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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)

Monday, 10 July 2023

(11.00 am)

MR JUSTICE ROTH: Good morning. As some may be joining the proceedings online who have not been doing so last week, I'll just repeat the warning that I gave that an official recording of the proceedings is being made and it's strictly prohibited for anyone to make any unauthorised recording or take any image of the proceedings, and to do so is a contempt of court.

MS DEMETRIOU: Good morning. We now call Mr Dhaene to give evidence on behalf of Mr Merricks.

MR JUSTICE ROTH: Yes.

MR LEON DHAENE (affirmed)

Examination-in-chief by MS DEMETRIOU

MS DEMETRIOU: Good morning, Mr Dhaene. I'll wait for you to pour yourself some water. (Pause)

A. Thank you. I'm all yours.

Q. You should have a copy of your witness statement in front of you {A/13/1}. Can you see that?

A. Yeah.

Q. It says "First witness statement of Leon Dhaene". And then if you wouldn't mind turning to page 38 of the internal pages, it's {A/13/38}.

A. Yeah.

Q. So do you see, on that page, your signature?

1 A. Yeah.

2 Q. And that is your signature, is it?

3 A. That is my signature. That is --

4 Q. And on the next page, page 39 {A/13/39}, do you see

5 another signature?

6 A. Yeah.

7 Q. And is that your signature too?

8 A. That is my signature.

9 Q. And have you -- so the contents of the statement, can

10 you confirm that they're true to the best of your

11 knowledge and belief?

12 A. Indeed.

13 Q. And insofar as you give expert opinion evidence in this

14 statement, can you confirm that those opinions represent

15 your true and complete professional opinion?

16 A. I can.

17 MS DEMETRIOU: Thank you very much. I'm going to sit down

18 and Mr Smouha will have some questions for you.

19 A. Thank you very much.

20 MR JUSTICE ROTH: Just before Mr Smouha asks you questions,

21 if I could just clarify one very small thing, Mr Dhaene.

22 A. Yes.

23 MR JUSTICE ROTH: On page 2 of your witness statement

24 {A/13/2} in the footnote, footnote 2, you explain that

25 there was first Eurocard International, which had

1 a strategic alliance with Mastercard International, and
2 then in 1992, Eurocard International,
3 Eurocheque International and Eurocheque International
4 Holding merged to form Europay International.

5 A. Correct.

6 MR JUSTICE ROTH: And then Europay International was taken
7 over by Mastercard in 2002. Is Europay International --
8 at some point, you refer to EPI. Is that --

9 A. Yes.

10 MR JUSTICE ROTH: That's --

11 A. That is Europay International.

12 MR JUSTICE ROTH: That's what -- I thought so. I just
13 wanted to be quite clear.

14 A. Yeah.

15 MR JUSTICE ROTH: Also, if we go to page 16 in your witness
16 statement, which is {A/13/16}, in paragraph 28, you say:

17 "The primary decision making ... in Europay was the
18 Board of Directors ..."

19 Then you explain there were a number of advisory
20 committees to the board. One is BMAC, another is RCAC.

21 And then in paragraph 29, you say:

22 "The BMAC was responsible for advising the Eurocard
23 Board ..."

24 A. Yeah.

25 MR JUSTICE ROTH: Is that the Europay board?

1 A. And also later on the Europay board.

2 MR JUSTICE ROTH: Yes, so it started when it was Eurocard --

3 A. Yes, started --

4 MR JUSTICE ROTH: -- and then it became Europay.

5 A. Yeah.

6 MR JUSTICE ROTH: Yes, I see, so it was -- it continued

7 across.

8 A. Yeah.

9 MR JUSTICE ROTH: Yes. I think the same, I imagine,

10 therefore, in paragraph 31 on the next page {A/13/17}.

11 A. Yes, correct.

12 MR JUSTICE ROTH: "The RCAC was a key corporate committee

13 that advised the Eurocard Board ..."

14 Would that be the Eurocard board and then --

15 A. And later on the Europay board, yes.

16 MR JUSTICE ROTH: I thought so. I just wanted --

17 A. Yeah.

18 MR JUSTICE ROTH: It's a typical lawyer's question.

19 A. Apologies.

20 MR JUSTICE ROTH: No, no.

21 A. Look over those things.

22 MR JUSTICE ROTH: Yes, I quite understand.

23 Yes, Mr Smouha.

24 Cross-examination by MR SMOUHA

25 MR SMOUHA: Good morning, Mr Dhaene. My name is Joe Smouha.

1 I am one of the counsel for Mastercard.

2 A. Yeah.

3 Q. I will be asking questions throughout today.

4 A. Please.

5 Q. Am I correct, Mr Dhaene, that I saw you here in court
6 last Thursday --

7 A. Correct.

8 Q. -- 6 July?

9 A. Yeah.

10 Q. Were you in court for most of the day, all the day?

11 A. Most of the day.

12 Q. You don't live in the United Kingdom.

13 A. No, I live in Belgium.

14 Q. When did you travel to the United Kingdom to be in court
15 on Thursday?

16 A. The night before.

17 Q. The night before?

18 A. Yes.

19 Q. Are you aware in the run-up to the trial, there was
20 extensive discussion between Willkie Farr & Gallagher,
21 and Freshfields, who are the solicitors for
22 Mastercard --

23 A. Yeah.

24 Q. -- about the trial timetable and some disagreement about
25 when you should be called to give evidence as

1 Mr Merricks' only witness of fact? Are you aware of
2 that?

3 A. Well, I asked several times when I have to come. I was
4 not aware of any discussion between the two of you.

5 Q. Could we look at, please, {D/139/1}. This is a letter
6 that Willkie Farr & Gallagher wrote to the Tribunal on
7 8 June. There's no reason why you should have seen this
8 before. Let me tell you that in this letter,
9 Willkie Farr & Gallagher are setting out their arguments
10 to the Tribunal as to which witnesses should be called
11 when, including the Mastercard witnesses, and why the
12 timetable that Mastercard was asking for should not be
13 ordered. Do you understand?

14 A. Yes.

15 Q. And in particular on page 2 {D/139/2}, if we go to
16 page 2, they argued that Mastercard's request that you
17 be made available on Thursday 6 July should be rejected.
18 And if you look, please, in the long paragraph on
19 page 2, the one that begins -- you see the paragraph
20 beginning:

21 "As the Tribunal is aware ..."

22 Do you see that paragraph?

23 A. Yes, I see it.

24 Q. If you count from the bottom of that paragraph up
25 six lines, do you see it says:

1 "The sole day that Mr Dhaene is unavailable is
2 6 July 2023, having a prior commitment."
3 A. Yes, and the prior commitment got moved to the 7th.
4 Q. Yes. So as I understand it, you would say that that was
5 true at the date of that letter.
6 A. Yeah.
7 Q. You knew that that information was being given to
8 Mastercard and to the Tribunal.
9 A. No.
10 Q. Well, you were being asked questions about when you
11 would be away.
12 A. Yes, when I could be available.
13 Q. Yes, so you must have understood that that information
14 was going to be passed on.
15 A. But to the Tribunal -- I don't know how it works in the
16 UK.
17 Q. Very well.
18 A. Yeah.
19 Q. When did that position change in relation to your
20 commitment that you had said caused you to be
21 unavailable?
22 A. Fairly late. I need to look in my agenda to find out
23 exactly when. It was fairly late. It was
24 an appointment with representatives of the Dutch and the
25 Flemish governments.

1 Q. Did you inform Willkie Farr that you would be available
2 on that date and could attend and would attend court?

3 A. Yeah, when it changed.

4 Q. You did?

5 A. Yes.

6 Q. You did inform them?

7 A. Yeah.

8 Q. Now, we'll be looking a little later at a much more
9 serious failure --

10 A. Yeah.

11 Q. -- to disclose relevant matters by you to the Tribunal,
12 but can I ask you in relation to this certainly far less
13 significant matter but still something that was
14 represented to the Tribunal and which Mastercard
15 accepted, on the basis of which the Tribunal directed
16 the trial timetable that we are following, may I ask you
17 if you are able to offer any explanation as to why
18 Mastercard and the Tribunal were not informed of the
19 change of circumstances and this representation
20 corrected?

21 A. Then you need to ask Willkie Farr.

22 Q. Right.

23 MR JUSTICE ROTH: You're saying you told Willkie Farr it got
24 changed.

25 A. Yeah.

1 MR JUSTICE ROTH: You don't know what happened afterwards.

2 A. Yes -- yeah.

3 MR SMOUHA: Very well. Let me ask you this, please. You
4 first signed a witness statement on 30 May 2023.

5 A. Yes.

6 Q. From the information that has been given by
7 Mr Bronfentrinker to the Tribunal when asking for the
8 Tribunal's permission to adduce your evidence. It
9 sounded as though, from that, from the information
10 given, that your statement was prepared in something of
11 a rush.

12 A. Yes, it was indeed short notice. Everybody would love
13 to have more notice, but it was short notice.

14 Q. How carefully did you check it?

15 A. Well, most of the paragraphs quoted in my witness
16 statement are from my own recollection, from my memory.
17 I had to check very little documents as I did have very
18 little documents in my possession, of course. To start
19 with, the beginning of the period is 30 years ago and
20 then, of course, I don't hold any documents in my -- in
21 my private archives from that period.

22 Q. Before signing it, did you go through it carefully and
23 check that, so far as you could remember, what was set
24 out there was, in all respects, accurate?

25 A. You refer to my witness statement?

1 Q. No, I'm referring to the one that you -- the statement
2 that was prepared and then an application was made to
3 the Tribunal as of 30 May.

4 A. Yeah.

5 Q. Your witness statement, but that first version.

6 A. Yes, I wrote it myself. So I typed it myself and
7 despite a couple of errors, grammatical errors --
8 I'm not native English. I read over again and over
9 again.

10 Q. Now, then your statement was re-prepared and refiled
11 with certain parts removed and then you signed it on
12 9 June.

13 A. Yes, yes.

14 Q. And did you check those parts -- when you then signed it
15 on 9 June, did you check again those parts that were in
16 fact just the same as the first version or did you just
17 sign it again without checking?

18 A. I read over the new version again --

19 Q. Yes.

20 A. -- and that was totally according to my statement.
21 I didn't check one-on-one what was moved. I had
22 a separate note indicating this and this, about ten or
23 something points which have to be removed. So I simply
24 read the new statement again, multiple times.

25 Q. Thank you. And what about before coming to give

1 evidence for the trial? Have you checked your statement
2 again --

3 A. Yes.

4 Q. -- for factual accuracy?

5 A. Yes, as the last version a couple of days ago --

6 Q. Very well. Let's --

7 A. -- to ensure I had the version which you all had.

8 Q. Let's talk a little bit about your background and your
9 career and the basis on which you say that you have
10 relevant evidence to give. Between October 1989 and
11 January 1993, you were a regional manager for
12 Central Europe at Eurocard.

13 A. Correct.

14 Q. And as regional manager for Central Europe, you were not
15 responsible for the United Kingdom, were you?

16 A. Correct.

17 Q. The regional manager at the time with responsibility for
18 the United Kingdom was the regional manager for
19 Northern Europe.

20 A. Yes, Mr Henning Jensen.

21 Q. Mr Henning Jensen?

22 A. Yeah.

23 Q. You claim in your witness statement that -- your words
24 are that you "came to understand the UK market
25 because" -- those were your words; "came to understand

- 1 the UK market". You say that because you and the
2 Northern Europe regional office manager worked in the
3 same office building, Eurocard's Brussels office, and
4 you had some contact with him.
- 5 A. Yes. We were a new department, newly created, and the
6 three of us were new and we worked very closely together
7 to understand the issues on the table.
- 8 Q. When you say "issues on the table", you mean where you
9 had common issues of interest to both of you --
- 10 A. Yes --
- 11 Q. -- within your different areas --
- 12 A. -- when there were particular -- particular issues which
13 might have been interesting to other -- to my other
14 colleagues. I refer to the Barclays case in Germany.
15 Of course, I had a close conversation with Henning on
16 this. Like, my colleagues were interested on the work
17 I did together with the Swedish company in Luxembourg.
18 They asked questions. We work together on this. We
19 explained what the objectives were and what the
20 particular questions were.
- 21 Q. The Barclays issue in Germany you're mentioning, so that
22 was the German subsidiary of a UK bank --
- 23 A. Correct.
- 24 Q. -- in relation to a licensing issue in Germany --
- 25 A. Correct.

1 Q. -- which fell, therefore, within your area of
2 responsibility.

3 A. Yes.

4 Q. Yes. Can we look in your statement, please, page
5 {A/13/7} and if you want to turn in your copy you have
6 there --

7 A. Yeah.

8 Q. -- to paragraph 12(c)(ii) --

9 A. Yeah.

10 Q. -- and turn to the last sentence -- well, actually, the
11 two last sentences. So the top of page 8 {A/13/8} --

12 A. Yeah.

13 Q. -- you say:

14 "However, the Regional Managers at the time all sat
15 together in Eurocard's Brussels office, to enable us to
16 be in regular contact with each other, and we often
17 discussed matters and exchanged experiences relevant to
18 our respective regions. So I came to understand the UK
19 market through my role as Regional Manager for
20 Central Europe by reason of the discussions that I had
21 with other Regional Managers."

22 A. Yeah.

23 Q. Mr Dhaene, are you seriously claiming to the Tribunal to
24 be an expert in the UK market or to have deep knowledge
25 of the UK credit and debit cards market in the period

1 1992 and 1993 because you chatted regularly to the
2 Eurocard regional manager who managed the UK?

3 A. Well, I think at that point in time, the three of us
4 were the best aware of the whole European markets for
5 Eurocard/Mastercard. There were just the three of us.
6 Where we end up today -- I mean, we were not scholars,
7 we did not do particular research, but if research was
8 done, we shared that with each other.

9 Q. Mr Dhaene, I'll repeat my question. Are you claiming to
10 the Tribunal to be an expert in the UK market or to have
11 deep knowledge of the UK credit and debit cards market
12 in the period 1992 and 1993 because you had regular
13 discussions with the Eurocard regional manager who
14 managed the United Kingdom?

15 A. Yeah, I can say to the Tribunal that at that moment in
16 time, I was an expert on the UK market as we exchanged
17 all the information about our markets together, and so
18 Mr Henning Jensen could say that was an expert on the
19 German market because we exchanged internal information
20 with each other. To that extent, I was an expert.

21 Q. Let's not speculate, Mr Dhaene, what Mr Henning might or
22 might not say.

23 A. Or Marie-Noelle Tardivel for that purpose.

24 Q. Just to be clear, when you say, "We exchanged all the
25 information about our markets together", are you

1 claiming that everything that Mr Henning Jensen did and
2 knew about the UK market, on a daily basis in relation
3 to all issues, was known to you?

4 A. We shared all the issues. We sat together minimum on
5 a weekly basis and our boss was there too, our line
6 manager, and in that respect, we shared all the things
7 we were working on.

8 Q. "We shared all the things we were working on."

9 A. Yeah, so --

10 Q. So you're saying that you knew absolutely everything
11 that Mr Henning Jensen did on a daily basis in relation
12 to every aspect of his job?

13 A. Everything Mr -- that Mr Henning Jensen was
14 communicating in that meeting was shared with the
15 four of us.

16 Q. Ah, I see. Okay. So you're saying at a weekly meeting,
17 there would be some discussion about what people were
18 working on.

19 A. Not some; just everything we had done over the last
20 week, all the issues which came on board, how we were
21 dealing with them and what we saw as a solution, what we
22 saw as a challenge.

23 Q. Where of -- where they were of mutual -- of relevance to
24 the other regional managers, those are the issues you
25 discussed.

1 A. No, not necessarily. It was just reporting, an oral
2 reporting, of what we were doing. First, it was our
3 line manager and then in that meeting, could be that we
4 say, "Okay, we're interested in this piece. I want to
5 understand more about this piece, etc." And that -- we
6 exchanged that --

7 MR JUSTICE ROTH: The line manager, that's Mr Van den Bosch,
8 was it?

9 A. That was Mr Tore Alve and Mr Van den Bosch, yes.

10 MR JUSTICE ROTH: And they were -- they would both be in,
11 what, the weekly meeting?

12 A. Yeah. Tore Alve certainly. Mr Van den Bosch sometimes
13 had other responsibilities and couldn't make it, but
14 they were both in those meetings.

15 MR SMOUHA: Now, we're talking 30 years ago --

16 A. Yeah.

17 Q. -- so not the era of email.

18 A. Not what?

19 Q. Not the era of emails.

20 A. Yes, correct.

21 Q. It wasn't your job, was it, to have any dealings with
22 UK banks?

23 A. No.

24 Q. It wasn't your job to engage in correspondence relating
25 to the UK market.

1 A. No.

2 Q. And it wasn't your job to have any direct involvement in
3 anything that Mr Henning was doing for the
4 United Kingdom at the time.

5 A. No.

6 Q. You didn't read letters of his that he would send before
7 he sent them.

8 A. He sometimes asked me to do that, yes, now that you
9 mention it.

10 Q. On a regular basis, he did not --

11 A. That I don't know. I don't know how many letters he
12 wrote.

13 Q. Right. So you didn't know everything that he was doing.

14 A. He didn't possibly tell me everything.

15 Q. And you didn't read his correspondence when it came in.

16 A. Not systemically.

17 Q. Well, presumably, only if there was something that he
18 specifically showed you and asked your opinion on.

19 A. Yes, or when he was travelling, sometimes he asked -- we
20 had a common secretary. Sometimes he asked to the
21 secretary if there's a letter coming in, show it to
22 either Marie-Noelle or myself, who are in the Brussels
23 office -- like you said, it was all with paper
24 correspondence -- to find out whether there was anything
25 important to notice him of.

1 Q. You started your job in October 1989.

2 A. Correct.

3 Q. You aren't claiming today that you acquired a deep and
4 detailed experience of the UK market in 1989.

5 A. Yeah.

6 Q. And 1990, '91, '92, '93, there is just the knowledge
7 that you acquired from the process you've described --

8 A. Yeah.

9 Q. -- of the occasional discussions, weekly meetings, at
10 which Mr Henning and all the regional managers --

11 A. And Marie-Noelle. We were only three.

12 Q. You were three?

13 A. Yes. Important addition: we were supposed to be each
14 other's back up.

15 Q. Now, your job as a regional manager was a sales side
16 job, wasn't it?

17 A. Sales and technical. We were also responsible for the
18 technical implementation.

19 Q. You didn't -- it's not a job which gave you
20 responsibility for the operating systems.

21 A. No, not the responsibility of the operations. So the
22 responsibility to make sure that other banks who were
23 applying for a licence or a licensed bank who wanted to
24 start a new programme, Goldcard, for instance, they
25 present a business plan, looked at the business plan.

1 We then had to see that all the legal documents were
2 there, that everything was filled in correctly. We then
3 had to request the set up programme in the technical
4 group and in the end, we signed off the whole technical
5 certification, the whole security installation and the
6 bank could then start issuing or acquiring, not sooner.

7 Q. Would it be fair to say that your job was to be
8 responsible for defining and meeting sales objectives?

9 A. Also. Not in the beginning; later on. There were
10 quantitative objectives.

11 Q. That was that the primary responsibility that you had.

12 A. The primary responsibility was the business
13 responsibility, correct.

14 Q. Responsible for defining and meeting sales objectives.

15 A. Yes.

16 Q. That's -- you realise that's your description --

17 A. Yeah.

18 Q. -- of your job in your CV.

19 A. Yes.

20 Q. Can we look at {A/13/43} behind your witness statement,
21 page 43. If we go to the bottom of the page for the
22 period 1 January '93 to 1 June 2004 under the heading
23 "Senior Vice President Global Key Accounts", and then
24 you have an indent for each of your roles within the
25 Mastercard organisation; correct?

1 A. Yeah.

2 Q. And then -- sorry, below that, right at the bottom of
3 the page, 1 October 1989 to 1 January 1993, "Regional
4 Manager Central Europe", and you describe your role and
5 job there as:

6 "Responsible for defining and meeting the sales
7 objectives, inclusive market shares, in the area
8 comprising Benelux, Germany, Switzerland, Austria,
9 Yugoslavia and Turkey."

10 A. Yes, correct.

11 Q. Let's consider your next job. So this is -- if we could
12 leave that on the screen, but in your -- if you want to
13 look --

14 MR JUSTICE ROTH: Before you move on, if we go back to where
15 you describe this job on pages 6 and 7 of the witness
16 statement, this is -- if we start at the bottom of
17 page 6 {A/13/6}:

18 "Between October 1989 and January ... I was Regional
19 Manager Central Europe ..."

20 And then in the -- on the next page at
21 subparagraph (ii) {A/13/7}, you talk about the
22 three regional managers, as you've just explained.

23 But the last sentence of the previous paragraph, you
24 say:

25 "As such, I have been closely involved ..."

1 This is as regional manager Central Europe:

2 "... and responsible for connecting over
3 100 banks ..."

4 Those -- am I right that those would be banks in
5 your region; is that right?

6 A. Yes, yes.

7 MR JUSTICE ROTH: So they would not be UK banks.

8 A. Not, no, UK banks, other than Barclays, the subsidiary,
9 and there were a number of subsidiaries also in Turkey.

10 MR JUSTICE ROTH: Yes.

11 A. Yeah.

12 MR JUSTICE ROTH: So where they had subsidiaries in your
13 region --

14 A. Yeah.

15 MR JUSTICE ROTH: -- then you would deal -- yes, thank you.

16 MR SMOUHA: Then in your witness statement, if you go over
17 to paragraph (iii) over the page {A/13/8}, so this is
18 paragraph 12(c)(iii), you say in your witness statement
19 that:

20 "Between 1993 and 1997, I was Head of Business
21 Services at Eurocard."

22 That role involved projects across Europay and
23 Mastercard worldwide.

24 A. Yes.

25 Q. The UK, of course, was one of the very large number of

1 markets for Europay and Mastercard globally.

2 A. Correct.

3 Q. You didn't have any particular responsibilities for the
4 UK.

5 A. No, it was for the -- the products and services we did
6 make available to all our banks.

7 Q. And you had no involvement in the agreement of domestic
8 interchange fees in the UK in that period, did you?

9 A. That's not entirely true. Whenever we had to make
10 a system change to facilitate that, then I remember in
11 the early days of the new clearing system, referred to
12 as ECCSS -- sorry, for all the acronyms -- it had to
13 come -- it had to pass by my department to make sure
14 that everything was correctly documented and understood
15 to make sure that there was a business case, because
16 every change to the system involves cost, and that,
17 therefore, the technical people could do it for the
18 deadline.

19 Q. I'll repeat my question, Mr Dhaene. I think the answer
20 is yes, but just consider it carefully, please.

21 You had no involvement in the agreement of domestic
22 interchange fees in the United Kingdom in this period,
23 did you?

24 A. No involvement in negotiating the agreement, that is
25 correct.

1 Q. The only project that you identify that had anything to
2 do with the United Kingdom is that you say you were, in
3 your words, in close contact with the year 2000 -- Y2K
4 Special Subgroup of MEPUK.

5 A. That was not the only one. That was the most important
6 one.

7 Q. Well, the other one was SAFE.

8 A. SAFE, for instance, yeah --

9 Q. We'll come back --

10 A. -- system, yeah.

11 Q. Let's -- we'll come back to SAFE in a moment.

12 A. Or SuperCom.

13 Q. SuperCom?

14 A. Yeah.

15 Q. As far as the Y2K Special Subgroup, that sub-group had
16 no role in respect of interchange fees, did it?

17 A. No.

18 Q. For that project, you contributed in 1999 to two pages
19 of a Bank of England report about preparing the
20 financial sector for the year 2000.

21 A. Correct.

22 MR JUSTICE ROTH: What does Y2K -- what does it do? What is
23 the Y2K programme?

24 A. The year 2000 programme was a programme in which we
25 revised all the applications, not just from a technical

1 point of view, but also from an administrative and
2 business point of view, to make sure they were compliant
3 with the passage to the year 2000. A lot of fields in
4 our system had only two digits for the year, so -- and,
5 as you know, mathematicians think that 00 is smaller
6 than 99, but that was not the case for the year 2000.

7 MR JUSTICE ROTH: Yes, so it was part of the millennium bug.

8 A. Millennium bug. It was a relatively big issue --

9 MR JUSTICE ROTH: Yes.

10 A. -- when we did the first go at it.

11 MR SMOUHA: Some of us who are old enough remember.

12 A. Remember, yeah, yes.

13 Q. Now, your description in paragraph 12(c)(iii) of your
14 job title is {A/13/8}:

15 "Between 1993 and 1997, I was [capital H] Head of
16 Business Services at Eurocard."

