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IN THE COMPETITION

APPEAL TRIBUNAL

(T)

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 5th – Friday 28th July 2023

Before:

The Honourable Mr Justice Roth

Jane Burgess

Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE

Class Representative

v

Mastercard Incorporated and Others

Defendants

A P P E A R A N C E S

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

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

Friday, 28 July 2023

(10.00 am)

Closing submissions by MS DEMETRIOU (continued)

MR JUSTICE ROTH: Yes, good morning.

MS DEMETRIOU: Sir, just five minutes on the two questions
you asked at the end of yesterday.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So the first related to paragraphs 36 to 38
of Mastercard's closing submissions.

And our response is that we have no reason to
dispute what is said there but we can't confirm its
accuracy because we haven't had disclosure from that
period so we're not challenging it but we don't have
a basis for challenging it.

MR JUSTICE ROTH: No, I understand. That makes sense.

MS DEMETRIOU: And in relation to 2008 when the EEA MIF went
to zero, you have our submissions at paragraph 200 of
our closings but we say that --

MR JUSTICE ROTH: Just a minute.

(Pause) Yes.

MS DEMETRIOU: Sir, and you asked me yesterday about what
happened with the UK MIF, and I just want to make
a couple of points.

So the first point is that Mastercard's position at
the time was that the decision to reduce the MIF to zero

1 was a temporary decision and that's because Mastercard
2 took the view that it could establish a lawful
3 alternative MIF, but for the time being the only MIF it
4 could be sure was not an infringing MIF was zero and so
5 it reduced the MIF to zero temporarily and said publicly
6 that it was reducing it temporarily to zero in order to
7 avoid exposing itself to daily penalties.

8 And if we just look at {C19/337}, please. So this
9 is a letter sent by Mastercard to its customers and you
10 can see from the first line of the letter that
11 Mastercard is saying:

12 "I am writing to inform you that as of 21 June 2008,
13 Mastercard Europe will temporarily repeal its current
14 Mastercard and Maestro intra-EEA cross-border ...fees
15 ..."

16 In conformity with its decision.

17 And then you see in the next paragraph:

18 "At the same time we will continue to pursue
19 vigorously our appeal before the European Court of first
20 instance."

21 And indeed there was at the time a Commission press
22 notice which we're going to load on to Opus in case it's
23 helpful but dated 12 June 2008 and the press notice said
24 that:

25 "Mastercard has informed the Commission that it has

1 chosen to temporarily repeal its cross-border MIF for
2 consumer cards while it continues to search for a MIF
3 for which Mastercard can demonstrate the exemption
4 criteria are met."

5 So market participants were therefore aware this was
6 a temporary decision and we say it's therefore
7 unsurprising that UK MIFs were left unchanged in
8 circumstances where the expectation was that the EEA MIF
9 rates would later go up, which they did, based on the
10 MIF schedule.

11 And in terms of what happened to the UK MIFs, sir,
12 there's very limited information that we have available
13 in this trial because the causation question as recorded
14 in the September CMC orders is confined to the period
15 22 May 1992 to 21 June 2009, and Mastercard was only
16 ordered to give disclosure for the period between
17 22 May 1992 to July 2009 save for the MIF schedule which
18 extended to 21 June 2010. And Mastercard has
19 consistently confined its disclosure to documents that
20 fall within the relevant period. And so the upshot --

21 MR JUSTICE ROTH: That's the schedule we've got in -- the
22 big schedule?

23 MS DEMETRIOU: The big schedule.

24 MR JUSTICE ROTH: Yes. So that's the --

25 MS DEMETRIOU: So that takes us up to June 2010. But the

1 key point is that disclosure post July 2009 wasn't
2 ordered and so the disclosure for that -- the documents
3 for that period afterwards are extremely patchy.

4 MR JUSTICE ROTH: But in 2009, footnote 92, July 2009, a new
5 EEA MIF came in?

6 MS DEMETRIOU: A new EEA MIF came in, yes.

7 MR JUSTICE ROTH: Yes, and the UK MIF didn't change.

8 MS DEMETRIOU: Sir, no, at that point in time I think that's
9 correct the UK MIF --

10 MR JUSTICE ROTH: So it was a temporary reduction,
11 I understand that, and the reduction -- the zero lasted
12 about a year.

13 MS DEMETRIOU: Yes.

14 MR JUSTICE ROTH: And then Mastercard did introduce an
15 EEA MIF.

16 MS DEMETRIOU: Correct.

17 MR JUSTICE ROTH: And the UK MIF in 2009.

18 MS DEMETRIOU: Sir, that's right. You can see the EEA MIF,
19 at that point it's a different structure following the
20 Commission decision, and so the documents show they were
21 searching for a MIF that they thought would be compliant
22 / exemptible and it's a different structure and we just
23 don't know in terms of the documents how that was
24 factored into decision-making in relation to the UK MIF.

25 MR JUSTICE ROTH: But the UK MIF didn't change.

1 MS DEMETRIOU: The UK MIF didn't change at all but you have
2 our point that the reduction to zero was a temporary
3 decision.

4 MR JUSTICE ROTH: Yes.

5 MS DEMETRIOU: And we don't -- there's a limit to what we
6 can say in relation to the period after 2009 because we
7 don't have the disclosure because it doesn't fall within
8 the issues for this case. Sir, of course that whole
9 time there is one unitary decision-maker, and so it
10 doesn't bear on the incentives during that time because
11 you have one unitary decision-maker.

12 So, sir, unless you have any questions, that's what
13 we wanted to say about the two questions you asked me.

14 MR JUSTICE ROTH: Yes.

15 MS DEMETRIOU: Thank you.

16 MR JUSTICE ROTH: We have one other question, or just some
17 clarification.

18 MS DEMETRIOU: Yes.

19 MR JUSTICE ROTH: And it's probably because we didn't -- at
20 least I didn't completely, on reviewing my notes, take
21 in the explanation you gave yesterday. It's to do with
22 your new coloured table. If we go to that. I'm not
23 sure what the Opus --

24 MS DEMETRIOU: That's {A/30/2}.

25 MR JUSTICE ROTH: We all have it in hard copy. We just

1 wanted to be clear that we have got right, and it
2 doesn't matter which example we take, we can go to the
3 first page, which is NatWest, and the first line. Where
4 we've got an actual rate in there, that means that that
5 was the rate -- that was the rate shown put in the table
6 and that was the UC00 rate.

7 MS DEMETRIOU: Correct.

8 MR JUSTICE ROTH: What we want to be quite clear about,
9 where the green line continues but there is no
10 percentage put in there, we were just a little puzzled,
11 and just to make sure we understood, what that means.

12 MS DEMETRIOU: Yes, so where there's no rate there, then
13 it's been rolled forward because we don't have any
14 positive evidence that a different rate was introduced.

15 MR JUSTICE ROTH: So when it's rolled forward.

16 MS DEMETRIOU: So, sir, can we take it from 104.3 of our
17 closings {A/29/41}.

18 MR JUSTICE ROTH: Yes, we were looking at that, and that's
19 why we came, if a little bit late.

20 MS DEMETRIOU: Sir, what we say at 104.3 is that because the
21 evidence from Mastercard is bilateral arrangements
22 persist unless they're modified, we've coloured green
23 those entries after May 1993, if banks were transacting
24 at the UC00 rates at that time.

25 MR JUSTICE ROTH: When you say "at that time", does that

1 mean at 1993?

2 MS DEMETRIOU: Yes. At 1993. And so unless there is
3 evidence -- so where the green is in a blank column is
4 what you're asking me?

5 MR JUSTICE ROTH: Exactly.

6 MS DEMETRIOU: Then in that period of time we don't have
7 positive evidence that there was a change of the rate.
8 So we don't have direct evidence that the agreement was
9 a UC00 agreement at that time because we're dependent on
10 the May matrix for that. But nor do we have any
11 evidence that there was a change in the rates or the
12 arrangement and so we have coloured it green on the
13 basis of the evidence that arrangements rolled forward
14 unless there was any positive -- unless there were
15 positive steps taken to the contrary.

16 MR JUSTICE ROTH: And therefore is the assumption then,
17 again going back to that first line and that example,
18 NatWest/Allied Irish Bank, is it the assumption that it
19 continues at 1% or is it an assumption that it continues
20 at UC00?

21 MS DEMETRIOU: Yes, so what we saw -- that's the point. Do
22 you remember I showed you the letter from NatWest that
23 changed the position?

24 MR JUSTICE ROTH: Yes.

25 MS DEMETRIOU: And so what happened is it went up to -- they

1 continued transacting at 1% until the end of 1995 and
2 then they wrote, do you remember, in January 1996 and
3 they changed the position. So this is dealing with
4 standard --

5 MR JUSTICE ROTH: Looking at the first line, in 1996 it's
6 1%.

7 MS DEMETRIOU: That's right, it's the other way around. In
8 1995 the EEA MIF changed.

9 MR JUSTICE ROTH: Yes.

10 MS DEMETRIOU: And so the rate changed with the EEA MIF.

11 MR JUSTICE ROTH: Well, but you say it changed with it. Do
12 you know that in 1995 it was -- there was UC00?

13 MS DEMETRIOU: Yes, because we have --

14 MR JUSTICE ROTH: You have evidence of the 1995 UC codes.

15 MS DEMETRIOU: Yes. Those are the documents I showed you
16 yesterday from NatWest which show the code. So that's
17 at -- let me just find the references. So they are --
18 if you just bear with me for a moment, please. So
19 {C2/405.2/1}.

20 MR JUSTICE ROTH: Those are the codes.

21 MS DEMETRIOU: Those are the codes.

22 MR JUSTICE ROTH: But those are the codes as at what date?

23 MS DEMETRIOU: Just bear with me for two minutes please,
24 sir.

25 If we go to {C3/51.2/1} this is the email dealing

1 with the internal review dated 22 December 1995. Before
2 that we have --

3 MR JUSTICE ROTH: Consolidation of bilateral issued members
4 per agreement and that has an attachment.

5 MS DEMETRIOU: Consolidation of bilateral, which is the one
6 I just showed you. {C2/405.1} is the attachment.

7 MR JUSTICE ROTH: No, this is -- that just shows the UC00
8 codes. The attachment is per member -- consolidation
9 bilateral issued members per agreement.

10 MS DEMETRIOU: Sir, there are two attachments to that email.
11 There is {C2/405.1} if we can get that up and then by
12 the side {C2/405.2}. And so the first attachment shows
13 the UC00 banks, do you see that, so we know at that date
14 that NatWest transactions with those banks were at UC00.
15 So that's the attachment to the email of 22 --

16 MR JUSTICE ROTH: So that's in 1995 NatWest and Allied Irish
17 Bank were at UC00?

18 MS DEMETRIOU: Yes, which is the point in the table. So you
19 were asking me in the table whether Allied Irish Bank
20 and NatWest were at UC00 in 1995. That's the evidence
21 showing that they were.

22 MR JUSTICE ROTH: Yes.

23 MS DEMETRIOU: And then the reason why in that first line of
24 the table -- and so what happens is that you can see
25 from the second of the documents here that the rates are

1 the EEA MIF rates which have gone up.

2 MR JUSTICE ROTH: Yes. So 1995, NatWest and Allied Irish
3 are at UC00?

4 MS DEMETRIOU: Yes.

5 MR JUSTICE ROTH: And in 1995 the Mastercard EEA MIF was
6 1.15?

7 MS DEMETRIOU: Yes, so we can see that.

8 MR JUSTICE ROTH: So it's not at the default?

9 MS DEMETRIOU: It is the default.

10 MR JUSTICE ROTH: No, it's now 1.15.

11 MS DEMETRIOU: No, sir. So going back to the table you
12 have -- it's at 1 until June 1994 because we have
13 documents showing it's at 1. What we then have are
14 documents which I've just shown you saying it was at
15 UC00. But what happened was because UC00 tracked the
16 default MIF, those agreements, those transactions went
17 up with the EEA MIF. So they rose with the EEA MIF.
18 And that's why we don't have a rate there. The rate
19 isn't 1, it's now changed to the EEA MIF rate.

20 And then what you have is the correction of the
21 position which is the letter a month later from NatWest.
22 There is then a review. We see that. There's
23 a discussion between NatWest and Europay. And then you
24 have a correction of the position and our hypothesis is
25 that NatWest is looking at these transactions and

1 thinking, well, why have these rates gone up? And
2 they've spoken to Europay and they've sent revised true
3 bilaterals which then bring the rate down to 1 which is
4 why we then have a white square saying "1" in 1996
5 because it's no longer UC00 and it's reverted to the 1%
6 rate having gone up to the EEA MIF rate. So that's what
7 we say went on and that's supported by the documents.

8 PROFESSOR WATERSON: So you're saying that the number in
9 the 1995 column should be 1.15 but there's nothing
10 actually written there.

11 MS DEMETRIOU: Exactly. So we've been conservative because
12 we don't have -- what we have is UC00 and we have
13 separate documents showing that UC00 tracked the code
14 but we don't have anything relating to NatWest saying
15 this was the rate. So we've been slightly conservative
16 in not writing the figure in. We have just taken
17 Mastercard's table and shaded it.

18 MR JUSTICE ROTH: And with other banks NatWest we have this
19 helpful exchange. But with Midland, say, where we
20 don't, well, Barclays mostly has rates agreed with the
21 exception of the on-us and Signet which I think was
22 small which we don't have much information about. But
23 if we take Midland. So Midland and Allied Irish Bank
24 you've assumed that -- well, we haven't got any exchange
25 as we do for NatWest. You've assumed that in 1995 it

1 continued at the UC00.

2 MS DEMETRIOU: We have because we haven't found anything to
3 the contrary.

4 MR JUSTICE ROTH: We just don't know. But you've made the
5 assumption because there's no document showing a change.

6 MS DEMETRIOU: No; and also on the basis, of course, of
7 Mastercard's case that where there is an arrangement, it
8 rolls on unless anything contrary is said.

9 MR JUSTICE ROTH: Yes, thank you.

10 Closing submissions by MR SMOUHA

11 MR SMOUHA: Good morning, sir. Good morning, members of the
12 Tribunal. I don't want to start on a grumpy note but
13 I do, sir, want to put down a marker that we were
14 timetabled to have a day. We sat 45 minutes extra
15 yesterday to make sure that my learned friend had in the
16 end more than a day. We were sitting at 10 today in
17 order to give us an extra half hour in replacement to
18 the extra hour that we should have had yesterday because
19 my learned friend wanted to keep that time. We will try
20 to cover everything, sir, I am sure you'll appreciate
21 but I've told Mr Cook that because this extra time has
22 been dealt on UC00 it's coming out of his time with the
23 issues he has to deal with.

24 MR JUSTICE ROTH: The arbitration does come out of both
25 times.

1 MR SMOUHA: 20 minutes each, sir.

2 MR JUSTICE ROTH: Mr Smouha we will manage, don't worry.

3 MR SMOUHA: We will, sir. But I'm sure you appreciate --

4 MR JUSTICE ROTH: We do.

5 MR SMOUHA: I just want to deal straight away with the
6 question that you asked the parties last night in
7 relation to what happened after 2009 because it's
8 interesting and striking and while it's being addressed.

9 The question that you asked my learned friend
10 yesterday evening {Day9/184} was:

11 "Mr Justice Roth: ... if you can tell us whether
12 it's suggested that the UK MIFs did eventually fall like
13 the EEA MIF. It didn't do so immediately, but are you
14 saying that it did do so a bit later?"

15 And my learned friend said she would come back to
16 that tomorrow.

17 Sir, there is evidence in relation to that in the
18 trial bundle, in the disclosure, which I want to show
19 you. My learned friend said to you a few minutes ago
20 said this in relation to:

21 "Mr Justice Roth: And then Mastercard did introduce
22 an EEA MIF.

23 "Ms Demetriou: Correct.

24 "Mr Justice Roth: And the UK MIF in 2009.

25 Ms Demetriou: Sir, that's right. You can see the

1 EEA MIF at that point it's a different structure
2 following the Commission decision, and so the documents
3 show they were searching for a MIF that they thought
4 would be compliant exemptible and it's a different
5 structure and we just don't know in terms of the
6 documents how that was factored in to decision-making in
7 relation to the UK MIF."

8 I mean, that is a -- we don't know when -- I mean,
9 that's an assumption as to there being any such
10 factoring in.

11 Sir, the position is, as I understand, what my
12 learned friend is saying is, that within the evidence
13 that you have there is no evidence that the EEA MIF that
14 was then introduced did factor into the decision-making
15 in relation to the UK MIF. We do know from the
16 documents we have that the UK MIF was reduced, and we do
17 know from the documents why it was reduced for 2010 and
18 2011. If we could go to {C21/218/1}. This is the
19 agenda, the agenda papers for the European Exchange
20 Committee on 24 September 2010 and you will see in
21 the -- under the subject "UK Intra-country Pay Later POS
22 Fallback Interchange Fees", and you will see -- sir, can
23 I just ask the Tribunal to read -- I won't read it all
24 into the transcript -- the first three bullets of the
25 executive summary.

1 So you see, members of the Tribunal, that the
2 proposal was to reduce the intra-country interchange
3 fees, the UK domestic fees, for all consumer cards
4 including Standard and World Signia cards, to mitigate
5 the forecasted increase of the UK domestic average
6 interchange fee.

7 If we go to page 3 {C21/218/3}, you will see
8 a table, and looking at the top box you will see that
9 the fifth column shows the current rates valid as from
10 October 2010, bearing in mind that this paper is from
11 September 2010, and then the proposed rates in the last
12 column. And just looking at the base rate, you have
13 them all there, the current rate valid as from
14 October 2010, base 1.05%, and the proposed rate 1%,
15 which I understand was then implemented, so in other
16 words a base standard rate for 2011 of 1%. So there
17 were reductions to the UK MIF.

18 Why were there reductions to the UK MIF? For the
19 reasons identified in the executive summary and which
20 are discussed in this paper. Not only that -- in other
21 words, UK domestic considerations.

22 Not only that. If we go to page 6 {C21/218/6} you
23 will see as part of the consideration of this proposal
24 there was a consideration of the competitive landscape
25 for the UK consumer cards segment. And in that table

1 you will see the consideration of Visa's charges at that
2 time.

3 Then it says:

4 "While the overall Amex issuer proposition remains
5 more attractive on a transaction basis MasterCard, as
6 a scheme, ensures that costs are adequately balanced
7 between issuers and acquirers to guarantee a broad
8 acceptance of its cards."

9 And then:

10 "According to an RBR report, Amex is currently
11 accepted by 650,000 merchants ..."

12 And so on.

13 So what, sir, do we see from this document, which as
14 I say is in the trial bundle and the disclosure for this
15 trial?

16 First, that the UK MIFs set by Mastercard for 2010
17 and then on the basis of this document proposed but then
18 as I understand it accepted for 2011 were reduced, very
19 marginally.

20 MR JUSTICE ROTH: This is the -- I'm just trying to

21 understand these rates. The table below and then we
22 have the rate. It says estimate average interchange,
23 and it says the current rate 0.9.

24 MR SMOUHA: Sir, do you want to go back to the table that
25 shows the current rate?

1 MR JUSTICE ROTH: I just want to compare them.

2 MR SMOUHA: On page 3.

3 MR JUSTICE ROTH: The one that we have on page 6 --

4 MR SMOUHA: Yes.

5 MR JUSTICE ROTH: -- says the current rate is 0.9 and the

6 proposed is 0.87.

7 MR SMOUHA: Those are averages. Competitive review

8 estimated point of sale average interchange fee.

9 MR JUSTICE ROTH: So are they weighted averages then? Or --

10 so their average of it must be weighted average.

11 MR SMOUHA: Must be.

12 MR JUSTICE ROTH: Because the current rates were well, we

13 know what the current rates were because we have them in

14 the previous table and it was 1.05 and 0.9.

15 MR SMOUHA: 1.15 --

16 MR JUSTICE ROTH: And then a few others so yes, it must be

17 an average. I see. It will be an average of them all.

18 Yes, it must be a weighted average. I see. That was my

19 only question. Yes.

20 MR SMOUHA: Yes, UK averages.

21 MR JUSTICE ROTH: It must be a weighted average, that's why

22 it's different.

23 MR SMOUHA: Sir, we can make the comparison and you can do

24 this, sir, separately. Going back to the table on

25 page 3.

1 MR JUSTICE ROTH: No, I see.

2 MR SMOUHA: You can make the comparison. But, sir, as
3 I say, three points.

4 First of all the UK MIFs were marginally reduced in
5 2010 and 2011 -- sorry, four points.

6 Secondly, we know the reasons why they were reduced
7 because of particular considerations in relation to the
8 effect and success of the cards which had been
9 relatively recently introduced.

10 Third, we see in the proposal a consideration of
11 competitive factors in relation to the domestic
12 UK market, including Visa.

13 Fourth, there is no reference whatsoever to the
14 EEA MIF.

15 MR JUSTICE ROTH: Yes.

16 MR SMOUHA: Sir, for the Tribunal's note, the EEA MIF from
17 July 2009 onwards had different rates for different
18 cards and categories, as my learned friend said,
19 an entirely different structure, but overall had
20 an average -- weighted average -- of 0.3% credit.
21 Different rates for credit cards and debit cards.

22 MR JUSTICE ROTH: Yes, we're talking about credit cards.

23 And where do you get that from?

24 MR SMOUHA: We'll give you a reference, sir.

25 MR JUSTICE ROTH: Thank you.

1 MR SMOUHA: I'll come back, of course, sir, to the point we
2 made in opening and we will emphasise again in closing
3 about the reduction in 2008 of the EEA MIF to zero as
4 being in effect a control test for the very causation
5 case that is advanced in this case but I'll come back to
6 that.

7 Sir, back then to overview of the position and then
8 our submissions supplemental to our written submissions
9 in relation to each of the periods.

10 Sir, on any view, the positive case advanced by
11 Mr Merricks at the close of this trial is very
12 significantly narrower than the unitary pleaded case in
13 paragraph 103(b) of the particulars of claim, even
14 though that pleading was amended only shortly before
15 trial.

16 Sir, we submitted in opening submissions in writing
17 and orally that there is no part of the class
18 representatives' case as to a suggested causal link in
19 fact between the EEA MIFs and the UK interchange fees in
20 the claim period which has evidential support in the
21 evidence and at the conclusion of the trial that
22 position is confirmed. For the reasons which we've set
23 out in detail in our written submission, there are no
24 findings favourable to what is left of that factual
25 causation case that the Tribunal should make and the

1 tribunal should, taking into account all of that
2 evidence, both the documents and the witness evidence,
3 fact and expert, make the findings of fact that we have
4 invited for each of the periods of focus, and should
5 reach the conclusions we propose which in sum reject
6 that there is any causation in fact as pleaded or
7 at all.

8 Sir, the reason we have in our written submissions
9 set out for each period the findings of fact that we
10 invite the Tribunal to make, as well as more general
11 conclusions at the end of each section, is to identify
12 those matters on which the Tribunal has seen or heard
13 evidence which go to the causation in fact case that
14 Mr Merricks should have addressed. They are the hurdles
15 in the way of his case.

16 The fact that you do not have an equivalent set of
17 findings of fact proposed by Mr Merricks, and they
18 really should be coming from the claimant side to show
19 how the pleaded case is supposed to be established, the
20 fact you do not have an equivalent set illustrates the
21 problems with the case as put.

22 Sir, there was yesterday afternoon a classic example
23 of the problem and it's worth using it immediately as
24 an illustration.

25 In paragraph 34 of our written submissions, page 9

1 {A/31/11}, we invite the Tribunal to make findings of
2 fact in number 34(1) on the prevalence of bilateral
3 agreements, and we invite you to find that they were
4 ubiquitous or virtually so during this period.

5 And in (7) on the next page we invite findings as to
6 the rates of the ubiquitous bilateral agreements and in
7 particular the last sentence of paragraph (7):

8 "By August 1994 the bilateral agreements covering"
9 --

10 Sorry, the last sentence:

11 "Every bilateral agreement between the six largest
12 banks was at these rates."

13 Now, these findings are directed as an obviously
14 critical issue both as to causation, and as to direct
15 application. What findings is Mr Merricks inviting you
16 to make on those points? We have absolutely no idea.
17 To what extent are they resisting the making of the
18 finding we're asking for?

19 After the exchanges yesterday afternoon with the
20 Tribunal, we have no idea. Transcript {Day9/149:7} --
21 sorry, page 148 -- no it is 149. Line 7, my learned
22 friend said:

23 "Ms Demetriou: Sir, I think the way of squaring the
24 circle is that the evidence shows -- we say that the
25 evidence does establish and Mr Van den Bergh said that

1 the UC00 code really does relate to a default rather
2 than a true bilateral but we're not seeking to say
3 Mr Hawkins is wrong about his agreement with Midland.
4 We think the most likely scenario is that they agreed."

5 Then, sir, you asked, or added, as it were:

6 "Mr Justice Roth: Or that NatWest had agreements
7 with all the major banks."

8 And my learned friend said:

9 "Or that NatWest had agreement with all the major
10 banks."

11 She was agreeing with you that it is not being said,
12 we are not seeking to say that Mr Hawkins is wrong
13 either about his evidence of making an agreement with
14 Midland or of making -- or that NatWest had agreement
15 with all the major banks.

16 So, now, it is confirmed that that evidence is not
17 challenged and there is no obstacle to the Tribunal
18 finding prevalence of bilaterals between NatWest and all
19 the major banks. Is it suggested that the position was
20 different as between other major banks? What finding of
21 fact are they asking for? Or perhaps none?

22 Now, sir, the discipline of identification by the
23 class representative of facts that the Tribunal is asked
24 to find which could even potentially make out
25 a causation case in fact, if accepted, is absent. And

1 as you know we say it is absent because it is not
2 possible for the class representative to identify a set
3 of facts which together amount to such a case, and which
4 it has any argument even to say that there have been
5 evidence at trial.

6 Now, sir, that certainly makes our life easier and
7 in some ways it makes the Tribunal's life easier because
8 for many of the findings we invite the Tribunal to make
9 there is no contrary factual case advanced.

10 MR JUSTICE ROTH: Well, I think the factual finding they are
11 asking us to make is that in all the cases where we have
12 green in the table, the arrangements between the banks
13 as reflected in green shading, were at UC00, and UC00 is
14 the default, represents the EEA default and therefore
15 either there was no agreement and it was just a default,
16 albeit entered for processing purposes by Europay as
17 a specific rate using that code. Or if there was
18 an agreement then it tracked the EEA default. That was
19 my understanding of the finding we're being asked to
20 make.

21 MR SMOUHA: Sir, if that's the only finding you're being
22 asked to make, that provides no assistance to you, sir,
23 because obviously that issue, the difference between
24 there being no bilateral agreement or a bilateral
25 agreement at a rate is fundamental in particular to the

1 direct application issue, which as I'll come to in
2 a moment, it is now being suggested to you in closing
3 you should make findings on that 50% of all transactions
4 in the claim period up to 1997 were processed at the
5 EEA MIF.

6 Now, sir, as I pointed out to you, the specific
7 findings that we ask you to make about the ubiquity, the
8 prevalence of the making of bilateral agreements
9 requires the Tribunal to consider on the evidence what
10 findings you can make as to the making of bilateral
11 agreement with the view to then considering also --
12 which I'm going to come to in detail -- why bilateral
13 agreements were made at the rates that they were.

14 Sir, this "either/or" submission in relation to the
15 green provides you no assistance in relation to that.
16 And as I say, the concession yesterday, the concession
17 made in oral argument under the Tribunal's questions
18 rather than it being spelled out in the written
19 submissions is seriously problematical. But it's
20 seriously problematical for Mr Merricks' case because it
21 means in relation to that kind of finding, I give that
22 only as an example, it means that there is in our
23 submission no basis on which the Tribunal can reject --
24 not make the findings that we ask in relation to that.

