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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)

Thursday, 6 July 2023

(10.30 am)

(Proceedings delayed)

(10.37 am)

Housekeeping

MR JUSTICE ROTH: Good morning. I've been asked by our transcriber to remind everyone, including no doubt myself, that we should be sure to speak with the microphone not far away so that the audio is clear for her.

Yes, Mr Smouha.

MR SMOUHA: Thank you, sir. Good morning, sir. Good morning, members of the Tribunal.

The plan for today is we will continue our opening submissions, aiming to complete our submissions by about 12.30. Ms Demetriou has confirmed to me that she needs, but doesn't need more than, half a day with Mr Sideris. So I will call him either shortly before or immediately after the lunch break.

We will be a bit longer than originally planned because I just wanted to pick up on and respond to some of the points made by my learned friend yesterday, in particular on pieces of evidence, which we say have been incorrectly characterised and, also, because -- I hope this is fair -- the case has been -- in the way the case

1 has been opened compared to the written submissions,
2 compared to the amended pleadings, that's been a bit of
3 a moving target.

4 Just before I move on to credit cards, sir, could
5 Mr Cook just give you some references for the points he
6 was making about the debit card rules at the end of
7 yesterday?

8 MR JUSTICE ROTH: Yes.

9 MR SMOUHA: Thank you.

10 MR COOK: Yes, sir. So it's just a reference to make good
11 the points that I made last night in relation to the
12 tribunal's question about the operation of the
13 Maestro Rules.

14 It's bundle {C14/459/1}. For time reasons, I'm not
15 going to take the Tribunal to the documents, just give
16 the references. So that was C14/459, a copy of the
17 Maestro Global Rules, and page 331 {C14/459/331} sets
18 out the position in relation to European defaults, and
19 that's the same position that applies in relation to
20 Mastercard credit cards from at least November 1996
21 onwards, namely that in the absence of a bilateral MIF
22 or a domestic MIF, the EEA MIF applied as a default.
23 Then -- that's page 331.

24 Then bundle {C16/47/1}, and that's an explanatory
25 note in relation to the UK Maestro scheme and that sets

1 out that the UK Domestic Rules had to be agreed by
2 members representing at least 51% of issuing and
3 acquiring volumes. So that's the equivalent of the
4 75% rule for Mastercard credit, but apart from the
5 percentage, it's the same there. The EEA rules are only
6 displaced by UK Rules set by the requisite percentage of
7 members.

8 You then have an explanation for how the UK Rules
9 operated, and that's in Mr Douglas' statement, and
10 that's {A/10/13}, in particular paragraphs 32-36. And
11 he explains that the UK Rules provided for interchange
12 fees to be agreed bilaterally with arbitration as
13 a fallback. There was an interim default interchange
14 fee which applied pending arbitration and that was set
15 by S2 Card Services, which was a representative
16 organisation for the banks, so the equivalent of MEPUK,
17 and bilateral rates were generally agreed around the
18 level of those interim default rates.

19 And there are documents in the bundles showing those
20 interim default rates, for example, {C13/421/1}, which
21 sets out rates at that point in time, which I think is
22 2005, and the explanation of the basis of the rates,
23 which were based on a UK cost study and UK market
24 conditions and, as always, there's no mention of the
25 EEA MIF rates at all.

1 So we say the picture that emerges here is very
2 similar for Mastercard credit. The EEA MIF would have
3 been the fallback in the absence of UK interchange fees.
4 You get bilateral negotiation with arbitration as
5 a fallback, with the bilateral interchange fees
6 coalescing around the indicative rates set by the
7 representative organisation, which is analogous to the
8 position from '92 to '97 for Mastercard credit.

9 And as you heard from Mr Smouha yesterday, what you
10 end up with is UK interchange fees which were
11 substantially lower than the EEA MIFs, and we say that
12 just -- it's a clear example which demonstrates the
13 fallacy of the floor guidance arguments that are being
14 put.

15 MR JUSTICE ROTH: Yes, thank you.

16 Opening submissions by MR SMOUHA (continued)

17 MR SMOUHA: Thank you, sir. So on debit cards, we do submit
18 that the interchange fee scheme had similar features to
19 those that Mr Merricks claims and relies on in the
20 credit card interchange fee scheme, and so if the --
21 Merricks' case that bilateral negotiations for credit
22 cards were causally affected by a belief that if no
23 agreement was reached, the EEA MIF would apply, the same
24 would have to be true for debit cards. But as we saw
25 yesterday from looking at the level, structure and

1 changes in rates and also the evidence of the basis of
2 the decision, that was not what happened.

3 So, sir, those evidential contraindications of
4 causation that we saw in relation to debit cards are
5 what I want to show you now, as also being present in
6 the facts in relation to credit cards. Let me just
7 identify them at the start. Nine points:

8 First, different structures of rates from time to
9 time. Second, different levels of rates. Third, the
10 absence of changes in the UK interchange fees when there
11 is a change in structure or level of the EEA MIF.

12 Fourth, changes in the UK domestic interchange fees,
13 which bear no resemblance to anything that has happened
14 to EEA MIFs or where the EEA MIF has not changed.

15 Fifth --

16 MR JUSTICE ROTH: Is that sort of the converse of three?

17 MR SMOUHA: It is, exactly. So looking at changes in one,
18 seeing whether there is anything that happens in the
19 other and vice versa.

20 And, of course, these are -- as I've shown you,
21 these are -- in some cases, these are examples rather --
22 as you know, there were changes in both driven by
23 innovation, but which we say is not a causal -- not
24 caused by the EEA MIF in a relevant sense. But these
25 are, as I say, contraindications from where one looks

1 over the entire period.

2 Fifth point, actual contemporaneous evidence of the
3 decision-making process and of the factors that were
4 considered in relation to the agreeing or setting of
5 UK interchange fees, whether bilaterally, or the MEPUK
6 indication of a reference rate, or the Mastercard
7 setting of MIFs in due course.

8 As to what factors were in play in that
9 decision-making process, we have -- and this is the
10 sixth point -- contemporaneous evidence of UK-specific
11 domestic market conditions as a basis for decision,
12 for -- a basis for agreement and the setting of the
13 level; indeed, the setting of the level and indeed
14 structure of the UK interchange fees.

15 Seventh, contemporaneous evidence of competitive
16 considerations; Visa as a key factor in the agreeing and
17 setting of the level and structure of UK domestic
18 interchange fees. That --

19 MR JUSTICE ROTH: That's different from six, is it?

20 MR SMOUHA: No, it's part of six. So six is general in
21 relation to market conditions. It's -- the competitive
22 considerations being one of --

23 MR JUSTICE ROTH: Yes, so that's a sort of sub-part.

24 MR SMOUHA: That's quite correct, sir. It's a sub of six.

25 That one, Visa, as I understood my learned friend's

1 submissions yesterday afternoon, is now not disputed.

2 MR JUSTICE ROTH: Well, I think what they said is they

3 accept it was taken into account --

4 MR SMOUHA: Yes.

5 MR JUSTICE ROTH: -- but they don't accept it was the main

6 driver, I think --

7 MR SMOUHA: Yes.

8 MR JUSTICE ROTH: -- for --

9 MR SMOUHA: Indeed. So yes, so --

10 MR JUSTICE ROTH: So they're not suggesting it was ignored,

11 but --

12 MR SMOUHA: So I formulate it as a key factor. Of course,

13 for the purpose of our case, the relative weight of

14 factors in relation to any decision doesn't matter,

15 because all we are doing is meeting a case and the issue

16 you are deciding is whether the EEA MIFs were a cause in

17 fact.

18 So we say, and this is apparent from our -- sir,

19 from our comments on the list of issues, the Tribunal

20 doesn't need to decide in relation to those matters,

21 which were factors, which were more important in

22 relation to any one time, the question of relative

23 weight. That's not the point. We -- when we identify

24 the matters that were factors, we do so by way of

25 support of our negative case that the EEA MIF was not

1 a factor.

2 MR JUSTICE ROTH: Yes.

3 MR SMOUHA: The next one, so also a sub of the UK-specific
4 domestic market conditions, is the contemporaneous
5 evidence of the consideration of costs and cost studies,
6 because that is of UK costs.

7 MR JUSTICE ROTH: Yes.

8 MR SMOUHA: And then ninth and last, this is another sub --
9 this is a freestanding and very big point -- the absence
10 of contemporaneous evidence of the consideration of
11 EEA MIFs as a factor, guide, minimum, floor or
12 benchmark; a causal irrelevance so far as the
13 contemporaneous documents are concerned and, also, as
14 you will be hearing from the witnesses, but importantly
15 in relation to the contemporaneous documents.

16 So, sir, I'll deal chronologically with the
17 three periods. So May 1992 to November 1997, that is
18 what one might call the bilaterals era, the period prior
19 to there being a UK MIF.

20 Second, November 1997 to November 2004, so starting
21 with 1 November 1997, being the date on which the first
22 UK domestic MIFs, as requested by MEPUK, were in force.

23 And, third, November 2004 to June 2009 -- sorry,
24 June 2008. There's a one-year run-off, but I put that
25 on one side. That's not -- for separate consideration.

1 November 2004 being when Mastercard took over the
2 setting of UK MIFs from MEPUK.

3 And again, sir, the focus of our submissions in
4 writing and also this morning is on the facts, either
5 not disputed or demonstrable from contemporaneous
6 documents. And, sir, as we've said in our written
7 submissions, and this is basic in terms of the
8 appropriate approach -- and forgive me for emphasising
9 it again -- but the Tribunal should of course, in
10 seeking to reach conclusions and making findings of
11 fact, which is the principal objective of this trial,
12 place principal reliance on the contemporaneous evidence
13 as being the best and most reliable source of evidence
14 as to what happened, most especially as the Tribunal is
15 being asked to consider the position going back to the
16 early 1990s.

17 The starting point is that in the period May 1992 to
18 November 1997, there was no UK MIF, so instead
19 Mastercard licensees in the UK agreed rates bilaterally
20 with each other, and the Tribunal has the bilaterals
21 table, which I would ask you to have open again.

22 I will come back in a moment just to address
23 a little further the submissions made by my learned
24 friend yesterday about what this table does and doesn't
25 show in terms of the completeness of it, which Mr Cook

1 said something to you about yesterday. I'll come back
2 to that.

3 But just as we're going to spend a little time with
4 this now for this period, just to orient you a little
5 further on it for the purposes of two general points,
6 what you will see if you -- just on page 1 {B/55/1}, the
7 cover page, you will see that part A sets out the
8 bilaterally agreed rates for standard transactions.

9 There are references in the documents at different
10 times. Sometimes they're called standard. Sometimes
11 it's called normal. Sometimes they're called paper
12 transactions.

13 And then part B, which starts at page 13 {B/55/13},
14 sets out the equivalent rates for electronic -- agreed
15 rates for electronic transactions.

16 Each part is ordered in descending order of the
17 acquiring banks' shareholding in MEPUK as of 1996, so --
18 and the shareholding of the banks in MEPUK reflected
19 their market share at that time. So at the top of
20 page 2 {B/55/2}, you'll see that. So in part A, you'll
21 see NatWest come first and the shareholding is indicated
22 in italics in the left-hand column, 35.2%. As I say,
23 that's in 1996.

24 Then the table then goes down through banks in their
25 descending order of shareholding. So the next one is on

1 page 4 {B/55/4}, Midland -- no, sorry, we have Coutts,
2 but no shareholding indicated there.

3 PROFESSOR WATERSON: Coutts are included (inaudible -
4 microphone off) --

5 MR SMOUHA: Of course, part of NatWest.

6 MR JUSTICE ROTH: NatWest, and so, I think, was Ulster.

7 MR SMOUHA: Ulster. Yes, I ought to know that.

8 MR JUSTICE ROTH: It says it on the next page.

9 MR SMOUHA: It does, and likewise Ulster. Thank you.

10 And then Midland on page 4 {B/55/4}, 19.5%;
11 Barclays, 16.9%; Lloyds 10.6% and so on.

12 The column second from the left shows the issuing
13 banks, the counterparties to the bilaterals of the
14 acquirers. Those are set out in alphabetical order.
15 Of course, most issuing banks were also acquiring banks,
16 so the same agreements appear twice in the table. So
17 NatWest as acquirer with Clydesdale, for example, as
18 issuer and then that same bilateral will then appear in
19 the table with Clydesdale as acquirer and NatWest as
20 an issuer.

21 PROFESSOR WATERSON: I notice they don't include themselves
22 in this table. So, for example, Barclays doesn't
23 include Barclays as an acquirer. It doesn't include
24 Barclays as an issuer.

25 MR SMOUHA: NatWest does on the first page.

1 PROFESSOR WATERSON: I see.

2 MR SMOUHA: And I will -- yes, and Mr Cook says generally
3 they won't because those will be on-us transactions, so
4 no bilateral, no need for a bilateral and processed
5 internally within the bank rather than on Europay.

6 MR JUSTICE ROTH: Which begs the question then why NatWest
7 is.

8 MR SMOUHA: Yes, I agree that it begs that question --

9 MR JUSTICE ROTH: And Ulster and Midland.

10 MR SMOUHA: Can I deflect that question off to my right and
11 if necessary behind, sir, while only agreeing with you
12 at the moment that it begs the question?

13 MR JUSTICE ROTH: Yes. We have a few others, but somebody
14 can work through that and --

15 MR SMOUHA: I'll come back to that as soon as I'm in
16 a position to --

17 MR JUSTICE ROTH: Can I just go back to -- I probably just
18 didn't pick it up. The electronic --

19 MR SMOUHA: Yes.

20 MR JUSTICE ROTH: -- does that mean -- I mean, this is the
21 earlier period. We weren't -- I don't think people were
22 doing PIN numbers at that point. I think they were
23 those things you would sign and the card would be swiped
24 through, wasn't it?

25 MR SMOUHA: Yes --

1 MR JUSTICE ROTH: That's presumably the paper ones. If
2 I follow the distinction, electronic, is that over the
3 phone, or what does that mean? (Pause)

4 MR SMOUHA: Yes, Mr Cook tells me that where -- in that
5 period when authorisations were obtained by telephone,
6 that would have characterised a transaction as
7 electronic -- yes, the obtaining of authorisation
8 electronically as opposed to the old, as I remember it,
9 giving your card, put it in the machine which they --

10 MR COOK: Carbon paper.

11 MR JUSTICE ROTH: Yes.

12 MR SMOUHA: Indeed, which of course Mr Cook only knows about
13 by the people reporting to him how it was done in
14 history.

15 What you have seen from the consolidated MIFs table
16 is as new technologies were developed in relation to
17 electronic, that often led to new categories when there
18 were new security advances and so on.

19 Now, sir, just two other points. One is that you
20 will see, unsurprisingly, that the bilateral agreements
21 generally tailed off after 1997/1998, of course, because
22 the first UK MIF was introduced.

23 And then the only other point is as with the MIF
24 table, a bold entry denotes a change in rate. So on
25 page 2 {B/55/2}, you can see most of NatWest's

1 bilaterals for standard changing to 1.3 in 1994 and so
2 on.

3 MR JUSTICE ROTH: Yes.

4 MR SMOUHA: Now, my learned friend made the submission
5 yesterday that the evidence indicates that there were
6 actually significant gaps in the bilateral agreements
7 that were in place between banks. This was at -- this
8 is the transcript reference {Day1/28:9} where my learned
9 friend said:

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

13 "If we go to ..."

14 And the reference was given:

15 "... this is part of Mastercard's schedule of
16 bilateral interchange agreements."

17 Going to the table:

18 "If we look at -- for example, if we look at the
19 bottom of the page, Save & Prosper as an acquirer, so
20 the banks in the first column -- you can see at the top
21 of the page, those are agreements where these banks are
22 acquirers and you see that they had no bilateral
23 arrangements until 1994. We know from other documents
24 that they were active in the market because they
25 responded, for example, to an EDC cost study in 1991."

1 Now, I just want to address that, if I may, and I do
2 so in stages. So page 11 of the table {B/55/11},
3 Save & Prosper at the bottom showing bilaterals --
4 listed bilaterals in 1994.

5 Now, the first point is, and as Mr Cook indicated
6 yesterday, this table was produced as part of
7 Mastercard's disclosure, reflecting the documents that
8 have been found that show bilateral agreements. So that
9 is one limitation of it. It is not and cannot be and is
10 not suggested to be at all a complete representation of
11 all bilateral agreements that were made.

12 Just because it reflects everything Mastercard has,
13 it does not follow at all that the table represents the
14 entirety of the bilateral agreements that actually were
15 in place, and in terms of the assessment of that, which
16 is an issue between the parties, we say that the
17 Tribunal should look at the evidence in the round, which
18 we've extensively detailed in our submissions, in
19 particular that the banks understood that they were
20 required to enter into bilaterals and, as you know, we
21 say that the Tribunal should find that, in fact,
22 bilaterals were ubiquitous.

23 Secondly, there are good, indeed rather obvious,
24 reasons why the disclosure available to Mastercard in
25 2023 would not be comprehensive as to all the bilateral

1 agreements that were in place in 1992, 1993 and 1994.

2 First, passage of time. Obvious point. Second, the
3 disclosure is drawing on -- is from repositories which
4 are within Mastercard's control. Europay would not
5 necessarily have had comprehensive records of all
6 bilateral agreements even at the time, because Europay
7 did not process all transactions. Processing was also
8 done by banks in-house and by, Mr Cook told you, FDR.

9 Now, I can illustrate all of this by reference to
10 Save & Prosper, which is the bank that my learned friend
11 referred to. So the main point that my learned friend
12 made was that in the table, there are no bilateral
13 agreements showing before 1994, but we know that
14 Save & Prosper did agree bilaterals before 1994.

15 Can I show you an example: {C1/252.1/1}. Here is
16 a letter from Save & Prosper of 30 November 1992 --
17 sorry, 24 November 1992, received by Barclays on
18 30 November 1992:

19 "Thank you for your letter ...

20 "I enclose, duly signed, the necessary form."

21 So this is in relation to a bilateral in 1992,
22 presumably for 1993 and -- so we know one is there. Why
23 is it not in the table? It's not in the bilaterals
24 table because there is some doubt as to precisely what
25 the rate was at the time. There's no doubt there was

1 a bilateral agreement. So it has not been included in
2 the table.

3 MR JUSTICE ROTH: It does set out the rate, doesn't it?

4 MR SMOUHA: That's for later. That's for 1 April 1993
5 onwards.

6 MR JUSTICE ROTH: Yes, but it's not in the table.

7 MR SMOUHA: Oh, but we don't have the form.

8 MR JUSTICE ROTH: Ah, I see. So you -- well, in any event,
9 I don't think --

10 MR SMOUHA: That --

11 MR JUSTICE ROTH: I mean, the point you make is it's common
12 ground that Save & Prosper did have bilaterals in,
13 I imagine, 1992 and 1993, because they were trading and
14 accepting, acting as acquirer, maybe also as issuer,
15 I don't know. And you just say the table is not seeking
16 to be comprehensive; it's based on insofar as you have
17 clear records.

18 MR SMOUHA: Indeed.

19 MR JUSTICE ROTH: That's the short point.

20 MR SMOUHA: Exactly, sir.

21 And the only other point to add to that is in
22 relation to Save & Prosper, Save & Prosper is a very
23 small player. My learned friend took the Tribunal only
24 to Save & Prosper, which is towards the end of the
25 table, because it is small. Now, that is telling

1 because for the larger players on the table, we do see
2 a much more comprehensive coverage of bilateral
3 agreements. NatWest had the -- there's a long list of
4 1993 agreements. Midland, a wide range of bilaterals in
5 1992, many in 1993 and so on.

6 And then lastly on Save & Prosper, my learned friend
7 said that Save & Prosper in 1991 responded to an EDC
8 cost study, so it was suggested that we know they were
9 active in the market before 1994. Now, that's not
10 correct either. Save & Prosper were just sent a cost
11 study questionnaire, but did not respond to it, or at
12 least we don't have any response. And I'll just give
13 the reference for that --

14 MR JUSTICE ROTH: Well, we know they're active to some
15 extent in the market because of the letter you've just
16 shown us.

17 MR SMOUHA: Yes --

18 MR JUSTICE ROTH: So --

19 MR SMOUHA: -- but the point my learned friend was making
20 was about -- what was being suggested was they had
21 actually responded to a cost study in 1991.

22 MR JUSTICE ROTH: Yes, but that was just to show that they
23 were paying with cards, which is not in dispute now.

24 MR SMOUHA: They were -- you have my point.

25 MR JUSTICE ROTH: Yes.

1 MR SMOUHA: It's trying to build an enormous amount of
2 weight to try and draw inferences that actually there
3 wasn't extensive coverage -- bilaterals coverage-- just
4 on the basis of this point about Save & Prosper.

5 And then -- and, by the way, Save & Prosper used
6 a different processor, and I will just give you the
7 reference for that: {C1/197.1/1} and {C2/458.1/1}. They
8 used FDR, not Europay.

9 Now, you will have seen -- just doing a quick turn
10 of pages generally in relation to standard, you'll have
11 seen -- and there are two things I draw attention to
12 that you get a general sense of.

13 First, between pages 4 and 7 {B/55/4}, you see the
14 general shift of standard rates from 1.0 to 1.3 between
15 1992 and 1994. And if you go to page 13 {B/55/13},
16 again, you just get a general sense of the emergence of
17 electronic rates in 1993 at 1.0, which do not move from
18 that figure; absolutely all of them and across the
19 period to 1997.

20 So those are the rates that actually existed at the
21 time. The Tribunal can see that they were widespread,
22 NatWest having -- alone having 19 agreed rates.

23 Now, Mr Merricks makes the guidance and floor
24 allegation in relation to those rates. In other words,
25 he contends that the rates in these bilateral agreements

1 were caused by the EEA MIFs either by the application of
2 a minimum or by use of the EEA MIFs as guidance.

3 And can I ask you just to look again at the way his
4 positive case on this is set out in my learned friend's
5 written submissions, {A/1/28}. This is paragraphs 76 to
6 78 of Mr Merricks' written submissions. If we can just
7 scroll up so we can see the whole of 76.

8 And then I'm going to go to some particular parts of
9 this, but you'll just note, if we go over the page and
10 look at 77 to 78 {A/1/29}, what you see there is this is
11 entirely concerned with Mr Coombs' analysis. There is
12 no reference to any facts, no reference to any
13 contemporaneous documents and you'll notice that, also,
14 there is no reference here to any actual EEA MIF rate
15 and there is no reference here to any actual rate agreed
16 in a bilateral.

17 Indeed, you may have noticed yesterday that in my
18 learned friend's submissions, she did not make reference
19 at any point in her submissions to an actual EEA MIF
20 rate at all, not for any period, which when you consider
21 what this trial is about is quite remarkable.

22 Anyway, the key point here is at paragraphs -- in
23 paragraph 76 in the fourth line {A/1/28}:

24 "In particular, there is a strong correlation
25 between weighted average intra-EEA MIFs and domestic

1 interchange fees in the Early Period ..."

2 "... a strong correlation between weighted average
3 intra-EEA MIFs and domestic interchange fees in the
4 Early Period ..."

5 And the key words obviously are "weighted average".
6 And as the Tribunal will hear, what Mr Coombs has done
7 is to apply weighted averages to these fees, which has
8 the effect, of course, of producing an average between
9 1.3 and 1 and so brings that a little closer to the
10 actual EEA MIFs which we'll get from the MIFs table in
11 a moment, so as to give at least a little more semblance
12 of resemblance.

13 Now, I'm not addressing the fallacies of the
14 economic analysis in Mr Coombs' approach. Mr Parker may
15 say something about that a little later. The point here
16 is that no such conversion of data to switch to
17 a comparison currency of weighted averages is either
18 necessary or appropriate because the Tribunal can,
19 indeed we would say must, make the direct comparison of
20 like rates with like rates.

21 And to see what the rates actually were as a matter
22 of fact, that the correct currency of comparison, being
23 actual rates and actual structure of categories, let's
24 now go to the MIFs table at {A/18.1/2}, page 2 of the
25 table.

1 And the Tribunal will see that for this period, so
2 starting in 1992, as we looked at yesterday, the range
3 of bilaterals in the square brackets shown in the
4 first column for Mastercard UK and you see that the
5 range in 1992 was -- for standard was between 1 and 1.1;
6 electronic always 1. And then for 1993, the range was
7 between 1 and 1.3; electronic 1, always 1.

8 Then in 1993 -- sorry, then in 1994, the same. No
9 change.

10 Going over the page {A/18.1/3}, still just looking
11 at the bilateral range, 1995, the same, no change; 1996
12 the same, no change; and then in 1997, of course, the
13 MIF set at 1.3.

14 Then going back to 1992 now, let's look at the
15 Visa UK MIFs. Let's just quickly run through those.
16 1992, Visa, 1.1 standard; electronic 1. 1993, Visa,
17 standard, 1.3; electronic 1. And then it doesn't
18 change. Visa, 1994, 1.3 and 1. 1995, Visa, 1.3 and 1.
19 1996, Visa, 1.3 and 1.

20 And just to mention that the source documents for
21 the -- if we just go back to 1993, the source documents
22 for the information that Visa changed their MIF to 1.3
23 is that that was a change with effect from 1 April 1993,
24 and you see there in footnote 15 at the bottom reference
25 to the documents which show that.

1 MR JUSTICE ROTH: So it's the case that although Mastercard
2 didn't have a UK MIF, as we know, till November 1997,
3 Visa had a UK MIF rather earlier; is that right?

4 MR SMOUHA: Yes, sir, and, in fact, we'll see a document
5 shortly which makes specific reference to that.

6 MR JUSTICE ROTH: Do you happen to know, or perhaps
7 someone -- and I don't need to see the document, just to
8 orient it-- when? Did Visa start really by '92 already
9 to have -- so when we see in the early part of this
10 table, Visa UK (overspeaking) --

11 MR SMOUHA: (Overspeaking) --

12 MR JUSTICE ROTH: -- Visa --

13 MR SMOUHA: Yes.

14 MR JUSTICE ROTH: -- it's an actual MIF just as opposed
15 to -- whereas we know Mastercard UK at that period is
16 the range of bilaterals.

17 MR SMOUHA: I'll check and also give you a reference to
18 that.

19 MR JUSTICE ROTH: Yes. I'm not so bothered about the
20 reference because I'm sure it's not controversial. It
21 just helps to understand what's happening.

22 MR SMOUHA: Absolutely.

23 And then -- and so, as I say, we see there the
24 change of the Visa UK MIF to 1.3 with effect from
25 1 April 1993 and then -- and, as I say, the Visa rates

1 then do not change.