17 A. Yeah.

18 Q. Which is a period of some interest to the Tribunal in
19 this case, and that does sound rather important.

20 Can we look at page 43, please, of your witness
21 statement {A/13/43} and go back to your description on
22 your CV. And the last -- so at the bottom, we looked at
23 "Regional Manager Central Europe". Can we look at the
24 indent above that, so the last indent of your 1993 to
25 2004 section, where you describe yourself as

- 1 "Senior Manager Business Services".
- 2 A. Yes.
- 3 Q. Forgive me, Mr Dhaene. That doesn't sound quite so
4 important as Head of Business Services. Which -- what
5 was your job title?
- 6 A. It was -- that was on my business card, Senior Manager
7 Business Services --
- 8 Q. Right.
- 9 A. -- and I was effectively heading up a four-people
10 department.
- 11 Q. The description you give of the job in your CV,
12 "defined, developed and implemented SuperCom,
13 an interbank network based on IP protocol and document
14 imaging technology to automate the chargeback support
15 and retrieval requests between banks", that's a rather
16 different description from the description you put in
17 your witness statement.
- 18 I don't know whether -- can I ask the EPE operator
19 if it's possible to put the pages side-by-side, so
20 page 8 {A/13/8} and this page, 43, {A/13/43}.
- 21 Is that a fair point, Mr Dhaene?
- 22 A. Can you repeat your question?
- 23 Q. Yes. The description of your job in your CV --
- 24 A. Yes.
- 25 Q. -- is -- or, rather, the description in your witness

1 statement of your job is very different from the
2 description in your CV.

3 A. Yes, this CV you see here, there's a Europass extract,
4 which is a formal CV one uses for the European
5 Commission. I must admit it's not such a handy format.
6 I did cut some parts here because otherwise, it will be
7 very long and I didn't want to monopolise all those
8 pages for myself.

9 In fact, what I've put in the witness statement is
10 the things which I found relevant to this case. If you
11 want to find all the details of my career, they're
12 pretty well described on my LinkedIn profile, which is
13 referred to at the back, I think.

14 Q. Well --

15 A. SuperCom was just a major project I've quoted.

16 Q. Your suggestion in your witness statement that the
17 department that you say you were head of dealt with all
18 the services that Europay International developed for
19 its member banks --

20 A. Yeah.

21 Q. -- if that was accurate and without exaggeration, one
22 might have expected there to be some description in your
23 CV of that being the nature of your job, the department
24 you say you headed up.

25 A. Well, it's on my LinkedIn in that level of detail.

1 Q. Right. Is there any exaggeration in your witness
2 statement?

3 A. No. In that sense, we were obliged to review all the
4 new products and new services that the product managers
5 and those departments, when created later, wanted to
6 present to the market to ensure that they were in
7 compliance with our rules, to ensure that they were good
8 for the market and good for Eurocard/Mastercard and that
9 the timing for the release was a realistic one, because
10 most of those products required the technical
11 development at the back.

12 We were sort of a private group between the
13 development people and the product people and the
14 business people who then sort of had to sell these
15 products into the market.

16 Q. Nothing in your description of your job in that period,
17 1993 to 1997, is of relevance or suggests that you had
18 even remote involvement in the setting of interchange
19 fees in the UK domestic market in the period 1993 to
20 1997.

21 A. That is not fully correct, in the sense, but I can't
22 remember any at this point in time -- at the sense that
23 when the interchange structure for any market, whether
24 it's the UK or Turkey or Spain, would require
25 development at Europay. It would pass via our

1 department. We would, as of '92, then connect to the
2 interchange group at Europay. We would look at whether
3 the people of the interchange group did give us all the
4 specifications, business requirements as well as
5 technical requirements. We would look at the timing.
6 We would look at the development plan and the
7 development group to see whether it could be delivered
8 according to the schedule.

9 Q. Thank you. You're talking about the technical --

10 A. That's it.

11 Q. Right. That's it.

12 A. Yeah.

13 Q. You're talking about the technical implementation of
14 changes.

15 A. Yes.

16 Q. Thank you. So, again, if I may, just listen to my
17 question. I was asking you in relation to your
18 involvement in the setting --

19 A. Yeah.

20 Q. -- of interchange fees in the UK domestic market in the
21 period 1993 to 1997.

22 A. Correct.

23 Q. Nothing in your job description --

24 A. I was not involved.

25 Q. -- indicates that you had any such involvement --

- 1 A. No involvement in that, yeah.
- 2 Q. -- and you did not, in fact, have any such involvement.
- 3 A. No.
- 4 Q. Thank you. Now, just before we return to your witness
5 statement descriptions of your jobs in this period,
6 which, as I say, is a rather important period of focus
7 for the Tribunal in this case, let's just look at your
8 descriptions in your CV for your other jobs in the 1993
9 and 1994 period.
- 10 Could we have page 43 {A/13/43} back as the only
11 page because -- on Follow Presenter. Thank you very
12 much. I'll be able to see that.
- 13 Right. Then 1997 to 1999, Senior Manager End-to-End
14 Quality, 1997 to '99. You have a description of that.
15 Was that Europe-wide or global?
- 16 A. For the global performance standards and for the
17 year 2000 programme, we work together with
18 Mastercard International. We had also in
19 Mastercard International a similar team.
- 20 Q. That was global.
- 21 A. Yeah.
- 22 Q. Right. How many banks were there approximately in
23 the -- how many banks were there approximately in the
24 Europay scheme across Europe at that time?
- 25 MR JUSTICE ROTH: At that time?

1 MR SMOUHA: At that time, sorry, sir.

2 A. In -- in total, Mastercard and Europay must have been
3 around 20,000. In Europe, I don't have any idea. Must
4 have been about 4,000.

5 Q. And you didn't have any particular responsibilities for
6 the United Kingdom in that role.

7 A. Oh, yes. I mean, the UK banks and the global
8 performance standards were a major part. In Europe,
9 five out of 20 lead banks which we were following up
10 with our team, then the rest was followed up by the
11 account managers -- by that time, we had more and more
12 account managers -- were UK banks in the global
13 performance standards programme.

14 Q. So this was -- do I understand this is -- from your
15 witness statement not from your CV --

16 A. Yeah.

17 Q. -- that this involved looking at the way transactions
18 worked from the perspective of the cardholder and the
19 merchant?

20 A. Yes, so -- so the whole way from the cardholder using
21 the card at the merchant point -- point of sale, overall
22 the steps in between, and back for what the
23 authorisation is concerned, and then the follow-up of
24 the clearing, the posting, all the correct information
25 and the settlement. So the whole, really, end-to-end

1 transaction.

2 Q. "... to ensure ..."

3 And I'm again using your words from
4 paragraph 12(c)(iv), top of page 9 {A/13/9}:

5 "... to ensure ... that all transactions worked as
6 expected where cards were accepted."

7 A. Correct.

8 Q. Now, you say in your witness statement that you were
9 aware that there were MIFs set for the UK by MEPUK.

10 A. Yes.

11 Q. And you say that, for example, in paragraph 38. I don't
12 think we need to turn it up.

13 From when, to your knowledge, did MEPUK set domestic
14 UK MIFs?

15 A. I think I was still a regional manager, so that must
16 have been around '92.

17 Q. That's your recollection.

18 A. It's a long time ago, but --

19 Q. Yes, it is a long time ago, indeed, Mr Dhaene, and
20 that's one of the issues about your evidence because,
21 of course, you are giving evidence of matters more than
22 30 years ago and I think you would readily accept that
23 your recollections may be faulty.

24 A. Maybe.

25 Q. So, anyway, you have a recollection that MEPUK set

1 domestic UK MIFs from around 1992.

2 A. I think so, yeah. To the best of my knowledge, yeah.

3 Q. Right. Well, will you take it from me that they did so
4 from November 1997?

5 A. Okay. Then the discussions may have been going on.
6 Then the discussions may have been going on as of '92.

7 Q. You don't have any recollection of such discussions?

8 A. Well, I know that the British Retail Consortium did send
9 a letter in '91 to Henning.

10 Q. Mr Dhaene, are you just speculating, trying to pull
11 little things together to --

12 A. I know that for a fact.

13 Q. No, I'm not talking about the letter; I'm talking about
14 your recollection that you think you have that MEPUK set
15 domestic UK MIFs while you were a regional manager.

16 A. This is what comes to mind now, yes.

17 Q. And you'll take it from me --

18 A. If you say it's '97, I trust you have the documentation.
19 I don't have the documentation. I trust that it's
20 correct.

21 MR JUSTICE ROTH: I think we all understand it's a long time
22 ago --

23 A. Yeah.

24 MR JUSTICE ROTH: -- and it's difficult to remember.
25 Everyone can understand that. I think it's very

1 important that when you give your evidence you say what
2 you can actually -- actually can remember and what
3 you're speculating or saying you're not sure about but
4 you think may be. You understand the difference,
5 I'm sure.

6 A. Yes, yes.

7 MR JUSTICE ROTH: Or where you actually know because there's
8 some document you've seen.

9 A. Yeah.

10 MR JUSTICE ROTH: So keep that difference in mind --

11 A. Okay, okay.

12 MR JUSTICE ROTH: -- so we're clear when you're remembering
13 as best you can and when you're sure about something.

14 A. Yeah, okay. Sorry.

15 MR SMOUHA: Thank you, Mr Dhaene. So next job in 1999. You
16 were made a key account manager for Deutsche Bank and
17 ABN AMRO.

18 A. Yes.

19 Q. That role didn't have anything to do with the setting of
20 UK interchange fees, did it?

21 A. No.

22 Q. From 1999 to 2000, you were Head of Acceptance
23 Management at Europay.

24 A. Yes.

25 Q. That was a Europe-wide role --

1 A. Yes, correct.

2 Q. -- focusing on the acquiring side of the business.

3 A. Yes.

4 Q. It looks from your CV description as though your main
5 job was to increase Maestro transactional volume.

6 A. That was a major programme.

7 Q. And in your witness statement, you say -- this is in
8 paragraph 12(c)(vi) at the bottom of page 9 {A/13/9}.

9 You say in the third line:

10 "I was privy to discussions about interchange plus
11 and interchange plus plus agreements."

12 What do you mean by "privy"?

13 A. Well, we -- as Head of Acceptance Management, I had
14 discussions with the major retailers in Europe,
15 Carrefour, IKEA, Tesco and others, and already at that
16 time, the retailers wanted to go to a system whereby
17 they would -- whereby they would like the rules to say
18 that the acquirers should mention the interchange to
19 them.

20 Q. Interchange plus and interchange plus plus agreements,
21 those are different types of merchant service
22 agreements?

23 A. Yes. So interchange plus is whereby the acquirer
24 informs the merchant about the interchange part in the
25 merchant service charge. Interchange plus plus is the

1 system whereby the acquirer mentions to the merchant not
2 only the interchange part but also all the other fees he
3 needs to pay to third parties involved in making the
4 transaction happen.

5 Q. Right. So these are arrangements between merchants and
6 acquirers.

7 A. Yes.

8 Q. Thank you.

9 The setting of the UK domestic MIFs in this period
10 was done by MEPUK.

11 A. I think so, yeah.

12 Q. So, anyway, you aren't claiming here to have been
13 involved in any discussions around the setting of the
14 UK MIFs in that period.

15 A. Not in the setting.

16 Q. Then in November 2001, you moved to New York and became
17 part of Mastercard's --

18 A. Yes.

19 Q. -- Global Key Accounts department.

20 A. Yes.

21 Q. You were responsible for ABN AMRO and had
22 responsibilities across 72 countries, of which the UK
23 was one.

24 A. Yeah.

25 Q. And in that role, you weren't involved in any

1 discussions about UK domestic interchange fee setting,
2 were you?

3 A. No, ABN -- ABN AMRO was not part of that.

4 Q. So in your various roles at Eurocard and Mastercard
5 across the entire period that we've looked at, you had
6 no involvement in the setting of UK domestic interchange
7 fees at all.

8 A. No involvement in the setting.

9 Q. And you were not present at any discussions where
10 UK domestic interchange fees were being set.

11 A. Correct.

12 Q. Now, can we go to paragraph 36 of your witness
13 statement, please, page 18 {A/13/18}. You say there:

14 "The decisions in the MEPUK Board were, as far as
15 I am aware, supposed to be agreed by the members.
16 However, my experience was that there was very little
17 debate and it seemed that the largest banks effectively
18 took decisions."

19 The only dealings you ever had with MEPUK was
20 working with the Y2K -- the year 2000 sub-group and also
21 on the SAFE committee.

22 A. And on end-to-end quality, which in the MEPUK papers was
23 called exception -- acceptance quality, but that was the
24 end-to-end quality programme.

25 Q. That wasn't dealing with the -- that didn't involve

1 dealings with the MEPUK board.

2 A. There was a report to the MEPUK board at some point.

3 Q. There was report to the board?

4 A. Yeah. So I was there.

5 Q. A report at a board meeting?

6 A. Yeah, yeah, yeah, at a board meeting.

7 Q. On that issue?

8 A. Yeah.

9 Q. Right. So you attended the board meeting for that

10 agenda item?

11 A. Yes. I was not presenting. It was in a total pack.

12 I was there for questions.

13 Q. So there was a paper prepared for the board --

14 A. Yeah.

15 Q. -- is that right?

16 A. I think so.

17 Q. There was an agenda item on the board --

18 A. Yeah.

19 Q. -- and you attended --

20 A. Yeah.

21 Q. -- not speaking, but attended at the board meeting but

22 only for that agenda item, of course --

23 A. Yeah.

24 Q. -- is that correct?

25 A. Yes.

1 Q. Now, what does SAFE stand for?

2 A. System to Avoid Fraud Effectively.

3 Q. Right. That's nothing to do with the setting of

4 interchange fees, is it?

5 A. No, that's fraud.

6 Q. Now, you also attended, I think, part of a MEPUK board

7 meeting when there was a discussion about year 2000

8 issues.

9 A. Yeah.

10 Q. But you attended only for that agenda item.

11 A. Yes.

12 Q. You were never involved in MEPUK discussions, MEPUK

13 board discussions, about the setting of interchange fees

14 or reference rates or defaults or fallbacks, were you?

15 A. No.

16 Q. So you have no direct and personal experience of the

17 decision-making process of the MEPUK board.

18 A. What I heard back --

19 Q. No, I'm not -- Mr Dhaene, I'm sorry, I'm not asking you

20 about what you heard back.

21 A. Yeah.

22 Q. You have no direct and personal experience of the

23 decision-making process of the MEPUK board; correct?

24 A. Correct, yeah.

25 Q. And no personal knowledge of how things were done or of

1 how things were debated or of how they were decided in
2 the MEPUK board. I emphasise "personal knowledge". You
3 have none.

4 A. It depends how you define "personal". I was definitely
5 updated on things going on because it was an important
6 matter, but it was not in firsthand, if that is your
7 definition.

8 Q. Well, let's do it in your language.

9 A. Yeah.

10 Q. Would you say that, in however you would choose to
11 understand it, you have personal knowledge of how things
12 were debated or not debated in the MEPUK board?

13 A. Not in firsthand. Not by being present there, yeah.

14 Q. Do you claim -- I want you to use the words as you
15 understand them.

16 A. Yeah.

17 Q. Do you claim to have personal knowledge of how things
18 were debated in the MEPUK board?

19 A. I was told about some of the discussion, how they went
20 on, yes. So in that sense, I knew.

21 Q. In that sense, you knew?

22 A. That I heard it back from colleagues who were there.

23 Q. And also how things were decided?

24 A. Yes, from colleagues; not only Europay/MasterCard
25 colleagues, but also people who were probably not

1 present neither but who were the people who had then to
2 implement things.

3 Q. Right. So this is -- so the limit of the evidence you
4 can give on this aspect is that some people,
5 unidentified, said some things to you from time to time;
6 is that -- is that fair?

7 A. Well, some people had to tell me things. If there were
8 changes to the system in my role of business services,
9 they knew that we had to make sure it happened.

10 Q. These people were not board members.

11 A. These were not board members; were reporting directly to
12 board members.

13 Q. Right. So how -- right. So we're talking at two stages
14 of removal.

15 A. Yeah.

16 Q. Right. Can you look at the words you've used in your
17 witness statement --

18 A. Yeah.

19 Q. -- in the second sentence {A/13/18}:

20 "... my experience was that there was very little
21 debate and it seemed that the largest banks effectively
22 took decisions."

23 A. Yeah.

24 Q. Your experience; you have no experience of the MEPUK
25 board, do you?

1 A. Well, not -- it didn't say my experience at the MEPUK
2 board; it says my experience from the information
3 I receive from people I trusted did know what happened
4 and how the discussion moved on. I talk about that
5 experience.

6 It is very important to know that, for instance, if
7 you are presenting to the MEPUK board, like I did on
8 other subjects, it's very important to know who is the
9 lead person in the meeting, and that could be
10 a different person for a different subject, what sort of
11 questions he -- most of the time it were a man -- were
12 asking on subject. It's very important to prepare that
13 upfront.

14 Q. So, Mr Dhaene, let's be -- let's get to the point on
15 this. Do you think the circumstances you've described
16 where your only "knowledge" of the way the MEPUK board
17 took decisions, do you think your description of that
18 you have given to the Tribunal this morning of having
19 spoken to some people who weren't even board members is
20 fairly presented in paragraph 36 as being your
21 experience?

22 A. Well, again, I'm not native English. Maybe I could have
23 phrased it better, but when I talk to my experience,
24 it's everything I remember from those days as it was
25 communicated to me. Otherwise, I would expect -- have

1 mentioned "my experience being at the MEPUK board was",
2 etc.

3 Q. Well, you don't mention anything here about the sources
4 of your information and having spoken to people, do you?

5 A. No.

6 Q. No. So, on any view, this is not a full presentation of
7 the information, is it?

8 A. Well, at the time I was writing this, I probably didn't
9 remember. Now more and more things become clear,
10 but ...

11 MR JUSTICE ROTH: Well, we have the point.

12 A. Yeah.

13 MR SMOUHA: Could you look, please, just -- so, Mr Dhaene,
14 so that the Tribunal understand actually what it is that
15 you have tried to do in your witness statement, could we
16 look at page 39 of your witness statement {A/13/39}.
17 This is the confirmation of compliance that you signed.
18 Could you just read out the first paragraph?

19 A. Which starts with:

20 "This witness statement ..."

21 Q. No, on page 39 --

22 A. Yeah.

23 Q. -- underneath the heading "Confirmation of Compliance".

24 A. The third paragraph?

25 Q. No, the first.

- 1 A. The first, sorry:
- 2 "I understand that the purpose of this witness
- 3 statement is to set out matters of fact of which I have
- 4 personal knowledge."
- 5 Q. And the third paragraph.
- 6 A. "This witness statement sets out only my personal
- 7 knowledge and recollection, in my own words."
- 8 "In my own words", yeah.
- 9 Q. And the fifth paragraph.
- 10 A. The last paragraph?
- 11 Q. The fifth, yes:
- 12 "I have not been asked ..."
- 13 A. "I have not been asked or encouraged by anyone to
- 14 include in this statement anything that is not my own
- 15 account, to the best of my ability and recollection, of
- 16 events I witnessed or matters of which I have personal
- 17 knowledge."
- 18 Q. Right. So, just to be clear, is that a distinction that
- 19 you had in your mind and still have in your mind today
- 20 when we're looking at your witness statement that it
- 21 should be limited to evidence of events which you either
- 22 witnessed or matters of which you have personal
- 23 knowledge?
- 24 A. Personal knowledge can also come -- I know that as
- 25 a historian -- from not being present but being

1 communicated to you or having found out through research
2 over the years yourself, and I consider that also to be
3 my personal knowledge.

4 Q. Can we agree, please, going forward, Mr Dhaene, that if
5 there are things in your witness statement which you are
6 saying are facts but they are only based on things that
7 you have been told --

8 A. Yeah.

9 Q. -- rather than being facts which you witnessed or have
10 personal knowledge in that sense, you will be clear that
11 that is the case?

12 A. Yeah, I think I mentioned it for the most, but I will be
13 super attentive now --

14 Q. Thank you.

15 A. -- and add eventually circumstantial evidence or
16 whatever description on how it came to this witness
17 statement.

18 Q. You do -- Mr Dhaene, you may not have given evidence
19 before in court proceedings, but I'm sure you understand
20 why that point is important for the Tribunal.

21 A. Yeah, I fully understand it, yeah.

22 Q. And you understand that it's important for the Tribunal
23 to have the full facts.

24 A. Yeah.

25 Q. You do understand that?

1 A. Yes.

2 Q. Right.

3 A. As I know it.

4 Q. As you know it.

5 Now, we're going to look at quite a lot of things in
6 your witness statement --

7 A. Perfect.

8 Q. -- but with that in mind, let me just give you the
9 opportunity now, if you would care to take it, to say
10 whether there is anything, now that we've had that
11 discussion, where you feel that your witness statement
12 is perhaps not accurate in setting out either the
13 sources of your information or relevant facts.

14 A. Like I've mentioned, where I was conscious during the
15 typing of the circumstances in which I got the
16 information, I've mentioned it. Of course, when you go
17 back over 30 years, you are already happy to remember
18 things and you type them down in a relatively short
19 period. That is also the circumstance under which this
20 witness statement was created.

21 Q. Let's go back to page 6, please, paragraph 12(c)
22 {A/13/6}, where we started.

23 A. 6.

24 Q. 12(c):

25 "Prior to starting my own company, I was employed by

1 Eurocard and ultimately Mastercard between 1989 and
2 2004 ..."

3 And then, Mr Dhaene, in May/June 2004, you were
4 dismissed.

5 A. Yes, the contract was stopped.

6 Q. You were dismissed.

7 A. Well, it was stopped --

8 Q. Your employment contract was terminated.

9 A. Yes, officially terminated by Mastercard.

10 Q. Yes. Of course, your CV doesn't mention that.

11 A. No. It says 2004, it ends. I mean, my previous
12 contract at IBM was also stopped.

13 Q. Nor does your witness statement mention that.

14 A. That it was stopped?

15 Q. That your contract of employment was terminated. You
16 were dismissed, fired.

17 A. I find that so obvious, yeah, I didn't mention it.

18 Q. You found it so obvious?

19 A. Yes.

20 Q. You'll have to --

21 A. the contract stopped.

22 Q. No, I'm talking, I think as you know, Mr Dhaene,
23 specifically about the fact that your contract was
24 dismissed.

25 A. It was --

1 Q. You did not -- you did not resign. You did not
2 voluntarily terminate your contract. Your contract was
3 terminated, wasn't it?

4 A. The contract was stopped after a discussion I had with
5 my boss and the official document says -- I think it was
6 in French -- (French spoken).

7 Q. We'll come to that document, Mr Dhaene.

8 A. Yeah.

9 Q. In your understanding at the time, you were fired,
10 dismissed.

11 A. Yeah, if you want to name it that way, I don't have
12 a problem with that.

13 Q. Well, how did you name it at the time?

14 A. Well, we had a discussion as to how to move on --

15 Q. No, in your mind at the time --

16 A. -- with my boss, yes --

17 Q. Yes. In your mind at the time --

18 A. -- and it was --

19 Q. -- did you consider yourself to have been dismissed?

20 A. No.

21 Q. You did not?

22 A. No.

23 Q. What did you think had happened?

24 A. Well, we came to a point. I was already planning months
25 before to return back to my family here in Europe. We

1 stayed in Europe. And we came to a point where we said,
2 okay, fine, this is the moment to do that.

3 MR JUSTICE ROTH: But where were you based at the time?

4 A. In New York in Global Key Accounts.

5 MR SMOUHA: So "we came to a point" --

6 A. My boss and myself.

7 Q. Yes.

8 A. Said, "Look, this is where I got". I achieved what
9 I had in mind to achieve in that group and I personally
10 wanted to get back to Europe to my family and my
11 three kids, doing something different. I mean,
12 I planned that after ten years, but it didn't work out
13 after ten years.

14 Q. We'll come back to that characterisation in a moment.
15 The document that you're referring to --

16 A. Yes.

17 Q. -- this is on 27 July 2004. Mastercard Europe sent you
18 a form, a C4 form, indicating that you had not left your
19 employment voluntarily but had been indemnified for
20 having been dismissed.

21 A. No, that is incorrect. The C4 form I received very
22 shortly after the ending of the contract, and that was
23 on the end of May.

24 Q. Can we look please at --

25 A. 25 May, I think.

1 Q. 25 May.

2 Can we look at {C11/459.3/1}, please. Is that the

3 document you're referring to?

4 A. No, that's not the document -- can I see the last page?

5 (Pause)

6 Ah, yes, that's the document.

7 Q. It is. Right. Can we go please to C13 --

8 A. "Le travailleur a quitte volontairement son emploi le",

9 yeah.

10 Q. Can we go, please, to --

11 MR JUSTICE ROTH: Sorry, just a minute.

12 MR SMOUHA: Sorry, sir.

13 MR JUSTICE ROTH: Can we have that enlarged a bit, please?

14 A. Yeah. So, "The employee has left voluntarily his job".

15 That was sent by registered mail.

16 MR JUSTICE ROTH: Yes, 23 May, it's not the date of the

17 form. It's the date on which -- it's the 25th,

18 I think --

19 A. Yeah, 25th of May.

20 MR JUSTICE ROTH: -- is the date on which it says that you

21 left.

22 A. Yeah.

23 MR JUSTICE ROTH: That's the date upon which "Le travailleur

24 a quitte".