25 So, sir, what actually is left of the pleaded case

1 that is actually in dispute, that is still positively
2 advanced?

3 MR JUSTICE ROTH: Can I just stop you one moment. At some
4 point, it need not be now, if you go back to the
5 paragraph you were just taking us to in your closing --

6 MR SMOUHA: 34, {A/31/11}.

7 MR JUSTICE ROTH: Subparagraph (6) the reference rate. If
8 at some point you could give us the references to the
9 reference rates as to where they come (inaudible). Is
10 it just Mr Hawkins' oral evidence or any document?

11 MR SMOUHA: Yes, the document. So the "current" and
12 "currently in adoption" are quotations from documents.

13 MR JUSTICE ROTH: Yes, because they're not -- it's not
14 a criticism, they're not footnoted in that passage so
15 they are later perhaps but at some point --

16 MR SMOUHA: Indeed. Just to be clear, the reason why the
17 findings in paragraph 34 are not footnoted at all --

18 MR JUSTICE ROTH: It's a high level summary, I appreciate,
19 of what comes later.

20 MR SMOUHA: Correct but we'll give you -- in fact Mr Leith,
21 I'm grateful.

22 MR JUSTICE ROTH: I think it's page 27.

23 MR SMOUHA: Paragraphs 76-79.

24 MR JUSTICE ROTH: But I'm still not quite clear but you'll
25 take us to it where they are actually set out.

1 MR SMOUHA: You mean as percentages?

2 MR JUSTICE ROTH: Yes, exactly.

3 MR SMOUHA: They were not, as you recall.

4 MR JUSTICE ROTH: Well, we know there wasn't a formal

5 decision that these are the rates to be circulated, we

6 know that and we were told the reason why not. But

7 where then do we get the 1.3 and the 1 from, that's the

8 point.

9 MR SMOUHA: Yes. Sir, documents that show that the

10 reference rates were at 1.3 and 1.

11 MR JUSTICE ROTH: Exactly. But come back to that in your

12 own time.

13 MR SMOUHA: Sir, on -- sorry, on a disrupted basis but now

14 catching up with your previous question for a reference

15 which I should have had when I made the point. In

16 relation to the EEA MIF being 0.3% weighted average.

17 MR JUSTICE ROTH: In July 2009 onwards, you said?

18 MR SMOUHA: 2009 onwards. The references are -- we don't

19 need to turn this up -- {C20/340/9} and that's the

20 undertaking that was given to the Commission that that

21 would be the weighted average. And {C21/196/1} which is

22 confirmation that it has not gone above that a year

23 later.

24 MR JUSTICE ROTH: Thank you.

25 MR SMOUHA: You'll get the sense, sir, from yesterday and

1 today that Mr Donnelly is going to be seriously
2 aggrieved on our team that he's not been given the
3 opportunity to say something. But I'll work on that,
4 sir.

5 MR JUSTICE ROTH: We appreciate his absolutely essential
6 back-up.

7 MR SMOUHA: Absolutely. No doubt whatsoever about that,
8 sir.

9 So, what is left of the pleaded case and what is
10 not?

11 First of all, for May 1992 to November 1997. First
12 of all, first point, there is no floor case. Now, the
13 Tribunal will recall that I made the point at the end of
14 the factual evidence that Mr Merricks had not raised the
15 floor allegation in cross-examination and the Tribunal
16 will see from our submissions that we made this point
17 again, paragraph 33.

18 The word "floor" does not appear in Mr Merricks'
19 written closings, and it was evident to us from
20 paragraph 9 of his written submissions -- if we could
21 open that {A/29/5} -- where it is said in the second
22 sentence that Mr Merricks suggested he abandoned the
23 guidance allegation:

24 "His case remains that but for the unlawful
25 Intra-EEA MIFs domestic IFs would have been lower

1 throughout the Full Infringement Period because the
2 Intra-EEA MIFs operated as 'guidance' and/or 'benchmark'
3 and/or 'starting point' through the causal mechanisms
4 summarised ... above."

5 No reference to floor there. We apprehended on that
6 basis that the position remained as we'd understood it
7 from before on the basis of it not having been
8 cross-examined on that there was no such case advanced.

9 There is no reference in the written closings to
10 floor allegation. There is no reference to floor or to
11 minimum price recommendation, or to minimum starting
12 point, or to minimum level.

13 Most extraordinarily yesterday when the Tribunal
14 asked my learned friend to confirm that the floor
15 allegation is pursued my learned friend said this,
16 transcript {Day9/25:7}, sir, you asked:

17 "Mr Justice Roth: You do go further than saying it
18 had ..."

19 That should be "influence".

20 "Mr Justice Roth: You do go further than saying it
21 had an inference, you say it was the floor.

22 "Ms Demetriou: Well, we say --

23 "Mr Justice Roth: And one of your alternatives."

24 MR JUSTICE ROTH: It should be:

25 "That's more than an influence isn't it?"

1 MR SMOUHA: "Mr Justice Roth: That's more than an inference,
2 isn't it?"

3 "Ms Demetriou: Well, sir, what we say the Tribunal
4 should find is that -- it may for some banks have
5 operated as a floor. So in some bilateral negotiation
6 it is may have operated as a floor in the negotiations.
7 Mr Warren's evidence indicates that it did operate as
8 a floor for him."

9 So what sort of case is that to advance in closing
10 submissions at the end of a four-week trial? It may be
11 that in some negotiations between some banks it did
12 operate as a floor. That is the class representatives'
13 case that is being tried on pleadings which require it
14 to be established on the balance of probabilities by
15 reference to evidence that what is alleged as fact in
16 the pleading happened / is true. There is no floor case
17 that has been suggested on the evidence or that is open
18 on the evidence or that was put to any witness, and,
19 with respect, the Tribunal is bound to reject that part
20 of the pleaded case.

21 MR JUSTICE ROTH: Yes, well, we have that point and you see
22 it's pursued if one reads down the page.

23 MR SMOUHA: The guidance case, sir?

24 MR JUSTICE ROTH: The floor point.

25 MR SMOUHA: I'm moving on, sir.

1 The guidance case, not including floor, and
2 presumably not including minimum and not clear where
3 they go as far as benchmark. But the case, as we
4 understand it, pursued in closing in relation to this
5 period up to 1997 is a very loose guidance case which is
6 maintained for this period. Essentially on the basis of
7 the argument that, and I quote "banks were able to
8 negotiate bilateral agreements with a backdrop of the
9 EEA MIF being, it's contended, a fallback throughout the
10 period and that that affected the rates agreed in the
11 bilaterals".

12 So that's the guidance case, I'm just going to come
13 back to that, but such as is pursued. Then there is in
14 relation to this period direct application -- the
15 argument that 50% of all domestic transactions across
16 this period were actually processed at the cross-border
17 EEA MIF rate.

18 For 1997 to 2004, all that is left is the hierarchy
19 and weighted voting case and infection which is
20 maintained in the written submissions, though nothing
21 further added to that yesterday.

22 And for 2004 to 2009 there is a resurrected and very
23 narrow guidance argument, which I will deal with, and
24 also infection.

25 That, sir, is a very shrunken construct compared to

1 the edifice in the pleading, and it shrivels over time
2 chronologically down to really nothing of substance and
3 upon examination it can be seen and we will show and
4 I will further address today and with Mr Cook why there
5 is actually nothing left at all.

6 Now, sir, to say that the direct application part of
7 a case has grown would be an understatement.

8 In opening the suggestion was floated that over
9 latter years some new licensees may not have had
10 complete bilateral agreement coverage, and that certain
11 member banks chose only to agree bilaterally particular
12 categories of a transaction. The reference is
13 paragraphs 53 and 54 of Mr Merricks' written opening.
14 And also that there was some documentary evidence of
15 domestic transactions being processed at the
16 intra-EEA MIF. That was paragraph 71. But it was said,
17 as you'll recall, that the volume of them would have to
18 be the subject of a further separate trial. And that
19 obviously was firmly put down as it -- as it was
20 absolutely right, sir, with respect to do so.

21 That has become a monolith of a case that half the
22 market from the beginning to the end of this period,
23 the 1997 -- sorry the 1992 to 1997 period was subjected
24 to the EEA MIF. And not by agreement apparently. This
25 was allowed to happen and allowed to continue to happen

1 by absence of agreement.

2 Now, sir, you would think that if that was true, or
3 anything like it, that that would have been known and
4 obvious to the banks, and to MEPUK. It would have been
5 all over the documents, and the cross-examination of
6 Mr Hawkins would have been suggesting to him that his
7 evidence about the prevalence of bilateral agreements
8 was -- it would've had to have been suggested to him was
9 a fabrication.

10 MR JUSTICE ROTH: Well, it doesn't have to be put as
11 a fabrication, it could be that he misremembered. You
12 don't have to say it's --

13 MR SMOUHA: Sir, with great respect, in reality, bearing in
14 mind the nature of Mr Hawkins' evidence in relation to
15 the making of bilaterals, it would have been very
16 difficult to put to him that it was just a mistake of
17 recollection, bearing in mind the significance and his
18 personal involvement in it, but anyway --

19 MR JUSTICE ROTH: Of course it could be put that way and he
20 would have no doubt responded but it wasn't. All
21 I'm saying is it doesn't have to be said it's
22 a fabrication but it wasn't put that he was mistaken.
23 On what basis it is mistaken it doesn't matter.

24 MR SMOUHA: I'm sorry, sir, you are correct, it doesn't
25 matter. Of course the point is this. What the Tribunal

1 is seeing here is the attempt to fill the vacuum left by
2 the retreat and narrowing of the actual causation case.
3 Direct application is not causation in the sense of the
4 factual causation issues that this trial is mainly
5 focused on, namely to consider what factors caused the
6 UK interchange fees, including the bilaterally agreed
7 rates, the MEPUK set rates and then the Mastercard set
8 rates to be at the levels they were.

9 Rather, in a sense, direct application is the
10 antithesis of causation because Mr Merricks says that
11 the unlawful rate was applied because banks knowingly
12 allowed it to be applied by not agreeing what rate
13 should be applied.

14 Now that case, the case now advanced as to the 50%
15 of the volume over that period, is absurd in its
16 dimensions, and it is even more divorced from reality
17 and disconnected from the evidence than Mr Merricks'
18 other outlandish and unevidenced suggestions. But it is
19 now the largest part of his case, certainly in terms of
20 concentration of submissions.

21 MR JUSTICE ROTH: Well, for the early period.

22 MR SMOUHA: For the early period -- no, not just for the
23 early period, sir, Mr Merricks' pre-1997 case accounts
24 in his written submissions for 50 pages of his 75,
25 putting substantially all of his eggs in this basket of

1 a case with his half of all domestic transaction finding
2 that he invited you to make at paragraph 123 on page 50
3 of his submissions.

4 Now, we -- that is Mr Cook and I -- will wade
5 through the shells today in detail to see whether there
6 is anything left on analysis of the evidence out of
7 which the Tribunal could even begin to cook an EEA MIF
8 omelette.

9 Now, sir, in relation to 1997 to 2004 of course you
10 will appreciate that the significance of this 50% of all
11 domestic transaction case and its credibility falls very
12 quickly to be tested when we consider what is left of
13 Mr Merricks' 1997 to 2004 case because from
14 1 November 1997 MEPUK set the UK MIFs at 1.3% standard
15 and 1% electronic. Now, of course Mr Merricks' case was
16 always very difficult in relation to the 1997 to 2004
17 period because, as we explored in opening, you only need
18 to look at the rates set by MEPUK and to look at the
19 changes made to the rates set by MEPUK over the
20 seven-year period until Mastercard took over the setting
21 and look at the categories introduced and look at how
22 those quite obviously had nothing to do with the
23 EEA MIF, with its different changes, at different times
24 with different categories, to see that there was no
25 relevant relationship there. That was even before

1 taking into consideration the unchallenged evidence of
2 Mr Peacop and Mr Hawkins. But before considering what
3 is left of Mr Merricks' causation case in relation to
4 MEPUK's setting of rates of 1.3% and 1%, the Tribunal
5 will now bear in mind that Mr Merricks takes on a new
6 challenge by contending that in the period immediately
7 prior to that, 50% of all domestic transactions were
8 processed at the EEA MIF rate. And the credibility of
9 that must be tested not only against the evidence in
10 that period but also by asking whether it is credible in
11 view of what we know happened with effect from
12 1 November 1997. So Mr Merricks would have you believe
13 that for years the acquiring banks paid and the issuing
14 banks received fees at the EEA MIF level on half of all
15 transactions, in what combination as between banks we
16 don't know, on this thesis, and that then as we know
17 MEPUK separates at 1.3% standard, 15 basis points higher
18 than the EEA MIF standard rate. 15 basis points.

19 If that had happened that would have been a major
20 change in the market with significant financial impact
21 and would have caused major disruption to the system.
22 It would certainly have been noted and mentioned in
23 contemporaneous documents. And what this shows
24 of course is that it didn't happen. 50% of transactions
25 were not being processed at the EEA MIFs nor indeed any

1 number of transactions other than at a --

2 MR JUSTICE ROTH: It might have triggered, on Ms Demetriou's
3 argument, the -- 90% or 75% rule. They wouldn't have
4 accepted it.

5 MR SMOUHA: On any view it would have been a major issue,
6 and even that must be an understatement.

7 Sir, in our submission it's obvious, just from that
8 point, just considering that point, that the actual
9 volume of transactions that were processed at the
10 EEA MIF level cannot have been significant because no
11 significant impact of the introduction of the UK MIF
12 into the rule book was noted or commented on.

13 Materially all transactions were being processed at 1.3
14 and 1% before and the move therefore for the MEPUK
15 setting of a UK MIF which they did on the basis of the
16 reference rates of 1.3 and 1% was seamless, was not
17 a cause for comment, which is why it provoked none.

18 Now, sir, as I say, more on that later from my
19 learned friend Mr Cook in terms of actual analysis of
20 the evidence that you have which enables you to form
21 a conclusion that the volume of transactions processed
22 was at most de minimis.

23 But, sir, I would just note that in regard to the
24 new submission that you should find that 50% of
25 transactions prior to 1997 were processed at the EEA MIF

1 rate, the broad axe that my learned friend swung in her
2 submissions yesterday and has deployed in their written
3 submissions, comes from a very different armoury than
4 Lord Justice Green's -- than the weapon
5 Lord Justice Green was referring to in the London &
6 South Eastern Railway v Gutmann case my learned friends
7 refer to and rely on in their written submissions.

8 Of course as Lord Justice Green explained, he was
9 not talking about some special weapon fashioned for
10 competition proceedings but to the well-known evidential
11 principle, most usually deployed in resolving quantum
12 issues especially considering loss by relation to the
13 counterfactual but it is a general principle that if the
14 court has limited evidence on a particular factual
15 matter, the court does not decline to make a finding on
16 the issue but must do the best it can with the evidence
17 it has.

18 The principle is that judges must reject what
19 Lord Justice Green describes as artificial demands for
20 production of comprehensive evidence and must do the
21 best they can with the material they have.

22 MR JUSTICE ROTH: Even that has limits as there's a full
23 discussion I think of broad axe in this -- these
24 proceedings in the Supreme Court and Lord Briggs has
25 made the point you can get to a point where you just

1 can't. You do not have evidence -- you can't make
2 a finding.

3 MR SMOUHA: Sir, what can actually start to happen, as it
4 were, the absence of evidence actually starts to weigh
5 the other way in relation to being able to establish it.
6 So, yes, first of all there's that limit.

7 Secondly, sir, but for the reasons I'm going to
8 explain in a moment, that's not the problem here.

9 And secondly there can be the debate about the
10 extent to which the broad axe can be used in other than
11 quantification context. Again let's not trouble with
12 that.

13 The point, sir, that I want to make is that the
14 broad axe -- the principled broad axe approach is
15 exactly the approach we invite you to take, that is to
16 look at the evidence there is, not least the prevalence
17 of bilateral agreements but also much else, and to
18 conclude that the volume of transactions processed at
19 the EEA MIF was, on the balance of probabilities, at
20 most de minimis.

21 It is my learned friend who makes the artificial
22 demand for comprehensive evidence, saying that because
23 the transaction data which did exist, which may have
24 enabled a precise answer to be given is not available,
25 that the Tribunal should proceed effectively as if there

1 were no evidence and pluck a large percentage out of the
2 air.

3 So, sir, this is yet again on the part of
4 Mr Merricks a plea to this Tribunal to make findings
5 that have no basis in the evidence and the facts. That
6 is the armoury from which this submission as so many
7 others comes, and, sir, that axe that they seek to asway
8 may be broad, indeed overreachingly broad, but as are so
9 many of the allegations of factual causation that are
10 pleaded in this case and are in issue, it's an axe which
11 is legally blunt.

12 Sir, the same blunt axe, the same invitation to the
13 Tribunal to make findings which are divorced from the
14 evidence, indeed inviting the Tribunal to reject or
15 ignore unchallenged evidence and the contemporaneous
16 documents is then wafted around the air around
17 Mr Merricks' residual submissions in respect of the 1997
18 to 2004 and 2004 to 2009 period.

19 Sir, I want to deal with those both relatively
20 shortly.

21 First our written submissions are comprehensive on
22 both periods, and, with respect, Mr Merricks' written
23 submissions are exiguous on it.

24 We are told, sir, yet again in the Tribunal is told
25 yet again in the written submissions that the Tribunal

1 must remember that even if there isn't factual causation
2 established on the facts of this trial, even if the
3 EEA MIFs did not in fact have any operative effect in
4 fact on the UK MIFs from 1997 onwards to the end of that
5 period, the legal causation question, the but for
6 question, the counterfactual question will be different
7 and for another day.

8 Sir, I hope I can fairly sum up the Tribunal's
9 response to my learned friend in openings and again
10 yesterday is: thank you, got that point.

11 But remarkably bravely, sir, I would not have
12 ventured this: it keeps rearing its noisy head again,
13 admittedly only 29 times in the written closing compared
14 to the 60 plus in the opening, or whatever it was.

15 In relation to the 1997 to 2004 period you are told
16 that even if the 90% and 75% rules were never threatened
17 to be used and had no operative effect in fact,
18 nevertheless it might have been different in the
19 counterfactual. They say in paragraph 142.3 on page 55,
20 {A/29/55}:

21 "Ultimately the relevant question in this litigation
22 is the effect these Rules would have had in
23 circumstances where the fallback was zero. A net
24 acquirer would have had a greater incentive to rely on
25 the Rules in such circumstances because the gain would

1 have been correspondingly greater."

2 In relation to 2004 onwards you are told at
3 paragraph 158 {A/29/60} on page 60:

4 "These examples indicate that once the UK MIFs were
5 brought under the control of the European Interchange
6 Committee the intra-EEA MIFs became a reference point
7 and source of guidance. If the intra-EEA MIFs had been
8 radically different, the European Interchange Committee
9 may have acted differently in respect of the UK MIFs.
10 The extent to which it would have done so is
11 a counterfactual question."

12 Well, sir, you know, because you've been told
13 ad nauseam what Mr Merricks thinks is the relevant
14 question in the litigation and that he would rather be
15 at a trial considering what would have happened if the
16 fallback was zero than at this trial addressing what
17 happened in fact and whether his allegations of fact in
18 his pleaded case are correct.

19 But all these references to the counterfactual do is
20 to come a cat's whisker from acknowledging and admitting
21 that, to use the two examples quoted there, to admitting
22 that the 90% and 75% rules were not operated or
23 threatened to be operated or a factor in MEPUK's
24 decision-making and that in relation to the second one,
25 the Mastercard European Interchange Committee creating

1 new categories in recognition of and to encourage
2 technological innovation, that the level of the EEA MIF
3 was not a factor in the decision-making process.

4 Now, sir, I want to emphasise to the Tribunal that
5 the effect of Mr Merricks limiting so severely the
6 allegations that are maintained in relation to the 1997
7 to 2004 and 2004 to 2009 periods is not that any issues
8 are removed from the scope of the Tribunal's issues for
9 determination and findings by the Tribunal, the Tribunal
10 must make findings on the full width of the pleaded
11 allegations, so far as they are allegations of causation
12 in fact.

13 MR JUSTICE ROTH: Well, I've got that point and I think in
14 the extract you showed in the transcript I made clear to
15 Ms Demetriou we have to decide whether it was a floor
16 because that's what's being alleged so we have that
17 point.

18 MR SMOUHA: I know you have, sir, forgive me for making it
19 again but as I'm sure you appreciate the importance of
20 -- that I make that as a submission not just in terms
21 of, as it were, with respect what the Tribunal should
22 and must do, but to emphasise the importance of that for
23 Mastercard.

24 MR JUSTICE ROTH: No, but I just say that we've got the
25 point so if you're worried about time, move on.

1 MR SMOUHA: Very good, sir. What I was going to do then --
2 sir, you know then the point -- I was going to make the
3 point by reference specifically to the pleading.
4 I don't need to go back to paragraph 103(b) but you
5 know, sir, that the Tribunal knows how that matter is
6 pleaded --

7 MR JUSTICE ROTH: Yes.

8 MR SMOUHA: -- on a unitary basis and in particular -- and
9 this is relevant, sir, to when we then consider what
10 allegations are left in relation to those later periods,
11 that when you read, sir, the chapeau to paragraph 103B
12 and the further lines in relation to what the allegation
13 of fact is, it is that the intra-EEA fallback MIF
14 operated -- key word "operated" -- as a floor and all
15 guidance etc. for the setting of the MIFs. That is the
16 allegation of fact which has to be determined.

17 So next question. Does Mr Merricks in closing
18 submissions allege that for the period 1997 to 2004
19 MEPUK set the -- for the period that MEPUK set the
20 UK MIFs as to category and rates using the EEA MIF as
21 a floor or guidance or minimum. The answer to that is
22 no, subject to the one extremely narrow argument that
23 Mr Merricks said he can maintain which is that the 90%
24 and 75% rules had what he calls pull in the background.
25 And, sir, that limitation is made expressly clear in

1 paragraph 195.1 of the written submissions on page 70.

2 I'll address in a moment the pull argument and why -- if
3 that is open at all, why it's wrong in any event but,
4 sir, as you -- and I'm grateful, sir, for the clear
5 indication, that still means that the Tribunal -- that
6 a determination is necessary in relation to the 1997 to
7 2004 period -- that MEPUK did not set the UK MIFs with
8 the EEA MIFs as a floor or benchmark or use them as
9 guidance in its decision-making.

10 So, sir, let me move, as I said I would do, to look
11 specifically at the remaining allegations in relation to
12 1997 to 2004.

13 Sir, would that be a convenient moment for a break?

14 MR JUSTICE ROTH: Yes. We'll come back at 11.30.

15 (11.20 am)

16 (A short break)

17 (11.34 am)

18 MR JUSTICE ROTH: Yes, Mr Smouha.

19 MR SMOUHA: Thank you, sir.

20 In relation to November 1997 to 2004 Mr Merricks has
21 now clarified that his case on this period is reduced to
22 two issues. First, the hierarchy and weighted voting
23 arguments, paragraph 195.1 of Mr Merricks' written
24 submissions, sir, which as a matter of pleading are
25 separate from the floor and guidance allegation.

1 I'll come back to that. But I'm going to address them
2 now, the allegation in substance.

3 Secondly, the infection allegation which is said to
4 be the alternative case on this period, paragraph 150 of
5 their submissions. That same infection is said to
6 continue throughout this period and indeed to 2009.

7 So, sir, if Mr Merricks fails in relation to this
8 period, all that will be left from November 1997 to the
9 end of the claim period which I'll come to, the
10 resurrected case on guidance after November 2004 when
11 Mastercard Europe took over the setting of UK MIFs.

12 Now, sir, although infection is Mr Merricks'
13 alternative case for this period I'm going to address it
14 first because it looks at whether there is anything of
15 factual causative relevance that is carried over from
16 the previous period. It concerns what actually happened
17 in the setting of the first UK MIFs in 1997, and in the
18 changes made to them between then and November 2004 when
19 Mastercard Europe took over responsibility for setting
20 domestic MIFs in the UK.

21 The first UK MIFs were set at the level of the
22 reference rates which MEPUK had been endorsing for some
23 years at 1.3% for standard and 1% for electronic.

24 Sir, we in our written submissions at paragraphs 77
25 on page 28, this is {A/31/30}, sir, you asked for the

1 identification of documents that show that the reference
2 rates were at 1.3 and 1 and within these paragraphs and
3 the references you have, for example, and, sir,
4 I'll make sure over the lunch break whether there are
5 any more, but for example at footnote 168 {C1/152/1}
6 they're referring to -- this is from Mastercard,
7 December 17, 1991 referring to the standard rate
8 approved as follows from May 1992, 1.1% plus 3p. May
9 1993, 1.35%.

10 MR JUSTICE ROTH: So this is Mastercard?

11 MR SMOUHA: From Mastercard to --

12 MR JUSTICE ROTH: Is it internal, is it?

13 MR SMOUHA: No it's to Europay. So sorry, sir, I've taken
14 this too quickly. Last sentence of paragraph 77 of the
15 written submissions.

16 MR JUSTICE ROTH: MCI wrote summarising a MEPUK meeting,
17 yes. Yes, I have the sentence. If we can go back to
18 the document. A copy of above -- do we have the
19 attachment? "Attached for ... a copy of the above
20 presentation".

21 MR SMOUHA: What we have then is the -- that says:

22 "It is proposed both 'standard' and electronic rates
23 be implemented over two years commencing May 1, 1992."

24 And what then was discussed and we've agreed in
25 January 1992 is an electronic interchange fee of 1% plus

1 3p and the reference is {C1/156/1}, page 2 {C1/156/2}.

2 Not easy to read.

3 Sorry, the presentation you asked for, the
4 attachment is {C1/150/3}.

5 MR JUSTICE ROTH: Ah.

6 "The final report ... has been reviewed
7 ... based ..."

8 That clearly is the attachment, yes.

9 MR SMOUHA: Sir, just in terms of timing can I just identify
10 that within the documents within -- referred to within
11 these paragraphs there are a number that show, refer to
12 expressly the rates of 1.3 and 1. So again for example,
13 but I'm not going to turn them all up, so for example in
14 paragraph 79, the MEPUK decision to maintain rates
15 in 1994, following receipt of the 1993 cost study. And
16 that's the paper referred to at footnote 171, and you
17 have the quotation in footnote 171. The document
18 reference is {C3/203/2}.

19 And then also in the last sentence of paragraph --

20 MR JUSTICE ROTH: What they call fallback was the way they
21 referred to reference?

22 MR SMOUHA: The reference rates are - there are a number of
23 different nomenclatures. It is clear in each case
24 whether they are describing it as standard rates, the
25 fallback rates, the current rates, the rates currently

1 in adoption or reference rates. There's no doubt
2 at all -- there's nothing else that that could be
3 referring to.

4 MR JUSTICE ROTH: Yes, I think there's a note in one of
5 the minutes by the secretary saying actually these
6 aren't formal fallbacks, isn't there, from recollection?

7 MR SMOUHA: So one other is {C3/160/5}. Sir, this is the
8 R&CC meeting of 7 May 1996, footnote 173 so the one
9 referred to in the last sentence of paragraph 79.

10 Sir, what's being considered here is a proposal to
11 change the reference rate and you can see there the
12 standard and electronic rates, the reference rates being
13 described as "current":

14 "Mr Hawkins proposed the following."