2 Then the third column, the EDC cost studies, and
3 then the EEA MIFs, and let's look at those.

4 MR JUSTICE ROTH: Yes. (Pause)

5 MR SMOUHA: So, sir, there's a document which shows that the
6 Visa MIF was in place at least -- well, from some time
7 before 1991 anyway, and the document reference is
8 {C1/151/1}. Thank you.

9 Now, looking at the EEA MIFs across this period,
10 back to page 2 {A/18.1/2}, the fourth column for 1992,
11 and the first point to note, importantly, is that the
12 EEA MIF was not a straight 1% during this period. It's
13 shown in the table for 1992 as 0.5 to 1%, and that is
14 because there were a number of discounts to the 1% that
15 could apply to the EEA MIF, and footnote 12 explains
16 what all of those are and gives the references. I'm not
17 going to go through them. There were a number of them.

18 The same was true in 1993 and in 1994; same range,
19 same discounts, no change.

20 So what do we see from a comparison of the rates as
21 they actually were and the changes in them? The
22 resemblance between the bilateral rates for Mastercard
23 and Visa's UK MIFs is obvious and striking, in
24 particular, the increase in bilaterals at the 1.3% level
25 around 1993/1994 following the 1993 increase in Visa's

1 standard UK MIF from 1.1 to 1.3.

2 Equally striking is the absence of any resemblance
3 between the 1.3 and 1 rates UK -- for the UK -- for the
4 bilaterals, and the EEA MIFs in this period, which range
5 from 0.5 to 1% until 1994.

6 In 1994, you will note, just looking down the
7 categories -- sorry, 1995, apologies. Sorry, 1995, you
8 will note that there is a -- sorry, just one moment.
9 Let me just check. 1994 for Visa, there is a new
10 secured electronic category and in 1995, there is then
11 a new secured electronic category for the EEA MIF. You
12 will note that that category does not get introduced in
13 the UK.

14 MR JUSTICE ROTH: Sorry, which -- we're on page --

15 MR SMOUHA: So on page 3 {A/18.1/3} --

16 MR JUSTICE ROTH: Yes, in 1994 --

17 MR SMOUHA: '94, Visa EEA MIF --

18 MR JUSTICE ROTH: Yes.

19 MR SMOUHA: -- introduces a new secured electronic category
20 with a rate of 0.6%.

21 MR JUSTICE ROTH: Well, I think it's the fact that it can go
22 up to 0.9 that's new, I think, because --

23 MR SMOUHA: Sorry, that --

24 MR JUSTICE ROTH: -- it had 0.6% in '93.

25 MR SMOUHA: Sorry, let me start again, sir, because I'm not

1 being comprehensive. In 1994 for Visa EEA --

2 MR JUSTICE ROTH: Yes.

3 MR SMOUHA: -- there are a number of changes. So standard
4 changes from 1 to 1.2.

5 MR JUSTICE ROTH: Yes.

6 MR SMOUHA: Electronic changes from 0.6 to a range of 0.6 to
7 0.9 and then as well, there is introduced a new category
8 of secured electronic, which there wasn't in 1993, and
9 that at a rate of 0.6.

10 MR JUSTICE ROTH: Yes.

11 MR SMOUHA: In 1995 for Mastercard EEA, there is a change in
12 standard rate, increase to 1.15% from what had been the
13 range 0.5 to 1. There is a single rate for electronic.
14 So it had been 0.5 to 1, but it is now 0.9. And then
15 Mastercard EEA also introduces a new secured electronic
16 category with a rate of 0.75%.

17 That category is not introduced in the UK. As you
18 see, 1996, nothing -- it doesn't then feature in
19 bilaterals, and then when the rate is set in 1997, it
20 doesn't appear either.

21 So there is no change in the bilaterals that reflect
22 in any way what's happening in relation to the
23 Mastercard EEA MIF both as to rates or as to categories.

24 Now, we've set out the reasons for this at some
25 length in our written opening, what we say are reasons

1 that are -- and why those rates were in the bilaterals
2 as they were and why it is readily apparent that there
3 was absolutely no relevance or impact of the EEA MIFs.

4 We say, first, what the banks did in fact is obvious
5 from the agreements they reached on the structure and
6 the level of rates which you've just looked at in the
7 bilaterals table, taking into account also Visa's rates
8 and the EDC cost studies.

9 The cost studies and Visa's rates were, of course,
10 doubly important because they also informed the
11 so-called reference rates which were set by MEPUK from
12 1994 onwards, which were also at 1.3 and 1%, and you'll
13 be hearing evidence about the reference rates from the
14 witnesses.

15 Third, and of equal importance, there is no
16 evidence, no evidence at all, of banks taking the
17 EEA MIFs into consideration when reaching their
18 bilateral agreements. None was identified to you in
19 Mr Merricks' written opening and none was identified to
20 you orally yesterday.

21 They were not a factor. They were not a minimum.
22 They were not a floor. They were not guidance. They
23 were just not a cause or a factor at all.

24 What we see in the contemporaneous documents is, as
25 we saw with Debit Mastercard, we see consideration of

1 UK-specific market considerations, consideration of
2 competitive factors, in particular Visa, reference to
3 costs and cost studies, and the absence of reference to
4 EEA MIFs when discussions take place about factors that
5 are being considered in bilateral negotiations.

6 PROFESSOR WATERSON: You have not mentioned the cost
7 studies -- I mean, well, you mention them, but you
8 didn't make a point on them. I'm struggling to
9 understand your point on the cost studies.

10 MR SMOUHA: Our point on the cost studies was only in terms
11 on the evidence, and we'll see this in a second in
12 a couple of documents; that they were taken into
13 consideration. I don't put it higher than that and
14 I don't need to put it higher than that because I don't
15 have a case to prove as to how different factors may or
16 may not have been weighted. And, sir, you're going to
17 hear evidence about that indeed from -- in relation to
18 cost studies.

19 But, as I say, I identified at the outset that they
20 were a factor. They were taken into consideration. We
21 see references in the documents to costs and the cost
22 studies being considered.

23 PROFESSOR WATERSON: Well, I'll await that evidence. Thank
24 you.

25 MR SMOUHA: Can we look then at a couple of examples of

1 evidence in relation to what was considered and what
2 wasn't considered; {C3/160/1}.

3 MR JUSTICE ROTH: Can we put the table away at the moment or
4 do you wish to come back to it?

5 MR SMOUHA: Yes, we can. Thank you, sir. I should have
6 anticipated that.

7 Sir, these are the minutes of a special meeting of
8 the Rules & Conciliation Committee of MEPUK on
9 7 May 1996, which deal -- which discussed interchange
10 fees, including reference rates.

11 First of all, note the list of attendees. They're
12 from NatWest, RBS, Midland, which, of course, later
13 HSBC, Barclays, TSB, Bank of Scotland and so on.
14 Together, those banks accounted for almost the whole of
15 the market.

16 The first discussion item is "UK Interchange Cost
17 Update 1996", and there's no need to read now the
18 first paragraph, but you will note at the bottom of the
19 page the subheading "Review of the draft formal Report
20 from Edgar, Dunn & Co dated 20th February, 1996". So
21 here we are straight into a consideration of cost
22 studies:

23 "Mr Griffin ..."

24 So Mr Griffin is from Edgar Dunn. He appears at the
25 top:

1 "... recapped the earlier results ..."

2 And then those are set out.

3 If we go over the page to page 2 {C3/160/2}, what
4 Mr Griffin was doing was going through the draft formal
5 report from Edgar Dunn discussing findings as to certain
6 elements of costs, and then you will see that he gives
7 Edgar Dunn's breakdown for costs for 1995. So you see
8 this in -- where the figures are. He's -- page -- it
9 says "Page 6", which must be referring to page 6 of the
10 draft report that he's presenting:

11 "Breakdown

12 "1995 Electronic, 1.09%.

13 "1995 Standard, 1.45%."

14 Then if we go to page 4 {C3/160/4}, under the
15 heading "Interchange Fees/Costs":

16 "Mr Hawkins pointed out that the rates, namely
17 1.46% Standard and 1.09% Electronic were, he believed,
18 higher than the competition. Mr Griffin stressed that
19 his report concerns costs whereas figures being quoted
20 for VISA were fees and he underlined the danger in
21 comparing costs with fees. Mr Hawkins acknowledged that
22 there was no process in the UK for determining fees,
23 rather than costs, for the MCI scheme. Mr Strachan
24 asked whether the MEPUK Board would be comfortable in
25 discussing fees and Mr Ashe-Taylor advised that UK Rules

1 were best put in place by EPI. Mr Nelson was asked
2 whether EPI had the authority to introduce UK Domestic
3 Interchange Fee rates. He felt that EPI would accede to
4 a request from the MEPUK Board to introduce fallback
5 rates which would apply in the absence of bi-lateral
6 agreements, but he would check to confirm.

7 "If confirmed, it appeared that the way forward
8 would be for R&CC to suggest rates to MEPUK Board; Board
9 would support the proposals and then request EPI to
10 introduce a UK Domestic Rule. Mr Griffin referred to
11 the challenge on interchange rates mounted by the Retail
12 Consortium some two years ago. At that time, the
13 challenge was successfully resisted and he asked whether
14 this suggested way forward would be likely to stand up
15 to a similar challenge. Mr Ashe Taylor said that he
16 would review the previous complaint and see whether
17 issues raised in that complaint would be likely to
18 recur."

19 So one sees this all arising out of a discussion of
20 the cost figures which Edgar Dunn had -- Mr Griffin has
21 presented to them.

22 If we then go to the top of page 5 {C3/160/5},
23 second --

24 MR JUSTICE ROTH: Before you jump --

25 MR SMOUHA: Sorry.

1 MR JUSTICE ROTH: -- the reference to the Commission at the
2 bottom of page 4, that's the -- this is 1996. This is
3 the -- is that the Monopolies Commission or the
4 European Commission or are we not sure?

5 MR SMOUHA: We don't know. Well, I say we don't know --

6 MR JUSTICE ROTH: Yes. Well, Mr Hawkins might vaguely
7 remember.

8 MR SMOUHA: Yes, good point, sir. We can ask him.

9 MR JUSTICE ROTH: Yes.

10 MR SMOUHA: Top of page 5 {C3/160/5}, second indent:

11 "Mr Ashe-Taylor sounded a note of warning that in
12 discussing interchange categories and rates, members
13 should bear in mind the need to be able to demonstrate,
14 in court if necessary, that they had come to decisions
15 independent of other schemes."

16 Then under the heading "Interchange Fees":

17 "The debate then turned to consideration of fees,
18 both current and to be proposed.

19 "Mr Hawkins proposed the following ..."

20 Standard -- well, the current is 1.3% and he -- the
21 cost-based, so that's the EDC figure, 1.46%, and he
22 proposed 1.35%. For electronic, current was 1.
23 Edgar Dunn costs shown at 1.09%. Mr Hawkins proposed
24 1.05%.

25 Yes, sorry, Mr Cook has pointed out the reference to

1 "Current", what was currently 1.3 and 1, that is the
2 reference rates that MEPUK had set essentially as
3 guidance, and Mr Hawkins is proposing a change to the
4 reference rates to increase them from 1.3 to 1.35 and
5 from 1 to 1.05.

6 Now, a couple of points, sir.

7 MR JUSTICE ROTH: Before you start making your point, I am
8 just trying to understand what's going on. They have
9 commissioned a cost study, which I understand, but when
10 they're talking about -- what you showed us on page 2,
11 those are the costs, are they, that 1.09 and 1.45 that
12 you refer to?

13 MR SMOUHA: Yes, so if you go back to page 2 {C3/160/2} --

14 MR JUSTICE ROTH: Yes.

15 MR SMOUHA: -- they're the ones which Mr -- which must have
16 been set out on page 6 of the Edgar Dunn report which
17 Mr Griffin is taking the board -- sorry, the committee
18 through.

19 MR JUSTICE ROTH: And that's overall costs, is it?

20 MR SMOUHA: Yes.

21 MR JUSTICE ROTH: Then the -- I'm trying to --

22 MR SMOUHA: So in other words, Mr --

23 MR JUSTICE ROTH: Because it's referred to as rates.

24 MR SMOUHA: It's clear that that's what those figures are.

25 It's clear that those are the figures that have come out

1 of the cost study. So what Mr Hawkins is doing -- and,
2 sir, for present purposes, I don't want to get into
3 matters that Mr Hawkins can be asked about, but it's
4 clear that what's happening here is that Mr Hawkins is
5 proposing an increase in the reference rates in the
6 light of the Edgar Dunn analysis. The costs in relation
7 to standard and electronic are at 1.46 and 1.09.

8 PROFESSOR WATERSON: Can you help me here? These costs,
9 these are clearly above the rates that are talked about,
10 so in what sense are the costs influencing the rates?

11 MR SMOUHA: Sir, again, in relation to this discussion, if
12 I may, can I suggest I shouldn't venture that in terms
13 of the -- because Mr Hawkins is going to be giving
14 evidence in relation to that.

15 And the reason -- sir, again, I would emphasise that
16 for our purposes and for the tribunal's purposes in
17 terms of considering what you have to consider, you do
18 not need to and should not be determining, in relation
19 to any particular period or any particular rate being
20 set, what were the relative weighing of factors such as
21 the competition or cost studies, which, of course, may
22 have been in relation to different banks and individuals
23 in the MEPUK discussions.

24 They may have had different views about how
25 important Visa was, how important cost studies were. It

1 doesn't matter. What is the reason for looking at this
2 material? There is only one reason for looking at it.
3 It is: do we see anything at all that refers to the
4 EEA MIF? Do we see that being a factor in any respect
5 at all? To which the answer is no.

6 MR JUSTICE ROTH: Well, I see one can do it on a purely
7 negative way, but I think sensibly one looks at it in
8 the positive way as well, saying: well, what were the
9 factors that led to the decision? I think your point is
10 we don't have to weigh those factors precisely, but
11 I think we want to get a sense of what were the
12 significant factors that were influencing the decision.

13 MR SMOUHA: Absolutely, and I hope, sir -- when I set out my
14 nine points, point seven --

15 MR JUSTICE ROTH: Seven --

16 MR SMOUHA: Point seven is Visa, competitive considerations.

17 MR JUSTICE ROTH: And point eight is --

18 MR SMOUHA: And point eight is cost --

19 MR JUSTICE ROTH: So --

20 MR SMOUHA: So that's exactly my point; contemporaneous
21 evidence of those factors being considered. I'm not
22 shying away from that. Absolutely not. I'm --

23 MR JUSTICE ROTH: So the answer --

24 MR SMOUHA: It's the weight point, which is --

25 MR JUSTICE ROTH: -- to the question is that you don't know

1 necessarily what weight, but it was taken into account
2 in a significant way.

3 MR SMOUHA: Exactly. Of course, let's be realistic about
4 this. The best way to prove the negative in relation to
5 something not being considered and not a factor is by
6 showing those matters that were considered, and that's
7 why we absolutely do address that and positively.

8 The only thing which is not necessary to do, because
9 it's simply irrelevant to the causation question, is to
10 decide in relation to any particular decision what the
11 factors -- what the significance or weight was of
12 particular factors as against each other.

13 You're not -- there's no -- you're not deciding
14 whether Mr Hawkins' proposal was driven only by the cost
15 figures or competitive considerations, which are also
16 mentioned, or how those weigh between each other.

17 MR JUSTICE ROTH: And when they talk about their proposals
18 on page 6, I think, if we can go to page 6, please, of
19 this document {C3/160/6}, "Proposals to MEPUK Board",
20 the paper and so on, proposing a structure, a range of
21 rates would be quoted. These are all sort of guidance
22 rates or reference rates.

23 MR SMOUHA: Correct, yes. So -- and what I want to do now
24 is now go on to see what happens when this goes to the
25 board, so --

1 MR JUSTICE ROTH: So just to be clear, initially, I got the
2 impression there was a period with all the bilaterals
3 and then come 1997, you've got a UK MIF being set. In
4 fact, in the earlier period, MEPUK was issuing guidance
5 rates to the members for the purpose of their bilateral
6 negotiation; is that right?

7 MR SMOUHA: I don't think it would be -- I don't think it
8 would be correct to characterise it as issuing in the
9 sense of there being a document. That's one of the
10 issues, because they clearly thought that they should
11 not document it as formal guidance and, also, one
12 doesn't have a document which says, "These are the
13 reference rates".

14 The -- Mr Merricks says in relation to that, "Oh,
15 well, then how did the banks who were negotiating
16 bilaterals even know about these?" To which the answer
17 is, well, how did they know about it? Because --

18 MR JUSTICE ROTH: Well, they're all sitting there.

19 MR SMOUHA: -- they're all sitting there on MEPUK.

20 MR JUSTICE ROTH: Yes, but it is effectively a sort of
21 guidance to them. That may be why they were so careful
22 to have a solicitor sitting there with them as to what
23 they can and cannot do.

24 MR SMOUHA: That appears to be -- that appears to be exactly
25 it, sir, on the evidence.

1 MR JUSTICE ROTH: Because, they -- you know, they go on to
2 say: when should it come in? Bottom of page 5
3 {C3/160/5}:

4 "... any changes in the rates should come into
5 effect in January 1997."

6 Well, that's not talking about costs, is it?

7 MR SMOUHA: No.

8 MR JUSTICE ROTH: So they were, as it were, guiding their
9 members of what they should do regarding interchange
10 fee. We're not addressing at the moment whether there
11 was -- how that fitted with competition law at the time.
12 That's not now before us. But it means that the
13 bilateral negotiations, there was this common -- there
14 was some common guidance behind it, even if they didn't
15 call it guidance or some reference points.

16 MR SMOUHA: Precisely so, sir.

17 MR JUSTICE ROTH: And I don't know when that really started
18 or whether that -- but we can ask Mr Hawkins, who was
19 deeply involved, whether that went right back to '92.
20 Yes, I see. Thank you.

21 MR SMOUHA: As you'll also see, it's sometimes described as
22 a reference rate. It's sometimes described as
23 a fallback rate and -- but clearly it was either as
24 guidance -- on documents, either as guidance or a factor
25 in terms of what was considered by MEPUK to be

1 appropriate; a matter that, as it were, was hanging over
2 every bilateral negotiation in a way that EEA MIFs were
3 absolutely not.

4 Now, that proposal that we see here from Mr Hawkins
5 to increase the level of fees because of increased costs
6 was rejected by the board, by the MEPUK board. And it's
7 interesting to see why they rejected it because the
8 reasons for rejection were nothing to do with EEA MIFs.
9 They don't get referred to.

10 And, secondly, it's interesting because the board's
11 discussion shows the understanding of MEPUK and the
12 banks that the reference rate that they were discussing
13 and setting was the fallback rate that would apply in
14 the event of an arbitration.

15 Now, of course, Mr Merricks submits that the rules
16 provided for something different, but what matters is
17 not who has the better of the argument in 2023 as to
18 what the correct legal interpretation of Mastercard or
19 Europay Rules might be or might have been had it arisen
20 for determination. What matters is what did the banks
21 understand the position to be when they negotiated
22 bilaterals?

23 And the board discussion of the R&CC's proposal that
24 Mr Griffin had brought forward in the R&CC to increase
25 rates is a good example and illustration of that

1 understanding.

2 If we can go to the board minutes -- yes, that may
3 be -- sir, would that be an appropriate moment to have
4 our mid-morning break?

5 MR JUSTICE ROTH: Yes, and we'll come back. Are you on
6 time? We've encroached on you a bit.

7 MR SMOUHA: Yes, we will be on time, one way or t'other.
8 (11.50 am)

9 (A short break)

10 (12.05 pm)

11 MR SMOUHA: The board discussion of R&CC's proposal to
12 increase rates is at {C3/268/1}, which should be on the
13 screen, the board meeting of 8 August 1996.

14 We can see the discussion of the proposal at page 9
15 {C3/268/9}, minute 53/96, and you will note the heading,
16 "Adoption of 1997 Arbitration Fallback Rates". And then
17 the discussion:

18 "Mr Godfrey opened the discussion by stating that he
19 would resist any proposal for an increase in the
20 fallback rates as he did not believe they were
21 sustainable in the marketplace. He also commented that
22 a full review of the card industry may take place
23 shortly at the instigation of the [DTI].

24 "Following a lively debate, it was agreed not to ask
25 EPI to change the arbitration process and fallback rates

1 and that arbitration should continue to be handled by
2 MasterCard. Mr Hawkins was asked to convey the thanks
3 of the Board to the R&CC Interchange Sub-Group."

4 So as far as the bank members of the MEPUK board are
5 concerned, they appear to have understood that they were
6 setting reference rates which would operate as fallback
7 rates in the event of arbitration.

8 MR JUSTICE ROTH: What does that mean? Someone is going to
9 explain that at some point.

10 MR SMOUHA: Sir, as I say, that's certainly appropriate for
11 Mr Hawkins and maybe other witnesses to be asked, but,
12 as I say, in terms of an understanding, in terms of what
13 they're referring to, it's clear they're referring to
14 the reference rates. They're rejecting a proposal to
15 increase them and they have some understanding that
16 these have something to do with what -- with the
17 arbitration process, if it happens.

18 The important point in relation to the reasons for
19 rejection: Mr Godfrey's reference to them not being
20 sustainable in the marketplace, in other words,
21 a competitive-- UK domestic competitive considerations.

22 MR JUSTICE ROTH: And EPI are who?

23 MR SMOUHA: Europay.

24 So what happens? We know bilaterals continue to be
25 negotiated on the basis of reference rates of 1.3 and 1,

1 which is reflected in all of the bilaterals in the
2 bilaterals table for 1997, and then, of course, with
3 effect from 1 November 1997, MEPUK sets the MIF, which
4 is set at 1.3 and 1.

5 Let me show you another example and rather germane
6 to a submission my learned friend made yesterday. At
7 the transcript reference {Day1/50:22}, my learned friend
8 said this:

9 "... as I say ... we don't have, of course,
10 disclosure from the banks which record their
11 negotiations, so we don't have any disclosure which
12 record their negotiations."

13 Now, of course my learned friend is correct that we
14 do not have general disclosure from the banks, but we do
15 have an example, and a very good one, of documents which
16 record the negotiations of a bilateral. This is at
17 {C2/34/1}.

18 This is a letter from Mr Clements of NatWest to
19 Mr Williamson, the treasurer of HFC Bank, dated
20 31 December 1993, and you will see from the first line
21 that it is responding to HFC Bank's bilateral proposals
22 in a letter of 24 December 1993, which one has to say is
23 rather sad that these dedicated bankers were having to
24 write letters on Christmas Eve and New Year's Eve to try
25 and get things settled, presumably, by year end.

1 Anyway, can we just see what it says:

2 "Thank you for your letter of 24 December 1993
3 containing your bilateral interchange fee proposals in
4 respect of MasterCard and Visa Card ... UK domestic
5 transactions emanating from cards issued by HFC Bank and
6 acquired by National Westminster Bank. Please note we
7 act for Ulster Bank Limited, a subsidiary of the
8 NatWest Group, where they are, similarly, an acquirer,
9 and they are also, therefore, included in the
10 arrangements now addressed. Our response to your letter
11 is as follows:

12 "Point of Sale Transactions

13 "MasterCard and Visa credit cards ...

14 "We agree with the rates you suggest of 1.3% of the
15 transaction value for standard (paper) transactions and
16 1% of the transaction value for electronic transactions,
17 until 31 March 1994 and to be reviewed again by that
18 time."

19 Then says they agree with the general description of
20 electronic transactions, and then:

21 "Whilst these rates, now agreed between us, will be
22 automatically recognised in the Visa processing system,
23 as they mirror the UK default rates for that scheme,
24 I know that you are aware that this is not the case for
25 domestic MasterCard transactions where it is necessary

1 to submit bilateral interchange fee instructions to
2 Europay, for systems implementation."

3 And then over the page {C2/34/2}, page 2, there's
4 reference to the various forms and then the last
5 three lines of that top paragraph:

6 "I should point out to you that, in the meantime and
7 until effected in Europay's system, the current
8 MasterCard International fallback rate of 1% for all
9 transactions will automatically apply."

10 "... the current MasterCard International fallback
11 rate of 1% ..."

12 Now, sir, this is valuable evidence, almost 30 years
13 old, of the process of agreeing bilaterals in action and
14 involving the biggest acquirer, NatWest, which had
15 a 32.5% shareholding of MEPUK.

16 Sir, do you want the reference for the hard copy of
17 this letter?

18 MR JUSTICE ROTH: Do we have the letter the other way to
19 which he's replying, the Christmas Eve letter?

20 MR SMOUHA: No, we do not. We'll double-check, but no, we
21 don't. This -- the hard copy of this one is in the
22 first volume.

23 MR JUSTICE ROTH: Yes, but it does get me to ask the
24 question again, the question I asked before the break
25 about Visa, because I thought I'd understood that I was

1 told that Visa did have a UK MIF --

2 MR SMOUHA: Well --

3 MR JUSTICE ROTH: -- but here we are from -- I think you
4 said by 1991, but it's clear that here we have two banks
5 negotiating a bilateral for Visa and what they say in
6 the letter suggests that what Visa had was maybe
7 a UK fallback rate, but not -- but it was not
8 a definitive rate.

9 MR SMOUHA: No, that's not -- well, my understanding of
10 what's being said here is that MIF have got -- sorry,
11 Visa have got a MIF and which will therefore be set in
12 the systems, in the Europay system, to apply --

13 MR JUSTICE ROTH: We're not in Europay, but in the Visa
14 system.

15 MR SMOUHA: Sorry, in the Visa system, there will be --
16 because Visa have set a MIF, that system will apply the
17 MIF, unless they are told that something different has
18 been agreed bilaterally. And as I understand what's
19 being said here is because the rate they are agreeing is
20 at the level of the Visa MIF, that will automatically be
21 recognised because "as they mirror the UK default rates
22 for that scheme", so that must be a reference to the
23 Visa MIF.

24 MR JUSTICE ROTH: Yes, I see.

25 MR SMOUHA: So they're saying, "We don't need to worry about

1 notification of what we're agreeing to for the Visa
2 processing system, because it's the same rate. However,
3 we do need to notify Europay of what we're agreeing in
4 relation to Mastercard because otherwise" -- and then
5 this is what he is saying is his understanding.
6 Otherwise, he understands that Europay will apply the
7 current Mastercard International fallback rate of 1%.

