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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**

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**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 point 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 contra-indication 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)

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