25 A. Yes.

1 MR SMOUHA: Can we go to {C13/24.1/1}. This is a further
2 C4 form which you were sent.
3 A. No, I never received this form.
4 Q. And on what basis do you say that?
5 A. The upper paragraph is different.
6 Q. Yes, it is different. It's a later date and it's
7 correcting the reason given for your -- for the
8 termination of your employment.
9 A. No, the form is different. There should be
10 a second page to this form.
11 Q. Yes, there is. Let's go to the second page
12 {C13/24.1/2}, and we see the box --
13 A. Yeah.
14 Q. -- the crossed box.
15 MR JUSTICE ROTH: Could that be enlarged as well, please?
16 MR SMOUHA: So that's at the top portion.
17 MR JUSTICE ROTH: The top. Thank you.
18 MR SMOUHA: "Une indemnité de rupture a été payee et couvre
19 la periode du ..."
20 And then 26 June.
21 A. Yeah.
22 Q. How would you translate "Une indemnité de rupture"?
23 A. So "severance pay", would that be --
24 Q. Severance pay?
25 A. -- yeah -- the English translation, I think.

1 Q. Indemnified for having been dismissed?

2 A. Yes.

3 Q. Now --

4 A. That was the agreement we had when we discussed the
5 ending of the contract.

6 Q. Right, and you --

7 A. But I never saw this. I never got this form in 2004.

8 Q. But this is -- well --

9 A. It was not sent to me. This form was never sent to me.

10 Q. Fine. I hear what you say, but that is an accurate
11 description of what took place.

12 A. I was paid an amount, yes.

13 Q. And, therefore, if this was sent to you -- I know you
14 say it wasn't, but if it was sent to you, it would have
15 been indicating and making a correction to the form --
16 to the earlier one that we looked at.

17 A. In a way an addition. It would add that a severance pay
18 was paid, which I don't think the previous form had
19 clicked on.

20 Q. Did Mastercard Europe give as the reason why they had
21 dismissed you that you no longer had the competencies to
22 meet the requirements of your role?

23 A. No.

24 Q. On around 19 May --

25 MR JUSTICE ROTH: Before we move on, what is said on the

1 form there in front of us:

2 "Motif

3 "Les compétences de l'employé ne correspondent plus

4 aux exigences de la fonction."

5 A. Yeah. "The competencies of the employee does no longer

6 meet his actual or current function."

7 MR SMOUHA: Yes, that's the reason given on the form.

8 A. Yeah.

9 Q. That's what I was asking you.

10 A. And --

11 Q. I wasn't asking you whether it was accurate or whether

12 you disputed it. I was asking you whether the reason

13 given by Mastercard Europe as the reason for your

14 dismissal was that you no longer had the competencies to

15 meet the requirements of your role.

16 A. No, that was not the reason given by Mastercard Europe.

17 Mastercard Europe was not aware of the discussion I had

18 with my boss.

19 Q. Right. So you're saying you had a different discussion

20 with your boss?

21 A. Before, yeah.

22 Q. Very well. And you say you didn't receive this form.

23 A. Mm-hmm.

24 Q. On or around 19 May 2005, did you sue Mastercard for

25 437,580 euros plus default interest in the labour -- in

1 the labour law court of Brussels?

2 A. Can you repeat your question, especially the date you

3 quote?

4 Q. The date I gave you was 19 May 2005. Let's not worry

5 about the date.

6 A. Ah, yeah.

7 Q. Let's not worry about the date.

8 A. Year after, yeah.

9 Q. Did you sue Mastercard for over 400,000 euros plus

10 interest in the labour law court of Brussels?

11 A. I -- I needed to have documentation relative to that

12 severance pay --

13 Q. Sorry, Mr Dhaene --

14 A. I'll come there.

15 Q. No, no. I'd like you, please, to answer my question

16 first and then if you want to give an explanation. Did

17 you --

18 A. There was a case in the court of Brussels, yes.

19 Q. A claim brought by you?

20 A. By my counsel.

21 Q. On your behalf?

22 A. On my behalf, yeah.

23 Q. Against Mastercard?

24 A. Against Mastercard, yes.

25 Q. In which you made a claim for over 400,000 euros.

1 A. In which I made a claim to receive the required
2 documentation for this severance pay, which I did not
3 receive, and Belgium labour laws are very strict and
4 there is a deadline. You need to deliver documentation
5 within a certain deadline.

6 Q. Did you or did your lawyer on your behalf claim that
7 Mastercard should be ordered to pay you that amount as
8 further compensation for having been dismissed?

9 A. You need to put an amount on a claim in Belgium. No
10 matter what you claim, you need to put a certain amount
11 on it.

12 MR JUSTICE ROTH: Yes, but I think the question was: were
13 you seeking this particular amount, 400,000 plus
14 interest? Does that ring a bell with you that was the
15 amount you were claiming?

16 A. The main goal was --

17 MR JUSTICE ROTH: Just before coming to the main goal --

18 A. Yeah.

19 MR JUSTICE ROTH: -- you say you had to put an amount. The
20 amount that you put was 400,000 --

21 A. That's well possible. I don't recall very well. It was
22 my counsellor who advised me and said, "Let's go for
23 that amount". There needs to be a certain rationale
24 behind. You can't just say, "I want 10 million for the
25 fact that five documents needed -- or something need to

1 be returned". There needs to be a certain rationale.

2 MR JUSTICE ROTH: Yes, so you think it's very possible that
3 was the amount.

4 A. Yeah.

5 MR JUSTICE ROTH: And then you say you did it because you
6 needed some document.

7 A. Yeah.

8 MR JUSTICE ROTH: Well, can you explain that?

9 A. Documents which were testifying that the severance pay
10 was a severance pay and not a bonus or a salary or --
11 yeah. It makes a difference.

12 MR SMOUHA: Did you, in around 2008, attempt
13 a reconciliation with Mastercard?

14 A. I recall that I wrote several times to people saying,
15 "Please deliver" -- maybe even before the case. "Please
16 deliver this documentation. Otherwise, I will be --
17 I will see myself obliged to go to court." And I think
18 there was even a letter to the CEO, Mr Selander --

19 Q. Yes, we'll have a look at that in a moment.

20 A. -- begging for -- nearly begging to get the information.

21 MR JUSTICE ROTH: That was in -- are you saying that was
22 before you went to court or -- I think you were being
23 asked about something that happened in 2008, so that's
24 after going to court.

25 A. Yeah. So, like I've mentioned, there were certain

1 deadlines my counsellor perfectly knew by heart, so we
2 had to act, and the reasons we first acted to the court
3 in Brussels was my original contract was signed in
4 Brussels and a court case in Brussels gave me the
5 advantage of being able to enter the documents in Dutch,
6 which for me, of course, is my native language and a big
7 advantage if you can do that.

8 In the meantime, Mastercard Europe had moved to
9 Waterloo, which is in the Walloon region under the
10 authority of the court of Nivelles and in case, as
11 happened, the court decided, "You cannot do this case in
12 Brussels, you need to move to Nivelles", we needed to
13 translate all the documentation, the whole case.

14 MR JUSTICE ROTH: I think you were asked about whether, in
15 2008, you tried to get some accommodation with
16 Mastercard. So that's a few years after the case
17 started; is that right?

18 A. Yeah, correct. Yeah, that was probably to avoid having
19 to go to Nivelles.

20 MR JUSTICE ROTH: I see.

21 MR SMOUHA: Let me help, Mr Dhaene, with the dates, if
22 I can. These are all -- these dates are all set out in
23 the court's judgment on your claim, but it records that
24 you attempted a reconciliation with Mastercard in around
25 2008. You were unable to reach a reconciliation with

1 Mastercard and then you continued to pursue your claim.

2 A. Yeah, on the advice of my counsellor, of course.

3 Q. And then you just made reference to a language issue.

4 On 12 June 2008 -- let me give you that date --

5 A. Yeah.

6 Q. -- the labour law court declared your claim against
7 Mastercard inadmissible because the summons should have
8 been drafted in French, not in Dutch, because the
9 defendant's registered office was in a French language
10 area.

11 A. Yeah.

12 Q. And then fifteen days later, after that, you sued
13 Mastercard Europe again, but by a summons now drafted in
14 French; correct?

15 A. Yeah, and we had to go to Nivelles, yes.

16 Q. And then you subsequently added a substantial new claim.
17 In addition to the 437,000-odd euros that you previously
18 sued for, you also then made a claim for more than half
19 a million euros; in fact, precisely for 573,429.80 euros
20 in addition, which you now claimed you were owed as
21 severance pay under an executive incentive plan.

22 A. Yeah, that was on advice of my counsellor who -- I had
23 given all the documentation I had in my possession and
24 based on that, he said, well, the claim should be maybe
25 that much. I didn't make the calculation.

1 Q. Right. So you --

2 A. But I signed off on it, yeah.

3 Q. So you now have a claim for over \$1 million euros.

4 A. Yeah.

5 Q. On 5 February 2009, Mastercard brought a counterclaim
6 against you for damages for the bringing of vexatious
7 proceedings.

8 A. Yeah.

9 Q. And then on 12 June 2009, you then added
10 Mastercard International as a defendant to your claim.

11 A. Yes. Again, my counsellor said, "You were in New York.
12 You should add Mastercard International."

13 Q. Let's look, please, at the letter you've mentioned to
14 Mr Selander, the CEO of Mastercard International. That
15 was on 24 August 2007. Could we go to C18/182.2.

16 MR JUSTICE ROTH: C18/182 --

17 MR SMOUHA: C18/182.2. Sir, can I just check on timing?
18 With an 11 o'clock start, shall we --

19 MR JUSTICE ROTH: Well, I had my eye on that.

20 MR SMOUHA: Sorry, I assume not --

21 MR JUSTICE ROTH: I think it would be fair to have a break
22 before -- not go through for the full two hours.
23 I think that's too much. So if it's a convenient point
24 and there's a problem finding this letter, which has not
25 come up on our screens, we can do it now if -- because

1 at the moment we haven't got the document.

2 MR SMOUHA: No. Is that an incorrect reference? Well, in
3 which case --

4 MR JUSTICE ROTH: Well, why don't we do that to help you get
5 your reference? So we'll come back at 12.30.

6 So we take a short break, Mr Dhaene. You will have
7 seen that when you came to court, and you can go to the
8 toilet if you need --

9 A. Yeah.

10 MR JUSTICE ROTH: -- but you mustn't talk about your
11 evidence with anyone.

12 A. No. Yeah, thank you.

13 (12.21 pm)

14 (A short break)

15 (12.34 pm)

16 MR SMOUHA: Sir, Mr Dhaene referred earlier in his evidence
17 to his LinkedIn page. I have mentioned this to my
18 learned friend. May I -- we haven't been able to get
19 many copies of it printed. May we put that document
20 into -- a print off of it into the bundle? I'm not
21 going to ask Mr Dhaene any questions about it, but as
22 he's referred to it, I just want it to be in. But what
23 I would like to do, if I may, is just hand him
24 a printout of it just for him to confirm that's what
25 he's referring to, if I may.

1 MR JUSTICE ROTH: Do you want to just do that now?

2 MR SMOUHA: If I do that now and then it will be -- thank
3 you. (Handed)

4 So, Mr Dhaene, this is -- during the morning, after
5 you referred to it, this is a printout of what we
6 understand to be your LinkedIn page --

7 A. Yeah.

8 Q. -- in which you describe yourself as "serial
9 entrepreneur, international negotiator and solution
10 builder".

11 A. Yeah.

12 Q. Can you just confirm that this is what you were
13 referring to earlier?

14 A. Yes, correct.

15 Q. Thank you. Very good. I'm not going to ask you more
16 questions about that. Thank you.

17 What I do want to ask you about, though, are
18 questions about the letter that you referred to that you
19 wrote to Mr Selander. The correct reference --
20 apologies for the erroneous reference. The correct
21 reference is {C18/182.1/1} and this is a letter you
22 wrote to Mr Selander, the CEO of Mastercard
23 International, on 24 August 2007; correct?

24 A. Yes.

25 Q. And if we go to the bottom of page 2 {C18/182.1/2}, this

1 was your letter --

2 A. Yeah.

3 Q. -- personal letter --

4 A. Yes.

5 Q. -- written -- drafted and written by you to him --

6 A. Yes.

7 Q. -- in your own words.

8 A. In my own words, yes.

9 Q. Yes, thank you. And if we go back to the top
10 {C18/182.1/1}, please, we see that in the second
11 paragraph -- sorry, I should have just asked you. You
12 say at the top:

13 "Dear Mr Selander,

14 "Dear Bob ..."

15 Had you ever met him?

16 A. Yes.

17 Q. You had. When had you met him?

18 A. I don't recall.

19 Q. Before you wrote this letter --

20 A. Yeah, yeah. When I was at Mastercard, yeah.

21 Q. When you were at Mastercard.

22 Then in the second paragraph, you say:

23 "Following my dismissal at MasterCard Global Key

24 Accounts, and the receipt of a severance pay,

25 I requested MasterCard Europe to provide me with the

1 details of this pay; in particular ..."

2 And you go on to make various points.

3 So you told him that you had been dismissed by

4 Mastercard.

5 A. Yeah, this is the translation of the Dutch "ontslag".

6 Q. Mr Dhaene --

7 A. Yeah.

8 Q. -- in English, which you speak fluently --

9 A. Yes.

10 Q. -- you chose to describe --

11 A. I used the word "dismissed", yeah.

12 Q. -- what -- you chose to describe what had happened as

13 your dismissal --

14 A. Yeah.

15 Q. -- dismissal by Mastercard of you; correct?

16 A. Yeah.

17 Q. Then in the -- you then, in that long paragraph, say

18 something about exchanges, response, and then you say --

19 can you see about -- this is about ten lines down, the

20 sentence that begins:

21 "Yet, no answer was received ..."

22 Do you see that?

23 A. Yes.

24 Q. "Yet, no answer was received, despite several reminders,

25 other than the fact that MasterCard Europe, being the

1 payer of both my [remuneration], inclusive all bonuses,
2 and this particular severance pay, did not want to
3 disclose this information, and even explicitly
4 prohibited the payment services company to disclose this
5 information to me, which they confirmed in writing. Be
6 advised that, according to my legal counsellor, it is
7 a legal offence for any company not to disclose the
8 [remuneration] details to an employee in Belgium."

9 When you referred there to legal offence, you are
10 referring to a criminal offence.

11 A. "Legal offence" was the word my counsellor advised me to
12 put in this document. I don't know whether it's
13 criminal or civil.

14 Q. Very well. But you were accusing Mastercard Europe of
15 having committed an offence in failing to disclose
16 certain details of your remuneration to you.

17 A. I was informing them the advice that, according to my
18 legal counsellor, it is a legal offence for any company
19 in Belgium not to disclose that information. I was not
20 excusing [sic] them.

21 Q. Well, you were saying that you and your lawyer
22 considered that an offence had been committed.

23 A. Yes, I have another copy here:

24 "Be advised that, according to my legal counsellor,
25 it is a legal offence for any company not to disclose

1 the remuneration details to an employee in Belgium."

2 We know that in the States, the legal -- the
3 (Dutch spoken), the legal law -- the employment law,
4 sorry --

5 MR JUSTICE ROTH: The labour law, yes.

6 A. Labour law, that's what I'm looking for. Thank you very
7 much -- is very different from the very severe and
8 complex labour law in Belgium. We were just advising
9 them, "Be advised that". And it would not be, I think,
10 an individual who would do that; it would be the state
11 agency who would do that.

12 MR SMOUHA: Who --

13 A. If a company was not compliant with the labour law --

14 Q. Yes.

15 A. -- the state agency would sue the company.

16 Q. Yes, with prosecution or whatever.

17 A. Yeah, whatever.

18 Q. Understood. Thank you.

19 Then in the next paragraph, you say:

20 "By stating this, I believe MasterCard Europe wants
21 to back out and put MasterCard International into the
22 eye of the storm."

23 Can we look at the next paragraph -- in fact, could
24 we go to the top of the next page, please {C18/182.1/2}.

25 You say there at the top of the page:

1 "The fact that all continental European staff
2 members of Global Key Accounts were being treated that
3 way, he considered as a possible discrimination based on
4 geographical descent."

5 This is a reference to your legal counsellor?

6 A. Yeah, this -- I was just going to say I think that
7 refers to my legal counsel.

8 Q. Right. So was this a suggestion that Mastercard
9 discriminated against its employees based on grounds of
10 race or ethnicity or nationality?

11 A. Like I said, you have to put a claim forward, a monetary
12 claim forward --

13 Q. No, Mr Dhaene, I'm really sorry.

14 A. Yeah.

15 Q. What is it you were suggesting here?

16 A. I was going to explain. So you need to put the monetary
17 claim -- a monetary amount on the claim and there has to
18 be some rationale. So the counsellor said, "I think",
19 given the details he has in his possession, "that you
20 were treated differently from your colleagues", and
21 that's what he --

22 Q. Did you think that?

23 A. No. Otherwise, I would have -- for me, it didn't
24 matter. I didn't even know what my colleagues were
25 earning.

1 Q. Right. So you actually didn't think there was any basis
2 for making that accusation?

3 A. That's different. I just said I didn't look into this.

4 Q. Well, if you didn't look into it, why did you put it in
5 the letter?

6 A. He said -- my counsellor said, "I think there was
7 a difference, a significant difference, between you" --
8 and part of my team also, who were continental, within
9 Global Key Accounts and the others.

10 Q. You understood this was a very serious matter to accuse
11 Mastercard of.

12 A. The sentence says:

13 "The fact that all continental European staff
14 members of Global Key Accounts were being treated that
15 way, he considered as a possible discrimination based on
16 geographical descent."

17 I don't read that as an accusation.

18 Q. Why mention it at all?

19 A. Probably to rationalise the -- to put a rationale behind
20 the amount he had put on the case.

21 Q. Or perhaps to indicate to Mr Selander that there might
22 be a discrimination issue here.

23 A. We would still need to take it forward --

24 Q. Is that the reason that you did --

25 A. Could be, could be. I don't -- I can't go in the mind

1 of my counsellor.

2 Q. No, no, I'm not going in the mind of your counsellor.

3 A. Yeah.

4 Q. I'm asking you, Mr Dhaene, why you included this in your
5 letter which you drafted in your own words.

6 A. On his advice, we put that in the letter.

7 Q. Why did you include it in the letter?

8 A. Because on his advice -- we wanted to make things move
9 on the administrative side and that was one of the
10 argumentations. The first one was, "Wait a minute, it's
11 a legal offence". The second one was, "There has been
12 put a claim on this, so you need to put some rationale
13 behind".

14 Q. Yes. It was a threat, wasn't it?

15 A. It was?

16 Q. It was a threat; "This is the way this issue may go if
17 we do not settle".

18 A. Yeah, but we still need to start the case.

19 MR JUSTICE ROTH: Well, what is being suggested is you
20 raised the prospect --

21 A. Yeah.

22 MR JUSTICE ROTH: -- of a discrimination claim to worry the
23 CEO of Mastercard --

24 A. Yes.

25 MR JUSTICE ROTH: -- to encourage him to settle --

1 A. Yeah.

2 MR JUSTICE ROTH: -- the case you've got.

3 A. Yeah.

4 MR JUSTICE ROTH: Is that a fair summary?

5 A. To get me the legal documentation. It was all about
6 that.

7 MR JUSTICE ROTH: Yes, I understand that, but you --

8 A. Yeah.

9 MR JUSTICE ROTH: This was -- when it was put to you that
10 this was a threat --

11 A. Yeah.

12 MR JUSTICE ROTH: -- it's saying, "This is what we might do
13 if you don't supply the documentation".

14 A. Yes.

15 MR JUSTICE ROTH: Is that a threat --

16 A. Yes, yes.

17 MR JUSTICE ROTH: Yes.

18 MR SMOUHA: Thank you.

19 A. And, like, the next paragraph is also a suggestion by
20 the counsel --

21 MR SMOUHA: Mr Dhaene --

22 MR JUSTICE ROTH: Yes, just let Mr Smouha ask his questions.

23 MR SMOUHA: -- just bear with me. Before we go to the next
24 paragraph, let's look at the next sentence.

25 A. Yeah.

1 Q. "He was also surprised to find out that the subsidiary
2 of a distinguished and renowned global company like
3 MasterCard International in Europe took the format of an
4 'sprl' in Belgium, which is genuinely the format of a
5 'one-man-band' company; and suggested a legal
6 investigation/audit as to whether this format was not
7 deliberately chosen to accommodate such or similar
8 situations."

9 So you were saying that your lawyer had raised the
10 possibility of there being a legal investigation or
11 audit into Mastercard as to the validity of its
12 corporate structure in Europe.

13 A. Yeah.

14 Q. And you then threatened, if we look in the next
15 paragraph -- sorry, in the next paragraph, you refer
16 then to the possibility of a series of investigations
17 which may irrevocably provoke reputational damage to
18 Mastercard. I'll come back to that.

19 And then in the next paragraph, you say -- you said:

20 "However, in the absence of a settlement by
21 agreement, which I would foster to occur, I regret to
22 inform you that my legal counsellor will have no other
23 option than to summon MasterCard International in
24 a Belgian court; retaining the right to eventually open
25 a case against MasterCard International in the USA."

1 This -- of course, this letter was written before
2 you joined Mastercard International as a defendant in
3 the Belgian proceedings.

4 A. Yeah, in the Nivelles --

5 Q. So you were threatening here to sue
6 Mastercard International both in Belgium and in the
7 United States if Mastercard did not settle its claim
8 against you.

9 A. Yeah, because it was from the one but second paragraph
10 where it mentioned the SPRL. At the time, it was
11 absolutely not clear who the parties were going to be.
12 Very confusing.

13 Q. And the previous paragraph that I -- that we looked at,
14 the reference to the series of investigations which may
15 irrevocably provoke reputational damage to Mastercard,
16 that was referring to a possible investigation into the
17 European corporate structure.

18 A. Yeah, and the corporate structure as a whole, not just
19 Europe.

20 Q. Now, on 2 October 2007, you received a response to your
21 letter to Mr Selander and also to a further letter that
22 you had sent him on 1 October. Do you recall that?

23 A. Yeah.

24 Q. This is C18 --

25 A. Yeah, if you can show it.

1 Q. Yes, I'm going to show it to you.

2 A. Yeah.

3 Q. {C18/300.1/1}.

4 MR JUSTICE ROTH: You said a letter on 2 October. I think

5 you said, didn't you, that there was a response?

6 MR SMOUHA: I -- I did.

7 MR JUSTICE ROTH: This is the --

8 MR SMOUHA: 18 October.

9 MR JUSTICE ROTH: Well, this is a letter -- this is not

10 a response; this is --

11 MR SMOUHA: No, sorry, sir, I have again got the wrong

12 reference, sorry. Sorry, thank you. Yes, can we go to

13 page 3 {C18/300.1/3}.

14 MR JUSTICE ROTH: That's an email.

15 MR SMOUHA: Thank you, which is an email. Thank you.

16 MR JUSTICE ROTH: We're into the email time.

17 MR SMOUHA: Yes.

18 Mr Dhaene, this is an email from Piet Grillet.

19 A. Yeah, Piet Grillet, yeah.

20 Q. -- Group Head, Lead Regional Counsel Europe, MasterCard

21 Europe, copied to Mr Selander on 2 October.

22 A. Yeah.

23 Q. And he says:

24 "I acknowledge receipt of your letters that you sent

25 to Mr Robert Selander on August 24 ..."

1 That's the letter we looked at:

2 "... and [then] on October 1."

3 Which is a further letter you had written.

4 A. Mm-hmm.

5 Q. "According to the information I have been provided with,
6 you filed a legal action against MasterCard Europe sprl
7 before the Belgian Court and, within the scope of that
8 litigation, MasterCard Europe's lawyers provided you
9 with all necessary explanations regarding the severance
10 amount that MasterCard Europe sprl paid you upon
11 termination of your employment agreement.

12 "As this litigation is still pending, we consider
13 that it is more appropriate to leave the decision with
14 regard to your claim to the Court."

15 That wasn't acceptable to you, was it?

16 A. Well, we did not have the -- at that point in time, we
17 had some documentation, but not the legally necessary
18 documents.

19 Q. That response was not acceptable to you, was it?

20 A. Yeah, it was not acceptable.

21 Q. Right. Then you wrote again to Mr Selander. Now we can
22 go to page 1 {C18/300.1/1}. You wrote to Mr Selander on
23 18 October 2007. And could we look at page 2, please
24 {C18/300.1/2}, and can I ask you please to read out,
25 Mr Dhaene, what you said. Again, this is your letter in

- 1 your words.
- 2 A. Yeah, yeah.
- 3 Q. Can I ask you to read --
- 4 A. It's not a signed one, but yeah.
- 5 Q. The second line, you see:
- 6 "If this requires ..."
- 7 Do you see where it says --
- 8 A. Yeah.
- 9 Q. Can you read from there to the end of the paragraph,
- 10 please, read out?
- 11 A. "If this requires a formal audit as to how come a global
- 12 company has set up a sprrl-structure in Europe, which is
- 13 a corporate format genuinely used by a one-man company
- 14 or to limit responsibilities, than my legal counsellor
- 15 will have no other option than to start such
- 16 a procedure."
- 17 Q. Keep going.
- 18 A. "Again, as stated in my previous letter, if such
- 19 an investigation has consequences other than the
- 20 response to our request, we clearly state that this is
- 21 not our intention, but were left with no other choice
- 22 than to start such a procedure based on the fact
- 23 MasterCard Europe does not want to take responsibility
- 24 in this matter."
- 25 Q. So you were again threatening to instigate or to try to

1 instigate a formal audit or investigation or
2 Mastercard's corporate structure in Europe.