15 And that proposal was, as we know, rejected.

16 PROFESSOR WATERSON: And these proposed rates, were they
17 enacted or not?

18 MR SMOUHA: No, sir, not those. That proposal was rejected.

19 MR JUSTICE ROTH: So they stayed at the current of 1.3 and
20 1, yes.

21 MR SMOUHA: And I'm going to come back. That's a document,
22 sir, which I'm going to come back to later in relation
23 to that period.

24 Professor, you'll see in paragraph 74 of our
25 submissions that proposal being rejected and you have

1 the references there, it was rejected as not being
2 sustainable in the marketplace. That's the board
3 meeting of 8 August 1996 {C3/268/9}.

4 PROFESSOR WATERSON: Thank you.

5 MR SMOUHA: So, sir, if one is considering in relation to
6 the infection case, the transaction from reference rates
7 to the MEPUK setting of the first UK MIF, we have
8 identified in paragraphs 170 to 173 of our written
9 submissions the documents which show that the first
10 UK MIF was set at the level of the reference rates which
11 MEPUK had been endorsing for some years.

12 And it is -- I'm not going to go through all of
13 those documents but it is clear from the contemporaneous
14 documents and in particular that MEPUK described what it
15 did as setting the UK MIFs as "the rates currently in
16 adoption and as modified from time to time by the MEPUK
17 board" it is clear that that was a seamless transition.
18 They were simply setting the first UK MIF on the basis
19 of and at the level of the reference rates that were in
20 place at the time.

21 MR JUSTICE ROTH: You say basically any infection came from
22 the reference rates not from the EEA MIF?

23 MR SMOUHA: There's no case that the reference rates were
24 infected, sir, so -- and that's exactly the point, and
25 therefore no infection case that can be contended for

1 transitioning into the 1997 period.

2 Sir, you also have Mr Hawkins' evidence on that
3 point at paragraph 79. I'm not going to go to it.
4 I give that to you for your reference. And indeed, sir,
5 you may think it remarkable that in two days of
6 cross-examination Mr Hawkins was not asked any questions
7 about either the MEPUK R&CC proposal and recommendation
8 to the MEPUK board of 1 October 1997 to set a UK MIF or
9 asked any questions about the board's decision to do so
10 on 10 October 1997, bearing in mind that that was the
11 first UK MIF.

12 In any event, it actually appears from my learned
13 friend's written closing submissions, at paragraph 151,
14 that it is common ground that MEPUK used the reference
15 rates to set the first UK MIF.

16 Now, sir, as I say Mr Merricks has no case that the
17 reference rates were based on the EEA MIF which
18 of course had a different structure and different levels
19 in 1997, and has no case that the reference rates were
20 in any way infected.

21 The evidence of Mr Hawkins that the EEA MIF was
22 irrelevant to MEPUK when it set UK interchange fees was
23 not challenged and is not disputed. We've set out that
24 evidence in our closing at paragraph 194.

25 MR JUSTICE ROTH: Just a moment. Yes.

1 MR SMOUHA: Sorry, sir, and it was not suggested to
2 Mr Hawkins that the EEA MIFs had any effect on the MEPUK
3 reference rate. So if the reference rates were not
4 infected, which they were not, the first UK MIF was
5 virus-free and that is the end of the case on infection.

6 So, sir, it also follows that there is no case that
7 subsequent UK MIFs were infected by the EEA MIFs. This
8 must follow from what is said by --

9 MR JUSTICE ROTH: Before you go to that, to what extent did
10 bilaterals continue after MEPUK set the UK MIF?

11 MR SMOUHA: After 1997?

12 MR JUSTICE ROTH: Yes.

13 MR SMOUHA: Can Mr Cook come back to that?

14 MR JUSTICE ROTH: Yes. You've said the MEPUK approach the
15 UK MIF was not affected but if bilaterals were - if
16 bilaterals continued then that would be irrespective of
17 a UK MIF.

18 MR SMOUHA: Two separate questions. One is, sir, as
19 I understand it the pleaded case and the only case
20 advanced in relation to 1997 onwards in relation to
21 infection is of infection of the MEPUK set UK domestic
22 MIF. So that's the issue that I'm addressing. And then
23 insofar as infection is then maintained through to the
24 2004 period, as a matter of pleading it's being said
25 that infection then also infected Mastercard's setting

1 of the MIF.

2 MR JUSTICE ROTH: Yes, but I think there was some evidence
3 that bilaterals started to fall away once we had
4 a UK MIF. But Mr Cook can pick that up.

5 MR SMOUHA: Yes, sir, if I may.

6 Sir, the point I was making is if for the reasons
7 I've given in terms of the setting of the first UK MIF
8 based on and carrying -- in effect carrying over the
9 reference rates which were not infected, then it must
10 also follow that there's no case that subsequent UK MIFs
11 were infected by the EEA MIFs.

12 In paragraph 152 of Mr Merricks' written
13 submissions, page {A/29/58}, they say:

14 "To the extent that new categories were introduced
15 in this period, they were priced by reference to the
16 existing categories."

17 On the other hand, the alleged infection starts in
18 1997 and is said to run continuously by reference to the
19 alleged initial infection. So there isn't a -- any
20 reinfection case applying only to a later time.

21 MR JUSTICE ROTH: Yes.

22 MR SMOUHA: Sir, that also follows from the fact that the
23 hierarchy and weighted voting allegation and the
24 infection allegation are run as alternatives to each
25 other because on the infection alternative the EEA MIFs

1 do not act as guidance on MEPUK's subsequent decisions
2 to vary the UK MIFs. The argument is only that MEPUK
3 failed to eradicate the infection that set in at the
4 outset of this period with the first UK MIFs.

5 Sir, one must stand back to ask anyway what the
6 infection allegation is in substance other than just
7 something to say if there is no new active causal fact
8 that can be found in this time period. It's in truth no
9 more than a run-off claim lasting 12 years. Whereas the
10 Tribunal of course has previously ruled that only
11 a one-year interchange fee run-off claim was realistic.

12 Factually, again standing back and thinking about
13 the reality, it is as weak a case as one can imagine
14 because MEPUK, like Mastercard after it, kept the MIFs
15 under review and made changes to them based on the
16 circumstances of the day, including, in particular, the
17 introduction of the new UK MIFs by Visa from time to
18 time. So they were not subject to any latent influence
19 of the EEA MIFs on the initial UK MIFs which even in
20 this period, again, just standing back from it and
21 considering it, one must remember had been fixed up to
22 seven years earlier.

23 Whenever MEPUK changed UK MIFs or set new UK MIFs it
24 did so on the basis of cost studies, and commercial and
25 competitive factors, still in this period most notably

1 Visa's UK MIFs.

2 The detail of all of that, sir, is set out in our
3 written closings at paragraphs 182 to 193. That is
4 central to the correct analysis of causation in the
5 factual world in this period and we invite the Tribunal
6 to make the factual findings that we see taking the
7 evidence into account.

8 MR JUSTICE ROTH: What I think Mr Merricks says in his
9 closings, the cost studies did operate as a ceiling, in
10 other words they got cost studies as we saw I think
11 every two years and they looked at those costs and
12 simply realised, well, we couldn't go above that because
13 we'd be in trouble with the regulators, and that that's
14 the role cost studies play. Are you saying it's more
15 than that?

16 MR SMOUHA: Can I show you, sir, the formulation of the
17 finding that we invite you to make in relation to cost
18 studies?

19 MR JUSTICE ROTH: Yes, it's --

20 MR SMOUHA: So page 56 of our submissions, paragraph 169(4)
21 {A/31/58} in relation to the basis on which the
22 reference rates had been set. And then in relation to
23 subsequent changes, (9), 169(9).

24 MR JUSTICE ROTH: It doesn't say much about cost studies?

25 MR SMOUHA: No, and then in terms of the -- the first point

1 I wanted to make, sir, is as you know from what I said
2 in opening, we do not say that you -- that the Tribunal
3 needs to make findings as to relative weight of the
4 factors that were the basis of the decisions, but we do
5 say, and ask for findings in relation to the importance
6 of Visa and in relation to cost studies. Sorry, I was
7 just trying to find it.

8 MR JUSTICE ROTH: I don't think it makes much difference
9 whether it's the reference rates or the UK MIFs because
10 they approach them in the same way.

11 MR SMOUHA: Correct.

12 MR JUSTICE ROTH: But I was just asking you whether you
13 accept that that's the role that cost studies played.

14 MR SMOUHA: Sir, what we say, and this is on page 10 of our
15 submissions, paragraph -- in relation to the earlier
16 period so it would be the same. Paragraph 34(9):

17 "Cost studies were a factor taken into account in
18 the setting of reference rates as an initial point of
19 reference, and were also a point of reference for
20 bilateral negotiations."

21 {A/31/12}.

22 MR JUSTICE ROTH: Yes, that's a little vaguer than what
23 I was putting to you. Maybe you go no further than
24 that.

25 MR SMOUHA: Sir, and we've dealt with this. The evidence is

1 of Mr Peacop in particular that the cost studies
2 provided a starting point but that the rate set -- there
3 wasn't a read-across from the cost percentage shown in
4 the cost studies to the rate then set because of the
5 particular significance of the competitive factors in
6 which respect Visa was the most important, as is clearly
7 evident from the rates then set.

8 MR JUSTICE ROTH: Yes.

9 MR SMOUHA: Sir, in relation to 1997 to 2004, the other
10 residual causation in fact case left is the hierarchy
11 and weighted voting argument.

12 Sir, if I may, can I just -- you raised the point
13 with me as to whether the way in which that is advanced
14 should be seen as part of the guidance allegation. We
15 say, sir, that it should not because that is not how it
16 is pleaded. Can I just show you and just remind you in
17 {A/3/49} in the Re-re-amended Claim Form,
18 paragraph 103(b) of course which is the guidance
19 allegation, using guidance in that sense, in the rolled
20 up sense of covering floor, guidance, benchmark, minimum
21 price etc, that is where the guidance allegation is.

22 103(c) on page 50 {A/3/50} is the weighted voting
23 argument and is put "further or in the alternative" and
24 103(e) at the bottom of the page and going over, can we
25 put pages 50 and 51 next to each other? {A/3/51}. The

1 bottom of 50 and the top of 51 next to each other.

2 (e) is the hierarchy argument and in particular in
3 the fourth line on the second page shown there:

4 "... level, banks favouring lower United Kingdom
5 Domestic MIFs would have used their power to withdraw
6 consent to the application of the United Kingdom
7 Domestic MIFs ..."

8 That again is the hierarchy argument is pleaded as
9 further or in the alternative to the previous arguments
10 including the guidance allegation.

11 So those are not -- weighted voting and hierarchy
12 are not pleaded somehow as particulars of guidance and
13 they are of course different in nature.

14 Sir, though in Mr Merricks' written submissions it
15 is suggested that they should be seen as an aspect of
16 the guidance allegation, that was not how my learned
17 friend put it yesterday, and indeed, with respect,
18 I would suggest that my learned friend.

19 MS DEMETRIOU: Sir, it is how I put it. In case Mr Smouha
20 is under any misapprehension, we do say that it's -- the
21 hierarchy argument is a particularisation of the
22 guidance allegation.

23 MR SMOUHA: Well, it simply isn't.

24 MR JUSTICE ROTH: Well, it doesn't really matter, does it?

25 Does it matter?

1 MR SMOUHA: Why does it matter, sir? It matters because the
2 Tribunal in its findings is going to have to make
3 an orderly disposition of the allegations as pleaded.

4 MR JUSTICE ROTH: Yes, but either -- if the weighted voting
5 meant that it had an effect, had a direct effect on the
6 MIFs that were set, whether one calls that effect
7 guidance or some other support doesn't really matter,
8 does it, it would still be a causative way that led to
9 the UK MIFs being set as -- at the levels at which they
10 were set. If it didn't need them to be set that way
11 then you haven't got factual causation.

12 MR SMOUHA: Sir, I agree with that --

13 MR JUSTICE ROTH: And whether one could say well therefore
14 it's a form of guidance or -- I mean if that's right,
15 let's suppose it's right against you and we say, yes the
16 weighted voting meant that because people were so
17 concerned that those with 25% would not accept it and
18 would walk out, therefore -- and revert to the EEA MIF
19 and therefore this led to the UK MIF being set in the
20 way it was, having regard to that fallback to the
21 EEA MIF, whether we say well, that's a form of guidance
22 or it isn't, it's a causative mechanism.

23 MR SMOUHA: Sir, yes, in substance. The point I'm making is
24 one of -- and it may be important to avoid confusion,
25 both confusion in relation to how the pleaded issues are

1 dealt with, and particularly in circumstances where no
2 other part of the pleaded case in relation to 1997 to
3 2004 is pursued.

4 So it's already bad enough, sir, that the guidance
5 allegation in 103(b) is a rolled up pleading of a number
6 of matters.

7 MR JUSTICE ROTH: Well, I don't think we should get too hung
8 up about this, Mr Smouha. That's the allegation in --
9 for that period, whether it's put under the heading of
10 guidance or something else, it doesn't matter. We
11 understand what the allegation is.

12 MR SMOUHA: Fine. Sir, I'm addressing in substance the
13 allegations that are made in paragraphs 103(e) and
14 paragraph 103(c).

15 MR JUSTICE ROTH: Yes.

16 MR SMOUHA: Now, in the written opening, Mr Merricks
17 described the hierarchy and weighted voting allegations
18 as operating in tandem. That was paragraph 108(3). The
19 suggestion they operated in tandem is itself a little
20 puzzling because tandems are not usually ridden by two
21 cyclists pedaling in opposite directions.

22 The premise of the hierarchy allegation is that the
23 threat of triggering the 90% or 75% rule allowed
24 acquirers to bring downward pressure on the UK MIFs
25 towards the EEA MIFs.

1 The premise of the weighted voting allegation is
2 that issuers held the balance of voting power on the
3 MEPUK board so that this acted to neutralise or at least
4 oppose any such downward pressure. And you can see this
5 point being made by Mr Merricks in paragraph 146 of the
6 written closing {A/29/57}:

7 "The power of net acquirers to cause a default to
8 the Intra-EEA MIF was therefore weighed against the fact
9 that net issuers held the numerical balance of power on
10 the MEPUK Board. This balance would suggest that, all
11 other things being equal, net issuers would be able to
12 raise domestic MIFs marginally higher than the Intra-EEA
13 MIFs. However, their ability to significantly increase
14 MIFs above the Intra-EEA fallback was ultimately
15 constrained by the 90% and 75% Rules ..."

16 So as we understand it, the logic suggested here is
17 that there isn't for this trial actually anything in
18 substance in the weighted voted allegation, his case
19 simply comes down to the contention that one or more
20 large net acquirers had the theoretical ability to
21 trigger the 90% or 75% rule though they never threatened
22 to do so.

23 MR JUSTICE ROTH: Well, the way I understood it is that they
24 have different incentives it's said, one wanting lower
25 MIFs, the other wanting higher MIFs. Those were --

1 relevant power through these two provisions, one through
2 voting strength but the other through the ability to
3 walk out and therefore remove the authority to set
4 rules, and each knowing that, that meant that the
5 compromise they would come to would be at the default,
6 which would apply if the rules that the MEPUK set MIF
7 fell away. That was how I understood the argument. Is
8 that right, Ms Demetriou?

9 MS DEMETRIOU: Sir, yes, more or less correct. But what we
10 say is that the incentives point you've just
11 articulated, that's absolutely right. But because in
12 the factual world the net issuers had more power on the
13 board that explains why the UK MIF hovered slightly
14 above the EEA MIF in the real world, but then of course
15 we rely on the possibility of the MIF collapsing back to
16 the default if it had been pushed too high or we say if
17 the default had been lower and offered more of
18 an incentive to trigger that collapse.

19 So yes, almost precisely as you say, except that we
20 say that the power of the net issuing banks on the board
21 explains why the UK MIF hovered slightly above the
22 default in the factual world.

23 MR JUSTICE ROTH: Because acquirers would hesitate a bit
24 more so it would only be if it's got too high?

25 MS DEMETRIOU: Exactly, or if what they stood to gain as

1 I said yesterday was greater because the default was
2 lower.

3 MR JUSTICE ROTH: Yes. Thank you.

4 MR SMOUHA: Sir, as I understand what's being said that is
5 therefore that the potential threat to use the 90% or
6 75% rule was in effect neutralised in the actual, but
7 there was the possibility that if the differential was
8 greater -- this is now moving into the counterfactual --

9 MR JUSTICE ROTH: No, no I don't think that's what's said
10 at all. It's being said in the actual world the issuers
11 would have wanted -- the net issuers would have wanted
12 significantly higher MIFs but the acquirers constrained
13 that desire through the potential to walk out and get
14 the EEA MIF, and they wouldn't want anything higher than
15 the EEA MIF. But they wouldn't walk out just for
16 1 point because that would be -- it's a bit of a nuclear
17 option. But it kept the UK MIF not far above the
18 EEA MIF because the acquirers knew the net acquirers
19 could walk out and if they did, then the default of the
20 EEA MIF would have kicked in. And Ms Demetriou is
21 nodding so I think I have got their point.

22 MR SMOUHA: Sir, it still appears from -- well, let's try
23 and --

24 MR JUSTICE ROTH: And that's how things happened in the
25 actual world and that's why you got the UK MIFs set at

1 the level at which they were set.

2 MR SMOUHA: Yes, well, sir, and maybe this is the key point,
3 that isn't what happened in the actual world, as we know
4 from the evidence, and there isn't any evidence that the
5 90% or 75% rule was operating on MEPUK in relation to
6 the basis of its decision as to either as to the setting
7 of the UK MIF or as to subsequent changes.

8 MR JUSTICE ROTH: Well, what is said is the members all knew
9 about this rule. They were aware that that option was
10 there. It didn't have to be triggered or actually
11 happen but in reaching their decisions that's something
12 they would have had in mind, and I think there was
13 evidence that they were, unsurprisingly of course they
14 were aware of this rule.

15 MR SMOUHA: Exactly so, sir.

16 MR JUSTICE ROTH: And therefore that would be in reaching
17 agreement or consensus or perhaps by voting that
18 operated as a constraint.

19 MR SMOUHA: So, sir, can I address that?

20 MR JUSTICE ROTH: That's how it's put. It doesn't actually
21 have to be triggered for people to know that this could
22 happen and one wishes to avoid it happening.

23 MR SMOUHA: So, sir, can I address that in relation to facts
24 because you have a question of whether it was triggered.
25 You have a question as to whether there was any threat

1 of it being triggered and then the question as to
2 whether in -- the word now used I think is "backdrop",
3 whether that is of causal significance.

4 MR JUSTICE ROTH: Well, there's no suggestion that it was
5 triggered.

6 MR SMOUHA: So, sir, again in relation to -- but again
7 bearing in mind, sir, that the Tribunal is going to be
8 making findings of fact and even on to those matters
9 those are important because --

10 MR JUSTICE ROTH: Yes.

11 MR SMOUHA: -- as we keep being told these facts are going
12 to then be attempted to be used as a springboard in the
13 counterfactual.

14 MR JUSTICE ROTH: Well --

15 MR SMOUHA: So facts which are not disputed and which we
16 invite the Tribunal to find, apart from the fact of the
17 rules, is that neither the 90% nor the 75% rule were
18 ever triggered in the UK, nor is there evidence of there
19 being even a threat to trigger.

20 PROFESSOR WATERSON: Can you remind me, Mr Smouha, about
21 when and why the rate moved between 90 and 75%?

22 MR SMOUHA: It moved February 1999. And changed -- and,
23 sir, of course there's an issue which has been touched
24 on which we say doesn't matter for this purpose as to
25 whether there was a change in the nature of the rule, as

1 to whether there was a difference between the 90% and
2 75% rule in relation to whether one involved the
3 collapsing -- would have involved, if triggered, the
4 collapsing of MEPUK or whether it could be used simply
5 to challenge a decision in relation to --

6 PROFESSOR WATERSON: No, my question is whether there was
7 discussion about changing the percentage.

8 MR SMOUHA: The reason for changing the percentage, yes.

9 MR JUSTICE ROTH: There is a document that discussed it
10 because they asked --

11 MR SMOUHA: Can I come back, Professor, with a reference for
12 that?

13 PROFESSOR WATERSON: Yes.

14 MR SMOUHA: Sir, as I say in terms of what the Tribunal
15 should find in relation to the fact of the rule, the
16 rule not having been triggered and there being no threat
17 to trigger.

18 We say for the purpose of this trial, determining
19 what happened in the factual world, that is the end of
20 the issue because there is no evidence that the
21 awareness of the existence of the rule had any effect on
22 MEPUK's decisions as to rate or structure of the
23 UK MIFs, which until 2004 resulted in rates which were
24 materially identical to Visa's UK MIFs, and even in 2004
25 largely followed the reductions in Visa UK's MIFs after

1 Visa reduced those MIFs to follow the logic of the
2 Commission's exemption decision in relation to Visa's
3 EEA MIFs.

4 Now, sir, touching on the evidence that you were
5 referring to. Mr Merricks tries to make as much as he
6 can of the fact that my learned friend got Mr Peacop to
7 agree in cross-examination that the 75% rule was in the
8 rules, and that he was aware of it. Now, sir, that is
9 not a foundation for saying that the 90% or 75% rule in
10 fact had any impact on the decision-making processes of
11 the R&CC, or the interchange fee sub-committee, or the
12 MEPUK board considering the recommendations from those
13 committees when setting the UK MIF.

14 Sir, can we look at paragraph 49 of Mr Merricks'
15 written submissions. {A/29/24}. They say here, last
16 sentence of paragraph 49:

17 "Mr Peacop further agreed in cross-examination that
18 MEPUK was aware of the possibility of the 75% Rule being
19 triggered."

20 Footnote 150 gives references to two parts of the
21 transcript of Mr Peacop's cross-examination. Can we
22 look, please, at those. Worth seeing exactly what he
23 said. First of all {Day4/39:20}.

24 Ms Demetriou:

25 "Question: All right. So, Mr Peacop, that's your

1 evidence and -- but the upshot of that is that
2 an acquiring bank with -- just to clarify, an acquiring
3 bank with more than 25% volume could in theory withdraw
4 from the body; yes, and then the whole of the UK Rules
5 would collapse?

6 "Answer: I think there's a process to go through.
7 They were perfectly entitled, if I can, just at
8 a hypothetical level to understand this rule. Yes, they
9 could withdraw. It would then have to be challenged and
10 you'd have to go through a process to arrive at that.
11 It was not a dynamic I ever experienced. It was not
12 a discussion I ever heard and therefore it remains as
13 a hypothetical discussion.

14 "Question: Right, but you knew the possibility was
15 there in the rules, you were aware of that at the time
16 we've established?

17 "Answer: Yes."

18 Then page 44, line 16 {Day4/44:16} and going over to
19 page {Day4/45}.

20 "Question: But you would have known that MEPUK
21 couldn't set UK MIFs if it didn't meet the 75% rule?

22 "Answer: Yes, I was aware of that.

23 "Question: And were you aware that the 75% rule was
24 triggered in Belgium in 2002?

25 "Answer: I can't remember that case, no.

1 "Question: You can't remember hearing about that at
2 the time?

3 "Answer: No.

4 "Question: Okay. Well, what happened in Belgium was
5 that the rule was triggered, the domestic rule was
6 triggered resulting in a lower MIF. And the point that
7 I want to put to you is, in principle, the same thing
8 could have happened in the United Kingdom, couldn't it?

9 "Answer: If I may just slightly correct or modify
10 my answer to the question, so that it wouldn't
11 necessarily be acquirers. I mean, any member was
12 entitled to withdraw support from MEPUK. So the dynamic
13 that a member could withdraw support or a group of
14 members could withdraw support, issuer or acquirer, is
15 perfectly true. As to what would happen as to
16 interchange rates again, it's a hypothetical. I can't
17 comment on how that would play out because I never saw
18 it. It was never contemplated."

19 And then my learned friend also you will recall,
20 sir, took you yesterday to another passage where
21 Mr Peacop said that, yes, it could be done under the
22 rules hypothetically.

23 Now, sir, you'll see in those passages even my
24 learned friend used the words "in theory" in her
25 question. Establishing that the 75% rule was in the

1 rules and that MEPUK members would have been aware of it
2 does not begin to provide the Tribunal with
3 an evidential basis for concluding that it operated in
4 fact on the minds of relevant individuals and had any
5 causal effect in fact.

6 MR JUSTICE ROTH: Well, he actually says, I think you just
7 stopped reading on {Day4/46} the question.

8 "Question: You would have had it in mind on MEPUK,
9 wouldn't you?"

10 And he says I can't recall.

11 MR SMOUHA: Can't recall discussing with that in mind.

12 MR JUSTICE ROTH: Yes.

13 MR SMOUHA: So that's the evidence, sir. And -- but the
14 question, the question as to whether it operated in fact
15 on the mind of relevant individuals and had any causal
16 effect in fact is the issue for the Tribunal, and that
17 is the limit of the issue. And, sir, I absolutely stand
18 by my objections to the attempts in cross-examination to
19 ask witnesses about what might have happened in the
20 counterfactual if the spread had been larger.

21 And as my learned friend kept on telling you,
22 Mr Merricks intends to keep the 75% issue in mind for
23 counterfactual purposes. Well, so be it but that is not
24 for this trial. And, sir, in the documents, the
25 contemporaneous documents again anchoring this to the

1 evidence, there is no mention of the 75% or 90% rule
2 ever being an issue.

3 Sir, even Mr Merricks' submissions are pushed to
4 formulate anything positive that he can ask the Tribunal
5 to find. If you look at paragraph 143.4 on page 56
6 {A/29/56}. They say:

7 "It is simply not the case that the possibility of
8 triggering the 95% or 75% rules would be perceived as
9 a wholly idle threat by issuing banks. It was not
10 perceived in that way in the factual. It would
11 certainly not have been perceived as fanciful in the
12 counterfactual where the upside for acquiring banks was
13 so significant."

14 Sir, there is rather an air of resigned reality in
15 that paragraph that there is nothing more from this
16 trial that can be said other than that the rule was
17 there, was known of, never operated or threatened and
18 that the rest is all for the counterfactual if we get
19 there.

20 MS DEMETRIOU: Sir, while Mr Smouha was on it, that's
21 a wrong cross-reference, where it says 49 above, it
22 should be to 137. Just if you could take a note of
23 that. I apologise for the mistake.

24 MR SMOUHA: Sir, that's all I wanted to say on 1997 to 2004.

25 Can I move to November 2004 onwards, which I hope

1 I can deal with briefly.

2 So this is the period of course when Mastercard set
3 the UK MIF and you will recall in Mr Merricks' opening
4 submissions, written opening submissions, Mr Merricks
5 told you at this trial he pursued only the infection
6 argument from 2004 to 2009 and it was for that reason
7 that we addressed only that case in our written opening.
8 You will recall that the written opening submissions
9 were sequential. You were then told in opening that the
10 guidance case was pursued in relation to this period but
11 because closing submissions were exchanged we still did
12 not know what that case was but we now do and you'll
13 have seen that Mr Merricks wants to go back on what was
14 clearly his abandonment of the guidance allegation in
15 opening, and now wishes to make the infection allegation
16 which he advanced in his opening into his alternative
17 case.

18 Well, sir, so far as that is concerned it matters
19 not. I'm not saying that that is to be shut out, it's
20 just for the reasons I've given in relation to 1997 to
21 2004 there was no infection.

22 MR JUSTICE ROTH: Yes, you have addressed that.

23 MR SMOUHA: And I have addressed that.

24 In relation to guidance -- sorry, sir, the only
25 thing I would say specifically in relation to this

1 period in our -- the fact findings that we asked to be
2 made at paragraph 205, page 67 of our submissions
3 {A/31/69} and we've analysed the evidence in detail in
4 relation to this period, but importantly, sir, the
5 second and third findings, paragraph 205(2):

6 "The EIC periodically reviewed the UK MIFs making
7 significant changes to them by successively ..."

