetings. Because our case, as I've already explained,
8 is that all things being equal, net issuing banks would
9 seek to negotiate higher interchange fees whilst net
10 acquiring banks would seek to negotiate lower
11 interchange fees. And it's accepted that MEPUK's board
12 was comprised of some members appointed by net issuers
13 and some members by net acquirers. And so when MEPUK's
14 board approved UK MIFs, net issuing banks would have no
15 incentive to agree a fallback MIF which was lower than
16 the intra-EEA MIF which remained the ultimate default
17 under Mastercard Scheme Rules. And the principles which
18 apply to banks negotiating bilateral agreements in the
19 knowledge that the intra-EEA MIF would apply if they
20 failed to reach agreement similarly applied in this
21 context.

22 Mastercard say there's no evidence of these
23 incentives operating in practice because the minutes of
24 MEPUK's board meetings don't record a net issuing bank
25 saying "I want a higher interchange fee", and a net

1 acquiring bank saying "I want a lower interchange fee".

2 But we say there's nothing in that point. It's
3 entirely unsurprising that decisions were taken on the
4 basis of consensus, in the knowledge that if the voting
5 was contested net issuers would refuse to accept a UK
6 MIF that was below the applicable fallback rate. So the
7 fact that member banks didn't expressly articulate the
8 rationale for their decision-making is no basis for the
9 Tribunal to find that they didn't act in accordance with
10 their economic incentives.

11 Then the run-off argument which we've set out --

12 MR JUSTICE ROTH: Pausing there. And that weighted voting
13 argument concerns MEPUK?

14 MS DEMETRIOU: Yes.

15 MR JUSTICE ROTH: So it only applies up to November 2004.

16 MS DEMETRIOU: Yes, that's right. Exactly after 2004
17 when -- yes.

18 MR JUSTICE ROTH: Not thereafter.

19 MS DEMETRIOU: Up till 2004, not thereafter, yes, exactly.

20 And then for completeness we've advanced the run-off
21 argument where we allege that even if intra-EEA MIF
22 ceased to have an effect on the levels of domestic
23 interchange fees during any part of the later period,
24 many retailers will have continued paying higher levels
25 of MIF -- of merchant service MSC because there was no

1 pass-through of MIF reductions to merchants.

2 Now that's not an argument that can be decided at
3 this trial, but we're just setting it out by way of
4 completeness.

5 And then of course we also continue to rely on the
6 guidance argument in respect of the later period.
7 Mastercard say that it's not open to us to rely on this
8 argument post-2004 because we don't advance it in our
9 written opening submissions, but we say that those
10 submissions are not a pleading, and the point is open to
11 us on the pleadings. The benchmark allegation in our
12 pleading is a general allegation that's not confined to
13 a particular time period.

14 Our reply says that the intra-EEA MIFs influenced
15 the domestic MIFs until at least November 2004. And
16 there is a document in 2005 which illustrates domestic
17 interchange fees being expressly set at the same level
18 as the intra-EEA MIFs, and we can see that at {C15/152}.

19 MR JUSTICE ROTH: What is this document?

20 MS DEMETRIOU: Sorry, bundle C15. It's a 2005 document.

21 MR JUSTICE ROTH: Oh, I think we've got the wrong document.

22 MS DEMETRIOU: Yes.

23 MR JUSTICE ROTH: C15?

24 MS DEMETRIOU: {C15/152/1}. So this is a European

25 Interchange Committee document from 1 September 2005 and

1 if we go to section -- if we go to page 5, for example,
2 section 3.2.2 -- I may have the wrong page. Just
3 a second. Bear with me. Page 4, please. Yes, so 3.2.2
4 {C15/152/4}.

5 If we go over the page {C15/152/5}, that sets the
6 context and at the very bottom of the page, please, so
7 this is -- so we see that this relates to -- so this
8 relates to Worldcard programme:

9 "Both the structure and the rates for the Worldcard
10 program will be aligned on the intra-European ones."

11 We say that's an example of, after 2004, the
12 intra-EEA MIF being used to inform what's happening
13 domestically. If we go to page --

14 MR JUSTICE ROTH: I'm a bit lost, I'm sorry.

15 MS DEMETRIOU: It may be that this is better explored in the
16 evidence, but this is a 2005 document relating to
17 domestic -- where domestic interchange fees are going to
18 be set for something called the Worldcard and what's
19 being --

20 MR JUSTICE ROTH: What is the Worldcard?

21 MS DEMETRIOU: Worldcard is a new -- sorry, just bear with
22 me a moment, please. (Pause)

23 Oh, yes, it's page -- I'm sorry, I'm taking --

24 MR JUSTICE ROTH: It's the previous page.

25 MS DEMETRIOU: Yes, so page 3 {C15/152/3} I think we want to

1 go to. If you look at the top of the page:

2 "The aim of this proposal is to reduce the number of
3 tiers and start aligning with the intra-European
4 structure in view of SEPA. The following changes are
5 proposed to the current structure ..."

6 So what this document is about, but we can explore
7 it with Mr Sideris, who refers to it, is -- it shows
8 that in 2005, decisions were being taken by Mastercard
9 in relation to the domestic MIF that were expressly
10 based on the structure and level of the intra-EEA MIF.

11 (Pause)

12 MR JUSTICE ROTH: This is about the number of tiers and then
13 it goes on to ...

14 MS DEMETRIOU: I think it may be best to explore this in the
15 evidence, but what --

16 MR JUSTICE ROTH: Yes. I think that's -- why don't we --
17 I think it's difficult to get.

18 MS DEMETRIOU: Okay.

19 MR JUSTICE ROTH: It's a complicated proposal, I think.

20 MS DEMETRIOU: Sir, I hope that in relation to causation
21 I've explained what the four corners of our case is and
22 what we say are the key thematic points. That really
23 leaves me with VoC and on-us transactions.

24 MR JUSTICE ROTH: Just before that, so once in
25 November 2004 -- I know you've just shown us this

1 document. You say that shows a European influence after
2 the change in November 2004. There's the infection
3 argument. The hierarchy argument doesn't apply, does
4 it, because of that rule?

5 MS DEMETRIOU: That's correct, yes.

6 MR JUSTICE ROTH: So it's -- and the weighted voting
7 argument we've covered.

8 MS DEMETRIOU: Yes.

9 MR JUSTICE ROTH: So it's really the infection argument.

10 MS DEMETRIOU: And the guidance argument which is that --
11 yes.

12 MR JUSTICE ROTH: Yes.

13 MS DEMETRIOU: And run-off, which is not for this trial.

14 MR JUSTICE ROTH: Yes, run-off is not really about the
15 direct effect on UK MIF. It's what merchants did --
16 what acquirers did in reducing MSC --

17 MS DEMETRIOU: Yes.

18 MR JUSTICE ROTH: Yes. So then that's -- then we move to
19 VoC, where there's a large measure of agreement.

20 MS DEMETRIOU: There is, so I'm only going to be making
21 submissions -- the only issue between us is on-us
22 transactions.

23 MR JUSTICE ROTH: Yes.

24 MS DEMETRIOU: Sir, I have about 15 minutes on it.

25 MR JUSTICE ROTH: Would you prefer to do that at 1.55?

1 MS DEMETRIOU: Yes, thank you.

2 MR JUSTICE ROTH: I think that may be sensible. We'll

3 adjourn now and return at 1.55.

4 (12.54 pm)

5 (The short adjournment)

6 (2.00 pm)

7 MS DEMETRIOU: Turning to VoC, and the only difference

8 between the parties on VoC relates to on-us

9 transactions, as you've seen. Those are transactions

10 where the same bank is the issuing bank and the

11 acquiring bank.

12 Mr Merricks advances three points on this issue.

13 The first point is that there is evidence which

14 indicates that at least some on-us transactions were

15 processed externally and subject to an interchange fee,

16 so that will be explored in the evidence.

17 Second, even where that didn't occur, it's likely

18 that an internal transfer price was charged within the

19 bank from its acquiring to its issuing business.

20 Third, in any event, the overwhelming majority of

21 merchants were on contracts which charged a set fee per

22 card transaction and that fee was not reduced or waived

23 if it was an on-us transaction, so the merchants were

24 being charged the allegedly inflated price on every

25 transaction.

1 And I want to show you Mr Coombs' expert report on
2 causation. If we go to {A/14/19}, this is the causation
3 expert report, and paragraphs 3.23 to 3.26, under the
4 heading "On-us transactions". So:

5 "During the Full Infringement Period, some issuers
6 and acquirers were vertically integrated: the same bank
7 was both an issuer and an acquirer. This meant that
8 there were some transactions where the same bank was
9 both the issuer and acquirer for that transaction.
10 These ... are called 'on-us' transactions ...

11 "... Mastercard pleads that default interchange fees
12 did not apply to 'on-us' transactions, and therefore
13 'there is no claim for damages in relation to these
14 transactions'.

15 "... The class representative pleads that [they]
16 were affected by the infringement."

17 Then at 3.26:

18 "Whether an [interchange fee], or similar internal
19 transfer price, was in practice charged between the
20 issuing and acquirer arms of vertically integrated banks
21 is a factual matter that will ultimately need to be
22 determined by the Tribunal. However, I offer the
23 following observations based on the structure of the
24 relevant businesses and market:

25 "a. Mastercard pleads that [interchange fees] were

1 necessary for issuers to recover their costs from
2 acquirers. Whether or not that is correct, the fact is
3 that issuers received an [interchange fee] on off-us
4 transactions. If the issuing business of a vertically
5 integrated bank did not receive the same stream of
6 income on its on-us transactions, it would have been at
7 a competitive disadvantage in the issuing market.

8 "It therefore seems likely that some form of
9 [interchange fee], or similar internal transfer price,
10 would have been paid within the bank from its acquiring
11 to its issuing business.

12 "b. Whether or not an [interchange fee] was paid on
13 an on-us transaction, it is still likely that any
14 interchange fee overcharge would have affected these
15 transactions. This will particularly be the case if the
16 same MSC was charged on both off-us and on-us
17 transactions. Since an interchange fee overcharge would
18 have affected the level of this uniform MSC, it would
19 have led to equally higher MSCs for both off-us and
20 on-us transactions."

21 So you'll see that Mr Coombs makes two points at
22 paragraph 3.26. The first is that it's likely that some
23 form of interchange fee or similar internal transfer
24 price would have been paid.

25 The second is, in any event, if merchants under

1 their acquirer contracts were charged a fee for --
2 off-us and on-us transactions were not actually treated
3 separately under the merchant agreements, they would
4 have been affected by the inflated interchange fees in
5 any event and --

6 MR JUSTICE ROTH: The second, though, is not within the
7 scope of this trial, is it?

8 MS DEMETRIOU: Well --

9 MR JUSTICE ROTH: Because that's about how acquiring banks
10 charged merchants.

11 MS DEMETRIOU: Well, we're looking at VoC -- yes, well, we
12 say -- so we're looking at the quantum at the moment, so
13 whether or not -- so can I deal with that --

14 MR JUSTICE ROTH: Well, you may say -- I mean, this is not
15 about the causation trial, although it's pleaded under
16 causation. You may say it's important to know the
17 VoC --

18 MS DEMETRIOU: Yes.

19 MR JUSTICE ROTH: -- and then -- or it may be important and
20 then subsequently, one might have to see how MSCs were
21 charged; is that right?