3 A. I could rephrase it and say I was begging them to have
4 the necessary documentation.

5 Q. Well, you could rephrase it --

6 A. It doesn't --

7 Q. -- but that would not be an accurate rephrasing. You
8 were threatening to instigate a formal audit or
9 investigation of Mastercard's corporate structure in
10 Europe if you did not get what you wanted.

11 A. If we did not get the official documentation, yes.

12 Q. Now, Mastercard's chosen corporate structure in Europe
13 was nothing to do with the subject matter of the reasons
14 for your dismissal, was it?

15 A. No, but it has something to do with this case, the
16 delivery -- the delivery of legal documents. It's
17 different in an SPRL than in a normal limited company.

18 Q. The reason you made that threat was because you hoped it
19 would scare Mastercard into settling your claim to avoid
20 such an investigation.

21 A. Like I've mentioned, yes. This is not our intention.

22 Q. No, but you were threatening to cause collateral damage
23 unless the company agreed to your demands.

24 A. No, if collateral damage refers to monetary value.

25 Q. Getting caught up in an investigation or an audit.

1 That's what you were threatening.

2 A. Well, that would, according to my counsel, have -- he --

3 there was no other way for him to proceed than to go

4 that way if we did not get the documentation we refer

5 to.

6 Q. And Mastercard did not respond to those threats, did

7 they, in the way that you hoped?

8 A. In the end, we got the documentation we needed in --

9 Q. Mr Dhaene --

10 A. -- in the settlement --

11 Q. -- I think you understand my question.

12 A. Yeah.

13 Q. Mastercard did not respond to those threats in the way

14 that you hoped, did they?

15 A. I don't understand your question, other than that

16 finally, they delivered the documentation we needed.

17 Q. Consistent with the letter that -- the email.

18 A. Yeah.

19 Q. Consistent with the email you received, they defended

20 the claim on the grounds that they told you that they

21 would and they left the matter to be decided by the

22 court; correct?

23 A. Yeah.

24 Q. Thank you. On 28 March 2013, the Belgian court, the

25 Nivelles court, ruled against you and declared your

1 claims against Mastercard Europe and
2 Mastercard International to be unfounded and dismissed
3 them; correct?

4 A. That's a very quick and drafty summary.

5 Q. Well --

6 A. There were like 12 decisions or more.

7 Q. -- {C21/302.2/18}.

8 A. Yeah. That's the format of the ultimate decision, but
9 you need to see the detailed argumentation of the
10 Tribunal.

11 Q. What is there about what I asked you that is not
12 accurate?

13 A. This --

14 Q. 28 March 2013, you agree?

15 A. Yeah.

16 Q. The court is the Nivelles Labour Court; correct?

17 A. Yes.

18 Q. Declared your claims against Mastercard Europe and
19 Mastercard International to be unfounded --

20 A. Yes.

21 Q. -- and dismissed them.

22 A. Yeah.

23 Q. Thank you.

24 You were, no doubt, very aggrieved by this decision.

25 A. No.

- 1 Q. You thought the court was wrong.
- 2 A. No, no. No, no. For me, the case was closed. I had
3 the documentation. I was in order with the Belgian
4 legislation and I could move on. Like I said in the
5 beginning, you have to put a financial claim on a case,
6 but it was not our intention to get that claim, and here
7 it says that that claim is unfounded.
- 8 Q. Did Mastercard ask the court and obtain from the court
9 an order that you pay Mastercard something in the
10 relation to their costs?
- 11 A. I need to go back to the details of the document.
12 I think so and I think also on that, the court said,
13 "No, that will not be granted".
- 14 Q. Do you --
- 15 A. Like I said, there were, like, maybe a dozen decisions
16 on this, on that, on that, on that. You know better
17 than I do, probably.
- 18 Q. It was a big story over a protracted period of time.
19 Your claim, your litigation, against Mastercard --
- 20 A. Yes.
- 21 Q. -- was protracted, took place over a long period of
22 time.
- 23 A. Well, it has to do with Belgian legal system.
- 24 Q. Now, Mr Dhaene --
- 25 A. It takes time because of the Belgian legal system, not

1 because of us.

2 Q. Yes, just to be clear --

3 A. Yeah.

4 Q. -- I wasn't blaming you in relation to the time that it

5 took, but I was indicating that the substance of it in

6 terms of the size of claim, the amount of time it took

7 finally to be resolved and that it ended with your claim

8 being dismissed.

9 A. And what's your question?

10 Q. It ended with your claim being dismissed.

11 A. Yes, yes.

12 Q. Yes.

13 A. Okay, I thought it was a question.

14 Q. No, sorry. My fault for the way I phrased it.

15 Now, Mr Dhaene, you understand, don't you, that

16 Mr Merricks sought and obtained the Tribunal's

17 permission to call you as a witness in support of his

18 case both as a witness of fact and as an industry

19 expert?

20 A. Mm-hmm.

21 Q. You need to say "yes" for the transcript.

22 A. Ah, yeah. Yes.

23 Q. Have you -- were you made aware that the Tribunal

24 granted Mr Merricks' permission to call you as a witness

25 of fact and -- or the permission granted by the Tribunal

1 was in relation to calling you as a witness of fact and
2 also as an industry expert in respect of certain
3 identified parts of the original version of your witness
4 statement?

5 A. Yes.

6 Q. So the reference, just for the Tribunal, is paragraph 1
7 of your order of 3 July 2023.

8 And you made an expert declaration attached to your
9 witness statement.

10 A. Yeah.

11 Q. Are you familiar with Part 35 of the CPR?

12 A. Yes, yeah.

13 Q. Can we look, please, at {A/13/51}. This is paragraph 10
14 of -- if you look in the section "Overriding Duty to the
15 Court" and look at paragraph 10, this is paragraph 10 of
16 the instructions to you of 30 May 2023.

17 So you know what the CPR is?

18 A. Yeah.

19 Q. What is it?

20 A. Well, the testimony, I think --

21 Q. No.

22 A. -- the witness statement.

23 Q. No.

24 A. The rules -- sorry, the rules, yeah.

25 Q. Very good. And have you read Part 35?

1 A. I have it with me here.

2 Q. You have read it?

3 A. Yeah.

4 Q. Thank you. Can I show you a document. Now, sorry, this
5 is not available electronically. This is
6 paragraphs 7.67 and 7.68 of the CAT Guide to
7 Proceedings. So in the Purple Book, it's page 1852.

8 And can you just look, Mr Dhaene, while we're
9 finding that, at paragraphs 7.67 and 7.68. Do you see
10 those?

11 A. Yeah.

12 Q. Have you seen those before?

13 A. Yeah, I think -- yeah, a summary at least.

14 Q. A summary?

15 A. Not in this format, but yeah, I have it with me.

16 Q. Sorry, Mr Dhaene, just help me.

17 MR JUSTICE ROTH: I think Mr Dhaene said he hasn't seen it
18 in this format.

19 A. Yeah.

20 MR SMOUHA: Right.

21 A. But I clearly remember it is the duty and obligation to
22 the person, etc, etc.

23 Q. Well, that you will have seen in Part 35 of the CPR.

24 A. Mm-hmm.

25 Q. This is a different -- this is a different document.

1 This is the -- this is this Tribunal's Guide to
2 Proceedings.

3 A. Okay. Let's go over it.

4 Q. So far as you recall, do you think you have looked at
5 this in this form, these two paragraphs before? (Pause)

6 You may not have done. I don't know, Mr Dhaene.

7 I genuinely --

8 MR JUSTICE ROTH: It's not a --

9 MR SMOUHA: It's not a trick question.

10 MR JUSTICE ROTH: -- trick question, Mr Dhaene.

11 A. Yeah.

12 MR JUSTICE ROTH: It's just an inquiry.

13 A. Yeah.

14 MR JUSTICE ROTH: If you haven't been shown it, nobody would
15 expect you to have seen it.

16 A. Yeah. No, it's a --

17 MR JUSTICE ROTH: It's a question of -- you have referred to
18 it, so that's why you're being asked about it. Does it
19 look familiar?

20 A. Yeah, it looks familiar.

21 MR SMOUHA: It looks familiar?

22 A. Yeah.

23 Q. Right.

24 A. I'm still reading all --

25 Q. Just the two --

1 A. -- 7.68, so --

2 Q. Yes, sorry, sorry.

3 A. Yeah, yes.

4 Q. That's my -- I do apologise. Let me give you a moment
5 to look through it properly.

6 A. Yeah. (Pause)

7 Yeah, it's my recollection that that was also in the
8 summary I read; that it was stated in this way --

9 Q. Right.

10 A. -- not with all the footnotes, though, but it was stated
11 in that way.

12 Q. Very well.

13 A. And it's also my correction that I'm -- collection [sic]
14 that I'm fully compliant with this at this moment.

15 Q. That was my --

16 A. Yeah.

17 Q. Thank you. That was my next question, because if we go
18 back to your declaration at {A/13/38}, you have -- in
19 your expert declaration, you have said -- in relation to
20 (b), you say:

21 "I am aware of the requirements of ...

22 "b. The Tribunal's Guide to Proceedings of 2015 on
23 expert evidence (including in particular paragraphs 7.67
24 and 7.68)."

25 A. Yeah.

1 Q. Which is why I asked you the question.

2 When you signed your witness statement and you made
3 that declaration, what was your understanding of your
4 duties to the Tribunal in giving expert evidence?

5 A. Well, it was my understanding that I have to give that
6 in a neutral way, based on the information I have and
7 recall, and that I could not be influenced by any
8 suggestion or question or even documentation from the
9 people who, lawyers who were requesting me to make that
10 witness statement.

11 Q. And that that is an overriding duty to help the
12 Tribunal.

13 A. Yeah, and that the information that should be in there
14 is there to help the Tribunal. That's why it may be
15 a bit unhandy I made a cut in my CV to throw away
16 everything which I judged not to be --

17 Q. And you understood that it's not just a question of
18 telling the truth and offering an opinion, but you had
19 to be independent.

20 A. Yes.

21 Q. You have to make a fair presentation of matters both
22 helpful and unhelpful.

23 A. Yes.

24 Q. You must have realised all along, Mr Dhaene, that
25 Mastercard would not consider you to be independent and

1 objective.

2 A. I would not see why not. I have been there 15 years,
3 covered the period with this infringement period here,
4 of which I will give neutral information, factual
5 information, and then later on when I did work for
6 Mastercard on even this matter for debit cards, on
7 matter of interchange, or for Mastercard members, or for
8 the European Commission, they never mentioned anything
9 like that. Why would they have done -- mentioned that
10 now?

11 Q. Well, the people you were dealing with may not have
12 known you had previously sued Mastercard for over
13 1 million euros.

14 A. Well, even if they know, maybe they would have
15 considered that to be irrelevant.

16 Q. Maybe they didn't know that you had written letters to
17 the CEO of Mastercard International making threats.

18 A. Mastercard was also part of the payment market services
19 expert group of the European Commission. I trust they
20 know; they would have known who I was. They could have
21 objected because, I mean, the work which came out of
22 that group led to significant regulation in the EU.

23 Q. Mr Dhaene, you knew when you agreed to give evidence and
24 then did your witness statements that Mastercard would
25 not consider you to be independent or objective in view

1 of the history of a dispute with them and what you had
2 said in your correspondence with the CEO of
3 Mastercard International.

4 A. No, that's incorrect. Like I said, given the fact that
5 I worked for them, that I had very good relations after
6 I left Mastercard, that my first big project with
7 TeleTech came in via the former CEO of Mastercard -- not
8 Bob Selander, his predecessor -- and that they never
9 made any objection to any of my investigations since,
10 I didn't even think they would object today. It came as
11 a surprise.

12 Q. Came as a surprise when?

13 A. When I was told Mastercard objects because they think
14 you are not a neutral -- an independent expert. And my
15 first reaction was: look, they didn't do that in
16 previous cases, why would they do that now?

17 Q. Right. So you say that came as a surprise, but then you
18 were told that they did object and you were told the
19 basis upon which they objected.

20 A. Yes.

21 Q. So let's just look at that. So bear in mind --

22 MR JUSTICE ROTH: Can I just ask you, bearing in mind the
23 time, if you -- well, if you're concluding this part of
24 cross-examination, we can sit for another five minutes
25 or so. I don't know how much longer you want to pursue

1 this with Mr Dhaene. I mean, you've put the
2 correspondence, the judgment. You've now dealt with
3 what he expected. How much more is there on this?

4 MR SMOUHA: Sir, I can probably complete this topic in
5 five minutes or so.

6 MR JUSTICE ROTH: Yes. Well, let's finish this topic.

7 MR SMOUHA: Thank you. And, sir, I apologise for not having
8 noted the time.

9 MR JUSTICE ROTH: No, not at all.

10 MR SMOUHA: {D/119/2}. Sorry, if we go to page 1 first
11 {D/119/1}. Let me show you, this, Mr Dhaene, is
12 a letter from Freshfields to Willkie Farr & Gallagher of
13 4 June. You will see that on page 1 it refers at 1c to
14 your draft witness statement from the 30 May 2023 which
15 Mr Merricks was applying for permission to adduce as
16 expert evidence as well as fact evidence. Do you see
17 that?

18 A. Yes, yes.

19 Q. If we go to page 2 please, can I ask you to read to
20 yourself paragraphs 2, 3 and 4 {D/119/2}. (Pause)

21 A. Yeah.

22 Q. Thank you. Could we look, please, next at {D/124/1}.

23 This is a letter from Willkie Farr to Freshfields of the
24 next day, 5 June. At the bottom of the page under the
25 heading "Allegation that Mr Dhaene was dismissed for

1 misconduct", can you please read to yourself that
2 paragraph? (Pause)

3 A. Yeah.

4 Q. And then if we go over the page please, can you read the
5 first paragraph {D/124/2}?

6 A. Yeah.

7 Q. Were you the source of this information provided to
8 Willkie Farr & Gallagher, namely that you had not been
9 dismissed but you had left Mastercard voluntarily?

10 A. Yes.

11 Q. So you concealed the fact from them that you considered
12 that you had been dismissed, as you told Mr Selander.

13 A. Well, dismissed in -- the word in Dutch is "ontslag",
14 which is very neutral; could be either way. So we're
15 not in an English court, I think. It could be either
16 way. The fact is that we discussed this -- I discussed
17 this with Mr Gary Flood. We agreed to end the contract,
18 like it says here, on a voluntary basis. We also agreed
19 that the severance pay would be paid out, following the
20 termination of that contract, and that was it.

21 Q. You concealed the fact that -- you concealed from
22 Willkie Farr in terms of providing this information, you
23 concealed the fact that you had written to the CEO of
24 Mastercard International saying that you had been
25 dismissed.

1 A. Can you repeat that question?

2 Q. Yes. You concealed --

3 A. What do you mean with "concealed"?

4 Q. Hid. Did not disclose.

5 A. Ah. Yeah, for me that was an administrative part to
6 obtain the necessary legal documents which for me was
7 closed a long time ago.

8 Q. You did not disclose the fact that you had made claims
9 in a Belgian court on the basis -- making claims on the
10 basis that you had been dismissed.

11 A. Yeah, for me -- like I said, for me that was a closed
12 case, an admin case closed.

13 Q. Can I ask you this: did you provide copies of the
14 correspondence to Willkie Farr of the documents you had
15 retained?

16 A. I think they were already in the bundle that was
17 provided to me. I had -- because I had to go back to my
18 archives I found back two papers showing that I did do
19 work for Mastercard afterwards.

20 Q. Did you provide --

21 A. And I provided that to Willkie, yeah.

22 Q. You provided that to Willkie, yes --

23 A. And maybe other documentation too in the meantime.

24 Q. Did you provide copies of the proceedings in relation to
25 your claim and the judgment --

1 A. No.

2 Q. -- to Willkie Farr. Why not?

3 A. I wasn't asked. I didn't consider that to be important.
4 And it took a long time for me to find the things back
5 in my archives to be quite honest.

6 Q. Can you explain why, when you prepared your revised
7 statement to be refiled pursuant to the Tribunal's
8 order, now that this issue had been raised as you had
9 been told, and there was this objection to your
10 independence, why didn't you address it in your
11 statement?

12 MR JUSTICE ROTH: Well, I think the terms on which the
13 statement was permitted to work, that it was the
14 statement that was before the Tribunal with certain bits
15 removed. I appreciate you weren't at that hearing,
16 Mr Smouha, so I think if they had wished to add a whole
17 section addressing this they would have had to have
18 asked for permission. And Mr Dhaene, of course, wasn't
19 there at that hearing, but they were quite strictly
20 confined as to what the finalised statement could
21 contain. So I don't think it's quite a fair question
22 for Mr Dhaene.

23 MR SMOUHA: The reason I'm putting it to him is this is
24 information and material which he had as a matter of
25 obligation, of his duty to the Tribunal in terms of

1 making a fair presentation of facts relating to his
2 independence, it would certainly be our submission, and
3 that's what I'm putting to him, these are matters that
4 should have been included. If it is the case he says
5 that it never occurred to him --

6 MR JUSTICE ROTH: Well, you can say it should have been
7 included in his initial statement but -- before it was
8 specifically raised by Mastercard, you can make that
9 submission it should have been out there -- out front.
10 But at the hearing where his statement was before the
11 Tribunal with the application, I think that -- and one
12 can go back to the transcript, but I think the ruling
13 that I gave was the statement can come in provided that
14 certain sections are removed, but not anything added.
15 And whether those representing Mr Merricks should have
16 asked for permission or whatever to put something else
17 in is not a matter for the witness.

18 MR SMOUHA: No, certainly not. Sir, maybe it's a matter for
19 submission.

20 MR JUSTICE ROTH: Yes, so I don't think it's fair to say --
21 he obviously would have been told this is likely to be
22 raised at the hearing, and indeed there was a question
23 about how much disclosure should be given about this,
24 which was in the rule as well.

25 MR SMOUHA: Sir, can we leave it on the basis -- as I say,

1 it may be a matter of submission as to whether
2 Mr Dhaene's overriding duty to the court in relation --
3 at any stage and, sir, we would certainly submit once he
4 was aware of the issue should have been addressed. But
5 we can perhaps deal with that as a matter of submission.

6 MR JUSTICE ROTH: I think that's not for Mr Dhaene.

7 MR SMOUHA: Mr Dhaene, just finally on this, apart from your
8 dismissal and your bringing a claim, your 1 million euro
9 claim against Mastercard, is there anything else that
10 might be relevant to the Tribunal's assessment of your
11 independence and motivations that you have not mentioned
12 in your statement which you wish to take the opportunity
13 to do so?

14 A. No, I don't think so. Not at all. I still carry a good
15 relationship versus the brand. It's close to my heart.
16 I still -- I still use it every day, so ... (Pause)

17 And I understood this is about interchange, yeah.

18 MR SMOUHA: To which we will return after the lunch break,
19 Mr Dhaene.

20 A. Yeah.

21 MR JUSTICE ROTH: So we'll take a break for lunch --

22 A. Okay.

23 MR JUSTICE ROTH: -- and come back -- how are we doing on
24 timing? We can't sit late today. We'll have to stop by
25 4.30. It's 1.20. If we come back at 2.05, would that

1 be --

2 MR SMOUHA: Certainly. Thank you, sir.

3 MR JUSTICE ROTH: So, obviously, you should have some lunch.

4 A. Yeah.

5 MR JUSTICE ROTH: You don't have to sit on your own, but if

6 you do sit with anyone else, you mustn't talk about the

7 case --

8 A. I know.

9 MR JUSTICE ROTH: -- or the evidence.

10 A. And I will abide to this.

11 MR JUSTICE ROTH: You understand that?

12 A. Yeah.

13 MR JUSTICE ROTH: So 2.05.

14 (1.20 pm)

15 (The short adjournment)

16 (2.07 pm)

17 MR SMOUHA: Mr Dhaene, can you, please, in your witness

18 statement turn up paragraph 16 --

19 A. Yeah.

20 Q. -- {A/13/11}, and you say there:

21 "As I explain below, from the start of the Full
22 Infringement Period (i.e. May 1992) Mastercard domestic
23 payments between UK banks (as well as cross-border
24 transactions between UK banks and other European banks)
25 were typically processed via the Eurocard system (called

1 'EPS- NET')."

2 And the "As I explain below", Mr Dhaene, you're
3 referring to paragraphs -- the section at the bottom of
4 the page under the heading "The introduction of domestic
5 interchange fees by Mastercard in the UK", paragraphs 18
6 all the way through to paragraph 24.

7 A. Yeah.

8 Q. And then let's look, then, at the basis upon which you
9 made that statement domestic payments between UK banks
10 being typically processed via the Eurocard system.

11 At paragraph 18, you say:

12 "In 1989 when I started working at Eurocard
13 International, the company did not have a presence in
14 individual countries. The Eurocard structure was such
15 that every country had a national Eurocard organisation
16 (such as the ... 'JCCC') ... Eurocard granted
17 a principal licence to the national organisation, who in
18 turn granted an affiliate license to any banks wishing
19 to participate in the scheme."

20 Then you say {A/13/12}:

21 "At the time, in the UK, the banks owned the JCCC.
22 Domestic transaction volumes went through the JCCC and
23 so no domestic interchange fee was required."

24 No domestic interchange fee was required because
25 those transactions were all on-us transaction,

1 weren't they?

2 A. Yeah.

3 Q. Let's go on to paragraph 19 of your statement. You say:

4 "Shortly before I joined Eurocard (I was told when
5 joining Eurocard in October 1989 by Mr John Welsh and
6 Mr Tore Alve of EPSS, the company who operated the
7 EPS-NET for both Eurocard International and Eurocheque
8 International, that this happened the year before, so
9 1988), National Westminster Bank PLC ('NatWest') and
10 Barclays Bank ... then the biggest issuers and acquirers
11 in the UK in terms of transaction volumes, decided that
12 instead of putting their transaction volumes through
13 JCCC, they would put their volumes directly onto the
14 Eurocard system (EPS-NET) to authorise, clear and settle
15 with each other directly. NatWest was already connected
16 to EPS-NET and Barclays got connected for its acquiring
17 business."

18 So, to be clear, you are saying that Barclays -- or
19 at least what you were told; that Barclays connected
20 its acquiring business through Eurocard's EPS-Net system
21 and that you were told when you joined Eurocard in
22 October 1989 that that had happened in 1988.

23 A. Yeah.

24 Q. Now -- so you're talking about here Barclays' business
25 of acquiring Eurocard transactions.

1 A. Yes.

2 Q. Because Eurocard wouldn't be processing
3 Visa transactions, would it?

4 A. No, we could have done that, but we didn't do that.

5 Q. You did not.

6 So you are also saying here that you were told that
7 NatWest was already connected to the Eurocard system.

8 A. Yes.

9 Q. Right. Can we please look at {C15/126/319}. This is
10 the Mergers and Monopolies report of August 1989, so
11 that's just two months before you join Eurocard. Is
12 this a document that you're familiar with?

13 A. No.

14 Q. Can we go, please, to paragraph 1.1 on page
15 {C15/126/322}:

16 "On 27 May 1987 we were asked to report on whether
17 a monopoly situation existed in relation to the supply
18 of credit card services in the United Kingdom. At that
19 time there was in effect only one merchant acquirer in
20 the United Kingdom for each of the two international
21 payments systems (MasterCard/Eurocard and Visa). The
22 banks issuing credit cards offered similar terms and
23 conditions and charged similar rates of interest. We
24 were struck by the absence of competition."

25 So in May 1987, there was only one merchant acquirer

1 for MasterCard/Eurocard. Do you see that? That's what
2 it's saying.

3 A. Yeah.

4 Q. And that --

5 A. That's what it says, yeah.

6 Q. And that's the JCCC.

7 A. Yeah, that's the JCCC. That's my understanding, yeah.

8 Q. Can we go forward to page 331, internal page 10 of the
9 report, paragraph 2.32 {C15/126/331}:

10 "Paragraphs 2.34 to 2.62 describe the Access credit
11 card scheme as it operated up to the early part of 1989,
12 and as it still operates in respect of most Access
13 trader and cardholder transactions. From March 1989
14 Lloyds and later Midland Bank ... National Westminster
15 Bank ... and The Royal Bank of Scotland Group ... began
16 to act as a merchant acquirer for
17 Access/MasterCard/Eurocard transactions. As a result
18 the JCCC has ceased to be the only merchant acquirer on
19 behalf of the Access banks; and Midland and later
20 NatWest began to issue Visa credit cards. These
21 developments and the changes in the role and future of
22 the JCCC, are described in paragraphs 3.104. to 3.110."

23 So what the Commission is saying here is that the
24 JCCC had been the only merchant acquirer for the Access
25 scheme until March 1989; correct?

1 A. Yeah.

2 Q. Access payment cards were, of course, co-branded with
3 Eurocard/MasterCard.

4 A. Yes, most of them, I think, yeah.

5 Q. So that meant that the JCCC had been the only merchant
6 acquirer for transactions on cards that were branded
7 Eurocard/MasterCard until March 1989.