8 And we set out the changes. That's dealt with in
9 detail. The cross-references to the paragraphs which
10 analyse the evidence in relation to that are
11 paragraphs 220 to 230.

12 Then (3):

13 "The EIC recommended these UK MIF levels based on UK
14 commercial and competitive factors, and having regard to
15 UK costs (and such levels were approved)."

16 Dealt with in paragraphs 214 to 215.

17 Sir, in our submission the Tribunal should -- must
18 accept those two findings on the facts because there is
19 nothing in the evidence to justify your rejection of
20 those findings.

21 So far as guidance is concerned, sir, if open to
22 Mr Merricks, his factual submission is -- you'll see
23 this at paragraph 158 of his written closings {A/29/60}.
24 I showed you this before. This is where the
25 counterfactual point is made in the second sentence but

1 let's just look at the first sentence as to what is said
2 and the limit of what is said in relation to guidance:

3 "These examples indicate that once the UK MIFs were
4 brought under the control of the European Interchange
5 Committee, the intra-EEA MIFs became a reference point
6 and source of guidance."

7 And then, sir, that submission is based on four
8 points which are in paragraphs 156, the previous page,
9 and 157 {A/29/59} and, sir, we say in relation to those
10 that none of them provides any support for the
11 submission that is made.

12 Sir, remember always that for this period there are
13 extensive examples of changes of rate and introduction
14 of categories that are fundamentally incompatible with
15 the guidance allegation. You'll recall, sir, that
16 I identified some of these in opening, off the MIFs
17 table, and I explained in opening that it would be
18 necessary for Mr Merricks to demonstrate to you before
19 the end of the trial how he accommodates or reconciles
20 those changes with his case, and we've identified them
21 again in our closing submissions and Mr Merricks has
22 simply ignored them because they cannot be accommodated.

23 The two big examples of this are first of all in our
24 written submissions paragraph 229 on internal page 72,
25 page 74 of the electronic {A/31/74}, the key point in

1 relation to these being changes in relation to the UK,
2 which were changes that Mastercard Europe declined to
3 endorse -- in making them Mastercard declined to endorse
4 the equivalent EEA contactless category.

5 And secondly, sir, and we really would say is the
6 dagger to the heart of Mr Merricks' case, the fact that
7 the reduction of the EEA MIF to zero from 21 June 2008
8 had no effect; none whatsoever on the UK MIF.

9 Briefly as to the four points relied on by
10 Mr Merricks.

11 The first is in relation to the introduction of
12 UCAF. On 1 June 2005 Mastercard introduced two new
13 UCAs, so essentially secure e-commerce categories of
14 MIF. For the UK it proposed rates of 0.9% for merchant
15 UCAF and 0.95% for full UCAF, merchant UCAF being where
16 the acquirer had enabled the relevant technology. Full
17 UCAF with both the issuer and acquirer had enabled the
18 relevant technology.

19 If we could go, please, to {C19/428/59}. It's the
20 paper presented to the European Interchange Committee on
21 1 June 2005. The proposed rates are set out in the
22 proposal, in the table. And if we go to page 61
23 {C19/428/61} under the heading "Business Impact &
24 Competitive Analysis" and can I just ask the Tribunal to
25 read that first paragraph under two indents.

1 MR JUSTICE ROTH: Sorry, I have a problem again. I don't
2 know what's happened here. (Pause). Yes, I'm sorry, we
3 have some technical glitch. Yes, looking at this
4 document, two new tiers.

5 MR SMOUHA: The proposal to introduce the UCAFs, for which
6 you see that the recommendation is being made in order
7 for Mastercard internet acquirers to be more competitive
8 in line with a Mastercard global strategy -- global, not
9 EEA -- but specifically based on what Visa was doing in
10 the UK.

11 My learned friend took you yesterday to {C14/363/1},
12 this was the proposals for the European Interchange
13 Committee to consider at their meeting of 1 June 2005
14 and she showed you page 1 in relation to the UCAF
15 proposal. And then showed you page 2 {C14/363/2} and
16 then jumped to page {C14/363/4}. And suggested to you
17 that in the section related to rationale, the first
18 indent and the fourth indent, that this showed
19 a rationale of alignment with the European structure.

20 It is true that this suggests that the structure,
21 which is the word used in those -- in the first indent
22 was chosen to align with the European. But the question
23 is, why was the rate chosen for the new UCAF categories
24 for the UK? And the answer to that question is on the
25 page that my learned friend skipped over, page 3

1 {C14/363/3}, under the heading "Business impact &
2 competitive analysis."

3 "It is believed that Visa has already introduced a
4 UK domestic incentive fee for secured internet
5 transactions of 0.87%, and is seen by the UK players as
6 having a more favorable approach towards internet
7 merchants. In order for MasterCard internet acquirers to
8 be competitive, it is therefore suggested to introduce
9 two new internet incentive tiers, in line with
10 MasterCard global strategy, ie:

11 "Merchant UCAF tier which will be applicable if
12 acquirers are SecureCode enabled ..."

13 So we see yet again, sir, that the factor causing
14 the particular rate to be chosen was Visa and only Visa.

15 Sir, the second point relied on by Mr Merricks is in
16 relation to the removal of four UK MIF categories. On
17 1 September 2005 Mastercard removed four UK specific
18 tiers that Mr Sideris you'll recall explained did not
19 attract a lot of transactions and didn't make sense at
20 the time for the UK, given that maintaining them meant
21 extra cost for Mastercard. The transcript reference is
22 {Day2/133} to {Day2/134}; we don't need to go to it.

23 The suggestion made in my learned friend's written
24 submissions is this change helped to align the structure
25 in view of preparation for SEPA, the Single Euro Payment

1 Area. Sir, again that had nothing to do with rates and
2 that goes nowhere.

3 The third point is in relation to World Signia. It
4 was at the same meeting that the EIC endorsed higher
5 rates for the World Signia Card which was an ultra
6 premium card; in other words, one which had to have
7 significant additional benefits to the cardholder at the
8 top end of the Mastercard credit card line above
9 "Ordinary consumer credit cards and the Intermediate
10 Word Card which I'll come to separately in a moment.

11 Sir, if we have a look at the MIFs table
12 {A/18.1/10}. You can see the UK MIFs for World Signia
13 until the decision took effect in 2006, the new rates
14 set in 2006 -- until then the World Signia rates were
15 still sitting at the normal UK credit MIFs of 1.3, 0.9
16 electronic and so on which simply didn't reflect the
17 place of World Signia in the product offering.

18 MR JUSTICE ROTH: Just one moment.

19 MR SMOUHA: First column.

20 MR JUSTICE ROTH: Is this the World Signia table?

21 MR SMOUHA: Yes, section B, the second set of tables.

22 MR JUSTICE ROTH: That's not the one we've got up -- is not
23 section -- is it? Yes, it is, yes.

24 MR SMOUHA: Can I take it from the screen, sir?

25 MR JUSTICE ROTH: I see.

1 MR SMOUHA: 1.3 and 0.9, 2005. And then 1.9 in 2006. And
2 then enhanced electronic, chip, PIN and so on replacing
3 the electronic category.

4 So Mr Sideris explained in his witness statement
5 that the EIC was looking at that anomaly and considering
6 what uplift should be applied to the World Signia MIFs
7 because it was a premium card and was therefore more
8 costly to the issuer because of the benefits. And
9 decided that the setting of the UK MIF for this product
10 at the same level as the EEA MIF, i.e., at 1.9%, would,
11 in his words, establish the desired hierarchy between
12 standard UK MIFs, world UK MIFs and World Signia UK MIFs
13 in the UK.

14 So this was not for the sake of harmonising with the
15 EEA MIF but a selection of an appropriate higher rate
16 for UK reasons. It made sense for the UK market to have
17 this level and this structure at the time, is what
18 Mr Sideris said in cross-examination, {Day2/139} to
19 {Day2/140}.

20 MR JUSTICE ROTH: Presumably this was for more affluent
21 higher wealth cardholders?

22 MR SMOUHA: Sir, yes. So specifically in relation to a UK
23 cost consideration; that because of the additional
24 benefits, the rates were out of line with what was
25 appropriate, and a change had to be made.

1 Sir, were you asking that question in order to get
2 a sense of significance in volume terms?

3 MR JUSTICE ROTH: Yes.

4 MR SMOUHA: Sir, I can give you figures for that.

5 World Signia in terms of percentage of total volume,
6 0.46% and --

7 MR JUSTICE ROTH: In which year?

8 MR SMOUHA: That is for April 2006 to June 2008. And the
9 World Card, which I'm coming to now for the same period,
10 percentage of total volume 0.15%.

11 MR JUSTICE ROTH: This is volume of transaction, is it?

12 MR SMOUHA: Yes. Percentage of total volume.

13 MR JUSTICE ROTH: Yes.

14 MR SMOUHA: Sir, and the last point is on World Card. Sir,
15 I think I can take this even more shortly.

16 Mr Merricks here simply ignores the point that we
17 have made in our written opening that Mastercard
18 rejected the proposal to implement an EEA MIF at the
19 same level as the UK MIF for the World Card. The
20 references are in paragraphs 228 of our closing
21 submissions to documents and to Mr Sideris' evidence.

22 On this my learned friend took you yesterday, at
23 speed, to one document {C15/152/1}. This is the agenda
24 and proposals for the European Interchange Committee for
25 their meeting of 1 September 2005.

1 And at page 4 {C15/152/4} section 3.2.2 is the
2 proposal to have the new World Card. And bear in mind
3 this proposal of course coming from Mr Sideris' team to
4 the committee.

5 And then, sir, my learned friend said this yesterday
6 at page {Day9/159} of the transcript -- you don't need
7 to turn it up, but said "... this was a proposal to
8 introduce a new product" and then she said:

9 "There isn't a detailed and bespoke UK market
10 analysis and cost study here."

11 I'm sure that was just a hasty submission made at
12 the end of a long day, but the entirety of this
13 section 3.2.2 is a detailed and bespoke UK market
14 analysis and cost analysis, except for three lines at
15 the end.

16 If we look at the last paragraph on page 4:

17 "The following table indicates that GEV ..."

18 GEV is Gross Euro Volume:

19 "... risk at various flip levels if Mastercard top
20 spending premium cards are converted to American
21 Express."

22 So that's talking about and only about
23 Mastercard UK. And on page 5 {C15/152/5} there's
24 a table showing a breakdown of P&L of revenues and cost.
25 See the three lines above the big table:

1 "The following table outlines the estimated P&L per
2 card for issuing a World Card versus an Amex reward card
3 in the UK. The analysis is taking into account lower
4 acceptance for Amex, thus lower GEV."

5 And that exactly supports what Mr Sideris said,
6 which is that the proposed EEA MIFs for World Card had
7 already been set primarily with reference to UK
8 competitive considerations.

9 So, sir, the World Card point is a bad point as
10 well. There is nothing in the guidance allegations in
11 relation to that period.

12 MR JUSTICE ROTH: You say it's only 0.15% of total volume
13 anyway.

14 MR SMOUHA: In relation to the figures I gave you, sir?

15 MR JUSTICE ROTH: Yes.

16 MR SMOUHA: Yes. Sir, I can give you the volume figures if
17 you --

18 MR JUSTICE ROTH: Well, you did, but you said it was --

19 MR SMOUHA: As a percentage.

20 MR JUSTICE ROTH: Yes. I don't think we need the actual
21 volumes.

22 MR SMOUHA: For the World Card, 0.15%.

23 Sir, can I now go back, please, then to -- now to
24 the period up until -- the first period, 1992. But
25 I want to, if I may, and I can do this just by way of

1 start, to emphasise that from the perspective of facts
2 of course you are entitled and should take into account,
3 because it's relevant, the period prior to the beginning
4 of the claim period in May 1992 because from a UK
5 perspective it's not as if there is any factual
6 significance to the beginning of the claim period
7 in May 1992.

8 Sir, in our submission the period prior to 1992
9 presents an important problem for Mr Merricks' guidance
10 allegation.

11 The paragraphs you asked about, sir, in our
12 submissions that my learned friend indicated they had no
13 reason or basis to dissent from, the domestic scheme was
14 established by 1989. MEPUK was established;
15 paragraphs 36 and 38 of our submissions. And you will
16 recall, sir, that Mr Hawkins said there were bilaterals
17 more or less from the start, and that was then, sir,
18 when you made your comment that it would be astonishing
19 if the banks had not made bilateral agreements.

20 The bilaterals were formed -- again, this is all in
21 our submissions, sir, paragraph 41 -- the bilaterals
22 were formed between all the former Access banks, and
23 then with new banks such as Barclays. And you'll
24 recall, sir, from the Mergers and Monopolies Commission
25 report, that Barclays began issuing and acquiring

1 in 1989. Can I just give you the references? Barclays
2 announced that it would offer acquiring for both
3 Mastercard, Eurocard and for Visa from May 1989. The
4 reference is {C15/126/383}, paragraph 3.108.

5 And Barclays began issuing Eurocard Mastercards
6 in 1989, at paragraph 3.110.

7 Bank of Scotland became a licensee in October 1988.
8 Again can I just give the reference? {XC22/61/154}.
9 And Mr Hawkins' evidence was, so far as he was aware,
10 bilaterals were agreed at 1% which was based on the
11 inter-regional MIF.

12 So, what that means is that all of the Access banks
13 plus Barclays, which was the other large bank in the
14 scheme, had agreed bilaterals on interchange in 1989.
15 Those bilateral agreements were already in place when
16 the claim period begins so those bilateral agreements
17 cannot have been affected by the infringement which
18 begins in May 1992.

19 So on any view the infringement cannot have had any
20 effect on the web of bilateral agreements that were
21 established in 1989, 1990, 1991 and up until May 1992.

22 MR JUSTICE ROTH: When you say the infringement cannot have
23 had an effect, the question is whether the EEA MIF had
24 any effect, not the infringement.

25 MR SMOUHA: The infringing.

1 MS DEMETRIOU: Sir, this isn't a point that's ever been made
2 and so it's inappropriate to make it in closing
3 submissions. It seems to be a legal argument.

4 MR JUSTICE ROTH: I don't think it's a legal argument but
5 I think it's just saying that they were agreed -- they
6 all had agreed bilaterals at 1% but before the claim
7 period started. That's a fact. That's what Mr Smouha
8 is saying. But I didn't follow the --

9 MR SMOUHA: Sir, paragraph 44 of our written submissions,
10 {A/31/15}, internal page 13.

11 MR JUSTICE ROTH: Well, if they were affected by the EEA MIF
12 at the time they were agreed they would be -- continue
13 to be affected by the EEA MIF. I'm not sure --

14 MR SMOUHA: Well, sir, we say they weren't but in any event
15 insofar as -- well, the question for the Tribunal is to
16 determine the causal effect in fact of the infringing
17 EEA MIFs. They were only unlawful from May 1992.

18 MR JUSTICE ROTH: Well, I'll think about that. It's
19 a slightly technical argument. That was the period of
20 the Commission's decision but if it was at the same
21 level pre -- you know, in January 1992 and had
22 an effect, it's somewhat artificial to say: well, it's
23 not an infringing MIF because it's --

24 MR SMOUHA: The point in substance, sir, is that on the
25 evidence the bilaterals were agreed in the years prior

1 to the commencement of the claim period at 1% because
2 that was the inter-regional MIF.

3 MR JUSTICE ROTH: And how do we know that that is why they
4 were agreed at 1%?

5 MR SMOUHA: Because that was Mr Hawkins' evidence.

6 MR JUSTICE ROTH: But he wouldn't know about why people
7 agreed bilaterals to which he was not a party to
8 the negotiations. He would know why NatWest agreed
9 bilaterals at 1%.

10 MR SMOUHA: Yes, sir.

11 MR JUSTICE ROTH: But he wouldn't know why Midland agreed
12 something with Lloyds. And I think he accepted that, in
13 fact, that he wouldn't have any knowledge of bilateral
14 negotiations to which he was not a party.

15 MR SMOUHA: Well first of all he would have the knowledge
16 from what he would understand from his negotiations on
17 behalf of NatWest with the other banks, including
18 Barclays. And secondly, sir, for you to find to
19 different effect in relation to the other banks would
20 require there to be some evidence to support such
21 a suggestion.

22 MR JUSTICE ROTH: Well that's a different point that we
23 don't -- you can say we don't know why they agreed at
24 1%. But I don't think we can say that they all agreed
25 at 1% because it was the inter-regional MIF.

1 MR SMOUHA: Sir, taking that approach, you can say that you
2 have no evidence that banks agreeing bilaterals -- other
3 than NatWest you have no evidence -- sorry, not "other
4 than NatWest".

5 You have no evidence that would enable you to find
6 that bilaterals agreed at 1% prior to the commencement
7 of the claim period were agreed at 1% because of the
8 level of the EEA MIF. Which of course was not 1%, but
9 that's a separate point which I'll come back to but
10 obviously rather important.

11 The inter-regional MIF was 1%. Visa UK's MIF was
12 1%. The EEA MIF was not a straight 1%.

13 MR JUSTICE ROTH: Yes.

14 Would that be a good moment?

15 MR SMOUHA: Sir, yes, thank you.

16 MR JUSTICE ROTH: We'll come back at 1.45.

17 MR SMOUHA: Very good. Thank you, sir.

18 (1.00 pm)

19 (The short adjournment)

20 (1.47 pm)

21 MR JUSTICE ROTH: Yes, Mr Smouha.

22 MR SMOUHA: Thank you, sir. I want to turn next to the data
23 in relation to the bilaterals, in which in our
24 submission comprehensively refutes the guidance
25 allegation when assessed against what the economists

1 agree they would expect to see if there was
2 a relationship between the EEA MIF and what was agreed
3 in the bilaterals.

4 So I'm going to go through the data on bilaterals on
5 time period. We can take it off the bilaterals table.

6 First, looking at the period up until 1994 {B/55/1}.

7 Sorry, the revised one {B/55.1/1}.

8 MR JUSTICE ROTH: Just a minute. Just one moment. We'll
9 look at it on screen. If we could be supplied with
10 these -- the revised table in hard copy.

11 MR SMOUHA: I'm sorry you didn't have that, sir, certainly.

12 MR JUSTICE ROTH: We find it quite helpful to have one in
13 hard copy. Don't worry, we'll get it in due course.

14 MR SMOUHA: In fact, sir, nothing I'm going to be saying to
15 you is not already well familiar to you in terms of the
16 development of the --

17 MR JUSTICE ROTH: No it's presumably the same as
18 Mr Merricks' version except for the colours because
19 that's done on the revised one.

20 MR SMOUHA: So you could take it from there.

21 MR JUSTICE ROTH: If we ignore the colours for your purpose.

22 MR SMOUHA: Sir, that is what we are inviting the Tribunal
23 to do.

24 So the period up to 1994. Between 1992 and 1994
25 there is no dispute there is a significant change in

1 rates agreed in bilateral agreements in that period.

2 The evidence that we have indicates that interchange
3 fees have generally been agreed at 1% of the start of
4 the scheme and on that, sir, you have Mr Hawkins'
5 evidence of NatWest's bilaterals, paragraph 38 of his
6 first statement. And the bilaterals table indicates
7 that in August 1992, of the records we have, almost all
8 bilaterals were at 1% for both standard and electronic,
9 16 out of 19 agreements. The others were for 1.06% and
10 1.1% for standard.

11 That strongly implies that at the start of the claim
12 period on 22 May 1992 those agreements were likely very
13 largely to be at 1% also.

14 MR JUSTICE ROTH: Can we just be clear about how these
15 figures in the table are arrived at because that's
16 something I'm still a bit confused about. Sometimes
17 you've got actually a notification to Europay that this
18 is the rate we've agreed. But it's not true of all of
19 them. Sometimes it's been assumed from a code that
20 that's the rate agreed and that's where the whole thing
21 gets a bit muddled, as I understand it.

22 MR SMOUHA: Sir, Mr Cook will say a bit more about that but
23 you are right for example as identified in the footnotes
24 sometimes it's taken from notification, sometimes the
25 source document as evidence of it is a different kind of

1 document.

2 MR JUSTICE ROTH: And although I said ignoring the colours,
3 as I understand it, but Mr Cook can address this and
4 help us on it, where we have a figure and it's not been
5 colour shaded by the Merricks version, that means
6 there's some independent evidence that that was agreed,
7 but where it's coloured green it's been derived from the
8 code, that's what, as I understand it, is the basis of
9 the green colouring.

10 MR COOK: That's Mr Merricks' case. We say their analysis
11 of that is fundamentally flawed and I'll make that good,
12 I hope.

13 MR JUSTICE ROTH: You'll explain it. Right. So it is
14 something we are trying to understand.

15 MR SMOUHA: Indeed.

16 MR JUSTICE ROTH: And it's not straightforward.

17 MR SMOUHA: The development of the submission that you
18 should not find anything in relation to the green will
19 be colourfully developed later.

20 Sir, all I want to do at this stage in terms of just
21 looking at the data, at the figures, and in particular
22 the course of change in relation to them and then coming
23 back to the reasons for it, just to establish
24 fundamental basic inconsistency with the guidance case.

25 If we move to the first half of 1993. This is all

1 in detail in our closing submissions at paragraph 72,
2 but first of all, for standard transactions, 156 -- most
3 bilateral agreements are still at 1%, 30 are now at 1.3%
4 and 29 are at 1.1%, that's for standard: all electronic
5 are at 1%.

6 Then there is a further movement of standard
7 transactions to 1.3% over the course of 1993 and early
8 1994. By the second half of 1994, as you see, almost
9 all bilaterals are at 1.3% for standard, that is all but
10 20 out of 142. Most of the agreements that were not at
11 1.3% were with smaller banks, or Northern Irish banks.

12 So we see a significant change in bilateral
13 agreements to 1.3% standard and 1% electronic. Those
14 changes following the increases in Visa's UK MIFs to
15 1.3% and 1% which was with effect from 1 April 1993 and
16 then the corresponding increase in MEPUK's reference
17 rates to the same rates.

18 MR JUSTICE ROTH: Visa was quite different in this period
19 from Mastercard. Visa had a UK MIF throughout this
20 period.

21 MR SMOUHA: Yes.

22 MR JUSTICE ROTH: Throughout our claims period.

23 MR SMOUHA: Yes. So this is bilaterals being agreed --
24 being negotiated and agreed in circumstances where there
25 is a Visa UK MIF throughout this period, that the

1 Visa UK MIF changes to 1.3% and 1% with effect from
2 1 April 1993, MEPUK's reference rates had changed to
3 those rates, and we see virtually across the board the
4 bilaterals changing in exactly the same way. That's in
5 terms of what the experts talked about what you would
6 expect to see if there was a causal relationship -- you
7 would expect to see things happening in tandem in the
8 same way, "moving together" was the phrase used in the
9 concurrent expert evidence.

10 PROFESSOR WATERSON: Mr Smouha, so this is correlation but
11 are you saying it's also causation?

12 MR SMOUHA: We do say it's causation of course but not --
13 sir, not -- in terms of factual causation I'm not
14 saying, sir, from the point of view of an econometric
15 analysis in relation to this, just as a matter of fact
16 what we are seeing. Looking at it at a general level --

17 PROFESSOR WATERSON: In terms of the way Mr Parker put it,
18 do you have a story along with this correlation?

19 MR SMOUHA: Yes, which is Visa.

20 PROFESSOR WATERSON: Well, okay, thank you.

21 MR SMOUHA: Sir, the two things that you established with
22 the experts in terms of what you would look at, looking
23 at the data, is what you would expect to see if there
24 was consistency with the theory, you would expect to see
25 the data "moving together" was their phrase, and in

1 terms of inconsistency they said you would expect to see
2 something moving differently, and all I'm doing is at
3 that -- I accept in some ways superficial but it's so
4 stark and so clear that it's valuable in that way.

5 Sir, then we look at the data. What do you see?
6 You see that move across the bilaterals to 1.3 and 1.
7 That comes after Visa -- not only Visa has changed its
8 rates to 1.3 and 1, but also MEPUK has changed the
9 reference rates to 1.3 and 1.

10 That is in contrast to the fact that there is no
11 change in the EEA MIF. So the relationship on the data
12 as between the EEA MIF and the evidence in relation to
13 bilaterals is that they are moving differently and
14 therefore inconsistent with the thesis.

15 Sir, in evidentiary terms, Professor, you ask, as it
16 were, do we have a story. In evidentiary terms
17 of course we absolutely do because we have the witness
18 evidence in relation to the key factors that drove -- in
19 terms of Mr Hawkins, in terms of the evidence he could
20 give in relation to the negotiation of bilaterals, and
21 in relation to MEPUK and the reference rates in relation
22 to Visa being the most important factor.

23 Sir, in relation to that difference, the fact that
24 the EEA MIF did not change, and therefore you now have
25 a 30 basis points difference between the bilaterals

1 being agreed at 1.3 at standard and the EEA MIF --
2 EEA MIF standard, Mr Merricks says, in paragraph 79 of
3 the written submissions:

4 "In 1994 the majority of the agreements shifted to
5 marginally higher rates than the EEA MIF default. This
6 does not prove that the fallback was irrelevant."

7 That is in our submission fairly extraordinary as
8 a suggestion to the Tribunal, characterising a 30%
9 increase and an increase of fully 30 basis points in the
10 interchange fee for standard transactions as a shift to
11 marginally higher rates. It's completely unreal. The
12 characterisation of a 30 basis points increase as
13 marginal is entirely unsupported by any evidence, either
14 factual or expert. And it's not marginal. The Tribunal
15 will recall, for example, that MEPUK in 1996 agonised
16 over a 5 basis point increase in view of increasing
17 costs and decided that it was unsustainable. The
18 references for that are in our written closing at
19 paragraph 87.

20 Mr Douglas gave unchallenged evidence, Douglas 1,
21 paragraph 48, that 5 basis points was enough of
22 a differential for issuers to start switching schemes
23 with a 10 basis point differential being enough for all
24 issuers to do so. That's Douglas, paragraph 48 at
25 {A/10/15}.

1 In any event, it is a shift, and as a shift it is at
2 odds with the idea of the EEA MIF having any
3 gravitational pull, to use Mr Merricks' phrase. On
4 Mr Merricks' case the standard rates of 1% were already
5 at the level of the EEA MIF and yet they are moving away
6 from that level by 30%. That is the only change in the
7 level of the bilaterals that we see in the evidence and
8 it is fundamentally irreconcilable with Mr Merricks'
9 case and he has no evidence-based explanation for it.

10 Now then let's look at what happens in the period
11 from 1 April 1995 onwards. It's common ground that from
12 1 April 1995, the EEA MIF was divided into three
13 categories: paper, 1.15%; electronic, 0.9%; security
14 electronic 0.75%.

15 There is no evidence at all of any change in any
16 bilateral agreement after those material changes in
17 structure and level of the EEA MIF.

18 Now, there are fewer records after 1994 because from
19 1994 almost all of the bilateral agreements were already
20 at 1.3% and 1. And both Visa's UK MIFs and the
21 reference rates stayed at those levels until 1997 so
22 there was no need for new bilateral agreements between
23 the existing banks, however what those records therefore
24 confirm is that 1.3% and 1% remained the norm.

25 Now, sir, to Mr -- and there is no evidence of any

1 bilateral agreement for electronic being changed in 1995
2 following the EEA MIFs splitting into two electronic
3 categories.