8 And that is important because my learned friend's
9 submission is that the Mastercard and Europay Rules,
10 when referring to "international interchange fee",
11 should be interpreted as referring to the EEA
12 intra-regional MIF. We say that, as you know from our
13 submissions, when correctly interpreted, "international
14 interchange fee" in the rules is referring to the
15 Mastercard International inter-regional rate.

16 Well, here we have a document in which NatWest
17 expressly say and refer to Mastercard International
18 fallback rate. The "Mastercard International"
19 descriptor tells you that he is referring to the
20 inter-regional rate set by Mastercard in the US. Now,
21 sir --

22 MR JUSTICE ROTH: Why is that so clear? I mean, it's not
23 the UK, but, as we know, the EEA rate was basically 1%.

24 MR SMOUHA: No, the key -- what is clear from -- is the
25 reference to Mastercard International. Yes, and of

1 course, sorry, the position in relation to the EEA MIF
2 at that time was there wasn't a single 1% rate because
3 there were lots of -- it was 0.5 to 1%, depending on
4 which discounts applied.

5 MR JUSTICE ROTH: Well, there was one discount, I think, of
6 0.5 --

7 MR SMOUHA: No, three, I think. No, no, I think --

8 MR JUSTICE ROTH: -- of authorisation requests generated for
9 100% of electronic transfers. That's what footnote 17
10 says to the table.

11 MR SMOUHA: Yes, there's the first sentence of footnote 17.
12 Then the next one {A/18.1/2}:

13 "Paper based transactions were also subject to
14 a reduced interchange fee in certain circumstances where
15 the local floor limit for a transaction category was
16 below the intra-European floor limit ..."

17 And then -- and petrol.

18 MR JUSTICE ROTH: Oh, it's petrol, yes. Yes. Yes, I see.

19 MR SMOUHA: Now, sir, I know you have this well on board,
20 but very importantly, we say the question around the
21 rules and the interpretation of them, we say the
22 question for you is not: what is the correct
23 interpretation of them as a legal question? The
24 question is: what was the understanding of banks when
25 negotiating bilaterals?

1 MR JUSTICE ROTH: Yes.

2 MR SMOUHA: So in this regard, this document --

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

4 MR SMOUHA: You've got it. The other points one gets from
5 this document are, first of all, the adoption and
6 agreement of 1.3% for standard and 1% for electronic,
7 consistent with the prevailing change across a large
8 number of bilaterals that were moving from 1% in 1993 --
9 1% standard in 1993 to 1.3% in 1994.

10 Secondly, the reference to Visa. So you have the
11 mirroring of Visa's 1.3 and 1.

12 And then the last point I can make off this document
13 is the point I've made off all the documents; that there
14 is no and never is a reference to the EEA MIF as
15 a factor at all in relation to the rates that they are
16 agreeing. Even if, which I do not accept, there was any
17 ambiguity about the reference at the end to
18 Mastercard International fallback rate, that is in the
19 context of a discussion about notification and systems.
20 It is not any indication that there has been any
21 consideration of the EEA MIF in relation to the choice
22 and agreement of the rates which were being agreed in
23 this bilateral.

24 Sir, that brings me, but I have made this point and
25 foreshadowed, to the submission made by Mr Merricks that

1 throughout 1992 to 1997, the bilaterals era, it was the
2 EEA MIF that applied as a fallback in the absence of
3 a bilateral rate.

4 Sir, we have -- we don't shy away from the --
5 altogether from the argument as to what the rules mean.
6 We have -- on the contrary, we have developed at
7 considerable length and detail in our written
8 submissions in paragraphs 41 to 53 our analysis, which
9 we say demonstrates that Mr Merricks' submissions on the
10 interpretation of the 1989 Mastercard Rules and the
11 1993 Mastercard Rules and the 1991 Eurocard Rules and
12 the 1993 Eurocard Rules is wrong.

13 But it really matters not. It is clear that in this
14 trial, what this trial is all about -- exclusively about
15 facts and, therefore, about what, as a matter of fact,
16 was happening in the bilaterals era and what the banks
17 understood.

18 There is no purpose whatsoever in the Tribunal
19 hearing and determining, in effect, the construction
20 summons that asks, for historical interest alone, what
21 the proper interpretation is of two sets of rules that
22 operated in tandem but which, as we readily accept, were
23 not crystal clear and their interface was potentially
24 confusing. The correct legal answer is irrelevant.

25 In fairness to Mr Merricks' submissions, my learned

1 friends accept in paragraph 42 of their written
2 submissions that ultimately, the question for the
3 Tribunal turns on what happened in fact, not on the
4 question of interpretation.

5 And, again, in our written submissions, we've
6 identified a large number of documents which
7 Mr Merricks' submissions do not address, which run
8 counter to the suggestion that there was any
9 understanding that the EEA MIF would be applied as
10 a fallback under the rules pending arbitration. And in
11 paragraph 50 of our submissions, we identify documents
12 from 1992, 1993, and 1996 that show that even Europay
13 did not have that understanding.

14 So, sir, what we will ask you to find at the
15 conclusion of the trial and for -- and on the basis of
16 the evidence, which we have developed very fully in our
17 written submissions, is, first, that bilateral
18 agreements were ubiquitous in this period: see
19 paragraphs 58-64 of our written submissions, four pages
20 of analysis of the evidence replete with
21 cross-references to extensive contemporaneous evidence
22 which really has not been answered at all.

23 Second, they were negotiated -- the bilaterals were
24 negotiated by reference to three factors: competitive
25 conditions, in particular Visa, cost studies based on

1 UK costs and reference rates.

2 Third, there was no general understanding that the
3 EEA MIF applied in fallback or default which somehow
4 informed negotiations.

5 Fourth, the EEA MIF was irrelevant to those
6 negotiating -- who were negotiating bilaterals, and
7 irrelevant to MEPUK in considering what it called the
8 reference rate, which was the closest thing to any kind
9 of guidance that was in play.

10 And, finally, that the great majority of bilateral
11 agreements were agreed at levels and in a structure
12 reflecting/mirroring Visa's UK MIFs, in other words --
13 and which were significantly different in both structure
14 and level from the EEA MIFs. In other words, no factual
15 causation.

16 My learned friend told you twice yesterday that your
17 decision as to the role of the EEA MIF, if any, in
18 bilateral negotiations is potentially decisive against
19 Mr Merricks. Now, the way she put it, of course, was
20 the question for decision of the interpretation of the
21 rules and we say the question is a factual one as to
22 whether the EEA MIF had any role in fact in the agreeing
23 and setting of rates in bilaterals, which depends on the
24 understanding of the banks.

25 But we completely agree that this point is

1 potentially decisive against Mr Merricks' whole case.
2 As my learned friend put it in relation to Mr Merricks'
3 case on the early period, if the Tribunal found against
4 Mr Merricks on this key point, she said:

5 "We accept that we would not be able to establish
6 but for causation in respect of the early period as the
7 mechanisms on which we rely would collapse, so
8 Mr Merricks' case on the early period would fall down at
9 this preliminary stage".

10 We agree. The transcript references are
11 {Day1/46:21} and {Day1/62:24}.

12 Sir, let me turn very briefly then to deal with the
13 direct application issue. So this is Mr Merricks' case
14 that there was a direct application of the EEA MIF to
15 a substantial proportion of transactions at the
16 processing stage within Europay's internal systems.
17 Now, this is a different issue, of course, from the
18 causation mechanism such as guidance and floor.

19 We submit that taking all the evidence into account,
20 the Tribunal can safely conclude and should conclude
21 that if there were any such transactions to which the
22 processing system applied the EEA MIF, they would not
23 have been material in volume and had no or negligible
24 impact on fees.

25 Let me just give you the references in our

1 submissions to pull them together. I'm not going to go
2 over those points. Paragraphs 19 to 20, 57, 91 to 99,
3 104 and 184.

4 All except the last of those references deal with
5 contemporaneous evidence. Paragraph 184 deals with
6 Mr Parker's expert analysis in his reply report,
7 annex A, paragraph A.18, where he concludes that there
8 is no evidence -- no evidence -- that any UK domestic
9 transactions took place at the EEA MIF rates during 1995
10 to 1997.

11 Obviously, if you accept our submission on this
12 point, then you don't need to be concerned with the
13 issue that my learned friends have raised about what the
14 issue is for determination at this trial and whether
15 there was always planned or expected to be a future
16 quantification trial of direct application. If you
17 accept our submission that there were no material volume
18 of transactions, then that's the answer.

19 MR JUSTICE ROTH: On what you said about Mr Parker, I mean,
20 that's -- you said "no evidence that took place".

21 That's to say he's reviewed the documents and that's
22 his --

23 MR SMOUHA: No, no --

24 MR JUSTICE ROTH: He is saying no evidence --

25 MR SMOUHA: It's a matter of analysis. (Pause)

1 Mr Cook will say something about that when -- he is
2 going to say something about the expert evidence.

3 MR JUSTICE ROTH: Yes.

4 MR SMOUHA: It's {A/21/57}. It's in the annex,
5 paragraph A.18 and it's at (b).

6 MR JUSTICE ROTH: Yes, I see. It's a conclusion he's
7 reached from looking at weighted average.

8 MR SMOUHA: Exactly so.

9 MR JUSTICE ROTH: Yes.

10 MR SMOUHA: Yes, also (c); that if there had been a material
11 proportion of transactions, then there would be
12 a notable jump in the weighted average, but the average
13 actually fell.

14 MR JUSTICE ROTH: Yes.

15 MR SMOUHA: Sir, as I say, if you accept -- if you make
16 a finding, as we say you should, as to there being no or
17 no material volume of transactions to which the EEA MIF
18 was directly applied, then obviously there isn't
19 a difficulty or isn't even an issue, as it were, of
20 quantification of proportion.

21 But let me just say in relation to that, in relation
22 to the issue which, sir, you asked my learned friend
23 about yesterday and the suggestion there might have been
24 some expectation on the other side that there could be
25 some sort of later quantification hearing, sir, that

1 issue is fairly and squarely within the scope of this
2 trial.

3 The evidence -- all the evidence that there is, with
4 ever -- sorry, with whichever limitations of information
5 there are is what it is, and it's for the Tribunal to
6 determine that issue. We don't accept at all that there
7 can ever have been any basis for thinking that that
8 somehow would be a further phase to determine something
9 which, if there was, there couldn't be any further
10 evidence or disclosure to come in relation to it.

11 In relation to the transaction data, sir, the
12 position is what it is. If it doesn't exist, it doesn't
13 exist. So there's no going back on that.

14 I do, though, sir, want to just make the position
15 absolutely clear. When there was a hint that somehow,
16 perhaps on the other side, they may have been coming
17 into this trial thinking that there could have been
18 somehow a revisiting of the question in relation to
19 disclosure of transaction data, the position is not that
20 it was said that it existed but was not proportionate to
21 disclose. The position -- I'm going to give you the
22 references, but I'm not sure it's in the bundle yet, but
23 we can add it in.

24 The relevant witness statement was the
25 second witness statement of Mr Sansom of

1 12 September 2022, and what Mr Sansom said in his
2 witness statement was, at paragraph 56(a):

3 "It is unlikely that reliable transaction data
4 exists for the claim period and it would be difficult
5 and expensive to determine what transaction data does
6 exist."

7 And then at paragraph 59:

8 "Based on the discussions my team has had with
9 Mastercard employees, I understand that Mastercard's
10 primary data repository suffered a significant
11 inadvertent loss of data during a planned software
12 upgrade that took place in 2013."

13 Not, as my learned friend described it yesterday,
14 a deliberate destruction of data:

15 "As a result of ..."

16 MR JUSTICE ROTH: I don't think there was any suggestion it
17 was deliberate destruction.

18 MR SMOUHA: Sorry, I may have misheard.

19 MS DEMETRIOU: I was drawing -- of course we knew that that
20 was the position back at the CMC, but what we've now
21 been told very recently is that there was a planned
22 deletion of data in 2011. I wasn't making
23 a suggestion --

24 MR SMOUHA: I misunderstood. Sorry, I apologise. I do
25 apologise. I misunderstood that reference.

1 And then he said in the same paragraph, 59:

2 "As a result of this data loss, the view of the
3 individuals who have responsibility for managing that
4 data repository is that Mastercard no longer holds
5 complete or reliable transaction level data for the
6 period prior to 2011."

7 So, sir, it is what it is. That is the limitations
8 of evidence. If we are right that there was no material
9 volume, that's then the end of it. If you reject that
10 submission, then you have to determine what Mr Merricks
11 contends would be, they say, a substantial proportion of
12 the volume.

13 Sir, that is all I wanted to say on the bilaterals
14 period. I can deal very swiftly with 1997 to 2004.
15 There isn't very much that I wanted to add to what we've
16 said in our written submissions.

17 And in relation to how MEPUK went about setting the
18 UK MIFs, the same points apply as in the bilaterals;
19 competitive landscape, nature of costs that MEPUK had to
20 consider were key considerations. That hadn't changed
21 just because MEPUK was now formally setting MIFs instead
22 of reference rates and, above all, Visa's rate of
23 1.3% standard and 1 electronic had not changed since
24 1993. MEPUK continued to consider those factors rather
25 than giving any consideration to the levels of the

1 EEA MIF. It was exactly the same as what had come
2 before.

3 The weighted voting and hierarchy arguments, which
4 appear to be directed mainly at establishing a basis for
5 argument in the counterfactual, we've dealt with those
6 fully in paragraphs 144 to 145. Essentially, the
7 documentary and witness evidence do not show any
8 instance where a bank sought to use its clout to force
9 a higher UK MIF whether because what the EEA MIF had
10 been set at or otherwise.

11 And in relation to that, sir, you will be in
12 a position just to make findings of fact as to that; the
13 existence of the rule, but there being no evidence of it
14 having had any significance at all in circumstances
15 where across the whole period, 1997 to 2004, there was
16 nothing contentious within the MEPUK board. The minutes
17 show all decisions being agreed without any indication
18 of opposition.

19 Infection. Sir, I don't need to add anything more.
20 The points that indeed you, sir, made to my learned
21 friend in relation to that show the difficulties with
22 that.

23 And finally for my part before I pass over to
24 Mr Cook, with apologies to him for not having given him
25 the amount of time that I said I would, but the

1 Mastercard era, 2004 to 2009, when Mastercard itself
2 took over responsibility for setting UK MIFs, for the
3 reasons I explained yesterday, our understanding was/is
4 that the only allegation pursued in relation to that
5 period is the infection allegation; paragraph 139 of
6 Mr Merricks' submissions.

7 And there are any number of evidential points, as
8 we've set out in our submissions, paragraphs 157 to 159,
9 why there cannot be said to have been any causal effect,
10 if there was, from a previous period carrying through
11 it. It makes no sense at all on the evidence.

12 So, sir, in sum, there is nothing in Mr Merricks'
13 factual case in the contemporaneous evidence. All of it
14 is fundamentally inconsistent in all periods and apart
15 from the factual evidence -- also on the expert
16 evidence, as to which, if I may, unless, sir, members of
17 the Tribunal, you have any further questions for me,
18 I would hand over to Mr Cook just to address you on
19 Mr Coombs' reports.

20 MR JUSTICE ROTH: No, thank you very much.

21 MR SMOUHA: Thank you, sir, and again apologies to you --

22 MR JUSTICE ROTH: No.

23 Mr Cook.

24 Opening submissions by MR COOK

25 MR COOK: Sir, the plan had been that I'd address you on the

1 expert evidence a little bit. I think it's going to be
2 very much the focus on the little bit given the time and
3 the availability and the issues have obviously -- those
4 are obviously matters we've dealt with -- well, we've
5 dealt with them in our written opening and, of course,
6 in terms of -- they will be matters to be explored in
7 cross-examination, of course.

8 MR JUSTICE ROTH: Yes. We wanted just to be clear. The
9 arrangement you all had is that Mr Merricks should have,
10 what, half a day to cross --

11 MR COOK: Yes.

12 MR JUSTICE ROTH: That's the understanding; is that right?

13 MS DEMETRIOU: Yes. I was rather hoping that they would
14 finish by 12.30 so I wasn't under a huge amount of
15 pressure, but I think --

16 MR JUSTICE ROTH: Well, we can sit until 5 o'clock if you --

17 MS DEMETRIOU: If we need it. That's very kind.

18 MR JUSTICE ROTH: So you continue until 1 o'clock.

19 MR COOK: That is very kind, sir. Thank you.

20 Sir, just a couple of themes to deal with in terms
21 of where we get to with the economic evidence. My
22 learned friend relied heavily in her opening on the
23 theories about incentives, issuers and acquirers, which
24 is based on Mr Coombs' evidence in his reports, and it's
25 particularly on his causation report, paragraphs 3.2 to

1 3.22.

2 And, essentially, there are two themes that
3 Mr Coombs has there. First, that issuers had no
4 incentive to agree lower rates than the default.
5 Essentially, they're the ones getting the money, so why
6 would they agree lower? And acquirers had no incentive
7 to agree higher rates than the default. Essentially,
8 they are the party paying, so why would they agree to
9 pay more?

10 Sir, there's similar logic -- that logic applies to
11 both bilateral rates and also setting of the UK MIFs
12 from 1997 onwards.

13 So that's the first theme; issuer and acquirer and
14 incentives. And the second one is Mr Coombs' evidence
15 that Visa, he says, as a matter of economic theory, was
16 largely not a relevant concern for Mastercard, so
17 Mastercard wouldn't have worried about matching
18 interchange fees to Visa.

19 And we say it's immediately apparent that both of
20 those themes of Mr Coombs' evidence have already been
21 largely ditched or wholly ditched by my learned friend.
22 She acknowledged, and this was page 57, line 19 of the
23 transcript yesterday {Day1/57:19}, that in the factual
24 world, Mastercard did consider Visa's UK MIFs to be
25 relevant and took account of them.

1 There's still a dispute about how important that
2 was, but that's completely contrary to Mr Coombs' theory
3 that Visa would not have been a relevant concern for
4 Mastercard. Frankly, the argument they wouldn't have
5 been a concern makes no commercial sense at all. They
6 were the other key player at the time.

7 Secondly, my learned friend acknowledged, and it was
8 page 16, line 23 onwards {Day1/16:23}, that payment
9 cards are a two-sided market and she says this places
10 some limitations on the incentives of issuers and
11 acquirers respectively, and that's an important
12 acknowledgement since it follows from that
13 acknowledgement that there may be good reasons why
14 issuers would accept lower rates or acquirers would
15 accept higher rates.

16 And, of course, that's the theme of art, the
17 economic case coming from Mr Parker, which is in
18 a two-sided market, everybody has an incentive in the
19 scheme being successful. Put crudely, a bigger pie is
20 better for everybody and, therefore, the incentive is to
21 get the right interchange fee that makes the scheme
22 successful as a whole. There isn't this conflict
23 between conflicting views because everyone wants the
24 same successful scheme.

25 But we say, of course, Mr Coombs -- sort of the

1 acknowledgement by my learned friend about Mr Coombs'
2 theories still don't go far enough. Mr Coombs put
3 forward theories, but he made no attempt at all to
4 analyse the data about the actual interchange fee rates
5 during the claim period to see if his theories were
6 correct. And, as you've heard from my learned friend
7 Mr Smouha, that's a continuing theme of this case from
8 Mr Merricks. The case is based on theory, but there's
9 no attempt to sort of test those theories or make good
10 those theories by reference to the actual rates and
11 actually what happened.

12 But Mr Parker has done exactly that analysis. He's
13 looked at the interchange fees agreed or set in the UK
14 and the EEA and considered whether those facts are
15 consistent with Mr Coombs' economic theories. That's
16 Mr Parker's reply report at paras 317-328. And he
17 concludes Mr Coombs' economic theories about what's
18 likely to happen, Mr Coombs said as a matter of theory,
19 are simply contradicted by the data about what did in
20 fact happen.

21 Mr Smouha has taken you through the detail. You
22 don't get bilateral agreements at the EEA MIFs' rates.
23 They're mostly above, but some are below. The first
24 UK MIF set in November '97 was set above the EEA MIFs.
25 The subsequent UK MIFs were generally different from the

1 EEA MIFs and, in general, you don't see parallel changes
2 taking place at any point.

3 So we say simply these theories don't survive
4 confrontation with the facts of this case and they're
5 obviously contradicted by those facts, and Mr Parker
6 explains why, which is those simplistic theories for
7 Mr Coombs just ignore the two-sided aspect of this
8 market, which doesn't mean that there is this conflict
9 between issuers wanting high and acquirers wanting low.
10 They want something which is successful for the scheme
11 as a whole; the right level for the scheme as a whole.

12 My learned friend suggested that what we said in our
13 opening submissions about two-sided markets was contrary
14 to our pleadings, contrary to our evidence. With
15 respect, nothing could be further from the truth.

16 What we say -- and my learned friend took you to
17 bits of the defence. What she didn't show you was the
18 paragraph that directly addresses this, and that's
19 paragraph 67A(vi), particularly subparagraph (2) of
20 that. So 67A(vi)(2) and the reference is {A/4/32}, sir.

21 It starts saying:

22 "It is denied that UK issuing banks had no incentive
23 ... to agree a UK MIF below the rate of the EEA MIF.
24 The incentives ... on a number of factors ..."

25 And then (2), depended on:

1 "Market conditions, since the incentive for both
2 issuing banks and acquiring banks in setting a Domestic
3 MIF (regardless of its relative level compared to the
4 EEA MIF) is to set a Domestic MIF which allows the
5 Mastercard scheme to operate successfully in that
6 country, particularly in the light of the competition
7 ... from other card networks ..."

8 We go on then to explain why and that, again,
9 an issuing bank may therefore prefer a lower interchange
10 fee if that will make the scheme competitive.

11 So that is the theme. That's very much there. It's
12 in our original pleading. It's not an amendment. So
13 that is the thesis that lies behind it and that's
14 an economic theory which we say is demonstrably correct
15 in light of what you see happen in terms of the setting
16 of the interchange fees by the banks, either bilaterally
17 or multilaterally, and then, from 2004 onwards, by
18 Mastercard.

19 And that's on credit cards and absolutely again,
20 what you see in relation to Debit Mastercard, which is
21 Mastercard setting, or Maestro, which is the UK banks
22 setting, they wanted the right interchange fee. If that
23 happened to be higher, lower or similar to the EEA MIF;
24 that was simply no part of the equation. You wouldn't
25 have the wrong interchange fee merely because the

1 EEA MIF was at a particular level.

2 So that point is very much there on our pleading.
3 It was suggested that Mr Parker's evidence was contrary
4 to this. It was a slightly surprising submission.
5 Mr Parker walks through these arguments. It's in his
6 reply report, which is {A/21/21} and it's paragraphs 3.9
7 to 3.14, where he explains and works his way through,
8 which I'm afraid will come as no shock to
9 Professor Waterson, but to the rest of us perhaps more
10 informative, a distinction between a one-sided market,
11 but even then, the fact that sometimes people have
12 an incentive to accept lower -- or have to accept lower
13 prices to get more business, of course.

14 But then the position is, of course, different in
15 a two-sided market. We pick up at paragraphs 3.12, over
16 the page {A/21/22}, onwards that when you got
17 a two-sided market, because you have the need for there
18 to be exactly the two sets of customers for every
19 transaction, both sides, issuer and acquirer, have the
20 same incentive to ensure that the interchange fee
21 ensures a scheme is competitive for both business,
22 because a card scheme without merchants is useless to
23 cardholders and a card scheme without cardholders is
24 useless to merchants.

25 So you want to try and ensure you can grow the pie

1 as much as possible and everyone has that shared
2 incentive. That's exactly what Mr Parker explains and
3 exactly what we set out in our opening submissions. So
4 our case there is entirely consistent with Mr Parker's
5 evidence.

6 My learned friend relied upon document, I think it
7 is, {C18/37/70}, and this was Mastercard's response to
8 the European Commission, which was suggested was
9 contrary to what we're now saying. I'm afraid it takes
10 a little bit of unpacking, this document, but just --
11 I invite the Tribunal to read it in due course and we
12 will explain it more in our closing submissions if
13 necessary.

14 The short point essentially is where it comes out is
15 exactly the same. The Commission's thesis, which we
16 see -- or as Mastercard understood the Commission's
17 thesis, which we see at 181, was the idea that all the
18 banks -- it's the third line -- had an interest in
19 a high interchange fee. So that's third line on to
20 fourth line. And they were saying everyone wants high
21 interchange fees because that is -- we see at the top of
22 the page because it's guaranteed revenues for all. It's
23 the third line at the top of the quotation.

24 We say that's wrong. Interchange fees is not
25 guaranteed revenues for all. Of course, acquirers are

1 paying and issuers are receiving.

2 It goes on at 182 to talk about the short-term
3 financial interests in having a lower interchange fee
4 for acquirers and a higher interchange fee for issuers,
5 but then it goes on in the middle of that paragraph,
6 about seven or eight lines down, the relevant -- the
7 line starts:

8 "... but it is a cost for 'net acquirers'."

9 And it's the middle of that line:

10 "There is therefore no 'commonality of interests' in
11 a high level of interchange between the banks
12 represented on the European Board; their only common
13 interest is that the fees be set at the
14 transaction-maximising rate."

15 So that is no different, unpacked a bit more
16 perhaps, than what we say now. It is not the case, and
17 this was the Commission's theory, that everyone wants
18 a high rate. Everyone wants the right rate and
19 sometimes that's low or certainly significantly lower
20 than the EEA MIF rate, and sometimes that may be higher,
21 depending on market conditions.

22 But that is what Mastercard was saying then and that
23 is what Mastercard says now. So there's no
24 contradiction between what we've said before or what we
25 say now. It is simply the shared interest in growing

1 the scheme, not about whether the fee is intrinsically
2 low or high, insofar as one can put any meaning on that
3 term at all.

4 So we say essentially, the economic theory that's
5 put against us simply fails to take account of economic
6 theory of two-sided markets and the conflict with the
7 data in any event. Our theory has been entirely
8 consistent and it reflects what we see and what
9 Mr Smouha has taken you through in terms of what
10 happened in practice for all three schemes that were
11 operating at the relevant time, two debit, one credit.

12 So that's in relation to the incentives point.
13 Briefly then, the data analysis that one gets from the
14 experts.

15 A noticeable admission from my learned friend's oral
16 opening was any real reliance upon Mr Coombs' weighted
17 average MIF analysis, and that's sections 5 and 6 of
18 Mr Coombs' causation report, so his first report. And
19 that's a particularly important omission because that's
20 the only time that Mr Coombs' case takes any real
21 account of the actual data. That analysis, as you know,
22 we say is simply flawed.