8 A. Mm-hmm.

9 Q. Sorry, you need to say --

10 A. Yeah.

11 Q. -- "yes" for the transcript.

12 A. Yes, sorry, yes.

13 Q. Yes, you understand --

14 A. Yes, I understand.

15 Q. -- and you confirm?

16 A. Well, it was before my time at --

17 Q. Yes, it was before your time, Mr Dhaene, but you are the
18 one that is giving evidence about what the position was
19 before your time --

20 A. Yeah, yes.

21 Q. -- on the basis of a conversation that you claim to
22 remember the details of more than 30 years ago.

23 A. Yeah, Mr --

24 Q. It's what's in your witness statement.

25 A. Yeah, because it struck me.

1 Q. Well, that -- well, maybe it struck you, but I am asking
2 you this because I'm now going to show you things which
3 show that --

4 A. Yes, please.

5 Q. -- either your recollection is wrong or, for some other
6 reason, the facts that you are suggesting are the case
7 are not so.

8 A. Yeah.

9 Q. You understand?

10 A. Yes.

11 Q. That's why I'm asking you the questions.

12 A. And it struck me because that was the reason for the
13 department where I was recruited for to be created.
14 That's why I remember.

15 Q. Right. Let's look at -- we'll see what's borne out in
16 terms of your recollection. Let's keep going. Let's
17 look at paragraph 2.36, please, at the bottom of the
18 page {C15/126/331}:

19 "The JCCC performs three main functions in the
20 Access credit card scheme:

21 "(a) It is the proprietor of the Access trade marks,
22 and the principal United Kingdom licensee of the
23 MasterCard and Eurocard trade marks which give the
24 Access credit card its international acceptability.

25 "(b) It acts as merchant acquirer.

1 "(c) It carries out processing and other services
2 related to traders and cardholders on behalf of the
3 Access banks."

4 So, in addition to being the merchant acquirer, the
5 JCCC did all the processing.

6 A. Yeah.

7 Q. And if we look back up to 2.32 that we were looking at
8 before, the Commission is explaining that a new
9 development had occurred in March 1989 when Lloyds
10 started acting as an acquirer, with other banks,
11 including NatWest, doing so later.

12 A. Mm-hmm.

13 Q. You see that in the third line?

14 A. Yeah.

15 Q. There is no mention of Barclays acting as an acquirer
16 for MasterCard/Eurocard transactions, is there?

17 A. No, I don't see that.

18 Q. And that's why -- sorry?

19 A. I don't see that in that paragraph.

20 Q. No.

21 And NatWest, which is the other bank you refer to in
22 your evidence, only acting as an acquirer some time
23 later than March 1989. That's what it says, isn't it?

24 A. Yeah.

25 Q. Yes. You have no reason to believe that the

1 Monopolies and Mergers Commission didn't properly take
2 evidence and record it in their report, have you?

3 A. No reason, yeah.

4 Q. So your evidence must be incorrect.

5 A. Well, I have no reason to believe that what I was told
6 as the reason for which the department was created was
7 wrong either.

8 Q. Well, maybe you're misremembering 30 years ago.

9 A. No, that I remember clearly. It says because business,
10 transactional business, between NatWest and Barclays was
11 suddenly put on to EPS-Net, which was, like, ten times
12 the volume it used to be before, the network collapsed
13 and we had to do -- Eurocard/EPSS had to do
14 interventions putting additional systems into the
15 network to cope with that additional traffic.

16 Q. Well, it may be, Mr Dhaene, that the Tribunal doesn't
17 need to be concerned with whether your recollection is
18 wrong of a conversation 30 years ago or the people who
19 spoke to you were wrong or some -- for some other
20 reason, what you are saying is inaccurate. But you
21 would agree on the basis what have is set out in the
22 Monopolies and Mergers report --

23 A. Yeah.

24 Q. -- that what you say in your witness statement cannot be
25 correct.

- 1 A. It's -- not conform with this statement, that's correct.
- 2 Q. Not conform.
- 3 A. Yeah.
- 4 Q. In other words, what you say cannot be correct.
- 5 A. That's a different question. It's correct to the extent
6 that I report what I have heard.
- 7 Q. Ah, sorry, right. The facts --
- 8 A. Yeah.
- 9 Q. The Tribunal is concerned with facts.
- 10 A. Yes.
- 11 Q. And when you give evidence of what you say you remember
12 from conversations, it is with a view to trying -- to
13 helping the Tribunal --
- 14 A. Yeah.
- 15 Q. -- to establish what the true facts are. I am
16 suggesting to you that what is in the Monopolies and
17 Mergers Commission report are the correct facts and
18 that, therefore, what you say on the basis of
19 a conversation are the facts are not correct. Do you
20 accept that?
- 21 A. On this basis, I can accept that. However, it should
22 not be a big issue to find that out based on the logs
23 available at Europay from that time.
- 24 Q. I'm not going to pick up on that, Mr Dhaene.
- 25 A. Yeah.

1 Q. I am just going to address and deal with what you have
2 said in your witness statement.

3 So, in fact, what you've said in paragraph 19 in
4 terms of suggesting what the facts are must be doubly
5 incorrect because first Barclays didn't do any acquiring
6 of Eurocard/MasterCard transactions in 1988 or 1989, as
7 far as we can see on the basis of the Monopolies and
8 Mergers report; agree?

9 MR JUSTICE ROTH: Well, the report is August '89.

10 MR SMOUHA: The report is August '89, but there's no -- in
11 the description in paragraph 2.32 --

12 MR JUSTICE ROTH: Well, they won't know in --

13 MR SMOUHA: -- of the banks that are beginning to act as
14 merchant acquirer, there is no reference to Barclays.

15 MR JUSTICE ROTH: No. Well, clearly, as at -- but what
16 happened in December '89, this doesn't help us, does it?

17 MR SMOUHA: But, sir, the -- Mr Dhaene's evidence is of
18 a conversation --

19 MR JUSTICE ROTH: No, I understand that, but it was the
20 question you put.

21 MR SMOUHA: Sorry.

22 MR JUSTICE ROTH: You said -- I think you said --

23 MR SMOUHA: Sorry.

24 MR JUSTICE ROTH: -- that Barclays didn't do any acquiring
25 in 1989.

1 MR SMOUHA: Sir, you quite correct, sir. Sorry, let me
2 reformulate the question.

3 On the basis of what is said in the Monopolies and
4 Mergers Commission report, it would appear that Barclays
5 did not do any acquiring of Eurocard/MasterCard
6 transactions in 1988 or before you joined Eurocard in
7 October 1989.

8 A. Okay, yeah.

9 Q. Secondly, the second part of the "not correct" part of
10 your statement, of your -- of the facts suggested by
11 your paragraph 19, NatWest did not do any acquiring of
12 Eurocard/MasterCard transactions until mid-1989.

13 A. Okay.

14 Q. The truth is, Mr Dhaene, and I think this is clear from
15 what you are saying, you don't know.

16 A. Well, then I ask myself the question: why --

17 Q. Well, you don't need --

18 A. -- such an obvious piece of information was told to
19 me --

20 Q. Mr Dhaene, you don't need --

21 A. -- in those days.

22 Q. Mr Dhaene, you don't need to ask yourself the question
23 why.

24 A. Yeah.

25 Q. That's the Tribunal's job.

1 A. Okay, yeah.

2 Q. So your job is to give evidence of what you can and also
3 not to give evidence of what you can't speak to, and
4 I think what you're saying is you have a recollection of
5 this conversation; correct?

6 A. Yes.

7 Q. But as to what the true facts are, you're not in
8 a position to say.

9 A. Correct.

10 Q. Thank you.

11 Can you look please at paragraph 23 of your
12 statement {A/13/14}. You say:

13 "It is my understanding that for the initial period
14 of UK domestic processing by Eurocard (1988-1989), UK
15 domestic transactions were all processed like the
16 intra-regional transactions and therefore the intra- EEA
17 interchange fee applied as a default."

18 And if we could also look at what you say in
19 paragraph 38, making a similar point on page 18
20 {A/13/18}:

21 "During my entire time at Eurocard - Europay -
22 Mastercard (1989-2004), I recall clearly that the
23 intra-EEA MIFs were the default rates in the system.
24 This meant that when there was no particular bilateral
25 agreement nor a domestic agreement in place determining

1 the applicable fallback rate, it was the intra-EEA MIFs
2 that would apply. Therefore at the very beginning, in
3 1988, when the transaction volumes between NatWest and
4 Barclays were switched over the EPS-NET ..."

5 So pausing there, that's referring to what you've
6 said --

7 A. Yeah.

8 Q. -- in your paragraph 19 about the conversation that you
9 recall.

10 A. Yeah.

11 Q. Right. You then say:

12 "... when the transaction volumes between NatWest
13 and Barclays were switched over the EPS-NET, the
14 intra-EEA rates then applicable would have been used
15 during settlement."

16 So if we go back to paragraph 23 on page 14
17 {A/13/14}, this is the part of your witness statement
18 which is based on your recollection of being told that
19 NatWest and Barclays had moved their --

20 A. Yeah.

21 Q. -- domestic processing to Eurocard in 1988, which --

22 A. And the knowledge I had on the system.

23 Q. -- which we've established is not factually correct, at
24 least on the basis of the Monopolies and Mergers
25 Commission report; yes?

- 1 A. Yeah.
- 2 Q. Now, if, as was the case, JCCC was the sole merchant
3 acquirer and the sole processor, there was no
4 interchange fee at all on domestic transactions.
- 5 A. Not known to Eurocard or Europay, if that was Eurocard
6 in those days. Whether there was internally
7 an interchange system, that I don't know.
- 8 Q. You don't know, but the EEA MIF was not the default
9 interchange fee for UK domestic transactions in 1988 to
10 1989.
- 11 A. If Eurocard would have processed domestic transactions
12 at that time, then the only interchange system that
13 could be used was the intra-regional Eurocard
14 interchange, because the old ENESS system could not
15 support any other interchange.
- 16 Q. The problem with the "if" --
- 17 A. Yeah.
- 18 Q. -- Mr Dhaene, is what we're looking at and addressing
19 and testing is your evidence as to what the position
20 was.
- 21 A. Yeah.
- 22 Q. The truth is you don't know what was happening during
23 this period, do you?
- 24 A. I was not there to check personally myself whether that
25 was the case. It was from what I heard and what my

1 understanding was of that period. My understanding was
2 there was domestic traffic and the question was: what
3 sort of interchange scheme did they then use? It could
4 only be the intra-regional one --

5 Q. And --

6 A. -- because until ECCSS came about, no other interchange
7 system could be supported.

8 Q. It was no part of your job as Eurocard manager working
9 only on Central Europe to know. You didn't need to know
10 as part of your job.

11 A. No, but like I've mentioned, we were also the backup of
12 each other. So to some extent, we had to know.

13 Q. In fairness to you, Mr Dhaene, should the Tribunal take
14 it from the formulation you use in the beginning of
15 paragraph 23, "It is my understanding", that you are
16 indicating that this is not a matter within your
17 personal knowledge?

18 A. Yes, correct.

19 Q. As a matter of interest, just explain to the Tribunal
20 why you said anything about the EEA MIF applying to the
21 UK if it was not within your knowledge and not within
22 your expertise?

23 A. Because the question was, as I understood it, if
24 UK domestic transactions came on to EPS-Net and were
25 authorised, cleared and settled by Eurocard and later

1 Europay, but Eurocard until '92, what interchange system
2 would have been used? And then it's clear: the EEA
3 system could only have one interchange structure, and
4 that was the intra-regional one.

5 Q. Mr Dhaene, it's very interesting that you say -- you
6 state at the beginning of that answer, "Because the
7 question was, as I understood it ..."

8 A. Yeah.

9 Q. I can't see any reference to the intra-EEA -- sorry, the
10 EEA intra-regional MIF in the questions that were put to
11 you in your instructions. We can have a look;
12 {A/13/51}, paragraph 7 of your instructions, which sets
13 out the questions you're instructed to consider.

14 A. Paragraph 7?

15 Q. Paragraph 7:

16 "... you are instructed to consider the following
17 matters ..."

18 Do you see that?

19 A. Yeah.

20 Q. And then they're set out. So what were you told was the
21 issue?

22 A. Well, it was 7(d):

23 "... the status of on-us transactions and in
24 particular whether, in your expert opinion, interchange
25 fees applied to on-us ..."

1 I mean, I give a general explanation on how the
2 system would work -- not just for the UK; for any bank,
3 for that matter -- if they were connected to the
4 Eurocard EPS-Net, if they were delivering on-us or
5 domestic traffic, processing them over the EPS-Net.

6 Q. But, Mr Dhaene, I'm sorry, but the part of your evidence
7 we're talking about, which is based on your conversation
8 that you had when you joined Eurocard in October 1989
9 about what the position was in the UK, that's not within
10 your expertise, is it, as to what the position was on
11 the ground in the UK at the time?

12 A. No.

13 Q. No.

14 A. I wasn't there.

15 Q. You weren't there and --

16 A. No.

17 Q. Thank you.

18 Let's go back to paragraph 20 of your statement on
19 page {A/13/12}:

20 "It was my understanding, through conversations
21 I had about this within Eurocard shortly after I joined
22 in 1989, that Barclays (which at the time was issuing
23 and acquiring Visa) did not want to join JCCC, and nor
24 did some of the JCCC member banks want Barclays to join
25 JCCC. I believe that this was because Barclays was the

1 only Visa issuer at the time whilst the JCCC member
2 banks were Mastercard issuers. NatWest and Barclays
3 were eager to open their merchant networks up to each
4 other's cards. They therefore had no other choice than
5 to route over the Eurocard [EPS network]."

6 So you're saying that if the JCCC wasn't an option
7 for processing, then the only choice open to NatWest and
8 Barclays was to use EPS-Net --

9 A. Yes.

10 Q. -- or at least that's what you understood --

11 A. That --

12 Q. -- based on conversations --

13 A. Yeah.

14 Q. -- you had in --

15 A. Yeah, (overspeaking).

16 Q. -- 1989.

17 Right. Let's go back to the 1989 Monopolies and
18 Mergers Commission report. {C15/126/437}, please, and
19 towards the bottom of the page, do you see "Part IV
20 Views of the JCCC and the Issuers of Access Cards"? Do
21 you see that heading?

22 A. Yeah.

23 Q. And then a heading -- a subheading "The JCCC".

24 So let me just explain to you, Mr Dhaene. In this
25 section, the MMC is setting out information and

1 representations provided to it by JCCC and the banks
2 that issued Access cards in the section that follows.

3 If we go forward, please, to {C15/126/442},
4 paragraph 6.310, do you see that under the heading
5 "Access brand name"?

6 A. Yeah.

7 Q. "New MasterCard/Eurocard credit card issuers did not
8 need to acquire the use of the Access brand name,
9 although the facility was open to them on the payment of
10 an appropriate fee; the JCCC would be ready to offer
11 processing facilities whether or not the Access brand
12 name was used. It would be open to new
13 MasterCard/Eurocard merchant acquirers to handle
14 transactions generated by Access cards without having to
15 use the Access brand name or to use the services of the
16 JCCC."

17 And then if you look at the last four lines of that
18 paragraph, do you see a sentence beginning "New
19 entrants":

20 "New entrants had applied for and been granted
21 licences as users of the MasterCard and Eurocard marks.
22 There were no significant deterrents to new entry.
23 Other processing services were available from Barclays,
24 TSB, [Bank of Scotland], Co-op, Girobank and the
25 American Express subsidiary, First Data Resources Ltd."

1 So the JCCC was telling the Monopolies and Mergers
2 Commission that there was a whole range of firms that
3 offered processing services --

4 A. Yes.

5 Q. -- including FDR, including First Data Resources.

6 A. Yes.

7 Q. There's no mention of Eurocard being an alternative for
8 processing domestic transactions there at all, is there?

9 A. I was going to remark that they forgot one, because that
10 was clearly an option.

11 Q. Well, or maybe it wasn't significant, for whatever
12 reason.

13 A. Or maybe it was not significant.

14 Q. You don't know as far as the position in the UK is
15 concerned --

16 A. I definitely know it was an option.

17 Q. You don't know what the position was in the UK.

18 A. I don't know what the position was of the author of this
19 report here, yeah, but it was definitely an option.

20 Q. Can I suggest you to a very simple reason why Eurocard
21 is not mentioned?

22 A. Tell me, please, yeah.

23 Q. Because Eurocard was not processing UK domestic
24 transactions in 1989.

25 A. But it could process, and here it says what -- the

1 options were available.

2 Q. That may be talking about identifying those entities
3 that were processing at the time.

4 A. Yeah. TSYS isn't mentioned either, but they were not
5 yet in the market.

6 Q. So let's just be clear. What's going on here? Are you
7 having an argument with me about what the facts are?

8 A. No.

9 Q. Right. What evidence -- what evidence do you have to
10 assist the Tribunal in relation to the position of
11 Eurocard so far as processing UK domestic transactions
12 in 1989 is concerned? Do you have any evidence of facts
13 that you're able to give to the Tribunal?

14 A. Yes. I used the Eurocard network to process Turkish
15 domestic transactions at the time.

16 Q. Thank you.

17 A. So --

18 Q. Can we look, please, at the Cruickshank report --

19 MR JUSTICE ROTH: Did you want to --

20 MR SMOUHA: Sorry.

21 MR JUSTICE ROTH: Sorry, I think Mr Dhaene wanted to add
22 something.

23 MR SMOUHA: Oh, I'm sorry.

24 A. So if it was possible for Turkey, it was possible for
25 Germany, for the UK. Later, the traffic between

1 Barclays and the German banks was through us, so ...

2 Q. Then we may be at cross-purposes. My question to you is
3 this. You are not able to give any evidence from your
4 own knowledge as to whether Eurocard was processing
5 UK domestic transactions in 1989.

6 A. Correct.

7 Q. Thank you.

8 Can we look, please, at the Cruickshank report;
9 {C6/445/1}. This was a report into banking in the UK
10 published in 2000.

11 Can we go, please, to page {C6/445/263}. And let me
12 tell you: this is a paragraph within a section dealing
13 with merchant acquiring and can we look, please, at
14 paragraph D2.9:

15 "The transaction processing function of merchant
16 acquirers is contracted out by several of the acquirers.
17 For example, FDR provides transactions processing
18 services to Lloyds TSB, HSBC, RBOS and the UK and
19 Ireland members of NAG; whereas NatWest and Barclays do
20 their own processing. Other aspects of merchant
21 acquiring are also carried out by third parties - for
22 example, companies such as WorldPay recruit internet
23 retailers to the card schemes and accept liability in
24 some cases if the retailer becomes bankrupt, acting as
25 a bureau or middleman between the merchant acquirer and

1 retailer."

2 So we see that FDR is mentioned as a processor?

3 A. Yes.

4 Q. Correct? In-house processing is mentioned.

5 A. Yes.

6 Q. And Europay is not mentioned as doing any processing
7 here at all.

8 A. Yes, and I remember this report very well. We read it.
9 And if I'm not mistaken, it also said that it doesn't
10 claim to be complete.

11 MR JUSTICE ROTH: Well, are you saying -- what was the
12 date --

13 A. It says, for example --

14 MR JUSTICE ROTH: Just one moment. What was the date,
15 Mr Smouha, of the Cruickshank report?

16 MR SMOUHA: It was published in 2000.

17 A. Yeah.

18 MR JUSTICE ROTH: In 2000.

19 So, Mr Dhaene, are you saying that -- when it says
20 here NatWest and Barclays do their own processing as at
21 2000, are you saying that was wrong?

22 A. No, I'm not saying that was wrong. The question that
23 one can ask then: for the business which goes from
24 NatWest to Barclays or Barclays to NatWest, which
25 network were they using? It doesn't say that.

1 MR SMOUHA: You don't know. You don't know.

2 A. It was my understanding that part of that traffic went
3 over EPS-Net.

4 Q. Well, that's going back to your conversation --

5 A. Yeah.

6 Q. -- which, as we saw --

7 A. But I didn't check that myself personally.

8 Q. It's also the case, isn't it -- well, perhaps you don't
9 know -- earlier in the period, many banks didn't use
10 Europay for processing?

11 A. Yeah.

12 Q. Can we look, please, at {C3/82.1/1}. This is
13 an internal Europay memo from 13 February 1996.

14 A. Yeah.

15 Q. And can we look at the third paragraph, please:

16 "However, if Nat West do take EPS-Net out as the
17 switch, the revenue impact to Europay would be higher.
18 This is because we would also lose revenues currently
19 earned between Nat West and the other main FDR banks
20 (Midland, Lloyds, RBS and National Australia Group).
21 Assuming the change took place Q2 '96 for all Nat West
22 'on-us' traffic plus processing between Nat West and the
23 FDR banks, we forecast the full 9 month impact at
24 88.2 M BEF to Europay."

25 So the description there of Midland, Lloyds, RBS and

1 National Australia Group as the other main FDR banks,
2 that suggests that NatWest also used FDR for some
3 processing. If you can't comment or can't say, please
4 say so.

5 A. I haven't seen that note before, but it's clear to me.
6 If I would need to interpret this paragraph, I would
7 say, okay, fine, the traffic between NatWest and the
8 other main FDR banks was going over EPS-Net and here,
9 Mr Van den Bosch describes a risk that that would be
10 moved away, to whom it doesn't say, maybe to FDR, and
11 that they would lose 88.2 million BEF as revenue.

12 Q. Mr Dhaene, thank you for that interpretation.

13 A. Yeah.

14 Q. Mr Merricks has one of the absolute crack legal teams
15 possible to put together to do things like that in terms
16 of interpreting. You are here to give evidence of what
17 you know and don't know.

18 A. Okay. This note to me says there was traffic between
19 NatWest and the other main FDR banks on the systems of
20 Europay.

21 Q. And says that and certainly suggests that NatWest also
22 used FDR for some processing.

23 MR JUSTICE ROTH: Well, I don't quite understand that.

24 MR SMOUHA: NatWest and the other main FDR banks.

25 MR JUSTICE ROTH: Yes. This is a Europay memo, is it not,

1 within Europay, the author?

2 MR SMOUHA: Yes.

3 A. Yeah.

4 MR JUSTICE ROTH: And they're saying that Europay's
5 currently earning revenue for processing between NatWest
6 and these various banks --

7 MR SMOUHA: Well, and the -- yes.

8 MR JUSTICE ROTH: -- and the other main FDR banks; that
9 Europay is earning revenue and if NatWest moves them
10 away from EPS-Net, then Europay will lose revenue.

11 MR SMOUHA: Yes. This is in 1996.

12 MR JUSTICE ROTH: Yes.

13 MR SMOUHA: So, again, I mustn't indulge in the temptation
14 to interpret, but this is -- what I was suggesting to
15 you, Mr Dhaene, is that this shows that NatWest were not
16 by 1996 even exclusively using Europay for processing.

17 A. Not exclusively. It doesn't say here, but it is
18 NatWest's acquiring or issuing function. But it must
19 have been one of the two.

20 Q. By this stage, by 1996?

21 A. Yeah, '96, 13 Feb '96.

22 Q. So can we go, please, to -- back to paragraph 20 of your
23 witness statement. Over the page to the top of page 13
24 {A/13/13}, the last sentence where I started reading at
25 the beginning of this run of documents, you say:

1 "They therefore had no other choice than to route
2 over the Eurocard EPS-Net."

3 That is wrong.

4 A. That is not wrong. It talks about the relationship
5 between Barclays and NatWest. The note of '96 clearly
6 says that NatWest is processing a part of its business
7 outside of FDR versus the FDR banks. Barclays, to my
8 knowledge, was not using FDR at that moment in time, so
9 it must have processed also, one way or another, the
10 transactions acquired on Barclays -- on NatWest cards
11 and vice versa, if that was the case. And then there
12 was no other choice than to route them over EPS-Net.

13 Q. You are talking in this paragraph about the position
14 when you joined in 1989 --

15 A. Yeah.

16 Q. -- which, if your recollection of a conversation of what
17 you were told is incorrect --

18 A. Yeah.

19 Q. -- then this too would be incorrect.

20 A. No, no. If there is no -- if the two banks are not
21 using the same processor or other processors
22 interconnected to each other, there is no other choice
23 if they want to have that business than to route over
24 EPS-Net, because both were connected to EPS-Net.

25 Q. So the two conditions, your two "ifs", are if the

1 two banks are not using the same processor.

2 A. Yeah.

3 Q. You don't know whether that was the case.

4 A. No.

5 Q. Or other processes -- or other processes were

6 interconnected to each other, and you don't know whether

7 that is the case.

8 A. No, correct. It's -- it's a theoretical description of

9 what happened if A/B is not there, then what is left

10 over as an option?

11 Q. Again, Mr Dhaene -- sorry to keep reminding you -- you

12 are not here to give interpretations. You are not here

13 to give theoretical descriptions. You are here to

14 address, so far as you can, if at all, evidence of fact.

15 A. Yeah. Well, that was a fact. If we looked at --

16 option A is not available, option B is not available,

17 fact, that option is available.