4 Now, as to the point Mr Leith wanted me to address.
5 Of course Mr Merricks contends that bilateral agreements
6 which recorded a rate of 1% for electronic transactions
7 were at the level of the EEA MIF. In other words, he
8 characterises the EEA MIF as being a single across the
9 board applicable rate of 1%. That is wrong. We've
10 developed this point in detail in our written closing at
11 paragraphs 90-93, explaining that there were lower
12 standard MIFs of between 0.5% and 1. There was a lower
13 electronic MIF of 0.5% and a lower petrol MIF of 0.5%.
14 It is wrong to characterise the EEA MIF as in that
15 period as being a 1% rate. I'm not going to go through
16 the detail now of it, I just want to pick up on two
17 points that Mr Merricks says about in his written
18 closing. This is tucked away in footnote 207 on
19 page 32.

20 First of all Mr Merricks says that a Europay
21 document which set out the position as at January 1994
22 indicates, his characterisation, very few discounts were
23 in place in the UK. We've addressed this at
24 paragraph 91 of our submissions. The Europay document
25 from the end of 1994, what it actually states is:

1 "Over the past 12 months most UK banks had
2 registered for the variable interchange where the floor
3 limit is below the international limit."

4 And we give examples in our submissions of banks
5 applying for and obtaining such discounts {A/31/34} for
6 cross-border -- in relation to the EEA MIF, the EEA MIF
7 cross-border MIF.

8 Secondly, Mr Merricks points to the example of RBS
9 obtaining reduced interchange fees in May 1994. The
10 reference is {C2/176/1}, my learned friend took you to
11 this letter.

12 Second paragraph:

13 "As I understand it, the applications are effective
14 against paper-based transactions acquired by the Royal
15 Bank where the issuer is either (a) another UK bank and
16 no bilateral agreement exists; or (b) a European bank."

17 And the point my learned friend sought to make is
18 RBS could and would have used this reduced interchange
19 in bilateral negotiations in relation to the
20 UK interchange fees.

21 Now, sir, you do not know what RBS' view was, we
22 don't know from the documents. What we do know is that
23 there is no evidence that RBS ever made use of these
24 discounts in a negotiation. Do we have elements going
25 the other way? Indeed we do. RBS' bilateral agreements

1 follow the norm of 1.3% and 1%. There is no suggestion
2 that any bilateral agreement between any bank included
3 any of the discounts available on the EEA MIF and there
4 is no evidence of any causative effect in relation to
5 the changes in the EEA MIF in that period.

6 Sir, so just to -- in relation to the summary of
7 the -- of what is established from the data, first of
8 all the evidence as to what bilaterals were agreed at
9 and when and how they changed is incompatible with the
10 guidance allegation. It is consistent, entirely
11 consistent with Mastercard's case on the factors that
12 did actually drive those bilaterals to the rates at
13 which they were agreed. We've set all this out in our
14 closings.

15 First, in 1991 Visa's MIF was 1% for all
16 transactions. The bilaterals for Mastercard were at 1%
17 for all transactions.

18 Just before December 1991 Visa decides to split its
19 MIF into two categories, electronic and standard. The
20 MIF for electronic remained at 1%, the MIF for standard
21 to increase in fact in two steps. In April 1992 it goes
22 to 1.1. In April 1993 it goes to 1.3. And the
23 documentary evidence shows this leads to two things.

24 First, MEPUK making a decision to approve -- its
25 word -- corresponding changes in the reference rates for

1 Eurocard/MasterCard. The changes making exactly the
2 same split between electronic and standard. And the
3 effect being at the same time and at similar rates. And
4 then secondly bilaterals then changing accordingly --
5 subsequently.

6 On the first of those points the changes in the
7 MEPUK board, the approval is recorded in letters from
8 Mastercard International because of course
9 Mastercard International attended MEPUK meetings. The
10 detail of that is set out at paragraphs 77 and 78 of our
11 submissions. And we then see from other documents that
12 by 1993 MEPUK's reference rates were at 1.3% standard
13 and 1% electronic, see paragraph 79 which I showed you
14 earlier this morning, sir, when you asked for the
15 document references.

16 MR JUSTICE ROTH: Yes.

17 MR SMOUHA: On the second of these points as to what
18 happened to bilateral agreements, again I emphasise this
19 is not only the consistency, the very close consistency,
20 but the fact the rates are increasing away from the
21 level of the EEA MIF so that by the second half of 1994
22 bilaterals covering practically all transactions are at
23 1.3% and 1, including bilaterals between the six largest
24 banks who had more than 90% of volumes, see
25 paragraphs 50 and 72(5) of our submissions. So the

1 factors driving the rates in bilateral agreements are
2 very straightforward. They are decisive. They're
3 influential and they exclude the potential for and on
4 the evidence there is none to show that the EEA MIF had
5 any role at all.

6 Sir, can I just pause there for a few seconds so
7 that I can hand the baton to Mr Cook who is going to
8 move to where I am standing to deal with UC00 and direct
9 application.

10 Closing submissions by MR COOK

11 MR COOK: Sir, Mr Merricks makes what I suggest is
12 a startling submission that in 1993 and the first half
13 of 1994 the majority of what are referred to on multiple
14 occasions in the documents as bilateral agreements are
15 in fact nothing of the kind but were in fact the EEA MIF
16 applying as a default. And Mastercard's submission is
17 that is clearly wrong on both the contemporaneous
18 documents and the witness evidence, and it is also
19 a submission that is simply not open to Mr Merricks
20 because it would require the Tribunal to reject evidence
21 from Mr Hawkins that was not challenged in
22 cross-examination.

23 And we submit that the correct position, and this is
24 what we invite the Tribunal to find, is that bilateral
25 agreements were virtually ubiquitous from before the

1 start of the claim period until at least November 1997.
2 And that includes what my learned friend refers to as
3 the UC00 transactions or agreements. And I'm going to
4 deal first with the UC00 point and then come on to
5 the 1997 point where of course there's a different issue
6 or a different set of arguments.

7 Now, in relation to UC00, we say in short that what
8 my learned friend has done is put two and two together
9 and made 22. In 1993 there were a series of internal
10 processing codes used by Europay within the ECCSS
11 processing system. And my learned friend was
12 specifically asked yesterday by the Tribunal, and it's
13 page 117 of the transcript, {Day9/117} whether there was
14 a table of UC codes. And my learned friend showed the
15 Tribunal a couple of much later documents, but she
16 didn't show you the 1993 table which is the only
17 relevant one, in my submission for understanding the
18 May 1993 matrix because they go together. We say the
19 obvious reason for that omission is it fundamentally
20 contradicts my learned friend's argument. And if we can
21 go to that document which is {C1/82.1/1}. It gives you
22 some idea of age, just what sort of state this document
23 is in.

24 PROFESSOR WATERSON: Looks like it was chunked in the bin.

25 MR COOK: It was 30 years ago. We see from the fax header

1 at the top this is the 2 May 1993 which is the same day
2 as what I would call the matrix, which is the matrix of
3 the 16 banks with the various UC codes on it.

4 So the starting point is the header, "UK bilateral
5 interchange fee rules". We say that's certainly
6 a promising start. This is about bilateral agreements
7 not the application of the default.

8 And at the bottom of the page we can see the four UC
9 codes in use at the time. UC00, 01, 02 and 03. And we
10 see from the top and as Mr Van den Bergh confirmed those
11 are UK-specific codes.

12 And then what we see under each of those listed
13 under, say, for example UC00 at the bottom of the page
14 we see a series of fee rules, transaction codes and if
15 we focus on the first two of those, which is retail
16 non-point of sale. And retail point of sale. Retail
17 non-point of sale I would say is standard. And point of
18 sale is electronic.

19 We then see the reference UF10. If we can piece
20 this together. We can then see the whole of the page,
21 at the top of the page we can see UF10 is 1%. 1.0%.

22 So we know that for UC00 it's simply saying standard
23 is 1%, electronic is 1%. There are lots of other codes
24 on there in relation to cash advance, ATM, refunds,
25 matters like that which needn't concern the Tribunal

1 because we're only focused on the ones in relation to
2 card purchase transactions.

3 MR JUSTICE ROTH: Electronic is not separate here, is it?

4 MR COOK: Not separate, retail point of sale will be
5 electronic, it's going through an actual card machine
6 that can process it. Then non-point of sale would be
7 standard. And that's consistent with what I'll then
8 point out as another significant one is UC02 and UC02 we
9 see from the codes which is UF12, which is 1.3%
10 standard, so retail non point of sale, and retail point
11 of sale is UF10, so that's 1%.

12 So UC001 is 1% standard, 1% electronic. UC00 is
13 1.3% standard and 1% electronic and those are the
14 predominant codes in use at that time.

15 There is also UC01 which is 1.1% standard and
16 1% electronic.

17 So, sir, each of those codes is simply
18 a pre-programmed set of numbers. So UC00 simply means
19 at that time 1% standard, 1% electronic. It is not --

20 MR JUSTICE ROTH: You say point of sale is always
21 electronic.

22 MR COOK: Sir, that's what we suggest is the way you
23 interpret that and is consistent with the fact that you
24 get retail point of sale as being 1.3 -- sorry, other
25 way around. Retail non-point of sale is 1.3 under UC02.

1 Therefore retail point of sale is electronic because
2 that is going to be going through a point of sale
3 device, hence electronic.

4 So what one gets from this, sir, is this is simply
5 identification of a number, and that is exactly what
6 Mr Van den Bergh explained and we say the extract
7 quoted, it's at paragraph 67(2) of our closing, he says
8 specifically a set of UK codes. He says the application
9 of the EEA MIFs would have involved a different
10 European-wide code and these are UK codes. So that's
11 all they are, sir, is simply a set of numbers. And
12 that's all the system is simply is doing is applying
13 those when you put in the code.

14 Now, armed with that information what we can now do
15 is go back to the matrix, which is in bundle {D/272/2}
16 and the second page of that, which is the matrix table,
17 which is -- sort of put in the terms that we can now
18 understand and we can see that when we have lots of
19 references to UC00, that's simply saying 1% standard, 1%
20 electronic. Where for example one gets references to
21 UC02, that's 1.3% standard and 1% electronic.

22 Now, obviously as you've heard and you can see the
23 majority of the codes in that matrix, which is as at
24 2 May 1993, are UC00, and Mr Merricks argues that
25 anything that is UC00 is just the EEA MIF applying as

1 a default. We say that's simply not the case. All it
2 is is simply saying 1% standard, and 1% electronic.

3 And briefly I just want to show -- direct the
4 Tribunal's attention to two banks to show the rates that
5 are recorded there, because then I'm going to make good
6 the fact that these are bilaterally agreed rates on
7 an illustrative basis and the same point applies more
8 broadly.

9 The first is UK09 bank which is identified there as
10 NatWest, National Westminster, so that's Mr Hawkins'
11 bank. And we see in relation to
12 your National Westminster and, sir, the Chairman, you
13 pointed this out that 12 out of the 16 listed are UC00.
14 It includes major banks such as Lloyds and Midland. And
15 Midland is of course important since Mr Hawkins gave
16 specific oral evidence of having negotiated bilateral
17 agreements with Midland. Also I'll mention,
18 particularly because it's important, some of the later
19 documents just to draw the Tribunal's attention to bank
20 UK 01, Allied Irish, UK02, which is the Bank of Ireland;
21 and far right of the page UK15, Frizzell Bank. Those
22 are tiny banks but they're the ones that are relevant in
23 particular for my learned friend's submissions later and
24 there are more banks but if we just focus on those three
25 because they come up again on -- so those are all UK00,

1 listed in matrix.

2 And the other one to show the Tribunal was UK08 bank
3 which is Midland.

4 MR JUSTICE ROTH: Sorry, Frizzell is --

5 MR COOK: UK15.

6 MR JUSTICE ROTH: Yes, it is not all UC00.

7 MR COOK: But in relation to NatWest -- what I'm trying to
8 say is NatWest's relationship is bilateral with
9 Allied Irish, Bank of Ireland and Frizzell was UK UC00.

10 And then in relation to Midland, which is bank UK08,
11 and again -- UK08 and again the same three banks so we
12 can just track it through, again there were lots at
13 UC00, but in particular Allied Irish, Bank of Ireland
14 and Frizzell, all three of those are listed at UC00.

15 I'll move it on from there.

16 So where do we get to in terms of this matrix?

17 We'll start with Mr Hawkins' evidence. Now
18 Mr Hawkins gave unchallenged evidence that under the MCI
19 and Europay Rules, UK banks were required to agree UK
20 domestic interchange fees bilaterally with arbitration
21 as a fallback, and that was his evidence, Hawkins 1,
22 paragraph 54 and he then explained in detail in
23 Hawkins 2, paragraphs 6-11 why he understood and
24 believed that to be the case. So his evidence is they
25 were required, UK banks were required to enter into

1 bilaterals. The first point.

2 The second point is his evidence was that NatWest
3 had entered into bilateral agreements from the point at
4 which the domestic scheme was established in 1989, which
5 he did initially by reference to the MCI International
6 MIF, Hawkins 1, paragraph 34. The Tribunal has just
7 heard the MCI International MIF at that time was 1% and
8 that was the same as Visa's UK MIF until April 1992.
9 And there's unchallenged evidence there that NatWest
10 agreed bilaterals at 1% and it was nothing to do with
11 the EEA MIF. There was no suggestion that when he
12 agreed 1% it was anything to do with the UK MIF at all.
13 That wasn't put to him.

14 Second point.

15 The third point was Mr Hawkins' team was responsible
16 for and he was involved in negotiating bilateral rates
17 with other UK licensees. And that's Mr Hawkins 1 at
18 paragraph 54.

19 The fourth point, he gave evidence that in practice
20 almost all UK domestic interchange fees, adding in
21 because this is implicit in what he says, prior to 1997
22 were agreed bilaterally, and that's his first statement,
23 Hawkins 1, paragraph 64. He addressed the point again
24 in Hawkins 2, 38: "However as I've explained above and
25 in my first statement, as I recall, transactions entered

1 into by NatWest (and, so far as I was aware, other
2 banks) were pursuant to bilateral agreements." So he's
3 giving evidence both in relation to what he directly
4 knew as a result of NatWest negotiating or him
5 negotiating on behalf of NatWest but also what he
6 understood the other banks were doing in the market in
7 terms of agreeing bilaterals. Not the exact rates that
8 they agreed but the fact he understood they were
9 agreeing bilaterally. And those are all points he
10 repeated in his oral evidence and, sir, you put a number
11 of those points to my learned friend yesterday, and that
12 evidence was all unchallenged.

13 And what's said against that, paragraph 113 of
14 Mr Merricks' closing is that Mr Hawkins accepted he had
15 no idea what bilateral agreements made by other banks
16 were. In relation to that, yes, but he's not giving
17 evidence at this point about the specific rate.
18 Of course he doesn't know whether Midland and Lloyds had
19 done a bilateral at 1.2% or 1.3, he's giving evidence
20 about the fact that he understood banks, the other banks
21 were agreeing bilaterals and during the course of that
22 period, 1999 to 1997, he had dozens of meetings with
23 other banks, both bilaterally to negotiate bilaterals,
24 multilaterally through MEPUK in which we see the banks
25 consistently discussing bilateral negotiation, reference

1 rates, applicable fallbacks and also, as we'll come to,
2 a very important multilateral meeting in the sense that
3 the four main banks were at it with the OFT.

4 So Mr Hawkins was well-placed to comment about
5 whether in general he understood the other banks were
6 negotiating bilaterals or not and no attempt was made to
7 put to him that he couldn't possibly have known whether
8 firstly that other banks were not negotiating and he
9 might have been unaware of this.

10 So the fact he didn't know the specifics of the
11 outcome doesn't matter. It's the fact that what we are
12 saying here, relying on his evidence to say he
13 understood other banks were negotiating about the
14 bilaterals.

15 But then in relation to his own bank, NatWest, of
16 course he knows exactly what NatWest itself was doing
17 and the points made in paragraph 113 of Mr Merricks'
18 closing said it's conceivable he might only recall them
19 making bilaterals because he did not appreciate that
20 what was happening was it was just being processed
21 through the system. Well, interesting argument.
22 Complete nonsense but again it's not a point put to
23 Mr Hawkins as a reason for the Tribunal to reject his
24 evidence.

25 But it's also just a silly point. The idea that he

1 thought he'd done bilaterals because things were being
2 processed in the system is absurd. Mr Hawkins was the
3 one negotiating the bilaterals. He'd known exactly who
4 he'd done a deal with or who he hadn't done a deal with
5 and his evidence was he understood he was required to do
6 a deal with all the other banks.

7 The idea that he might've thought: I think I might
8 have done a bilateral with Lloyds because, you know,
9 it's being processed through the system, when in fact he
10 knew full well he hadn't met with Lloyds is simply
11 preposterous. So the argument is not open to my learned
12 friend but it's a thoroughly bad point in any event.

13 Therefore the contention that the NatWest references
14 UC00 reflected a default to the EEA MIF i.e., no
15 bilateral rather than a specific bilateral agreement at
16 1% standard and 1% electronic cannot be maintained on
17 the basis of the unchallenged evidence. And once that's
18 clear, the case here basically comes crashing to the
19 ground. UC00 cannot simply be a default rate. It is,
20 as I hope I've shown you, simply a set of numbers and
21 those numbers happen to be 1% standard and
22 1% electronic.

23 And the same is true of Mr Hawkins' wider evidence
24 that he knew the other banks were agreeing bilaterals,
25 even if he didn't know the specific rates agreed.

1 Again, it simply can't be right that the majority of the
2 market was operating on the basis of a default if his
3 evidence was he thought everybody was doing bilaterals
4 and we'll see he had very good reasons for that, such as
5 the OFT meeting that we'll come to.

6 So UC00 simply can't represent what my learned
7 friend is suggesting.

8 So that's the first point, the unchallenged
9 evidence.

10 The next fundamental problem my learned friend's
11 argument faces is that as Mr Smouha has already
12 explained, my learned friend has made no attempt to
13 explain what the position was before Europay started
14 processing, which generally seems to be clear on the
15 evidence now it wasn't doing until May 1993. It's not
16 generally clearing UK domestic transactions before that
17 date. And again there is no challenge to Mr Hawkins'
18 evidence that during this period rates were being agreed
19 bilaterally.

20 So this isn't -- it can't have been a default based
21 on what was going into the Europay system in 1993
22 because they would have needed to have something
23 positive in place before that, and that was bilateral
24 agreements, see Mr Hawkins' unchallenged evidence.

25 And Mr Smouha has explained those bilaterals in the

1 1991 period and what we see in the evidence were largely
2 already at 1%.

3 The third fundamental problem is, as Mr Smouha has
4 just explained, that 1% standard and 1% electronic was
5 not the EEA MIF rate in 1993 in any event, in particular
6 for electronic the rate was 0.5%. And that is just
7 simply fundamentally different. My learned friend
8 ignores the actual rates that applied, the EEA MIF
9 rates.

10 But the fourth and perhaps most fundamental set of
11 problems is this argument is clearly wrong on the
12 contemporaneous documents.

13 So the starting point, and a document you haven't
14 seen, at {C1/47/1} which I can briefly take you to, is
15 that in 1992 the UK banks asked Europay to update its
16 system so it will be able to clear domestic transactions
17 using variable bilateral interchange fees and you see at
18 the top "domestic bilateral interchange" and just to
19 sort of draw one paragraph in particular, which is just
20 above the number 2, "Purpose of this document":

21 "The UK and Irish members are now reaching bilateral
22 agreements on interchange rates and would like the ECCSS
23 clearing system to calculate and apply these rates
24 during the clearing process."

25 And as we'll see this was new functionality being

1 introduced to the Europay system which is why then we
2 see in due course that in May 1993 culmination of this
3 process was Europay became capable of processing
4 domestic transactions with bilateral agreements. And as
5 part of doing so, and here I'll be making this good with
6 some documents, Europay gathered together comprehensive
7 records for bilaterals and the final output of that is
8 the matrix document we've just seen with all of the
9 UC00s etc. in it, gathered all the bilaterals together
10 so it could do a test run to prove that its system could
11 do this.

12 Now, 31 years later the documentary record is not
13 complete but what remains is more than sufficient to
14 show the position that what Europay received were
15 comprehensive bilaterals between every single one of the
16 banks. So the matrix is fully the result of bilaterals,
17 not any form of default to the EEA MIF.

18 And the starting point on that is the document at
19 {C1/209.2/1}. It's an exchange between Europay,
20 Mr Leader, and he's sending this letter to Mr Slough of
21 Midland Bank. I mentioned I was drawing the Tribunal's
22 attention to Midland because I was going to show you
23 a Midland document at this point. He says:

24 "I refer to your letter ..."

25 Midland's letter:

1 "... of July 9 containing details of bilateral
2 interchange agreements" with a number of banks, but to
3 remind you of the familiar three: Bank of Ireland, AIB
4 and Robert Fleming -- sorry, Frizzell was the third one,
5 I apologise. So Bank of Ireland, AIB and
6 Robert Frizzell. Unfortunately we don't have the
7 original letter of July 9th but what we do have is the
8 response which is {C1/210.1}. And this is Midland's
9 response saying:

10 "Andy ... has passed me your letter of 3 August
11 regarding the implementation of bilateral interchange
12 rates ...

13 "I have chased those banks with whom we have
14 negotiated a changed rate [so] you should receive their
15 forms ..."

16 Europay wants to receive it from both sides:

17 "Please note that our agreement with
18 Bank of Ireland, AIB, Frizzell is for a rate of 1%. As
19 there is no change to the rates for these banks you
20 should not need to take any positive action."

21 So what we take from this is it's absolutely clear
22 that Midland is saying that they have done a specific
23 bilateral agreement with among others Bank of Ireland,
24 AIB and Frizzell Bank. As I say it's not a change
25 because 1% was already in place, and the drawing

1 distinction with some of the other banks who they've
2 negotiated a different bilateral with, but what is quite
3 clear is those are bilateral agreements.

4 And of course those were -- the three banks I drew
5 to your attention were UC00 banks in the matrix. So
6 they've simply got a 1% standard, 1% electronic as it's
7 split down, obviously that covers both.

8 So we see here this is absolutely showing this is
9 the product of a bilateral negotiation with bilateral
10 agreements.

11 MR JUSTICE ROTH: And then presumably they changed with
12 Robert Fleming in 1993 because on the matrix
13 Robert Fleming and Midland are UC02?

14 MR COOK: Sir, I don't know if I can particularly trace that
15 down on all of the documents but, yes, with that one it
16 looks like --

17 MR JUSTICE ROTH: (Overspeaking inaudibles).

18 MR COOK: -- here is August and the matrix is May 1993 so
19 there is a subsequent process of negotiation with some
20 of the banks but what I'm showing you is for the --

21 MR JUSTICE ROTH: No, I understand.

22 MR COOK: Those are bilaterals undoubtedly so.

23 But what we see at this time is all of the banks,
24 and there are multiple examples, this is one clear one
25 providing information on their bilaterals to Europay so

1 it can run its system, the system test that I have been
2 telling you about.

3 And if we go to bundle {C1/218.1/4}, under the
4 heading "Domestic interchange forms" and this is
5 a Europay sort of note of a meeting with Midland, saying
6 CL -- Clive Leader -- advised forms had been received,
7 i.e., domestic interchange forms with the exception of
8 Bank of Scotland and TSB. So they are updating them --
9 these forms have been received from everyone apart from
10 Bank of Scotland and TSB and we'll see in due course
11 it's quite clear they have come in from Bank of Scotland
12 and TSB.

13 So by mid-August 1992 Europay's receiving bilateral
14 agreement forms from pretty much all of the banks at
15 this stage. And that's particularly significant when we
16 see the next document which is {C1/242/1} and this is
17 Europay's response to a request for information from the
18 European Commission. And we see at the bottom of the
19 page that the response, the request from the Commission
20 was August 1992. The response is October 1992, hence
21 the reason I've shown you this process. They gathered
22 the bilaterals and they're responding to the Commission
23 two months after really getting deep into that process
24 and having everybody apart from the last couple of
25 banks.

1 And if we go to page 10 {C1/242/10} the
2 European Commission at the bottom of the page we can
3 see -- middle of the page, exactly right the way it is
4 on the screen under the 2.2.1.4, conveniently numbered:

5 "Are there many such bilateral or multilateral
6 agreements, in particular in the United Kingdom?"

7 This is Europay says:

8 "In the United Kingdom as far as we are aware, all
9 domestic interchange fees are and have been the subject
10 of bilateral negotiations between issuers and
11 acquirers."

12 So they gathered in the bilaterals and they're in
13 a position to tell the Commission and they do tell the
14 Commission all of them have been bilaterally negotiated
15 between issuers and acquirers.

16 With respect we say that's the end of the position.
17 It's quite clear these are all bilaterals.

18 But I can take it further than that. As I said,
19 it's been gathering in these bilateral agreements so it
20 can do a test run of its system, and if we go to
21 {C1/259.1/1} and this is a letter that's sent out from
22 on 7 December 1992. If we can go over the page we can
23 see -- maybe it is page 3, keep on flicking {C1/259.1/3}
24 but it's from Europay in any event the letter. So if we
25 go back to page 1. We see at the bottom of the page

1 it's updating on what's happening in relation to the
2 interchange implementation working party. It says:

3 "All agreed domestic bilateral deals have now been
4 entered into a test clearing/settlement system in
5 Europay. The first test (one full day's outgoing files)
6 is to be run on 8/12."

7 8 December:

8 "With regard to the next steps, once I am satisfied
9 with the test results, I will write [this is Europay] to
10 each principal contact with details of all bilateral
11 deals agreed by that bank ..."

12 Bilateral deals agreed, not defaults to a fallback:

13 "... together with an implementation date."

14 So this is December. They say they are going to run
15 a test, I say that's what the purpose of the process
16 was, to run a sample test of a system, and then Europay
17 are going to write to the banks with details of all
18 bilateral agreements, all bilateral deals agreed by that
19 bank and that is exactly what happens.

20 So the next document is {C1/376/1} and if we can
21 have this up on the page with the attachment which is
22 {C1/377/1}. Thank you very much.

23 This one is a letter from Patrick Nelson of Europay
24 to Mr Slough, Midland Bank again.

25 "Dear Andy.

1 "Domestic bilateral interchange agreements.

2 "I am pleased to inform you that Europay will be
3 able to support bilateral interchange agreements for UK
4 domestic clearing settlements and traffic."

5 We see midnight 2 May is an important date because
6 that's the date of the matrix, and then it says:

7 "... a complete list of interchange agreements
8 entered into by Midland Bank is attached for your
9 reference. Please let me know if this does not match
10 your own records."

11 Then we see the attachment again headed "Domestic
12 bilateral agreements set up for Midland Bank" and
13 I think my learned friend took you to an example of this
14 without the covering letter, to say well, that's just
15 what's been set up, it didn't mean these are actually
16 bilateral agreements. And you see the covering letter
17 I'm afraid that is a submission that is just simply --
18 is unsustainable. It's been quite clear, they've
19 described this as a complete list of interchange
20 agreements entered into by Midland Bank, not the
21 application of some default fallback. We see the list,
22 back to our familiar friends Allied Irish Bank 1% and
23 1%; Bank of Ireland 1% and 1%; and Frizzell 1% and 1%.

24 These are the UC00 entries I particularly drew to
25 your attention. The ones we saw had been specifically

1 notified as being agreed, and again they figure as being
2 domestic bilateral agreements that -- entered into by
3 Midland Bank. Again it's just quite clear what is going
4 on.

5 And what we have in the bundle is one of these
6 pretty much for every single bank.

7 I want to quickly draw the Tribunal's attention, to
8 pop it up on the screen {C1/374} with {C1/375/1} next to
9 it and this is the NatWest one. Again, they are all in
10 essentially identical language, you see the rates vary
11 slightly, exactly the same.

12 "A complete list of interchange agreements entered
13 into by National Westminster Bank is attached for your
14 reference."