22 MS DEMETRIOU: Sir, yes.

23 MR JUSTICE ROTH: Because we won't know.

24 MS DEMETRIOU: Well --

25 MR JUSTICE ROTH: You know, if the same MSC was charged on

1 both off-us and on-us transactions, well, that's the
2 "if". We're not going to get an answer to the "if"
3 question in this trial, are we?

4 MS DEMETRIOU: Well, I don't know to what extent Mastercard
5 dispute that point, because they're not engaging with
6 it. They're saying we haven't pleaded it, which we
7 don't think is correct, so --

8 MR JUSTICE ROTH: Well, there is certainly no evidence about
9 it either way, is there, in this trial? You haven't put
10 in evidence on it and you're as well placed to get
11 evidence from merchants as Mastercard is.

12 MS DEMETRIOU: But some of the documents go to this point in
13 the trial, so there are documents that bear upon this
14 issue.

15 MR JUSTICE ROTH: Yes.

16 MS DEMETRIOU: So can we just turn to Mr Coombs' expert
17 report on VoC, and that's at tab 15 {A/15/1}.

18 MR JUSTICE ROTH: Yes.

19 MS DEMETRIOU: And this was initially served on the same
20 date as the causation report that you've just seen,
21 which is 17 May, and it was refiled with some minor
22 corrections.

23 If we look at page 12 of bundle {A/15/12},
24 paragraph 3.16, he includes -- he says he includes on-us
25 transactions in his VoC calculations.

1 And then if we go to page 31 {A/15/31} and table 8,
2 if you look at the adjusted loss estimate without
3 interest, so you can see the figure there beginning with
4 a 3. And if we go back Claim Form -- so that figure
5 includes the on-us transactions.

6 If we go back Claim Form at {A/3/1} -- the Amended
7 Claim Form, which was filed 6 June after both of these
8 expert reports, and if we go to {A/3/68}. So you can
9 see at paragraph 120(a) the same figure that's taken
10 from Mr Coombs' VoC report. You see the same sum there,
11 and the full set of figures from Mr Coombs' VoC report
12 are pleaded out in greater detail in the body of the
13 amended pleading.

14 So, in terms of our pleading, it's abundantly clear
15 that on-us transactions are included and that we've seen
16 what Mr Coombs said about internal pricing and MSC. So
17 our pleading is predicated on what Mr Coombs says in his
18 report and on his figures.

19 And then if you go to Mastercard's Amended Defence,
20 served on 13 June, at {A/4/87} and paragraph 137 at the
21 bottom of that page, so they say there that the figures
22 in our pleading are inflated because they include on-us
23 transactions.

24 And then over the page at page -- paragraph 139 at
25 the very bottom of the page {A/4/88}, you see that on-us

1 transactions have been removed from Mastercard's own
2 calculations on VoC. So that's how the pleadings deal
3 with the matter.

4 MR JUSTICE ROTH: Yes.

5 MS DEMETRIOU: And then Mastercard served five additional
6 witness statements on 19 and 20 June and two of those
7 statements specifically addressed on-us transactions.
8 So Mr Sideris dealt with on-us transactions and Mr Van
9 den Bergh addressed on-us transactions.

10 And then we have the amended reply and if we look at
11 {A/5/46}, please. So paragraphs 68 to 69 respond to
12 paragraphs 137 and 139 of the defence that you've just
13 seen and they identify that the only remaining dispute
14 on VoC arising from the expert reports is the inclusion
15 of on-us transactions. So you see that at para 68 in
16 the amendment. And the amendments therefore address
17 on-us transactions and they particularise the two points
18 made by Mr Coombs in his report of 17 May.

19 So, first, at paragraph 69(aa):

20 "On us transactions led to MSCs being levied on
21 merchants."

22 And it's important to see that this
23 subparagraph (aa) replaces a passage in the reply, the
24 previous version of the reply, and you can see that
25 below, which effectively pleaded that Mr Merricks didn't

1 know what was going on with the merchant service charges
2 in relation to on-us transactions, so it flagged the
3 issue. You can see the deleted text at paragraph (a).

4 So you see there:

5 "... or the alleged costs otherwise recovered from
6 the merchants."

7 Then, secondly, at 69(a) there's the pleading at (i)
8 and (ii) of the internal charge previously flagged by
9 Mr Coombs in his 17 May report.

10 Now, Mastercard's written openings, we say, strongly
11 suggest that Mastercard didn't actually have a factual
12 answer to either of these points and that Mastercard
13 intends instead to take technical points rather than
14 dealing with the substance.

15 So if we look at their written opening, first of
16 all, on the MSC argument, so at {A/2/61}, paragraph 188.
17 And you see what they're saying there is in relation to
18 the MSC argument, they say that that argument is not
19 even open to Mr Merricks. So, first of all, Mastercard
20 say that Mr Merricks raised the point for the first time
21 in the reply served on 26 June, and that's wrong.

22 As you've seen, it was raised in Mr Coombs' report
23 of 17 May. That was the basis on which his VoC
24 calculations were prepared, and those were the figures
25 advanced in the Amended Claim Form.

1 And, secondly, Mastercard argues a claim can't be
2 expanded through a reply. You see that two-thirds of
3 the way down that paragraph, and they cite the
4 White Book. Well, that commentary, without turning it
5 up, says that paragraph 9.2 of Practice Direction 16
6 states that a reply must not contradict or be
7 inconsistent with an earlier pleading; for example, it
8 mustn't bring a new claim.

9 But we say this is plainly not a new claim. It's
10 further particulars of causation within the context of
11 a single cause of action. The basic claim is that the
12 infringement caused loss to consumers because of the
13 causative effect of the higher EEA MIFs, and this is
14 simply an amendment to particularise that the higher
15 domestic interchange fees impacted the fees charged to
16 merchants irrespective of whether, from the perspective
17 of the banks, they were internal or external
18 transactions.

19 Thirdly, Mastercard says this is not a consequential
20 amendment and Mr Merricks has no permission to change
21 his case in this way. But these are updating amendments
22 to reflect the state of the expert evidence relevant to
23 VoC going into trial. They're clearly within the scope
24 of the permitted pleaded exercise.

25 And, fourth, Mastercard says that it's too late for

1 Mr Merricks to advance an entirely new claim on which
2 Mastercard hasn't had the opportunity to adduce
3 evidence. But you've seen this point was squarely made
4 by Mr Coombs on 17 May 2023 and Mastercard served
5 five additional witness statements over a month later,
6 two of which expressly addressed on-us transactions.

7 And the strong inference, we say -- they had
8 permission to adduce witness evidence precisely to
9 address amendments in our pleading, and the strong
10 inference is that Mastercard has no substantive response
11 on this point, because it's factually correct. So we
12 say that the pleading point is without merit and goes
13 nowhere.

14 In relation to the second, on the internal transfer
15 price argument, if we go to page 62, paragraph 189
16 {A/2/62}, the next paragraph of Mastercard's opening
17 submissions, all that says is -- that just asserts that:

18 "There is no scope for an interchange fee to be
19 charged on on-us Transactions, since on-us Transactions
20 are entirely internal to a single legal entity.
21 Consistent with the normal meaning of the word
22 'interchange', interchange fees are inherently payable
23 only on transactions between banks. Mr Coombs'
24 suggestion that funds may have been allocated internally
25 within a bank is nothing to the point. An internal

1 allocation of funds within a single entity is not
2 payment of an interchange fee."

3 But that simply doesn't answer the factual points
4 made by Mr Coombs and pleaded in Mr Merricks' reply at
5 paragraph 69(a)(ii) that it's likely that an amount
6 equivalent to the interchange fee or an internal
7 transfer price would be paid from the bank from its
8 acquiring to its issuing business.

9 Again, we say having put in evidence and not dealt
10 with this point, the strong inference is that Mastercard
11 has no substantive response to offer on this point.

12 Thirdly, at paragraph 190 on the question of whether
13 some on-us transactions were processed externally and
14 were in fact subject to an interchange fee, Mastercard
15 submits that Mastercard -- sorry, that the banks
16 generally processed on-us transactions themselves.

17 You notice the term used is "generally". So
18 Mastercard seems to accommodate the possibility that at
19 least a proportion of on-us transactions were processed
20 externally and were subject to an interchange fee. So
21 that is an issue to be explored in evidence.

22 PROFESSOR WATERSON: Just to be clear on this, then, if they
23 were transacted purely internally, there would be
24 nothing to pay to Mastercard; is that right?

25 MS DEMETRIOU: So if they were -- if it was a transaction

1 that was paid internally, then we say yes, that would
2 have -- that fee would have been transmitted to
3 merchants in the form of a higher merchant service
4 charge. (Pause)

5 Yes, so the internal administration fees may have
6 been different depending on how it was routed, how the
7 charge was routed. So in terms of administrative fees
8 to Mastercard, then that would be different if it had
9 been an external process as opposed to an internal
10 process.

11 MR JUSTICE ROTH: Is it said if it was done internally, it
12 would be the same as ...

13 MS DEMETRIOU: In terms of the internal transfer price, then
14 yes. Yes, because that's the point Mr Coombs is making
15 in terms of the competitive position of the bank.

16 MR JUSTICE ROTH: Yes. So you have an internal transfer
17 price and you'd have -- and that would -- therefore, the
18 bank would wish to pass it on to its -- on the acquiring
19 side.

20 MS DEMETRIOU: Yes, exactly, sir.

21 Then just also in terms of Mastercard's evidence,
22 they ask for permission to adduce supplementary evidence
23 not only to address the points, the new points, in our
24 pleading, but also to respond to Mr Dhaene's evidence,
25 you'll recall. And he makes the same point about MSCs

1 at paragraph 90 of his statement. That's at {A/13/36}.

2 MR JUSTICE ROTH: Is that what they refer to here? They
3 talk about his evidence on on-us transactions at
4 paragraph 190.

5 MS DEMETRIOU: Yes. Well, no, sorry, that's a different
6 point. So let's -- if you look, the point I'm making is
7 at {A/13/36}, if we turn that up, and that's
8 paragraph 90 of Mr Dhaene:

9 "From the merchants' perspective ... banks would not
10 typically inform merchants whether a transaction went
11 over the European network or not. In practice ... the
12 same merchant service charge was still applied to the
13 merchant irrespective of whether an interchange fee was
14 applied to the on-us transaction or not."

15 MR JUSTICE ROTH: Is there a dispute of principle at the
16 moment or perhaps procedure? Is there -- as it comes
17 into VoC, is there agreement about the actual amount of
18 on-us transactions?

19 MS DEMETRIOU: Yes, there is, and so the question is the
20 point of principle. And, really, I think you have my
21 fundamental point, which is that we've proceeded on the
22 basis of these three possibilities, so the external
23 on-us interchange fee, the internal transfer fee and the
24 effect, in any event, on the merchants.

25 That formed the basis, you can see very clearly, for

1 Mr Coombs' expert evidence. He says it in terms --

2 MR JUSTICE ROTH: Yes.

3 MS DEMETRIOU: -- and the figure he identifies. That figure
4 was pleaded in our re-amended claim form, which --
5 plainly, it's exactly the same figure, so it's on the
6 basis of Mr Coombs' evidence. And then we made it
7 crystal clear in our reply. We provided particulars of
8 that.

9 And then they had every opportunity to respond
10 evidentially on on-us transactions, which they have
11 done. So they've put in further statements from
12 Mr Sideris and Mr Van den Bergh which relate to on-us
13 transactions, but do not say that we're wrong on these
14 points. They could have done that and they haven't.

15 So we say that they -- presumably, they think we're
16 right on those points and they're taking this technical
17 pleading objection, which is unfounded. That's how we
18 see it.