23 And briefly just the four points. One, none of the
24 allegations or the economic theory suggests any reason
25 why you get correlation for weighted average MIF rates,

1 not -- because that's not looking at the levels. That's
2 just looking at the weighted average, which depends upon
3 weightings.

4 Two, the critical conclusion -- it's at
5 paragraph 6.25 of Mr Coombs' causation -- is that over
6 the claim period as a whole, correlation coefficients
7 are marginally to moderately negative, but not
8 statistically significant, i.e., no correlation over the
9 claim period.

10 And the only way, third point, that Mr Coombs finds
11 correlation is what we say is essentially cherry-picking
12 period. He takes the data that helps and ignores the
13 data that doesn't help. He excludes the three years in
14 the middle, 2001 to 2003. He describes that as
15 a structural break. Of course, if that's the case,
16 that's the death knell for the infection argument if
17 there's a structural break in the middle. And he also
18 ignores the pleaded one-year run-off period from 2008 to
19 2009, though, of course, the infection argument now
20 amounts to a 12-year run-off period.

21 And we say that's just simply a question of ignoring
22 data which doesn't help the story. When you look at all
23 the data, the answer is no correlation, so he has to
24 exclude the bits that make a difference. And his
25 explanations for excluding those period; well, there's

1 no explanation for excluding the one-year run-off period
2 and in terms of --

3 MR JUSTICE ROTH: Sorry to interrupt you, Mr Cook, and I may
4 be misremembering, but I thought the one-year run-off is
5 to do with the MSC, not the MIF.

6 MR COOK: No, sir, there are two -- you granted permission
7 for it. There's two types of run-off period.

8 MR JUSTICE ROTH: Ah, yes.

9 MR COOK: So you granted permission for a one-year
10 interchange fee run-off period, the idea that the MIF
11 gets set to zero in June 2008, but you considered it was
12 at least pleadable --

13 MR JUSTICE ROTH: Yes, that the UK MIF --

14 MR COOK: -- that the UK MIF had -- there was ongoing effect
15 on the MIF which lasted a year. So that is the case
16 where they say -- and that's the issue for this --

17 MR JUSTICE ROTH: Yes, you are quite right. I had
18 misremembered.

19 MR COOK: And then there was a two-year MSC run-off period,
20 which is not a matter for this trial at all.

21 MR JUSTICE ROTH: Yes.

22 MR COOK: So the argument is that there is this correlation,
23 this causative effect, for that one-year period, but
24 that's just simply not tested at all by Mr Coombs. So
25 it's a startling omission, we say. But nonetheless,

1 there is no explanation for excluding that.

2 The explanation for excluding the middle three years
3 of the claim period is -- relies upon factors which were
4 equally true at other parts of the claim period. He's
5 just trying to find data to support the thesis, not the
6 other way round.

7 But we say the most fundamental problem is that even
8 for those two, we say, cherry-picked periods considered
9 by Mr Coombs, the rates of the EEA MIF and the UK MIFs
10 are largely unchanged during those periods. So changes
11 in the weighted average of interchange fees over time
12 are essentially entirely due to weighting.

13 And Mr Parker has looked at the data and explains
14 what you get is an increase in electronic transactions
15 during the 1990s, and that electronic transactions are
16 those which effectively there was an online checking
17 that you had -- that was a valid card and you had the
18 available funds or the available credit facility. So
19 there was an increase in those kind of electronic
20 transactions in the 1990s and then an increase in chip
21 tech transactions in the 2000s.

22 So all the analysis shows is that the same
23 technological trends in the payment markets took place
24 on the continent and in the UK over similar periods.
25 While that's probably not a great surprise, but

1 certainly it is utterly uninformative of any of the
2 issues for this Tribunal to deal with. It tells the
3 court absolutely nothing about the EEA MIFs having
4 a causative effect upon UK interchange fees. And that
5 is the only data analysis that Mr Merricks has put
6 forward and it simply doesn't support any case at all on
7 correlation, let alone on causation.

8 Now, Mr Parker has done rather more data analysis
9 and he's obviously done three kinds. He's looked at the
10 data and that's where he's identified a whole series of
11 contradictions/contraindications on the data compared to
12 the theories. He's done some, with appropriate -- to be
13 fair, with caveats he's done some econometric analysis
14 and he's done that -- he makes clear there aren't a huge
15 number of data points here, so he has concerns about it.
16 But nonetheless, he's none the econometric analysis and
17 that shows absolutely no relevant association between
18 the UK MIFs and the level of the EEA MIFs for comparable
19 categories. So Mr Parker concludes the econometric
20 analysis doesn't provide any support at all for the
21 pleaded causation allegations.

22 And the third of his analysis, as Mr Smouha has just
23 explained, is his consideration of the direct
24 application analysis, and the conclusion there is --
25 those are put in both positive and negative terms. So

1 no evidence of any transactions at the EEA MIF rate, but
2 also, the data is consistent with all of the
3 transactions taking place at the principal bilateral
4 rates of 1.3 standard and 1% electronic. So it's both
5 positive and negative there and it supports Mastercard's
6 case in both directions.

7 Sir, and then briefly then in terms of the VoC
8 issues. You've heard the issue between the parties
9 concerns on-us transactions. Essentially, the dispute
10 is about the proper scope of the issue which is before
11 the Tribunal.

12 And we say the proper basis of the issue before the
13 Tribunal is the pleaded case, and Mr Merricks' case, and
14 it's paragraph 98 of the claim form, is that the
15 infringement caused the interchange fees paid by
16 acquiring banks to issuing banks on both cross-border
17 and domestic transactions to be higher than they would
18 have been absent the infringement.

19 That's defined as the overcharge. So higher
20 interchange fees is the overcharge. The allegation is
21 then that's passed on -- that overcharge is passed on by
22 acquiring banks to businesses in higher MSCs, and then
23 by businesses to consumers in higher prices.

24 We say that's the pleaded case and that's what the
25 Tribunal needs to consider and, therefore, Mr Merricks

1 needs to show there were interchange fees on on-us
2 transactions which were higher than they would otherwise
3 have been.

4 And there is an evidential dispute, which is we
5 accept the proper matter for the Tribunal to consider
6 and determine, which is if transactions were processed
7 by Europay, Mr Dhaene has given evidence that then
8 an interchange fee would have applied. If he's right,
9 then an interchange fee applies.

10 We rely on the evidence of Mr van den Bergh and
11 Mr Sideris. The banks generally didn't process -- or
12 generally processed on-us transactions themselves
13 because if Europay processed them, a fee was payable.
14 So, obviously, it was cheaper to do it in-house. And in
15 those circumstances, there just is no scope for
16 interchange fees to be payable.

17 MR JUSTICE ROTH: But if there is -- this could happen often
18 in, say, a group where you have different subsidiaries.
19 You have a charge from one to the other and that is then
20 passed on in the MSC that the acquiring side charges its
21 merchant. Then why isn't that within the scope of this
22 claim?

23 MR COOK: Well, the short answer to that, sir, is, firstly,
24 you say "if". Firstly, if we're talking about different
25 subsidiaries, so different entities, then you might have

1 payments, yes. But if you're talking about
2 one entity --

3 MR JUSTICE ROTH: Yes, and why isn't it different if there
4 is an internal fee being charged within the way the bank
5 prepared accounts for different parts of its business
6 that they both have to show, as sections of a business
7 often have to do, that they are -- what their costs are
8 and what their revenues are and meet certain targets?

9 MR COOK: The short answer to that is had they advanced that
10 claim early on, there would have been no objection to
11 that claim at all. It would have been one that we would
12 then have tried to test, look for evidence to see what
13 in fact happened to see if there is evidence to support
14 that and to support the level, because, of course, the
15 claim is there's got to be a causative effect on that
16 level.

17 The issue is that that is something that comes out
18 only now in opening submissions, and in the reply served
19 the same day as the opening submissions, so that is not
20 how the case has been advanced. So, there has not been
21 disclosure. There has not been evidence addressing that
22 point.

23 So it's not, sir, that we say that that wouldn't
24 have been an arguable way to run the case, it's just not
25 how the case was advanced until such a late stage that

1 it's simply not possible to be dealt with.

2 And the same point we say in relation to the other
3 one, which is the MSC argument. Again, if the same MSC
4 applied, that you can basically sort of not worry about
5 the internal accounting. And, again, that's not the way
6 the case was run, not the way it was pleaded, and there
7 is no evidence on those issues.

8 So my learned friend characterised this as
9 Mastercard having no answer. But it's not a case of us
10 having no answer to it, it's a case where a point is
11 coming so late that there is no disclosure or evidence
12 on the issue. And effectively it's put as, you know, if
13 these things happened-- if it's right that there were
14 these transfers.

15 The point is, sir, we simply don't have the data to
16 test those important "if" points, and that is simply too
17 late to raise those points. They had an opportunity --
18 they fully re-pleaded their claim back at the end
19 of May. If they'd raised it at that point then that
20 might have been possible, but it could have been raised
21 at that stage. It would have been very difficult, but
22 it's simply far too late to raise it on 26 June and
23 think this can be dealt with within this trial.

24 So we say, sir, it's simply too late. Not because
25 the points are unarguable if they had been raised in

1 good time, but because they were not raised in good time
2 and that makes it too late, sir.

3 MR JUSTICE ROTH: Thank you. That takes us to our normal
4 time for breaking and we'll resume at 2 o'clock.

5 (1.04 pm)

6 (The short adjournment)

7 (2.02 pm)

8 MR JUSTICE ROTH: Yes, Mr Smouha.

9 MR SMOUHA: Thank you, sir. May I call Mr Sideris?

10 MR JUSTICE ROTH: Well, just before you do that, we do have
11 some concern about the way Mastercard has prepared its
12 evidence -- its witness evidence in this case.

13 MR SMOUHA: Why? Sorry, sir?

14 MR JUSTICE ROTH: Well, do you have what we sometimes call
15 the Purple Book, the Competition Law Handbook?

16 MR SMOUHA: Yes.

17 MR JUSTICE ROTH: If you -- this is, of course, the trial
18 part of the trial and we have a Practice Direction about
19 witness evidence, which you'll find at page 1873,
20 Practice Direction 2 of 2021.

21 MR SMOUHA: Yes.

22 MR JUSTICE ROTH: And you'll see over the page that under
23 section 3, 3.3:

24 "A trial/appeal witness statement should, so far as
25 possible, be expressed in the witness' own words and

1 drafted in their own language."

2 And if you look at any of your -- Mastercard's
3 witness statements, I think, but let's take Mr Sideris'
4 first witness statement on {A/11/2}, paragraph 4:

5 "This statement has been prepared following
6 discussions with Freshfields. Freshfields prepared the
7 first draft of this witness statement and I then
8 reviewed it and revised it in an iterative process ..."

9 That is not the way that trial witness statements
10 should be prepared in this Tribunal or, indeed, as you
11 well know, there's nothing unique to the Tribunal. That
12 statement -- that Practice Direction is very much
13 equivalent to the Practice Direction for trial witness
14 statements in the High Court. It does not appear to
15 have been followed.

16 MR SMOUHA: Well, sir, all I can say is in relation to what,
17 sir, you said about the position being the same in other
18 courts, certainly it's not my understanding that the
19 reference in the Practice Direction to matters being --
20 words being in the witness' own words means that the
21 witness is supposed to do the drafting.

22 MR JUSTICE ROTH: Well, that's what -- doing something in
23 your own words means that you -- it's not prepared for
24 you and given to you, written by someone else, which you
25 then review, which is what happened here.

1 MR SMOUHA: It is, sir --

2 MR JUSTICE ROTH: That's how I understand it.

3 MR SMOUHA: Sir, there may be a misunderstanding:

4 "Freshfields prepared the first draft of this
5 witness statement ..."

6 In the second sentence of paragraph 4.

7 MR JUSTICE ROTH: Yes.

8 MR SMOUHA: That is after the discussions with Freshfields
9 that are referred to in the first sentence.

10 MR JUSTICE ROTH: Yes, I'm not suggesting they sort of made
11 it up --

12 MR SMOUHA: No, no. No, no. Sorry, sir --

13 MR JUSTICE ROTH: -- but they -- I mean, writing it in your
14 own words means that you can dictate it to someone or
15 you can -- but not that it's actually written for you
16 based on after -- that's the way statements used to be
17 prepared before the Practice Direction. It was -- the
18 whole point of the Practice Direction was to get away
19 from that.

20 MR SMOUHA: Sir, certainly the distinction, as I have
21 understood it, and I'm not claiming any special
22 knowledge about this, but I was on the consultation
23 committee that prepared the reports chaired by
24 Mr Justice Andrew Baker that led to the Practice
25 Direction.

1 MR JUSTICE ROTH: Yes.

2 MR SMOUHA: The principal practice that was desired to be
3 changed was the practice of solicitors preparing draft
4 witness statements off documents and then having
5 discussions with witnesses in relation to that.

6 And certainly it is my understanding, but I am
7 saying, sir, this is my personal understanding in
8 relation to the objective of the provision in -- as
9 I say, I am not speaking to the tribunal's rules, but in
10 relation to what appears in the Practice Directions in
11 the Chancery Division and in the Commercial Court --
12 well, actually in the Business and Property list where
13 this started, is that the references to being expressed
14 in the witness' own words and that being expressly, as
15 it were, in that formulation, is directed at the -- is
16 not directed at requiring the witness to prepare a draft
17 of their own witness statement and that it is perfectly
18 appropriate -- and certainly my understanding from,
19 I think, all the cases in which I've been involved since
20 the Practice Direction in which I'm aware of what's
21 being done by the professions is that the draft -- that
22 the proofing of a witness, within all the very important
23 new limitations in relation to the identification of
24 documents and so on, is currently done generally by
25 solicitors.

1 In other words, the witness is proofed, but that
2 what is happening in terms of the preparation of a draft
3 by the solicitors is a draft using the words that the
4 witness has in their interviews -- in their proofing,
5 used. That is what one is trying to get at.

6 MR JUSTICE ROTH: No, I think that's entirely right. It's
7 not quite the impression that that paragraph gave, but
8 if what you're saying is that's what happened, in any
9 event, we're not saying -- we're not going to exclude
10 any of the statements. There's no question --

11 MR SMOUHA: No. It's more important than that, sir.

12 I would not -- I wouldn't want the Tribunal to have any
13 concerns about it, so if I may, I have Mr Sansom behind
14 me. Can I --

15 MR JUSTICE ROTH: Yes.

16 MR SMOUHA: May I take specific instructions on that?

17 MR JUSTICE ROTH: Yes, I think that would be helpful.

18 MR SMOUHA: If you would just give me a moment, sir.

19 (Pause)

20 Sir, yes, that is confirmed. So the process has
21 been done on the basis of the interviewing, the proofing
22 of the witness, verbatim notes made of that interview,
23 the preparation of the first draft of the statement by
24 Freshfields being done on the basis of those verbatim
25 notes; in other words, with the intent of capturing the

1 witness' own words, and that the review -- Mr Sansom
2 confirmed to me that the review process has also
3 involved the witness making -- in each case making
4 changes to that draft, again to reflect their own
5 wording.

6 So that the objective has been at all times to
7 arrive at a witness statement which, so far as possible,
8 is expressed in the witness' own words and drafted in
9 their own language.

10 MR JUSTICE ROTH: Yes, thank you. Well, we're reassured and
11 understand that.

12 MR SMOUHA: I'm grateful. I'm grateful, sir, for the
13 opportunity to have that clear. Sir, is there --

14 MR JUSTICE ROTH: And I obviously wanted to raise that with
15 you because it's got -- it's no reflection at all on
16 Mr Sideris or, indeed, any of the other witnesses.

17 MR SMOUHA: Indeed, but, sir, if I may say so, I'm very glad
18 that you did because obviously the whole point of the
19 new Practice Direction is to enhance the value and
20 assistance to the court of the witness statement, and we
21 obviously would not want, and it wouldn't be in
22 Mastercard's interest, for the Tribunal to have any
23 reservations on that front.

24 MR JUSTICE ROTH: Yes, thank you.

25 MR SMOUHA: Sir, can I ask Mr Sideris to come forward?

1 MR JUSTICE ROTH: Yes.

2 MR SMOUHA: If I may call him.

3 MR JUSTICE ROTH: Yes.

4 MR JEAN SIDERIS (affirmed)

5 Examination-in-chief by MR SMOUHA

6 MR SMOUHA: Good afternoon, Mr Sideris. Could we please
7 have on the screen {A/11/1}.

8 Mr Sideris, you have made two witness statements for
9 the purposes of these proceedings and this trial, and
10 you should see there on the screen the cover page,
11 first page, of your first witness statement. Do you see
12 that?

13 A. Yes.

14 Q. And please if we could go to page 35 --

15 MR JUSTICE ROTH: I think 34, is it?

16 MR SMOUHA: Sorry, 34 {A/11/34}. Thank you, sir.

17 And can you please confirm that you signed this
18 witness statement, signing both the confirmation of
19 compliance and the statement of truth, on 24 March 2023?

20 A. Yes.

21 Q. And can I ask you, please, whether there are any
22 corrections or additions which you wish to make to this
23 statement?

24 A. No.

25 Q. And then can we please go to your second witness

1 statement at {A/13.4/1}. Do you see there the cover
2 page of your second witness statement?

3 A. Yes.

4 Q. Thank you. If we could go, please, to page 14
5 {A/13.4/14}, and can you confirm, please, that that is
6 your signature, signing the confirmation of compliance
7 and the statement of truth on your second witness
8 statement on 19 June 2023?

9 A. Yes.

10 Q. And are there any corrections or additions which you
11 wish to make to this statement?

12 A. No.

13 Q. And can you please confirm that the contents of your
14 two statements are true?

15 A. Yes.

16 MR SMOUHA: Thank you.

17 MR JUSTICE ROTH: Mr Sideris, you've been looking at them on
18 screen. You'll probably be asked some questions about
19 what you said in them shortly. If you would prefer to
20 have paper copies of your statements, if you find that
21 easier, I'm sure that can be arranged. If you're happy
22 with them on screen only, it's a matter for you.

23 A. If I can, I would rather have them. Otherwise, it's
24 fine.

25 MR JUSTICE ROTH: Yes, I think it might be helpful for the

1 witness to have his own paper copy of his own witness
2 statement.

3 MR SMOUHA: I would certainly agree, sir.

4 MR JUSTICE ROTH: If someone could provide Mr Sideris
5 with --

6 MR SMOUHA: If there's a hard copy bundle A --

7 MR JUSTICE ROTH: He could have the bundle, I would think,
8 with the other statements.

9 There will be other documents, Mr Sideris, you'll be
10 asked about which will come up on screen. If you want
11 to see a paper copy of those, it can probably be
12 arranged, but if you're able to deal with the others on
13 screen, I think that's helpful because there are a lot
14 of documents in this case and mostly we're dealing with
15 them electronically.

16 A. Yes.

17 MR SMOUHA: Thank you, Mr Sideris. If you wait there,
18 Ms Demetriou will have some questions for you.

19 Cross-examination by MS DEMETRIOU

20 MS DEMETRIOU: Good afternoon, Mr Sideris. You're presently
21 a director at Edgar, Dunn & Company, aren't you?

22 A. Yes.

23 Q. And from 2002 to 2011 you held various roles at
24 Mastercard Europe; that's right, isn't it?

25 A. That's correct.

1 Q. And from 1997, you explain that MEPUK set MIFs for
2 UK domestic transactions until 2004; yes? So UK MIFs
3 were set domestically in the UK from 2007 to 2000 --
4 from 1997 to 2004.

5 A. I believe I joined Mastercard in 2002, so I can only
6 talk about from 2002.

7 Q. But when you joined in 2002, then UK MIFs were being set
8 by MEPUK; that's correct?

9 A. That's correct.

10 Q. And from 2004, Mastercard Europe had responsibility for
11 setting the UK MIFs.

12 A. Yes.

13 Q. And throughout your time at Mastercard Europe,
14 Mastercard set the EEA MIF; that's right, isn't it?

15 A. Yes, to the extent that it was approved by the board of
16 Mastercard prior to the IPO, yes.

17 Q. And you worked at Mastercard Europe during the
18 Commission investigation into Mastercard's
19 EEA interchange fees; correct?

20 A. That's correct.

21 Q. And were you involved in -- were you involved in that
22 investigation on Mastercard's behalf?

23 A. Of course.

24 Q. So you helped, what, with responding to requests for
25 information and so on?

1 A. Yes, among the others, yes.

2 Q. Now, if we look at your -- so you've explained in your
3 statement that an interchange fee is a fee that's
4 generally paid by the acquiring bank to the issuing
5 bank; correct?

6 A. Yes.

7 Q. And if we look at your first statement at paragraph 59,
8 you're talking there about -- so paragraph 59 is on page
9 {A/11/13}. That's at the bottom of the page and you're
10 talking there about setting the EEA MIF and you say in
11 that first sentence, you say -- you see that:

12 "... the main challenge ... we faced ... was
13 balancing the interests of net-issuing and net-acquiring
14 countries."

15 Yes?

16 A. Yes.

17 Q. Now, I want to show you the -- so what you mean there is
18 the net issuing countries had different incentives to
19 the net acquiring countries; yes?

20 A. Yes.

21 Q. And if we look at Mr Parker's expert report -- Mr Parker
22 is Mastercard's expert economist. Can we go to
23 {A/16/26}, paragraph 2.48. Maybe that could be made
24 bigger. Let's have a look at that.

25 So Mr Parker is here describing incentives in

1 a bilateral negotiation between banks; yes? So he says:

2 "An individual bank (Bank A) entering a bilateral
3 negotiation with another bank (Bank B) to set
4 an appropriate [interchange fee] would wish to set the
5 most profitable fee for that bank. Each bank's
6 individual incentives would depend on its net
7 issuing/acquiring position vis-à-vis the other bank.
8 Suppose Bank A is a net issuer and Bank B a net
9 acquirer. Assuming that this negotiation is a one-off
10 with no impact on other negotiations:

11 "... Bank A would seek the highest possible
12 [interchange fee], subject to achieving agreement ...

13 "... Bank B would seek the lowest possible
14 [interchange fee], subject to achieving agreement."

15 Do you agree with that as a basic proposition? Do
16 you agree that in a bilateral negotiation, the bank
17 which is a net acquirer vis-à-vis the other bank
18 generally has an incentive to pay a lower interchange
19 fee on the transactions between those banks?

20 A. That seems logical.

21 Q. Okay. And then if you then have a scenario of
22 a multilateral negotiation where a group of banks are
23 agreeing on a multilateral interchange fee which binds
24 them all, in that situation, you presumably agree that
25 a bank which is a net acquirer overall, in other words

1 its acquiring business is larger than its issuing
2 business, would generally have an incentive to achieve
3 a lower MIF in those negotiations; yes?

4 A. Yes.

5 Q. And for a bank which had a large issuing business and
6 either no acquiring business or a smaller acquiring
7 business, then the converse is true, isn't it? So in
8 a multilateral negotiation, they would generally have
9 an incentive to achieve a higher MIF; yes?

10 A. Yes.

11 Q. Now, let's look at what Mastercard said to the
12 European Commission in response to its statement of
13 objections and see if you still agree with what it said.
14 So if you go to {C10/371/1}. So you can see this is
15 Mastercard's submissions to the European Commission in
16 response to the Commission statement of objections; yes?

17 A. (No audible answer).

18 Q. Then if we turn to page 33 {C10/371/33} and if we look
19 at paragraph 127, we see here that what is being
20 evaluated are alternatives to the default MIF; yes?
21 That's the heading, and the submission raises the
22 question. So the question here is whether there are any
23 practical alternatives to the default MIFs. Do you see
24 that in paragraph 127?

25 A. Yes.

1 Q. And then at 128, what's said is there are at least
2 four -- in theory four options; do you see? And there
3 are then some bullet points and the second is:

4 "Bilateral negotiations with issuers setting fees in
5 default of an agreement ..."

6 And the third is:

7 "Bilateral negotiations with the acquirers setting
8 fees in default of an agreement ..."

9 Yes? So you see what is said there.

10 A. (Witness nods).

11 Q. And then let's look at what Mastercard said to the
12 Commission would be the result of those options. So
13 could we go to page 34 of this document, paragraph 130
14 {C10/371/34}. So:

15 "In the second scenario, in the absence of any
16 bilateral agreement, the issuer would be entitled to set
17 the interchange fee."

18 Then you see at paragraph 131:

19 "In such a scenario, the issuer would not have any
20 incentive to lower the level of the interchange fee
21 (compared to the current default MIF)."

22 Yes:

23 "This would only be economically sensible if the
24 reduction in the interchange fee was offset by
25 an appropriate rise in the financial volume of

1 transactions entered into by that issuer's cardholders.
2 This would not be the case, since the impact of one
3 issuer's interchange fee on the MSC is small and the
4 interchange fee has no direct impact on cardholders who
5 will have no knowledge of it. As a result, a unilateral
6 reduction of the interchange fee by an issuer simply
7 means that it would receive lower revenues from its
8 transactions. Therefore, there is no reason to expect
9 that issuers would reduce the interchange fee
10 unilaterally."

11 And you'd agree with that still, wouldn't you,
12 Mr Sideris? So it's true, isn't it, that issuers
13 wouldn't normally want to reduce interchange fees below
14 the fallback, below the default, because that would mean
15 lower revenues for them?

16 MR JUSTICE ROTH: You seem to be asking these questions for
17 Mr Sideris' opinion. He's not -- he was never -- as
18 I see it, he's worked at Mastercard. I think he may
19 have worked at some point at Visa, but never for
20 an issuer or an acquirer.

21 MS DEMETRIOU: Well, he has worked at Mastercard and Visa,
22 sir --

23 MR JUSTICE ROTH: But not at a bank.

24 MS DEMETRIOU: No, and I'm asking his view because
25 Mastercard --

1 MR JUSTICE ROTH: Well, he has an opinion, but it's not
2 factual evidence; it is opinion evidence.

3 MS DEMETRIOU: Well, lots of his statement is opinion
4 evidence, sir, and I need to be able to challenge it.

5 MR JUSTICE ROTH: Yes, you're not at the moment challenging
6 his statement.

7 MS DEMETRIOU: No. Alright.

8 MR JUSTICE ROTH: You can ask these questions, but we are
9 going to get some witnesses from Mastercard who actually
10 worked for banks, I think.