15 Our familiar friends AIB, Bank of Ireland and
16 Frizzell at 1% because they're UC00 but that is because
17 that is the agreed bilateral rate.

18 And again it's sent to each of the banks. So, sir,
19 you asked: where do we get the bilateral rates from?
20 And whether there's a disagreement about our table.
21 With the exception of a single column which is May 1993,
22 which we take from the matrix, and where we do have to
23 interpret that by reference to what UC00 or UC01 means,
24 every single other entry is the product of either the
25 Midland letter that we saw, with Midland saying in a way

1 that allows us to actually see exactly what the rate is,
2 we have done a deal at 1%. Or these letters of
3 confirmation which are put explicitly in terms of here
4 is a list of your interchange agreements, domestic
5 bilateral interchange agreements and the language, with
6 respect, sir, is absolutely clear.

7 MR JUSTICE ROTH: Just I understand that. You said with the
8 exception of May 1993?

9 MR COOK: Yes, sir. If you go to {B/55.1} which is the
10 bilateral agreement schedule.

11 MR JUSTICE ROTH: May to December.

12 MR COOK: The footnote explains that that is the only -- the
13 source of that entry is the 2 May matrix. So for all of
14 the other columns it is a document of the kind I showed
15 you, either a specific letter or these letters
16 confirming a list of rates. The column that we
17 essentially fill in from the matrix is simply the May to
18 December column. As the footnote explains, it's from
19 that matrix. And we've explained exactly how it was
20 compiled at paragraph 54 of our written closing, thanks
21 to Mr Leith.

22 So that's the sort of a one exception where we've
23 taken it from the table and just, sir, simply because
24 that is the one place we get an absolutely comprehensive
25 matrix which shows us that all 16 banks at the time had

1 bilaterals with all of the other 16 banks.

2 But with all the others we're looking at documents
3 where the disagreement between me and my learned friend
4 is when the document says here is a list of your
5 domestic bilateral agreements, does it mean domestic
6 bilateral agreements or does it mean this is the
7 application of a default? And when you see the
8 document, sir, with respect it is absolutely clear what
9 it means, particularly when seen in the context of
10 Mr Hawkins' unchallenged evidence.

11 And just to show you a further example of that,
12 which is {C2/212/1} for example. And this is rolling on
13 into 1994, again it's a process that Europay
14 periodically does this check on what is happening. This
15 is NatWest though again there are multiple versions of
16 this to different banks at around this kind of time.
17 Again:

18 "Domestic bilateral interchange agreements."

19 Absolutely clear.

20 "I am attaching herewith a complete list of all
21 bilateral interchange agreements entered into by NatWest
22 ..."

23 And two subsidiaries Ulster Bank and Coutts & Co.
24 And if we have on the screen {C2/213/1} as well. And
25 there are -- this is the NatWest. Three lists, one for

1 Ulster and one for Coutts as well but this is NatWest
2 again, domestic bilateral agreements set up for NatWest.
3 This is again rolling it forward and by this stage you
4 see that a lot more of the rates have gone up. What
5 hasn't gone up is for our three friends Allied Irish,
6 Bank of Ireland and Frizzell who are still at the
7 previous 1% rate.

8 MR JUSTICE ROTH: Presumably Europay, it looks like
9 a standard letter they sent to each of the banks.

10 MR COOK: Yes. No, it's a standard -- they're periodically
11 doing this and sending it out to each one saying: here
12 is list of all your bilateral agreements. They wouldn't
13 have said that unless that was a reflection of what they
14 had as bilateral agreements and each time you got all of
15 the banks and all of the major banks certainly on this
16 list.

17 And then the next document is {C2/92/1} and this can
18 just be on the screen on its own. And you've seen this
19 before, sir. This is the meeting note of the meeting at
20 the Office of Fair Trading on 15 March 1994. And
21 I'm afraid my learned friend has a tendency to
22 misdescribe this document, which given the number of
23 documents in the case perhaps isn't necessarily all that
24 surprising. It's not a meeting attended by Mastercard.
25 It's a meeting attended by the four principal UK banks

1 that either issue or acquire Mastercard: Barclays,
2 NatWest, Lloyds and Midland. And it's about -- but it's
3 about multiple card schemes, not simply Europay, it's
4 also about Visa, it's also about the Switch debit card
5 scheme.

6 Now, if we start on page 1, we can see the
7 introduction. So it's with Sir Bryan Carsberg,
8 Director General of Fair Trading at the time, and he
9 opens the meeting and the second paragraph:

10 "The issues on which he wished to focus were ..."

11 Second one, fallback interchange. So that is one of
12 the topics they are considering.

13 If we go on over the page to page 3 {C2/92/3} the
14 first section is about the non-discrimination rule, the
15 honour-all-cards rule, but then the second bit, the 3,
16 fallback interchange:

17 "The DG accepted that the card payment systems
18 needed an honour-all-cards rule and also a fall-back
19 interchange rate. What he was interested in was the
20 extent to which the fall-back rate was relied upon and
21 what mechanisms, if any, existed for varying it because
22 of factors such as high volumes of transactions. The DG
23 said that he had been told that departures from the
24 fall-back rate were rare."

25 And of course come back when we look at the answers

1 we've got the four principal banks in the Mastercard
2 scheme, so the Visa scheme, present in the room. So
3 they pretty much represent the entirety of the market,
4 they know what they're talking about, they're the ones
5 all of the issuers are going to have to enter into
6 bilaterals with -- with him.

7 The second paragraph there:

8 "It was pointed out to him by the card companies
9 that Interchange rates were individually negotiated but
10 the spread either side of the fall-back rate was
11 a competitive issue which could not be discussed in open
12 forum."

13 My learned friend suggested on multiple occasions in
14 cross-examination and submissions that the reference to
15 the spread is about Mastercard. It's not. And we see
16 that because the next sentence is about Mastercard or
17 more accurately at that time Europay, EPI, so it says:

18 "Furthermore, in some schemes (Switch and Eurocard)
19 there is no fallback rate but provision instead for
20 arbitration in the event that a bilateral agreement
21 cannot be reached."

22 And we say that's absolutely significant. The four
23 largest banks in the scheme, the Director General of
24 Fair Trading has asked them, he was concerned about the
25 fallback rate whether people were departing from it and

1 they say for the Eurocard scheme essentially there isn't
2 a fallback rate. Interchange rates were individually
3 negotiated with arbitration in the event the bilateral
4 agreement cannot be reached. Again that just completely
5 destroys the suggestion from my learned friend that the
6 vast majority of transactions up to this point were
7 being done at the EEA MIF. That's just simply
8 completely inconsistent with what they tell the
9 Director General of Fair Trading. It simply just cannot
10 be right that there was any fallback because they tell
11 the Director General they cannot at the time as they
12 understand it, regardless of how you might interpret the
13 rules 30 years later, they understood you had to, you
14 couldn't simply fall back; you had to individually
15 negotiate with arbitration as a fallback.

16 MR JUSTICE ROTH: It says it was pointed out to him by the
17 card companies?

18 MR COOK: Yes.

19 MR JUSTICE ROTH: The card companies as such are not there.

20 MR COOK: It's the banks.

21 MR JUSTICE ROTH: It's the banks who are there.

22 MR COOK: So this document is inconsistent with there being
23 any fallback to any form of default rate within the
24 Eurocard scheme at this point in time -- up to this
25 point in 1993/94. All of these four largest banks know

1 exactly that they have bilateral rates as we've seen
2 from all of the other documents with all the other banks
3 in the scheme.

4 Now, with respect, we say that's the end of my
5 learned friend's UC00 story. It simply is obviously
6 wrong. It is simply a rate, a set of numbers and every
7 single one of those was specifically negotiated at 1%.

8 MR JUSTICE ROTH: One moment. And then the next paragraph.

9 "The card companies pointed out that for
10 international transactions it was inevitable that the
11 fallback rates would be applied and that, at least in
12 the case of the Visa system, market forces in the
13 domestic market would inevitably mean that the fallback
14 rates were used as benchmarks for negotiation but they
15 were not applied invariably."

16 MR COOK: So those are the UK MIFs.

17 MR JUSTICE ROTH: So that paragraph is really conflating two
18 points, isn't it: one, international transactions, where
19 you won't have individual negotiation because there are
20 too many banks.

21 MR COOK: Yes.

22 MR JUSTICE ROTH: And then the second point about the Visa
23 system in the domestic market.

24 MR COOK: Yes.

25 MR JUSTICE ROTH: Where you have a fallback rate.

1 MR COOK: Absolutely, sir. I suppose the other point to
2 mention is just the bit at the bottom which is
3 conveniently highlighted in yellow by somebody, which
4 says:

5 "Bilaterally negotiated rates applied in respect of
6 the mass of transactions conducted between the larger
7 players in the market."

8 So even in relation to Visa which has a fallback,
9 bilaterally negotiated rates applied to the mass of
10 transactions and that must go doubly for the scheme
11 Eurocard, Europay, which they're saying doesn't have in
12 their understanding the ability just to use a fallback
13 rate.

14 So we say it is absolutely clear from all these
15 documents that my learned friend is simply -- is trying
16 to make bricks without straw with her UC00 story.

17 Now, my learned friend did rely on two further
18 documents which jump the story on several years and we
19 say that frankly tells the Tribunal nothing about what
20 the position was in 1993. The first one of those is --
21 and this is {C2/405.1/1} and we deal with this, sir, for
22 your reference at paragraph 67(6) of our closing
23 submissions. I'll just briefly take you through it.

24 So the arguments being made in relation to these
25 documents that these show agreement to UC00, our old

1 friends Allied Irish, Bank of Ireland and Frizzell
2 banking were at UC00. And it's suggesting this shows
3 this was the EEA MIF default. So having identified
4 those banks we then look at -- and before I move on,
5 sir, just a reference that we can see that everybody
6 else in the market, except MBNA is at UC02 and we saw
7 UC02 is the 1.3% and 1. Which you will see from the
8 bilaterals table has pretty much become the dominant
9 rate at which everyone is transacting by this stage in
10 '94-'95. And all we're left with is what are
11 essentially some of the most tiny banks in the system
12 still at -- I will say are simply the 1% standard
13 1% electronic rate that they've always been at and
14 simply not moved on. But on the UC00 -- so UC02 just to
15 note Barclays, Lloyds, Midland, all the big banks, are
16 at that 1.3 and 1 rate.

17 Turning back, then, to the small banks. There's
18 also {C2/405.1/1} which my learned friend showed the
19 Tribunal and this list said: "ah, this shows UC00 is
20 indeed the EEA MIF because the rates that are listed
21 here are, and we agree, the EEA MIF rates, 1.15, 0.9 and
22 0.75." So saying: "ah, this shows that in fact this was
23 simply the application of the default". And with
24 respect we say I'm afraid where my learned friend goes
25 wrong in this document was clearly an early draft which

1 was wrong. The position was corrected and we get back
2 to the point where it's absolutely clear that NatWest
3 knew that it had done bilaterals at 1% standard,
4 1% electronic with these banks and that once the mistake
5 is corrected, Europay agrees.

6 And if we then go -- so these two documents are the
7 attachment to the email which is {C3/51.2}, this is the
8 email we've seen before. It's the 22 December. So
9 somebody working close up till Christmas and it's
10 saying, starting at the top:

11 "Within the scope of an internal review at NatWest
12 Bank for the application of the correct interchange rate
13 indicators in clearing files, Mr Rocco Terrazzano
14 addressed to Bernard Ferran a listing of issuer BINs
15 held within Streamline as bilateral member issued."

16 So what we unfortunately don't have is the original
17 request but we can understand from that that NatWest has
18 sent a list of what it thinks its bilaterals are and
19 it's asking Europay to check. And this is then
20 an internal Europay email which has the two documents
21 we've seen as attachments that is saying -- then if we
22 go down, middle of the page:

23 "Please note that Andy and myself [that's Andy
24 Marshall] have been working on the consolidation ..."

25 The two documents we've just seen, 3 and 4:

1 "... which we kindly ask you to review and approve."

2 And we then see two paragraphs below, at the end,
3 after the numbers 1, 2, 3 at the end of the final
4 sentence:

5 "The above items 3 and 4 focus on the three
6 agreements in place today. In addition, the values
7 reported on the letter do not seem to be consistent with
8 the reality."

9 So what's happening here is NatWest has sent
10 a letter in, which I'm afraid we don't have, with a list
11 of what it thinks its bilaterals are. Europay
12 internally are saying this doesn't seem to be right and
13 somebody has prepared a list which indicates that these
14 are at the EEA MIF rates. But that was simply
15 a mistake.

16 And we see that from the next letter, of the next
17 stage which is {C3/77/1} and if we could have that up on
18 screen with {C3/55/1} as well which is the attachment to
19 it. And this is the culmination of it. It's a month
20 later, 30 January. There's been an internal Europay
21 process. And the result is:

22 "Dear Mr Terrazzano ..."

23 Who is the one who started this:

24 "I refer to your letter ... to Jean-Marie Viroux ...

25 "I am attaching a list of bilateral agreements held

1 by National Westminster Bank and as you will see, our
2 respective files appear to be in harmony."

3 And then Allied Irish 1%, Bank of Ireland 1%,
4 Frizzell 1%. What this letter isn't saying is: oh,
5 we've been applying the wrong rate for the last
6 nine months there's going need to be a refund or there's
7 been a mistake and is absolutely not what my learned
8 friend suggested which is NatWest sends in a new set of
9 new bilaterals agreements for the first time, NatWest
10 starts this with its list of bilaterals, it knows it did
11 a bilateral with these three banks of 1% and 1% and
12 Europay comes back and says it's obviously gone wrong in
13 the middle, but here it's saying our records are in
14 agreement.

15 So the idea that the document my learned friend
16 showed you with the UC00 shows that this is the EEA MIF
17 default, that was an error. It was simply a mistake,
18 and it is corrected.

19 And we see, and I probably for time won't be able to
20 take the Tribunal through it, but TSB is another example
21 of a bank where we have bilaterals from earlier periods,
22 {C2/262} and {C2/263} for example which show the list of
23 bilaterals. Again the poor Irish banks end up with the
24 worst rates it appears, and they're still at 1%. But
25 then we get a confirmation, so this is TSB and we can

1 see that this is 1994, before the change in the EEA MIF
2 rate, Allied Irish, Bank of Ireland, Frizzell are at 1%.

3 And then if we show {C2/484/1} and significantly
4 this is September 1995. That's the other side of the
5 change to the EEA MIF. So again, we have a situation
6 where there were bilaterals at 1% for these banks. They
7 remained bilaterals at 1% for these banks.

8 So again the idea that these are a default to the
9 EEA MIF is clearly wrong. It is not the case that
10 NatWest was an outlier who spotted a mistake and
11 corrected it. It's simply what happened was the mistake
12 is my learned friend relying on a document which is
13 clearly one issued by mistake and more then rapidly
14 corrected. So UC00 simply doesn't have in any way the
15 force that my learned friend seeks to put upon it.

16 The final document I think my learned friend relied
17 upon in this regard was {C6/288/1} and this is
18 a document from 1999. So we get ever further away from
19 the May 1993 starting point in relation to this.

20 If we can then go to the tab "ECDR Retail UK".
21 I think if we go up the page. My learned friend showed
22 you, we see on the column C on the Excel spreadsheet
23 some of the resulting agreement codes. UC01, which by
24 this stage is the fallback UK Domestic MIF. We say in
25 relation to that it simply tells the Tribunal nothing,

1 what UC00 meant six years earlier at a point when there
2 was no UK fallback MIF. All that's happened is the code
3 has been repurposed with a change of circumstances. It
4 clearly was not a fallback earlier and we can tell that.

5 What, however, is interesting is what we see in
6 relation to UC02.

7 MR JUSTICE ROTH: Just one second. Yes.

8 MR COOK: We can see there are various resulting agreement
9 codes. So UC00 is the fallback UK Domestic MIF, this
10 is 1999. UC02, we saw that historically, that was the
11 code that applied 1.3 and 1. Now this is still
12 a bilateral but it's described in the column on the
13 right-hand side as "fully follows fallback UK domestic".
14 So it's now being used as the code that is the same as
15 the UK MIF and of course it was 1.3 and 1 historically.

16 And the distinction that's drawn between that and
17 some of the other codes, UC01, UC03, and UC05 is those
18 are described as true bilaterals because they differ
19 from the fallback.

20 So we've got the UC0 bilateral, which is the same as
21 the UK Domestic MIF but there are some that are
22 described as true bilaterals because they're different.
23 And the mistake suggesting in relation to this when
24 I come on to the 1997 bit of the piece is that this may
25 well be the explanation of the numbers that make no

1 sense -- the fact that what's happened is codes have
2 been repurposed over time and so people are describing
3 without understanding how codes are being repurposed.

4 So that's UC00 which simply collapses away. That
5 left my learned friend's case that the EEA MIF had any
6 role in the period 92 to 96, any direct role this is, as
7 being three specific documents which are said to show
8 gaps. That's the Bank of Scotland, the Beneficial Bank
9 and MBNA, First Trust Bank and the submissions made by
10 now Lord Justice Green in 2006 in the OFT proceedings.
11 That's paragraphs 106, 107 and 108 of my learned
12 friend's closing and we've answered those at
13 paragraphs 58-62 of our closing. With respect, they
14 show very little. At most they show a tiny hold of
15 a bank that had trivial volumes.

16 Sir, it's probably convenient a moment as any. You
17 asked, some questions were put about shares of banks at
18 different times. So we've put it on a sheet of paper.

19 This shows the four snapshots we have during this
20 period of market share information which is taken from
21 the shareholdings which is based on the aggregated
22 turnover for issuing and acquiring. Essentially, sir,
23 the picture didn't really shift very much during this
24 period. NatWest is always the largest. It goes down
25 slightly from 40% to about 35. Midland 23 to 17. But

1 you can see, sir, these are the big players and the big
2 players are always the top four, the top five always
3 amount to in excess of 90% or so. But then if we look
4 at the banks that are sort of identified by my learned
5 friend as exceptional things.

6 First Trust Bank, which is another name for AIB, our
7 familiar favourite, which is entry 20.

8 AIB had 0.03, 0.02, 0.04 essentially and 0.06% of
9 the market. These are the people we are talking about,
10 banks that have the most trivial percentage imaginable.

11 Bank of Ireland which isn't actually one of those
12 illustrations but again we've seen the application,
13 again it's tiny at 0.2% of the market.

14 Frizzell is so small I don't think it actually even
15 figures in the numbers.

16 So Beneficial Bank doesn't figure.

17 Just to note the reference at the end of the page,
18 if we turn it over, sir, to identify some of the other
19 banks that join the market, join the scheme, but there's
20 a Europay memo we've quoted from there, dated
21 11 June 1997 which says that MBNA is the only non-MEPUK
22 member who generates a meaningful business with Europay
23 and MBNA does join Europay and we see if we go back on
24 to the main page, row 28 even by 2007 it's only doing
25 2.7% of the market.

1 So when we talk about some of these small banks,
2 sir, they are, with respect, de minimis. They are tiny
3 parts of the whole market.

4 MR JUSTICE ROTH: Just to tie up the percentage shares in
5 the initial bilaterals table which are very close, not
6 quite the same. You'll recall in the bilaterals table
7 on the left-hand column --

8 MR COOK: If that could come up. It's {B/55.1/1} sir.

9 MR JUSTICE ROTH: Just trying to work out what -- it looks
10 like it may be -- maybe it's 1994.

11 MR COOK: They're shareholdings in 1996.

12 MR JUSTICE ROTH: That explains the slight -- they're 1996,
13 are they?

14 MR COOK: Yes and they are not surprisingly exactly in the
15 middle of --

16 MR JUSTICE ROTH: Yes, that explains it. Thank you.

17 MR COOK: Sir, where we get to at the end of that as I say
18 the conclusion, we deal with all of this at
19 paragraphs 51 to 68 of our closing that the bilaterals
20 were ubiquitous or nearly ubiquitous in the period 1992
21 to 1996. The only answer was the UC00 point and what
22 that might show about our bilaterals table. That, with
23 respect, takes them nowhere, it doesn't help at all and
24 the Tribunal should therefore -- there's no reason for
25 the Tribunal to reject the absolutely clear evidence,

1 the documents and the weaknesses, the bilaterals were
2 essentially ubiquitous.

3 MR JUSTICE ROTH: And then for 1997 there's that -- which
4 you're coming to, there's the response to the OFT wasn't
5 it?

6 MR COOK: Yes.

7 MR JUSTICE ROTH: And that you're about to come to.

8 MR COOK: Yes.

9 MR JUSTICE ROTH: So shall we take a short break here and
10 come back -- how are you doing on time?

11 MR COOK: I have about another 20 minutes, sir, then my
12 learned leader comes to deal with the causation piece in
13 relation to 1996 and 1997.

14 MR JUSTICE ROTH: So it looks like we're all right then by
15 the looks of things?

16 MR SMOUHA: The two points I have to deal with afterwards
17 are first of all just the evidence in relation to
18 whether the EEA MIF was understood to be the default.
19 And the evidence suggested that the EEA MIF was actually
20 used in negotiations of bilaterals. So it's those two
21 points. There are some documents that I want to show
22 you but I would hope, sir, that -- can I check -- I know
23 it's been a long day but can I check in terms of
24 planning --

25 MR JUSTICE ROTH: We can sit a bit later today.

1 Ten minutes.

2 (3.12 pm)

3 (A short break)

4 (3.25 pm)

5 MR COOK: Sir, I turn now to the 1997 position. The
6 starting point here is, as so often, the bilaterals
7 table, so {B/55.1/2} and if we pick it up at page 2.
8 And, sir, this is just to note as the starting point
9 that by the time we get to the end of 1994, so that's
10 the July to December 1994 column, we can see that
11 virtually everybody is at 1.3% standard, 1% electronic.

12 If we go to page 3 of this {B/55.1/3} we see
13 sometimes at occasion for Midland, for example, I am
14 noting particularly because Mr Smouha will be addressing
15 the comment made by Midland in relation to the EEA MIF,
16 we can see a couple of our familiar friends AIB, Bank of
17 Ireland and Frizzell are still at 1% but almost
18 universally we can see that everybody is at 1.3 and 1 by
19 the end of this period, consistent with Visa's UK MIFs
20 and the reference rates.

21 In terms of volumes because as we've seen
22 Bank of Ireland, AIB, these are such tiny fractions of
23 the market, close to 100% of the market is transacting
24 bilaterals at 1.3 and 1 and there is no suggestion those
25 can possibly be a default, for obvious reasons.

1 So that's the picture at the end of 1994.

2 The next point is Mr Hawkins' evidence and it is
3 Mr Hawkins' second statement and to briefly what I take
4 from this. In particular paragraphs 28 to 35 and 28 and
5 29 he explains if a bank had wished to cease transacting
6 under an existing bilateral agreement he would need to
7 give notice to its counterparty bank/banks and its
8 processor. So that's the bilaterals continue until
9 someone expressly terminates them, a point which doesn't
10 seem to be contentious.

11 Paragraph 30, Mr Hawkins says this never happened
12 for NatWest or its subsidiaries and they continue to
13 transact until November 1997 at 1.3% standard and
14 1% electronic, and he gives some very graphic evidence
15 if anyone had ever tried to do that to him then "all
16 hell would have broken loose" in his language and he
17 didn't.

18 Paragraph 31, he explains that he would have known
19 if another major bank had chosen to terminate its
20 bilateral agreements and apply the EEA MIF because this
21 would have been an important event. It would have been
22 raised or commented on at the multiple meetings they
23 have about this, and he sets out a number of
24 contemporaneous documents which he says confirm his
25 view, including all the banks were agreeing the

1 reference rates at 1.3 and 1, these were Visa's UK MIFs
2 and the adoption of UK MIF in November 1997.

3 Paragraph 32 explains if a substantial proportion of
4 transactions had taken place at the EEA MIF in 1996/1997
5 this would have caused two substantial disruptions to
6 bank's business. First, the rates would have fallen at
7 whatever point somebody terminated the bilaterals we
8 know were in place at the end of 1994. So there would
9 be no reduction. And then secondly, when the UK MIF
10 comes in in late 1997 the rates would have then jumped
11 up again so there would have been two disruptions going
12 down and going up. And this again these are -- that's
13 the evidence he gives and he says, paragraph 33, he has
14 a distinct recollection that this never happened and he
15 refers to the R & C paper submitted to the MEPUK board
16 in October 1997 saying there had been no real problems
17 to date.

18 Paragraph 34, that he would have regarded it as
19 a real problem if the EEA MIF had applied to any
20 substantial part of the business of NatWest or any of
21 the MEPUK members.

22 Paragraph 35, he explains that what they were
23 talking about in that paper was the anomaly of new
24 members and we see from the table I handed up that the
25 new members are essentially tiny. Mr Hawkins says they

1 were under 1% of the domestic scheme overall and
2 paragraph 36, if Midland had used the EEA MIF in
3 negotiations with NatWest or with any of the other MEPUK
4 members he would have expected it to be raised and it
5 wasn't.

6 All of that evidence is unchallenged, that -- so we
7 say in relation to that quite clearly everyone is at 1.3
8 and 1. And evidence clearly shows that that did not
9 change. His evidence is unchallenged but it's also
10 supported firmly by the documents that there is no
11 reference here to any of these events having happened.
12 No reference to -- there is no document that shows
13 anybody serving notice of termination, notifying the
14 processor. There is no reference to anyone saying
15 there's a problem in relation to the EEA MIF,
16 complaining about the UK MIF is going to cause problems
17 because it's going back up again.

18 So this is all confirmed by the contemporaneous
19 documents. There are also, while there are fewer
20 records of bilaterals after 1994 because there was no
21 need to enter into new ones, we do have records for
22 NatWest for example, bilaterals table, which shows again
23 the confirmation they were at 1.3% and 1 consistently
24 for all the major parties apart from a couple of Irish
25 banks and Frizzell right the way through until 1997.

1 So nothing has changed is what he is saying and all
2 the reasons to say that that must be right, and that's
3 all unchallenged.

4 So, my learned friend is essentially -- she hasn't
5 I think challenged the evidence but she's suggesting in
6 some way we move from a position at the end of 1994
7 where close to 100% of the market is transacting at
8 bilaterals of 1.3 and 1 to a point where some are
9 unknown, had the 50% figure thrown around, some unknown
10 portion of the market are not at 1.3 and 1, they're at
11 the EEA MIF default, she says. But there is no
12 mechanism identified. There is no way that that can
13 happen in a way that is -- sorry, the way that is
14 consistent with Mr Hawkins' unchallenged evidence fully
15 supported by all the contemporaneous documents.

16 And there was a very revealing passage in my learned
17 friend's submissions yesterday, page 9 of the -- sorry
18 {Day9/76} of the transcript. And it's line 15 onwards,
19 my learned friend made the point that:

20 "Ms Demetriou: ... Mastercard say that Mr Hawkins'
21 evidence on this point wasn't challenged by us. But,
22 [she says] again, it's completely consistent with our
23 case there was no major problem in November 1997 when
24 domestic MIFs were introduced because our case is that
25 the EEA MIF was the fallback throughout the early and

1 middle period. That default rate was the outside option
2 and therefore acted as a constraint on negotiations
3 throughout the period.

4 "The majority of the interchange fees recorded in
5 the bilateral interchange fees table were at the EEA MIF
6 in 1992 and 1993.... "

7 That's the UC00 point I just addressed:

8 "For 1994 some remained at that level, but the
9 majority increased the standard rate to 1.3."

10 A point about weighted averages and then she says:

11 "And when the UK MIF was introduced, it was adopted
12 at the prevailing rate. And so on our case [Mr
13 Merricks' case] there was no market disruption in either
14 November 1996 or November 1997. It [being Mr Hawkins'
15 evidence] wasn't something that we needed to challenge."