18 Q. Let's look at paragraph 21 of your statement, please, on

19 page 13 {A/13/13}. This is further detail about what

20 you say happened when Barclaycard and NatWest moved to

21 Eurocard processing. Again, you're still saying -- this

22 is all on the same basis. You are saying Barclaycard

23 and NatWest moved to Eurocard processing in 1988.

24 And could you look, please -- can I ask you to read

25 to yourself again -- remind yourself of what you've said

1 in the -- seven lines, down you have a sentence
2 beginning:

3 "I recall that ..."

4 A. Yeah.

5 Q. Can you read to yourself again what you have said there,
6 to the end of the paragraph. (Pause)

7 A. Yes.

8 Q. Now, you don't put a date on the point in time at which
9 these changes, you say, were made to allow Eurocard to
10 support wider UK domestic traffic. When are you
11 suggesting this took place?

12 A. Well, like I've mentioned, I was informed about the
13 crash of EPS-Net happening because that certain traffic
14 came on to the EPS-Net. They started working on that as
15 soon as possible. It was the head of the network,
16 Mr Didier Verstichel, which I did not mention in my
17 statement --

18 Q. Mr Dhaene, forgive me.

19 A. Yeah.

20 Q. I'm going to interrupt you, if I may --

21 A. Yes.

22 Q. -- with apologies, but also because we have time
23 constraints.

24 A. Okay.

25 Q. All I'm asking you is: what is the date you're

1 suggesting those changes were made, or if you don't
2 know, say so?

3 A. They started immediately after the case and when
4 I arrived in October '89, they were still working on
5 that, and throughout 1990.

6 Q. So the changes had not been -- had not been made when
7 you arrived?

8 A. They were working on that. They had to pull in systems
9 and that is a task which takes time.

10 Q. Right. So those had not been completed when you
11 arrived.

12 A. Those were not completed, no. In fact, it took quite
13 some time.

14 Q. Could we turn to paragraph 47 of your witness statement
15 on page 22 {A/13/22}. You say here:

16 "I personally inputted somewhere between 100 and
17 150 banks onto the Eurocard system between 1989 and
18 1992."

19 And you made reference to that this morning,
20 I think, in answer to the question from the Chair. Just
21 to be clear, at that time, your area was Central Europe.

22 A. Yes.

23 Q. And I think you confirmed to the Chair that those were
24 all banks in your region.

25 A. Yeah.

1 Q. And it obviously wasn't your job to input details for
2 UK banks for domestic transactions.

3 A. Correct.

4 Q. Then you say in the fourth line:

5 "The Eurocard system was perfectly capable of
6 implementing different interchange fees for different
7 bank pairs - from both a technical perspective and
8 a rules perspective ..."

9 Are you suggesting there that there were no
10 technical limitations on implementing bilateral
11 agreements in the period you're talking about here, 1989
12 to 1992?

13 A. Well, that's not correct. The system was capable of
14 doing that, but you needed to ask for a development.
15 For instance, in that period of time, I asked the
16 technical department to implement a domestic processing
17 system for Turkey, so they had to do that. They were
18 capable of doing that, but they had to put it into the
19 system. They had to do some development work.

20 Q. Well --

21 A. It was not like they were not capable of doing that. It
22 was simply not there.

23 Q. Right, fine.

24 A. Yeah.

25 Q. Let's -- we're going to get confused if we start talking

1 about capability in terms of something that could be
2 done. Let's concentrate on facts actually as to whether
3 there were or were not technical limitations.

4 MR JUSTICE ROTH: Well, there are two different kinds of
5 limitations. Some things could be implemented with some
6 technical adjustments and some things the system
7 couldn't be adjusted to do.

8 MR SMOUHA: Yes, sir.

9 MR JUSTICE ROTH: So they're both technical questions.

10 MR SMOUHA: I agree they are different questions and,
11 Mr Dhaene, what I want to ask you about is in terms of
12 the facts as to actually what the system did; in other
13 words, as it was without whatever adjustments could have
14 been made. In relation to the period 1989 to 1992, you
15 don't know what the position was in the UK, do you?

16 A. Yeah, the UK was not my responsibility.

17 Q. Could we look, please, at {C1/374/1}. This is a letter
18 of 21 April 1993 from Europay to NatWest. This is from
19 Patrick Nelson, Regional Business Manager for UK and
20 Republic of Ireland.

21 A. Yeah.

22 Q. Did you know him?

23 A. Yes, yes.

24 Q. So did he work under Mr Henning?

25 A. No, no, no. It was past '92 here.

1 Q. Yes.

2 A. I think he was reporting directly to Francis.

3 Q. Right.

4 A. There might be one person in between that I can't
5 remember, who would then have the whole overview of the
6 region, but I think he was reporting directly to
7 Francis.

8 Q. Right. So, anyway, the UK is obviously his area of
9 responsibility.

10 A. Yeah.

11 Q. And he says --

12 A. And I --

13 Q. Sorry.

14 A. And I thought also Ireland, but --

15 Q. And Ireland?

16 A. Yeah.

17 Q. You are quite correct. It says under his signature.
18 Thank you for that correction.

19 A. Yeah.

20 Q. Addressed to Mr Tyndall of NatWest and he says, under
21 the heading "Domestic Bilateral Interchange Agreements":
22 "I am pleased to inform you that, as from midnight
23 Sunday 2 May 1993, Europay International will be able to
24 support bilateral interchange arrangements for
25 UK domestic clearing and settlement traffic. In

1 practice, this will mean that any transactions received
2 for clearing processing on Sunday 2 May will be treated
3 using the new rates."

4 A. Yeah.

5 Q. So this indicates that up until 2 May 1993, Europay was
6 not able to support bilateral interchange arrangements
7 for UK domestic clearing or settlement, or if the
8 position is you can't comment, please say so.

9 A. Yeah, I can't really comment, but I wouldn't read it in
10 that way --

11 Q. Well, as I say, don't -- let's not do the
12 interpretation.

13 A. Yeah.

14 Q. If you can't assist as a matter of evidence, then
15 I'll move on.

16 A. Yeah, I can't -- I can't comment on that. I need to see
17 all the documentation before.

18 Q. Mr Dhaene, do you recall the EEA MIFs changed in
19 April 1995?

20 A. Mm-hmm.

21 MR JUSTICE ROTH: You need to say "yes" or "no".

22 A. Yes, sorry.

23 MR SMOUHA: Sorry, forgive me, Mr Dhaene.

24 A. Yeah.

25 Q. I've missed one. Can I just go back, please, to

1 paragraph 47 of your witness statement {A/13/22}.

2 A. Yes.

3 Q. I asked you about the inputting. In the last sentence
4 of that paragraph, you say:

5 "However, it is my recollection that the reality was
6 that different fees were rarely, if ever, used."

7 Can we just go back to the letter that I just took
8 you to, {C1/374/1}, and if we go -- I think it will be
9 the next document, so if we can go to {C1/375/1}.

10 MR JUSTICE ROTH: Before you do that, can I just ask
11 Mr Dhaene.

12 You clarified, I think, in answer to my question --
13 repeated an answer to Mr Smouha's question that the
14 100/150 banks, those would be -- would not be
15 UK domestic banks. They would be either banks in your
16 area or subsidiaries of you.

17 A. Yeah.

18 MR JUSTICE ROTH: When you say in the end of that paragraph
19 "it is my recollection that the reality was that
20 different fees were rarely, if ever, used", are you
21 referring to what you know about those 100 to 150 banks?
22 Is that right?

23 A. I know for a fact it was not the case in my region.

24 MR JUSTICE ROTH: Yes.

25 A. I know for a fact that it was very rare, because none of

1 my colleagues reported to us -- they would normally
2 report those things in the meetings. They would say,
3 "Look here, we have this occurrence of a change in fee
4 which is not according to what we have in our system",
5 which is an override.

6 MR JUSTICE ROTH: I see. Yes, thank you.

7 MR SMOUHA: Just to be clear, what you are saying is that
8 your recollection is that, though the system could
9 implement different interchange fees --

10 A. Yes.

11 Q. -- different fees were rarely, if ever, used as between
12 different banks pairs.

13 A. Yeah.

14 Q. Right, and is that evidence you're giving with reference
15 to the UK?

16 A. No, that's, like I said, factual evidence in my
17 region --

18 Q. In your region?

19 A. -- and factual evidence from the fact that we didn't
20 hear of those in the meetings. They would definitely
21 have mentioned those in meetings.

22 Q. Or there may have been a reason not to mention it.

23 A. Yeah.

24 MR JUSTICE ROTH: Why do you say they would have definitely
25 have mentioned it?

1 A. Because it's an override and each time there's
2 an override, there's a possibility, an important
3 possibility, of an error and, as such, the communication
4 of the override would not have been very important to
5 mention in the meeting, but the fact as to whether it
6 went on smoothly or there were issues. And,
7 unfortunately, there were, from time to time, issues in
8 those overrides.

9 MR JUSTICE ROTH: But if it had gone smoothly and done in
10 the UK with an override, would it be something that
11 Mr Jensen would necessarily have mentioned?

12 A. Yes. In the weekly meetings, he would have mentioned,
13 "We have done this, we have done this, we have done
14 this", and that would definitely be an item he would
15 have mentioned, definitely. Yeah.

16 MR JUSTICE ROTH: Yes, I see.

17 A. And vice versa. I would have done that too.

18 MR SMOUHA: The second paragraph of that letter -- in the
19 second paragraph of that letter, Mr Nelson says
20 {C1/374/1}:

21 "A complete list of interchange agreements entered
22 into by National Westminster Bank is attached for your
23 reference. Please let me know if this does not match
24 with your own records."

25 Do you see that?

1 A. Yeah.

2 Q. If we can go to the attachment, which is at {C1/375/1}.

3 A. Yeah.

4 Q. Do you see that, Mr Dhaene?

5 A. Yeah.

6 Q. We see a number of different interchange fees for
7 different bank pairs, don't we?

8 A. Yes. Lots of them are equal, though.

9 Q. Well, Mr Dhaene, it's you that said, "It's my
10 recollection that the reality was that different rates
11 were rarely, if ever, used".

12 A. Yeah. So it's, statistically speaking, rare that there
13 is a difference.

14 Q. Right. So we're going to get rid of interpretation,
15 please, Mr Dhaene.

16 A. Yeah.

17 Q. We're going to get rid of theory and now can we also get
18 rid of statistical interpretation?

19 A. Okay.

20 Q. Can you try and stick to the facts?
21 You had no idea what was happening in the UK, did
22 you, because there was no reason for you --

23 A. There was no reason --

24 MR JUSTICE ROTH: To be fair, Mr Dhaene has explained he
25 didn't have, as it were, firsthand knowledge. He said

1 that, but he had these weekly meetings. There were
2 three of them. They were all dealing with the same
3 issues and he says his knowledge is derived from
4 Mr Jensen and this is something -- he says their working
5 practice was they would have reported this to each
6 other, and that's the basis on which he gives evidence
7 for the UK. So it's subject to that limitation, but
8 he's explained why he thinks it's -- how he comes to
9 rely on it.

10 And we've here got a table for the UK. This is from
11 1993.

12 MR SMOUHA: Yes.

13 MR JUSTICE ROTH: So a little bit after the period, but not
14 long, and we've got two or three different fees.

15 MR SMOUHA: Yes, and, of course, the Tribunal has fuller
16 information of other bilaterals for 1992.

17 MR JUSTICE ROTH: Yes.

18 MR SMOUHA: So let me move on. I think I've explored the
19 limits of the assistance Mr Dhaene can give you on that
20 point.

21 MR JUSTICE ROTH: Yes.

22 MR SMOUHA: Mr Dhaene, do you recall that the EEA MIFs
23 changed in April 1995?

24 A. Yeah.

25 Q. Three new rates were created.

1 A. There were a number of new rates created. I don't know
2 off the top of my head now which ones they were, but --

3 Q. That's very fair.

4 A. Yes.

5 Q. Can I show you a document to remind you?

6 A. Yes, yes.

7 Q. {C2/331/21}.

8 A. Yeah.

9 Q. A new rate of base of 1.15%. Electronic, a new
10 category --

11 A. Yeah.

12 Q. -- and rate, 0.9%. And secured electronic, new category
13 and rate of 0.75%.

14 A. Yeah.

15 Q. Can we go, please, to {C2/361.1/1}, and this is an email
16 from Mr Jenkins to Mr Nelson, who we've seen was the
17 UK and Ireland regional manager. This is of
18 22 February 1995 and under the first heading --
19 paragraph 2.1.1, Mr Jenkins says:

20 "I think we have already answered this in our last
21 letter. There is no precedent to suggest that because
22 we have changed the cross-border rate that domestic
23 rates change as well. This is down to the domestic
24 issuers/acquirers to decide."

25 From your own knowledge, Mr Dhaene, you don't have

1 any reason or basis to suggest that what this email says
2 is untrue, do you?

3 A. No.

4 Q. So the change in the EEA MIF wasn't expected to affect
5 the interchange fees that were being applied by Europay
6 to domestic transactions. That's what this suggests; do
7 you agree?

8 A. Yeah.

9 Q. And just as it had not affected them in the past, as it
10 appears from this, there is no precedent.

11 A. In terms of the change, yeah.

12 Q. And that was because the UK market was based on
13 bilateral agreements or, again, you can't say?

14 A. Yeah, I can't really comment on that. I would interpret
15 that that was because it was --

16 Q. No, Mr Dhaene, please don't interpret. Just, please,
17 confirm that you had no involvement in any discussions
18 about whether any changes should be agreed to
19 UK domestic rates just because new rates had been
20 created for the intra-EEA MIF.

21 A. Correct.

22 Q. Thank you.

23 Can we go back to paragraph 16 of your statement on
24 page 11 and, you recall when we started looking at this
25 and this section {A/13/11}, I -- sorry, you confirmed

1 that what you say here in paragraph 16, but starting by
2 "As I explain below", is a reference to the paragraphs
3 in the section which follow, which -- we've now been
4 through that material and shown in a number of
5 significant respects, I would suggest to you, that as
6 facts, they are incorrect.

7 What I would like to do, please, just in conclusion
8 on this point is to ask you to look at Mr Van den
9 Bergh's statement at {A/13.5/5}.

10 Just while that's coming up, can I ask you,
11 Mr Dhaene, have you read Mr Van den Bergh's statement?

12 A. Yes.

13 Q. Thank you. That's very helpful.

14 Could you please remind yourself -- sorry, I have
15 given a wrong page reference. A/13 -- sorry, Mr Dhaene,
16 sir, my fault. Could we start on page 2, please
17 {A/13.5/2}, where Mr Van den Bergh describes his
18 professional background. Just remind yourself,
19 Mr Dhaene, what Mr Van den Bergh says in paragraph 7 and
20 then when you're ready, we'll turn over the page and
21 I'll ask you to read paragraph 8. (Pause)

22 A. Okay, yeah.

23 Q. If we could have the next page, please. (Pause)

24 Mr Dhaene, I take it that you would accept that Mr
25 Van den Bergh is someone who can speak directly to

1 questions about processing of UK domestic transactions
2 and processing interchange fees by Europay by -- at EPSS
3 at least from 1992 --

4 A. Yeah.

5 Q. -- when he joined. Thank you. Because those are
6 obviously matters which fell within his and the
7 operation team's area of responsibility.

8 A. Yes.

9 Q. Unlike you.

10 A. I was not in operations, yeah.

11 Q. Right. If we can go, please, to page 5 {A/13.5/5}, and
12 can I ask you, please, to remind yourself of what Mr Van
13 den Bergh says in paragraphs 14 to 17. (Pause)

14 A. Okay.

15 Q. I'd ask you to focus, please, in paragraph 16 --

16 A. Yeah.

17 Q. -- on the second sentence:

18 "To the contrary, when I joined the Operations Team
19 in 1992, I recall that Europay almost exclusively
20 cleared cross-border transactions between banks, and
21 generally did not process domestic transactions."

22 Mr Dhaene, you have no basis for disputing that
23 evidence, do you?

24 A. I have. That may be correct for the UK, but in my
25 region --

1 Q. Mr Dhaene, apologies, that's my fault. I should have --
2 and it's clear from the first sentence Mr Van den Bergh
3 is talking about domestic transactions between UK banks,
4 so let me reformulate the question.

5 On the basis that what Mr Van den Bergh is
6 addressing in that second sentence is the position in
7 relation to domestic transactions between UK banks, you
8 have no basis for disputing his evidence.

9 A. No, other than what I was told that they were. So --

10 Q. Thank you.

11 A. -- I have two statements --

12 Q. Now --

13 A. -- which are contradictory, which I'm not able to
14 verify.

15 Q. Well, that will be a matter for submission to the
16 Tribunal as to how to reconcile Mr Van den Bergh's
17 evidence, and he will be giving evidence, and your
18 evidence of the conversation that you had in 1989.

19 Now, back to your statement, please, paragraph 27,
20 {A/13/15}. Three lines from the bottom of the page, you
21 say:

22 "It was also understood by the banks that the system
23 default would apply when a new bank was set up until the
24 banks informed Eurocard of required changes. The
25 intra-EEA MIF was the default value."

1 Now, you're referring here to what the banks
2 understood. Are you suggesting or giving evidence as to
3 what the UK banks understood?

4 A. Also the UK banks understood that. All the banks
5 understood that very well, and that's why we -- they
6 were very careful in the set up to mention if there were
7 variations to the default, those are the variations to
8 the default.

9 Q. You weren't in a position to know what each UK bank
10 understood about Europay systems.

11 A. Well, they hadn't told me individually.

12 Q. You didn't deal with them.

13 A. I didn't deal with them.

14 Q. Well, if you didn't deal with them, they wouldn't have
15 been telling you anything at all.

16 A. Yeah, correct.

17 Q. Thank you.

18 Can we go next to paragraph 45 of your statement on
19 page 21. Just remind yourself of what you've said in
20 paragraph 45, please {A/13/21}.

21 A. Yeah.

22 Q. So you're talking here about the addition of banks into
23 the Eurocard system between 1989 and 1992.

24 A. Yeah.

25 Q. And is the reason you put the limit on that because you

- 1 moved to a new role in 1993?
- 2 A. Yes, yeah.
- 3 Q. Thank you.
- 4 Now, you describe a situation here of the person
5 doing the inputting making a mistake and failing to
6 enter a bilateral agreement or another domestic rate
7 into the system.
- 8 A. Yeah.
- 9 Q. Now, if that was to happen, you would expect the bank to
10 notice that there had been an error, wouldn't you?
- 11 A. Yes, but that's not always that obvious. It's not like
12 within a second, you notice.
- 13 Q. If the bank -- I didn't say in a second you notice.
14 I asked you, Mr Dhaene, whether you would expect the
15 bank to notice that there had been an error.
- 16 A. Yeah.
- 17 Q. You would?
- 18 A. Yeah.
- 19 Q. Thank you. You would then expect the bank to bring that
20 to Eurocard's attention.
- 21 A. Yes.
- 22 Q. If an issuer had been getting a rate that was lower than
23 what they had agreed, they would have every reason to
24 raise it, wouldn't they?
- 25 A. Yes.

1 Q. Now, you have no personal knowledge of this whatsoever,
2 do you? You don't know if such errors happened in the
3 UK.

4 A. Not in the UK.

5 Q. And you don't -- and, if so, you don't know how often it
6 happened.

7 A. Correct, not in the UK.

8 Q. And for all you know, any and every such error was
9 picked up and corrected, for all you know.

10 A. Yeah. It would be picked up and corrected, yes.

11 MR SMOUHA: Thank you.

12 Sir, I'm moving on to a new topic.

13 MR JUSTICE ROTH: Would that be a sensible moment?

14 MR SMOUHA: Certainly.

15 MR JUSTICE ROTH: So we'll take a ten-minute break.

16 (3.13 pm)

17 (A short break)

18 (3.26 pm)

19 MR SMOUHA: Mr Dhaene, can you look, please, at paragraph 75
20 of your witness statement, page 31 and, again, just the
21 bottom of page 31. Just remind yourself of what you've
22 said in paragraph 75 {A/13/31}.

23 A. Yeah. (Pause)

24 Q. You're commenting here on the question of whether
25 interchange fees on Mastercard transactions were

1 influenced by Visa's interchange fees and, in
2 paragraph 76, you then say {A/13/32}:

3 "From my experience, it was rare in those days for
4 consumers to hold two different branded cards (for
5 example one Mastercard and one Visa). This was because
6 issuing banks typically limited their offering to only
7 one brand. Over time that has changed, and some banks
8 (although still few) offer both Visa and Mastercard.
9 For example, I recall that during the 1990s
10 Barclays Bank Germany issued a 'Dobbele Karte' whereby
11 if you ordered a Mastercard, you also got a Visa for
12 free on the same account."

13 You don't know what the position is in the UK in the
14 1990s, do you?

15 A. No.

16 Q. Did you know that Barclays issued Eurocard/Mastercards
17 in significant volumes?

18 A. That I know, yeah.

19 Q. You do know that?

20 A. That, yes, but what the volumes are I'm not able to
21 remember --

22 Q. Did you know that --

23 A. -- because it became a significant issue, yeah.

24 Q. Did you know that Barclays issued Visa payment cards?

25 A. Yes.

1 Q. Did you know that Barclays was the largest issuer of
2 Visa payment cards in the UK in the late 1980s?

3 A. Yes.

4 Q. For the Tribunal's reference, in 1988, Barclays had
5 issued 8.68 million Visa cards and they had 35% of all
6 Visa cards. The reference is {C15/126/319}. That's the
7 MMC report dating from August 1989.

8 You have no idea how many issuing banks in the UK
9 limited their offering to only one brand, do you?

10 A. I think they were rare. I can't remember anyone
11 mentioning that there were banks who offered both, other
12 than Barclays when they got a licence for Mastercard and
13 when another bank got a licence -- Mastercard Bank got
14 a licence for Visa.

15 Q. Can we look at C15/136/382? (Pause)

16 MR JUSTICE ROTH: What is it you're looking for?

17 MR SMOUHA: Just one moment. Sorry, sir.

18 This is still in the MMC report, {C15/126/382},
19 paragraph 3.104 under the heading "The development of
20 'duality':

21 "Since the middle of 1988, a number of banks have
22 obtained or applied for licences to enable them to
23 become members of both Visa and MasterCard/Eurocard."

24 Then if we go to 3.106, two paragraphs down:

25 "So far as cardholders are concerned, the ability to

1 offer a dual service would enable card issuers to offer
2 a greater variety of credit cards, either as mass
3 circulation cards or cards aimed at particular groups of
4 customers, such as the affinity type of card already
5 mentioned."

6 And then over the page, please, at page 383 --
7 sorry, I apologise. Can we go back to the bottom of
8 382, 3.107:

9 "Lloyds was the first bank to offer a dual card
10 issuing service, when, in the middle of 1988, it offered
11 a Visa debit card in addition to its Access credit card.
12 The following banks now have both Visa and
13 MasterCard/Eurocard membership: Barclays ... BCCI,
14 Girobank. Lloyds, Midland, NatWest, Fleming, [Bank of
15 Scotland] and RBS. TSB, which is a Visa member, has
16 applied for MasterCard/Eurocard membership."

17 And then over the page {C15/126/383},
18 paragraph 3.108:

19 "By May 1989, the following developments had
20 occurred in merchant acquisition and card issuing
21 associated with the development of duality ...

22 "(a) In March 1989 Lloyds made available to traders
23 a service for both their Visa and their
24 MasterCard/Eurocard/Access transactions, the only bank
25 so far to offer such a dual service.

1 "... Barclays has announced that it will offer a
2 similar service from 30 May 1989.

3 "... Midland and NatWest have announced that they
4 will also offer a dual service to merchants as, we
5 understand, will RBS."

6 So just going back to that list on the bottom of the
7 previous page, actually, in the UK, it was commonplace
8 or it became commonplace for banks to issue both Visa
9 and Eurocard/Mastercard.

10 MR JUSTICE ROTH: Well, they say they got membership.

11 A. Yeah. That's not exactly the same.

12 MR JUSTICE ROTH: I mean, Lloyds there, it's virtually not
13 two credit cards, is it, in the example given? (Pause)

14 PROFESSOR WATERSON: Yes, it may be these relate to these
15 Affinity cards. We haven't, I think, heard about
16 Affinity cards.

17 MR SMOUHA: Thank you. Thank you, sir. In fact, we see
18 that if we go on to page 383, paragraph 3.110:

19 "The following cards have been launched since the
20 beginning of 1989 and the obtaining of dual licences by
21 the banks concerned:

22 "... Barclays has issued two new MasterCard cards.
23 One of these is an RAC-affinity credit card, with terms
24 similar to other mass circulation credit cards. The
25 other is a budget credit card called 'Assent' ...

1 "(b) Midland has issued a Visa credit card, called
2 Indigo ...

3 "(c) NatWest has launched a new Visa credit card,
4 with terms and conditions similar to its Access credit
5 card ...

6 "(d) BCCI is now offering a new MasterCard credit
7 card ...

8 "(e) Midland's MasterCard Arts Card affinity
9 card ..."

10 A. So here in this example, you see that NatWest is the
11 only one who has afford, like, Visa card/Mastercard or
12 Access Mastercard. All the others are other types of
13 product.