11 MS DEMETRIOU: Sir, yes, and I'll ask them similar
12 questions.

13 MR JUSTICE ROTH: It may be more appropriate.

14 MS DEMETRIOU: Yes, okay.

15 So can I just ask you, Mr Sideris, whether you agree
16 with that statement, so whether you agree with what
17 Mastercard said to the Commission at that time?

18 A. Sorry, can you please repeat the question?

19 Q. Yes. So what Mastercard said to the Commission at that
20 time, you can see in paragraph 131, is that the issuer
21 wouldn't have any incentive to lower the level of the
22 interchange fee compared to the current default MIF, and
23 can I ask whether you agree with that or not?

24 A. Well, it depends, actually. I don't -- I don't agree.

25 An issuer might agree to reduce interchange fees if, as

1 a result, there was more transactions and, therefore,
2 more revenue as a whole.

3 Q. And what's being said here by Mastercard is that that
4 wouldn't be the case in respect of an individual issuer
5 because -- so they say here it would only be
6 economically sensible if the reduction in the
7 interchange fee was offset by an appropriate rise in the
8 financial volume of transactions entered into by that
9 issuer's cardholder, which is the point you're making,
10 but then Mastercard says this wouldn't be the case since
11 the impact of one issuer's interchange fee on the MSC is
12 small and the interchange fee has no direct impact on
13 cardholders who have no knowledge of it. So do you see
14 the point and do you agree with it?

15 A. Not entirely, actually. It depends on which kind of
16 interchange we're talking about. So if we're talking
17 about cross-border interchange, obviously, any single
18 bank would have a minor impact on the total cross-border
19 interchange fees, but if we're talking about domestic
20 transactions, a significant -- a large bank would have
21 significant impact on domestic interchange. So it
22 depends.

23 Q. Right. Now, let's have a look -- let's go back to
24 paragraph 59 of your witness statement that I took you
25 to, so {A/11/13}. Here, as I said, you're describing

1 the process at paragraph 59 of setting the intra-EEA MIF
2 and you're talking about the challenge you face about
3 balancing the interests of net issuing and net acquiring
4 countries; yes? And what you do is explain that banks
5 from countries in Southern Europe had lots of incoming
6 cross-border transactions so they would have wanted
7 a lower interchange fee; yes?

8 A. Yes, that's correct.

9 Q. And banks from Northern European countries tended to be
10 the issuing banks for such cross-border transactions;
11 yes?

12 A. Not -- not exactly. They were representing, you know,
13 their country, so it's not that they were issuing banks;
14 they were northern banks.

15 Q. Well, let's just look at what you say. So you say
16 there:

17 "... banks from countries in southern Europe, which
18 were more reliant on tourism (and so had a lot of
19 incoming cross-border transactions by foreigners),
20 preferred lower cross-border rates to the banks from
21 northern European countries (whose customers were more
22 often making cross-border transactions abroad)."

23 So what you are saying is that they were more often
24 the issuing banks; yes?

25 A. Excuse me?

1 Q. The banks --

2 MR JUSTICE ROTH: Perhaps, Ms Demetriou, if you read the

3 first sentence of paragraph 59, that might --

4 MS DEMETRIOU: I had read it, sir, but I'll read it again.

5 MR JUSTICE ROTH: Perhaps read it again, because that might

6 help.

7 MS DEMETRIOU: So, Mr Sideris, why don't you read

8 paragraph 59 to yourself --

9 A. "I recall that, in this period ..."

10 Q. No, you don't have to read it out loud.

11 A. Oh, sorry.

12 Q. No, just to yourself just to give you the opportunity to

13 have a look at it again. (Pause)

14 A. Yes.

15 Q. So I'm just trying to, first of all, establish what

16 you're saying. So you're saying there that you faced --

17 the main challenge that you faced in setting the

18 intra-EEA MIF was balancing these competing interests;

19 yes?

20 A. That's correct.

21 Q. And the competing interests were between net issuing and

22 net acquiring countries; yes?

23 A. Yes.

24 Q. And what you're saying is that it tended to be banks

25 from countries in Southern Europe which were the net

- 1 acquiring countries; yes?
- 2 A. Yes.
- 3 Q. And banks from countries in Northern Europe that
- 4 tendered to be the net issuing countries, yes?
- 5 A. Yes.
- 6 Q. And there -- they were in conflict because the banks
- 7 from the southern countries wanted lower MIFs and the
- 8 banks from the northern countries tended to want higher
- 9 MIFs; yes?
- 10 A. Yes.
- 11 Q. Now -- and you knew -- so in your role at
- 12 Mastercard Europe, you were aware of those conflicting
- 13 interests; yes?
- 14 A. Yes.
- 15 Q. And that's because they would have expressed that view
- 16 to you, the banks, or you just would have known that
- 17 that's what they wanted?
- 18 A. I didn't have any direct contact with the banks, so
- 19 I would have known it.
- 20 Q. It went without saying. You didn't need them to tell
- 21 you because you would have appreciated that those were
- 22 their interests, yes?
- 23 A. Probably that, and also that was what other people told
- 24 me.
- 25 Q. What sort of other people?

1 A. My boss.

2 Q. Your boss. What was the name of your boss?

3 A. Luc Gillain.

4 Q. I'm so sorry?

5 A. Luc Gillain.

6 Q. So he would have had contact with these banks, would he?

7 A. Yes.

8 Q. So if an interchange fee, if MEP -- sorry, if

9 Mastercard Europe was proposing to set a cross-border

10 MIF that looked quite high, then some of these acquiring

11 banks would have gone to your boss, would they, and

12 said, "No, no, that looks too high, we want it to come

13 down a bit"? Is that the kind of conversation that

14 would have taken place?

15 A. There is an error in what you're saying. You're talking

16 about acquiring banks and I'm talking about net

17 acquiring countries and net issuing countries. They're

18 not the same.

19 Q. Alright. Well, let's stick with what you say. So let's

20 stick with the net acquiring countries; yes? So you say

21 that your boss would have had contact with these -- with

22 banks from those countries.

23 A. Yes.

24 Q. And your boss would've been aware as what the banks from

25 those countries wanted; yes?

1 A. Yes.

2 Q. And that's why you say this was a big challenge. You

3 were trying to balance these competing interests; yes?

4 A. Yes.

5 Q. In fact, you say it was the main challenge; yes?

6 A. That's what I say, yes.

7 Q. And how would your boss have known that those were their

8 competing interests? Presumably they would have

9 vocalised what they wanted to your boss, who would have

10 told you; is that correct?

11 A. They vocalised it during the board meetings or the BMAC

12 meetings, yes.

13 Q. Right. So you were in no doubt that the net acquiring

14 countries wanted lower MIFs and the net issuing

15 countries wanted higher MIFs. You were in no doubt

16 about that.

17 A. Yes.

18 Q. And it was difficult to balance out those competing

19 interests. That's why you say it was a challenge.

20 A. It was a challenge. I'm not saying it was difficult or

21 easy. I'm just saying it was a challenge.

22 Q. It was a main challenge.

23 A. That's what I said.

24 Q. And in terms of vocalising what they wanted, if

25 Mastercard Europe were proposing or would have proposed

1 a MIF that was too high, then those net acquiring
2 countries or banks from those net acquiring countries
3 might have sought to challenge that; no?

4 A. So if we were proposing an interchange that was deemed
5 too high, there would be a vote and the net acquiring
6 countries would have probably been against it.

7 Q. But before you got to the vote, you'd be trying to
8 balance out the competing interests; yes? You wanted to
9 do this consensually, didn't you?

10 A. I don't really recall the process of how we actually got
11 there, but I probably -- we took into account
12 vocalisations of members during previous discussions
13 that we knew that -- what they -- where they stood, and
14 we would put forward interchange proposals. Some --
15 some of them got approved, some of them didn't.

16 Q. But in formulating the proposals, you would've taken
17 into account those competing interests in advance,
18 wouldn't you, to try and avoid conflict? That's right,
19 isn't it?

20 A. To some extent, yes, but interchange is about conflict.
21 At the end of the day, the right interchange is a level
22 where nobody is happy.

23 Q. I think we see a flavour of that from the documents and
24 I think it follows from what you're saying that there
25 was never any agreement between every bank that there's

1 one right level; yes? There was lots of conflict about
2 what the right level would be, lots of agreement and
3 discussion and so on.

4 A. Yes, that's true.

5 Q. Now, you refer in your first witness statement to the
6 75% rule. Do you remember referring to that? We can
7 see it at {A/11/6} at paragraph 25 at the bottom. So
8 you talk about a local country association:

9 "If a local country association had invoked the
10 75% rule ..."

11 Yes?

12 A. Yes.

13 Q. And I just want to show you the Eurocard Rule Book from
14 March 2002, so these would have been in force when you
15 started your employment. So if we go to {C8/356} and if
16 we could look at page 3 under the heading "Domestic
17 Rules" {C8/356/3} and if we look at that
18 first paragraph:

19 "Any domestic rules applicable to all domestic
20 transactions in a country, including centrally acquired
21 domestic transactions, must be agreed by a group of
22 Members ... representing, during the year preceding the
23 agreement, at least 75% of each of the
24 Eurocard-MasterCard issuing and acquiring domestic
25 volumes in the country. Domestic rules will remain in

1 effect until changed or challenged. If domestic rules
2 are challenged because the group of Members agreeing to
3 them no longer meets the 75% threshold, the
4 international rules will apply in their place, as from
5 the date when Europay has determined that the
6 75% threshold is no longer met."

7 And that's what you're referring to, isn't it, when
8 you talk about the 75% rule; yes?

9 A. Yes.

10 Q. And when we see, first of all, the reference to
11 "domestic rules applicable to all domestic transactions
12 in a country" in the first line, that would include
13 domestic MIFs; yes?

14 A. Yes.

15 Q. Now, the effect of this rule was that any bank or group
16 of banks representing over 25% of acquiring volume could
17 challenge the domestic rules; yes?

18 A. Yes, or issuing as well.

19 Q. Or issuing, correct. And if they did, it says the
20 international rules will apply in their place. And to
21 be clear about what the international rules are, if we
22 scroll up and look under the heading of "Scope" on the
23 same page, that says that -- so if we look at the
24 second paragraph:

25 "The specific Eurocard Rules which differ from the

1 standard MasterCard Rules are described in this manual.
2 In all cases, the Eurocard Rules override the MasterCard
3 Rules."

4 And then we see the Eurocard Rules apply to
5 intra-European transactions, etc, etc, and then the
6 last paragraph:

7 "The above mentioned Rules are applicable to
8 intra-European Eurocard-MasterCard transactions and, by
9 default, to domestic transactions."

10 So that's what's meant by the international rules;
11 yes?

12 A. Yes.

13 Q. And then let's see what the Eurocard Rules say about
14 interchange fees, and if we go to page 35 {C8/356/35} of
15 this document and if we look at rule 6.2.2.3, "Order of
16 Precedence", we see:

17 "Bilaterally agreed interchange and service fees
18 always prevail over fallback interchange ... fees.

19 "In the absence of bilaterally agreed interchange
20 and service fees, the fallback interchange ... for the
21 country must be applied to domestic ... transactions."

22 Yes?

23 And then:

24 "In the absence of either bilateral agreed
25 interchange fees ... or fallback interchange ... fees,

1 the intra-European interchange ... fees will be applied
2 to domestic ... transactions."

3 So those are the order of precedence of the rules;
4 yes?

5 A. Yes.

6 Q. And during the time that you were employed by
7 Mastercard Europe, so from 2002, there were no bilateral
8 UK domestic interchange fee agreements, were there, that
9 you're aware of, no bilateral agreements?

10 A. Honestly I don't remember. I think there might have
11 been one or two.

12 Q. Alright. And you presumably agree, do you, that if
13 banks representing 25% of UK acquiring domestic volumes
14 challenged the UK MIF, then the intra-EEA MIFs would
15 apply, yes, on the basis of this rule?

16 A. Yes.

17 Q. Are you aware -- you might not be because it was before
18 your time, but are you aware before the 75% rule, there
19 was a similar rule that required 90% agreement?

20 A. No.

21 Q. And the 75% rule was there, wasn't it, because
22 Mastercard Europe wanted to ensure that any domestic
23 rules carried the support of the large majority of
24 licensees in the relevant country?

25 A. I don't know why they were there.

1 Q. You don't know. Okay.

2 Now, if we go to bundle {XC22/75/1}. So this is
3 a confidential -- I'm not sure -- sir, this is
4 a confidential document. It may be -- Mr Smouha wants
5 to say something.

6 MR SMOUHA: No, no, I want to say something --

7 MS DEMETRIOU: Ah, to me?

8 MR JUSTICE ROTH: Yes. (Pause)

9 MS DEMETRIOU: Mr Smouha is saying -- and that's the basis
10 on which I was proposing to proceed. I was going to
11 point out the relevant parts of the document without
12 reading them out.

13 MR JUSTICE ROTH: Yes.

14 So, Mr Sideris, apparently this document is
15 confidential to Mastercard. It's been disclosed in the
16 proceedings. So counsel, Ms Demetriou, will ask you
17 some questions pointing you to the relevant paragraph,
18 but please don't read it out or repeat what it says
19 unless you are actually asked to do so. Thank you.

20 MS DEMETRIOU: So this is {XC22/75/1}, and this is the
21 Mastercard's response to the Commission's request for
22 information. And if we go to page 6 {XC22/75/6} and if
23 we can please -- we may need to go to the previous page,
24 actually, to get the context -- no, it's actually
25 page 6.

1 And then if you count down three paragraphs, can you
2 see a sentence saying:

3 "The above scenario ..."

4 A. Yes.

5 Q. If you don't mind just reading that to yourself, please.

6 (Pause)

7 A. Yes.

8 Q. Were you aware of this at the time having taken place?

9 A. I don't remember. I joined after that.

10 Q. You don't remember any -- you weren't involved in -- you
11 don't remember any discussion about this at the time?

12 You can't remember now anything about it?

13 A. I don't remember. As I said, I joined in September.

14 Maybe it was mentioned, maybe not. I really don't
15 remember.

16 Q. Okay. If we look at page 21 {XC22/75/21}, this is the
17 letter that was referred to in that paragraph. Do you
18 see the name of the company at the top?

19 A. Yes.

20 Q. So do you see that that letter indicates that the
21 interchange fee is going to cease to apply? Do you see
22 at the end of the second paragraph, it says that the
23 company wants to put an end to this interchange? And
24 then in the third paragraph, it explains what's going to
25 apply instead; yes? Which is the intra-EEA MIF. Do you

1 see that?

2 A. Yes.

3 Q. And if we look at {B/28/1}, this is a schedule of
4 EEA MIFs and you can see for 2002, which is the same
5 year, the base rate was 1.3; yes? So the 1.35 domestic
6 interchange fee mentioned by the company we just saw was
7 higher than this; yes?

8 A. Yes.

9 Q. So the consequence of them giving notice or triggering
10 the rule was to reduce the applicable interchange fee.
11 Do you see that?

12 A. Yes. Well, actually, there's only the base rate; right?
13 I don't know -- if you show me the other rates. There's
14 many rates in the table.

15 Q. Well, I think the precise rate doesn't matter, but the
16 point of triggering the rule and defaulting to the
17 intra-EEA MIF, the point of that would be to achieve
18 a lower rate; yes?

19 A. I don't know. I need to see all the rates to be able to
20 tell you.

21 Q. Alright. Yes. Well, if we look at the column in 2002,
22 so we saw the rate that was being disapplied. The
23 domestic rate was 1.35 and if we look at all of the
24 rates in the column for 2002, they're all lower than
25 that, aren't they?

1 A. Yes.

2 Q. So you would accept, would you, in these circumstances
3 that the effect of this was to default to the lower
4 rate?

5 A. If I may ask to see the previous rate -- the previous
6 document you shared.

7 Q. Yes, so that was at --

8 A. The termination document, the termination of the
9 domestic MIF document.

10 Q. Yes, so {XC22/75/21}, page 21. Thank you. (Pause)

11 A. Okay, thank you.

12 Q. And if we look at the statement of objections, so
13 {C16/215/173} and if we look at paragraph 12.14, we can
14 see in the middle of that paragraph:

15 "A petrol station owner, a large variety store chain
16 and an airline replied that Bank Card Company was still
17 a 'monopolist' acquirer for VISA and MasterCard in
18 Belgium."

19 So that company seems to have had a significant
20 acquiring business in Belgium; yes? So do you agree
21 that it was likely in its interests to reject the higher
22 domestic MIF in favour of the lower intra-EEA MIF?

23 (Pause)

24 So, Mr Sideris, my question was quite
25 straightforward; that we've seen they triggered

1 a default from the 1.35 level to the lower
2 intra-EEA MIF.

3 A. Yes.

4 Q. We've seen them described as a monopolist acquirer, at
5 least -- and so assuming that they have a large
6 acquiring business, I think it follows from your
7 previous responses that you would accept that they have
8 an incentive to achieve a reduction in the rate from
9 1.35 to 1.3.

10 A. Are you talking about Citibank?

11 Q. I'm talking about Bank Card Company.

12 A. I'm not sure I follow, sorry.

13 Q. Right, okay. The letter that we saw, if we go back to
14 the letter, which is at {XC22/75/21} --

15 MR JUSTICE ROTH: Is it confidential who the letter is from?

16 MR SMOUHA: No. I can give some clarification just in
17 relation to confidential material, which will help and
18 not slow things down.

19 The first thing is that the documents that are in
20 the XC bundle, it is not the entirety of the document
21 which is confidential. The confidential material is
22 highlighted. So if you don't see any highlighting,
23 don't worry.

24 MS DEMETRIOU: That's helpful.

25 MR SMOUHA: And sorry we've not been able to say that

1 earlier.

2 Secondly, it is not that it's Mastercard's
3 confidential information; it's the confidential
4 information of third parties, mostly banks, gathered
5 from them in the regulatory investigations and disclosed
6 to Mastercard on the regulatory file.

7 MR JUSTICE ROTH: So this document, which is not
8 highlighted, is not confidential?

9 MR SMOUHA: Correct.

10 MR JUSTICE ROTH: Right. Well, that will make
11 Ms Demetriou's task easier. Thank you.

12 MS DEMETRIOU: Thank you. That makes it a lot easier.

13 So we've seen that this is a letter from Bank Card
14 Company, yes, and that what they're doing is they're
15 saying they no longer want the 1.35% interchange fee.
16 They want to put an end to it, yes, and what's going to
17 apply is the intra-EEA default; yes? And what I was
18 showing you in the --

19 THE SHORTHAND WRITER: I'm sorry, but can -- I'm not taking
20 down nods, so --

21 A. Yes, sorry.

22 MS DEMETRIOU: Of course, yes.

23 So, I'm sorry, Mr Sideris, I'm just responding to
24 your nods, but the transcriber is quite right. If you
25 don't mind just saying "yes" or "no" --

1 A. Sorry for that.

2 Q. Thank you.

3 So if we -- so we've looked at the Commission
4 statement of objections, and the statement of objections
5 seems to indicate that they have a large --
6 Bank Card Company had a large acquiring business; yes?

7 MR JUSTICE ROTH: Would you like to be shown that again?

8 I think perhaps could we bring back --

9 MS DEMETRIOU: Yes, so it's {C16/215/173}.

10 A. To my recollection, Bank Card Company was -- I don't
11 remember exactly what they were doing, but they were on
12 the acquiring side.

13 Q. Okay.

14 A. I don't remember if they were also on the issuing side,
15 to be honest.

16 Q. No, but here -- so your recollection seems to accord
17 with what the Commission is noting; that they're
18 an acquirer. They've been spoken about as a monopolist
19 acquirer, but anyway, leave that aside. You remember
20 them being -- having a significant acquiring business.
21 So that would explain, wouldn't it, why they would have
22 an incentive to get rid of the 1.35% domestic MIF and
23 default to the lower intra-EEA MIF; yes?

24 A. Potentially, yes.

25 Q. Now, if we go to {C10/429/36}, please. This was

1 a UK cost study produced by EDC dated September 2002.

2 And if we go to page 45 {C10/429/45}, EDC here explains
3 where the data -- where its data has come from and if we
4 look at the top of the page, it says:

5 "The sample represented around 90% of the MasterCard
6 acquiring volume in the UK and just over 55% of
7 transactions on the issuing side."

8 And then below that, it says that the sample was
9 increased to include monoline issuers. So monoline
10 issuers are issuers that didn't have an acquiring
11 business; correct?

12 A. Yes.

13 Q. And smaller issuers who have been increasing their
14 overall market share over the last few years.

15 And then in the table below, EDC says that their
16 study includes eight issuers and five acquirers; yes?

17 A. Yes.

18 Q. So that means that those five acquirers represented
19 90% of acquiring volume. We see that at the top of the
20 page; yes?

21 A. Yes.

22 Q. And the eight issuers represented 55% of issuing volume;
23 yes?

24 A. Yes.

25 Q. So it appears that the acquiring market was concentrated

1 in a smaller number of banks. Would you agree with
2 that?

3 A. So it would seem, yes.

4 Q. And we can see that all the banks listed in the
5 acquiring column are also listed in the issuing column,
6 yes, apart from Girobank?

7 A. Yes.

8 Q. So do you agree that because the issuing column
9 represents 55% of issuing volume and the acquiring
10 column represents 90% of volume, it seems very likely
11 that several of the banks in acquiring column will be
12 net acquirers; correct?

13 A. No. This is not automatic.

14 Q. So you don't think that any of those banks in the
15 acquiring column would have been net acquirers; is that
16 your evidence?

17 A. I'm not saying I don't think; I said I don't know.

18 Q. You don't know. Alright.

19 Let's have a look at {C9/411}. These are joint
20 written representations of MEPUK, Mastercard
21 International and Mastercard Europe in response to the
22 OFT's supplementary rule 14 notice. So this is dated
23 2 May 2003.

24 And if we go to page 10 {C9/411/10}, figure 2.2 at
25 the top illustrates how Mastercard's four-party scheme

1 operated; yes? You see that diagram?

2 A. Yes.

3 Q. And you can see the box in respect of issuers states

4 there are approximately 60 in the UK. Do you see that?

5 A. Yes.

6 Q. And you can see that the box in respect of acquirers

7 states that there are eight acquirers in the UK. So

8 there are many more issuers than acquirers; yes?

9 A. Yes.

10 Q. And of the named acquirers, several of them are issuers

11 too; yes?

12 A. Yes.

13 Q. So we see that RBS Group, Barclays and HSBC are all

14 listed as both issuers and acquirers; yes?

15 A. Yes.

16 Q. Now, the overall volumes have to balance out, don't

17 they? The issuing and acquiring volumes, they all have

18 to balance out, don't they?

19 A. Overall, yes.

20 Q. Yes. So given the fact that there are many more issuers

21 than acquirers and given the fact that some of those

22 issuers are monoline issuers who don't have any

23 acquiring volume, it follows logically, doesn't it, that

24 most of these acquirers will be net acquirers; yes?

25 A. No, you could have one acquirer that has 99% of the

1 market. I'm --

2 Q. You could have one of them.

3 A. You could have one acquirer, let's say -- you can take
4 RBS Group. It could be 90% of the market in acquiring.
5 Does it mean that Barclays, HSBC, Lloyds and Bank of
6 Scotland would be net acquiring? Not automatically.

7 Q. Right, so -- but you would accept that at least -- so
8 your case is that at least one of them has to be a net
9 acquirer; is that right?

10 A. Yes, probably.

11 Q. Right. And it's unlikely just to be one, isn't it,
12 because they would have to have a huge amount of the
13 acquiring volume?

14 A. I can speculate, but I don't know.

15 Q. You don't have any recollection about how this worked?

16 A. No.

17 Q. Alright. Now, coming back to the operation of the
18 75% rule, take a hypothetical scenario; yes? So let's
19 imagine that the year is a year that you were there, so
20 say 2003, and a group of domestic issuers have managed
21 to assemble quite a lot of support to produce draft
22 board papers to vote through a domestic MIF of, let's
23 say, 2% for most transaction categories.

24 So my question is, first of all, do you agree that
25 net acquiring banks would be incentivised to resist

1 raising the MIF in that way?

2 MR SMOUHA: Sir, I'm sorry to interrupt, but that question
3 is -- both could only go to the counterfactual,
4 certainly not a question directed to a question of fact,
5 and it also appears to be asking for an opinion in
6 relation to --

7 MR JUSTICE ROTH: It's a rather complicated question.
8 I'm not quite sure really what you're seeking to ask the
9 witness. You're putting a hypothesis, which is not
10 a factual question.

11 MS DEMETRIOU: Sir, we obviously have a case as to how this
12 rule -- how incentives interacted with this rule, and
13 that's what I'm trying to put to the witness.

14 MR JUSTICE ROTH: But I don't think the witness had any
15 experience of seeing the rule at work because he wasn't
16 involved with the UK.

17 As I understood, the witness said -- correct me if
18 I'm wrong -- that you only became involved with the UK
19 when, in 2004, the part of Mastercard where you were
20 working the MCE took over setting the UK domestic MIF;
21 is that right?

22 A. Yes.

23 MS DEMETRIOU: Sir, right --

24 MR JUSTICE ROTH: So asking him to give an opinion on -- you
25 have asked, because he does say something about

1 incentives, about acquirers' -- net acquirers'
2 incentives and net issuers' incentives and he's agreed
3 with you on that, but then to put a -- I really don't
4 think --

5 MS DEMETRIOU: Sir, that's fair enough. I'll leave that be
6 and move on.

7 I want to turn to a document which was written
8 before you joined Mastercard, but I want to see whether
9 you agree with what's said in it, please. So it's at
10 {C5/370}. So this is a 1999 Q&A document and I just
11 want to look at something at the bottom of the page.

12 So if we go to -- sorry, if we go to page 2 and the
13 very bottom of page 2 {C5/370/2}. And the backdrop to
14 this it's seeking -- this paper is seeking to justify
15 a process where the intra-EEA fees are increased for
16 magnetic strip transactions while lower fees are
17 introduced for chip and PIN transactions so as to
18 incentivise a movement to chip and PIN.

19 If we look at the bottom of the page, it says:

20 "Why playing with cross-border Interchange? Don't
21 you understand that this is not the key driver for
22 getting countries to migrate to Chip, that it is rather
23 the Domestic considerations? In the meantime, you
24 damage the International acceptance."

25 And the response that's there says:

1 "Cross-border Interchange is important. First, it
2 sets a direction for the whole scheme, with impacts on
3 domestic markets as well, in particular those applying
4 the cross-border Interchange domestically."