16 At that point my learned friend was addressing her
17 guidance case, the idea the (inaudible) was guidance
18 during this period. But the problem with this
19 submission is it fatally undermines her direct
20 application case. She's not just not disputing the
21 propositions I've just put to you, she is putting them
22 forward positively that everybody was at 1.3 and 1. We
23 agree. That's what the position is in 1994 that nothing
24 changed and that nothing changed when the UK MIF was
25 adopted. We agree. But that means there cannot be

1 a direct application case because there is not some
2 category of or substantial category of transactions of
3 the EEA MIF which would be a reduction in the MIF at
4 some point 1995,1996 and then an increase in interchange
5 fees in December 1997.

6 So their positive case, which is absolutely
7 consistent with what it has to be because they can't
8 contradict Mr Hawkins' evidence, they haven't challenged
9 it, is there is no scope for the direct application
10 case. So we say with respect that's the end of the
11 point. She's contradicted the very basis of the
12 document that she tries to rely upon, and more
13 fundamentally she has no explanation of how that
14 document can be right or her interpretation of that
15 document can be right on the facts of the case.

16 But in terms then of the Europay document, it's
17 rather surprisingly stated at paragraph 2.4 of
18 Mr Merricks' closing that that is an unequivocal
19 statement from Europay that 99% of transactions were
20 processed at the EEA MIF. With respect, it's a very far
21 from unequivocal document, but it's one that on her
22 interpretation simply cannot be right.

23 Now, I think what she said in trying to save that
24 was it might still -- or her interpretation of it that
25 it's saying 99% plus at the default, it only relates to

1 transactions being processed on the ECCSS, so on the
2 Europay system. That doesn't help, and it doesn't help
3 for two principal reasons.

4 Firstly, we've just seen, all the major banks, all
5 the banks with the exception of a couple of tiny ones
6 we've seen were transacting at 1.3 and 1, so there can't
7 be this category of transactions which are being
8 processed at the EEA MIF unless those transactions are
9 infinitesimal, a tiny proportion. But with respect
10 a more fundamental problem with it even if Europay is
11 not processing for any of the major banks because as
12 we've seen those are the acquiring banks even if we just
13 look at NatWest which NatWest has a third of the
14 acquiring market, every issuer is going to have to deal
15 with NatWest. And we know that NatWest had
16 comprehensive bilaterals in place, 1990 and 1997, that's
17 the unchallenged evidence. So realistically every bank
18 is going to do a third of its business with NatWest.
19 It's going to do a substantial proportion of its
20 business with NatWest so it simply can't be right, it's
21 impossible mathematically that whatever Europay is
22 processing that 100% is taking place at the EEA MIF.
23 That just simply doesn't work, there is no category of
24 transactions that can be taking place in that way unless
25 there's some totally trivial proportion, that is

1 difficult to envisage what that could be, but again this
2 is contradicted by the facts.

3 And there is of course the question of whether
4 Europay was doing substantial amount of clearing. And
5 I emphasise the word "clearing" in 1997 and you have our
6 submissions on that at paragraphs 135 and 136 of the
7 closing. There really isn't a clear evidential picture
8 of what it was doing at that stage but we say the best
9 evidence is probably it wasn't doing very much clearing
10 at all.

11 And just -- why I emphasise the word "clearing",
12 it's important to recall the distinction that one sees
13 in the documents between the two categories of
14 processing. There is authorisation, which is just the
15 process of checking it's a valid card and I have money
16 in my bank account and the process of clearing, which is
17 when the EEA MIF applies and at different times banks
18 might only do authorisation or might only do clearing or
19 might do both through Europay.

20 Now, my learned friend tries to sort of save the
21 point -- my learned friend tries to save the point about
22 what Europay may have been doing by saying, well, even
23 if banks were processing in-house, which is what
24 Cruickshank said was happening for NatWest and Barclays,
25 or through FDR they'd still have to go through ECCSS or

1 somebody else with a different processor. With respect,
2 that's just wrong. The whole point of this was to cut
3 out Mastercard and the fees it was charging to do
4 processing directly. As was the case with Barclays and
5 FDR, they'd always be doing that directly and not
6 paying, you know, Europay its fees.

7 So, no, it isn't right to say that merely the fact
8 that somebody brought it in-house means they still have
9 to use ECCSS. That was the whole point of removing it
10 from Europay was to avoid the fees and save the fees.

11 Second, my learned friend pointed to some snippets
12 of information about the volume of transactions that
13 Europay processed --

14 MR JUSTICE ROTH: Pausing there. If NatWest and Barclays
15 brought it in-house by 1996 then their transaction won't
16 go through Europay so that takes out -- we've got now
17 your table on shares but it's probably over half the
18 market?

19 MR COOK: Yes, that's certainly over half the market. Then
20 we know Lloyds, Midland, RBS are FDR banks and that's
21 what we say in terms of the evidence, that's at
22 paragraphs 135 and 136 of our closing. It seems to us
23 that it's difficult to see in clearing terms who was
24 really left which is the reason we say it's likely to
25 have been very small at that point.

1 MR JUSTICE ROTH: So it could be right for those who were
2 being processed by ECCSS, could it not?

3 MR COOK: I'm afraid, sir, it can't be and it would be nice
4 if there was an easy cut through, but I am afraid there
5 isn't. And the reason for that is let's say for the
6 sake of argument Bank of Ireland, I have no idea who
7 Bank of Ireland was with, but if Bank Ireland is using
8 ECCSS for its processing, every transaction has to then
9 be with Barclays or with NatWest, so it's going to go
10 through ECCSS as Bank of Ireland's processor. So it's
11 only -- so there is always going to be a link with ECCSS
12 if one of the parties has Europay as its processor.

13 So I'm afraid there isn't a category that one can
14 realistically think of that could take place through
15 Europay that doesn't involve all of these big banks, and
16 certainly NatWest just as a starting point, that,
17 you know, Bank of Ireland if it was transacting with
18 NatWest, it would have been pursuant to bilaterals.

19 MR JUSTICE ROTH: I see.

20 MR COOK: I am afraid, sir -- it would be nice if there was
21 a category we can identify. I'm afraid we simply can't,
22 sir.

23 My learned friend pointed to a couple of snippets
24 from later information at about percentage of processing
25 and what that was at various times. The problem is that

1 doesn't take one that far which is why I draw
2 a distinction between the two levels of processing. And
3 with some of the later numbers you don't know if that's
4 authorisation or whether it's clearing and settlement.

5 So we say the best evidence you have, which we set
6 out in our closing, is it's likely Europay did very
7 little clearing in 1997, but in any event the numbers
8 simply can't accurately represent the volume of
9 transactions at a default rate because of all the
10 bilaterals that we absolutely know did exist in the
11 market and must have existed.

12 So we say the conclusion you get to on the clear
13 evidence is 100% of transactions virtually were pursuant
14 to bilaterals and that is firmly supported by
15 Mr Parker's weighted average MIF analysis, both versions
16 of it, so both the analysis from 95 to 97 and then the
17 analysis looking at what happened from 1997 to 1998.

18 Now, there are various attacks at paragraph 116 of
19 Mr Merricks' closing on this. Some of those criticisms
20 are overstated, certainly in the main text, and they go
21 beyond the points that really can be made but we've
22 dealt with all of them at paragraphs 146 and 147 of our
23 closing. There's nothing in them. With respect, my
24 learned friend really had no answer to my points
25 including the most fundamental one which is, while it's

1 data from the four largest banks, as we saw from the
2 Cruickshank report, the four largest banks are close to
3 100%, they are the entire market, so looking at that
4 data is looking at the entire market.

5 And we say all of the other ones are just trivial
6 points of detail which don't affect their numbers and
7 there is a startling correspondence between Mr Parker's
8 calculations with what the weighted averages are. So
9 his analysis is very supportive of that. There cannot
10 have been a material volume of transactions pursuant to
11 the EEA MIF prior to November 1997, and there is simply
12 nothing in the evidence at all that can possibly support
13 the idea you should pluck 50% from the air as my learned
14 friend suggested. A broad axe is not an excuse just to
15 cut in half and there is simply no support for those
16 numbers at all.

17 One final point from me, sir, now which is on
18 bilaterals. You asked the question: do they fall away
19 in 1997? To some extent it almost becomes a completely
20 moot point because we say everybody was at 1.3 and 1
21 bilateral. The UK MIF comes in at 1.3 and 1. It
22 doesn't really matter to anybody, until a new UK MIF
23 comes in two years later what formally they're at which
24 may partly explain why you get this UC00 code I showed
25 you -- sorry, UC02 code I showed you saying basically

1 they're the same thing.

2 What appears to be the case -- and this is dealt
3 with at paragraph 138(4) of our closing -- is that
4 certainly the FDR banks didn't tell FDR and there's
5 a document reported there, FDR says we haven't been told
6 by any of our banks to terminate bilaterals. (1) It's
7 a confirmation that there were bilaterals by the FDR
8 bank in place in 1997. Again, the end of the possible
9 analysis, my learned friend's Europay document. But
10 what that also shows is there really wasn't a rush to do
11 so because it was irrelevant. You had two identical
12 things, identical rates.

13 Sir, it's not really very clear at what point people
14 formally moved from one to the other, probably because
15 nobody cared very much, sir.

16 So unless you have any further questions, that's
17 1997.

18 Closing submissions by MR SMOUHA

19 MR JUSTICE ROTH: Yes, Mr Smouha how long are you going to
20 be?

21 MR SMOUHA: Can I work that the other way around. Can

22 I ask, if I may, how long the Tribunal --

23 MR JUSTICE ROTH: No, we want to know how long you think you
24 would like.

25 MR SMOUHA: Ms Demetriou would like 20 minutes. And I need

1 to make sure that she will, sir, have the 20 minutes.

2 MR JUSTICE ROTH: Well, we can sit till 4.45. And that
3 should enable you and Ms Demetriou --

4 MR SMOUHA: What I will do, sir, the two points I want to
5 address which are the content of them is very much
6 evidence-based and documents-based. So what I will --
7 and there were a number of documents that I wanted to
8 show you where they've particularly been relied upon.
9 But what I will do in relation to some of them, I hope
10 you forgive me is in terms of identifying them, giving
11 the reference but rather than turning them up, which is
12 what takes the time, because I know the Tribunal will be
13 looking at them again closely, just indicate what the
14 points are that we make on them, or give the
15 cross-reference to our submissions where that's
16 a substitute.

17 MR JUSTICE ROTH: Yes.

18 MR SMOUHA: The two areas that, sir, I am addressing are
19 first of all the question whether the EEA MIF was
20 understood by the banks to be the default. And
21 secondly --

22 MR JUSTICE ROTH: Under the --

23 MR SMOUHA: All the early period, yes, sir. I'm not going
24 back to anything 1997 onwards.

25 And secondly, the suggested evidence that there is

1 evidence of the default being used in bilateral
2 negotiations.

3 Now, sir, in relation to the first.

4 MR JUSTICE ROTH: And the first is, just to be clear, it's
5 basically the choice between the EEA MIF and the
6 inter-regional MIF; is that right?

7 MR SMOUHA: No, it's more complicated than that, sir, and we
8 have in the documents the references to an understanding
9 that it was the reference rates which were, and they're
10 described in different ways, sometimes described as
11 default, sometimes described as fallback and pending
12 arbitration. So it's a mix of things. I'll touch on
13 that.

14 But sir, as I'm sure you appreciated in this
15 context, the lack of clarity, the variety of
16 formulations, these are all reasons why, and are
17 problems for Mr Merricks' case on this aspect because on
18 the basis of, sir, the discussion with the experts in
19 relation to this aspect, the outside option,
20 Mr Merricks' case as to the role of the EEA MIF in the
21 negotiation of bilateral agreements is based on the
22 contention that the EEA MIF represented and this phrase
23 that's been deployed, "outside option". Which, as
24 I understand it, sir, is the reason it's formulated in
25 that way is to try and put a label on something which is

1 not discussed, which is not articulated, which is not
2 actively deployed. So they're trying to reach for
3 something which they can say it had some effect but it
4 was in the ether, on the wallpaper of the room.

5 And so that aspect, the potential significance of
6 that kind of matter was addressed in the concurrent
7 expert evidence, sir, when you explored with the
8 experts. And Mr Coombs accepted and accepted readily
9 that for a suggested outside option to have any
10 relevance it would need to be credible, it would need to
11 be clear to both sides, such that both parties have it
12 in mind, and have similar expectations. And the
13 reference to that is {Day8/42} and also paragraph 100 of
14 our submissions.

15 So lack of clarity, inconsistency of terminology,
16 differences of views are a problem for Mr Merricks'
17 case. Now, sir, three points in relation to this
18 aspect.

19 The first is that the Tribunal is looking at the
20 shared understanding of the banks. Statements that
21 Europay or Mastercard made about the effect of the rules
22 to the Commission or the OFT are irrelevant. Now, what
23 of course you see, and have seen in the documents, are
24 differences of view between different camps, between
25 Europay in one camp, MCI in another camp and then the

1 banks and MEPUK in their own distinctive camp.

2 The only relevant question in this context for the
3 outside position aspect is what the UK banks understood
4 the position to be at the time and in particular whether
5 they had a shared and clear understanding that the
6 EEA MIF was the default. If the point was unclear, if
7 views differed or if the view was that it was unclear,
8 that the significance of the outside position as
9 suggested wallpaper in the background of every bilateral
10 negotiation, simply fades to insignificance. Even as
11 a potential influence.

12 The second point is we see in the documents the
13 banks recognised the very lack of clarity at the time.
14 They raised questions as to what the fallback rate was
15 and what rules actually apply and how it worked. And
16 what's particularly important is that they raise these
17 questions but even then they don't get clear answers.
18 And that lack of clear response is important in itself
19 because if the default was an important factor in the
20 negotiation of bilateral agreements, the banks would
21 absolutely want to clarify the position straight away.
22 It would be -- would have been -- a really urgent
23 question.

24 So the fact they were not troubled by the extended
25 period of time over which the debate took place and the

1 lack of clear answers or clarification, again weighs
2 against this being of any significance to them in the
3 context of bilateral negotiations.

4 And the third point, sir, is about time periods
5 following on from what I've just said. We are dealing
6 with a four and a half year time period and what the
7 Tribunal will see from the evidence is a progression in
8 the views of UK banks about how the scheme rule operated
9 over the course of that period and as a result there is
10 no single answer for the entire period.

11 Sir, can I hand up a document which is essentially
12 just a map of cross-references which I hope will be
13 helpful to you and to everyone.

14 Sir, let me just explain what this is. This is
15 a list of all the documents referred to by either side
16 in their closing submissions on this point. But
17 organised by who it is who is making the reference to
18 the effect of the arbitration rules.

19 So first of all, the first three are Mastercard.
20 The second group are Europay. And then references to
21 the arbitration rules and their effect, so relevant to
22 understanding of MEPUK or its members.

23 Now, sir -- and we give the document references as
24 I say, but this is whether these are documents referred
25 to or relied on by Mr Merricks or by Mastercard.

1 Three points, sir, just apparent -- which will be
2 apparent to the Tribunal just from looking down that
3 list. The first is the extended period of time over
4 which the issue remained unresolved or that over which
5 strongly held views differed. You see we have documents
6 going back to 1992, and then through to 1997. 9, 19 and
7 20, the 2000 and 2002 documents are of course different
8 because they are later looking back at and saying what
9 was understood to be the position.

10 The second point that you get from this is that my
11 learned friend's heavy reliance on Europay documents, in
12 the second category, gives you little assistance. It is
13 hardly surprising that Europay's view would be
14 consistent. The fact that they say similar things,
15 although even so with imprecision, but the fact that
16 they say similar things in a sequence of documents over
17 a period January 1993 to December 1994 tells you nothing
18 about whether the banks had a view which operated
19 causally at the negotiating table. So simply going to
20 document after document and saying, "Here is another
21 document, here is another document which Europay say
22 this" doesn't advance matters.

23 The third point is that it is the MEPUK and bank
24 contemporaneous documents from this period, 1992
25 to 1997, that will be of most significance to you.

1 Sir, in paragraph 29 of his submission, Mr Merricks
2 accepts that in the early 1990s there was a-- these are
3 the words used -- "lack of clarity" among members of
4 MEPUK as to whether the international rate referred to
5 the intra-EEA or the inter-regional MIF. If MEPUK
6 members thought the fallback was the inter-regional MIF
7 or it was unclear to them whether the fallback was the
8 inter-regional MIF then the outside option argument
9 doesn't work.

10 So there is at least, sir, some common ground that
11 there was not a clear view among banks that the EEA MIF
12 was the default in 1992, 1993 and 1994.

13 Now, sir, I want to look at some of the documents
14 but in relation to what in our submission you get from,
15 in particular, the MEPUK and members of MEPUK documents
16 that are listed there, three things.

17 First, the documents show the banks saying that if
18 there is a failure to agree bilaterally there will be
19 arbitration.

20 Second, the banks understood -- the documents show
21 that the banks understood that while the arbitration is
22 pending there will be a fallback rate and that that will
23 be the international inter-regional MIF set by
24 Mastercard International.

25 And third, we also know from the documents that it

1 was understood that an arbitration would be informed by
2 the reference rates.

3 Now, sir, there were four documents that I was going
4 to take you to. I am going to give you references for
5 the first three, one of which Mr Cook has taken you to,
6 so that will save time, and then there is one very
7 important one which I need to just spend a few minutes
8 on.

9 The four documents are: first of all and using the
10 list that I just handed to you, number 10, the MEPUK
11 board minutes from 1992, from 28 May 1992 which is
12 {C1/197/3} and sir -- at page 3 and the key paragraph is
13 the top paragraph beginning:

14 "... a number of issues ..."

15 And five lines down "would result in arbitration"
16 and you see reference to "the MCI international fallback
17 rate".

18 The point there is that it was understood the
19 failure to agree interchange rates would result in
20 arbitration by MCI and we then see that the interim
21 rate, characterised as "meanwhile", is the rate set by
22 Mastercard International.

23 Sir, Mr Merricks accepts that reference rates would
24 be used in any arbitration. That's Mr Merricks' written
25 opening, paragraph 59, and Mr Hawkins' evidence was that

1 MCI and Europay were both aware of the reference rate
2 and that the banks understood that an arbitration would
3 be informed by the reference rate. And the reference to
4 that, sir, in response to questions from you,
5 {Day6/62:4} to {Day6/63:15} and further references at
6 paragraphs 76(2) and 76(3) of our written closing.

7 So the banks thought in the event of a failure to
8 agree a bilateral there would be arbitration and that
9 an arbitration would be informed by the reference rates.

10 Second document, sir, you've been taken to, again
11 Mr Cook took you to it, is the meeting note of the 1994
12 meeting with the Director General of Fair Trading,
13 document 12 on this list, {C2/92/3} and, sir, you saw
14 Mr Cook showed you the point that the OFT, the four
15 banks attending that meeting expressly told the OFT in
16 1994 that there was no fallback rate and that in the
17 event -- there was no fallback rate but provision
18 instead for arbitration in the event that a bilateral
19 agreement cannot be reached.

20 The third document is the letter from MEPUK's
21 solicitors Denton Wilde Sapte to the OFT dated
22 23 March 2002, document 20 on the list. Sir, we deal
23 with that at paragraph 113 of our written submissions.
24 This is a later document but it is addressing the
25 position prior to 1995 and makes it clear in unequivocal

1 terms that Mastercard International, international
2 fallback rate applied pending an arbitration.

3 And then to the fourth document, which is document
4 14 from 1996. 12 June 1996 note from Mr Hawkins as R&CC
5 chair to the MEPUK board.

6 Sir, this is in the later part of this earlier
7 period and is a MEPUK board paper. Sorry, this is
8 {C3/203/1}. Now, sir, the reason why this is important
9 is because of the way this or an aspect of this has been
10 deployed and referred to by Mr Merricks in his written
11 submissions.

12 There are different versions of this document and
13 I want to start with the version that Mr Merricks has
14 deployed and to look at what he says about it in his
15 written closing submissions. Can we pick this up --

16 MR JUSTICE ROTH: When you say different versions.

17 MR SMOUHA: Drafts and then -- so you'll see, sir, in
18 a moment.

19 MR JUSTICE ROTH: I see.

20 MR SMOUHA: Can we go to Mr Merricks' written submissions
21 {A/29/11}, paragraph 19.3 which says:

22 "Other internal documents towards the end of the
23 Early Period sing from the same hymn sheet. For example,
24 a board paper prepared for MEPUK dated 6 June 1996
25 stated that 'currently the fallback rates are the EPI

1 rates' whilst internal e-mail correspondence within EPI
2 dated 10 May 1996 stated that a licensee 'who does not
3 agree a domestic bilateral effectively works on OUR
4 [i.e., EPI's] international rates'."

5 But it's:

6 "... a board paper prepared for MEPUK dated
7 6 June 1996 stated that currently the fallback rates are
8 the EPI rates ..."

9 And then there's a further point made at 20.1 about
10 the same document:

11 "The MEPUK board paper from 6 June 1996 states that
12 the applicable domestic fallback rates for 1995 were
13 '1.15% standard and .90% and .75% for varying electronic
14 transactions'. These match precisely with the levels of
15 the intra-EEA MIFs in 1995 but are very different from
16 the MCI's inter-regional rate ..."

17 The reference given in both cases to this board --
18 as it's described "Board paper prepared for MEPUK dated
19 6 June 1996" is {C3/194/9}. So let's have a look at
20 that. You will see, sir, that this document has
21 a heading "Draft board paper", subject heading "1995
22 Domestic interchange study final report".

23 At the bottom of the document, can we blow up the
24 footer. You will see that in the footer it's
25 "T boards/draft" you will see there is a manuscript

1 diagonal line through the document.

2 At the top of the document, if we go back to the
3 top, right to the top you'll see, top right in
4 manuscript "to MGH23/5" so evidently it wasn't written
5 by Mr Hawkins but was sent to him. Mr Hawkins was not
6 asked any questions about this document -- sorry, about
7 this draft. He was not asked any questions about the
8 document -- this draft, the document that is shown up on
9 the screen.

10 And, sir, we see the passages that Mr Merricks
11 alights on and sets out in his submissions and we know
12 that this draft was then going to be reviewed by the
13 actual members of the R&CC including Mr Hawkins.
14 Because if we go up a page to page 8 {C3/194/8} we have
15 a fax cover sheet for the draft paper that Mr Merricks
16 is relying on and you will see the words in manuscript:

17 "At last, a draft board paper for circulation to
18 R & C members for approval before going to the board.
19 In addition, for your delectation, a copy of the one we
20 did earlier."

21 So the fax cover sheet indicates there were actually
22 two draft papers and that the final version would have
23 to have been approved by the R&CC members.

24 So the document Mr Merricks relies on is in fact
25 just a draft, though that's not said in the written

1 submissions, and indeed it is one of two drafts and
2 that's not said in the written submissions. We have the
3 final version and in the final version the passages that
4 Mr Merricks has cited are removed from the final
5 version. The version that the R&CC approved and that
6 Mr Hawkins signed, entirely different and have
7 an entirely different position as to what fallback was
8 set out.

9 Let me show you the Tribunal version. We've
10 actually cited the final version in our written
11 submissions but one page of it was cut off. The
12 reference we had given was {C3/194} but we should look
13 at {C3/203/1} which is the complete document. This is
14 the board paper as finalised and then signed by
15 Mr Hawkins. If we see at the bottom of page 2,
16 {C3/203/2} signed by Mr Hawkins on 12 June 1996. Thank
17 you. If we go back to the first page, heading "1995
18 Domestic interchange fee study final report" under
19 heading 2 it notes the results of the 1995 cost study to
20 R&CC on 7 May and we see this under heading 3, "Adoption
21 of 1997 fallback rates":

22 "The practice in the past has been for these cost
23 studies, traditionally commissioned by MCI to be noted
24 and merely used as a reference point for bilateral
25 negotiations with the fallback of international

1 arbitration which would be undertaken if requested by
2 the parties by two MCI board directors. We are advised
3 that there has only been one such case which has gone to
4 arbitration in the past seven years."

5 So arbitration expressly described as the fallback,
6 and nowhere in this final approved signed version of the
7 document is there any of the material that Mr Merricks
8 has relied on. There is no reference to Europay rates
9 at all. So what this board paper, the final version of
10 it, actually shows is that the R&CC and Mr Hawkins
11 absolutely did not regard the EEA MIF as the fallback
12 because they deleted that wording from the one of the
13 drafts which was sent to Mr Hawkins to consider for
14 finalisation for what should be sent to the board.

15 And then if we look over the page at what the paper
16 actually said about rates that are described as
17 "fallback" in inverted commas on page 2 and, sir, this
18 is important because this is about reference rates. You
19 see the words:

20 "The last study (1993) produced cost-based rates
21 1.33 standard and 1.1 electronic but 'fallback' was
22 maintained at 1.3 and 1% respectively."

23 That is a description of the reference rates as
24 fallback. And then you will see consideration being
25 given therefore as to options as to what to do. So

1 under the heading "standard" you have the reference
2 rates. And then under -- sorry under "standard" and
3 "electronic" you have on the left the reference rate
4 showing and on the right -- sorry, the other way around.
5 You are shown the three rates for standard and for
6 electronic and the three options are, first line, keep
7 them as they are, 1.3 and 1, status quo. Option two,
8 a marginal move towards cost-based rates for electronic
9 only or both standard and electronic, which would be so
10 change electronic to 1.05. Or change standard to 1.35,
11 option three, change standard to 1.35 and electronic to
12 1.05. And then last option 1.46% -- changed to 1.46%
13 for standard and 1.09% cost-based. "Board guidance is
14 requested please on the appropriate rates ..."

15 So, sir, you see here reference rates of 1.3 and 1
16 which the paper says were maintained following the last
17 cost study for 1993, and what is evident from the face
18 of the document is that these, being described as
19 fallback rates of 1.3 and 1% had been in place for some
20 time since that preceding study.

21 And what Mr Hawkins also says is that the MEPUK
22 reference rates of 1.3 and 1 had been in place
23 since 1994. For the Tribunal's note that is Hawkins 2,
24 paragraph 72 about which he was also not asked anything.

25 MR JUSTICE ROTH: The next section is interesting.

1 "The practice in the past has been for these cost
2 studies traditionally commissioned to be ... merely used
3 as a reference point for bilateral with the fallback of
4 international arbitration if requested."

5 MR SMOUHA: Could we go back a page?

6 MR JUSTICE ROTH: I think you showed us that. No, sorry
7 I'm on the wrong page. It's on page 2, under "Summary
8 of recommendations"

9 "For current procedure whereby MCI commissioned UK
10 interchange ... undertakes ... if bilateral negotiations
11 fail."

12 The current procedure. So if bilateral negotiations
13 fail then an arbitration procedure.

14 MR SMOUHA: Yes, so the change should be so that MEPUK
15 commissions the study.

16 MR JUSTICE ROTH: That's the change they want but it's the
17 reference to the current procedure.

18 MR SMOUHA: Indeed. Because you'll recall, sir, in the
19 rules in rule A what happens when there's a notification
20 of a dispute the next step is for there to be a cost
21 study commissioned.

22 Sir, then can I then finally turn to -- sir, the
23 next document I was going to deal with but I won't have
24 time is Mr Turner's note. So document 16,
25 30 October 1996 note from Mr Turner {C4/26/26} this

1 really does repay slow and careful reading, sir, in full
2 and in particular it needs to be read together with the
3 cover letter that it relates to because it was addressed
4 to Mrs Hall, who was -- we see the cover letter at page
5 {C4/26/3}. And Mrs Hall who was working on the
6 UK Rule Book. Sir, I'm not going to go through it
7 because it will take some time.