19 MR JUSTICE ROTH: Yes.

20 MS DEMETRIOU: So we do say it's for this trial. We say
21 that they haven't -- Mastercard hasn't substantively
22 engaged or put in evidence to rebut the case that we
23 advance.

24 Sir, that's all I wanted to say --

25 MR JUSTICE ROTH: It's a fairly narrow dispute, really,

1 between you on this.

2 MS DEMETRIOU: Yes, it's not on quantum; it's on the

3 principle of it.

4 MR JUSTICE ROTH: Yes.

5 MS DEMETRIOU: They -- the only point they've taken at the

6 moment is the pleading point, which we say is unfounded.

7 MR JUSTICE ROTH: Yes, and if that's what it is, a sort of

8 definitional point of what is an interchange fee, which

9 I don't find very attractive because it's not a legally

10 defined term --

11 MS DEMETRIOU: No, exactly. So it's not -- it doesn't

12 matter what label you put on it.

13 So, sir, those are our opening submissions.

14 I should just say what we've done, in case it's helpful,

15 is at {D/246/1}, we've put in a consolidated version

16 stripped of advocacy, if I can put it that way, of the

17 list of issues. So we've put in red and green and black

18 where it's agreed.

19 MR JUSTICE ROTH: Yes, we've got that.

20 MS DEMETRIOU: That's at {D/246}.

21 MR JUSTICE ROTH: I think we got it this morning.

22 MS DEMETRIOU: I think you got it this morning. I'm not

23 proposing to make submissions on it unless you want me

24 to. I just wanted to flag that it's there.

25 MR JUSTICE ROTH: No. Well, it is a useful sort of

1 reference point, but we're not going to be tied to it in
2 any way or need submissions on it.

3 MS DEMETRIOU: Sir, I'm grateful. So unless you have any
4 questions -- further questions for me, those are my
5 submissions.

6 MR JUSTICE ROTH: Thank you very much.

7 Opening submissions by MR SMOUHA

8 MR SMOUHA: Sir, members of the Tribunal, let me just
9 mention the position on timing, which I've discussed
10 again with my learned friend. So we're not going to be
11 in any difficulties of timing, as my learned friend
12 mentioned, I will definitely go substantially into
13 tomorrow, but my learned friend has again confirmed that
14 that's not going to cause any difficulties in relation
15 to Mr Sideris, who will start and finish tomorrow.

16 MR JUSTICE ROTH: Excellent. So we'll sit until -- what
17 time do you suggest? Do you want to see how we get on?
18 But somewhere between 4.15 and 4.30.

19 MR SMOUHA: Very good, sir. I'll try and if I come to
20 a natural break around then, I'll indicate.

21 Sir, I will be addressing principally facts. My
22 learned friend Mr Cook will say something about the
23 expert evidence, anything which needs to be said in
24 response to my learned friend's submissions this morning
25 about the economic theory which underlies the basis of

1 the causation claim, and also my learned friend Mr Cook
2 will deal with VoC.

3 So, members of the Tribunal, as I'm sure you
4 appreciate, as the newbie to Mastercard proceedings and
5 in view of Mr Cook being the veteran of Mastercard
6 proceedings, I'm sure you'll understand that in relation
7 to questions which you may ask me or in relation to
8 points as to which I am not clear, I hope I will be at
9 liberty to defer to Mr Cook, if that's going to be more
10 efficient in relation to assistance.

11 MR JUSTICE ROTH: Whatever suits you best.

12 MR SMOUHA: I'm grateful. I don't pretend to, as --

13 becoming involved in Mastercard proceedings, in any
14 Mastercard proceedings for the first time, to have
15 anything like the depth of knowledge that the Tribunal
16 or my learned friends on both sides have.

17 Sir, the critical foundation of this follow-on claim
18 is, of course, the proposition that the infringement
19 caused the loss alleged by Mr Merricks and to establish
20 that proposition, Mr Merricks must establish
21 a relationship between the levels of the EEA MIFs and
22 the UK domestic interchange fees such that the levels of
23 the EEA MIFs caused those UK interchange fees to be set
24 at the levels they were.

25 We say and will invite you to determine at the

1 conclusion of this trial that on the evidence,
2 including, most importantly, the very extensive
3 contemporaneous documentation, but also taking into
4 account the evidence of the fact witnesses who can speak
5 to the issue and that you will hear, and the expert
6 evidence for what it adds, that there was not a relevant
7 causal link, as a matter of fact, between the levels of
8 EEA MIFs and the levels of UK domestic interchange fees
9 at any time during the claim period, May 1992 to
10 June 2008.

11 The evidence, being, as I say, principally a wealth
12 of contemporaneous documents, but supported and
13 corroborated by witness evidence of fact, shows that
14 there was no such relationship.

15 Sir, members of the Tribunal, it must be remembered
16 that by making his claim across a 16-year period and on
17 the basis of a causation thesis, which is necessarily
18 unitary because the claim needs the infringement, needs
19 the EEA MIFs to have caused the UK domestic interchange
20 fees, Mr Merricks' thesis can only make sense, can only
21 have factual credibility, if it makes sense factually
22 across the whole period, across all Mastercard cards and
23 across all categories of interchange fees.

24 The economic theory which my learned friend
25 addressed this morning and which is developed --

1 MR JUSTICE ROTH: If I can just interrupt you, you say it
2 can only have credibility if it makes sense across the
3 whole period. Is it not possible in theory -- I'm not
4 saying that's the case -- that there could have been
5 this link for part of the period but not another part of
6 the period?

7 MR SMOUHA: Absolutely, and exactly the point that
8 I'm coming to. But, essentially, in circumstances where
9 the economic theory which is said to underlie the basis
10 of causation -- of course, it's advanced -- it is
11 a single theory in that sense, but, and this is the
12 point I want to develop, if, in relation to a particular
13 period or a particular card, the -- that theory cannot
14 be satisfied in practice on the facts, then of course it
15 is theoretically possible that there could be
16 an explanation -- a distinction made in relation to that
17 period as to why the basic theory does not apply to that
18 period or to some category or to the card, but then
19 there would have to be that explanation.

20 MR JUSTICE ROTH: And there are a number of different
21 theories, as we've heard. Indeed, they're classified
22 with various terms of convenience being given. So, for
23 example, we know that there was a period when the
24 EEA MIF was the fallback. There was a later period
25 where we have a UK MIF as the fallback.

1 So the theory, even on bargaining terms that we've
2 heard expounded by Ms Demetriou, echoing her expert, may
3 be quite different for those different periods.

4 MR SMOUHA: Well, if it is quite different, then it needs to
5 be identified as quite different.

6 MR JUSTICE ROTH: Yes. Well, I think it has been because
7 we've had this distinction between different periods and
8 different factors and --

9 MR SMOUHA: The distinction between the periods is in
10 relation to the facts, the circumstances as to who was
11 setting and so on. The question still applies in terms
12 of then looking at the facts in relation to what
13 happened to the setting -- to the levels of
14 UK interchange fees and to the categories to establish
15 whether they can be reconciled with the causation
16 theory. If not, if they are -- if they contraindicate
17 the causation case that is advanced, then there needs to
18 be an explanation.

19 That's exactly my point, and what I want to come to
20 is to identify both -- some of the important
21 inconsistencies, irreconcilabilities between facts and
22 the case advanced and to focus on whether what actually
23 Mr Merricks does in relation to those is to address them
24 or duck and ignore, and that's exactly the point I want
25 to focus on at the outset.

1 But the causal thesis that EEA MIFs were the driver,
2 the minimum, the floor, the guideline, were a virus that
3 infected the UK MIF, all the multiple causation
4 mechanisms that Mr Merricks pleads, are all causation
5 mechanisms that, on his own case, have to work in theory
6 without distinction as to time.

7 And exactly the point, sir, that you make to me and
8 that we say is a fundamental problem for the case as now
9 advanced at the beginning of trial is that it is not
10 unitary any more. It is a patchwork of causation
11 allegations so that the claim is no longer made on
12 a unitary basis that says that, throughout the period,
13 the EEA MIFs caused the UK domestic interchange fees to
14 be at the level they were because of the posited causal
15 mechanisms of floor, minimums, benchmarks, guidance and
16 so on.

17 If the EEA MIF was a floor or a minimum, then either
18 it must always have been a floor or minimum and remain
19 so, or Mr Merricks would have to come up with facts --
20 and I emphasise "facts" -- that show why, at some points
21 in time, it was decided not to apply the EEA MIF as
22 a floor or minimum; to explain that difference of
23 treatment in that period.

24 If the EEA MIF was a guide, then the causation
25 theory posits that it was always used or would always

1 have been used as a guide. If the EEA MIF was the
2 reference point or the basis for setting UK MIFs,
3 whether bilaterals or MIFs, then the logic and theory of
4 that case would apply across the board to all cards, to
5 all periods of time, unless Mr Merricks adduced evidence
6 or pointed to documents which establish as fact that
7 there is some explanation for a particular departure in
8 relation to that period or that difference.

9 In other words, there is no room -- and this is
10 critically important in relation to your assessment of
11 the totality of the evidence. There is no room for
12 exceptions to his causation theory, to his causation
13 mechanisms, unless, on the facts, they can be explained.

14 And the fundamental difficulty, we submit, with the
15 case theory as still advanced, but in this patchwork, is
16 that it posits causation mechanisms in the face of
17 undisputed facts or indisputable facts which are
18 irreconcilable with the case and which Mr Merricks makes
19 no attempt to explain.

20 We say, as you've seen in our written submissions,
21 that, actually, the evidence, the contemporaneous
22 documentary evidence, with which Mr Merricks cannot
23 argue, shows that there is no such causal link in fact
24 at all. The EEA MIFs were not used to establish the
25 rates in bilateral agreements. They were not used to

1 set UK MIFs and they did not influence or, as
2 Mr Merricks prefers to term it, infect the UK MIFs which
3 were set; set, as the evidence shows and will show, on
4 the basis of taking into account UK market conditions so
5 that, in essence, the EEA MIFs were not relevant to the
6 setters of the rates as they were from time to time.

7 Now, as each new variation on the causation theme
8 has been raised by amendment Claim Form, so -- as you
9 have seen in the pleadings, Mastercard has, by its
10 defence, identified the multiple reasons why we say that
11 that thesis does not work as a matter of fact; that the
12 factual obstacles, the indisputable facts that show that
13 it ain't so; that it is not -- that the theory as to
14 what should happen is not and cannot be reconciled with
15 the facts as to what did happen.

16 The class representative's reaction to the
17 identification by Mastercard of these obstacles has been
18 striking and revealing, because what you would expect,
19 indeed what the Tribunal would need -- exactly to your
20 point, sir -- where facts are identified which appear to
21 contradict a part of his case would be a response to
22 those facts, an explanation for them, an accommodation
23 of those different facts within the case and
24 a demonstration -- critically important, a demonstration
25 that the contradicting facts do not invalidate the

1 whole. But that is not what has happened, as I say,
2 strikingly and revealingly.

3 The first reaction has been what, with respect,
4 I would characterise as an extraordinary attempt to
5 marginalise the significance and importance of the
6 factual causation case to be determined at this trial by
7 informing the Tribunal at two CMCs -- or informing the
8 Chair at two CMCs and then informing the Tribunal at
9 great length in the written submissions and again this
10 morning at length in oral submissions that, actually,
11 the pleaded factual causation case is not very
12 important, that not very much rides on it because the
13 case is all going to come home when the counterfactual
14 case is developed, obviously not at this trial.