5 So I just want to see whether you agree with the
6 points that are being made here. So the first point the
7 author is making is that intra-EEA rates particularly
8 impact on domestic markets which apply those rates to
9 domestic transactions directly. You'd presumably agree
10 with that proposition.

11 A. Yes.

12 Q. And the second point that's being made is that even in
13 respect of markets where the rates don't apply directly,
14 it sets the direction for the whole scheme. Do you
15 agree with that proposition?

16 A. Not entirely. So it sets a direction. What does
17 "direction" mean? There is the structure of the rates
18 and there is the actual value of the rates. I think
19 what this document is trying to achieve -- again,
20 first time I see it -- is introduction of new tiers in
21 face of new technology, which was EMV at the time, and
22 therefore the objective seems to be that they want to
23 send a message on what incentives could be like between
24 the different tiers rather than saying, you know, the
25 intra-European should be the actual rates for domestic

1 transactions that don't apply it.

2 Q. But in terms of setting a direction, we know that the
3 intra-EEA rates do set a direction in the sense that if
4 there isn't 75% agreement, then domestic rules will be
5 disapplied and the intra-EEA MIF will apply; yes? So we
6 know in that sense it sets a direction.

7 A. I don't call that a direction -- I would say it's
8 a fallback rate that would apply in case of no bilateral
9 or domestic agreements.

10 Q. Alright. And it sets a direction as well, doesn't it,
11 because Mastercard Europe is the regional authority and
12 so domestic jurisdictions would know what
13 Mastercard Europe was doing at a strategic level; yes?

14 A. So domestic jurisdictions would know what the
15 intra-European rates would be, yes, that's correct.

16 Q. They would know whether they were rising or falling.

17 A. Rising or falling of what?

18 Q. Whether the rates, the EEA MIFs, were rising or falling
19 or staying the same, they would know that.

20 A. They would know that.

21 Q. And the banks would know that too, wouldn't they?

22 A. Of course, yes.

23 Q. So an acquiring bank who saw that an intra-EEA MIF was
24 lower or falling might use that to argue for a lower
25 domestic MIF in principle; yes?

1 A. Potentially.

2 Q. Now, if we look at {C10/92/21}, we can see here the
3 terms of reference for the European Interchange
4 Committee, the EIC, and you used to sit on that
5 Committee, didn't you?

6 A. Yes.

7 Q. And this is a document from 18 August 2003, so it's
8 before Mastercard takes control, direct control, of the
9 setting of the UK MIFs; correct?

10 A. Yes.

11 Q. And under "Vision" -- do you see that -- it says:

12 "In accordance with MasterCard strategy, develop,
13 review and make recommendations to MasterCard Europe
14 senior management on intra-European interchange programs
15 and, where appropriate, domestic interchange programs
16 for potential submission to the European Boards."

17 And under "Objectives", it says that an objective is
18 to:

19 "Review interchange at European level, by region, by
20 market and by product on a regular basis and recommend
21 the required repositioning."

22 So do you agree that the EIC, even in 2003, has
23 an overall function of providing strategic oversight at
24 a European level?

25 A. The main objective of the EIC at the time was to set

1 cross-border interchange fees and, by default, domestic
2 in case a cross-border would apply. I think this
3 document opened the door to potentially a situation
4 where a group of banks could ask Mastercard to set
5 domestic rates in their country, and that was just
6 holistic just to make sure that if it has -- if it had
7 happened, we'd be able to do it.

8 Q. So I think you're agreeing with my question, aren't you,
9 that looking at these objectives, that the EIC, as well
10 as setting intra-EEA MIFs, had a function of providing
11 strategic oversight at the European level?

12 A. "Strategic oversight", I don't know what that means.

13 Q. Well, strategic oversight -- it says here:

14 "Review interchange at European level, by region, by
15 market and by product on a regular basis and recommend
16 the required repositioning."

17 So there was strategic input coming from the
18 European level, wasn't there?

19 A. As I said, the role of the EIC was to make
20 recommendation for intra-EEA interchange fees.

21 Q. Well, this is suggesting it was a bit wider than that.
22 Are you disagreeing?

23 A. It is open for the possibility of local banks asking
24 Mastercard to set domestic rates in their country, yes.

25 Q. Right. Alright.

1 Now, in November 2004, Mastercard took direct
2 control over setting the levels of UK domestic MIFs,
3 yes?

4 A. Yes.

5 Q. And to be clear on who's taking the decisions on
6 UK domestic interchange fees from that point, the
7 domestic fees were discussed by the Interchange Fee
8 Team, the IFT, which was overseen by you; correct?

9 A. Yes.

10 Q. And presented to the EIC and sent to the chief operating
11 officer for approval; yes?

12 A. Yes.

13 Q. And as far as the intra-EEA MIFs were concerned, the
14 decision-making, at least from 2006 to 2008, was
15 effectively the same as that, wasn't it?

16 A. Yes.

17 Q. And it was slightly different, wasn't it, from 2004 to
18 2006 in the sense that it was initially -- it was the
19 same in that it was initially being decided by the IFT
20 and the EIC, but the difference at that stage was that
21 the Mastercard Europe board also needed to approve the
22 IFT's proposals, yes --

23 A. Yes.

24 Q. -- on the advice of the Business and Marketing Advisory
25 Committee?

1 A. Yes.

2 Q. So from 2004, it was the very same Committees deciding
3 on the EEA MIFs and the UK MIFs; yes?

4 A. Yes.

5 Q. And primary -- so primary responsibility for developing
6 proposals and making a preliminary decision on both the
7 intra-EEA MIFs and the domestic MIFs rested with the
8 IFT, managed by you, and the EIC, from 2004 to 2008;
9 yes?

10 A. Yes, for all countries and all cross-border rates.

11 Q. So those Committees would obviously have been conscious
12 of the direction of travel at the intra-EEA MIFs level
13 when thinking about domestic MIFs.

14 A. Sorry, can you please repeat the question?

15 Q. Yes. I mean, you -- it's the same people on the same
16 Committees, so you would've known about what the
17 intra-EEA MIFs -- what was being decided for those when
18 you were looking at domestic MIFs; yes?

19 A. So I knew about it, yes, but in my team, you didn't have
20 the same people working on all same countries and all
21 same cross-border rates. So it could be different
22 people within my team that work on different cases.

23 Q. But they still would have known what the intra-EEA MIFs
24 were.

25 A. The manuals were available to everybody, so I assume

1 they could read them, yes.

2 Q. And you were in charge.

3 A. I was in charge.

4 MR JUSTICE ROTH: Can I just ask: you said various countries
5 you were dealing with. We know, from 2004, one was the
6 UK. What were the other, can you remember,
7 domestic MIFs that your team or the IFT were dealing
8 with at this point?

9 A. Over the period?

10 MR JUSTICE ROTH: Yes.

11 A. I recall we worked on many countries. Just off the top
12 of my mind, I remember France, where we set the fees
13 much lower than the intra-EEA. I think it was around
14 55 basis points, and that was to compete with the local
15 scheme there. It was in Poland. It was in Italy,
16 I think. Many other countries where we -- when we
17 disconnected the interchange fees cross-border from the
18 domestic, there was the opportunity to optimise it, yes,
19 so ...

20 MR JUSTICE ROTH: The countries you particularly remember,
21 France, Poland, Italy, and then came the UK.

22 A. No, UK came first.

23 MR JUSTICE ROTH: UK came first.

24 A. Yes.

25 MR JUSTICE ROTH: Right. Thank you.

1 MS DEMETRIOU: Can we look please at {C13/362/1}. So this
2 is an email dated 6 December 2004, so it's shortly after
3 Mastercard has taken direct control of the UK MIF; yes?
4 And it's from Etienne -- I want say "Goose", but
5 I'm sure that's not how you pronounce it. How do you
6 pronounce his name?

7 A. Etienne Goosse.

8 Q. "Goosse", thank you. So it's from Etienne Goosse, who's
9 the Mastercard Europe head of corporate affairs, and we
10 see at the top of the email:

11 "The Global Board decision to delegate to Management
12 the setting of the domestic MIFs in the UK raises a ...
13 number of issues which are ... addressed below ..."

14 And we can see in the penultimate -- the last but
15 one bullet point that there's to be a formal -- "First
16 formal domestic UK MIF review". Do you see that towards
17 the bottom?

18 A. Yes.

19 Q. And the final bullet point says:

20 "Long term evolution: to be part of the overall
21 review of MIF [setting] in Europe and globally."

22 Yes?

23 A. Yes.

24 Q. So would you agree that Mastercard's intention is to
25 take a view of MIF setting in the UK which is part of

1 a broader European strategy?

2 A. At the time -- I think at the time when the email was
3 sent, it was about the UK. There were discussions,
4 obviously, with the European Commission. There were
5 antitrust and competition law issues around the setting
6 of the interchange. At this time, I am not aware that
7 the vision was to take over for all countries, but
8 obviously this came later.

9 Q. Well, Mr Sideris, I think the point I'm putting to you
10 is that when Mastercard was looking at UK domestic MIFs
11 from 2004, it wasn't doing so in a way which was sealed
12 off from its strategy in the rest of Europe, was it? It
13 was taking it into account in the context of its broader
14 European strategy.

15 A. I don't agree. The -- at the time the -- of the taking
16 over of the UK MIF, my recollection is there was an OFT
17 investigation and I believe the management thought it
18 would be, from a legal perspective, better off to have
19 interchange fees in the UK being set by Mastercard
20 rather than the UK members.

21 Q. And when Mastercard Europe were looking at UK, once it
22 took over setting UK interchange fees, it had regard to
23 what it was doing in the rest of Europe, didn't it?

24 A. I don't know. As I said, I am aware of what happened
25 for the UK at the time it happened and what happened for

1 the rest of Europe when it happened later on with the
2 IPO, but I cannot tell you whether, at the time when we
3 set the UK MIF, there was already a vision that I was
4 aware of to do it all around Europe.

5 Q. Alright. Let's have a look at {C14/363/1}. So this is
6 a report produced for the meeting of the EIC on
7 1 June 2005. Do you see that at the top of the page?

8 A. Yes.

9 Q. And at the bottom of the page, it says that -- we see it
10 recorded that Mastercard's taken -- has authority to
11 establish the UK domestic MIFs; yes?

12 A. Yes.

13 Q. And then if we go to page 2 {C14/363/2}, under the
14 heading "Future Trends for e-Commerce", it's said here
15 that it's believed that UCAF transactions will take off,
16 so it's anticipated that there's the potential for a big
17 rise in UCAF transactions amongst UK consumers; yes?

18 A. So UK transactions, in order to happen, need to have
19 both consumers and merchants on board. So what I read
20 here is that indeed at that time we believed that UCAF
21 transactions will take off, meaning that consumers will
22 use them, as well as merchants. We develop the right
23 technology on their end.

24 Q. And if we look at the paragraph just -- so the
25 third paragraph in that section:

1 "There is therefore a need to implement changes in
2 the UK to reflect the strategy developed for support of
3 SecureCode implementation in Europe. This was delayed
4 at the end of 2004 ... but the expectation is that
5 MasterCard will move to a similar structure for the UK."

6 So do you agree that the structure of the UK MIFs is
7 being amended to bring them into line with the European
8 structure?

9 A. So the structure of the UK was amended to actually
10 implement the SecureCode, the 3DS technology. That was
11 a global initiative -- it was also a European
12 initiative -- to develop a new technology and fight
13 fraud and reduce fraud for e-commerce transactions and
14 it was rolled out everywhere.

15 Q. So I think -- just going back to my question, I think
16 your answer is yes, isn't it, that you agree that the
17 structure of the UK MIFs was being changed to align with
18 what was going on in Europe?

19 A. I don't fully agree. To the extent of these two new
20 tiers were introduced, these were introduced to align
21 with the industry initiative of 3DS rather than, you
22 know, the overall strategy of Europe to align
23 interchange fees.

24 Q. Well, it's said there -- I didn't think this was going
25 to be a controversial question. It's said there:

1 "There is ... a need to implement changes in the UK
2 to reflect the strategy developed for support of
3 SecureCode implementation in Europe."

4 So there seems to be some strategy that's been
5 developed in Europe; yes?

6 A. For SecureCode, yes.

7 Q. Yes.

8 A. And it was global. That's what I said.

9 Q. Alright. So you're saying not just in Europe, but
10 globally.

11 And what's being said here is there is a need to
12 effect changes -- to implement changes in the UK to
13 reflect that strategy; yes?

14 A. Yes, correct.

15 MR JUSTICE ROTH: I think what -- Mr Sideris, as

16 I understand, the point you're making there was --
17 excuse me. You were accepting there was a strategy to
18 encourage the introduction of this technology across
19 Europe and indeed beyond. In that regard, there was
20 a general strategy across Europe, but you're saying it
21 doesn't mean it went beyond that particular initiative.
22 Is that the point you're making?

23 A. Exactly, yes.

24 MS DEMETRIOU: And if we look at page 4 of this document --
25 sorry, the page before {C14/363/3}, we see under the

1 heading "Further UK MIF Review" -- do you see that? So:

2 "The above strategy will be further reviewed ... The
3 above proposal only focuses on the introduction of the
4 two new UCAF tiers ..."

5 So, pausing there, the review that's happened so far
6 has only really focused on these two new
7 UCAF categories; yes?

8 A. That's correct, yes.

9 Q. And then it says:

10 "A complete MIF structure and rate review will be
11 undertaken after the completion of the UK domestic cost
12 study ..."

13 So there's going to be a further review to come;
14 yes?

15 A. Yes.

16 Q. And if we go to {C14/363/4}, we see that the
17 first bullet point there is that the proposed fees aimed
18 to start aligning UK domestic MIF structure with the
19 European one; yes?

20 A. In view of SEPA, yes.

21 Q. And the fourth bullet point says that:

22 "The Merchant UCAF tier is positioned at the same
23 fee level as the Electronic tier, consistently with the
24 European approach ..."

25 Yes?

1 A. Yes, that's what it says.

2 Q. So it's fair to say, isn't it, that the European
3 approach is driving these decisions; that's right,
4 isn't it?

5 A. So not entirely. When we set the European interchange,
6 the cross-border interchange for the UCAF tiers, we
7 looked at incentivising, both on the issuing and the
8 acquiring side, the take-up of 3DS technology, and there
9 was a level between these new -- two tiers, the merchant
10 UCAF and merchant -- full UCAF, comparing it to the base
11 tier, which was the tier they would get in case there
12 was not a 3DS transaction and there was a logic about
13 how you put the level, one compared to the other one.

14 So when we set domestic interchange fees in the UK
15 and other countries, the logic was there, but you would
16 probably have seen the rates themselves were not the
17 same as the ones in Europe.

18 Q. Yes. Let's have a look at that. So if we go to
19 {C15/152/1}, so this was a document prepared for an EIC
20 Committee meeting in September 2005. If you see in
21 section 1, there's a proposal to endorse various
22 interchange fees set out in those tables; yes?

23 A. Yes.

24 Q. So in the table on page 1, we see there's two new UCAF
25 tiers. Can you see that? So that's the second table.

1 A. Yes.

2 Q. And they were introduced in June.

3 And then we have a proposal to delete a number of
4 other categories and reduce -- so let me just check that
5 I have the right document. Yes, that's right. So it's
6 the second table.

7 Do you see that there's a proposal to delete some of
8 the other categories? So you have current and proposed
9 then you see there's an "N/A, N/A, N/A" for three of the
10 categories.

11 A. Yes.

12 Q. And to reduce the standard rate from 1.3 to 1.2; do you
13 see that in the last row?

14 A. Yes.

15 Q. And then if we go to the background on page 2
16 {C15/152/2}, that explains that these decisions,
17 Mastercard's taken responsibility in-house, and we see
18 that this is the second stage of the review. Do you see
19 that, third paragraph:

20 "This proposal represents the second step of the
21 UK Domestic Interchange Fees review ..."

22 A. Yes.

23 Q. And then if we go to page 3 {C15/152/3}, section 3.1,
24 you see:

25 "The aim of this proposal ..."

1 This is the second sentence:

2 "... is to reduce the number of tiers and start
3 aligning with the intra-European structure in view of
4 SEPA."

5 So the domestic -- I think, just pausing there, the
6 domestic fee categories are being amended in order to
7 match the intra-EEA categories; correct?

8 A. Yes.

9 Q. And that this was all about simplifying the UK fee
10 structure so it became more similar to the EEA MIF
11 structure; correct?

12 A. Partially correct. It was simplified because it didn't
13 make sense to have all these tiers that didn't attract
14 many transactions. It was extra cost for Mastercard to
15 do so. It -- it was extra risk of making errors of
16 having different tiers, especially when they didn't
17 attract a lot of transactions.

18 Q. And it's an example of management that is dealing with
19 MIFs across Europe, or at least with the intra-EEA MIFs
20 and MIFs for some other European countries, taking
21 a more strategic top-down view of what's appropriate;
22 yes?

23 A. No, it was just simplifying the tier structure in the
24 UK, because this didn't make sense at that time for the
25 UK.

1 Q. Yes, but you did it by reference to the tier structure
2 for the intra-EEA MIFs; yes? You weren't starting with
3 a blank piece of paper.

4 A. Not entirely true because afterwards, we introduced
5 tiers in the UK that were not in the EEA.

6 Q. Well, Mr Sideris, at this stage, you were simplifying
7 things so that it matched up with the intra-EEA
8 category; yes? That was the purpose of this change.

9 A. So the purpose of this change was to get rid of the
10 tiers that didn't make sense for the UK --

11 Q. No --

12 A. -- and to simplify it, not to make it closer to the EEA.

13 Q. So that was just a coincidence, was it?

14 A. That's just a coincidence.

15 Q. Just a coincidence, right.

16 Now, we see listed on the page the categories that
17 are being removed, and the bottom bullet point explains
18 the reduction in the standard fee from 1.3 to 1.2. So
19 do you see that:

20 "Reduce standard rate by 10 [basis points] in order
21 to accommodate for the inclusion of volumes related to
22 cancelled tiers and keep similar weighted average
23 interchange rate."

24 Yes?

25 A. That's correct.

1 Q. So what they were doing -- what was being done here was
2 that the weighted average -- you wanted to keep the
3 weighted average the same and so that's why a reduction
4 was being made in the standard rate; yes?

5 A. Yes, that's correct.

6 Q. So it's correct that decision-makers did look at
7 weighted averages as targets; correct?

8 A. Weighted average, amongst many other things, like tier
9 rates themselves and weighted average as well.

10 Q. Okay. Now, I think we can see from these two reviews
11 that you didn't want to depart very far from the rates
12 that you inherited in 2004, did you?

13 A. I'm not sure I say that anywhere.

14 Q. Well, I'm just asking you now to answer my question. So
15 we don't see you departing very far from the rates that
16 you inherited in 2004.

17 A. So maybe that's a fact.

18 Q. And you regarded the 2004 rates as the starting point
19 for your review; yes? You weren't starting with a blank
20 sheet of paper and working out from scratch what would
21 be appropriate.

22 A. So when we set domestic interchange and any interchange,
23 there's many things we take into account. Competitive
24 aspect is one of them. Cost study is another one.
25 Situation in a country for Mastercard is another one.

1 I would say the rates that were in existence prior to
2 the changes were a point of data that was there and we
3 were making sure that, you know, the new rates were the
4 ones that actually made sense for the country.

5 Q. But you took the view that the old rates were working
6 well, broadly, didn't you?

7 A. Well, if we did, then we wouldn't have changed anything
8 [sic]. I believe we changed many things, so --

9 Q. But that's why you change the weighted -- that's why
10 you wanted to keep the weighted average static, because
11 you thought it was all okay.

12 A. The main reason why we wanted to keep the weighted
13 average is because we were getting rid of some
14 transactions tiers that would otherwise fall into the
15 basic standard tier and we didn't want to increase the
16 interchange and impact the merchants and the acquirers.

17 Q. Yes, because you thought that the level that you had in
18 2004 in terms of the weighted average was the right
19 level, so that's why you wanted to keep the weighted
20 average the same; yes? That's why you made this
21 adjustment in the base points to compensate, as you say,
22 for the deletion of the other tiers.

23 A. So what is the exact question -- sorry, could you
24 repeat?

25 Q. The exact question, Mr Sideris, is that you regarded the

1 rates in 2004 as appropriate. You thought the weighted
2 average hit the right balance, and that's why, when you
3 made these adjustments by -- when you deleted these
4 tiers, you reduced the standard rate so as to keep the
5 weighted average the same.

6 A. So as I -- as I already responded, the reason why we
7 reduced it is to make sure that there was no negative
8 impact on the acquiring and merchant side.

9 Q. So I think you're agreeing with me that you thought the
10 rate in 2004 was the right rate and you didn't want to
11 have any adverse impact and so you wanted to keep the
12 weighted average static; yes?

13 A. We want to avoid that it goes up.

14 Q. Alright. Now, if we go to page 4, section 3.2.1 this
15 time {C15/152/4}, you see a reference to MasterCard
16 World Signia; yes?

17 A. Yes.

18 Q. And we can see here a proposal to implement the
19 World Signia intra-European structure and rates for
20 UK domestic transactions; yes?

21 A. Yes.

22 Q. And if we go to the table at {A/18.1/10}, please, we can
23 see at the top of the page -- well, actually, if we go
24 back to page 8 because that, I think, has the heading
25 {A/18.1/8}, we can see these tables are for Mastercard

1 World Signia credit cards and Visa cards; yes? So these
2 are the tables.

3 And if we go to page 10 {A/18.1/10}, what we see is
4 that there is a change, yes, in the UK rates? So if you
5 compare 2005, the UK and the EEA rates, you see base and
6 standard, 1.3 and 1.9; yes?

7 A. Yes.

8 Q. And then if you go to 2006, the UK ones change to come
9 up to the EEA rate; yes? That's 1.9.

10 A. Yes.

11 Q. And then 2007, you see it's again 1.9 and 1.9.

12 A. Yes.

13 Q. So these -- what we're seeing here, consistently with
14 the document I just showed you, is an increase in the
15 UK MIFs to match the EEA MIFs for these cards; yes?

16 A. So an increase in the UK MIFs to have the right rate for
17 World Signia, which was at the same level as consumer at
18 the time.

19 Q. Right, but if we go back to that document on page 4, so
20 it's {C15/152/4}, you see there that:

21 "It is proposed to implement the World Signia
22 intra-European structure and rates for UK domestic
23 transactions."

24 So this is an example, isn't it, of Mastercard
25 driving forward the harmonisation of the EEA and

1 UK structure and rates that we saw as a strategic
2 objective?

3 A. No, that's not correct.

4 Q. And it's not correct, is it, either that the UK fees for
5 Signia have essentially been set on the basis of the
6 long-standing EEA fees for that card?

7 A. Excuse me?

8 Q. Do you agree that the UK fees for Signia have been
9 essentially set on the basis of the long-standing EEA
10 fees for that card?

11 A. The UK World Signia rates were set at the level which
12 was the same level and same structure than the ones we
13 had for intra-EEA. That's correct. It's a fact. But
14 we didn't do it to harmonise. We just did it because it
15 made sense for the UK market to have this level and this
16 structure at that time.

17 Q. Well, there's none of that in this document, is there?
18 Because all this document says is:

19 "It is proposed to implement the World Signia
20 intra-European structure and rates for UK domestic
21 transactions."

22 So it rather looks like you're seeking to match the
23 EEA rates in the UK.

24 A. We are saying we are proposing:

25 "... to implement the World Signia intra-European

1 structure and rates for UK domestic transactions."

2 Yes, and the reasoning is why? Because it made
3 sense for the UK.

4 Q. So if the EEA rate had been something totally different,
5 you would have still moved up the UK rate to 1.9, would
6 you?

7 A. If the sorry, if the what? The UK or ...

8 Q. So if the EEA rate -- you -- what we've seen is
9 an alignment, a substantial move of the UK rate to the
10 EEA rate, and they match, so a move from 2005 to 2006.
11 So are you saying that it's just coincidence that
12 they're both at 1.9?

13 A. I'm saying it -- we had weighting rates in the UK that
14 were deemed to be too low to be competitive on the
15 premium range of card, and the rates we implemented were
16 the same rates and same structure that we have for
17 intra-European because they made sense for the UK.

18 Q. And --

19 A. If they didn't make sense for the UK, if the
20 World Signia in Europe were something else, maybe we
21 would have done something else for the UK.

22 Q. And there's no cost study, is there, explaining why it
23 makes sense for the UK?

24 A. I don't remember if there was a cost study at this
25 stage.

1 Q. No, no other analysis indicating why it's appropriate
2 for the UK.

3 A. I don't remember if there was at that time.

4 Q. Now, let's look at the same document. If we go down the
5 page to Mastercard World card, this is a proposal to
6 introduce World card and it's at this stage a new
7 product, isn't it, which doesn't exist either in the UK
8 or the EEA; correct?

9 A. Yes.

10 Q. If we look at page 5, please, final paragraph
11 {C15/152/5}, we see at the bottom of the page:

12 "Both the structure and rates for the World Card
13 program will be aligned on the intra-European ones."

14 Yes?

15 A. Yes.

16 Q. So as I've said, this is -- there's no product on the
17 market, so this doesn't refer to actual intra-European
18 rates. It's the recommendation. It's the proposal for
19 the intra-European rates; yes?

20 A. So this proposal was for the UK; right?

21 Q. This -- what I'm asking you about is it says that the
22 structure and the rates for the World card programme
23 will be aligned on the intra-European ones and the
24 question -- it's just a short question, really -- is
25 that there wasn't yet a European card on the market, so

1 when this paper talks about the intra-European rates,
2 it's talking about a proposal for an intra-European
3 rate; yes?

4 A. Yes.

5 Q. Okay. And if we go to {C15/349/1}, this is a paper
6 presented to the EIC on 8 December 2005, so just after
7 the document we've just been looking at, and you can see
8 the subject line -- you can see the subject line at the
9 top of the document, "Domestic Fallback Interchange on
10 New Product Releases"; yes? And then "For Discussion",
11 it says:

12 "... this paper uses World card as an example ..."

13 And what's being discussed is the authority to
14 mandate a specific product interchanged domestically.
15 Do you see that in the first paragraph?

16 A. Yes.

17 Q. And then you can see under paragraph 2 that Mastercard
18 has agreed internally that a blended interchange rate of
19 1.49% would be justified for the World card, and that
20 rate was calculated on several factors, including the
21 targeted spend levels and expected features and benefit
22 cost to the issuer; yes?