8 MR JUSTICE ROTH: Mr Turner is?

9 MR SMOUHA: Mr Turner of Bank of Scotland.

10 Sir, this is the one document that refers to there
11 having been, as you'll recall, a "ruling" is the word
12 used by Europay in relation to the issue of default.

13 And, sir, forgive me in doing it in this way.

14 MR JUSTICE ROTH: And Mrs Hall -- he is not writing as
15 Bank of Scotland, is he, he is writing following the
16 meeting to her?

17 MR SMOUHA: Of the R&CC committee, yes. What he says in the
18 letter is basically it's another "here is something
19 I prepared earlier". He says, if we go to page --

20 MR JUSTICE ROTH: Writing on behalf of the committee.

21 MR SMOUHA: Sorry, back to page 1 -- page 3, the cover
22 letter the last two lines of the first paragraph:

23 "It was suggested I make available to you what
24 papers I have pulled together over the years on the
25 subject now enclosed."

1 And the last paragraph:

2 "It is difficult to look at arbitration to the
3 exclusion of interchange. In this connection you may
4 like to cast your eye over an internal discussion note
5 I prepared highlighting the need for clarification on
6 fallback and arbitration."

7 MR JUSTICE ROTH: Yes.

8 MR SMOUHA: As I say, sir, forgive me for just making the
9 points but without being able -- the Tribunal will be --

10 PROFESSOR WATERSON: And what was her role?

11 MR SMOUHA: She was working on a new rule book. What would
12 then become the UK Rule Book. This is 1996 so this is
13 moving towards what had now been a very long project
14 which was to move towards there being a UK rule book and
15 then the UK MIF with effect from 1 November 1997.

16 MR JUSTICE ROTH: And writes "seeking your involvement in
17 defining the UK arbitration process" and seek to
18 determine what the current rules are. So they were
19 struggling with the same rules we were struggling with
20 by the looks of it.

21 MR SMOUHA: Exactly so, sir. When you go through the whole
22 of this document, cover letter and the document you
23 will, as I say, see again the identification of that
24 lack of clarity. But, sir, the key point I want to make
25 in relation to this is that Mr Turner refers to there

1 having been in his note a ruling by Europay.

2 Mr Turner's note is undated, it's not clear what date
3 the Europay ruling, whatever that was, was, but the
4 short point, sir, the very fact that there had been
5 something which was seen by Mr Turner as a ruling by
6 Europay suggests that there had been uncertainty which
7 Europay had been trying to resolve.

8 He also says, as you'll see from the document, that
9 the European inter-country rate will apply. So he's
10 making a point about what will happen prospectively
11 which is consistent with the making of the ruling, in
12 other words that's what Europay say should happen, and
13 it's also apparent that Europay had not succeeded in
14 resolving the issue because the ruling was being
15 questioned and the purpose of Mr Turner's note was to
16 seek clarification.

17 Sir, I can't take it further than that because
18 I have one more point to -- very important point to deal
19 with which is Midland and Mr Warren.

20 MR JUSTICE ROTH: Yes. So your basic point is you are
21 saying going back to your starting point that the banks
22 for -- the outside option has to be clear to both sides
23 with similar expectations -- and that it was not clear?

24 MR SMOUHA: Not clear and when there is apparently some
25 ruling from Europay which may have been trying to

1 resolve the issue and Europay had a view that it should
2 be the EEA MIF, even at that point the banks were
3 questioning whether that was correct.

4 MR JUSTICE ROTH: Yes.

5 MR SMOUHA: Sir, the last point is the question of -- is
6 Mr Merricks' case that there is evidence he says that
7 shows that the EEA MIF was deployed in fact in bilateral
8 negotiations and I think the quickest way of addressing
9 this is first of all to see what Mr Merricks says in
10 paragraph 70 of his skeleton argument.

11 MR JUSTICE ROTH: The closing or the opening skeleton
12 argument?

13 MR SMOUHA: The closing submissions. Apologies, {A/29/30}.
14 He says:

15 "In a candid exchange, Mr Warren of Midland Bank
16 revealed to the MEPUK Governance Sub Group meeting in
17 April 1997 that 'in the past, the use of the
18 intra-regional rate as the fallback rate had worked to
19 Midland Bank's advantage'."

20 And then goes on to address that and then also to
21 refer to Mr Turner's note, but I've just shown you.

22 Now, sir, we know that apart from that Mr Warren
23 made other statements about that rate. So if we go to
24 {C4/135/5} in the minute itself, last paragraph:

25 "Mr Warren said that in the past, the use of the

1 intra-regional rate as the fallback rate had worked to
2 Midland Bank's advantage but that Midland was
3 uncomfortable with this rate."

4 Even looking at what he is saying, the fact that
5 Midland is uncomfortable with that rate suggests it is
6 unlikely to be something that Midland would be keen to
7 use or would have deployed liberally in negotiations.

8 Then let's go to another document that records
9 Mr Warren's reaction. This is now after the EEA MIF was
10 expressly adopted in the UK Rules {C4/18/1} and what's
11 happening here is this is an extract from -- of the
12 minutes of the R&CC committee meeting of 24 October 1996
13 and we see a comment that Mr Warren is making referring
14 to a minute of a meeting that he was not at. Mr Warren
15 referred to the following paragraph.

16 "The majority agreed to add a note in the
17 UK Rule Book to the effect that in the absence of
18 bilateral agreement then the intra-regional rate would
19 apply. Mr Hawkins wholly opposed saying that it was
20 a recipe for chaos. He said [that must be Mr Warren]
21 that this contradicted the figures agreed at MEPUK board
22 for fallback rates of 1% and 1.3%."

23 So Mr Warren's reaction to the adoption of the
24 EEA MIF is to say: hang on, but what about MEPUK's
25 approved rates? So Mr Warren evidently considered that

1 the MEPUK reference rates were more appropriate since
2 they had been agreed by MEPUK.

3 MR JUSTICE ROTH: And then the secretary says, actually they
4 aren't fallback rates and that there isn't a fallback.
5 Because if you can't agree then there's an arbitration.

6 MR SMOUHA: But at 4.25pm, sir, on the last day of the
7 trial, sir, you are still looking for clarity which is
8 wonderful optimism but on this issue --

9 MR JUSTICE ROTH: No, I'm just saying that that shows the
10 confusion. I'm not --

11 MR SMOUHA: Absolutely, sir. Absolutely. But just bear in
12 mind this is one -- this is one of the problems of
13 course with trials and parties find you have a reduction
14 of vast amounts of documents from the time and a vast
15 amount of issues down to focus on one little issue and
16 one document and just think about the edifice that's
17 been built on Mr Warren's comment. The suggestion what
18 are you looking for here? The suggestion is that you
19 should find as a matter of fact --

20 MR JUSTICE ROTH: No, I think we've got the point.

21 MR SMOUHA: That Midland deployed this point. So the
22 assumption is they had a clear understanding of it in
23 negotiations.

24 Now, sir, our position as you've seen from our
25 submissions is that any use Midland made of the EEA MIF

1 to its advantage would have had an effect in relation to
2 a trivial number of transactions. We know from the
3 bilaterals table that all of Midland's agreements with
4 banks of any consequence were at 1.3 and 1. The same
5 rate as Visa. Visa's UK MIF and the reference rates and
6 it is clear from the surrounding documentary evidence
7 and the witness evidence that if, and it is a big "if",
8 if this were a point that Midland had raised or deployed
9 in some way in bilateral negotiations it could only have
10 arisen in relation to new banks, incoming banks with
11 consequently trivial volumes, and in that context, sir,
12 can I just give you a reference which is a paper from
13 the MEPUK R&CC signed by Mr Hawkins from October 1997 at
14 {C4/327}. It's an important document. Mr Hawkins dealt
15 with it in detail in his written evidence. He wasn't
16 asked any questions about it and it dates from the
17 period in which the EEA MIF was expressly enshrined in
18 the UK Domestic Rules and which he describes the fact
19 that there have been no real problems to date that the
20 R&CC committee as are aware of in relation to the
21 arbitration process -- in relation to the arrangements
22 and rules in relation to the arbitration process. He
23 then identifies the EEA MIF as a major flaw because it
24 is vulnerable to regulatory attack but says that so far
25 as the R&CC is aware, as I say, there had been no real

1 problems.

2 If the inclusion of the EEA MIF had actually been
3 affecting interchange at the time that definitely would
4 have been a problem from Mr Hawkins' perspective and he
5 discusses that in his second witness statement at
6 paragraphs 34 to 35.

7 So again Mr Hawkins' evidence here wasn't challenged
8 and it makes perfect sense this point arose in the way
9 that he explained in that it was simply not -- that the
10 lack of clarity, the problem was simply not an issue.
11 And that is why ultimately Mr Warren's comment about
12 Midland simply does not have the significance that
13 Mr Merricks tries to attribute to it.

14 The scheme had been established for many years. The
15 overwhelming practice was for the MEPUK banks to agree
16 bilaterals following the reference rates. The use of
17 the EEA MIF could only have been anomalous and so at
18 most used in respect of the negotiation of bilaterals
19 relating to a truly tiny proportion of transactions.

20 So in relation to the question, the question for the
21 Tribunal, causal effect in fact on bilaterals of the
22 EEA MIF: first, the rates and changes in rates in
23 bilaterals evidence no effect of the EEA MIF.

24 Second, the bilaterals were ubiquitous.

25 Third, there is no evidence of the EEA MIFs having

1 in fact played any role with causal effect on
2 a bilateral -- on the negotiation of a bilateral
3 agreement or on a bilateral agreement. And if it did,
4 it would have been of trivial effect in relation to
5 a number of agreements simply involving new issuing
6 banks dealing with Midland.

7 The banks -- and fourth and finally the banks did
8 not have a clear understanding through the bilateral
9 period that if no bilateral was concluded the EEA MIF
10 would be applied in default on the contrary.

11 Sir, thank you for the indulgence in relation to
12 time. Mr Cook gives me permission to say that our
13 submissions in relation -- our submissions in relation
14 to on-us -- we stand by what is in our written closing
15 and he has nothing to add in relation to that.

16 MR JUSTICE ROTH: Yes, thank you. Just one moment.

17 MR SMOUHA: And thank you to my learned friend and apologies
18 for being five minutes over even what I left to her.

19 Sir, unless the Tribunal has any further questions
20 for me.

21 MR JUSTICE ROTH: What we'll do is take a five-minute break
22 and we'll sit until 5 o'clock and that will give you
23 time to gather your thoughts.

24 (4.32 pm)

25 (A short break)

1 (4.38 pm)

2 Submissions in reply by MS DEMETRIOU

3 MS DEMETRIOU: May it please the Tribunal, the basic
4 proposition we advance in this case is an outside option
5 is relevant to any negotiation and that's really a basic
6 proposition of economics and it was one on which the
7 experts were agreed in principle.

8 Mastercard's position in this trial is that the
9 outside option in this case, the EEA default, was never
10 relevant to any negotiation and we say that it has
11 failed to show that. We have succeeded in showing that
12 the basic economic truism held good here.

13 Mastercard's submission that the outside option was
14 never relevant is both economically incoherent but it's
15 manifestly wrong on the facts.

16 Mr Smouha did his valiant best to explain away
17 Mr Warren's comment but Mr Warren said he did deploy the
18 EEA MIF to his advantage in negotiations, and Mr Hawkins
19 explained exactly on what basis.

20 And that isn't a shaky edifice on which to build our
21 argument, it's a direct piece of contemporaneous
22 evidence which supports the underlying fundamental
23 principle of economics at play.

24 Now, in terms of the understanding of the banks,
25 which is the other point that Mr Smouha advanced, he

1 says, well, there was a lot of confusion, and so the
2 banks wouldn't have known what the outside option was.
3 And we say that the weight -- that does not hold good in
4 light of the weight of the documents that we took you
5 to, that I took you to in detail yesterday, including
6 the consistent document showing that Europay told the
7 MEPUK board that the EEA rate was the default.

8 Now, Mr Smouha seeks to relegate Europay documents
9 in the table that was handed out as being somehow not
10 relevant to the banks. But apart from the fact that
11 you've seen that Europay wrote to the banks and we have
12 the example of the letter to RBS, the banks were
13 represented at Europay meetings and to say that there's
14 some sort of hermetically sealed situation here is
15 completely wrong.

16 Now, what does Mastercard say influenced the rates?
17 One of the things they say influenced the rates were
18 reference rates and they took you to a document this
19 morning {C1/152/1}. Can we just turn that up, please.
20 That's a document from 1991 which set out reference
21 rates we were told and there was another document, we
22 don't need to turn it up at {C1/150/3} from May 1992
23 which we were also told set out reference rates.

24 But this is important information because what we
25 can see is that these so-called reference rates at that

1 time were not followed because at the time in 1992,
2 1993, 1994 almost all the banks were -- 1992, sorry,
3 I was over enthusiastic in including 1994. Most of the
4 banks were transacting at the default, the EEA default
5 rate and not at the so-called reference rates, which you
6 can see were structurally different. So you can see one
7 of the rates there, 1.1% plus 3p. That sort of
8 structure, an ad valorem rate plus a flat fee, does not
9 appear anywhere in the bilateral interchange fee table.

10 And so what this shows is that the reference rates
11 during that period had much less of an impact, if they
12 had an impact at all, on the bilaterally agreed rates
13 than the EEA MIF. So the banks were transacting early
14 on at the actual default rate. And we say that the
15 submission that the reference rates, which were not
16 written down, which were not transmitted to the banks,
17 which were discussed as recommendations at most were
18 somehow influential whereas the actual outside option in
19 the negotiations had no bearing whatsoever we say is
20 incoherent and wrong.

21 On reference rates additionally, we have made the
22 point at paragraph 89 of our written closing submissions
23 that it emerged at trial that the reference rates were
24 not based on costs and so in those circumstances we say
25 that no special authority could be given to reference

1 rates in an arbitration either.

2 Mr Smouha then took you to our reference in our
3 closing submissions to the draft of the board paper.
4 Now, it appeared from the rather dramatic way in which
5 he unveiled the point that the implication might be that
6 we had deliberately misled the Tribunal by not referring
7 to the final document. I think that the Tribunal knows
8 me better than that. It was inadvertent, we hadn't
9 traced through the fact that that was a draft. But
10 substantively there is nothing in the final version of
11 the document which contradicts the version that was sent
12 to Mr Hawkins, and it is notable that what Mr Hawkins,
13 who signed the final version, toned down was a reference
14 to the EEA rate being a default because of course we
15 know that he didn't like it.

16 But regarding that draft board paper, what we do
17 know from the document at {C3/332/23} is that the
18 discussion on 2 October at the R&CC committee was that
19 Mr Turner said that EPI is the fallback. So that was
20 the understanding at that point, regardless of whether
21 the direct reference in the draft to the EEA rate being
22 the fallback was airbrushed by Mr Hawkins from the final
23 version of the board document.

24 So going back to what we say in our pleaded case.
25 We do maintain the floor allegation. We do maintain it.

1 We've expressed it as an alternative benchmark,
2 guidance, floor but we maintain it because during the
3 whole of the bilateral period UK bilateral interchange
4 fees never went below the EEA MIF default during that
5 early and middle period. They did not dip below the EEA
6 default rate and we say that was because of the outside
7 option. It was actually acting as a floor in the
8 negotiations. It was not irrelevant to the
9 negotiations. It was a relevant influence.

10 I turn now briefly to the pre-claim period.

11 Mr Smouha said that bilaterals agreed before the
12 claim period were agreed on the basis that that was the
13 inter-regional rate, so again this is an attempt to
14 distance themselves from the fact that they -- that
15 bilaterals in the early part of the claim period were
16 agreed at the EEA default MIF rate.

17 Now, as to that we say there's absolutely no
18 evidence whatsoever to support that submission, aside
19 from the limited evidence given by Mr Hawkins in his
20 statement regarding his negotiation with Barclaycard in
21 the very early days.

22 No disclosure has been provided in relation to the
23 period before the infringement period and the Chairman
24 will recall -- in fact the whole Tribunal will recall --
25 at the September CMC we sought disclosure from a period

1 before the beginning of the claim period and that was
2 resisted by Mastercard and was not eventually ordered.

3 In fact, no disclosure was provided even from the
4 Commission file in relation to the inter-regional fee.
5 And so for now -- for it now to be said in closing
6 submissions, to be asserted, that the reason that the
7 banks transacted at the rate of 1 in the early part of
8 the claim period was because of the inter-regional fee,
9 we say just does not stand up, there's no supporting
10 evidence and Mastercard have failed to supply the
11 disclosure which would have enabled us to test that
12 evidence.

13 Indeed if we go to {E2/40} and page 41 side by side
14 a transcript from the September CMC {E/2/40} and we see
15 what Mr Cook says on the second page is he says
16 {E/2/41} -- we were saying that it's relevant to look
17 before 1992 and Mr Cook says at line 10:

18 "Mr Cook: Yes, but bear in mind we've had EEA MIFs
19 at the same level a year beforehand. The relevance of
20 the 92 date is simply that's the date when we made an
21 exemption application."

22 So they resisted disclosure on the basis that the
23 EEA MIFs were in force before 1992 and there had been no
24 change. Now they're saying it's not open to us to argue
25 that because the thing that was key was the

1 inter-regional fee and we say that just doesn't stack up
2 at all.

3 Now, they made a point about discounts. They said
4 that I think the point they were making was that when we
5 refer to the fallback being the EEA MIF that doesn't
6 make any sense because you have to factor in discounts
7 and so there was not a single EEA MIF. But we say that
8 that misunderstands fundamentally how discounts were
9 used. Banks had to apply to Europay in order for
10 certain transactions with some merchants and if
11 eligibility criteria were met, apply for discounts in
12 those circumstances. So it couldn't be taken for
13 granted they would get discounts, they only apply to
14 certain transactions if an application was granted.

15 And so they couldn't be used in the same way, in
16 bilateral negotiations. We say that where the rules
17 referred to the fallback being the intra-EEA MIF, it was
18 the undiscounted rate and that's what would have been
19 used as the outside option in the negotiations.

20 The 90% and 75% rule.

21 Mr Smouha went back to some of Mr Peacop's evidence
22 but he didn't go back to the critical part of
23 Mr Peacop's evidence which I don't turn up now. I went
24 to it yesterday. It's {Day4/51:7} to {Day4/52:3} where
25 he said there was significant pressure by acquirers in

1 the context of MEPUK. That the possibility of the rule
2 being triggered was part of the backdrop against which
3 the acquirers exerted that significant pressure, and he
4 accepted, he accepted that. I put that to him. He
5 accepted that. But he said it wasn't the only leverage
6 there by accepting that it was some leverage.

7 Mr Waterson while on the point asked a question
8 about the transition between the 90% and the 75% rule
9 and if I can just give you the reference to where we
10 deal with that in our written closing submissions. It's
11 paragraphs 33 and 34, {A/29/22}.

12 But what those documents we refer to there show is
13 that MEPUK and Mr Hawkins were very concerned about this
14 threshold and that's why they were pushing for the rule
15 first of all to be abolished, which wasn't accepted by
16 Europay. Instead they reduced it to 75%.

17 Signia, a few words about Signia. Mr Smouha said
18 well, the Signia UK MIF was all to do with UK costs
19 reasons. We put to Mr Sideris in cross-examination that
20 there had been no UK cost study or analysis and he
21 agreed with that. And again Mastercard's case here is
22 that the EEA MIF was irrelevant to the setting of the
23 UK MIF in the Mastercard Europe period, yet here they
24 were moving the UK rate for the Signia card to match the
25 EEA MIF level. And it's implausible we say that this

1 was coincidental. They were moving it to the very level
2 that the EEA MIF was at for that card and we say that
3 it's illustrative of a wider proposition that these
4 interchange fees were being set by the very same
5 committee. And so of course they had regard to what the
6 EEA MIF was, and here it directly influenced the moving
7 up of the UK MIF to the same level as the EEA MIF.

8 World Card, another example. Now, Mr Smouha said:
9 oh, well, there was a UK cost analysis and he showed you
10 a document referring to some analysis in relation to the
11 United Kingdom. There was a different document that
12 I cross-examined Mr Sideris on. For your note that's
13 {C15/349/1}. Maybe we should just turn it up. And if
14 we could put the first two pages up side by side
15 {C15/349/2}, I think we need to scan through that
16 document and what you see throughout the document is
17 an analysis in relation to various European markets.
18 Can we go on to page 3 and 4. And so you see some of
19 the key European markets here being referred to. And
20 so, yes, there was some analysis in relation to the UK
21 but the point is that the starting point for
22 Mastercard Europe was to look at key markets in the EEA
23 not just the UK but other markets too. And to set
24 a rate they thought was appropriate for the EEA and then
25 from that they said well, that will be the rate in the

1 UK. But as we know in fact what happened was that it
2 was only ever adopted in the UK but it's evidence of the
3 same point, that the Mastercard Europe committee, the
4 relevant committee was analysing things and looking at
5 things at an EEA level, and that affected the way in
6 which they set the UK MIF.

7 I'm now going to turn to UC00. Now, Mr Cook
8 undertook a valiant effort to persuade the Tribunal that
9 UC00 was not a default code and he took you to some of
10 the documents. What he said absolutely nothing about --
11 nothing -- was Mr Van den Bergh's evidence. Their own
12 witness. He said nothing about their evidence, nothing
13 about how Mr Cook's theory about all of this 30 years
14 after the event, patching together the incomplete
15 documentary record could be reconciled at all with
16 Mr Van den Bergh's evidence, and it can't. Are they
17 asking the Tribunal to disregard his evidence? No, they
18 didn't say that and plainly the Tribunal should not
19 disregard Mr Van den Bergh's evidence. He was the only
20 witness able to talk about the UC00 code and he was very
21 clear that it was a default rate. He said several times
22 it's the UK default.

23 That is consistent with Mr Nelson's email, again
24 something not mentioned by Mr Cook in his exegesis.
25 Mr Nelson's email said yes, albeit with a question mark

1 but he said where there's no bilateral we default to
2 EEA MIF rates. Is that UC00? Again that's not
3 a coincidence, that fits exactly with Mr Van den Bergh's
4 evidence.

5 And also consistent with the Excel spreadsheet
6 in 1999 which distinguishes completely in accordance
7 with Mr Van den Bergh's evidence and Mr Merricks' case
8 between defaults being entered in the system as
9 bilaterals, defaults and true bilaterals. What did
10 Mr Cook say about that? He gave evidence from the bar
11 with respect saying that the codes had been repurposed.
12 Absolutely nothing in the documents to support that
13 evidence, and it's inappropriate for him to have given
14 it.

15 Now, consistent with our case on the UC00 code is
16 the fact, as we've explained in our written closing
17 submissions, that it tracks precisely the default levels
18 and I'm not going to go over that but you've seen that
19 when the UK MIF was introduced in November 1997 that the
20 UC00 transactions go up to the default MIF. Again, not
21 a coincidence.

22 The truth is that the documents that Mr Cook took
23 you to are perfectly consistent with our case. And it's
24 only our case that makes sense in Mr Van den Bergh's
25 evidence. Take the NatWest documents, I dealt with them

1 this morning, I'm not going to go over it again but that
2 sequence of documents, what that shows is that there was
3 a review, we can see that there was a review, they talk
4 about clearing records where some discrepancy has been
5 identified, and the discrepancy obviously is that the
6 transactions have moved with the EEA MIF. We saw that
7 from the first table and there's then a correction in
8 January 1996 where they then change again so that they
9 return to true bilaterals.

10 The standard form letter that Mr Cook took you to
11 that was sent to the bank {C1/376/1} but paragraph 3 of
12 that letter makes clear that what's also been
13 contemplated are transactions at default rates and the
14 table that was sent with that letter, like the NatWest
15 table that was sent first time round, included UC00
16 codes and that's because those transactions at UC00 were
17 entered as though they were bilateral agreements. So
18 the fact they appear in an appendix to a letter does not
19 tell the Tribunal that they were true bilaterals. It
20 simply doesn't.

21 Finally on the point about direct application.
22 Mr Smouha said that if 50% of transactions in the early
23 period had been proceeding at the EEA MIF level, in 1997
24 he said, so he said if 50% of transactions had been
25 going through at the EEA MIF level in 1997, pandemonium

1 would have ensued once the UK MIF was adopted. And the
2 point we make about that is that the 50% that we ask the
3 Tribunal to find is spread over of the whole of the
4 early period and you can see from the table, our
5 colour-coded table, that some of the big banks were
6 transacting at 1.3 and 1% in 1997 so before the UK MIF
7 was adopted and that it's really in the early part of
8 that period that more of the banks were transacting at
9 the EEA MIF.

10 The second point we make is that the change was
11 small. So the change between the EEA MIF and the
12 domestic MIF was small. So it was 0.15% for standard
13 and 0.1% for electronic and indeed there was a similar
14 shift in the electronic value in 2004 from 1% to 0.9% in
15 the UK MIF and there was no pandemonium and nothing in
16 the document saying that anyone was aghast at that
17 change.

18 And the third point is that when the change to the
19 UK MIF did take place, it was widely consulted on and it
20 wouldn't have taken the banks by surprise, and
21 an example of that consultation again for your note is
22 at {C3/387}.

23 Sorry, just one clarification. I should have said
24 that bilaterals in 1992 never dropped below the EEA MIF
25 on a weighted average basis. That's the point that we

1 make. That's at {A/14/45} figure 1.

2 MR JUSTICE ROTH: This is on the floor point.

3 MS DEMETRIOU: The floor point.

4 It's nearly 5 o'clock.

5 Those are the bullet points I wanted to make by way
6 of reply. If you have any questions for me I'm happy to
7 answer them, but otherwise those are my submissions.

8 MR JUSTICE ROTH: No, thank you very much. Thank you for
9 all the hard work that you and your teams have done.

10 MR SMOUHA: Forgive me. Mr Cook and I do not want to be
11 outdone. My learned friend has herself been valiant and
12 brave but wrong in making the assertion to you in
13 relation to this attempt to maintain the floor
14 allegation when she said at page --

15 MR JUSTICE ROTH: Just now?

16 MR SMOUHA: [Draft] Page 175, line 14:

17 "Ms Demetriou: We do maintain the floor allegation.
18 We do maintain it. We've expressed it as an alternative
19 benchmark guidance floor but we maintain it because
20 during the whole of the bilateral period UK bilateral
21 interchange fees never went below the EEA MIF default
22 during that early and middle period."

23 MR JUSTICE ROTH: Yes, she has now corrected that to say on
24 a weighted average basis.

25 MR SMOUHA: Oh on a weighted average.

1 MR JUSTICE ROTH: She did correct that.

2 MS DEMETRIOU: Mr Smouha was obviously asleep unsurprisingly
3 when I was --

4 MR SMOUHA: I was trying to find the references. I should
5 give you the references which are that there were three
6 bilaterals --

7 MR JUSTICE ROTH: I think it's not on a weighted average
8 basis.

9 MR SMOUHA: It is rather relevant. There were three
10 bilaterals which remained at 1.0 through 1996 when the
11 EEA MIF had gone up to 1.15% in 1995.

12 MR JUSTICE ROTH: Right. But I did pick up Ms Demetriou's
13 correction so at least I was not asleep! But I no doubt
14 would be if we continued much longer.

15 I repeat my thanks to everyone, not only those who
16 have addressed us but those who I'm sure have done
17 a great deal of the work supporting them.

18 And thanks also to Opus and the team there who have
19 been so efficient in rapidly bringing up documents that
20 have helped us all. We'll let you know in the usual
21 way. It will be some time when we're able to issue
22 a judgment. That concludes this hearing.

23 (5.01 pm)

24 (The hearing concluded)

25