15 Apparently, that is going to happen at some future
16 trial, which, as the descriptions have been given of
17 what would be involved and the kind of issues that would
18 be in play, would have to be far longer than this one.
19 And it is said that this fantastic counterfactual case
20 is not going to depend at all on the factual case which
21 has been pleaded and developed and amended because it is
22 said that the counterfactual trial will have to rove
23 widely in thinking away a vast range of actual facts, of
24 things that did occur, not just the infringement, so
25 that a huge number of hypotheticals will have to be

1 considered. So the facts apparently as to what actually
2 happened are not what mattered.

3 Now, the suggested legal basis which you saw trailed
4 in Mr Merricks' written submissions for this trial, we
5 say and have said, are actually a juridical nonsense,
6 but that's for another day. The Tribunal will not have
7 been surprised to learn from our written submissions
8 that certainly we see this attempted marginalisation of
9 the significance of this trial as a rather transparent
10 acceptance of the thinness and fundamental problems with
11 the factual causation case which is presented by the
12 class representative at trial.

13 Sir, we also take serious issue with the subtext of
14 Mr Merricks' submissions at the CMCs and in the written
15 submissions and as advanced this morning that is being
16 suggested to you, the Tribunal, that the identification
17 of Mr Merricks' factual causation case as appropriate
18 for separate consideration at this substantial trial
19 wasn't a good idea and that nothing much of advantage or
20 progress in narrowing or disposing of issues is going to
21 be achieved.

22 We fundamentally disagree with that. In our
23 submission, it was absolutely the right course to take.
24 The pleaded factual causation case, without any
25 counterfactual issues being considered and before any

1 counterfactual issues are considered, is a fundamental
2 pillar of Mr Merricks' case and if it is determined, as
3 has been ordered and as we certainly say it should be,
4 that the EEA MIFs did not cause, in fact, the levels of
5 the UK MIFs or interchange fees and MIFs, then that will
6 be very important indeed in progressing the case, in
7 narrowing it very substantially and, as we see,
8 beginning to bring the claim back to a reality based on
9 what the facts actually are and that is --

10 MR JUSTICE ROTH: Mr Smouha, if it helps you, we obviously
11 don't think it is a waste of time or we wouldn't have
12 proceeded with it when the counterfactual point was
13 raised.

14 As I said to Ms Demetriou, one question for future
15 argument may be how significant the findings are, but
16 I don't see that on any basis it can be said they're
17 insignificant because the starting point would have to
18 be, well, why would things -- assuming you win. I mean,
19 of course, if Ms Demetriou wins, she's home and dry and
20 there isn't a further trial, it seems to me, unless you
21 run the argument in the counterfactual and things would
22 have been different the other way.

23 But assuming that doesn't arise, it will be: well,
24 why would things have been so different? So we start by
25 finding out what actually caused the decisions that were

1 taken and at that point, one can say: well, would it
2 really have made such a difference and why?

3 MR SMOUHA: Absolutely so, sir.

4 MR JUSTICE ROTH: And we can't answer that question until we
5 know what actually happened.

6 MR SMOUHA: Sir, my -- the submissions I have just made as
7 to the importance of it of course are resonant of the
8 precise basis and reasons for you making the orders you
9 did as to what should be tried.

10 It is -- and the reason I make comment on it; it is
11 striking, it is revealing that the effective claimant in
12 the proceedings should be reacting in that way so as to,
13 as I say, seek to marginalise the potential significance
14 within Mr Merricks' case of the issues which are to be
15 tried. That is -- I won't go so far as to say some
16 element of forensic surrender, but what the Tribunal has
17 seen in terms of actual forensic surrender in relation
18 to significant parts of Mr Merricks' case is those parts
19 which are no longer pursued.

20 As I've said, the problem -- the problems for
21 Mr Merricks are the multiple facts that simply don't fit
22 and can't be fitted, accommodated or explained
23 consistently with the factual causation case. And what
24 Mr Merricks has done so far is not to explain but to
25 duck or ignore, because faced with the unanswerable,

1 what Mr Merricks has done is progressively to carve-out
2 and then ditch pieces of his claim -- and I'm talking
3 now about the parts of the claim which are being
4 tried -- the issues that are being tried at this
5 trial -- in an attempt to bypass the factual obstacles,
6 trying to leave a residue of resemblance in what remains
7 between the EEA and the domestic UK interchange fees.

8 Now, that won't do, because the inconsistent facts
9 are still facts and removing them from the claim doesn't
10 mean -- from the pleaded claim doesn't mean that they
11 did not happen.

12 So let's look immediately at the first of these
13 carve-out and ditch examples. That was in relation to
14 the types of card at issue. Initially, as you know,
15 Mr Merricks had accepted that no claim could be brought
16 in relation to Maestro. I'll just give you the
17 reference in the claim form; paragraph 113, {A/3/65} to
18 {A/3/66}.

19 That was explained on the basis that Maestro was not
20 operated under Mastercard's interchange network rules.
21 I'll come back to that. The key point for now is that
22 it was always plain on its face that no relationship at
23 all can be discerned between the EEA and the UK MIFs for
24 Maestro.

25 In Mr Merricks' written opening submissions for this

1 trial, Mr Merricks then abandoned his claim in respect
2 of the other major debit card scheme that is relevant;
3 Debit MasterCard, and he explained that he had done so
4 on grounds of proportionality. That's footnote 60,
5 where that explanation has been relegated in the written
6 opening submissions.

7 I doubt that the Tribunal were taken in by that
8 explanation for abandonment of the claim for one moment
9 because, of course, Mr Merricks had substantially
10 re-pleaded his claim on quantum only about a fortnight
11 earlier. There hadn't, of course, been some subsequent
12 epiphany that a part of a claim was not financially
13 worth pursuing and anyway, litigation funders do not
14 bring headline claims down, short of having bits of
15 their claim struck out or at risk of being struck out.
16 They only like to push headline numbers up.

17 But that isn't the point. The point is that what
18 Mr Merricks was actually trying to do by dropping it was
19 to take the spotlight off the hole in his factual
20 causation case that is Debit Mastercard. During the
21 claim period, Maestro and Debit Mastercard had
22 UK interchange fees which were substantially lower than
23 the EEA MIFs.

24 Mr Merricks accepted originally that that fact made
25 it impossible to make a claim in relation to UK domestic

1 transactions on Maestro. The same obviously applies to
2 Debit Mastercard and the point is that if Mr Merricks'
3 causation thesis were factually correct, then it would
4 apply equally to Maestro and to Debit Mastercard. It
5 cannot be explained away by dropping the claim. The
6 evidence of those lower rates shows again that there was
7 no causal relationship between the EEA and the
8 UK interchange fees.

9 MR JUSTICE ROTH: But if Maestro -- I understand your point
10 about Debit Mastercard, but if Maestro was not under the
11 same rules, then much of -- and didn't have the same
12 fallback arrangement, then the causation would be very
13 different. So isn't there a distinction between the
14 two, which may be why Maestro was dropped a while ago?

15 MR SMOUHA: I take the point, sir, and actually, the point
16 of my -- the point of this submission is very much
17 concentrated on Debit Mastercard.

18 MR JUSTICE ROTH: Yes, and that's the one that was only just
19 dropped now.

20 MR SMOUHA: Exactly, and that evidence is particularly
21 powerful because it was Mastercard itself that was
22 simultaneously setting both the EEA and the UK MIFs for
23 Debit Mastercard, but taking a separate approach to
24 each. That is why Debit Mastercard is so important and
25 significant, and the EEA rates had no necessary bearing

1 on what would work in the United Kingdom, and the
2 Tribunal will hear first that the EEA cross-border and
3 domestic UK markets were indeed quite different and,
4 secondly, that Mastercard's UK interchange fees were set
5 at different levels precisely as a result of those
6 UK-specific features.

7 Now, we will look at debit cards on this point in
8 more detail shortly because they are important as
9 a factual litmus test of the whole causation construct.

10 So the first category I've identified of the
11 carve-out and ditch approach are the claims in respect
12 of debit cards. The second category of carve-out and
13 ditch are those parts of the causation case in relation
14 to credit cards, which have been progressively abandoned
15 in light of the evidence.

16 Now, you can see this to some extent from the
17 patchwork on list of issues, even in contentious form.
18 What remains, in our submission, does not form
19 a coherent whole and is, in any event, still entirely at
20 odds with the evidence.

21 Different pieces of the pleaded case are now not
22 pursued, as appeared from the written submissions, and
23 it is perhaps important in this regard to see what the
24 pleaded allegations are; of course, only recently
25 re-pleaded.

1 I don't want to take you, sir, and members of the
2 Tribunal, back through the pleading. You are familiar
3 with it. Of course, the key part of the pleading at
4 paragraph 103 at {A/3/49}, pleading what -- if we can
5 just scroll up to see the beginning of paragraph 103.
6 Then going over the page:

7 "As regards ..."

8 Sorry, could we go back:

9 "... as regards Domestic Transactions, the effect of
10 the Infringement on the interchange fees paid by
11 acquiring banks was as follows ..."

12 And then at (a) and (aA), over the page:

13 "... throughout the Full Infringement Period, the
14 proposed Defendants' scheme rules provided for the
15 illegal Intra-EEA fallback MIFs to apply by default to
16 Domestic Transactions absent either ... bilateral
17 arrangements between banks, or ... the setting of
18 a Domestic MIF;

19 "aA. from on or around 22 May 1992 until
20 December 1997 (or around that time) there were no
21 Domestic MIFs and the illegal Intra-EEA fallback MIFs
22 applied by default to Domestic Transactions in the
23 absence of bilateral arrangements between banks ..."

24 Etc:

25 "Thereafter until the end of the Full Infringement

1 Period, [UK] Domestic MIFs were established and applied
2 by default to Domestic Transactions absent bilateral
3 arrangements between member banks ..."

4 The pleading directed at the whole of the full
5 infringement period, 22 May 1992 to 21 June 2008.

6 And then at (b):

7 "... the causative effect of those arrangements, as
8 found in the EC Decision as aforesaid, was that the
9 Intra-EEA fallback MIFs operated as a floor and/or
10 guidance and/or a benchmark and/or a minimum price
11 recommendation and/or a minimum starting point and/or
12 a minimum level for the setting of either bilateral
13 domestic arrangements ... or the Domestic MIFs,
14 including in the United Kingdom for United Kingdom
15 Domestic Transactions."

16 Again, pleaded in relation to the whole period
17 without distinction.

18 Now, that is -- interestingly, you will have seen
19 that in Mr Merricks' written submissions, this is
20 defined as the guidance allegation and as you will
21 have -- may have picked up from our suggested
22 formulation of the issues, it is rather obvious that the
23 reason why that is -- why it is suggested that that
24 should compendiously be defined as "the guidance
25 allegation" is because it is no longer very convenient

1 for Mr Merricks' case to talk about the intra-EEA
2 fallback MIFs operating as a floor or a minimum, for
3 reasons which will become apparent as soon as one looks
4 at the facts as to actually what the levels of EEA MIFs
5 were relative to the UK domestic interchange fees.
6 I will come back to that.

7 So that is important. We can work with it for this
8 purpose as being the guidance allegation, but it is very
9 important always to remember that the pleaded case has
10 always been and is still, in relation to this part,
11 an allegation which both pleads that the EEA MIFs
12 operated as a floor and/or minimum, alternatively
13 guidance or a benchmark.