23 A. Yes.

24 Q. So that's the rate that Mastercard considers will be
25 appropriate across Europe; correct?

1 A. No. Actually, when we made the recommendation for 1.49,
2 we took into account the countries that were in the
3 pipeline for potential world launch. From recollection,
4 UK was one of them. I believe there was also France and
5 Germany. So there were a few countries that we took
6 into account when make the analysis and recommendation
7 for the cross-border interchange for World Card. Out of
8 that pool of countries, I recall the vast majority of
9 the opportunity was from UK.

10 Q. Alright. So what you're saying is you looked at the key
11 countries and you worked out the best rate that would
12 apply for Europe; yes?

13 A. Yes, and this rate was based on, essentially, UK banks.

14 Q. Alright. We'll come to that in a minute.

15 But the 1.49% is the rate -- is the Europe-wide rate
16 this you're proposing, and then if you look at what's
17 said about the effect of this decision, so it says:

18 "... assuming that MasterCard ... adopts the
19 1.49% interchange on a intra-European basis ... the
20 effect of this decision would be implemented in Europe
21 as follows ..."

22 And if we go down, we see that there are two -- can
23 we just scroll, please, down the page -- that there are
24 two options:

25 "For those applying the Intra-European Fallback ...

1 the new rates defined ... will be applicable [but]

2 "For ... members applying specific intra-country
3 interchange fees, MasterCard will advise them that a new
4 product will be launched and a new interchange
5 structure/rate will apply. We will inform them ... they
6 have two options ..."

7 And if we go to the next page {C15/349/2}:

8 "They communicate specific intra-country rates for
9 this ... product.

10 "If they do not want specific rates ... then [the
11 fallback] rates apply."

12 But then we see that there's a problem with this.
13 If we go down the page -- sorry, let's just look at the
14 paragraph now at the top of the page. It says:

15 "Under this current policy, MasterCard Europe's
16 World Product would have wide variation by country in
17 terms of fundamental economics."

18 And there is then a table.

19 And if we scroll down further, we see:

20 "Due to the wide variation ... the fundamental
21 product ... becomes unsustainable for our issuers ..."

22 And if we go over the page {C15/349/3}:

23 "... and many of our markets. As a result of the
24 variation in domestic interchange rates it is almost
25 impossible to roll out any type of new product with any

1 kind of standardized ingredient requirements.

2 "This calls into question why new products would by
3 default fall back onto the standard domestic interchange
4 in our markets as opposed to the European Intra-Regional
5 Interchange which has been carefully calculated to
6 reflect the value of the product to the payment
7 industry."

8 And if we see -- so just to unpack that, is this --
9 am I understanding this correctly? Mastercard wants to
10 launch a card with particular features and benefits that
11 will be attractive to consumers and attractive to
12 issuers; yes?

13 A. Yes.

14 Q. And the divergences in domestic interchange fees make
15 that virtually impossible; yes?

16 A. I don't fully agree.

17 Q. Well, that's what the paper says.

18 A. I know that's what the paper says.

19 Q. Well, whoever wrote it must have thought that; yes?

20 A. It was a thought.

21 Q. Just a thought, okay.

22 And if we see what Mastercard want to do, what they
23 want to do -- if we look down the page, please, we see
24 again "Impact Analysis":

25 "... this volatility makes standardizing a minimum

1 level of benefits and features virtually impossible."

2 It's not just a view, is it, Mr Sideris? Someone
3 actually carried out quite a lot of analysis to work
4 this out.

5 A. So I agree somebody made some analysis, yes.

6 Q. Right. If we go to page --

7 MR JUSTICE ROTH: Can I understand? This document, if one
8 goes to the first page, page 1 of the document
9 {C15/349/1}, at the top, so this is -- as I understand
10 it, this is a paper prepared for the Committee. Is that
11 what it is, Mr Sideris?

12 A. Yes, sir.

13 MR JUSTICE ROTH: It says "For Discussion" on that subject.
14 And this will be what's come out of your team, would it,
15 or who would put this forward for discussion?

16 A. That would have been done in co-ordination between the
17 product group and my team; the product group that was in
18 charge of developing new products.

19 MR JUSTICE ROTH: Then it goes to the Committee for them to
20 consider and discuss.

21 A. To discuss, yes.

22 MR JUSTICE ROTH: Thank you.

23 MS DEMETRIOU: And then if you go to page 4, please -- in
24 fact, let's go back to page 3 to see the context of
25 this, bottom of page 3 {C15/349/3}. We've seen the

1 statement I just took you to:

2 "... volatility makes standardizing a minimum level
3 of benefits ... impossible."

4 Then if we go to page 4 {C15/349/4}, what we see
5 are, on page 4, the pros and cons of mandating domestic
6 interchange on new product launches, and you see the
7 pros include enabling you, Mastercard:

8 "... to be more proactive in setting the price
9 strategy of our products, and ... consistently
10 [mandating] product features throughout the region and
11 thereby [building] up 'reference products'."

12 And then in terms of the cons, what's being said is,
13 well, Mastercard might not have authority to do that, so
14 there's a legal issue, and some members will feel
15 they're not being consulted.

16 But the clear message that this document is sending
17 out is that it's damaging, isn't it, to have
18 differential interchange fees for this new product
19 because it doesn't allow you to launch a consistent and
20 coherent product? That's what the paper is saying.

21 A. Yes, but this was a view of the product team, who wanted
22 to have a simple approach to developing the product.
23 The reality is that I don't believe, from recollection,
24 that we actually did it at the end, and we ended up
25 having to have a -- the mandate for the new product

1 being a basis points cost for the issuer that would be
2 applicable to each country separately, depending on the
3 interchange that will be applicable in each country.

4 Q. Yes, and what actually happened, I think you explain in
5 your statement, is that the 1.49 rate was accepted as
6 far as the UK was concerned, but in the end, it was
7 voted down at European level; correct?

8 A. That's correct.

9 Q. And what you've said in your statement and what you've
10 explained to the Tribunal is you say this 1.49 rate was
11 based on certain data from key countries and to be fair
12 to you, let me take you to the document you refer to in
13 your statement. That's at {C14/348/1}.

14 And that's the document you refer to. It's dated
15 1 June 2005 and it's talking about the new World card
16 and it's explaining -- and if we scroll down, what we
17 see throughout the document is that, I think as you
18 explained, there are certain key countries that the card
19 is going to target first of all; yes? So Germany,
20 France, Italy, Spain and the UK.

21 A. Yes.

22 Q. So what you have -- if we scroll down the document, if
23 we can go to the next page {C14/348/2}, is we can see in
24 that table, for example, there's data from each of those
25 key countries, and it's on the basis of that data that

1 the European rate of 1.49 is determined; yes?

2 A. Yes.

3 MS DEMETRIOU: Okay.

4 MR JUSTICE ROTH: Would that be a sensible moment to take
5 a break?

6 MS DEMETRIOU: It would be, sir, yes.

7 MR JUSTICE ROTH: So we'll come back at 3.55.

8 So we'll take a short break for your benefit, for
9 the benefit of everyone, in particular for the benefit
10 of the transcriber, but you mustn't discuss your
11 evidence or the case with anyone over our ten-minute
12 break.

13 (3.45 pm)

14 (A short break)

15 (3.57 pm)

16 MS DEMETRIOU: Mr Sideris, I want to go back to a document
17 we looked at before relating to UCAF. It's at
18 {C15/152/6}, page 6, please.

19 So you remember we looked at this document, and if
20 we look at 3.3 at the bottom of this page, we see that:

21 "The average MIF level which will result from the
22 above changes ... will be well below the latest measured
23 costs (1.63% in the 2002 UK domestic cost study). The
24 2005 UK domestic ... cost study has currently not been
25 finalized."

1 Yes? So that's the timing of things.

2 A. Yes.

3 Q. So the interchange fee proposals in this paper, which
4 are from the end of -- well, Q3 2005, have all been
5 produced before the 2005 cost study results are known;
6 yes?

7 A. Yes.

8 Q. And a decision is going to be made on these fees without
9 knowing the results of the cost study; correct?

10 A. I believe we received an indicative cost study result.

11 Q. Well, it says they will be exposed during the meeting,
12 and the results -- if we compare the levels of the
13 proposed MIFs with the most recent cost study, 1.63, we
14 can see they're well below the cost study figures,
15 aren't they?

16 A. Excuse me, can you please repeat?

17 Q. Yes. So the proposals are well below the cost study
18 figures from 2002, which are 1.63.

19 A. Yes.

20 Q. So they weren't actually being set on the basis of those
21 cost studies, were they, these proposals? They weren't
22 being made on the basis of the cost studies.

23 A. So what -- I believe what is said here is that at the
24 time we drafted the paper, we didn't have the results of
25 the 2005 UK cost study. We put in the paper the

1 reference to the previous cost study and as I read,
2 which I didn't remember exactly what had happened, but
3 as I read, it says that during that meeting, we will be
4 providing the indicative cost study results for 2005.

5 MR JUSTICE ROTH: Yes, that's what it says. I think the
6 question you're asked is: you don't say, "Well, we can't
7 make a proposal until we get some indicative cost
8 results". You are nonetheless making a proposal without
9 yet knowing the results of the new cost study and you
10 know the results of the old cost study and it seems
11 you're making a proposal that's well below it. So it's
12 not based -- that what's being proposed is not based on
13 the cost study; is that fair?

14 A. The moment we wrote the paper, from, again, reading what
15 it says, I understand that we did not have the latest
16 cost study out of hand, but there is always a time
17 between the drafting of the proposal, sending around,
18 few -- maybe a week or two before to the Committee. By
19 that time, again from reading what is said, I understand
20 that we were waiting for Edgar Dunn to get the
21 indicative cost study and at the time of debating it at
22 the EIC, we would have had both the proposal and the
23 cost study, which was not in the paper at that time.

24 MR JUSTICE ROTH: So, in other words, when the actual
25 decision is taken, you will have information from the

1 cost study, but you were able to make a proposal --

2 A. Yes.

3 MR JUSTICE ROTH: -- which clearly is not based on the cost
4 study because you didn't have it.

5 A. Exactly. That's correct.

6 MS DEMETRIOU: I'd like to take you -- I think we can see
7 this most easily from the expert evidence relied on by
8 Mr Merricks. If we go to {A/14/38}. So this is a table
9 which matches up costs reported in the EDC cost studies
10 with the level at which the UK domestic interchange fees
11 were set; yes?

12 A. Yes.

13 Q. And if we look down at those figures, then we can see
14 that they're very different, aren't they? So the
15 figures of the interchange fees are very different to
16 the cost figures, if you just scan all the way down;
17 yes? So take the average figures and you look down.

18 A. Yes, they are different --

19 Q. Yes.

20 A. -- except for '97, I guess.

21 Q. And, in fact, the 2005 blended cost figure was even
22 higher. It was 2.11, just going back to the point I was
23 putting to you earlier. So had that been shown to you
24 in the meeting, you would have seen even more of
25 a divergence between the proposal and the costs, the new

1 cost figures. Do you remember that or not?

2 A. I don't remember what was the result at that time, to be
3 honest.

4 Q. Okay. And if we go to the agree/disagree statement
5 between the two experts, so at {A/22/19}, so row 26. So
6 Mr Parker -- the question is:

7 "Was there a relationship between UK Domestic IFs
8 and EDC cost studies?"

9 And Mr Parker, who is Mastercard's expert, says he
10 doesn't find a correlation between the level of the
11 UK interchange fees and the level of costs, and then he
12 says:

13 "There is factual evidence that the EDC cost studies
14 were seen by Mastercard as indicating the maximum level
15 at which interchange fees could be set."

16 So do you agree that, at most, the results of the
17 cost studies were seen as indicating a maximum level at
18 which interchange fees could be set; in other words,
19 a ceiling?

20 A. Yes.

21 Q. Okay. And that was true both of the EEA MIFs and the
22 UK MIFs; yes?

23 A. Yes.

24 Q. And let's go to the Commission decision, so {A/27/61}
25 and if we first of all go to the next page, so 62, and

1 look at recital 175 {A/27/62}, so:

2 "MasterCard recognises that the cost-study is 'a
3 relatively simple analysis'. In doing the cost study,
4 MasterCard tries to answer the question: 'How high could
5 interchange fees go before we would start having either
6 serious acceptance problems, where merchants would say:
7 we don't want this product anymore, or by merchants
8 trying to discourage the use of the card either by
9 surcharging or discounting for cash ..."

10 Do you accept that the European cost studies were
11 a relatively simple analysis?

12 A. I don't really know what to answer. I didn't do them
13 myself, so -- so I can't really answer that.

14 Q. You can't answer that question. Yes.

15 Well, Mr Sideris, you're now at EDC; yes? So let's
16 look at paragraph 22 of your statement at {A/11/5}. So
17 you say that:

18 "In the process of setting all of the MIFs in which
19 I was involved, [Mastercard] adopted a clear and
20 consistent approach ..."

21 And it says:

22 "... that the MIF in question should be set at or
23 changed to a certain level, while checking the proposed
24 figure against the results of any relevant cost study
25 that had been performed by EDC for that particular

1 market ... to make sure that the proposed figure was not
2 higher than the indicated cost."

3 So that's consistent with what you just said about
4 it being a ceiling, but then you say:

5 "By the time of my involvement in setting MIFs,
6 including the EEA MIFs and the UK MIFs, those MIFs were
7 well-established, and [Mastercard] had a good sense of
8 how different markets would react ... They had been set
9 by reference to cost studies for a number of years, such
10 that when we were looking to change the MIFs or
11 introduce new tiers of MIFs we could assume that the
12 existing rates had been set taking costs into account,
13 at a level that generally reflected costs or was below
14 cost. Given this, commercial considerations and market
15 expectations were at the fore of our minds when looking
16 to change the MIFs or introduce new tiers of MIFs, and
17 we then used the EDC cost studies as a cross-check."

18 So am I understanding you correctly? You're saying
19 that when you became involved in all of this, you
20 assumed that the MIFs that you were looking at up to
21 that point had been set on the basis of cost studies.

22 A. Yes.

23 Q. So what you were looking at at that stage, when you were
24 considering whether or not to change them, were
25 commercial considerations rather than costs because --

1 primarily; yes?

2 A. Commercial consideration and costs.

3 Q. But you were assuming at that point that the figures --

4 the rates up to that point had been set by reference to

5 costs; yes?

6 A. Yes.

7 Q. So when you say you don't know whether or not the

8 European cost studies were a relatively simple analysis,

9 had you not addressed your mind to that question?

10 Because in this paragraph of your statement, you seem to

11 be saying that you relied on the levels of the MIFs

12 being set by reference to cost studies.

13 A. Sorry, what is your question?

14 Q. So had you addressed your mind to how robust those cost

15 studies were?

16 A. I didn't.

17 Q. You didn't. So you just assumed, did you, when you

18 started -- when you started your role at looking at

19 MIFs, you just assumed, as you say at paragraph 22, that

20 the existing rates had been set taking costs into

21 account? You didn't ask yourself whether that had been

22 done robustly; is that your evidence?

23 A. Yes, I didn't.

24 Q. You didn't. Okay.

25 Now, going back to the Commission decision, please,

1 so {A/27/61}.

2 Well, actually, before we do that, are you -- so
3 the Commission was obviously not very impressed by the
4 cost studies. Were you aware that the OFT also had
5 concerns about the cost studies and methodology? Were
6 you aware of that at the time?

7 A. I don't remember. Maybe, maybe not.

8 Q. So you have no recollection either way?

9 A. What I remember is that at some time, the Commission
10 expressed concerns about the cost studies and asked us
11 to audit them with an independent auditor, and this is
12 when we started to do that and we used Ernst & Young for
13 that. But I don't recall whether the OFT had similar
14 concerns or not.

15 Q. Alright. Let's look at the Commission statement of
16 objections at {C10/98/33}. At paragraph 125, you see
17 that the Commission is also concerned about the quality
18 of the data. Do you remember that concern? Do you
19 remember that the Commission expressed concerns about
20 the quality of the data that was being used at that time
21 by EDC?

22 A. I remember there was concern. I didn't remember exactly
23 on what parts they had the concern.

24 Q. Do you remember that the EDC cost studies were not
25 looking at like-for-like data? They were using

1 different samples from different banks. Do you remember
2 that?

3 A. No. To be honest, I don't remember.

4 Q. Alright. So I think -- is this a fair reflection of
5 your evidence at paragraph 22; that you assumed that the
6 existing rates had been set -- had been set taking costs
7 into account? That's what you say; yes?

8 A. Yes.

9 Q. You knew that there had been costs studies that had been
10 carried out.

11 A. Yes.

12 Q. You knew that there had been concerns expressed by the
13 Commission about data and methodology.

14 A. I'm not sure I knew it at that time.

15 Q. Right. You didn't enquire into the robustness of those
16 cost studies; is that correct?

17 A. That's correct.

18 Q. Alright. Now, if we go to paragraph 37 of your first
19 statement, so {A/11/9}, there you talk about Visa and
20 you say that Mastercard's aim was to be relatively close
21 to whatever rates Visa had in that specific market; yes?

22 A. Yes.

23 Q. But then you explain it wasn't the only consideration
24 that Mastercard took into account; correct?

25 A. Correct.

1 Q. And if we look at paragraph 41 of your statement on
2 page 10 {A/11/10}, let's see what you say there. So you
3 say:

4 "In terms of how [Mastercard Europe] gathered
5 intelligence on the interchange fees of our
6 competitors ..."

7 Your internal policy, which you followed, was that
8 you were not permitted to discuss interchange rates with
9 member banks or competitors, but you were allowed to
10 collect market feedback; yes?

11 So you were aware then at the time that
12 Mastercard Europe had to be careful how it gathered
13 intelligence on the interchange fees of its competitors;
14 correct?

15 A. Correct.

16 Q. And obviously that would include Visa, Visa's
17 interchange fees; yes?

18 A. Yes.

19 Q. And that's because you knew at the time, didn't you,
20 that it would be an infringement -- a violation of
21 competition law for Mastercard and Visa to discuss what
22 their rates were; yes?

23 A. No, I was not aware of why -- I am not a lawyer myself,
24 so I knew we were not allowed to discuss with Visa, yes,
25 that's obvious.

1 Q. Right. So what is it that you're agreeing to in my
2 question? You didn't know that it was competition law
3 that stopped you discussing? You knew that you weren't
4 allowed to discuss rates.

5 A. Yes.

6 Q. But you didn't know it was competition law that was the
7 relevant law.

8 A. That was the rule, so we applied the rule.

9 Q. So you knew about competition law?

10 A. No, I knew about competition law since I worked at
11 DG COMP before, but the fact is that there were rules
12 within Mastercard that told us that we're not allowed to
13 discuss anything with Visa, so obviously we stick to
14 that.

15 Q. Well, Mr Sideris, when did you work at DG COMP?

16 A. I worked in DG COMP from 1997 to roughly 2000.

17 Q. Alright. So you must have picked up quite a bit about
18 competition law when you worked at DG COMP; yes?

19 A. Yes, that's what I said.

20 Q. So can we agree then, when we look at paragraph 41, that
21 when you say you weren't permitted to discuss
22 interchange fees with member banks or competitors, that
23 you would have known that that was because competition
24 law prohibited it? Can we agree that you would have
25 known that?

1 A. I knew that, but the reason why we were not doing it is
2 because the rules, internal rules, said we couldn't do
3 it.

4 Q. But why did the internal rules say you couldn't do it?

5 MR JUSTICE ROTH: (Overspeaking) the rules would be drafted
6 with taking account of competition law if Visa were your
7 biggest competitor.

8 A. Probably, but at the end of the day, I didn't do the
9 rules, right?

10 MR JUSTICE ROTH: No, I understand that. I appreciate that.
11 I'm not sure whether this is worth pursuing.

12 MS DEMETRIOU: Alright. So -- but you would have known as
13 well, wouldn't you, that as well as not being able to
14 discuss interchange fees with Visa, you had to be very
15 careful about trying to find out what Visa's interchange
16 fees were through the banks; yes?

17 A. Very careful, yes, that's correct.

18 Q. And I think it follows from this that you had policies,
19 internal rules and policies, in place to try and ensure
20 that everyone took care; correct?

21 A. Yes.

22 Q. So is it fair to say then that Mastercard could never be
23 sure that it had full information about Visa's rates?

24 A. Yes.

25 Q. And, also, Mastercard could not always be sure that the

1 information it did have about Visa's rates was
2 100% accurate.

3 A. Yes, but we were not -- so the way it worked, I mean, at
4 the time, is banks would eventually talk to us about the
5 rates of the competition, whether it was Visa or Amex,
6 and I'm sure they were doing the same on the other side.
7 So we were aware of what was the Visa rate, but we could
8 never be aware that there was nothing that has changed
9 very recently that we wouldn't have picked up. But over
10 a certain, you know, period of time, eventually
11 everybody knew everybody's rates.

12 Q. So how does that fit, Mr Sideris, when you say at
13 paragraph 41 that you weren't permitted to discuss
14 interchange rates with banks?

15 A. Proactively.

16 Q. Sorry?

17 A. Proactively. We weren't allowed to proactively ask for
18 Visa interchange rates, but if we receive them
19 passively, then it was deemed to be fine, according to
20 our rules.

21 Q. Right. So that was what your rule said, was it; that
22 you can passively receive information and act on it, but
23 you can't proactively seek it?

24 A. Yes.

25 Q. So you were dependent on -- in terms of your knowledge,

1 you were dependent on whether a bank gave you some
2 information, but, as you say, you could never be
3 100% sure that that was accurate or up to date.

4 A. Yes, that's correct.

5 Q. And that limitation, if I can put it that way, is
6 something that you would have borne in mind, yes, as
7 a sophisticated company?

8 A. What do you mean?

9 Q. Well, that limitation on your knowledge, the fact that
10 you could never be 100% sure that you knew exactly what
11 the rates were or if something had changed, that's
12 something you would have borne in mind at the time.

13 A. We knew there was a limitation, but whether there was
14 a concern, I wouldn't say so because I don't remember
15 that rates changed very often, especially for
16 cross-border rates.

17 Q. Alright. Well, let's look at the Visa exemption
18 decision at {H/2/1}, please. This is dated
19 22 November 2002 so shortly after you joined; yes? And
20 if we go to --

21 A. Shortly previously I joined, actually.

22 Q. Sorry, yes, that's right.

23 So if we go to page 2 and recital (3) {H/2/2}, so we
24 see that:

25 "[This] decision relates to the intra-regional

1 inter-change fee scheme of Visa ... for consumer
2 cards ..."

3 Then if we go to recital (9), again, we see what
4 this decision relates to. So these are Visa's -- these
5 fees are equivalent to the Mastercard intra-EEA MIFs;
6 yes?

7 A. Roughly, yes.

8 Q. Yes, and if we go to page 4 {H/2/4}, recital (17), you
9 see that Visa is going to -- has to carry out a phased
10 reduction of the level of the ad valorem per transaction
11 MIFs applicable to certain types of credit and deferred
12 debit cards.

13 And if we go to recital (19), we see the period for
14 that. So the reductions will leave the weighted average
15 MIF at 0.7% by 2007; yes? And then if we look at
16 footnote 14, we can see that that's going to be carried
17 out in stages. Do you see that? So it's 2002, there's
18 a staged reduction up to 2007 and you end up at 0.7%;
19 yes?

20 A. Yes.

21 Q. Now, let's have a look at -- so we've got that phased
22 reduction there. Let's have a look at Mastercard's
23 equivalent EEA MIF. So if we go to {B/28/1}, we see
24 that the base is unchanged. So if we look at 2001 to
25 2006, the base rate is unchanged at 1.3%; yes?

1 A. Yes.

2 Q. Now, there's a reduction in 2007 and that's helpfully
3 explained in your witness statement at paragraph 83, if
4 we just remind ourselves of that. It's at {A/11/20}.
5 So what you say there is that -- you say that:

6 "... one of the reasons we proposed reducing the EEA
7 base rate was because the planned introduction of the
8 World EEA MIFs (with their comparatively high MIFs)
9 would have increased the weighted average EEA MIFs for
10 consumer cards generally. [You] wanted to avoid any
11 significant increase in the weighted average ... MIFs
12 ... in order to avoid a negative reaction from merchants
13 and further regulatory scrutiny, and so to prevent this
14 increase, the IFT proposed to reduce the EEA base rate
15 for consumer cards."

16 Yes? That's the reason for that reduction that we
17 saw in 2007.

18 A. Yes.

19 Q. And we can see -- we've looked at this already, but we
20 can see from what the World EEA MIFs are -- we've got
21 those figures at paragraph 80 of your statement at
22 {A/11/19}. So what you're doing here is you're
23 explaining that the reduction in the intra-EEA base rate
24 was a pragmatic step to offset the introduction of the
25 higher World EEA MIFs to try and avoid any increase in

1 the weighted average; correct? That's what you're
2 explaining.

3 A. Yes.

4 Q. If we go back to {B/28/1}, please, we can see that
5 enhanced electronic is unchanged. If we start at 2001,
6 it's unchanged. From 2001 to 2007, it's 0.95%; yes?

7 A. Yes.

8 Q. And then chip is unchanged from 2001 to 2007 at 0.8%;
9 correct?

10 A. Yes.

11 Q. And then merchant UCAF was introduced in 2002 and that's
12 unchanged. It stays at 0.95% until 2007. And, equally,
13 full UCAF was introduced in 2002, and that stays at
14 1.15%; correct?

15 A. Yes.

16 Q. So there wasn't any reaction, was there, to the
17 substantial changes in Visa's intra-EEA MIF following
18 the exemption decision; that's correct, isn't it?

19 A. Yes.

20 Q. And then if we look at some of Visa's -- Mastercard and
21 Visa's domestic MIFs over the same period, so these are
22 the domestic MIFs, if we go to {A/18.1/6}. So let's
23 look at 2006 first of all, and we see that the weighted
24 averages at the bottom of the page are 0.92% and 0.81%.
25 And then at 2007, for some reason, there's a blank for

1 Mastercard, but we have the weighted average from
2 Mastercard's defence at 0.9% and the Visa UK MIF is
3 0.78%. So, again, they're not at the same level, are
4 they?

5 A. They are not at the same level.

6 Q. And when you look up those columns at the different
7 categories, there are significant divergences; correct?

8 A. Between Mastercard and Visa?

9 Q. Yes.

10 A. Yes.

11 Q. And I think what this shows is, and I think you accept
12 this, to be fair to you, in your statement, that
13 Mastercard was not seeking parity with Visa. It didn't
14 consider that it had to be at exactly the same level as
15 Visa's MIFs, did it?