14 Q. Well, Mr Dhaene, again, in terms of what you know, your
15 evidence, the Tribunal can --

16 MR JUSTICE ROTH: Well, to be fair, Mr Smouha, you are
17 challenging Mr Dhaene's evidence on the basis of this
18 document and he's responding to this document to say,
19 "Well, the only thing there that does make me see that
20 there's anything inconsistent with what I said is
21 NatWest with the Visa card", so --

22 MR SMOUHA: Well --

23 MR JUSTICE ROTH: And he's saying, "This was my experience".
24 He's not saying he's expressing absolute omniscience
25 when he's saying -- he doesn't say -- he says it's rare

1 for consumers to hold two different branded cards.
2 Well, that's about consumers. And then he's saying
3 banks typically; he's not saying they never did. And
4 you sought to challenge that saying, "Look at this.
5 That can't be right."

6 MR SMOUHA: Sir, in relation to what this document shows, as
7 I say, this may be a matter for submission, but in
8 relation to what this documents shows, the card being
9 launched since the beginning of 1989, 3.110(a) is
10 referring to Barclays issuing two new Mastercard cards
11 in circumstances where it had --

12 MR JUSTICE ROTH: I think Affinity cards are a bit
13 different --

14 MR SMOUHA: One of those is an Affinity card.

15 MR JUSTICE ROTH: Yes, and the other is a particular kind.

16 MR SMOUHA: Midland -- Midland --

17 MR JUSTICE ROTH: It's not equal to Visa because you haven't
18 got the same flexibility.

19 MR SMOUHA: Sir, I'm going to be, if I may, resistant to
20 debating it with you --

21 MR JUSTICE ROTH: No, I'm not asking you to debate it with
22 me. I'm just saying that you're putting -- your last
23 remark to the witness was to say that -- and that's
24 what's prompted my naming that you're seeking to
25 challenge his evidence saying he doesn't really know

1 anything.

2 MR SMOUHA: Well, that is, sir, indeed what I -- and let me
3 reformulate the question because what I do want to get
4 at, if I can, with Mr Dhaene is, actually, what is the
5 factual evidence he has to give on this as the basis for
6 what's said in paragraph 76?

7 Well, Mr Dhaene, what do you know from within your
8 personal knowledge in relation to -- that can help the
9 Tribunal in relation to whether, in the UK, issuing
10 banks limited their offering to only one brand? Do you
11 have anything that you can actually say to the Tribunal
12 as a matter of your own knowledge?

13 A. As a matter of my own knowledge, I remember very well
14 the Automobile Club cards because then Visa was trying
15 to make the same breakthrough in Holland, adding or
16 offering a card with the Automobile Club of Holland.
17 Again, I assume RAC is the Automobile Club card,
18 Affinity card.

19 As -- as a consumer, you cannot apply for an RAC
20 card directly with the bank. You need to be an RAC
21 member and then you can get such card. You can apply
22 for such a card. So it's no way comparable to
23 a standard card, for instance.

24 And that's it.

25 Q. That's it. Very well. Let's move on.

1 Mr Dhaene, at paragraph 59 of your witness statement
2 on page 26 {A/13/26}, in this paragraph you are
3 referring to a letter from the British Retail Consortium
4 that you say arrived on Henning's desk. You mentioned
5 that letter this morning.

6 And I take it from what -- well, let me just focus
7 on the particular point I want to ask you. On the next
8 page, page 27, still within this paragraph {A/13/27},
9 you say three lines down:

10 "Eurocard had an interchange fee for intra-regional
11 transactions within the Europe region (i.e. the
12 intra-EEA MIF) that had been set at a particular level
13 (I recall at this time it was 1%). That rate was
14 applicable to all transactions, whether signature or PIN
15 based, paper based or electronic. I recall that this
16 was in the pricing paper that we mailed to our new
17 members, certainly by 1991 (and possible even before
18 that)."

19 So a 1% rate applicable to all transactions, you
20 say. That's from your recollection --

21 A. Yes.

22 Q. -- 30 years later.

23 A. Yes.

24 Q. You have not checked whether that's actually correct?

25 A. I couldn't check. I don't have the information.

1 Q. Where -- where would you have checked? What information
2 would you want in order to check it?

3 A. Well, I would need the manual and the pricing paper.

4 Q. This is -- let's just be clear, Mr Dhaene. This is in
5 the -- this paragraph is -- you're making this statement
6 in the context of an allegation that you're making that
7 Eurocard was trying to reverse-engineer a defence of
8 a single rate intra-EEA MIF that applied across the
9 board.

10 A. Yeah.

11 Q. In fact, Mr Dhaene, there were multiple EEA MIFs and for
12 rates lower than 1%.

13 A. That's possible, but let's say the bulk of the traffic
14 was around 1%.

15 Q. Well, that's different from what you've said in your
16 paragraph, but let me show you some documents --

17 A. Yeah.

18 Q. -- and then you can consider --

19 A. Yeah.

20 Q. -- whether you want to revise your evidence.

21 Petrol transactions, for example. Can we go to
22 {C1/109/1}, paragraph E7.02.1.3, "Petrol Outlets". Do
23 you see that?

24 A. Yeah.

25 Q. "The interchange fee on transactions performed at petrol

1 outlets is reduced to a minimum of 0.50%."

2 MR JUSTICE ROTH: Sorry, what document is this?

3 Q. Sir, this is the Eurocard International Rules,

4 30 July 1990:

5 "This fee is applicable both in the case of [point
6 of sale] and paper-based transactions."

7 Do you see that?

8 A. Yeah.

9 Q. Then if we go to up to E7.02.1.2, "Electronic

10 Transactions":

11 "For individual transactions performed at merchant
12 outlets when EPSS qualified POS devices are used, the
13 acquirers in the EPSS system are entitled to a flat
14 0.50% interchange fee only."

15 A. Yeah.

16 Q. The 0.5% rate for petrol had been in place for several
17 years by 1990; in fact, since 1987.

18 A. Yeah --

19 Q. When you say "yes" --

20 A. But it was a very limited business.

21 Q. Sorry, when you say "yes", you mean you know that?

22 A. Yeah, I remember that.

23 Q. Right. Why didn't you mention that in your witness
24 statement?

25 A. Because it was a relatively reduced business. It was

1 not the bulk of the business. I can't remember the
2 percentage, but it was very low in terms of
3 percentage --

4 Q. Right. Well, then --

5 A. -- of the -- of the total volume.

6 Q. Maybe, Mr Dhaene, I've unfairly misread what you say in
7 your statement in that sentence, but I read the words,
8 "That rate was applicable to all transactions".

9 A. And where do you read that?

10 Q. Five lines down.

11 A. Yeah, for the volume of the transactions, that rate was
12 applicable, whether it was signature, PIN-based, paper
13 or electronic. In the beginning, it was one fee, one
14 interchange fee, for all those transactions. I think in
15 this paragraph here, I'm trying to demonstrate that
16 there were a set of business conditions which were
17 driving interchange, and one of the business conditions
18 was to have more electronic transactions at petrol
19 outlets, the programme which could -- which took some
20 time, and the introduction of full electronic
21 transactions.

22 Q. Mr Dhaene, I'm making a much -- I'm asking you something
23 much, much simpler. You have made an unqualified
24 statement in this paragraph that a 1% rate was
25 applicable to all transactions; a 1% intra-EEA MIF rate

1 was applicable.

2 A. Yeah.

3 Q. You've just said, actually, you know perfectly well and
4 remember that, for example, in relation to petrol, that
5 was not the case.

6 A. Yes, but like I explained, it was for a limited volume.
7 The -- the bulk of the volume was 1%.

8 MR JUSTICE ROTH: Yes, it's -- no, I think the point being
9 made --

10 A. Yeah.

11 MR JUSTICE ROTH: -- is that you don't say the overwhelming
12 volume was at 1%.

13 A. Yeah.

14 MR JUSTICE ROTH: In fact, you say that rate was applicable
15 to all transactions of any kind.

16 A. Yes, if all is 100%, that was incorrect. When
17 I mentioned the 1%, I said in the beginning in that
18 period, for signature, as well as for PIN-based, because
19 it was the start of PIN-based, paper-based or
20 electronic, it used to be 1%. In the context of where
21 it moved on later where the standard rate was increased
22 to, for instance, 1.15 -- you showed the table before
23 the break, I think -- and for electronic, it was then
24 a bit lower.

25 MR SMOUHA: And not only -- not only petrol, but also, as

1 you see on this page and the other paragraph I showed
2 you, a lower rate for electronic transactions --

3 A. Yeah.

4 Q. -- that you don't mention.

5 A. Yes, it was also the beginning of electronic.

6 Q. Do you remember that?

7 A. I remember that, yeah.

8 Q. Can we go to {C2/289.1/1}, please. This is a Europay
9 document from -- dating from 1994.

10 A. Yeah.

11 Q. And on the second page -- no, third page {C2/289.1/3},
12 if we go to page 3 -- thank you -- this is a table that
13 shows reduced interchange fees and also shows when they
14 were introduced.

15 So -- and I'm sure you can help me and confirm
16 whether this is correct, but, for example, if we look in
17 the top line, does this show a service -- a fee in
18 relation to service station transactions?

19 A. Mm-hmm.

20 Q. The eighth column, "Fee [percent]", shows the rate, half
21 a percent.

22 A. Yeah.

23 Q. The category is shown under "Merchant Description".

24 A. Yeah.

25 Q. And then from the last column, we can tell the date when

1 it was introduced --

2 A. Yeah.

3 Q. -- 27 August '87; is that correct?

4 A. Yes, yeah.

5 Q. Second line, another half a percent.

6 A. Eurocard France, yeah.

7 Q. Automated fuel dispense.

8 A. Yeah.

9 Q. And all of these on this page are below 1%.

10 A. Yeah.

11 Q. And if we look at the dates, they go back to -- had been

12 in place since '87, 1990, '86 for some years.

13 A. Mm-hmm.

14 MR JUSTICE ROTH: I'm just trying to understand. These are

15 country rates; yes? Some are French and the rest are

16 Spanish; is that right?

17 A. Yes.

18 MR JUSTICE ROTH: The first two are --

19 A. It's the acquirer who could ask a sort of exemption on

20 the interchange rate to stimulate the acceptance at

21 those point of sales. So here, you see that France is

22 asking or proposing 50 basis points, 0.5%, for their

23 service and petrol stations, including the CAT, the

24 automated terminals.

25 And then you see a set of requests from Spain, which

1 have been approved in a variety of merchant segments,
2 but all relatively small -- well, you have restaurants
3 first paying. You have hotels, and it was obvious Spain
4 was primarily an acquirer in the system.

5 And I think if you move down, you will eventually
6 come to GBP.

7 Q. "CCA", the fourth column, is the currency code; is that
8 right?

9 A. Yes. So if you move down, you probably come to GBP.
10 I think they're listed on "ICA".

11 Q. Mr Dhaene, as I understand from the evidence you have
12 given, which was certainly not what I expected, you
13 actually have a recollection of there having been
14 a number of rates lower than 1% --

15 A. Yes.

16 Q. -- and some significantly below 1%.

17 A. That's correct, but all -- most of the volume from those
18 were limited. So if you would take what is the average
19 interchange over volume, you will end up very close to
20 the 1%.

21 Q. Well, that is something, Mr Dhaene, you could have
22 explained in your witness statement --

23 A. I could have, yeah.

24 Q. -- and that would have been rather more accurate,
25 wouldn't it?

1 A. Yes, correct.

2 Q. Thank you.

3 MR JUSTICE ROTH: But I'm just trying to understand. In
4 paragraph 59, when you say Eurocard interchange fees for
5 intra-regional transactions within the Europe region,
6 the intra-EEA MIF, that would be between all countries
7 in Europe, would it?

8 A. Yeah, if you would take all the volume --

9 MR JUSTICE ROTH: (Overspeaking) --

10 A. If you would take the total transfer of interchange
11 divided by the volume, you would end up fairly close to
12 the 1%, and 1% was a figure we had in mind, was there
13 since a long time also, which we used if we had to make
14 quick calculations.

15 MR JUSTICE ROTH: Yes, and the fees on this table --

16 A. Yeah.

17 MR JUSTICE ROTH: -- are these EEA MIFs or are these just
18 MIFs for transactions with French acquirers and Spanish
19 acquirers?

20 A. Yeah, yeah.

21 MR JUSTICE ROTH: So they don't apply across the EEA.

22 A. No, no, no. I remember a merchant programme --

23 MR JUSTICE ROTH: Yes.

24 A. -- who said, "Look, we want to stimulate the acceptance
25 and we want to stimulate certain types of transactions

1 like electronic or secured", and the acquirers could
2 then make a proposal.

3 MR JUSTICE ROTH: Yes.

4 A. It had to match a sort of business plan, although I have
5 some doubt whether it was looked at carefully, and you
6 could say, okay --

7 MR JUSTICE ROTH: No, I think we've got the picture.

8 I don't think this has anything to do with EEA MIFs,
9 Mr Smouha. I think it's dealing with something else, as
10 I understand. I don't know if you want to pursue it,
11 but these are not -- these don't apply across the EEA.

12 MR SMOUHA: I think we think they do. It's just being
13 expressed --

14 MR JUSTICE ROTH: Well, that's --

15 MR SMOUHA: But -- but --

16 MR JUSTICE ROTH: If you do, you need to put it to Mr Dhaene
17 because his evidence is clear that this is only for the
18 service stations in France. It will be, of course, for
19 foreigners coming into France, but it's not across --
20 it's only with French acquirers. It's not across the
21 EEA.

22 MR SMOUHA: Sir, I'm not going to put it on this document
23 because Mr Dhaene has accepted and indeed he said that
24 he recalls that in relation to petrol and electronic
25 transactions, there was a reduced rate.

- 1 MR JUSTICE ROTH: Yes, those were EEA.
- 2 MR SMOUHA: I'm not -- I don't need to go further than that.
- 3 MR JUSTICE ROTH: I think this is something else.
- 4 MR SMOUHA: Mr Dhaene, can you now look, please, at
5 paragraphs 49 and 50 of your statement on page 23
6 {A/13/23}.
- 7 A. Yeah.
- 8 Q. Would you just remind yourself of what you say there,
9 dealing with arbitration? (Pause)
- 10 A. Yeah.
- 11 Q. Now, you're saying that as regards Eurocard,
12 an arbitration procedure was available and it was
13 invoked in the case of Barclays in Germany --
- 14 A. Yes.
- 15 Q. -- in 1992, and that was a dispute concerning whether
16 Barclays should be given a licence to enter the German
17 market.
- 18 A. Correct.
- 19 Q. And you are also saying the arbitration procedure was
20 rarely used.
- 21 A. Yeah, that was my understanding.
- 22 Q. Now, just to be clear, so you were regional manager for
23 Central Europe until 1993.
- 24 A. Yeah.
- 25 Q. Is your evidence on the arbitration procedure -- are you

1 giving evidence in relation to that period, in other
2 words, up to 1993, or are you also saying that you have
3 evidence to give in relation to later periods in the
4 1990s and --

5 A. No, no. I would probably know some cases, but I'm not
6 saying that.

7 Q. Right. So it maybe follows from that you may not have
8 been aware that the Eurocard Rules on domestic
9 interchange in arbitration were deleted in June 1994.

10 A. No, I don't recall that.

11 Q. Well, that was after you'd --

12 A. Yeah.

13 Q. -- moved on in terms of jobs.

14 And just to be clear, your evidence here is
15 specifically in relation to the rules that were in place
16 in 1993.

17 A. Yeah.

18 Q. Thank you.

19 Can you - we look, please, at paragraph 57 of your
20 statement {A/13/25}. You say here:

21 "In Europe and the UK, the issue of costs and cost
22 recovery, provided a means by which Mastercard could
23 seek to justify the fees that it was charging and had
24 charged even before cost studies were introduced, but
25 they were an after the event means of justifying

1 interchange fees in the face of investigations by
2 competition authorities."

3 And then in paragraph 59 {A/13/26}, this is about --
4 after referring to the BRC letter, ten lines down, you
5 say:

6 "However, in the end it was the BRC letter coupled
7 with the European Commission letter that prompted
8 Eurocard to consider how to formulate a defence and
9 justification of the interchange fee from a regulatory
10 perspective. Defending the Eurocard process was,
11 however, what I would call an exercise in reverse
12 engineering, in that Eurocard was looking for ways in
13 which it could justify the interchange fees rather than
14 looking for a legitimate and proper way to formulate
15 interchange fees going forwards, in a potential defence
16 versus the regulators."

17 At this stage in the early 1990s, there were MIFs
18 for cross-border intra-EEA transactions.

19 A. Yeah.

20 Q. And just to be clear, your evidence here is in relation
21 to -- you're giving evidence about the Eurocard process.

22 A. Yes.

23 Q. And it was the cross-border MIFs that you say Eurocard
24 was seeking to justify.

25 A. Yeah.

1 Q. Could we go, please, to {A/13.3/6}. This is
2 Mr Sidenius' witness statement, paragraph 22:

3 "By way of brief explanation of the regulatory
4 background, it was understood in the credit card
5 industry following the 1979 case of NaBanco v Visa that
6 interchange fees were a necessary and permissible
7 element of a four-party payment system provided they
8 were set by reference to cost. As far as I am aware,
9 MEPUK/MMF followed the rationale set out in that case
10 when setting interchange fees. Therefore, their
11 approach to setting interchange fees by reference to
12 cost was in line with contemporary regulatory standards.
13 This confirms why cost studies were undertaken and
14 certainly does not mean that the cost studies were an
15 exercise in reverse engineering."

16 Were you aware there had already been extensive
17 litigation in relation to interchange fees in the US --

18 A. In the US, yes.

19 Q. -- in NaBanco v Visa?

20 A. Not on 7 -- the '79 study, but the '82 study.

21 Q. And that it concluded interchange fees were a necessary
22 and permissible element of a four-party payment system
23 provided they were set by reference to cost?

24 A. Yes.

25 Q. Could we go, please, to Mr Hawkins' first statement,

1 paragraph 4, {A/7/12}. Just read to yourself

2 paragraph 41 --

3 A. Paragraph 41?

4 Q. Paragraph 41. (Pause)

5 Were you aware that Mastercard International had
6 long-adopted its own cost-based approach to calculating
7 interchange in the US --

8 A. Yes.

9 Q. -- which was used on -- based on studies conducted by
10 Edgar Dunn?

11 A. I haven't seen the Edgar Dunn one. I saw the 1982 one.
12 Maybe that was the Anderson one, I'm not sure. But what
13 was striking for me was through the whole period --

14 Q. Mr Dhaene, if you don't mind --

15 A. Yeah.

16 Q. -- all I'm asking is if you're aware -- are you aware of
17 that? You say you were.

18 Were you aware that UK banks had been looking into
19 the US cost study methodology from 1990 onwards?

20 A. No.

21 Q. Can we go down to paragraph 43 of Mr Hawkins.

22 A. Yeah.

23 Q. He says:

24 "As I have mentioned, EDC was engaged by MCI on
25 behalf of MEPUK from 1991 to produce periodic

1 interchange cost studies in relation to UK domestic
2 transactions on Mastercard/Eurocard cards."

3 You were not aware of that?

4 A. I knew that Edgar Dunn was doing those studies. I knew
5 that.

6 Q. For the UK?

7 A. For the UK, yes.

8 Q. The first --

9 A. And also for Europe, I think.

10 Q. The first UK MIF was only set in 1997. I told you
11 earlier.

12 A. Yeah.

13 Q. You'd misremembered. So there was no question of the UK
14 seeking to reverse-engineer a justification for UK MIFs
15 because the UK was following the approach which
16 Mastercard had been following for many years in the US.

17 A. Yes, but it was striking that the result of the
18 Edgar Dunn study was exactly the interchange which was
19 there before in most of the cases, so that I would
20 qualify as reverse engineering.

21 Q. Right, that's -- well, that's your opinion --

22 A. Yes --

23 Q. -- based on --

24 A. -- that's my opinion.

25 Q. -- based on completely incomplete information.

1 A. Based on the information I received as to the result of
2 the study.

3 Q. You weren't involved in the decision by the UK banks --

4 A. No.

5 Q. -- to obtain cost studies for the UK domestic market,
6 were you?

7 A. No.

8 Q. And that was a matter for decision for the banks.

9 A. Correct.

10 Q. So in circumstances where you were wrong about your
11 recollection of the date when the UK MIF was first
12 set --

13 A. Well, I wasn't that wrong. It says '91 here; as of '91.
14 Maybe that was the mis-link I had in my mind.

15 Q. No, the first UK MIF was only set in 1997.

16 A. Yeah, but here it says EDC was engaged by Mastercard on
17 behalf of MEPUK from '91.

18 Q. Yes, to get --

19 A. That's probably what I had in mind.

20 Q. -- to get cost studies.

21 A. The fact it was only approved years later -- yeah.

22 Q. You weren't involved in any of the deliberations or
23 discussions of the UK banks when they received EDC cost
24 studies for the UK domestic market --

25 A. No, I was not involved.

1 Q. You were not involved in any bilateral negotiations of
2 interchange fees.

3 A. No.

4 Q. Paragraph 62 of your statement, page 27 {A/13/27}, you
5 talk here about there being a big difference between the
6 cost structures of banks due to their size.

7 A. Yes.

8 Q. You weren't involved with any of the cost studies for
9 the EEA MIF or for UK interchange fees.

10 A. At that time --

11 Q. At that time.

12 A. -- you refer to, that is correct.

13 Q. Yes. You don't know what steps Edgar Dunn took to
14 ensure that they were using a representative sample of
15 participants.

16 A. Well, I've --

17 Q. Do you --

18 A. -- gone through studies afterwards. I'd gone through
19 those studies afterwards and when I had my own practice,
20 I looked at that methodology to find out: is that a fair
21 rate or not and what can be done, what can be said?

22 Q. That's a different point.

23 A. I studied that question --

24 Q. Mr Dhaene, that's, I think, a different point. I'm
25 asking you --

1 A. That's a different -- yeah.

2 Q. -- about whether you have any knowledge of the steps
3 that Edgar Dunn took to select a representative
4 sample --

5 A. No.

6 Q. No.

7 Can we look, please, at {C20/88/5}. This is a --
8 this is an Edgar Dunn -- it's actually described as
9 a final. Sorry, if we go to page 1 {C20/88/1},
10 an Edgar Dunn final draft report, 2008 UK cost study.

11 If we go to page 5, please {C20/88/5}, do you see
12 the heading at the bottom "Selection of participants"?

13 A. Yeah.

14 Q. If you just read that, please. (Pause)

15 And they say on the basis of the representative
16 sample, that would account for at least 70% of the
17 transaction volume in the market.

18 A. Yes.

19 Q. And if you look at the table just below that and do some
20 quick -- no, there's no need to do quick maths because
21 it's actually stated in the last sentence on the page
22 {C20/88/6}:

23 "The collective sample of UK banks represented just
24 over 90% representation of all domestic transactions
25 volumes."

- 1 A. Yeah.
- 2 Q. So you would accept from that that EDC were seeking to
3 obtain a substantial sample that would be representative
4 of costs for the market.
- 5 MR JUSTICE ROTH: Well, is that question about this cost
6 study or about all cost studies going back to 1990?
- 7 MR SMOUHA: No, it's about this cost study, sir.
- 8 MR JUSTICE ROTH: From 2008?
- 9 MR SMOUHA: Yes.
- 10 A. Yeah, I notice that it's the seven big banks they
11 included to get to the 90%, which then obviously gives
12 a -- not a good view on the smaller banks. And if you
13 use domestic total volumes versus share versus cards,
14 you end up in a thinking one card, one transaction
15 frame.
- 16 Q. So this is, I think, a criticism you're making as to how
17 the cost studies were done.
- 18 A. Yeah.
- 19 Q. That doesn't show that there has been any reverse
20 engineering, does it, Mr Dhaene?
- 21 A. Well, if you then find out that the cost study
22 (inaudible) are leading towards, as a result,
23 a percentage that was there before, okay, that's my own
24 interpretation, but -- and I'm not saying there was no
25 good work done here. It was very intensive work.

1 I think there were, like, 50 meetings of that
2 interchange group, so they worked very intensively to
3 get to a percentage which was there before.

4 Q. Are you aware that the European Commission in 2002
5 granted an exemption from the competition rules to Visa
6 for its EEA MIF?

7 A. Yeah.

8 Q. And in that decision, the Commission decided that Visa
9 could set a MIF up to the level of costs in relation to
10 transaction processing, guarantee of payment, even where
11 the cardholder defaulted or the transaction was
12 fraudulent and also for the -- in respect of the free
13 funding period.

14 A. Yeah.

15 Q. You're aware of that? And the Commission decided that
16 those were services that provided benefits to merchants.

17 A. Yes, which was disputed, but I was aware of this, yeah.

18 Q. Can you look at paragraph 83 of your statement,
19 Mr Dhaene {A/13/34}. You have a section here on
20 MIF category mapping.

21 A. Yeah.

22 Q. And you are commenting on Mr Coombs' report in
23 paragraph 83, which you say you've reviewed and
24 considered as part of those paragraphs. And the issue
25 here is -- and between the experts is whether some of

1 the categories of interchange fee are comparable to
2 categories in the EEA MIF structure.