14 Now, that -- as I say, the pleaded case --

15 MR JUSTICE ROTH: I mean, to be fair, it says "floor and/or
16 guidance and/or a benchmark and/or a minimum" --

17 MR SMOUHA: Yes.

18 MR JUSTICE ROTH: -- this being pleaded at a time when,
19 obviously, the Class Representative had no disclosure,
20 didn't know how the thing worked in detail, basically
21 just had the Commission decision. Now, having got a lot
22 more information, they say, well, it appears that of
23 those alternatives, the guidance appears to be the more
24 effective one, and that's not inconsistent with what
25 they were saying. You would say, well, they've rowed

1 back from the more extreme assertion, but it's within
2 the scope of the allegation.

3 MR SMOUHA: Sir, you are very generous as always.

4 Of course, sir, you are absolutely correct in relation
5 to the original pleading and this original pleading, but
6 this has now, shortly before trial, been through however
7 many iterations it has been, and I hope, sir, it's not
8 unfair to suggest that the Tribunal might have expected
9 that immediately pre-trial version of the pleading to
10 set out the case that is to be advanced at trial,
11 including -- including the deletion of allegations which
12 cannot be maintained or are not maintained.

13 MR JUSTICE ROTH: Well, the floor is maintained because that
14 was the whole point, as I understood it, of the
15 bargaining theory, and that is supporting the allegation
16 of a floor.

17 MR SMOUHA: Indeed, so my point -- absolutely so, and my
18 point, sir, is therefore that that part of the case, the
19 floor, must be tested against the facts.

20 MR JUSTICE ROTH: Yes.

21 MR SMOUHA: And my point is that it is not an answer -- it
22 would not be an answer to the difficulties of that part
23 of the case, where you can see on the facts that it
24 cannot have been operated as a floor, to say, "Oh, well,
25 we have an alternative case that says it was guidance

1 and therefore, that can allow some movement". You take
2 my point.

3 MR JUSTICE ROTH: I understand.

4 MR SMOUHA: It's in. It is maintained. It's in the
5 pleading and therefore, the Tribunal will be deciding
6 whether the intra-EEA MIFs operated as a floor and, I go
7 further -- this is the burden of these opening points --
8 if the facts -- if the facts demonstrate that it was not
9 operated as a floor, bearing in mind exactly the point,
10 sir, you've just made to me about that part of the case
11 also being based on the bargaining economic theory that
12 sits behind it, that raises the serious question marks
13 about that case as a whole.

14 The second point in relation to this is the point
15 that this was pleaded in this immediately pre-trial
16 iteration as applying throughout the period.

17 If you would go to paragraph 139 of Mr Merricks'
18 written submissions for trial, so this will be {A/1/53},
19 and again bearing in mind these submissions filed on
20 26 June, so I think just a couple of weeks after the
21 pleading, the amended -- the latest amended pleading,
22 and they say -- my learned friends say in paragraph 139:

23 "As explained at 107 and 118 above, from
24 November 2004 the Hierarchy Argument does not apply
25 because the UK fallback MIFs were set unilaterally by

1 [Mastercard International]. Mr Merricks' case as to the
2 effects of the intra-EEA MIFs on domestic interchange
3 fees after November 2004 is twofold:

4 "(1) Mr Merricks' submissions concerning the
5 Infection Argument ... apply mutatis mutandis from
6 November 2004. Accordingly, if the intra-EEA MIFs
7 affected the levels of UK fallback MIFs prior to
8 November 2004, they will have continued to affect the
9 levels of UK fallback MIFs thereafter.

10 "(2) Further, it may be open to Mr Merricks to
11 submit that, in the counterfactual world, the structure
12 by which domestic MIFs were set could have been
13 different."

14 Etc. That paragraph says in clear terms that in
15 relation to the case, Mr Merricks' case as to the effect
16 of the intra-EEA MIFs on domestic interchange fees after
17 November 2004, that there are only two parts to that
18 case, the second of which is a counterfactual matter not
19 for this trial and, therefore, all that is left of that
20 case for this trial is the infection argument.

21 Now, this was characterised by my learned friend
22 this morning -- our point that we were told there that
23 that is the case and the only case, my learned friend
24 characterised that this morning as a pleading point.
25 It's not a pleading point. We are making the point that

1 the opening submissions, which are supposed to address
2 the case for this trial, expressly tell the Tribunal
3 that that is all of their case in relation to the effect
4 of the intra-EEA MIFs after November 2004 for the
5 Tribunal to consider at this trial.

6 As far as we were concerned, that was an abandonment
7 of the guidance, floor, benchmark, etc, part of the
8 pleaded case, telling the Tribunal that that is no
9 longer pursued.

10 Now, if my learned friend is now telling you --
11 which it appears may be the case from something that
12 they are saying should go back into the list of issues,
13 then it's not that I'm saying to you that there might
14 not be circumstances in which they should be allowed to.
15 The point that we are making is, well, on the basis of
16 the opening submissions, which were supposed to be
17 comprehensive, there is nothing which addresses, for
18 post-November 2004, anything other than the infection
19 argument. And if my learned friend is, in fact, telling
20 the Tribunal today that, actually, there is such a case
21 that is pursued, well, then certainly we would quite
22 like to know on what basis it is pursued, by reference
23 to what facts and what the arguments are in relation to
24 it, and I'm sure the Tribunal would like to as well,
25 because that's the point of the written opening

1 submissions and the opening oral argument.

2 So, as we saw it and in fact still see it, that --
3 the Tribunal was told that the guidance allegation was
4 no longer pursued and for good reason, because it's
5 inconsistent with the facts. And that -- if that is the
6 case and if there isn't a serious case advanced any more
7 in relation to the guidance allegation for post-2004,
8 that would be very important and also striking because
9 that would be in relation to the very period when
10 Mastercard itself was setting both the UK and EEA MIFs.

11 Then back in the claim form at {A/3/50},
12 paragraph 103(c) is the weighted voting allegation and,
13 again, even though that was pleaded as applying
14 throughout the period as little as a few weeks ago, it
15 is now said to apply only for the period 1997 to 2004.
16 That is in the written opening submissions,
17 paragraph 108(2).

18 That is said to operate in tandem with the weighted
19 voting argument and that also -- sorry, that in tandem
20 with the weighted voting argument is the hierarchy
21 argument at claim form paragraph 103(e), and that also
22 is now said to be limited to the period 1997 to 2004.

23 Again, this is the contraction of these arguments
24 and -- but still significant, for the reasons that
25 I have made in relation to claims that were advanced

1 originally; factual causation allegations made
2 originally and in the pleading in relation to the whole
3 period.

4 Then that leaves paragraph -- on page 49 {A/3/49},
5 paragraph 103(aA), which is the direct application
6 allegation that EEA MIFs applied directly to an unknown
7 number of domestic transactions, and I will come back to
8 that to say more about that later.

9 So, members of the Tribunal, with that in mind and
10 these significant reductions in the case, I want to turn
11 then to the facts in more detail to look -- and I will
12 look in a moment at the debit schemes first and their
13 particular significance and then at the key facts in
14 relation to each of the periods just to test what the
15 impact is on the case in relation to these contractions.

16 What you will see again and again is that the facts
17 are really all one way. The case is that the EEA MIFs
18 caused the UK interchange fees to be at the levels they
19 were. The facts all contraindicate that.

20 At the outset, I would make four points about the
21 whole period, which are evident just from an overall
22 consideration of the UK interchange fees and the
23 EEA MIFs, as they were from 1992 to 2008.

24 You may have seen that we have -- well, I hope the
25 Tribunal will find to be very useful documents. I am

1 going to make a number of references to them. That is
2 the consolidated table of MIFs and also the table of
3 bilaterals.

4 Now, these are -- they are on Opus electronically,
5 but I certainly find it easier to actually look at the
6 hard copies. They're in the first tab of volume 1 of
7 the documents referred to in our written opening
8 submissions. The reason why the Tribunal may find it
9 helpful to look at the hard copy is that it enables you
10 to not only to flick between different pages, but also
11 just to get a sense of what's happening in terms of
12 changes over time.

13 So can I just identify them first? The consolidated
14 schedule of MIFs is at -- as I say, it's in the first
15 tab in volume 1, and this is electronic {A/18.1/1}. And
16 the table of bilaterals is at the second tab, and it's
17 electronic {B/55/1}.

18 As I say, I am going to make fairly extensive
19 reference to these, so I will just to make sure that --

20 MR JUSTICE ROTH: Just one moment.

21 MR SMOUHA: -- yes, the Tribunal has them. So ... (Pause)

22 MR JUSTICE ROTH: Yes, we've got it, thank you, or got them.

23 MR SMOUHA: I will say a little bit more about the

24 bilaterals table a little later just to explain what
25 it's done, but what -- just for present purposes in

1 relation to these four points that I want to make at the
2 start, what you will see is that these are a very handy
3 substitute for going -- to avoid the need to go to large
4 numbers of source documents.

5 MR JUSTICE ROTH: Yes.

6 MR SMOUHA: And what you will see in relation to the
7 consolidated MIFs table, just from the footnotes, that
8 the source documents are identified in the footnotes for
9 all of this information.

10 The four points -- the four points are these.
11 First, the UK interchange fees are rarely at the same
12 level as the EEA MIFs. That's something which, when you
13 just turn the pages, will be apparent even from
14 a cursory review. As I say, I'm going to be coming back
15 to the detail of some of these at a number of points,
16 but that's just a general point.

17 Secondly, the UK interchange fees are sometimes
18 below the EEA MIFs. Now, that, of course, is
19 an insuperable factual obstacle for the posited
20 causation thesis, and I'll come back to that. But what
21 that means is that there were many bilaterals which had
22 agreed interchange fees for standard transactions in
23 1995 and 1996 which were below the EEA base MIF.

24 So may I, sir, complete this point, or at least try
25 to complete this first point, before we break?

1 MR JUSTICE ROTH: Yes. We'll break whenever is convenient
2 for you.

3 MR SMOUHA: Very good. Sir, if I may, I'll just try --
4 I'll try and complete these four points. As I say,
5 they're outline points.

6 So if you go in the consolidated MIF table to
7 {A/18.1/3} --

8 MR JUSTICE ROTH: Before we do that, just to orientate us --

9 MR SMOUHA: Yes.

10 MR JUSTICE ROTH: -- just help us a little bit, or at least
11 help me, with the table.

12 MR SMOUHA: Yes.

13 MR JUSTICE ROTH: So across the top, we've got year by year.

14 MR SMOUHA: Exactly, yes.

15 MR JUSTICE ROTH: Starting with the first page, these are
16 UK. That's clear. EDC UK is --

17 MR SMOUHA: Costs studies, Edgar Dunn. So that's the
18 results of the Edgar Dunn cost studies.

19 MR JUSTICE ROTH: So that's a -- so that's the cross -- is
20 that an actual MIF that anybody applied or is that the
21 cost study?

