

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**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 sprl-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 Schroders, 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)