3 A. Yeah.

4 Q. Could we look, please, at {A/16/30}. This is
5 Mr Parker's, Mastercard's expert, report. He deals with
6 this in "Comparability" in section 3.2. Have you
7 reviewed this section?

8 A. I've read that, yeah.

9 Q. You have. Thank you.

10 One example is that -- of the debate is that
11 Mr Parker is of the view that some of the UK MIF
12 categories do not have a corresponding category amongst
13 the EEA MIFs.

14 If we go, please, to page 35 {A/16/35}, in
15 paragraph 3.31, Mr Parker identifies the categories
16 where there is, in his view, insufficient comparability
17 between the UK category and any EEA category because
18 they are -- relevant categories are UK only, and he
19 lists those out there.

20 A. Mm-hmm.

21 Q. Back in your statement, please, you say in paragraph 84
22 {A/13/35}:

23 "The reason I believe Mastercard's expert overstates
24 the difficulties with mapping the UK and EEA categories
25 is due to the constraints of the Mastercard Eurocard

1 system ..."

2 And then you explain in paragraphs 85 to 87 why you
3 think that is so.

4 A. Yeah.

5 Q. And you say that when domestic schemes wished to created
6 a new category, they could either create new categories
7 or adopt the structure used at the EEA level.

8 A. Yeah.

9 Q. And then in paragraph 86, you say:

10 "Turkey, for example, opted to create its own
11 system. In the UK, however, from 1992 onwards, banks
12 processed transactions through the Mastercard Europe
13 system. As a result, when the UK set its own
14 interchange fee categories, it had to set these up in
15 a way that was compatible and consistent with the
16 Mastercard Europe system."

17 But, Mr Dhaene, we looked earlier at your evidence
18 in relation to that and we saw that, in fact, it's not
19 correct that UK banks processed transactions through the
20 Mastercard Europe system from 1992.

21 A. Yeah, my understanding was that there was traffic on the
22 net.

23 Q. So this --

24 A. Maybe we can find that back one day.

25 Q. Right. So this part of your evidence is based on that

1 misunderstanding, as I showed you yesterday [sic], of
2 the factual position.

3 A. No. If you go back to the table where you have the
4 different station, the ones you showed -- I don't recall
5 the number -- where you had the (a), (b), (c)
6 difference, airlines, etc. Can we go back to this one?

7 Q. Yes, that's --

8 MR JUSTICE ROTH: That's {A/16/35}.

9 A. Yeah. Yeah, here you see under the heading
10 "Non-comparable categories", card not present,
11 cardholder activated terminals, PAN-key-entered, airline
12 and, to some extent, internet, were all categories which
13 did exist also in the intra-regional one, but were
14 mapped into a broader category. Internet was card not
15 present, for instance. Only for the charity, I recall,
16 we had to create a code whose then applicable to the UK
17 only and that interchange, if I recall well, was set at
18 zero, correct or not, which I think is a proof that the
19 system works with zero interchange.

20 Q. Is the point you're making in paragraph 86 that because
21 you say or said that from 1992 onwards, banks
22 processed -- in the UK processed domestic transactions
23 through the Mastercard Europe system, you're saying,
24 therefore, they had to have categories which either were
25 the same as the EEA MIFs one or mapped on to it?

- 1 A. Yes, if they wanted another category, if they would have
2 wanted a lower interchange for pizzas, that code was not
3 there, so Europay would need to create such a code and
4 say, "We now have a category, pizza, which is different
5 from restaurant".
- 6 Q. Or, if they were processing through another processor --
- 7 A. Yeah.
- 8 Q. -- for example, First Data, then that wouldn't be
9 a problem.
- 10 A. That would not have been a problem --
- 11 Q. And if Europay --
- 12 A. -- to the extent that when a non-UK cardholder,
13 a European cardholder went into those stores, that would
14 not be applied. You would have a differentiation there
15 between UK domestic, lower or higher, and intra-European
16 or an inter-regional one of a different level.
- 17 Q. Yes. So it wouldn't present a problem if the processor
18 didn't need to be using the same categories for the
19 EEA MIFs.
- 20 A. Yeah, but then the communication to the merchant would
21 be - a pizza order by a UK cardholder is going to cost
22 you less than a pizza ordered by an American in the UK
23 or by a French man in the UK.
- 24 Q. If, as we saw earlier, Europay was not able to process
25 domestic bilateral transactions at all until May 1993 --

1 A. Yes, when ECCSS came into place.

2 Q. -- then there would be no reason or need for the
3 categories that were being agreed in bilaterals prior to
4 that to bear any resemblance to the EEA MIF categories.

5 A. Can you repeat that question because --

6 Q. Yes. Bilateral -- in domestic bilaterals --

7 A. Yeah.

8 Q. -- agreed prior to 1993, the banks could in each
9 bilateral could decide what categories they wanted.

10 A. Except if the traffic went over EPS-Net, then it had to
11 be a category which Eurocard did recognise in its
12 tables.

13 Q. Yes, but we know that Europay was not able to process
14 bilaterals until May 1993.

15 A. Yeah.

16 Q. So prior to that the issue you're identifying wouldn't
17 have been an issue at all.

18 A. No, looking from that perspective it's not an issue
19 at all.

20 Q. Thank you.

21 One last topic, Mr Dhaene. Paragraph 90 of your
22 witness statement, page 36 {A/13/36}. You say here:
23 "From the merchant's perspective ..."
24 This is under the heading "On-us transactions":
25 "From the merchant's perspective, however, banks

1 would not typically inform merchants whether
2 a transaction went over the European network or not. In
3 practice from my recollection, the same merchant service
4 charge was still applied to the merchant irrespective of
5 whether an interchange fee was applied to the on-us
6 transaction or not."

7 Mr Dhaene, merchant service charges are agreed
8 between acquiring banks and merchants, aren't they?

9 A. Correct.

10 Q. Those were confidential agreements.

11 A. Yes, yeah.

12 Q. Mastercard was not a party to the negotiations of those,
13 to your knowledge.

14 A. No, there was definitely not a negotiation.

15 Q. Mastercard was not a party to those merchant agreements,
16 was it?

17 A. We did not ask a copy of those neither, no.

18 Q. So Mastercard had very little visibility of what was
19 being negotiated between acquiring banks and merchants.

20 A. Yeah.

21 Q. And as we've seen anyway, you have very little knowledge
22 and had very little involvement, or none at all, in
23 relation to the UK market.

24 A. Mm-hmm.

25 Q. So you have no idea what UK acquiring banks actually

- 1 agreed with merchants, do you?
- 2 A. Officially we did not have an idea. In acceptance
3 management, big retailers told us about certain
4 practices in general terms. Of course they could not
5 reveal the individual negotiations but in general terms
6 they were complaining that merchant service charges only
7 went up whilst they also understood that processing
8 costs went down, and that a number of cost elements
9 which were referred to -- I'm talking here about later
10 in the '90s -- went down and that they did not see
11 an equivalent reduction of their merchant service
12 charge.
- 13 Q. You're talking about later in the 1990s?
- 14 A. Yeah, when I was in acceptance management.
- 15 Q. Right. So remind me: you had global and European
16 responsibility?
- 17 A. Yeah, for the global performance standards -- that was
18 a global programme, but it was not in that context. It
19 was in the context of acceptance management.
- 20 Q. Right, but you're not talking about the UK-specific --
21 anything UK-specific.
- 22 A. There were UK -- larger UK merchants had the same sort
23 of remarks. I wouldn't call it a complaint, it was more
24 a remark.
- 25 Q. Not made to you personally.

1 A. Not written to me personally, but when we were gathering
2 those merchants -- we had a yearly meeting with
3 merchants. When we were gathering those merchants, that
4 was one of the reflections which was there.

5 Q. Well, I'm not sure what "reflection" is, in that
6 context, but I don't think that's going to -- need
7 detain us further.

8 MR JUSTICE ROTH: I don't completely understand what you're
9 saying here, Mr Dhaene. You said that the UK merchants
10 we complaining -- although costs were going down the
11 merchant service charge was not being reduced.

12 A. Yes.

13 MR JUSTICE ROTH: People often voice that complaint in many
14 contexts. But this here specifically you're saying
15 something about on-us transactions and how they're
16 charged. That's a much more specific point than
17 a general complaint about the merchant service charge
18 not reflecting reduction in costs. And I think what
19 you're being asked is: well, how did you know
20 specifically about what the practice was in the UK by
21 acquirers and the merchant service charges with regard
22 to on-us transactions?

23 A. Yeah.

24 MR JUSTICE ROTH: How would you know that about the UK --

25 A. One of our replies would have been to merchants, "Well,

1 go to your acquirer and see whether you can obtain
2 a separate merchant service charge for domestic", in
3 general. I would never refer to any country in that
4 function. Now, understanding well that for a merchant
5 it's not always easy too to do that, and that some
6 merchants prefer to have one charge for all the
7 transactions, over a set of different charges. These
8 were only the bigger merchants who could really process
9 those different agreements, the likes of IKEA, Tesco,
10 for which I did do work later.

11 MR JUSTICE ROTH: So you're saying it came out of your
12 discussion with merchants about what they could do to
13 reduce the charges.

14 A. Yeah. It was like in those merchant forums it was like
15 a standing item. We asked the merchants -- what are
16 your problems, where do you see challenges, and the
17 standing item was, okay, merchant service charges do not
18 change, they stay the same, they go up and then they
19 always mention -- the banks mention that it's due to
20 interchange. That was a very standard kind of reply.
21 But it's not in my witness statement. Apologies for
22 that. If it's helpful --

23 MR SMOUHA: Thank you, sir.

24 Thank you, Mr Dhaene. Thank you, sir, I have no
25 further questions.

1 MR JUSTICE ROTH: Yes, Ms Demetriou, how long do you need
2 for re-examination?

3 Re-examination by MS DEMETRIOU

4 MS DEMETRIOU: Not very long at all. I only have one matter
5 to explore very briefly. I don't think it's going to
6 take me very long.

7 Mr Dhaene, I wanted to ask you about -- do you
8 remember you were taken to the Cruickshank report. If
9 we can get that up {C6/445/263}. Do you recall you were
10 asked about paragraph D2.9?

11 A. Yeah.

12 Q. And if we go over the page -- sorry, this might be
13 a wrong reference. If you just give me one moment.

14 MR JUSTICE ROTH: This is the paragraph 2.9 that Mr Dhaene
15 was asked about.

16 MS DEMETRIOU: Can we get it back up again? Maybe I'm just
17 misreading it. That's right, sorry, I am misreading it.

18 So you were asked about the processing function and
19 this says that, for example, FDR provides transaction
20 processing services whereas NatWest and Barclays do
21 their own processing. And then we see:

22 "Other aspects of merchant acquiring are also
23 carried out by third parties - for example, companies
24 such as WorldPay recruit internet retailers to ..."

25 Go over the page, please {C6/445/263}:

1 "... the card schemes and accept liability in some
2 cases if the retailer becomes bankrupt ..."

3 So it was put to you -- and this report, of course,
4 the Cruickshank report, was published in the year 2000.
5 Do you remember seeing that?

6 A. Yes.

7 Q. And it was put to you that Europay is not mentioned here
8 as a processor of domestic transactions. Do you recall
9 Mr Smouha asking you about that?

10 A. Yeah.

11 Q. And the question that was put to you was that because
12 they weren't mentioned, they couldn't have been
13 processing domestic transactions; yes?

14 A. Right.

15 Q. I just want to show you two other documents. The first
16 is Mr Van den Bergh's statement. So you were shown
17 paragraph 16, so that's at {A/13.5/5}, and if you just
18 re-read paragraph 16. So you were shown that by
19 Mr Smouha and that says that:

20 "If Mr Dhaene is suggesting that, from May 1992,
21 domestic transactions between UK banks were typically
22 cleared by Europay, I do not agree."

23 And he says when he joined the operations team in
24 1992, he recalls that Europay almost exclusively cleared
25 cross-border transactions and generally didn't process

1 domestic transactions.

2 Now, I want to show you what he says at
3 paragraph 19, please, over the page {A/13.5/6}, and that
4 wasn't shown to you. So he says:

5 "Over the course of the 1990s, however, ECCSS
6 processed an increasing share of UK domestic
7 transactions."

8 You see that?

9 A. Yeah.

10 Q. And then I want to show you another document at
11 {C10/268/1}. So this is a letter sent by Linklaters,
12 who acted for Mastercard to the European Commission, and
13 if we go -- it's responding to a question asked by the
14 European Commission. And if we go over the page
15 {C10/268/2}, please, we'll see a table and that says
16 "Table showing the percentage of domestic MasterCard pay
17 later card transactions processed by MasterCard Europe
18 in EU Member States", and this gives data for 2001 and
19 2002. Do you see that at the top?

20 A. Yeah.

21 Q. And if we go down to the United Kingdom, you see that
22 the proportions are 95.57% and 97.25%. So those are the
23 proportions in 2001 and 2002.

24 So bearing in mind what Mr Van den Bergh says and
25 also these figures, could you offer any more commentary

1 on the Cruickshank report? So do you think it's likely
2 that in 2000, there was no UK transactions being
3 processed via Europay?

4 A. Yeah, I think this table shows something totally
5 different.

6 MS DEMETRIOU: That's all I had for you. Thank you very
7 much, Mr Dhaene.

8 Questions by THE TRIBUNAL

9 MR JUSTICE ROTH: We know Mastercard is a four-party scheme.
10 Visa is a four-party scheme. Am I right in thinking
11 Amex is a three-party scheme?

12 A. Yes.

13 MR JUSTICE ROTH: Because it's Amex that issues the cards,
14 not an issuing bank.

15 A. Correct.

16 MR JUSTICE ROTH: And Amex that pays the merchants, not --

17 A. Yeah.

18 MR JUSTICE ROTH: So there's no interchange fee.

19 A. There's no interchange, yeah.

20 MR JUSTICE ROTH: And an interchange fee is a feature of
21 a four-party scheme.

22 A. Yeah, that's typically for a four-party scheme.

23 MR JUSTICE ROTH: And you wouldn't have it with
24 a three-party scheme, would you?

25 A. No. You could theoretically because you know the

1 merchants know the concept; theoretically break that
2 down and say, well, this is the sort of revenue stream
3 to issue the card. I mean, I did that exercise for
4 Diners Discover. We say, well, that part of what we're
5 asking the merchant to pay is related to costs on the
6 issuing side. You could theoretically say that --

7 MR JUSTICE ROTH: Yes, I see.

8 A. -- because you have the same fraud and possibly credit
9 write-offs, free interest period. You have the same
10 elements.

11 MR JUSTICE ROTH: To say it's a sort of fee that covers
12 costs on different sides --

13 A. Yeah.

14 Q. -- it's not really an interchange between different --

15 A. There is no interchange, yeah. It would be a left
16 pocket, right pocket sort of thing.

17 MR JUSTICE ROTH: Yes. Yes, I see, because I was a bit
18 puzzled in your statement -- if you look at paragraph 15
19 of your statement --

20 A. Yeah.

21 MR JUSTICE ROTH: -- when you say an essential prerequisite
22 for interchange fees is to have --

23 A. Yeah.

24 MR JUSTICE ROTH: -- a three or four-party payment system.

25 A. Yeah. Well, I refer -- I mean, in my mind it was

1 the Discover one I had in mind --

2 MR JUSTICE ROTH: Yes.

3 A. -- where we said: this part of the merchant service can
4 be considered the compensation of the cost of issuance
5 and then it's more -- it's very like -- like
6 an interchange sort of concept.

7 MR JUSTICE ROTH: Yes.

8 A. And American Express had also some issuing banks at some
9 point in time, but then it was like more a four-party
10 system.

11 MR JUSTICE ROTH: That's a four-party system, yes. So
12 that's what you meant. I see.

13 A. Yeah.

14 MR JUSTICE ROTH: The other thing I wanted to ask you about
15 is -- and it comes back to what you just said about
16 costs. One of the things that the Mastercard covers for
17 the benefit of the merchants is it provides credit to
18 their customers so customers can buy without having to
19 pay at once --

20 A. Yeah.

21 MR JUSTICE ROTH: -- and if there's a -- and another benefit
22 that it provides is protection against fraud, so --

23 A. For the merchant.

24 MR JUSTICE ROTH: -- for the merchants.

25 A. Yeah, but that's -- it's again limited. You need to

1 look at all the merchant category codes. I will give
2 you some simple examples. You're not going to eat
3 two pizzas because you pay by credit card. You are just
4 going to eat one. You are not going to suddenly order
5 two or three things of the same because you pay by
6 credit card.

7 You might decide to rather purchase an item at
8 a merchant who accepts cards because you don't have cash
9 and you don't want to take the long walk to an ATM,
10 versus a merchant who doesn't take it, but when we did
11 studies on what is the real effect, it -- on the
12 merchant side, it was relatively limited. Whilst most
13 of the investment going forward into the system with
14 electronic PIN pads, chip, the bulk of the investment
15 was on the merchant side; the bulk of the side was on
16 the merchant side.

17 MR JUSTICE ROTH: But fraud is a case where the cardholder
18 is fraudulent --

19 A. Yeah.

20 MR JUSTICE ROTH: -- dishonest and so will never pay for the
21 transaction.

22 A. Yes.

23 MR JUSTICE ROTH: Is that right?

24 A. That's right.

25 MR JUSTICE ROTH: And a credit write-off is where it's not

1 dishonest, but the cardholder --

2 A. Cannot pay.

3 MR JUSTICE ROTH: -- is unable to pay.

4 A. Yeah.

5 MR JUSTICE ROTH: So if you look at paragraph 64 of your

6 statement --

7 A. Yeah.

8 MR JUSTICE ROTH: -- which is {A/13/28}, at the bottom of

9 that page, you say the costs -- refer to costs of card

10 and you say:

11 "... credit-write offs, fraud ... were all costs

12 that were borne by the issuer and that could be (and

13 indeed usually were) recovered from the customer."

14 And I didn't quite understand that because I thought

15 the whole point about if there's fraud, you won't get it

16 back from the customer.

17 A. Sorry, can you repeat the question?

18 MR JUSTICE ROTH: If there's fraud --

19 A. Yes.

20 MR JUSTICE ROTH: -- you do not get it back from the

21 customer.

22 A. No, but an issuer could -- can protect itself against

23 fraud by having systems to control the transactions and

24 to manage fraud. And if there's a financial incentive

25 coming to you from the other side, my experience is,

1 having been in that business of fraud management systems
2 and in 2010 developed a system based on artificial
3 intelligence and statistical pattern recognition, a lot
4 of issuing banks were not keen of installing such new
5 technology because they said, "Well, we're compensated
6 through interchange. Why would we do huge investments
7 to tackle fraud if the cost benefit for us is not
8 enough?" If you take away the interchange, then that
9 reverses the picture.

10 MR JUSTICE ROTH: Yes, so they're coloured by the
11 interchange.

12 A. Yeah.

13 MR JUSTICE ROTH: That protects them from the cost of --

14 A. And that would have made the system better, I think.

15 MR JUSTICE ROTH: Yes. And, equally, the credit
16 write-off --

17 A. Yeah.

18 MR JUSTICE ROTH: -- they won't recover it from the
19 customer, will they?

20 A. No, but if you look at --

21 MR JUSTICE ROTH: That's the -- the very fact that it's
22 a write-off --

23 A. Yeah.

24 MR JUSTICE ROTH: -- means they're not recovering it.

25 A. No, but if you look at the UK, the worst credit

1 write-off was in 2010 and it was under 10%. If you then
2 know that -- of the revolving part, not over volume
3 because over volume it's even less. If you then look at
4 the 90% who paid 16% APR interest rate and you make
5 a quick calculation, you end up with a profit margin of
6 4 to 5% still, and that does not take into consideration
7 the fact that they still go after those people who do
8 not pay, try to recover from whatever assets they have
9 with huge penalty fees, etc. That does not take that
10 into consideration because otherwise, the 10% would even
11 be less.

12 MR JUSTICE ROTH: Yes, I see.

13 Any questions arising out of that?

14 PROFESSOR WATERSON: You were critical of the cost studies,
15 the EDC cost studies. Could you explain the nature --
16 a bit more about the nature of your criticism? That is,
17 you were pointed to the fact that the cost studies cover
18 the majority of transactions. Is it a problem about the
19 way the cost studies were set up or is there some other
20 problem?

21 A. Well, there is a huge diversification on the issuing
22 side between very small, and I've named Schrodgers, for
23 instance, Coutts, for instance, who done -- most of the
24 time worked under the umbrella of NatWest, fine, and
25 large issuers. And typically, a front management

1 system, whether you have one card and one transaction,
2 you need one, but whether you have one transaction or
3 you have 10 million transactions, you can still do it
4 with that laptop, so your investment stays the same.

5 Same for authorisation systems, same for clearing
6 systems, for posting systems. You have an initial
7 investment which you can carry through, and the more
8 transactions you have, the lower the cost per
9 transaction. Yet, the interchange is a percentage of
10 volume --

11 PROFESSOR WATERSON: Yes.

12 A. -- which does not change whether you're a big issuer or
13 a small issuer. So in that respect, you can say, yeah,
14 if the theorem is that interchange fee should cover for
15 the cost, then there must be a diversification.

16 There were several studies by the Federal Bank of
17 Boston, Professor Schuh and others, who systemically
18 showed that the total volume of interchange revenue to
19 the issuers went up over the -- these to (inaudible),
20 90s and 2000 --

21 PROFESSOR WATERSON: I see.

22 A. -- whilst costs were going considerably down, processing
23 costs went spectacularly down. And if you would try and
24 do the -- the calculation here even on bulk volumes,
25 based on the information available, you would probably

1 end up at 0.1, 0.2 max, blended, and not 1%.

2 PROFESSOR WATERSON: Thank you.

3 MR JUSTICE ROTH: Any questions arising out of that?

4 MR SMOUHA: No, thank you, sir. Oh, sorry, Mr Cook ...

5 MR COOK: Yes, sir, will you --

6 MR JUSTICE ROTH: Yes.

7 Cross-examination by MR COOK

8 MR COOK: Mr Dhaene, you were talking about processing costs

9 and processing costs, you were saying that's sort of

10 a fixed cost. Regardless of whether you do 1 million

11 transactions or a billion, that's there.

12 A. Not a billion; 1 or 1 million.

13 Q. Yes, 1 or 1 million.

14 A. If you do 1 to 1 billion, you would have to invest and
15 it would be in stages.

16 Q. Yes. Well, that's the processing costs. When you talk
17 about fraud, fraud's likely to be -- that's likely to be
18 dependent on transaction values, isn't it?

19 A. Yes.

20 Q. It's going to be a percentage. When you talk about
21 cardholder default, that's likely to be a percentage of
22 transaction values, isn't it?

23 A. Yes, but it's more -- in both cases, it has more to do
24 with the effort the issuing bank puts into the
25 validation of the cardholder. Will we give this

1 cardholder a revolving credit card or not? What is its
2 proof? Is it a risky profile or not?

3 It was crystal clear also just before the banking
4 crisis, and I have written some, in the years before,
5 notes on this, that one of the main causes of this
6 crisis was the mis-evaluation of the sub-prime. So you
7 can limit that risk as an issuer.

8 Also, on fraud, you know certain profiles. You can
9 limit it, and if you do it that way, your cost goes
10 considerably down. Of course, you have maybe less
11 business. That's a trade-off.

12 Q. And the other category, interest free period --

13 A. Yeah.

14 Q. -- again, that's going to be a percentage of value,
15 isn't it, cost of --

16 A. Yes, yes, but --

17 Q. So, basically, you're focusing on processing, which is
18 largely a fixed cost.

19 A. Don't forget --

20 Q. The main cost categories are going to be value-based,
21 aren't they?

22 A. Yeah, don't forget that the issuing bank has an
23 advantage in that respect that the cardholder will load
24 his credit card account, which is most of the time
25 a credit account, with liquidities just to make sure

1 that that card -- he can use that card to pay for his
2 transactions. So suddenly, the bank has also an income
3 flow from very low liquidities, which you need to match.

4 MR COOK: Nothing else, sir.

5 MR JUSTICE ROTH: That concludes, Mr Dhaene, your evidence.

6 Thank you for coming to give evidence.

7 A. Thank you very much.

8 MR JUSTICE ROTH: You are now free to return to Belgium.

9 A. Yeah.

10 MR JUSTICE ROTH: And we will resume at 10.30 tomorrow. Our
11 witness tomorrow from Mastercard, is it Mr Peacop?

12 MR SMOUHA: Yes, sir.

13 MR JUSTICE ROTH: And then possibly Mr Hawkins starting
14 tomorrow.

15 MS DEMETRIOU: Sir, can I raise one point without expecting
16 a response from the Tribunal? But I think at some stage
17 we left open the question of how the expert evidence was
18 going to be heard, and it's next week.

19 MR JUSTICE ROTH: Yes.

20 MS DEMETRIOU: Again, I'm not expecting an answer now, but

21 I just wanted to raise it so that we have --

22 MR JUSTICE ROTH: We have it in mind.

23 MS DEMETRIOU: Thank you.

24 MR JUSTICE ROTH: Thank you. 10.30 tomorrow.

25 (4.43 pm)

(The hearing adjourned until 10.30 am on
Tuesday, 11 July 2023)

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