22 MR SMOUHA: No, that is just the -- that is the reported
23 result of the cost study.

24 MR JUSTICE ROTH: I see.

25 MR SMOUHA: That's not a -- yes, that's not a MIF.

1 MR JUSTICE ROTH: It's not a MIF.

2 MR SMOUHA: No. It's being shown in the MIFs table --

3 MR JUSTICE ROTH: Right, I see. Yes, and then we have the

4 Mastercard EEA --

5 MR SMOUHA: Then you've got the Mastercard EEA, Visa EEA and

6 then -- and then if there is one, a cost

7 (overspeaking) --

8 MR JUSTICE ROTH: Yes, that's what slightly confused me.

9 MR SMOUHA: No, I'm sorry, I should have started --

10 MR JUSTICE ROTH: No, not at all.

11 MR SMOUHA: And then down the left-hand side, you have the

12 categories and that's also, of course, as the Tribunal

13 will appreciate, a very important point; always to be

14 looking not only at the rate of the MIF, but also

15 whether the position is, for comparison purposes, the

16 same in relation to categories in structure, because

17 there are, of course, and were significant differences

18 between the UK interchange fees, domestic UK interchange

19 fees and the EEA fees from time to time in relation to

20 categories.

21 PROFESSOR WATERSON: Where the figures are in square

22 brackets, what does that mean?

23 MR SMOUHA: That means that there is a range and which --

24 so, for example -- let me take an example. Are you

25 looking on the first page?

1 PROFESSOR WATERSON: Yes, I was looking at the 1 which is in
2 square brackets, 1%.

3 MR SMOUHA: Yes.

4 PROFESSOR WATERSON: That's not a range.

5 MR SMOUHA: No, the 1 down to 1.1%?

6 PROFESSOR WATERSON: No, no, the one below that.

7 MR SMOUHA: Oh, the one below that. Oh, it's bilaterals.

8 Apologies. The square brackets indicate ... (Pause)

9 For that one, that's in square brackets because it's
10 a bilateral and for -- the reason may be different on
11 others where it's indicating a range, but can I just --

12 MR JUSTICE ROTH: You say it's a bilateral.

13 MR SMOUHA: Yes.

14 MR JUSTICE ROTH: I thought this is -- the bilaterals are in
15 the next table. Perhaps I misunderstood it.

16 MR SMOUHA: So can I just -- while we're looking at that
17 one, and I take no credit for this enormous --

18 MR JUSTICE ROTH: No, don't worry. We just are trying to
19 understand it.

20 MR SMOUHA: No, no, but I have found that almost any
21 question that one has about this is usually answered in
22 the footnote. So, as I say --

23 MR JUSTICE ROTH: Well, we're rather hoping we don't need to
24 read all the footnotes.

25 PROFESSOR WATERSON: Yes.

1 MR SMOUHA: I agree, but as I've been asked the question,
2 footnote 9, which is marked for this, looking at
3 1992 Mastercard UK, footnote 9 says:

4 "Bilaterally agreed interchange fee (Clydesdale-Bank
5 of Scotland). UK Domestic Interchange Form
6 (Clydesdale-Bank of Scotland) prepared for Eurocard
7 International ... As explained on p.1, prior to
8 1 November 1997, there were no specific UK domestic
9 MIFs. For the years prior to this date, we have
10 included the range of interchange fee rates that were
11 bilaterally agreed between UK member banks (in square
12 brackets), to the extent that they are available from
13 documents in Mastercard's possession and as set out in
14 the UK bilateral interchange fee schedule ..."

15 I hope that answers the question and so in the --
16 and we'll see this in the bilaterals table in a moment.

17 In the top box, the 1 to 1.1 is indicating that on
18 the basis of the information that we have in relation to
19 bilaterals in 1992, the standard base rate in those
20 bilaterals was in the range 1 to 1.1 and I think, in
21 fact, was either 1 or 1.1, whereas in the bilaterals,
22 the 1992 bilaterals for electronic, they were all 1.

23 I can show you that. If you keep your finger in the
24 consolidated MIFs table and if you go to the bilaterals
25 table and if you can find in the internal pagination

1 4 of 22, using the numbers bottom right, electronic
2 {B/55/4}, and if you look in the "1992" column, you will
3 see for Midland -- I'll explain a little bit more about
4 this table. If I may, I'll come back to explain how it
5 works, but this is -- these are bilaterals for
6 Midland Bank as acquirer with the issuing banks that it
7 concluded bilaterals with in the next column. And
8 you'll see that the 1992 rate in the bilaterals on that
9 page were all 1.

10 But if you go over the page {B/55/5}, you will see
11 that Barclays had -- so this is {B/55/5}. You will see
12 that Barclays had 1 with the -- bilateral with the
13 Bank of Ireland at 1.06.

14 And if you go to page 7 {B/55/7}, you will see that
15 the Bank of Scotland had a bilateral with Clydesdale at
16 1.1. That's the standard one, so that now explains the
17 range shown in the MIF table of 1 to 1.1.

18 If you go on to page -- in the bilaterals table to
19 page 13 {B/55/13}, these are the bilaterals with the
20 agreed electronic rates.

21 And if you go to page 18 {B/55/18} -- and I'm going
22 to try and do this comprehensively, but if you go -- you
23 will see, looking through pages 18, page 19 -- no, sorry
24 that's not correct. Wrong year. One moment.

25 Sorry, page 17 {B/55/17}, apologies. At page 17,

1 you will see Bank of Scotland as acquirer, Clydesdale,
2 1, 1.0, and that's the one that's referred to in the
3 consolidated table.

4 PROFESSOR WATERSON: Just to understand this, there are
5 a lot of gaps in this table.

6 MR SMOUHA: Yes, so -- sorry, and I'm going to come back to
7 that and explain exactly what the reason for that is and
8 what this table is showing. The short answer is that
9 this is setting out the information that we know from
10 the documents we have, but we're not suggesting and
11 Mastercard has never suggested that it has or would ever
12 have had all the bilateral agreements available to it.

13 So it is not -- in other words, this is what we
14 know, but it doesn't mean that there were not bilateral
15 agreements concluded at all where there is a gap. It
16 simply means we don't know what they are --

17 PROFESSOR WATERSON: But it is quite striking that you seem
18 to know a lot about 1993 and to some extent 1994, but
19 very little thereafter. You would think, if anything,
20 that you would know more later than earlier.

21 MR SMOUHA: I will find out whether we think there is
22 a particular reason for the -- why the contours of
23 information that is available to Mastercard are in that
24 way. I take the point, Professor.

25 MR JUSTICE ROTH: The other thing that's a bit puzzling for

1 1992 is it just -- is it just that for some of the
2 banks, you -- for NatWest, who were a major player in
3 cards early on, I think I saw somewhat quite a large
4 share of the market, you don't have the information for
5 1992 and that's why it's all blank? I don't know. It's
6 been shaded as though it's somehow -- so I'm not quite
7 clear.

8 MR SMOUHA: Again --

9 MR JUSTICE ROTH: If you could find out in due course and
10 let us know. It's obviously a very useful table.

11 MR SMOUHA: Yes. Can I just ask Mr Cook to assist?

12 MR COOK: It was just to deal firstly with the question
13 about why you have 1994 figures, but not the same sort
14 of volume of material for '95, '96, '97.

15 What we say in relation to that is that what happens
16 is there had been notifications of bilaterals either
17 when a new agreement is reached or from time to time
18 because there's a clarificatory check, ie just checking
19 nothing has changed. So what we say is, and the pattern
20 you see here is, there was a change in bilaterals, we
21 say, over the period '92 to '94.

22 By '94, nearly everybody has coalesced around 1.3
23 standard and 1 electronic, 1% electronic, and therefore,
24 the 1994 figures continue in subsequent years, but there
25 is not a new record of a new bilateral because you have

1 an agreed rate and unless and until somebody says
2 either, "I want a new one" or, "Bring that to an end",
3 therefore, you're not going to get a new bilateral in
4 place.

5 So we say where you have a 1994 figure, effectively
6 it continues until at least '97, and we have various
7 economic analysis which we say supports that. So it's
8 not saying that the absence of a '95 figure means there
9 was no bilateral. It is the one we have a record of is
10 '94 and we say that continues in subsequent years.

11 MR JUSTICE ROTH: And 1992?

12 MR COOK: With 1992, that is very simply -- yes, that is the
13 start of the period and that is where we obviously have
14 the least data, but there is a particular reason why we
15 say that is true or likely to be true, which is --

16 MR JUSTICE ROTH: What is likely to be true?

17 MR COOK: The reason why it's likely -- why there was a lack
18 of data in particular, other than simply the time
19 period -- it's 31 years ago -- which is that obviously
20 the records that Mastercard have are, in practical
21 terms, the record of what -- was at the time --
22 Eurocard/Europay had and we consider that or the
23 evidence shows Eurocard/Europay didn't start processing
24 any material volume, perhaps any UK domestic
25 transactions, until some time in 1993, and there's no

1 particular reason why Eurocard/Europay would have had
2 record of bilaterals at a point when it wasn't doing
3 processing.

4 So what we have is only -- we only have the
5 information that Europay had at the time. Processing is
6 done largely, we say, and up until '93 almost
7 exclusively by First Data Resources, which are FDR, or
8 some in-house. Europay start to do some from '93. As
9 a result, it starts to have some records.

10 So it's a question of simply what we have is
11 Europay's data, which is inherently not going to cover
12 1992.

13 MR JUSTICE ROTH: Yes, thank you very much.

14 MR COOK: Those are obviously factual points made good in
15 the footnote of the submissions.

16 MR SMOUHA: So, sir, you see I haven't even learned my own
17 lesson which I said at the start, which is if I'm asked
18 a question and I don't know the answer, turn to Mr Cook
19 immediately. So I'm sorry to have wasted time.

20 MR JUSTICE ROTH: No, no. Well, it's important that we
21 understand this table.

22 I think, after that dense exchange, probably this is
23 the right moment to take a short break, not least for
24 the benefit of the poor lady who is trying to transcribe
25 all this.

1 MR SMOUHA: Absolutely, sir.

2 MR JUSTICE ROTH: So we'll come back in about ten minutes.

3 (3.26 pm)

4 (A short break)

5 (3.40 pm)

6 MR COOK: Sir, briefly in relation to the points I made,
7 just to give the Tribunal or the transcript the
8 references to where those points are made in our opening
9 submissions. It's Mastercard's opening at paragraph 62
10 and in particular the footnotes to the documents at 8
11 and 90. And then Mastercard's opening at paragraphs
12 94(2) and 94(3), in particular, footnotes 150, 151 and
13 152, and then footnote 179, which deals with the
14 continuing effect of bilaterals until terminated.
15 That's 179.

16 And just to add to that, sir, paragraph 60(1) of our
17 opening, which sets out documents that we consider show
18 that Europay did have comprehensive records of
19 bilaterals in 1992, but those are largely records that
20 don't exist anymore, those specific '92 records, but we
21 have a much better picture from '93 onwards. So we do
22 say there were comprehensive bilaterals there, but those
23 are the ones where there is not a comprehensive record
24 of the bilaterals. (Pause)

25 MR JUSTICE ROTH: Paragraph 62, sorry, the footnote was --

1 you were saying it was footnote?

2 MR COOK: 89 and 90.

3 MR JUSTICE ROTH: 89 and 90. Thank you. Yes.

4 MR SMOUHA: So on the consolidated schedule of MIFs, and
5 apologies for information overload, but -- and I perhaps
6 should have pointed this out when I first went to it.
7 If you just go to the cover page on page 1 {A/18.1/1},
8 you will see in the bullets there is information given
9 there about -- which is quite useful in terms of the --
10 why and what this does in relation to the showing of
11 bilaterals, the source of the information. The question
12 you asked me, sir, about the EDC, about the cost
13 studies. There's a description there of what the
14 information is that's given. And then also, the last
15 bullet, an explanation of the position in relation to
16 the information shown as to Visa's rates.