16 A. No.

17 Q. That wasn't a commercial necessity, was it?

18 A. To be at exact parity? No.

19 Q. No. And, indeed, you explain in your witness statement,
20 if we look at paragraph 39 on page {A/11/9}, that in
21 competing with Visa, you would look at the proposition
22 you were offering holistically; correct? So you
23 would -- so competition with Visa was not only about
24 interchange fees. It would include things like
25 licensing fees paid by banks, advertising, sponsorship.

1 There was a bigger picture; correct?

2 A. And product fees and switching fees and brand fees and
3 all these, yes.

4 Q. Yes. And you've explained in detail the process that
5 Mastercard adopted to set interchange fees, which
6 involved a number of different committees, commissioning
7 of cost studies; yes?

8 A. Yes.

9 Q. Weighing the demands of issuers and acquirers we
10 established; yes?

11 A. Yes.

12 Q. And all of that wouldn't have been necessary if your
13 policy had simply been to attract Visa's MIFs, but that
14 wasn't your policy, was it?

15 A. Our policy was to be aware of the competition, whether
16 it was Visa or anybody else.

17 Q. It was a factor amongst others that Mastercard took into
18 account --

19 A. Excuse me?

20 Q. It was one of the factors Mastercard took into account.

21 A. It was one of the factors, yes.

22 Q. Alright. So I want to look at something different now.
23 Can we look at Mr Dhaene's statement {A/13/36}, and this
24 is paragraph 89. He is talking about on-us transactions
25 and he says, from his recollection:

1 "... if the on-us transaction went over the European
2 network and there was no specific arrangement in place
3 with regards the applicable interchange fee, from
4 a technical systems perspective, the intra-EEA fee would
5 have also applied to those transactions. As mentioned
6 previously, the intra-EEA fee was the standard rate
7 applied to domestic and cross-border transactions in the
8 absence of anything else being inputted into the system.
9 If, however, the transaction did not go over the
10 European network, whether or not an interchange fee was
11 applied to the transaction was a matter for the bank in
12 question to decide."

13 And you comment on this in your second statement, so
14 let's get that up at {A/13.4/11}. And you say there
15 at -- you say that your recollection -- sorry, at
16 paragraph 36 at the bottom of the page you say your
17 recollection is in practice -- so you refer back to
18 paragraph 89 of Mr Dhaene's statement and you say:

19 "However, my recollection is that in practice the
20 majority of on-us transactions were processed by the
21 banks themselves, and for good reason. It cost banks
22 less to process those transactions internally as they
23 did not have to pay switching fees to Mastercard or
24 Visa."

25 Now, can the Tribunal take it from your statement

1 that you don't dispute that from a technical systems
2 perspective, the default position was that
3 an interchange fee was charged if it went over the
4 European network?

5 A. So for on-us transactions, if they were processed by
6 Mastercard, the -- there would be an order of the
7 interchange fee programme that would be applied, which
8 would be the same as any other transaction, bilateral
9 first, then domestic, then cross-border. So if it was
10 a cross-border transaction, an on-us transaction
11 cross-border transaction, it would get the cross-border
12 rate. If it was a domestic on-us transaction, it would
13 get a domestic rate, and if there was no domestic rate,
14 it would get the cross-border rate.

15 Q. Okay, thank you. Then you say the majority of on-us
16 transactions were processed by the banks themselves, so
17 I think you would accept, wouldn't you, that some on-us
18 transactions were not processed by the banks themselves;
19 correct?

20 A. This is correct. It happened in case of mergers, one
21 bank acquiring another bank. There are some on-us
22 transactions which would be processed through
23 Mastercard, yes.

24 Q. Alright. Let's look at {C2/255/1}, please.

25 PROFESSOR WATERSON: Could I just ask before that --

1 MS DEMETRIOU: Of course.

2 PROFESSOR WATERSON: -- these switching fees, what were
3 they?

4 A. There is authorisation clearing settlement fees.
5 Essentially, it would be fees paid by issuers and
6 acquirers to the schemes, Mastercard/Visa, for doing the
7 authorisation clearing settlement of the transaction.

8 PROFESSOR WATERSON: I see. Thank you.

9 MS DEMETRIOU: If we could go to {C2/255/1}, please. This
10 is headed "Domestic Bilateral Agreement set up for
11 NatWest Bank" and in the -- if we go to the very bottom
12 of the page, we should be able to see the date, which is
13 1 August 1994.

14 And if we go to the ninth row, can you see that
15 NatWest is listed there; yes?

16 A. Yes.

17 Q. So this specifies bilateral interchange fees between
18 NatWest and NatWest, doesn't it?

19 A. So it seems, yes.

20 Q. So that must relate to on-us transactions; correct?

21 A. Probably.

22 Q. And then if we go to {C3/51.1/1}, this is an internal
23 Europay memorandum dated 21 December 1995 and that says:

24 "I understand ..."

25 This is the second paragraph:

1 "... that Tony Lee has today decided to cease
2 routing [NatWest] acquired 'On-Us' traffic
3 (authorisations and clearings) from EPS-Net preferring
4 to interface directly with [FDR]."

5 So this refers to authorisations and clearings, so
6 that's -- that could involve the application of
7 interchange fees; correct?

8 A. Unless it was a bilateral, which I don't know.

9 Q. So what we can see that the current position is as at
10 the date of this memo, it looks like NatWest is
11 currently routing its on-us transactions via Europay,
12 correct? And they're saying that they're going to
13 instead interface directly with FDR? Do you see that?

14 A. Yes.

15 Q. So do you recall that NatWest had a substantial
16 acquiring business?

17 A. Yes, although I don't remember how big they were, but
18 yes, it was a big player.

19 Q. And then if we go over the page, please, to page 2
20 {C3/51.1/2}, so the heading there is "[NatWest] As
21 Acquirer" and then the left-hand column is headed
22 "Issuer". So the counterparty to NatWest -- that's the
23 counterparty to NatWest as acquirer; yes? And we see --
24 in the top row, we see again NatWest, so that must be
25 an on-us transaction with NatWest on both sides;

1 correct?

2 A. Yes.

3 Q. And we see that this is approximately 35% of the
4 1995 volume. So that's a significant number of on-us
5 transactions being processed by Europay; correct?
6 That's what it looks like.

7 A. 35%.

8 Q. Yes. And then if we go over the page to page 3
9 {C3/51.1/3}, the heading is "Nat West Acquired
10 Transactions in 1995" and, again, the second row of the
11 table refers to NatWest, so that must again be on-us
12 transactions, mustn't it?

13 A. Probably, yes.

14 Q. And then we see on the far right that the total for 1995
15 is nearly 30 million on-us transactions. Do you see
16 that in the "Total" column?

17 A. Yes.

18 Q. So it's reasonable to assume, isn't it, that the
19 30 million transactions that we see here are being
20 charged the interchange fee which we saw in the document
21 entitled "Domestic bilateral agreement set up for
22 NatWest Bank"? That --

23 MR JUSTICE ROTH: Ms Demetriou, if you want to really pursue
24 this -- I don't want to stop you, but this is, of
25 course, 1995, so you are asking for Mr Sideris' help to

1 interpret a document that doesn't relate to his personal
2 experience. Mr Hawkins, I assume, is the Mike Hawkins.

3 MS DEMETRIOU: Sir --

4 MR JUSTICE ROTH: I assume the Mr Hawkins who is giving
5 evidence is the Mike Hawkins who is referred to in the
6 document, so wouldn't it be more appropriate and helpful
7 to ask Mr Hawkins about it?

8 MS DEMETRIOU: Sir, that's a fair point, except for the fact
9 Mr Hawkins doesn't talk about on-us transactions at all
10 and Mr Sideris is one of the only two witnesses that
11 does talk about on-us transactions. He has been put
12 forward as a witness responding to Mr Dhaene, so that's
13 why I'm taking -- that's why I felt I had to put the
14 case to him.

15 MR JUSTICE ROTH: Well, I don't see there's any objection,
16 or could be, to you -- Mr Hawkins is giving evidence --
17 asking him about it. Just because he doesn't deal with
18 it in his witness statement, it seems to me you're
19 perfectly entitled to pursue it with him, and he was
20 there, so he will probably explain it with a bit more
21 understanding.

22 MS DEMETRIOU: Sir, I agree that I'm entitled to pursue it
23 with him. I don't know whether he will be in a position
24 to give evidence on it. I hope he is, but this is one
25 of the two witnesses that has been put forward by

1 Mastercard to address on-us transactions and so I think
2 I'd be criticised if I --

3 MR JUSTICE ROTH: As I say, I won't stop you, but I think
4 you're basically asking Mr Sideris to speculate on the
5 document which he's reading like we're reading it,
6 really.

7 MS DEMETRIOU: Sir, in that case, I'll keep it very short,
8 but I'm going to -- I'm going to shorten what I was
9 going to put, but I will ask the Tribunal to be a little
10 patient because I do want to pursue --

11 MR JUSTICE ROTH: As I say, I don't see any objection to you
12 putting this to Mr Hawkins. I understand that
13 Mr Sideris has said in the passage that you went to --
14 if I find it -- that his recollection is that the
15 majority processed ...

16 Well, I mean, your recollection is based -- are you
17 speaking, where you talk in paragraph 36 about your
18 recollection that in practice the majority of on-us
19 transactions were processed by banks themselves, is that
20 your recollection concerning your time at Mastercard?

21 A. Yes.

22 MR JUSTICE ROTH: Yes. I don't know if you heard that,
23 Ms Demetriou.

24 MS DEMETRIOU: I did.

25 MR JUSTICE ROTH: What the witness said was he's not giving

1 evidence about what happened in 1995.

2 MS DEMETRIOU: No, I did hear that, sir. Thank you.

3 So, Mr Sideris, Mastercard were notified of
4 bilateral agreements; correct?

5 A. Yes.

6 Q. And those bilateral agreements included some bilateral
7 agreements that related to on-us transactions. Do you
8 remember that in the time that you were there?

9 A. I believe so, yes.

10 Q. Now, if we go to -- let's go to Mr Coombs' expert report
11 on causation, so {A/14/19}. Mr Coombs is the expert
12 witness called by Mr Merricks. If we look at
13 paragraph 3.26 and subparagraph (a) at the bottom of the
14 page, and we see that there what's said is that if the
15 issuing business -- so:

16 "If the issuing business of a vertically integrated
17 bank did not receive the same stream of income on its
18 on-us transactions, it would have been at a competitive
19 disadvantage in the issuing market."

20 If we go over the page, it says {A/14/20}:

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

25 Now, do you agree that for banks where we see

1 interchange fees for on-us transactions specified, do
2 you agree that those banks could in theory charge those
3 rates as an internal transfer price?

4 A. In theory, yes.

5 Q. And then if we look at the next paragraph,
6 subparagraph (b):

7 "Whether or not an [interchange fee] was paid on
8 an on-us transaction, it is still likely that any
9 interchange fee overcharge would have affected these
10 transactions. This will particularly be the case if the
11 same [merchant service charge] was charged on both
12 off-us and on-us transactions. Since an interchange fee
13 overcharge would have affected the level of this uniform
14 [merchant service charge], it would have led to equally
15 higher [merchant service charges] for both off-us and
16 on-us transactions."

17 So do you agree that as a matter of fact, most
18 merchant contracts didn't impose a different service
19 charge for on-us and off-us transactions?

20 A. No, I disagree. Actually, I recall that large banks
21 which were both issuing acquiring and had a lot of on-us
22 transactions between themselves were using that to
23 sometimes have an MSC that would be lower than the
24 interchange fees. I'm not saying this was the case in
25 the UK, but I know it was something that we have seen

1 across Europe in many countries.

2 Q. Let's go to {C21/322/1}. So this is the
3 Payment Systems Regulators' final report in
4 November 2021. If we go to page 31 {C21/322/31} and
5 paragraph 3.63, can I just ask you to read that
6 paragraph to yourself rather than me reading it out?

7 A. The first one or --

8 Q. 3.63, the whole of that paragraph. (Pause)

9 A. Yes.

10 Q. Then I'm going to ask you to read 3.64 as well, please,
11 over the page {C21/322/32}. (Pause)

12 A. Yes.

13 Q. Do you agree that under standard pricing, as described
14 in this report, the merchant is charged the same for
15 an on-us or off-us transaction?

16 A. Probably.

17 Q. And do you agree that pricing for merchants would have
18 been fairly similar, at least in structure, in the
19 period we're concerned with in this claim; similar in
20 structure to what we see described here?

21 A. So this report was from 2021?

22 Q. Yes.

23 A. And I suspect things have changed over the last
24 ten years since the period I was at Mastercard.

25 Q. That's your suspicion, but you don't know. You don't

1 have evidence to that effect.

2 A. What I remember is there were cases across many European
3 countries where acquirers were using on-us to actually
4 have MSC that was lower than the interchange.

5 I remember that.

6 Q. But you're not in a position to assist us with what
7 proportion of contracts --

8 A. No.

9 Q. -- would have been structured in that way.

10 A. And it varied from country to country.

11 MR JUSTICE ROTH: When you say they had an MSC lower than
12 the interchange --

13 A. Yes.

14 MR JUSTICE ROTH: -- yes, it would still be the same MSC for
15 all transactions that they were acquiring, but it just
16 would reduce the blend, is that what you are saying,
17 that led to the MSC?

18 A. Both, actually, were happening. In some cases, you had
19 different terminals at merchants, so when you had
20 an on-us transaction, you would put it on one terminal
21 and you will get one rate and an off-us transaction
22 would get another rate.

23 MR JUSTICE ROTH: But in other cases, it was just that the
24 overall MSC was lower, and that was the same for
25 everyone?

1 A. Yes.

2 MS DEMETRIOU: Mr Sideris, that's taken me to the end of
3 what I wanted to ask you. Thank you very much. It may
4 be that Mr Smouha has some follow-up questions, I'm not
5 sure.

6 A. Thank you.

7 MR JUSTICE ROTH: Yes, Mr Smouha.

8 Re-examination by MR SMOUHA

9 MR SMOUHA: Thank you, sir, just one matter if I may.

10 Mr Sideris, can we go please to {C15/152/1}. You
11 recall you were asked quite a number of questions about
12 this document.

13 A. Yes.

14 Q. And if we can go to page 3 {C15/152/3} and just while
15 I am finding a reference in the transcript to your
16 answers to questions about this, just remind yourself --
17 if you would just read through the page which you were
18 asked questions about. (Pause)

19 A. Yes.

20 Q. Just bear with me a moment, please. (Pause)

21 And I'm just going to read from the [draft]
22 transcript the questions and your answers to
23 Ms Demetriou in relation to the questions about this
24 page and then ask you two follow-up questions.

25 This is at [draft] page -- if we can leave this

1 document on the screen and I'll just give the
2 transcript -- page in the draft transcript; [draft]
3 page 122, starting at --

4 MR JUSTICE ROTH: Have you thought about getting a split
5 screen?

6 MR SMOUHA: Getting a screen, very good. Perfect.

7 So [draft] 122, [draft] line 3. So [draft] line 7:
8 "So the domestic -- I think, pausing there, the
9 domestic fee categories are being amended in order to
10 match the intra-EEA categories."

11 You answered

12 "Answer: Yes.

13 "Question: And this was all about simplifying the
14 UK fee structure so that it became more similar to the
15 EEA MIF structure; correct?

16 "Answer: Partially correct. It was simplified
17 because it didn't make sense to have all these tiers
18 that didn't attract many transactions. It was extra
19 cost for Mastercard to do so. It was extra risk of
20 making errors of having different tiers, especially when
21 they didn't attract a lot of transactions."

22 Just pausing there, are you able to identify which
23 of the tiers that you are referring to there, "all these
24 tiers that didn't attract many transactions"?

25 A. So it was the tiers on the left-hand side, so PAN key

1 entry, CAT, which is cardholder activated terminals,
2 airlines and internet.

3 Q. Yes, and when you are saying they didn't attract many
4 transactions, what is it you are referring to in terms
5 of the information about those?

6 A. Well, these tiers -- well, there was a minority of
7 transactions that were qualified to be processed under
8 these tier, and you can see the percentages; 2% of all
9 transactions for PAN key entry, 0% for CAT, etc.

10 Q. Thank you. And then:

11 "Question: And it's an example of management that
12 is dealing with MIFs across Europe, or at least with the
13 intra-EEA MIFs and MIFs for some other European
14 countries, taking a more strategic top-down view of
15 what's appropriate ...

16 "Answer: No. It was just simplifying the tier
17 structure in the UK because this didn't make sense at
18 that time for the UK.

19 "Question: Yes, but you did it by reference to the
20 tier structure for the intra-EEA MIFs, yes, you weren't
21 starting with a blank piece of paper?

22 "Answer: Not entirely true but because afterwards
23 we introduced tiers in the UK that were not in the EEA.

24 And I'll come back to that. I want to ask you
25 a question about that.

1 "Question: Well, Mr Sideris, at this stage you were
2 simplifying things so that it matched up with the
3 intra-EEA category, yes, that was the purpose of this
4 change?

5 "Answer: So the purpose of this change was to get
6 rid of the tiers that didn't make sense for the UK and
7 to simplify not to make it closer to the EEA.

8 "Question: So that was just a coincidence, was it?

9 "Answer: Just a coincidence."

10 Now, in relation to two parts of that, what I want
11 to ask you -- in relation, first of all, to, "We
12 introduced tiers in the UK that were not in the EEA",
13 can we please look at the MIF table, {A/18.1/5}.

14 Now, would you like a hard copy of this table?

15 A. Yes.

16 Q. You may find it easier while we're working on it.

17 Are you able -- just before we look into it, are you
18 able just from memory to recall which category any of
19 those were that were introduced in the UK?

20 A. I remember this one from memory, which was the charity
21 tier, so a tier at 0% for charity donations.

22 Q. Right. That -- if we look on page 6 {A/18.1/6}, 2007,
23 the number is bottom left; yes? Have you got 2007?

24 A. Yes, I have it.

25 Q. Do we see "Approved Charity Waiver", 0%, coming in in

1 2007?

2 A. Yes.

3 Q. And let me just explain to you, Mr Sideris; it's in bold
4 to indicate it's new.

5 Could you go back to 2004 {A/18.1/5}? Are you able
6 to -- well, maybe you have no recollection of these.
7 There were a number of new categories introduced for the
8 UK, not introduced for the EEA. Are you able to assist
9 with that? Electronic, card not present, airline,
10 chip/PIN and chip signature.

11 A. Yes, so chip signature and chip/PIN, I think, were
12 specific for the UK because at the time, the UK banks
13 had both and we believed that chip signature was less
14 secured, so we made an incentive rate to push towards
15 chip -- chip and PIN.

16 Electronic, it seems, was already there before and
17 so was card not present and ...

18 Q. You are quite right. Sorry, that's another introduction
19 of category, forgive me. That's change of rate.

20 A. Yes.

21 Q. Thank you. Then in relation to the removal of
22 categories that we saw on that document, so if we -- let
23 me just show you where that is on here. We've got, can
24 you see, "PAN-Key-Entered"? It's about the seventh or
25 eighth category down --

1 A. Yes.

2 Q. -- which was present in the UK through -- on this page,
3 all the way through to 2005. If you go over the page,
4 we see it removed in 2006 {A/18.1/6}. That's on the
5 basis of the document we've just seen.

6 Were any others removed?

7 A. Airline, it seems, was removed.

8 Q. Yes.

9 A. CAT, cardholder activated terminal.

10 Q. Thank you, so exactly as we've seen on that document.

11 Now -- I'm afraid it's over the page, but if you can
12 compare 2005 and 2006, and if we are looking at in the
13 fourth column, the EEA categories, we have
14 EEA categories that were not -- in 2005 were not in the
15 UK and if we look at 2006, they are still in the EEA,
16 but not in the UK.

17 Was there, either then or subsequently, anything
18 along the lines that you were asked about,
19 an implementation to get all the categories of the UK to
20 match the EEA?

21 A. As I look at it, it doesn't seem so.

22 Q. And from your recollection, was there any such programme
23 with implementation to get everything to match?

24 A. Not for the UK.

25 MR SMOUHA: No. Thank you.

1 Thank you very much, sir. I don't have any further
2 questions. The Tribunal may.

3 Questions by THE TRIBUNAL

4 MR JUSTICE ROTH: Well, just while we have this open, this
5 schedule, which is very convenient, and where we were
6 you-- you took over setting the UK MIF in 2004, we've
7 just seen the internal document and the proposal to
8 remove certain categories and, therefore, it says to
9 reduce the standard by 10 base points so that you get
10 the same weighted average.

11 And one sees that because in 2005 on page 5
12 {A/18.1/5}, you see the UK standard base is 1.3% and if
13 we go over the page {A/18.1/6}, in 2006 it comes down to
14 1.2%. That's what -- I think that's reflecting that
15 decision; is that right?

16 A. Yes.

17 MR JUSTICE ROTH: But the EEA MIF of Mastercard, which we
18 see further along in 2005, it was then 1.3% and your
19 committee is setting that as well, proposing that. That
20 stays at 1.3%.

21 A. Yes.

22 MR JUSTICE ROTH: It doesn't move. Were you concerned about
23 reducing the UK MIF when you're not also reducing the
24 EEA MIF?

25 A. Not at all.

1 MR JUSTICE ROTH: Why not?

2 A. So every interchange consideration had to be taken in
3 relation to the context and the geography. So UK needs,
4 domestic needs in general, were set based on UK domestic
5 considerations. Cross-border was based on cross-border
6 considerations.

7 Cross-border was -- intra-EEA was about 5% of all
8 transactions and the intra-regional will be 1 to 2%, so
9 obviously the cross-border had a -- much less impact on
10 banks in general, whereas domestic was more important.

11 And at the time we reduced the UK, it was
12 introduction of World, as we said before, or New World
13 or World card, which, as we also said, was -- the
14 proposal was mainly focusing on UK because it was the
15 country where there was the highest opportunity. So the
16 cross-border impact of World Card was much less. As it
17 started, you know, growing, then we started to be
18 concerned that, you know, the cross-border would also be
19 impacted, and that's when we actually reduced the
20 cross-border base also to compensate potential
21 interchange increase.

22 MR JUSTICE ROTH: Yes, thank you.

23 The other thing I wanted to ask you is if we go to
24 your witness statement on page 3 of your witness
25 statement, your first statement {A/11/3}, where at

1 paragraph 8 you describe what you were doing between
2 2002 and 2011, your roles in MCE and preparing proposals
3 for the rates at which EEA MIFs and UK MIFs for
4 November 2004. And then you say, over -- just one
5 moment. (Pause)

6 And I think you told us that you were also
7 responsible, or became responsible after -- later in
8 time for some other countries, and I think you
9 mentioned, in answer to my question earlier, France,
10 Poland and Italy as among the countries that you were
11 concerned with, and then --

12 A. So, excuse me, I was -- after 2011, I moved to
13 Mastercard France. Is that what you are referring to?

14 MR JUSTICE ROTH: No, I'm talking about when your team, your
15 interchange fee team, the IFT, you said proposals for
16 the rates at which EEA MIFs and UK MIFs should be set,
17 but when other countries in Europe came to have
18 a domestic MIF during the period that you were dealing
19 with where you based at Waterloo, I think you said your
20 team was also responsible for proposals for those
21 domestic MIFs; and that's right?

22 A. Yes, that's right.

23 MR JUSTICE ROTH: I understood it, yes.

24 And then if we go on to page 33, which is {A/11/33},
25 that's where you -- paragraph 136:

1 "Throughout my time on the IFT, and in particular as
2 MCE became responsible for setting domestic MIFs for
3 more countries across Europe, I was also aware of
4 domestic MIFs in countries other than the UK. These
5 varied substantially. Some were much higher than the
6 EEA MIFs. Some were much lower than the EEA MIFs."

7 Can you give an example of countries where it was
8 much lower than the EEA MIF, if you can remember?

9 A. Yes. So France was an example I gave you. On debit,
10 many countries were lower. For instance, there were
11 countries with zero interchange in the Nordics. The
12 Netherlands was very low on debit. Belgium was very low
13 on debit.

14 MR JUSTICE ROTH: What about credit cards?

15 A. Well, France again was low on credit cards.

16 MR JUSTICE ROTH: And why was France lower than the EEA MIF
17 on credit cards?

18 A. I don't know.

19 MR JUSTICE ROTH: You don't remember, but you were involved
20 in setting it.

21 A. Yes. Why was -- oh, why we set it lower?

22 MR JUSTICE ROTH: Yes.

23 A. Yes, because we were competing with a domestic scheme
24 called Carte Bancaire, which had the majority of
25 transactions in France, and we wanted to incentivise

1 banks to issue Mastercard cards rather than
2 Carte Bancaire banks -- Mastercard only cards, if I may
3 say. So we had to set an interchange in France that
4 would be accepted by acquirers and merchants, but at the
5 same time be competitive for issuers, which is always
6 difficult.

7 MR JUSTICE ROTH: If Carte Bancaire had a large share of the
8 market and you wanted to incentivise banks to issue
9 Mastercard, that's attracting issuers. You'd think
10 you'd put it higher, wouldn't you?

11 A. But at the risk of it not being accepted.

12 MR JUSTICE ROTH: By merchants?

13 A. Yes.

14 MR JUSTICE ROTH: So that was -- that was --

15 A. A main concern, yes.

16 MR JUSTICE ROTH: Yes, I see. And can you give any -- can
17 you remember about any of the other countries because --
18 if you can't remember. It's a long time ago.

19 A. It's vague. I know there was Italy in the mix, but
20 honestly, I don't remember what we did there. There was
21 the whole SEPA discussion on debit, as I said, where we
22 would compete with domestic schemes in all countries --

23 MR JUSTICE ROTH: Yes.

24 A. -- and the intra EEA MIF just didn't make sense. It was
25 too high. So we had to have domestic rates for

1 competing, like Carte Bancaire, with other schemes on
2 debit.

3 MR JUSTICE ROTH: It's a slightly different market, debit,
4 isn't it, from credit?

5 A. Yes, it is.

6 MR JUSTICE ROTH: Yes.

7 A. But same principles apply.

8 MR JUSTICE ROTH: Are there any questions arising out of
9 that?

10 Well, thank you very much, Mr Sideris. You are
11 released as a witness and you can leave the witness box,
12 and I think we resume on Monday.

13 MR SMOUHA: Monday with Mr Dhaene.

14 MR JUSTICE ROTH: Monday with Mr Dhaene at 10.30.

15 (5.05 pm)

16 (The hearing adjourned until 11am on
17 Monday, 10 July 2023)

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