17 Also, the first bullet in this is useful and
18 important to note when we're looking through the table.
19 Where figures appear in bold, that is because there is
20 a change in rate from the previous year and so, for
21 example, you can see, on page 2, of the first page of
22 the tables -- of rates {A/18.1/2}, some of those figures
23 in bold. That's just indicating that there has been
24 a change.

25 And that actually then brings me to the point,

1 sorry, some time ago now and I'm sorry for having not
2 provided a rather fuller explanation of this in the
3 first place, but the point I wanted to show you just as
4 a general point, and the second of my four points, is
5 that the UK interchange fees are sometimes below the
6 EEA MIFs. So, first of all, there were many bilaterals
7 which had agreed interchange fees for standard
8 transactions in 1995 and 1996 which were below the EEA
9 base MIFs.

10 So if you go to the table at page 3 {A/18.1/3} and
11 if we look at 1995 and 1996, you see that the EEA base
12 MIF, so the fourth column, in each case was 1.15. It
13 had changed between 1994 and 1995 from 1.2 to 1.15 and
14 then in 1996, it was 1.15.

15 Now, keep your finger in there, if you would, and go
16 to the bilaterals table, page 2 {B/55/2}. So these are
17 the NatWest bilaterals with NatWest as acquirer and you
18 see that for 1996, there are four bilaterals with
19 issuers where the agreed standard rate was 1%;
20 Allied Irish, Bank of Ireland, Frizzell and, about
21 five lines up, Robert Fleming. So that's below the
22 EEA MIF.

23 At page 8 of the bilaterals table {B/55/8}, in the
24 lower half showing bilaterals with Northern as acquirer,
25 and you see that Northern had a bilateral for 1995 with

1 TSB at 1, second line from the bottom, and you will see
2 that that was a change and reduction from what it had
3 been the previous year where the Northern bilateral with
4 TSB had been 1.1. So it is actually moving in the
5 opposite direction to and now below the EEA MIF;
6 an obvious contraindication of the positive causation.

7 On the next page, still in the bilaterals, page 9
8 {B/55/9}, TSB as acquirer had a mixture of bilaterals in
9 1995, five of which were at 1%, 1.0%, all below the
10 EEA MIF, and then the 1.3%s were, of course, all
11 significantly above the EEA MIF. None of TSB's
12 bilaterals were actually at the EEA MIF level.

13 Another example. Go back to the consolidated MIFs
14 table, page 5. Let's look at a year in a different
15 period. If we look at 2005, so {A/18.1/5}. Now, in
16 2005, so we're obviously talking about a MIF now for the
17 UK and you will see that there were separate and
18 different rates for standard and electronic; 1.3 for
19 standard, 0.9 for electronic. For the EEA MIF, there
20 is -- the fourth column along there is a single rate,
21 1.3 standard, but which also applies to electronic. You
22 see no separate rate for electronic.

23 PROFESSOR WATERSON: Enhanced electronic there.

24 MR SMOUHA: Yes.

25 PROFESSOR WATERSON: That's not --

1 MR SMOUHA: Yes.

2 PROFESSOR WATERSON: That's in some way different from
3 electronic.

4 MR SMOUHA: Yes, indeed, and you will see that the UK didn't
5 have an enhanced electronic category, but Visa did --
6 Visa EEA. Sorry, Visa EEA did.

7 PROFESSOR WATERSON: Yes.

8 MR SMOUHA: And the rate was 0.95% for the -- so the
9 Mastercard EEA enhanced electronic rate is 0.95%. So
10 the categories don't match. The rates don't match.

11 More importantly, look at what happens then going
12 into 2006. So comparing 2005/2006. The EEA MIF stays
13 exactly as it was {A/18.1/6}. The UK MIF for standard
14 is reduced to 1.2% and is now below the EEA MIF.

15 What is the explanation from Mr Merricks as to how
16 that reduction in the UK MIF is supposed to have been
17 caused by the EEA MIF not changing? To which the answer
18 is none, no explanation, because it can't be explained.
19 It cannot be reconciled with the suggested causality.

20 Then note what happens in the -- so still on page 6
21 with 2006. Note what happens in the following year and
22 the following year and, indeed, for four years. The
23 UK MIF, so it's in bold for 2006 because it's changed,
24 then stays at 1.2% standard in 2007, 2008, 2009. The
25 EEA MIF drops in 2007 from 1.3% to 1.2%, so that is

1 happening a year after the UK MIF, so that can't be the
2 causal relationship suggested.

3 But even more importantly, you see that it's in the
4 next year, in 2008, that the EEA MIF has to be reduced
5 to zero as a result of the EC decision, and what happens
6 to the UK standard MIF? It stays exactly where it was
7 and had been since 2006.

8 Now, even those, as examples of the UK MIFs being
9 below the EEA MIFs, are destructive of the causation
10 argument. Indeed, when one thinks about what happened
11 in 2008, you could almost say that that is a -- like
12 a control test of what would happen if the EEA rate is
13 reduced to zero, because that did happen, in fact, and
14 absolutely nothing happens to the UK MIFs.

15 Next point. There are no examples, and I mean no
16 examples, where changes in the level of the EEA MIFs are
17 followed by corresponding changes in the UK MIFs at the
18 same time or shortly thereafter, and it's just worth
19 pausing to consider how striking that is.

20 In a case in which the claim is based entirely on
21 saying that the EEA MIFs, from the beginning until the
22 end, caused the UK MIFs to be what they were as to
23 structure and level, yet the class representative cannot
24 point to a single example of a change being made to the
25 EEA MIFs which is then followed by that change being

1 then made to the UK MIF.

2 Now, as I said, those were general points but big
3 points that are just -- that one can see from the
4 totality of the run, as it were, in relation to major,
5 major irreconcilable facts with the causation theory
6 posited.

7 Let me turn in more detail, if I may, first of all,
8 as I promised I would, to the debit schemes and to focus
9 on their direct significance as a matter of evidence to
10 the findings of fact the Tribunal is asked to make. And
11 then I'll come, after that, to the chronological
12 evolution of the UK credit interchange fees.

13 The point about both debit card schemes is short and
14 important. The bilateral -- those bilateral interchange
15 fees were, first of all, much lower and, secondly,
16 structured differently from the relevant EEA MIF.

17 The class representative's causation theory offers
18 no explanation why that should be so and we say, of
19 course, that there is no basis for the distinction and
20 that they are, therefore, a strong contraindication as
21 to the validity of Mr Merricks' causation theory. And,
22 as I've said, Mr Merricks offers no answer to this,
23 other than to say he pursues no monetary claim in
24 respect of either, which, of course, is not an answer.

25 Now, first of all, just in relation to what the

1 facts are, and these should not be in dispute. They are
2 all well-evidenced in the contemporaneous documents.

3 So far as Maestro is concerned, Maestro was
4 Mastercard's sole debit card product until
5 Debit Mastercard was introduced in 2007, and the point
6 in relation to Maestro can be seen easily from the
7 table, from the consolidated MIFs table.

8 If you go to page 14 -- sorry, I should just show
9 you -- page 13 {A/18.1/13}, which is section D of this
10 table, is the consumer MIFs for Debit Mastercard cards
11 and Visa -- and debit Visa cards. And then on page 14
12 {A/18.1/14} are the MIFs for Maestro debit cards.

13 And then if -- in Maestro, if you then go to page 15
14 {A/18.1/15}, and can we look, please, at 2004, 2005 and
15 2006. Maestro UK is in the first column for each year
16 and EEA, Maestro EEA, in the second column. You will
17 see that the Maestro EEA rates were all ad valorem fees
18 ranging from -- if you look down the column, ranging
19 from 0.5% to 1.15%.

20 I'll just give you a reference, if I may. I'm not
21 going to turn it up. The source document for these
22 shows the decision to set these being taken by the
23 Europay board of directors, and the references are
24 agenda item 4.4 on {C8/186/3} and the decision to set
25 those at {C8/187/4}.

1 The UK interchange fees for Maestro were negotiated
2 bilaterally with arbitration as a fallback, and as the
3 Tribunal may recall and I'll explain in a little more
4 detail presently, that was the same approach adopted for
5 Mastercard credit cards until November 1997, but in
6 stark contrast to the EEA MIFs, the UK interchange fees
7 for Maestro were a pure flat fee per transaction;
8 a single standard fee in 2004 of 4.67p per transaction
9 and then you see in 2005 and 2006 different flat fees
10 for a number of categories. But all flat fees; all
11 pence per transaction.

12 Now, what is interesting from all this, apart from
13 just the very obvious difference in a flat fee per
14 transaction and a rate, apart from that, is that the
15 flat fee worked out substantially lower on average than
16 the EEA ad valorem rates.

17 On 25 July 2006, a Mastercard task force produced
18 a launch plan for Debit Mastercard which was to be done
19 against the backdrop of the existing Maestro product;
20 the innovation of Debit Mastercard, being that
21 Mastercard itself would have control over domestic MIFs,
22 unlike with Maestro.

23 The launch plan is at {C16/290/1}. Members of the
24 Tribunal, these documents I'm referring to are all
25 referred to in our opening submissions, which means

1 there are hard copies of them also in the bundles, if
2 needed, but I think for this purpose we can take it from
3 the screen.

4 This is July 2006, "Debit MasterCard Launch Plan for
5 the United Kingdom", and if we go, please, to page 29
6 {C16/290/29}, there is an important discussion of
7 interchange fees. So section 13:

8 "This section details the UK domestic Debit
9 MasterCard interchange and service fee rates that will
10 be put forward to the MasterCard Worldwide President and
11 CEO for approval.

12 "This section also provides an outline of the core
13 principles underpinning the rate setting process, the
14 rationale for, and benefits arising from, establishing
15 a combination rate structure and finishes with a review
16 of the stakeholder impacts."

17 And then 13.1, "Interchange Rates":

18 "At its 3 July 2006 meeting ... (European
19 Interchange Committee) considered a series of
20 interchange rate proposals for Debit MasterCard UK
21 domestic POS and endorsed the rate structure detailed
22 below.

23 "It is planned to have contactless payment ...
24 functionality available for use with Debit MasterCard in
25 Europe and the UK, effective from release 07.1. In this

1 regard a discrete interchange fee rate will be defined
2 and put to EIC for consideration later this year."

3 Then over the page on to page 30 {C16/290/30}, the
4 Tribunal will see the numbers that Mastercard was
5 interested in for the purposes of this launch plan and
6 the decision as to what to do. What you see is in the
7 right-hand column, you see what Maestro UK interchange
8 fees were, showing what these were for each category.
9 So this is pence per transaction, so those are the same
10 as the figures we just saw on the consolidated MIF
11 table. They're just in a different order.

12 And then you see from the last row of the table
13 a weighted average fee in terms of pence per transaction
14 has been calculated, and that is 6.6p per transaction.
15 So that was being -- and then that was estimated as
16 being equivalent to an ad valorem fee of 15.3 basis
17 points.

18 So just to be clear what was being said here,
19 looking at the MIFs for -- sorry, the -- yes, looking at
20 the MIFs for Maestro UK and then doing a conversion and
21 equivalent to work out -- using the weighted average to
22 work out what the equivalent would be if it was in
23 ad valorem terms, and the answer was 0.153% on average.

24 Now --

25 PROFESSOR WATERSON: Is that based on transactions or is it

1 based on predictions?

2 MR SMOUHA: So, no, no, it's on transactions. It's on
3 volumes, so -- and you can see that from the bottom of
4 the page. It may not be visible on the screen. There
5 is an asterisk at the bottom of the page:

6 "Average pence per transaction (ppt) is based upon
7 the volume and value of transactions in each fee tier
8 and assumes the same transaction split seen for UK
9 Domestic Maestro ... for [that] period ... but adjusted
10 forward ..."

11 Etc.

12 PROFESSOR WATERSON: Thank you.

13 MR SMOUHA: So, of course, there is nothing about EEA rates
14 on here. That's not the point. But what this does do
15 is to enable us to compare that ad valorem equivalent of
16 0.153% to -- now going back to the table {A/18.1/15}
17 and if you look for 2006, Maestro EEA, so the
18 second column of 2006, and you see that the ad valorem
19 rates vary from 0.5% to 0.95%.

20 So quite apart from being a different kind of fee,
21 flat fee rather than ad valorem, the calculated
22 comparison showed that the UK -- and this wasn't
23 a comparison done at the time. As I say, they were
24 comparing to Visa on that document, but we can make the
25 comparison now, and you can see that the UK interchange

1 fees were the equivalent of less than a third of even
2 the lowest of the EEA MIFs of -- EEA MIF of 0.5%; 0.153%
3 compared to 0.5%, the lowest of the EEA MIFs.

4 But perhaps the most interesting point of all is
5 that the comparison that I've just made, as I've said,
6 is a comparison of UK interchange fees and EEA MIFs and
7 is a comparison that is not made in the contemporaneous
8 document. Indeed, there is no reference to EEA MIFs
9 at all. What you see from that document is that the
10 main factor being considered and the comparison being
11 made is with what Visa's debits -- Visa debit cards
12 UK MIFs were and where to position Debit Mastercard
13 accordingly.

14 And if we go over the page, please, {C16/290/31},
15 you see at the top of the -- on the screen, the next
16 page of the product launch document, what you see at the
17 top of the page is a substantive discussion of
18 Mastercard strategy. And can I perhaps ask the Tribunal
19 to read the first two paragraphs on the page on screen.

20 (Pause)

21 And UKDM in the second paragraph in the brackets in
22 the third line, "i.e. 4p or 60% higher than UKDM", is
23 UK domestic Maestro. Thank you.

24 So there's a substantive discussion of strategy.
25 It's all about how Visa and merchants might react. And

1 then at the bottom of the page under the heading
2 "Principles for Setting Interchange Rates", there is
3 an explicit statement of principles:

4 "Listed below are the principles used for setting
5 the Debit MasterCard UK interchange rates ..."

6 The principles used for setting the Debit Mastercard
7 UK interchange rates, and reference in point 2 to cost
8 studies, and point 3:

9 "The rates will be set at levels comparable with the
10 rates of competitive products (i.e. Visa Debit) to
11 ensure product competitiveness and that the product is
12 acceptable to both merchants and regulators."

13 Nothing about EEA MIFs at all; not a hint of
14 a reference to EEA MIFs.

15 And then the last point on Maestro, but also
16 important, significant changes in the EEA MIF had no
17 effect on UK interchange fees. That can be seen again
18 if we go back, please, to the consolidated MIF schedule,
19 page 16 {A/18.1/16}.

20 Look at 2009 on the right-hand side. On
21 11 January 2007, the EEA MIFs were changed to a flat fee
22 of 5 cents per transaction, plus an ad valorem fee of
23 between 0.11 and 0.26%. And if you look at the
24 UK column, that change in the EEA MIFs did not result in
25 any change whatsoever to either the structure or level

1 of UK interchange fees, which were, in 2009, still flat
2 fees at the fixed pence per transaction rates which were
3 the same in 2009 as they had been in 2006.

4 Then, sir, can I try and just finish with
5 Debit Mastercard, if I may. Same exercise, but, again,
6 important points as to what one sees. Again, we say
7 another set of indisputable facts which belie the
8 claim's causation theory.

9 On the EEA side, when Debit Mastercard was
10 introduced, the same MIFs were initially set for
11 Debit Mastercard as for consumer credit cards, and you
12 can see those in the consolidated MIFs table, page 13
13 {A/18.1/13}, section D. If you don't mind, for the
14 purpose of this comparison, to then keep your finger in
15 there, but then also open page 6 {A/18.1/6}, and if we
16 compare 2007.

17 So on page 13 {A/18.1/13}, 2007, second column,
18 "EEA" base, 1.2%; chip, 0.8%; merchant UCAF, 0.95%; full
19 UCAF, 1.15%. And if you look on page 16 {A/18.1/16},
20 2007, fourth column, Mastercard EEA, standard, 1.2%;
21 enhanced electronic, 0.95%, and so on.

22 So they were set at the same and they are pure
23 ad valorem between 0.8% and 1.2% as at that date. The
24 relevant date is 4 October 2006. The source reference
25 for that is {C16/439/2}.

1 In contrast, back on page 13 {A/18.1/13}, on the
2 UK side for Debit Mastercard, 2007, you see that the
3 MIFs were originally -- sorry, were initially set with
4 a combination of a flat 3.5p per transaction and plus
5 ad valorem fees, which ranged from 0.12% to 0.35%.

6 So, again, no resemblance at all; different
7 structure, different rates. And, again, we have
8 a contemporaneous document which estimated the UK fees
9 to be the equivalent on average to an ad valorem fee of
10 0.262%, so again less than a third of the lowest
11 applicable EEA MIF.

12 And, again, that comparison that I have just made
13 was not a comparison made at the time. I'll give the
14 reference to the draft introductory bulletin for the UK;
15 {C16/284/6}. No hint -- no reference to EEA MIFs, no
16 hint that what was being done with the EEA MIFs was
17 considered to be relevant, considered, discussed.
18 Nothing at all, because it wasn't.

19 And then we see the obverse of what happened with
20 Maestro with Debit Mastercard. The UK MIFs changed
21 significantly in response to UK-specific factors, but
22 there is no change at all in the EEA MIF.

23 Can we go, please, to {C18/146/1}. This is
24 a memorandum from Mr Perez, the CEO of
25 Mastercard Europe, to Mr Heuer, the COO of

1 Mastercard International.

2 Can I just ask -- to save the transcriber's fingers
3 at the end of the day, can I just ask the Tribunal
4 please to read the letter, first three paragraphs on
5 that page. (Pause)

6 And then if we can go to the top of the page 2
7 {C18/146/2}, Mr Perez says:

8 "Based upon feedback obtained in 1 to 1 meetings
9 with many of the key major merchants,
10 [Mastercard Europe] is confident of securing acceptance
11 with this new rate structure and level.

12 "I would appreciate your approval of the new rates
13 at your earliest possible convenience."

14 Three things of interest from this letter. First,
15 a purely UK domestic market reason and consideration
16 being the reason for the change; second, a comparison
17 with Visa; and, third, no reference or consideration
18 at all of what the EEA MIFs had been or were.

19 In fact, there's a fourth thing of interest in this
20 document. If we go back to the top {C18/146/1}, you
21 will see Mr Sideris is copied in, who will be my first
22 witness tomorrow.

23 And if, finally, you go -- having seen that, if you
24 now go back to the consolidated MIFs table, page 13
25 {A/18.1/13}, and if we compare 2007 UK and 2008 UK, you

1 see the change that is discussed and of which approval
2 was being sought being made to the structure to get rid
3 of the ad valorem plus flat fee combination. So
4 2007 UK, the base, 0.35% plus 3.5p per transaction, and
5 you see that being changed and the change being
6 implemented to move away from that combination. So
7 2008 UK, flat fee only, 18p base, 8p enhanced electronic
8 and so on.

9 And EEA -- what's happening in EEA, what, as I say,
10 might be thought to be the final nail in any suggestion
11 that the EEA MIFs had any relevance to the UK MIFs, you
12 see there, 2008, the EEA MIF was reduced to 0 in 2008
13 following the EC decision and the UK MIFs do not change
14 and, as I said, before they stay the same in 2009, with
15 one minor and immaterial change to the PayPass category.

16 Sir, if that would be a convenient moment, I'm going
17 to move on to -- that's all on Debit Mastercard and
18 I'm going to move on and back to credit cards and then
19 the first early period next.

20 MR JUSTICE ROTH: Yes. Can I just ask you -- and you can
21 come back to that, if you wish, tomorrow -- were there
22 bilaterals for debit cards before these MIFs? Because
23 I think the bilateral table or schedule at {B/55/1},
24 that's just credit cards, isn't it?

25 MR COOK: The answer to that, sir, is Debit Mastercard

1 always operated on the basis of MIFs, so that's from its
2 launch in 2007. Maestro -- and Maestro in the UK starts
3 in 2002 -- operated on the basis of bilateral
4 interchange fees up until August 2009, when Mastercard
5 set a UK MIF for the first time.

6 And the information about sort of the bilateral
7 rates, we don't have detailed breakdowns of exactly what
8 those rates were because they're nothing to do with
9 Mastercard, but the rates that have been talked about
10 are -- when you see -- talk about the rate applying in
11 Maestro, that's what is broadly thought to be the market
12 rate across all of those bilaterals.

13 MR JUSTICE ROTH: Yes, because part of the claimant's case
14 for at least a good part of the period is based on the
15 fallback that would apply if a bilateral agreement
16 couldn't be reached, as you know. So that seems to me
17 it might be rather different from whatever the structure
18 was for debit cards.

19 MR COOK: Sir, what we say in relation to -- in relation to
20 Maestro is it was bilateral negotiation with arbitration
21 as fallback.

22 MR JUSTICE ROTH: Yes.

23 MR COOK: But, of course, we say that's exactly what the
24 position was with Mastercard --

25 MR JUSTICE ROTH: Was there a fallback of an EEA rate?

1 MR COOK: We're getting into detailed points, sir. The
2 rules -- the same Mastercard rules structure of global,
3 European and domestic applied, so the EEA MIF was there
4 as a fallback if there were no UK Domestic Rules. The
5 banks chose to set UK Domestic Rules which provided for
6 bilateral negotiation with arbitration as a fallback,
7 and that resulted in the Maestro bilateral rates which
8 we get from -- sort of, you know, the general level of
9 those bilateral rates, being the 0.153% Mr Smouha has
10 just shown you as being substantially lower than the
11 EEA MIF.

12 So if the banks hadn't set UK Domestic Rules, the
13 EEA MIF would have applied, which we say is essentially
14 analogous to what you get once you have UK MIFs being
15 set in the UK for Mastercard from '97 onwards.

16 MR JUSTICE ROTH: And that's under the Scheme Rules for --
17 the Maestro Scheme Rules?

18 MR COOK: The Maestro Scheme Rules, which of course --

19 I mean, Maestro is subject to the Commission decision as
20 much as Mastercard credit is.

21 MR JUSTICE ROTH: Yes.

22 MR COOK: So the Commission decision applies to both. The
23 EEA MIF is -- and this is what the Commission concludes;
24 it's the EEA MIF is a fallback for domestic in the
25 absence of anything else, but in the UK, you get

1 UK Domestic Rules, as you do for Mastercard credit from
2 '97 onwards.

3 MR JUSTICE ROTH: Yes, thank you, well we'll resume --
4 you're on time. If we resume at 10.30, that gives you
5 both enough time with your witness tomorrow, and that
6 will be Mr Sideris.

7 MR SMOUHA: Mr Sideris.

8 MR JUSTICE ROTH: Yes, very well. 10.30 tomorrow.

9 (4.30 pm)

10 (The hearing adjourned until 10.30 am on Thursday,
11 6 July 2023)